No. _____

In the
Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, et al.,

Petitioners,

v.

GINA RAIMONDO, in her official capacity as Secretary of Commerce, et al.,

Respondents.

Cert Granted

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Magnuson-Stevens Act (MSA) governs fishery management in federal waters and provides that the National Marine Fisheries Service (NMFS) may require vessels to "carry" federal observers onboard to enforce the agency's myriad regulations. Given that space onboard a fishing vessel is limited and valuable, that alone is an extraordinary imposition. But in three narrow circumstances not applicable here, the MSA goes further and requires vessels to pay the salaries of the federal observers who oversee their operations—although, with the exception of foreign vessels that enjoy the privilege of fishing in our waters, the MSA caps the costs of those salaries at 2-3% of the value of the vessel's haul. The statutory question underlying this petition is whether the agency can also force a wide variety of domestic vessels to foot the bill for the salaries of the monitors they must carry to the tune of 20% of their revenues. Under well-established principles of statutory construction, the answer would appear to be no, as the express grant of such a controversial power in limited circumstances forecloses a broad implied grant that would render the express grant superfluous. But a divided panel of the D.C. Circuit answered yes under *Chevron* on the theory that statutory silence produced an ambiguity that justified deferring to the agency.

The questions presented are:

1. Whether, under a proper application of *Chevron*, the MSA implicitly grants NMFS the power to force domestic vessels to pay the salaries of the monitors they must carry.

2. Whether the Court should overrule *Chevron* or

at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

PARTIES TO THE PROCEEDING

Petitioners (plaintiffs-appellants below) are Loper Bright Enterprises, Inc.; H&L Axelsson, Inc.; Lund Marr Trawlers LLC; and Scombrus One LLC.

Respondents (defendants-appellees below) are Gina Raimondo, in her official capacity as Secretary of Commerce; the Department of Commerce; Richard Spinrad, in his official capacity as Administrator of the National Oceanic and Atmospheric Administration (NOAA); NOAA; Chris Oliver, in his official capacity as Assistant Administrator for NOAA Fisheries; and the National Marine Fisheries Service.

CORPORATE DISCLOSURE STATEMENT

Petitioners have no parent corporations, and no shareholders own 10% or more of their stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Loper Bright Enterprises, Inc., v. Raimondo*, No. 21-5166 (D.C. Cir.), judgment entered on August 12, 2022;
- *Loper Bright Enterprises, Inc. v. Ross*, No. 1:20-cv-00466-EGS (D.D.C.), judgment entered on June 24, 2021.

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PETITION FOR WRIT OF CERTIORARI

Operating fishing vessels in the Atlantic is hard work. The vessel operators tend to be small, family-owned enterprises. The profit margins are tight, and the quarters onboard are tighter still. The typical vessel has room for only five or six individuals. Nonetheless, the Magnuson-Stevens Act (MSA) requires petitioners and other vessel owners to make room onboard for federal observers who can oversee operations to ensure compliance with a slew of federal regulations. That is an extraordinary imposition that few would tolerate on dry land. But without any express statutory authorization, the National Marine Fisheries Service (NMFS) has decided to go one very large step further and require petitioners to pay the salaries of government-mandated monitors who take up valuable space on their vessels and oversee their operations. That is truly remarkable, so much so that even the agency acknowledged that the power it asserted was highly controversial. In a country that values limited government and the separation of powers, such an extraordinary power should require the clearest of congressional grants. The MSA provides such a grant, but only in three narrow circumstances inapplicable here, and even then, subject to strict caps on how financially onerous the payment requirement can be for domestic vessels. In light of those clear and clearly limited authorizations, the agency's claimed power to impose payment requirements on other domestic vessels unburdened by statutory caps should have been a complete non-starter.

Instead, a divided panel of the D.C. Circuit deferred to the agency by purporting to identify silence in the statutory scheme, which it perceived as an ambiguity that called for *Chevron* deference. That is either a fundamental overreading of *Chevron* or a powerful argument for its overruling (or both, as Judge Walker observed in dissent). Either way, this Court should grant review to impose sensible limits on agency deference.

The decision below poses a dual threat to efforts to rein in agency overreach. One of the few practical constraints on agency overregulation is the need for sufficient congressionally appropriated funds to actually enforce the agency's regulations. One of the few legal restraints on agency overreach is sensible rules of statutory construction that recognize reasonable limits on agency authority. The decision below simultaneously eviscerates both constraints. It authorizes agencies to force the governed to quarter and pay for their regulatory overseers without clear congressional authorization. And it perceives ambiguity in statutory silence, where the logical explanation for the statutory silence is that Congress did not intend to grant the agency such a dangerous and uncabined authority. Whether by clarifying *Chevron* or overruling it, this Court should grant review and reverse the clear agency overreach at issue here.

OPINIONS BELOW

The D.C. Circuit's opinion is reported at 45 F.4th 359 and reproduced at App.1-37. The district court's opinion is reported at 544 F.Supp.3d 82 and reproduced at App.38-114.

JURISDICTION

The D.C. Circuit issued its opinion on August 12, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the MSA are reproduced at App.115-135.

STATEMENT OF THE CASE

A. Legal Framework

In 1976, after recognizing that "[c]ommercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation," 16 U.S.C. §1801(a)(3),[1] Congress passed and President Ford signed the MSA to "promote domestic commercial and recreational fishing under sound conservation and management principles," among other purposes, §§1801(b)(1), (3). The MSA entrusts those goals to the Secretary of Commerce, who in turn has delegated the administration of the statute to NMFS. §§1802(39), 1855(d).

The MSA divides the Nation's federal fisheries into eight regions, each of which is governed by a "fishery management council" whose members include an assortment of federal and state officials and federal appointees. §1852(b)-(c). An essential duty of each regional council is to prepare a "fishery management plan" for each of the region's fisheries. §1852(h). Regional councils also have authority to "amend"

[1] All further statutory references are to Title 16 of the U.S. Code unless otherwise noted.

those plans as is "necessary from time to time." §1852(h). After a regional council prepares a fishery management plan, or an amendment to such a plan, it must seek approval from NMFS. §1854. After NMFS reviews the plan or an amendment for consistency with applicable legal requirements, it must provide a period for public comment and eventually decide whether to approve or disapprove the proposal. §1854(a). If NMFS approves the proposal, the agency promulgates it as a final regulation. *See* §1854(b)(3).

The MSA sets forth various "required provisions" that fishery management plans "shall" contain, as well as "discretionary provisions" that they "may" contain. §1853(a)-(b). Among the required provisions, fishery management plans "*shall* 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." §1853(a)(1)(A) (emphasis added). Among the discretionary provisions, fishery management plans "*may* require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery." §1853(b)(8) (emphasis added). The statute also contains a catch-all provision stating that plans also "may prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery." §1853(b)(14).

Space onboard a commercial fishing vessel is a scarce and precious resource. Thus, displacing someone engaged in active fishing to make way for a federal observer tasked with overseeing regulatory compliance is already an enormous imposition. Making the fishing vessels foot the bill for that imposition adds insult to injury. In light of that reality, when Congress wanted the fishing industry to cover the cost of federal observers, it has said so expressly. For example, the MSA expressly provides that the North Pacific Council—whose jurisdiction encompasses Alaska, Washington, and Oregon and some of the largest and most commercially successful enterprises, §1852(a)(1)(G)—"may … require[] that observers be stationed on fishing vessels … for the purpose of collecting data necessary for the conservation, management, and scientific understanding of any fisheries under the Council's jurisdiction," and "to pay for the cost of implementing the plan," the Council "may … establish[] a system … of fees." §1862(a). Those fees are expressly capped and "not to exceed 2 percent[] of the unprocessed ex-vessel value of fish and shellfish harvested under the jurisdiction of the Council." §1862(b)(2)(E).

Similarly, for "limited access privilege programs"—*i.e.*, programs where persons are permitted to harvest a specific quantity of the total allowable catch for the fishery, *see* §1802(26), where the need for regulatory compliance is particularly acute—the MSA provides that regional councils "shall … include an effective system for enforcement, monitoring, and management of the program, including the use of observers," and "shall … provide … for a program of fees paid by

limited access privilege holders that will cover the costs of management, data collection and analysis, and enforcement activities." §1853a(c)(1)(H), (e)(2). Once again, those fees are capped and "shall not exceed 3 percent of the ex-vessel value of fish harvested under any such program." §1854(d)(2)(B).

Finally, the statute understandably expresses an especial concern that authorized "foreign fishing"—*i.e.*, fishing involving foreign rather than U.S. vessels, *see* §1802(19)—not deplete offshore resources within our exclusive economic zone. Thus, for foreign fishing, the MSA provides that "a United States observer will be stationed aboard each foreign fishing vessel while that vessel is engaged in fishing within the exclusive economic zone" and that NMFS "shall impose … a surcharge in an amount sufficient to cover all the costs of providing a United States observer aboard that vessel." §1821(h)(1)(A), (4). To guard against the possibility that "insufficient appropriations" would allow foreign fishing to proceed unmonitored, the MSA also provides that the agency shall certify a cadre of other U.S. nationals to serve as observers as part of a "supplementary observer program" and "establish a reasonable schedule of fees that certified observers or their agents shall be paid by the owners and operators of foreign fishing vessels for observer services." §1821(h)(6)(A), (C).

The MSA backs these limited and express authorizations for industry-funded observers with provisions authorizing the imposition of penalties on vessels that fail to comply. In particular, the MSA authorizes "sanctions" on vessels that fail to make "any payment required for observer services provided

to or contracted by an owner or operator." §1858(g)(1)(D). And the MSA also declares it "unlawful" to "forcibly assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with any observer on a vessel … or any data collector employed by [NMFS] or under contract to any person to carry out responsibilities under this chapter." §1857(1)(L). Beyond these provisions, the MSA is silent with respect to forcing the fishing industry to pay for the cost of inspectors.

B. Factual Background

The New England Council develops fishery management plans for the fisheries in the Atlantic Ocean off the coasts of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut. *See* §1852(a)(1)(A). One of those fisheries is the herring fishery.[2] Unlike the permissive authorization for industry-funded observers in the North Pacific and the mandatory authorization for limited access and foreign fishing, nothing in the MSA authorizes making vessels involved in the Atlantic herring fishery foot the bill for federal inspection efforts. As a consequence, and because NMFS has experienced budgetary shortfalls in recent years, NMFS has spent the better part of a decade attempting to develop a workaround. *See, e.g.*, 79 Fed. Reg. 8,786, 8,793 (Feb. 13, 2014) ("Budget uncertainties prevent NMFS from

[2] Although the New England Council has primary responsibility for the Atlantic herring fishery, it shares that responsibility with the Mid-Atlantic Council, whose jurisdiction covers New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, and North Carolina. §1852(a)(1)(A).

being able to commit to paying for increased observer coverage in the herring fishery.").

In 2013, the New England Council began developing the attempted workaround at issue here: an "omnibus amendment" to all the New England fishery management plans that would give the Council the power expressly granted in three inapplicable circumstances—*i.e.*, "the option to allow the fishing industry to pay its costs for additional monitoring, when Federal funding is unavailable." CADC.App.273[3]; *see also* 83 Fed. Reg. 55,665 (Nov. 7, 2018); 83 Fed. Reg. 47,326 (Sept. 19, 2018). That proposal drew intense opposition from over 90% of commenters. *See* 81 Fed. Reg. 64,426 (Sept. 20, 2016); Docket No. NOAA-NMFS-2016-0139-0001, http://bit.ly/2p5NO1s.

Nonetheless, the New England Council formally submitted its amendment to NMFS, which then opened a comment period before promulgating a final rule approving it. *See* 83 Fed. Reg. 47,326; 83 Fed. Reg. 55,665. In February 2020, NMFS published the final rule, thus formally establishing a standardized process to introduce forced "industry-funded monitoring"[4] across all New England fisheries in any

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[3] "CADC.App." refer to the appendix filed with the D.C. Circuit.

[4] The final rule refers to the program as an industry-funded "monitoring" program instead of an industry-funded "observer" program because "observers" are typically federally funded and perform statutorily required duties. By contrast, industry-funded "monitors" are government-approved third parties with whom vessels must directly contract, and they supplement the minimum observing required by the MSA and other statutes. But the terms "monitor" and "observer" are often used

year when certain conditions are met.[5] *See* 85 Fed. Reg. 7,414 (Feb. 7, 2020). NMFS took that action despite industry warnings that it would impose an "impossible financial burden" on small businesses. CADC.App.46. And NMFS moved ahead despite its own assessment that "[i]ndustry-funded monitoring is a complex and highly sensitive issue" due to the "socioeconomic conditions of the fleets that must bear the cost" and because "it involves the Federal budgeting and appropriations process." CADC.App.293.

As to the herring fishery in particular, the final rule creates an industry-funded monitoring program that aims to cover 50% of herring trips undertaken by vessels with either a Category A permit (authorizing them to fish in any of the Atlantic herring management areas) or a Category B permit (authorizing them to fish in those same areas except for the Gulf of Maine). 85 Fed. Reg. at 7,417. More precisely, "[p]rior to any trip declared into the herring fishery, representatives for vessels with Category A or

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interchangeably, *see, e.g.*, 50 C.F.R. §648.2 (defining "observer or monitor"), which reflects the reality that industry-funded monitors and federally funded observers perform the same basic function on fishing vessels.

[5] One such condition is that there must at least be sufficient appropriations for NMFS' training of the monitors. *See* 85 Fed. Reg. at 7,416-17; 50 C.F.R. §§648.11(g), (g)(4). NMFS recently announced that there would be insufficient funding for the 2023 fishing year, *see* NOAA Fisheries, *Atlantic Herring Industry-Funded Monitoring Program Suspended Beginning in April 2023* (Nov. 2, 2022), https://bit.ly/3G22Y2G, but this condition was satisfied in prior years, and there is no reason to think that it will not be met in future fishing years.

B permits are required to notify NMFS for monitoring coverage." *Id.* If NMFS determines that an observer is required on a particular vessel, but NMFS does not assign an observer under a federally funded program, the vessel is required to contract with and pay for a government-approved third party that provides monitoring services. *Id.* at 7,417-18. If the vessel refuses to foot the bill, it is "prohibited from fishing for, taking, possessing, or landing any herring." *Id.* at 7,418.

This industry-funded monitoring program is not cheap. In addition to taking up precious real estate onboard, NMFS has estimated that "industry's cost responsibility associated with carrying an at-sea monitor" is "$710 per day." *Id.* On an annual basis, the program is estimated to "reduce" returns-to-owner by "approximately 20 percent." *Id.*

C. Proceedings Below

1. Petitioners are four family-owned and family-operated companies that "regularly participate in the Atlantic herring fishery." App.4. In February 2020, petitioners filed suit alleging, as relevant here, that the MSA did not authorize NMFS to mandate industry-funded monitoring in the herring fishery. Petitioners moved for summary judgment, and NMFS cross-moved for summary judgment. The district court awarded summary judgment to NMFS.

The district court began by explaining that its analysis is "governed by *Chevron*." App.60. Remarkably, the court found for NMFS at step one of the framework, holding that the MSA unambiguously authorizes industry-funded monitoring in the herring fishery. The court emphasized that the statute says

that fishery management plans "may require" fishing vessels to "carr[y]" observers and that it contains two sections authorizing such plans to include other "necessary and appropriate" provisions. App.61. "Taken together," the court continued, these provisions "'vest broad authority in [NMFS] to promulgate such regulations as are necessary to carry out the conservation and management measures of an approved [fishery management plan]." App.62 (alteration omitted). The court also thought that the MSA's provision authorizing "sanctions" on vessels that fail to pay observers "provided to or contracted by an owner or operator" reinforced the idea that the statute "most certainly does not prohibit" industry-funded monitoring. App.65 (emphasis omitted).

The district court acknowledged petitioners' argument that Congress expressly addressed industry-funded observers in three circumstances, none of which implicate the herring fishery. *See* App.65-66. But the court determined that, "[e]ven if [petitioners'] arguments were enough to raise an ambiguity in the statutory text," NMFS' "interpretation" of the MSA is a "reasonable reading" of the statute "[u]nder step two of the *Chevron* analysis." App.60, 69.

2. A divided panel of the D.C. Circuit affirmed. Writing for the majority, Judge Rogers likewise applied "the familiar two-step *Chevron* framework."[6] App.5. The majority acknowledged that this Court "has not applied th[at] framework" in "recent cases,"

[6] Now-Justice Jackson heard oral argument in the D.C. Circuit, but Chief Judge Srinivasan replaced her following her nomination to this Court.

but it felt obligated to apply it because only this Court can "overrul[e] its own decisions." App.15.

Like the district court, the majority emphasized that the MSA contemplates that fishery management plans can require vessels to "carry" observers, that the statute contains two "necessary and appropriate" clauses, and that the statute includes "penalties" that "indicate that Congress anticipated industry's use of private contractors." App.7. The majority also noted that regulated parties "generally bear the costs of complying" with "regulatory requirements," and it observed that nothing in the MSA "imposes a funding-related restriction on [NMFS'] authority to require monitoring in a plan," which purportedly "suggests the [MSA] permits [NMFS] to require industry-funded monitoring" in the herring fishery. App8. But the Court did not rest its decision on step one of *Chevron*; it instead concluded that the statute is not "wholly unambiguous" and in fact leaves "unresolved" the question whether NMFS "may require industry to bear the costs of at-sea monitoring mandated by a fishery management plan." App.6; *see* App.13 ("[T]he text does not compel [NMFS'] interpretation of the Act as granting authority by omission to require industry-funded monitoring."). The majority considered whether the MSA's specific provisions addressing industry-funded observers in three inapplicable circumstances resolved that ambiguity, but it concluded that they do not. *See* App.6-13.

The majority thus explained that "it behooves the court to proceed to Step Two of the *Chevron* analysis." App.13. Applying a "deferential" standard of review at that step, the majority held that NMFS'

interpretation of the MSA is a "reasonable" way of resolving the "silence on the issue of cost of at-sea monitoring." App.15-16.

Judge Walker dissented. In his view, "Congress unambiguously did not" "authorize [NMFS] to make herring fishermen in the Atlantic pay the wages of federal monitors who inspect them at sea." App.21. He explained that everyone agreed that Congress did not "explicitly empower" NMFS to impose such a requirement and that NMFS had failed to demonstrate that Congress had "implicit[ly]" done so. App.27.

Judge Walker first examined the MSA provision that permits fishery management plans to require vessels to carry observers. *See* App.28-29. He acknowledged that "[r]egulatory mandates … often carry compliance costs," but he stated that NMFS "has identified no other context in which an agency, without express direction from Congress, requires an industry to fund its inspection regime." App.29; *see* App.29 ("[I]t is not usual to require a regulated party to pay the wages of its monitor when the statute is silent.").

Judge Walker also found NMFS' reliance on the MSA's "necessary and appropriate" clauses unavailing. *See* App.29-34. He observed that the statutory sections surrounding those clauses "inform" the scope of NMFS' authority, and "none of the measures in those sections look anything like the funding scheme that [NMFS] contemplates here." App.31. He observed that the logic of NMFS' theory "could lead to strange results" and "undermine Congress's power of the purse." App.31-32. And he

noted that, "if Congress had wanted to allow industry funding of at-sea monitors in the Atlantic herring fishery, it could have said so," but it "instead chose to expressly provide for it in only certain *other* contexts." App.32-33. In short, he concluded, nothing authorizes NMFS to require herring fishermen to "spend a fifth of their revenue on the wages of federal monitors embedded by regulation onto their ships." App.37.

REASONS FOR GRANTING THE PETITION

The divided decision below got an exceptionally important issue exceptionally wrong. One of the few bulwarks of the citizenry against overregulation is that federal agencies must limit their regulations to those they can practically enforce given resources expressly authorized by Congress. The decision below eviscerates that practical limit by green-lighting federal agencies to make the citizenry foot the bill for enforcing their regulatory regimes in the absence of any congressional authorization for those costly and controversial practices. Congress expressly gave NMFS the power to commandeer scarce real estate on vessels by requiring federal observers to be onboard. And in three specific circumstances, it gave the agency discretionary or mandatory authority to require vessels to foot the bill. But that was not enough for NMFS. It has added insult to injury by forcing the herring fleet to pay for the costs of federal monitoring, without any express authorization from Congress. The decision below approving that remarkable intrusion—and elimination of a critical practical constraint on regulatory overreach—cannot stand.

That the decision below reached that result by applying *Chevron* only heightens the stakes and the

need for this Court's plenary review. This Court has shied away from giving agencies deference under *Chevron* in recent years for good reason. While the doctrine may have made sense in theory on the assumption that faithful application of principles of statutory interpretation would make step-one cases the rule and step-two cases the exception, *Chevron* has been a disaster in practice. Lower courts see ambiguity everywhere and have abdicated the core judicial responsibility of statutory construction to executive-branch agencies. The exponential growth of the Code of Federal Regulations and overregulation by unaccountable agencies has been the direct result.

The decision below is a case in point and an ideal vehicle for this Court's review. Silence is not ambiguity, especially when the extraordinary power of making the citizenry pay for the cost of regulatory enforcement is expressly granted in three limited and obviously inapplicable circumstances. If *Chevron* really requires deference in these circumstances, then *Chevron* can no longer be ignored, but must be overruled so that lower courts stop abdicating their responsibility to interpret statutes sensibly whenever they confront any difficulty that can be labeled an ambiguity. But whether to clarify that agencies cannot force the governed to foot the bill for agency enforcement or to reconsider *Chevron* more broadly, this Court should not allow the extraordinary decision below to stand.

I. The D.C. Circuit's Split Decision Applying *Chevron* Deference Is Indefensible.

A. Congress Did Not Silently Empower the National Marine Fisheries Service to Require Herring Fishermen to Cede 20% of Their Annual Returns to Pay the Salaries of Government Monitors.

This Court emphasized in *Chevron* that, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Here, those tools—"text, structure, history, and so forth," *Kisor v. Wilkie*, 139 S.Ct. 2400, 2416 (2019)—unambiguously confirm that Congress did not silently empower NMFS to promulgate a regulation requiring herring fishermen to fork over 20% of their revenues to pay the salaries of at-sea monitors.

Starting with the text, the MSA nowhere explicitly provides the sweeping authority that NMFS now asserts. "An agency … 'literally has no power to act' … unless and until Congress authorizes it to do so by statute." *FEC v. Cruz*, 142 S.Ct. 1638, 1649 (2022). Thus, "statutory silence, when viewed in context," is in many situations "best interpreted as *limiting* agency discretion," not creating it. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) (emphasis added). That is precisely the situation here.

Indeed, the broader statutory context makes clear beyond cavil that Congress knew how to draft language that allows or requires the extraordinary

practice of forcing vessels to pay for government observers onboard and that it carefully limited that authority to three specific contexts—none of which include the herring fishery. In particular, the MSA gives the North Pacific Council the discretion (but not the obligation) to "require[] that observers be stationed on fishing vessels" and to "establish[] a system … of fees … to pay for the cost of implementing the plan." §1862(a). That express authorization for industry-funded observers in the discretion of a regional council is powerful evidence that other regional councils may not exercise the same power. And allocating that extraordinary power to the North Pacific Council alone was no accident, as the waters governed by that Council involve large commercial fishing operations that can more feasibly bear the costs. The situation in other areas is far different, with family-owned vessels operating on tight margins being far more prevalent. *Compare* NOAA Fisheries, *Alaska*, https://bit.ly/2WaalL4 (last visited Nov. 10, 2022) ("Alaska produces more than half the fish caught in waters off the coast of the United States, with an average wholesale value of nearly $4.5 billion a year."), *with* Jessica Hathaway, "Feds Declare East Coast Herring Fishery a Disaster," *National Fisherman* (Nov. 23, 2021), https://bit.ly/3fHxN1I (NOAA economist estimating value of Atlantic herring fishery at $6.77 million in 2020).

The MSA further provides that a "limited access privilege program" "shall … include an effective system for enforcement, monitoring, and management of the program, including the use of observers," §1853a(c)(1)(H), and that a regional council "shall … provide … for a program of fees paid by

limited access privilege holders that will cover the costs of management, data collection and analysis, and enforcement activities," §1853a(e)(2). And the MSA additionally provides that, in the context of foreign fishing, NMFS "shall impose … a surcharge in an amount sufficient to cover all the costs of providing a United States observer," but if Congress provides "insufficient appropriations" for that observer program, NMFS can establish a "supplementary observer program" with "certified observers" who abide by standards that are "equivalent to those applicable to Federal personnel," and those certified observers "shall be paid by the owners and operators of foreign fishing vessels for observer services." §1821(h)(4), (6). Those two limited but mandatory authorizations for industry-funded observers make perfect sense. When vessels are given a "limited access privilege" to operate in restricted areas with strict catch limits, both the need for observation and the reasonableness of making special-privilege holders foot the bill are at their apex. Similarly, when foreign vessels are given the special privilege to operate within our exclusive economic zone, it only makes sense for them to pay for the observers' costs instead of domestic vessels or taxpayers. *See* §1801(a)(3) (congressional finding that "massive foreign fishing fleets" contributed to overfishing and "interfered with domestic fishing efforts"). No comparable justification exists for garden-variety domestic fishing operations.

The limited and express authorization for industry-funded observers powerfully indicates that the agency lacks comparable power in other contexts. As this Court has explained, "[w]here Congress

includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *see also Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013) ("[I]t is fair to suppose that Congress considered the unnamed possibility and meant to say no to it[.]").

That presumption is particularly appropriate given that Congress has authorized both the permissive use of industry-funded observers (in one context) and the mandatory use of industry-funded observers (in two separate contexts). If Congress had done no more than mandate the use of industry-funded observers in two limited contexts, it might be plausible to argue that Congress never considered the possibility of granting permissive authority at all. But here, Congress considered both distinct authorities and conveyed neither in this context.

The MSA's statutory evolution powerfully reinforces that Congress' failure to grant permissive authority to make vessels pay for the government's inspection efforts outside the North Pacific was deliberate. Congress granted the North Pacific Council the discretion to establish an industry-funded observer program as part of the Fishery Conservation Amendments of 1990. *See* Pub. L. No. 101-627, §118(a), Nov. 28, 1990, 104 Stat. 4447. In the very same law, Congress enacted the MSA provision authorizing the "carrying" of observers on vessels, which supplemented the preexisting authority to include other "necessary and appropriate" provisions.

See id. §109(b)(2), 104 Stat. 4436, 4448 (codified at §1853(b)(8)); *see also* Pub. L. No. 94-265, §303(a)(1)(A), (b)(7), Apr. 13, 1976, 90 Stat. 351, 351-52. As Judge Walker explained below, "[i]t is hard to believe that, when Congress decided to *explicitly* allow industry-funding for observers in one way (fees) in one place (the North Pacific), it also decided to *silently* allow all fisheries to fund observers in any other way they choose." App.34 (Walker, J., dissenting); *see also Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) ("'[N]egative implications raised by disparate provisions are strongest' where the provisions were 'considered simultaneously when the language raising the implication was inserted.'"). Indeed, if Congress provided such sweeping general authorization, it would have rendered the specific grant of authority to the North Pacific Council utterly pointless. *But see Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S.Ct. 768, 779 (2020) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

The presumption is further reinforced by the reality that, where Congress has expressly authorized industry-funded observer programs for domestic vessels, it has put strict caps on the level of fees to ensure that the financial burden of paying for government inspectors does not render the fishing enterprise uneconomical. *See* §1862(b)(2)(E) (2% cap in the North Pacific context); §1854(d)(2)(B) (3% cap in the context of limited access privilege programs). In the absence of any congressional authorization, NMFS has shown no such restraint. The levies imposed on the herring fishery extract upwards of "*20 percent*" of a commercial fisherman's net operating revenues. 85

Fed. Reg. at 7,418 (emphasis added). All this under authority purportedly derived from a statute (the MSA) enacted with a specific finding that "[c]ommercial … fishing constitutes a major source of employment and contributes significantly to the economy of the Nation," with "[m]any coastal areas … dependent upon fishing and related activities." §1801(a)(3). The notion that the MSA nevertheless permits NMFS to force herring fishermen to pay the salaries of government monitors thus strains all credulity.

Equally telling, Congress has considered multiple proposals over the course of several decades that, if enacted into law, would have provided expanded authority for industry-funded observer programs. *See, e.g.*, H.R. 5018, 109th Cong. §9(b) (2006); H.R. 39, 104th Cong. §9(b)(4) (1995); H.R. 1554, 101st Cong. §2(a)(3) (1989). But "the most noteworthy action" that Congress has taken vis-a-vis those proposals is to *reject* them. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S.Ct. 661, 666 (2022) (*NFIB*). "[W]e cannot ignore" that history, *West Virginia v. EPA*, 142 S.Ct. 2587, 2614 (2022), as it confirms that NMFS "decided to do" via regulatory action "what Congress had not" done via statute, *Ala. Ass'n of Realtors v. HHS*, 141 S.Ct. 2485, 2486 (2021) (per curiam).

The power that NMFS seeks to divine from statutory silence is quite literally extraordinary. As Judge Walker observed, NMFS "has identified *no other context* in which an agency, without express direction from Congress, requires an industry to fund its inspection regime." App.29 (emphasis added). Indeed, just as it did in the MSA, Congress ordinarily

speaks clearly when it wishes to authorize such extraordinary impositions on regulated parties. *See, e.g.*, 42 U.S.C. §7552(a) (authorizing EPA to "promulgate (and from time to time revise) regulations establishing fees to recover all reasonable costs [to EPA] associated with" a specified program). As this Court has repeatedly admonished, a "'lack of historical precedent'" is a "'telling indication'" that agency action is "beyond the agency's legitimate reach." *NFIB*, 142 S.Ct. at 666 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)).

Just so here, especially given that the lack of agency funding to actually enforce the ever-burgeoning content of the Code of Federal Regulations is one of the few practical constraints on overregulation. The prospect of an agency that lacks this practical constraint is not just ahistorical but frightening. It is bad enough that the corpus of federal regulations is so extensive that virtually everyone is in non-compliance with something. But if the agencies can saddle each of us with personal monitors that we pay and house at our expense, then there is no practical constraint on the administrative state remaining.

Even the agency recognized that arrogating to itself the power to make the regulated community pay for the government's monitoring efforts was "highly sensitive." CADC.App.293. Highly unconstitutional would be more accurate. After all, the appropriations process is a primary mechanism by which Congress prevents regulatory overreach and keeps the executive branch in check. *See, e.g.*, *U.S. Dep't of Navy v. Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012)

(Kavanaugh, J.) ("The Appropriations Clause is … a bulwark of the Constitution's separation of powers among the three branches of the National Government. It is particularly important as a restraint on Executive Branch officers[.]"); Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 Harv. L. Rev. 1822, 1825 (2012) ("The crudest method of control through appropriations is to curtail an agency's activity by reducing its budget[.]"). By interpreting the MSA in a manner that would allow it to evade that process, NMFS' theory raises grave separation-of-powers concerns. That is one more strike against the NMFS' alarming construction of the statute. This Court's precedent teaches that, "[w]hen a serious doubt is raised about the constitutionality of an act of Congress, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Jennings v. Rodriguez*, 138 S.Ct. 830, 842 (2018) (quotation marks omitted). Petitioners' (and Judge Walker's) interpretation of the MSA does exactly that.

B. The D.C. Circuit's Application of *Chevron* Is Egregiously Wrong.

The D.C. Circuit majority's understanding of the MSA was flawed from start to finish, and its (mis)application of *Chevron* cries out for this Court's review. Although the majority ultimately concluded at *Chevron* step one that the MSA is "not … wholly unambiguous" on the question whether NMFS may require industry-funded monitoring in the herring

fishery, it nonetheless drew an "inference" that the statute conveyed this extraordinary power with clarity—and then deferred to the agency at step two for largely the same reasons. App.8. In doing so, the majority first invoked the MSA sections stating that fishery management plans may "require that … observers be carried on board a vessel," §1853(b)(8), and may include other "necessary and appropriate" provisions, §1853(a)(1)(A), (b)(14). According to the majority, "reduc[ing]" a fisherman's "annual returns by 'approximately 20 percent'" to pay the wages of at-sea monitors is merely a "necessary and appropriate" way of imposing routine "costs of compliance." App.6-8.

That position is untenable. Indeed, while the "necessary and appropriate" compliance costs associated with "carrying" a government monitor might include the marginal cost of paying for extra fuel to accommodate additional weight or the opportunity cost of ceding one of the fishing vessel's limited bunks to a non-fisherman, no ordinary person would say that the "necessary and appropriate" compliance costs of "carrying" that person entail the costs of paying his salary. That presumably explains why NMFS has never identified any example where any other agency has ever suggested such an absurdity. *See* pp.13, 21-22 *supra*; *cf. Niz-Chavez v. Garland*, 141 S.Ct. 1474, 1484-85 (2021) (stating that statutory interpretation is an exercise in "how ordinary people understand the rules that govern them").

The problems with the majority's invocation of the MSA's "necessary and appropriate" clauses run

deeper. As this Court has explained, the other provisions surrounding a provision like a necessary-and-appropriate provision "inform[] the grant of authority by illustrating the kinds of measures that could be necessary." *Ala. Ass'n of Realtors*, 141 S.Ct. at 2488. Here, the MSA's first "necessary and appropriate" provision—which is in the section addressing what fishery management plans are required to contain—includes provisions that discuss matters like "a description of the fishery," "objective and measurable criteria for identifying when the fishery to which the plan applies is overfished," and "a mechanism for specifying annual catch limits in the plan." §1853(a)(2), (10), (15). And the MSA's second "necessary and appropriate" provision—which is in the section addressing what fishery management plans may contain—includes provisions that discuss matters like "designat[ing] zones where, and periods when, fishing shall be limited," "incorporat[ing] … the relevant fishery conservation and management measures of the coastal States nearest to the fishery," and "reserv[ing] a portion of the allowable biological catch of the fishery for use in scientific research," §1853(b)(2)(A), (5), (11). None of that is remotely analogous to paying the salaries of at-sea monitors, which only further underscores that it is a "stretch" to suggest that the MSA's necessary-and-appropriate clauses encompass that power. *Ala. Ass'n of Realtors*, 141 S.Ct. at 2488.

Furthermore, if those clauses actually extended as far as NMFS suggests, it is hard to see where the agency's power would end. As Judge Walker explained, the logic of the theory that the majority embraced below is that NMFS could "require …

fishermen to drive regulators to their government offices if gas gets too expensive" or even "requir[e] the industry to fund a legion of independent contractors to replace … federal employees" if Congress chose to "entirely defund" NMFS' "compliance" wing, App.32, since those efforts would also further the goals of fishery "conservation and management," §1853(a)(1)(A), (b)(14). Tellingly, the majority below did not dispute any of that. But the "usual rule" is that Congress "does not … hide elephants in mouseholes." *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1627 (2018). And there is no reason to think that Congress deviated from that usual rule here.

The majority also suggested that the MSA's "penalty" provisions, *see* §§1857(1)(L), 1858(g)(1)(D), "further indicate that Congress anticipated industry's use of private contractors." App.7. But those penalty provisions simply reflect the reality that the provisions expressly addressing industry-funded observers explicitly contemplate private contractors. The foreign fishing provision, for instance, empowers NMFS to establish a "supplementary observer program" comprised of private contractors who "shall be paid by the owners and operators of foreign fishing vessels for observer services." §1821(h)(6)(C); *see* 50 C.F.R. §600.506(h)-(j) (referring to supplementary observers as "contractors" 18 times).

The majority tried to downplay the importance of the three instances in which Congress expressly authorized industry-funded observers, but those arguments are distinctly unavailing. The majority first suggested that the section addressing "limited access privilege program[s]" does not "speak directly"

to "observers" or "say anything about who may fund observers." App.9. But the statutory text belies that claim. As noted, §1853a expressly states that a limited access privilege program "shall … include … *the use of observers*" and that a regional council "shall … provide … for a program of *fees paid by limited access privilege holders*." §§1853a(c)(1)(H), (e)(2) (emphases added).

As for the provisions regarding industry-funded observers in the North Pacific and foreign fishing contexts, the majority tried to "distinguish[]" them from what NMFS did in the herring-fishery context by asserting that those other programs contemplate "fees" paid to the government, which in turn pays the observers—not (as here) salaries paid directly to the monitors. *See* App.10. But even setting aside that the supplementary observer program in the foreign fishing context expressly provides for a direct-to-observer payment scheme materially indistinguishable from the one at issue here, *see* §1821(h)(6)(C), that middleman-is-dispositive argument misses the forest for the trees. There is no denying that NMFS sought to achieve here the same basic objective that Congress authorized in the North Pacific and foreign fishing contexts but not in the herring-fishery context: industry funding for federal inspection efforts. Moreover, "[t]o the extent there is a meaningful difference between paying fees to the government and paying observers directly," that only highlights the "novelty" of NMFS' assertion of power, which "cuts even more against" it. App.35-36 (Walker, J., dissenting).

Finally, the majority asserted that nothing in the MSA "imposes a funding-related restriction on [NMFS'] authority to require monitoring in a plan," which "suggests the [MSA] permits [NMFS] to require industry-funded monitoring." App.8. But it is difficult to imagine an inference from statutory silence that is more obviously wrong: "Federal agencies may not resort to nonappropriation financing because their activities are authorized only to the extent of their appropriations." Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1356 (1988); *see also Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015) ("The dissent repeatedly claims that congressional silence has conferred on [the agency] the power to act. To the contrary, any such inaction cannot create such power[.]" (citation omitted)); *Chamber of Commerce of U.S. v. NLRB*, 721 F.3d 152, 160 (4th Cir. 2013) (similar); *Bayou Lawn & Landscape Servs. v. Sec'y of Lab.*, 713 F.3d 1080, 1085 (11th Cir. 2013) (similar); *Sierra Club v. EPA*, 311 F.3d 853, 861 (7th Cir. 2002) (similar). Thus, when an agency seeks "funding" outside of the appropriations process without express statutory authority, it "suggests" that the agency's action is *ultra vires* and unconstitutional.

C. If *Chevron* Tolerates the Result Below, the Court Should Overrule It or Clarify Its Limits.

As the foregoing demonstrates, a proper application of *Chevron* leaves no doubt that the decision below is plainly wrong. But if the decision below is somehow consistent with *Chevron*, rather than an overreading of *Chevron*, the Court should overrule that decision or at least clarify its limits—in

particular, by explaining that silence does not create ambiguity when the claimed power is granted expressly elsewhere in the statute. Given the manifold problems with *Chevron* recognized by members of this Court,[7] it is understandable that the Court has declined to mention *Chevron* even in cases where it is directly at issue. *See, e.g.*, *Am. Hosp. Ass'n v. Becerra*, 142 S.Ct. 1896 (2022). But, as this case well illustrates, lower courts continue to feel obligated to apply it because the Court has not yet formally overruled it. *See* App.15 (acknowledging the "recent cases in which the Supreme Court has not applied the framework," but concluding that it "does not affect" *Chevron*'s applicability). Accordingly, in an appropriate case, it remains "necessary and appropriate to reconsider … the premises that underlie *Chevron* and how courts have implemented that decision." *Pereira*, 138 S.Ct. at 2121 (Kennedy, J., concurring). This case is an appropriate case.

At a minimum, the decision below provides an opportunity to clarify that silence is not ambiguity, especially when it comes to an extraordinary power that is expressly conveyed elsewhere in the statute. This Court has made clear that courts are supposed to exhaust the statutory-construction toolkit before declaring an ambiguity that causes the tie to go the

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[7] *See, e.g.*, *Pereira v. Sessions*, 138 S.Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring); *Michigan v. EPA.*, 576 U.S. 743, 760-64 (2015) (Thomas, J., concurring); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 109-10 (2015) (Scalia, J., concurring in the judgment); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150-54 (2016).

agency. *See, e.g.*, *Kisor*, 139 S.Ct. at 2415. Among the most obvious and important tools are the canons against superfluity and *expressio unius est exclusio alterius*, both of which strongly indicate that silence about the authority to make vessels pay for federal observers outside the narrow contexts where Congress has expressly authorized the practice is no ambiguity. It is a clear indication that the agency lacks that power. That would seem to be particularly clear in a context like this, where even the agency recognizes that the power expressly conferred in limited circumstances is "highly sensitive." CADC.App.293.

But if *Chevron* really supports the result below, then it is no longer sufficient for this Court to ignore *Chevron*. Whatever theoretical benefits might have been perceived with *Chevron* when it was decided, decades of practice have exposed its many flaws. To begin with, *Chevron* "wrests from Courts the ultimate interpretative authority to 'say what the law is'" and places it in the executive's hands. *Michigan*, 576 U.S. at 761 (Thomas, J., concurring). When a law is truly unambiguous, there is little need for statutory construction. The whole business of statutory construction concerns statutory text that at least one of the litigants perceives to be ambiguous. Thus, a doctrine that defers to the executive at the first sign of ambiguity is nothing short of an "abdication of the judicial duty." *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).

Moreover, precisely because the judiciary is weakened under *Chevron*, the doctrine also encourages the executive branch's aggrandizement at the expense of the judiciary, Congress, and the

citizenry. It is no accident that the Code of Federal Regulation has burgeoned during the *Chevron* era. It is far easier to gin up ambiguity in a statute than it is to run the gauntlet of bicameralism and presentment. *Compare Ramos v. Louisiana*, 140 S.Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring in part) ("Both by design and as a matter of fact, enacting new legislation is difficult."), *with* Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1, 33-34 (2017) (sampling over 1,000 cases and concluding that courts of appeals find ambiguity at *Chevron* step one 70% of the time). Worse still, it is far harder for Congress to enact new legislation when one party or the other can rely on their friends in the executive branch to fix the problem without the hassle and accountability that comes with actually legislating.

As bad as *Chevron* has been for the judiciary and the Congress, the real loser has been the citizenry. At one level, that is obvious. In a liberty-loving Republic, one would expect the rule to be that, when there is doubt about whether the executive has authority over the governed, the tie would go to the citizenry. But *Chevron* quite literally erects the opposite rule for breaking not only ties, but anything that can be fairly deemed ambiguous. The difficulties for the citizenry take more subtle forms as well. It is perhaps a tolerable fiction that the citizenry can master the various provisions of the United States Code. But "[u]nder *Chevron* the people aren't just charged with awareness of and the duty to conform their conduct to the fairest reading of the law that a detached magistrate can muster. Instead, they are charged with an awareness of *Chevron*; required to guess

whether the statute will be declared 'ambiguous' (courts often disagree on what qualifies); and required to guess (again) whether an agency's interpretation will be deemed 'reasonable.'" *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).

Nearly four decades of judicial experience with *Chevron* have demonstrated that courts are incapable of applying its two-step *Chevron* framework in a consistent manner. As Justice Kavanaugh has explained, "the fundamental problem … is that different judges have wildly different conceptions of whether a particular statute is clear or ambiguous." Kavanaugh, *Fixing Statutory Interpretation*, at 2152; *see also* Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 817 (2010). Many judges find ambiguity immediately and engage in "reflexive deference" to the agency. *Pereira*, 138 S.Ct. at 2120 (Kennedy, J., concurring). In stark contrast, other judges may literally never find ambiguity. *See, e.g.*, Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 323 (2017) ("I personally have never had occasion to reach *Chevron*'s step two in any of my cases[.]"). Thus, while *Chevron* might make theoretical sense as a doctrine reserved for a narrow band of hopelessly ambiguous statutes, in practice, courts have not even been able to agree on whether a given statute is ambiguous. This case is a perfect example of this dynamic: The district court thought that the statute unambiguously favored NMFS; the D.C. Circuit majority found it ambiguous and so

deferred to NMFS; and Judge Walker thought that the statute unambiguously favored petitioners.

In sum, the decision below vividly illustrates that *Chevron* is overdue for either a reboot or an overruling. Simply ignoring it will just lead to more problematic results like the decision below. Thus, as Justice Gorsuch recently emphasized: "No measure of silence (on this Court's part) and no number of separate writings (on my part and so many others) will protect [Americans]. At this late hour, the whole [*Chevron*] project deserves a tombstone no one can miss." *Buffington v. McDonough*, 2022 WL 16726027, at *7 (U.S. Nov. 7, 2022) (Gorsuch, J., dissenting from the denial of certiorari).

II. This Case Is An Ideal Vehicle To Resolve Exceptionally Important Issues.

This case is profoundly important on multiple levels. As NMFS has acknowledged (with considerable understatement), the action that it took here is "highly sensitive" and "controversial," including because "it involves the Federal budgeting and appropriations process" and because numerous participants in the herring fishery "cannot afford" to pay for mandatory at-sea monitors, CADC.App.293, 411, which could cost fisherman upwards of 20% of their net operating revenue, App.4. That kind of draconian financial burden is difficult for even the largest companies to bear, but it is especially crushing for small or family-owned businesses, whose futures are now in peril. And NMFS has not limited this extraordinary burden to the herring fishery, but imposed it on several other fisheries—an injustice that even Hollywood has noticed. *See* 50 C.F.R.

§§648.11(g)(5), 648.87(b); *see also CODA* (Vendôme Pictures & Pathé Films 2021) (referencing observers in the New England groundfish fishery). This case thus is indisputably consequential to the fishing industry, which (as Congress has expressly found) "contributes significantly" to the national economy. §1801(a)(3).

But the importance of this case is by no means limited to NMFS or the fishing industry. Courts and litigants alike have an undeniable interest in whether agencies can force them to fund enforcement efforts and on the current state of *Chevron*, which applies to countless statutes involving the entire alphabet soup of federal agencies. Virtually every agency has some residual "necessary and appropriate" clause akin to the one invoked here. "[I]n the field of federal administrative law, Congress has enacted numerous statutes authorizing agency action that is 'necessary and appropriate' to a certain end." *Al-Bihani v. Obama*, 619 F.3d 1, 25 n.11 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc). Accordingly, if agencies have *carte blanche* to leverage that language to engage in fundraising whenever congressionally appropriated funds run short and get away with it under *Chevron*, the threat to the separation of powers will grow only more pronounced.

This case is an ideal vehicle to resolve these issues. Although other cases have challenged NMFS' efforts to impose industry-funded monitoring, they have fizzled on procedural grounds before arriving at this Court. *See, e.g.*, *Goethel v. Pritzker*, 2016 WL 4076831 (D.N.H. July 29, 2016), *aff'd sub nom. Goethel*

v. Dep't of Commerce, 854 F.3d 106 (1st Cir.), *cert. denied*, 138 S.Ct. 221 (2017). This case suffers from no such defects. To the contrary, both the district court and the D.C. Circuit thoroughly analyzed the relevant statutory provisions in decisions that collectively exceeded 120 pages. And both of those decisions relied exclusively on *Chevron*. *See* App.5 (D.C. Circuit explaining that "[t]he court applies the familiar two-step *Chevron* framework."); App.60 (district court explaining that its analysis is "governed by *Chevron*").

Moreover, the fact that this case arises from the D.C. Circuit makes certiorari here all the more appropriate. *Chevron* may have "fallen into desuetude" in some circles, but that has not occurred in the D.C. Circuit. *Buffington*, 2022 WL 16726027, at *7 (Gorsuch, J., dissenting from the denial of certiorari); *see* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298, 1301-02 (2018) (surveying 42 federal appellate judges and explaining that "[m]ost of them are not fans of *Chevron*, with the significant exception of the judges we interviewed from the D.C. Circuit, the court that hears the most *Chevron* cases"). Moreover, even in circuits that sometimes ignore *Chevron*, a panel will revive it occasionally to duck responsibility for resolving a particularly nettlesome question. Like *Lemon v. Kurtzman*, 403 U.S. 602 (1971), before it, *Chevron* is a "useful monster" that "is worth keeping around." *Lamb's Chapel v. Central Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring). In all events, the D.C. Circuit is where the action is—home to "the vast

majority of challenges to administrative agency action," *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 535 n.14 (1978)—and there, *Chevron* is alive and well, *see* Kavanaugh, *Fixing Statutory Interpretation*, at 2153 (explaining that the D.C. Circuit encounters *Chevron*'s problems "all the time" in its "many agency cases" and that they have "significant practical consequences"). There is simply no substitute for granting review either to stop the overreading of *Chevron* or to start its overruling.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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Counsel for Petitioners

November 10, 2022

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5166

LOPER BRIGHT ENTERPRISES, INC., et al.,
Appellants,

CAPE TRAWLERS, INC., et al.,
Appellees,

v.

GINA RAIMONDO, IN HER OFFICIAL CAPACITY AS SECRETARY OF COMMERCE, et al.,
Appellees.

Argued: Feb. 8, 2022
Decided: Aug. 12, 2022

Before: Srinivasan*, *Chief Judge*, Rogers and Walker, *Circuit Judges*.

ROGERS, *Circuit Judge*: In implementing an Omnibus Amendment that establishes industry-funded monitoring programs in New England fishery management plans, the National Marine Fisheries Service promulgated a rule that required industry to

* Chief Judge Srinivasan was drawn to replace Judge Jackson, now Justice Jackson, who heard argument and did not participate in this opinion.

fund at-sea monitoring programs. A group of commercial herring fishing companies contend that the statute does not specify that industry may be required to bear such costs and that the process by which the Service approved the Omnibus Amendment and promulgated the Final Rule was improper. We affirm the district court's grant of summary judgment to the Service based on its reasonable interpretation of its authority and its adoption of the Amendment and the Rule through a process that afforded the requisite notice and opportunity to comment.

I.

The Magnuson-Stevens Fishery Conservation and Management Act of 1976 (the "Act"), 16 U.S.C. §§ 1801-1884, in furtherance of its goal "to conserve and manage the fishery resources . . . of the United States," 16 U.S.C. § 1801 (b)(1), authorizes the Secretary of Commerce, and the National Marine Fisheries Service ("the Service") as the Secretary's delegee, to implement a comprehensive fishery management program, *id.* § 1801(a)(6); *see id.* §§ 1854, 1855(d). Key to the statutory scheme is the promulgation and enforcement of "fishery management plans." Plans and periodic amendments are developed by regional fishery management councils, *id.* § 1852(h)(1), and include measures "necessary and appropriate for the conservation and management of the fishery," *id.* § 1853(a)(1)(A). The proposing council may include specific conservation and management measures enumerated in 16 U.S.C. § 1853(b), as well as any other measures "determined to be necessary and appropriate," *id.* § 1853(b)(14). In

addition, the council may propose implementing regulations. *Id.* § 1853(c).

Nine fisheries, including the Atlantic herring fishery, are managed by the New England Fishery Management Council (the "Council"). *Id.* § 1852(a)(1)(A), (h)(1). The Council submitted the Omnibus Amendment to the Service, which published a notice of availability and subsequently opened a comment period. Notice of Availability, 83 Fed. Reg. 47,326 (Sept. 19, 2018); Notice of Proposed Rulemaking ("NPRM"), 83 Fed. Reg. 55,665 (Nov. 7, 2018). The Service approved the Omnibus Amendment on December 18, 2018, and published the Final Rule on February 7, 2020.[1] The Amendment and the Rule set out a standardized process to implement and revise industry-funded monitoring programs in the New England fisheries. Omnibus Amendment at v; Final Rule, 85 Fed. Reg. at 7,414-17. Plan coverage requirements may be waived if monitoring is unavailable or certain exemptions based on use of monitoring equipment or catch size apply. *See* Final Rule, 85 Fed. Reg. at 7,417, 7,419-20.

The monitoring program for the Atlantic herring fishery covers 50 percent of herring trips. The 50-percent coverage target is met through a combination of limited Service-funded monitoring pursuant to the

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[1] *Industry-Funded Monitoring: An Omnibus Amendment to the Fishery Management Plans of the New England Fishery Management Council* (2018) ("Omnibus Amendment"); Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Industry-Funded Monitoring Final Rule, 85 Fed. Reg. 7,414 (Feb. 7, 2020) ("Final Rule").

fishery management plan, *see* 16 U.S.C. § 1853(a)(11), and, for the difference between the target and Service-funded monitoring, industry-funded monitoring, with owners of vessels selected by the Service to carry an industry-funded monitor and pay the associated costs (other than administrative costs). Final Rule, 85 Fed. Reg. at 7,417. The Service estimated industry costs to the herring fishery "at $710 per day," which in the aggregate could reduce annual returns by "approximately 20 percent." *Id.* at 7,418.

Appellants are commercial fishermen who regularly participate in the Atlantic herring fishery. They filed a lawsuit alleging, as relevant, that the Act did not authorize the Service to create industry-funded monitoring requirements and that the rulemaking process was procedurally irregular. The district court ruled on the parties' cross-motions for summary judgment in the government's favor. *Loper Bright Enters., Inc. v. Raimondo,* 544 F. Supp. 3d 82, 127 (D.D.C. 2021).

II.

On appeal, appellants' challenge to the Final Rule presents the question how clearly Congress must state an agency's authority to adopt a course of action. This court is aware of the Supreme Court precedent that Congress must clearly indicate its intention to delegate authority to take action that will have major and far-reaching economic consequences. *Util. Air Regul. Grp. v. EPA,* 573 U.S. 302, 323-24 (2014). But that "major questions doctrine" applies only in those "'extraordinary cases' in which the 'history and breadth of the authority that [the agency] has asserted,' and the 'economic and political significance'

of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *West Virginia v. EPA,* 142 S. Ct. 2587, 2595 (2022) (alteration in original) (quoting *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 159-60 (2000)). Here, the Service's challenged actions are distinct. Congress has delegated broad authority to an agency with expertise and experience within a specific industry, and the agency action is so confined, claiming no broader power to regulate the national economy. The court's review thus is limited to the familiar questions of whether Congress has spoken clearly, and if not, whether the implementing agency's interpretation is reasonable. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council,* 467 U.S. 837, 842-43 (1984). Although the Act may not unambiguously resolve whether the Service can require industry-funded monitoring, the Service's interpretation of the Act as allowing it to do so is reasonable.

A.

Appellants contend the Act permits the Service to require at-sea monitors but prohibits any industry-funded monitoring programs beyond three circumstances. The Service responds that the Act unambiguously authorizes it to implement industry-funded monitoring requirements. The court applies the familiar two-step *Chevron* framework. *See, e.g., Cigar Ass'n of Am. v. FDA,* 5 F.4th 68, 77 (D.C. Cir. 2021) (citing *Chevron,* 467 U.S. at 842-43). At *Chevron* Step One, the court, "employing traditional tools of statutory interpretation," evaluates "whether Congress has directly spoken to the precise question at issue." *Chevron,* 467 U.S. at 842-43 & n.9. "If the

intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If the statute considered as a whole is ambiguous, then at *Chevron* Step Two the court defers to any "permissible construction of the statute" adopted by the agency. *Cigar Ass'n of Am.,* 5 F.4th at 77 (quoting *Chevron,* 467 U.S. at 843).

At *Chevron* Step One, the court "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.,* 541 U.S. 246, 252 (2004) (internal quotation marks omitted). Section 1853(b)(8) provides fishery management plans may "require that one or more observers be carried on board a vessel . . . for the purpose of collecting data necessary for the conservation and management of the fishery." That text makes clear the Service may direct vessels to carry at-sea monitors but leaves unanswered whether the Service must pay for those monitors or may require industry to bear the costs of at-sea monitoring mandated by a fishery management plan. When Congress has not "directly spoken to the precise question at issue," the agency may fill this gap with a reasonable interpretation of the statutory text. *Chevron,* 467 U.S. at 842.

The Service maintains that two additional features of the Act, when paired with Section 1853(b)(8), unambiguously establish authority to require industry-funded monitoring. First, Section 1853 contains two "necessary and appropriate" clauses that permit plans approved by the Service to

"prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery." *Id.* § 1853(b)(14); *see also id.* § 1853(a)(1)(A) (mandating "measures . . . necessary and appropriate for the conservation and management of the fishery"). Second, the penalty provisions allow the Service to impose permit sanctions for failure to make "any payment required for observer services provided to or contracted by an owner or operator," *id.* § 1858(g)(l)(D), and make unlawful various acts committed against "any data collector employed by the [Service] or under contract to any person to carry out responsibilities under [the Act]," *id.* § 1857(1)(L).

Taken together, these provisions of the Act signal the Service may approve fishery management plans that mandate at-sea monitoring for a statutory purpose. Section 1853(b)(8) grants authority to require that vessels carry at-sea monitors. Sections 1853(a)(l)(A) and (b)(14) grant authority to implement measures "necessary and appropriate"—a "capacious[]" grant of power that "leaves agencies with flexibility," *Michigan v. EPA,* 135 S. Ct. 2699, 2707 (2015)—to achieve the Act's conservation and management goals. The penalties in Sections 1857 and 1858 further indicate that Congress anticipated industry's use of private contractors. Still unresolved, however, is the question of whether the Service may require industry to bear the costs of at-sea monitoring mandated by a fishery management plan.

When an agency establishes regulatory requirements, regulated parties generally bear the

costs of complying with them. In *Michigan v. EPA,* 135 S. Ct. 2699, 2711 (2015), the Supreme Court held that an agency implementing a policy under wide-ranging "necessary and appropriate" authority must consider the costs of compliance. That principle presupposes that a "necessary and appropriate" clause vests an agency with some authority to impose compliance costs. Here, the Act's national standards for fishery management plans direct the Service to "minimize costs" of conservation and management measures, 16 U.S.C. § 1851(a)(7), and to "minimize adverse economic impacts" of such measures "on [fishing] communities," *id.* § 1851(a)(8). Those statutory admonitions to reduce costs seem to presume that the Service may impose some costs, as "minimize" does not mean eliminate entirely. In addition, neither Section 1853(b)(8) nor any other provision of the Act imposes a funding-related restriction on the Service's authority to require monitoring in a plan. That also suggests the Act permits the Service to require industry-funded monitoring.

The inference that the Service may require fishing vessels to incur costs associated with meeting the 50-percent monitoring coverage target is not, however, wholly unambiguous. Nothing in the record definitively establishes whether at-sea monitors are the type of regulatory compliance cost that might fall on fishing vessels by default or whether Congress would have legislated with that assumption. Absent such an indication, the court cannot presume that Section 1853(b)(8), even paired with the Act's "necessary and appropriate" and penalty provisions, unambiguously affords the Service power to mandate

that vessels pay for monitors. *See NY. Stock Exch. LLC v. SEC,* 962 F.3d 541,554 (D.C. Cir. 2020).

Appellants maintain that Sections 1821, 1853a(e), and 1862, which create monitoring programs with some similarities to the Omnibus Amendment's monitoring program, give rise by negative implication to the inference that the Act unambiguously deprives the Service of authority to create additional industry-funded monitoring requirements. This *expressio unius* reasoning, "when countervailed by a broad grant of authority contained within the same statutory scheme, . . . is a poor indicator of Congress' intent." *Adirondack Med. Ctr. v. Sebelius,* 740 F.3d 692, 697 (D.C. Cir. 2014). Examination of each of the three monitoring programs further illustrates why appellants' view is unfounded.

First, the limited access privilege program created in Section 1853a(e) authorizes a council to establish "a program of fees . . . that will cover the costs of management, data collection and analysis, and enforcement activities." It does not list monitoring as a covered activity. *See id.* Although monitoring might qualify as "data collection and analysis," this provision does not speak directly to this point, nor does it say anything about who may fund observers. The canon that "the specific governs the general," *RadLAX Gateway Hotel, LLC v. Amalg. Bank,* 566 U.S. 639, 645 (2012); *see Genus Med. Techs. LLC v. FDA,* 994 F.3d 631, 638 (D.C. Cir. 2021), is unhelpful to appellants in this context because there is no relevant "conflict" between statutory terms that do not address the same subject, *Genus Med. Techs.,* 994 F.3d at 638-39. Section 1853a(e) therefore does not suggest any

limitation on the Service's discretion to impose monitoring costs on industry under Section 1853(b)(8).

Second, the North Pacific Council monitoring program created by Section 1862, which "requires that observers be stationed on fishing vessels" and "establishes a system . . . of fees . . . to pay for the cost of implementing the plan," 16 U.S.C. § 1862(a)(1)-(2), is similarly distinguishable. These fees are to be "collected" by the Service, *id.* § 1862(b)(2), and deposited into a North Pacific Fishery Observer Fund established by the Act and "in the Treasury," *id.* § 1862(d), for disbursement to cover the costs of the monitoring program, *see id.* § 1862(a), (e). This special fee program also does not suggest that the Service lacks authority to require industry-funded observers in all other fisheries. The fee program in Section 1862 institutes a different funding mechanism from that of the Omnibus Amendment and Final Rule: under Section 1862, money collected from regulated parties passes through government coffers, while under the Omnibus Amendment and Final Rule, regulated vessel owners pay third-party monitors directly to supply services required for regulatory compliance. Congress's specific authorization of a single fishery program funded by fees paid to the government does not unambiguously demonstrate that the Act prohibits the Service from implementing a separate program in which industry pays the costs of compliance to service providers without any government pass-through.

Section 1821 creates a foreign fishing vessel monitoring program, which authorizes the Secretary to impose a "surcharge" to "cover all the costs of

providing a United States observer" aboard foreign vessels. *Id.* § 1821(h)(4). Generally, observers on foreign vessels are funded through "surcharges [to owners] collected by the Secretary" and deposited in an earmarked U.S. government fund, *id.*, a fee program roughly analogous to the North Pacific Council monitoring program. In the event of insufficient appropriations, however, Section 1821 establishes a "supplementary observer program" by which "certified observers or their agents" are "paid by the owners and operators of foreign fishing vessels for observer services." *Id.* § 1821(h)(6). This provision for industry-funded observers in the foreign-fishing section of the Act, does not show that Congress implicitly intended to preclude the Service from requiring any other industry-funded monitoring. *See Util. Air Regul. Grp.,* 573 U.S. at 323-24. Its contingency plan for monitoring in the foreign-fishing context has no unambiguous consequences for the Service's authority to implement industry-funded monitoring in other contexts. By providing for industry-funded observers as part of a contingency in the foreign-fishing provisions of the Act, it appears doubtful that Congress intended implicitly to preclude the Service from requiring industry-funded monitoring in all other circumstances. Further, the Act's penalty provisions offset negative inferences that might be drawn from Section 1821. *See* 16 U.S.C. §§ 1857(1)(L), 1858(g)(1)(D). Rather, these broad provisions indicate that Congress anticipated the use of privately retained contractors to comply with the Act's requirements. And the penalties in a broadly applicable section of the Act appear to recognize the possibility of industry-contracted and funded

observers beyond the foreign-vessel context. If Congress had intended for penalties associated with industry-funded monitoring to apply only in the foreign fishing context, the court would expect that Congress in the penalty provisions would have specifically referenced foreign vessels or included a cross-reference to the foreign fishing provision.

Finally, appellants claim that, given the substantial costs of industry-funded monitoring to herring fishing companies, "Congress would not have delegated 'a decision of such economic and political significance to an agency in so cryptic a fashion'" as reliance on "necessary and appropriate" authority. Appellants' Br. 41 (quoting *Brown & Williamson Tobacco Corp.,* 529 U.S. at 160). Indeed, an agency may not rely on a "necessary and appropriate" clause to claim implicitly delegated authority beyond its regulatory lane or inconsistent with statutory limitations or directives. *See, e.g., Ala. Ass'n of Realtors v. HHS,* 141 S. Ct. 2485, 2487-88 (2021); *Michigan,* 135 S. Ct. at 2707-08; *NY. Stock Exch.,* 962 F.3d at 554-55. The Service does not do so here because its interpretation falls within the boundaries set by the Act. Section 1853(b)(8) expressly envisions that monitoring programs will be created and, through its silence, leaves room for agency discretion as to the design of such programs. In addition, at-sea monitoring relates to the Service's interest in fishery management and the Act contains no bar on industry-funded monitoring programs, instead permitting plans to "prescribe such other measures, requirements, or conditions and restrictions" as are "necessary and appropriate for the conservation and management of the fishery," *id.* § 1853(b)(14); *see id.*

§ 1853(a)(1)(A). The Service's understanding of Section 1853(b)(8) and the "necessary and appropriate" clauses as encompassing industry-funded monitoring thus does not exceed statutory limits.

Nonetheless, the text does not compel the Service's interpretation of the Act as granting authority by omission to require industry-funded monitoring. Courts "construe [a statute's] silence as exactly that: silence." *EEOC v. Abercrombie & Fitch Stores, Inc.,* 135 S. Ct. 2028, 2033 (2015). Neither Section 1853(b)(8) nor any other provision of the Act explicitly allows the Service to pass on to industry the costs of monitoring requirements included in fishery management plans. Nor do the traditional tools of statutory interpretation provide another basis on which to conclude that the Act unambiguously supports the Service's interpretation. Congress has thus provided no wholly unambiguous answer at *Chevron* Step One as to whether the Service may require industry-funded monitoring in the Omnibus Amendment and Final Rule. Although an agency's interpretation need not be compelled by the text for it to prevail at Step One, here, where there may be some question as to Congress's intent, particularly in view of appellants' cost objection, it behooves the court to proceed to Step Two of the *Chevron* analysis.

Pursuant to Step Two, an agency's interpretation can prevail if it is a "reasonable resolution of an ambiguity in a statute that the agency administers," *Michigan,* 135 S. Ct. at 2707, and "the agency has offered a reasoned explanation for why it chose that interpretation," *Cigar Ass'n of Am.,* 5 F.4th at 77

(internal quotation marks omitted). Under this deferential standard, the Service's interpretation of the Act as authorizing additional industry-funded monitoring programs is reasonable. Section 1853(b)(8), paired with the Act's "necessary and appropriate" clauses, demonstrates that the Act considers monitoring "necessary and appropriate" to further the Act's conservation and management goals. That conclusion provides a reasonable basis for the Service to infer that the practical steps to implement a monitoring program, including the choice of funding mechanism and cost-shifting determinations, are likewise "necessary and appropriate" to implementation of the Act. *See* Final Rule, 85 Fed. Reg. at 7,422-23.

In addition, the Final Rule provides a reasoned explanation for the Service's interpretation. The Rule noted that Section 1853(b)(8) authorizes the Service to require at-sea monitors "for the purpose of collecting data necessary for the conservation and management of the fishery. *Id.* at 7,422 (quoting 16 U.S.C. § 1853(b)(8)). It further explained that industry-funded monitoring to reach the new 50-percent coverage target would best serve the Act's conservation and management goals. In particular, increased monitoring would permit the Service "to assess the amount and type of catch, to more accurately monitor annual catch limits, and/or provide other information for management." *Id.* at 7,423. The Rule also stated that industry-funded monitoring was consistent with other provisions of the Act that impose compliance costs on industry. *Id.* at 7,422. This explanation reasonably tied the industry-funded monitoring requirement to the Act's purposes. The

Service's interpretation of the Act is therefore owed deference at *Chevron* Step Two.

Our dissenting colleague agrees that the *Chevron* framework governs this case but disagrees about how it applies, asserting that the court should reach *Chevron* Step Two only if "the statute is ambiguous" *and* "Congress either explicitly or implicitly delegated authority to cure that ambiguity." Dis. Op. at 5 (internal quotation marks omitted); *see id.* at 5 n.16. The dissent suggests that "Congress's silence on a given issue . . . [generally] indicates a lack of authority," *id.* at 6, but *Chevron* instructs that judicial deference is appropriate "if the statute is silent *or* ambiguous with respect to the specific issue," 467 U.S. at 843 (emphasis added). The Supreme Court has affirmed its *Chevron* analysis, *see, e.g.*, *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013), and this court has reacknowledged its binding force, *see, e.g., Sierra Club v. EPA*, 21 F.4th 815, 818-19 (D.C. Cir. 2021). The dissent's reference to recent cases in which the Supreme Court has not applied the framework, *see* Dis. Op. at 5 & n.6, does not affect the obligation of this court to "leav[e] to [the Supreme] Court the prerogative of overruling its own decisions," *Agri Processor Co. v. NLRB*, 514 F.3d 1, 8 (D.C. Cir. 2008) (second alteration in original) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477,484 (1989)).

Not every statutory silence functions as an implicit delegation. *See U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004). But Section 1853(b)(8)'s silence on the issue of cost of at-sea monitoring provides no basis for applying different

standards of review here. Dis. Op. at 8-9. Under *Chevron,* such silence in the context of a comprehensive statutory fishery management program for the Service to implement, 16 U.S.C. §§ 1801(a)(6), 1854, 1855(d), is a lawful delegation, *Chevron,* 467 U.S. at 842-44. Furthermore, the Supreme Court has instructed that a broad "necessary and appropriate" provision, as appears in the Act, "leaves agencies with flexibility" to act in furtherance of statutory goals, *Michigan,* 135 S. Ct. at 2707, and here the Service pointed to the Act's conservation and management goals. Speculation that the Service's interpretation of its authority may lead to exorbitant regulatory costs to industry, *see* Dis. Op. at 11, overlooks *Chevron* Step Two's reasonableness limitation. Nor, in these circumstances, is Congress's provision for industry-funded monitoring in three unique situations properly understood to eliminate the Service's authority to create industry-funded monitoring programs in any other situation, *see id.* at 12-14. Under the well-established *Chevron* Step Two framework, the Service's interpretation of the Act to allow industry-funded monitoring was reasonable.

B.

Appellants' alternative challenge emphasizes that this court reviews the grant of summary judgment *de novo* and the Omnibus Amendment and Final Rule were enacted and adopted pursuant to the Administrative Procedure Act ("APA"). Under the APA's deferential standard, the court upholds agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Cigar Ass'n of Am,* 5 F.4th at

74. "An agency is owed no deference," however, "if it has no delegated authority from Congress to act." *NY. Stock Exch.,* 962 F.3d at 553. The court "determines whether the resulting regulation exceeds the agency's statutory authority" before it determines whether the regulation "is arbitrary or capricious," *id.* at 546 (citing *Sullivan v. Zebley,* 493 U.S. 521, 528 (1990)), as is addressed in subsection A.

Appellants urge that the Omnibus Amendment and Final Rule are arbitrary and capricious, even if statutorily authorized, "because they do not adequately account for the economic cost" of industry-funded monitoring for participants in the Atlantic herring fishery. Appellants' Br. 55. To survive arbitrary and capricious review, an agency "may not 'entirely fai[l] to consider an important aspect of the problem' when deciding whether regulation is appropriate." *Michigan,* 135 S. Ct. at 2707 (alteration in original) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)). Cost is such a factor in view of the Act's directive that fishery management plans minimize adverse effects and costs to the fishing community wherever possible. *See* 16 U.S.C. § 1851(a)(7), (8).

The record shows the Service took note of evidence that the Atlantic herring industry-funded monitoring program costs impacted vessels $710 per day and could reduce annual returns by approximately 20 percent. Final Rule, 85 Fed. Reg. at 7,418. It evaluated the economic impacts of the program in detail, *see id.* at 7,417-22, 7,428-29, responded to comments raising cost-related concerns, *see id.* at 7,424-26, and described its efforts to minimize economic impacts on

herring fishery participants, *see id.* at 7,429-30. For example, vessel owners may request waivers of industry-funded monitoring coverage on trips intending to land less than 50 metric tons of herring, and midwater trawl vessels may comply with the requirement through electronic monitoring instead of retaining a private monitor. *Id.* at 7,430. Further, in the Rule, the Service explained its choice of a 50-percent coverage target as "balanc[ing] the benefit of additional monitoring with the costs associated with additional monitoring," *id.* at 7,425, and adopted exemptions designed to address adverse effects on smaller vessels, *see id.* at 7,419-20, 7,425, 7,430. So, the Service's decision to proceed with an industry-funded monitoring requirement after extensive deliberations on the question of cost was not arbitrary or capricious.

C.

Finally, appellants contend that promulgation of the Omnibus Amendment and the Final Rule was procedurally improper. Specifically, appellants challenge the Service's failure to comply with the Act's timeline for review of the Amendment, *see* 16 U.S.C. §§ 1853, 1854, and its use of overlapping comment periods for the Amendment and the Rule. Neither contention is persuasive.

That the Service did not follow the Act's timeline provides no basis for relief here. The Service published the notice of availability for the Omnibus Amendment three days after the statutory deadline, *see* 16 U.S.C. § 1854(a)(1)(A)-(B), (5), and adopted the Final Rule more than a year after its comment period ended, *see* Final Rule, 85 Fed. Reg. at 7,414, contrary to the

requirement that implementing regulations be promulgated within thirty days of the close of their comment period, *see* 16 U.S.C. § 1854(b)(3). Procedural errors that are "technical" in nature and "therefore harmless" are "not grounds for vacating or remanding." *Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.,* 724 F.3d 206, 217 (D.C. Cir. 2013); *see Nevada v. Dep't of Energy,* 457 F .3d 78, 90 (D.C. Cir. 2006). Appellants do not identify any harm or prejudice resulting from the alleged delay. In addition, "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 159 (2003) (internal quotation marks omitted); *see Transp. Div. of Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers v. Fed. R.R. Admin.,* 10 F.4th 869, 873-74 (D.C. Cir. 2021). The Act does not penalize missed deadlines, and appellants do not point to any basis for this court *sua sponte* to vacate the Final Rule.

Appellants' suggestion that the Service "prejudged the legality" of the Omnibus Amendment through its use of overlapping comment periods with the Final Rule fares no better. The Act requires that notice and comment on a plan amendment and its accompanying regulations occur in tandem. *See* 16 U.S.C. §§ 1853(c)(1), 1854(a)(1), (5), 1854(b)(1)(A). Even if the statutory text did not control, the Service may initiate implementing regulations of its own accord, subject to APA notice-and-comment requirements that it "publish [a] notice of proposed rulemaking in the Federal Register and . . . accept and consider public comments on its proposal." *Mendoza v.*

Perez, 754 F.3d 1002, 1020 (D.C. Cir. 2014) (citing 5 U.S.C. § 553). Here, the Service set comment periods of sixty and forty-five days, respectively, for the Omnibus Amendment and the Final Rule and stated that it would consider comments received on either document in its decision to approve the Amendment. NPRM, 83 Fed. Reg. at 55,667. The Act does not require publication of approval of plan amendments. *See* 16 U.S.C. § 1854(a)(3). So, the Service could address public comments on the Omnibus Amendment upon promulgation of the Final Rule, *see* 85 Fed. Reg. at 7,422-27. In view of Congress's expectation that the Service would consider comments on plan amendments and implementing regulations at the same time, *see* 16 U.S.C. §§ 1853(c)(1), 1854(a)(1), (5), 1854(b)(1)(A), appellants fail to show a lack of fair notice and a meaningful opportunity to comment as the AP A requires. *See, e.g., Conn. Light & Power Co. v. Nuclear Regul. Comm'n,* 673 F.2d 525, 528 (D.C. Cir. 1982).

Accordingly, the court affirms the district court's grant of summary judgment to the Service and denial of summary judgment to appellants.

WALKER, *Circuit Judge,* dissenting:

Did Congress authorize the National Marine Fisheries Service to make herring fishermen in the Atlantic pay the wages of federal monitors who inspect them at sea?

Congress unambiguously did not.

I.

A fishery is both a group of fish and the fishing for that group.[1] The Magnuson-Stevens Act governs all fisheries in federal waters.[2] Its goal is to keep the fisheries healthy so that Americans can enjoy the economic, recreational, and nutritional benefits of a marine ecosystem.[3]

In pursuit of that goal, the Act allows the National Marine Fisheries Service to approve fishery management plans, which set rules for the fisheries they govern.[4] Those plans are developed by regional councils and include provisions specifying things like the number of fish that will be harvested in the fishery, the type of fishing gear to be used, and the

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[1] 16 U.S.C. § 1802(13).

[2] *Id.* § 1801 *et seq.*

[3] *Id.* § 1801(b).

[4] *Id.* §§ 1853, 1854(a). The Fisheries Service's authority is delegated from the Secretary of Commerce. Although the Appellees also include the Secretary of Commerce, the Department of Commerce, and officials in the National Oceanic and Atmospheric Administration, I refer to the appellees as the "Fisheries Service" because they are the most direct regulators in this matter.

reporting methods required.[5] When a plan needs updating, the relevant council submits a proposed amendment to the Fisheries Service for review.[6] The council may also propose corresponding implementing regulations.[7] Then the Fisheries Service must publish those proposals, take comments, and approve or disapprove of the proposals.[8] If it approves, it will promulgate them as final regulations.[9]

That's what happened here. The New England Council amended the Atlantic herring fishery management plan to require that fishermen allow at-sea monitors on many of their fishing trips, and the Fisheries Service approved its amendment.[10] The at-sea monitors are third-party inspectors who go aboard fishing vessels to keep an eye on operations. They track things like how many of which fish are being caught with what gear. No one disputes that the Magnuson-Stevens Act allows the Fisheries Service to impose this monitoring requirement.

But providing a monitor for a days-long fishing voyage can get expensive, and the Fisheries Service has had trouble affording its preferred monitoring

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[5] *Id.* § 1853(a)(4)-(5), (a)(11), (b)(4). The regional councils were established by the Magnuson-Stevens Act and are made up of representatives from various interested sectors (commercial, recreational, governmental, and academic). *Id.* § 1852.

[6] *Id.* § 1852(h)(1).

[7] *Id.* § 1853(c).

[8] *Id.* § 1854(a).

[9] *Id.* § 1854(b)(3).

[10] Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Industry Funded Monitoring, 85 Fed. Reg. 7417 (Feb. 7, 2020).

programs with just its congressionally appropriated funds.[11] Add to that a further problem for the Fisheries Service: Congress generally prohibits an agency from collecting fees and keeping the money from those fees for the agency's own purposes.[12] Instead, absent express statutory authority to keep and spend that money, agencies can only spend as much money as Congress appropriates.[13]

Here, the Fisheries Service attempted a workaround. It decided to make fishing companies, like Loper Bright Enterprises, hire and pay for their own at-sea monitors. The Fisheries Service estimates that for the Atlantic Herring fishery, those monitors

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[11] Fisheries of the Northeastern United States; Atlantic Herring Fishery; Amendment 5, 79 Fed. Reg. 8,786, 8,792-93 (Feb. 13, 2014) (The Fisheries Service has been working since at least 2013 to find a legal way to use industry funding to increase observer coverage as "[b]udget uncertainties prevent [the Fisheries Service] from being able to commit to paying for increased observer coverage in the herring fishery."); *see also* Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Amendment 14, 79 Fed. Reg. 10,029, 10,038 (Feb. 24, 2014) (Without industry funding, "increased observer coverage levels would amount to an unfunded mandate, meaning regulations would obligate [the Fisheries Service] to implement something it cannot pay for.").

[12] 31 U.S.C. § 3302(b) (With one unrelated exception, "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.").

[13] *Id.* § 1341(a)(1) ("An officer or employee of the United States Government or of the District of Columbia government may not—(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation").

will cost more than $700 per day and could reduce financial returns to the fishermen by twenty percent.

The fishermen challenged the amendment and the implementing regulations in district court and now appeal the court's decision granting summary judgment for the Fisheries Service.[14]

I would reverse the judgment of the district court because the Magnuson-Stevens Act unambiguously does not authorize the Fisheries Service to force the fishermen to pay the wages of federally mandated monitors.

II.

Agencies are creatures of Congress, so they have no authority apart from what Congress bestows.[15]

The Fisheries Service points to the Magnuson-Stevens Act as its source of authority for requiring fishermen to pay for at-sea monitors. We review the Fisheries Service's interpretation of that statute

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[14] *Loper Bright Enterprises, LLC v. Raimondo*, 544 F. Supp. 3d 82, 127 (D.D.C. 2021).

[15] *Louisiana Public Service Commission v. FCC,* 476 U.S. 355,374 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power upon it"); *Motion Picture Association of America, Inc. v. FCC,* 309 F.3d 796, 801 (D.C. Cir. 2002) ("An agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress."); *Railway Labor Executives' Association v. National Mediation Board,* 29 F.3d 655, 670 (D.C. Cir.), *amended,* 38 F.3d 1224 (D.C. Cir. 1994) ("Agencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature."); *Bowen v. Georgetown University Hospital,* 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

under the two-step *Chevron* framework.[16] First, we ask "whether Congress has directly spoken to the precise question at issue" or "left a gap for the agency to fill."[17] At that stage, in searching for direction from Congress, we empty our interpretive toolkit.[18] And if it's clear that the text does not authorize the agency's action, the analysis ends, and the agency loses.[19] Only if the statute is ambiguous, and only if "Congress either explicitly or implicitly delegated authority to cure that ambiguity," do we proceed to *Chevron's* second step and defer to the agency's reasonable interpretation of the ambiguity.[20]

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[16] *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-44 (1984). *But see Becerra v. Empire Health Foundation*, 142 S. Ct. 2354 (2022) (not mentioning Chevron); *National Federation of Independent Business v. OSHA*, 142 S. Ct. 661 (2022) (same); *BNSF Railway Co. v. Loos*, 139 S. Ct. 893 (2019) (same); *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) ("Given the concerns raised by some Members of this Court, it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision." (citations omitted)).

[17] *Chevron*, 467 U.S. at 842-43.

[18] *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000).

[19] *Chevron,* 467 U.S. at 842-43; *see also Virginia Uranium, Inc. v. Warren,* 139 S. Ct. 1894, 1900 (2019) (plurality opinion) ("in any field of statutory interpretation, it is our duty to respect not only what Congress wrote but, as importantly, what it didn't write").

[20] *Hearth, Patio & Barbecue Association v. United States Department of Energy,* 706 F.3d 499, 504 (D.C. Cir. 2013) ("The ambiguity must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity. Mere ambiguity in a statute is not evidence of congressional delegation of authority." (quoting *American Bar*

Congress's silence on a given issue does not automatically create such ambiguity or give an agency carte blanche to speak in Congress's place.[21] In fact, all else equal, silence indicates a lack of authority.[22]

That means that when agency action is challenged, it is not the challenger's job to show that Congress has specifically prohibited the challenged action.[23] Holding challengers to that burden would be "entirely untenable."[24] Instead, an agency must

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Association v. Federal Trade Commission, 430 F.3d 457, 469 (D.C. Cir. 2005))).

[21] *United States Telecom Association v. FCC,* 359 F.3d 554, 566 (D.C. Cir. 2004) ("the failure of Congress to use 'Thou Shalt Not' language doesn't create a statutory ambiguity of the sort that triggers *Chevron* deference"); *American Petroleum Institute v. EPA,* 52 F.3d 1113, 1120 (D.C. Cir. 1995) ("we will not presume a delegation of power based solely on the fact that there is not an express withholding of such power").

[22] *United States Telecom Association,* 359 F.3d at 566 ("The statutory 'silence' simply leaves that lack of authority untouched.").

[23] *Bais Yaakov of Spring Valley v. FCC,* 852 F.3d 1078, 1082 (D.C. Cir. 2017) ("The [agency] and the dissent seem to suggest that the agency may take an action . . . so long as Congress has not *prohibited* the agency action in question. That theory has it backwards as a matter of basic separation of powers and administrative law. The [agency] may only take action that Congress has *authorized*."); *Railway Labor Executives' Association,* 29 F.3d at 671 ("Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.").

[24] *Motion Picture Association,* 309 F.3d at 805-06; *see also Gulf Fishermens Association v. National Marine Fisheries Service,* 968

positively demonstrate where Congress explicitly or implicitly empowered it to act.

III.

Both sides agree that nowhere in the Magnuson-Stevens Act does Congress explicitly empower the Fisheries Service to require the Atlantic herring fishermen to fund an at-sea monitoring program. So to prevail, the Fisheries Service must point to some implicit delegation of that authority.

It has failed to do so. The Act unambiguously does not authorize the Fisheries Service to require these fishermen to pay the wages of at-sea monitors.[25]

A.

The Fisheries Service first relies on 16 U.S.C. § 1853(b)(8), which provides that fishery management plans may:

F.3d 454, 456 (5th Cir. 2020), *as revised* (Aug. 4, 2020) ("Congress does not delegate authority merely by not withholding it").

[25] *But see Relentless Inc. v. United States Department of Commerce,* 561 F. Supp. 3d 226, 238 (D.R.I. 2021) (Another group of herring fishermen challenged the same industry-funding provision, and citing our district court, the District of Rhode Island found that the Fisheries Service "reasonably interpreted" the Magnuson-Stevens Act "to authorize" industry-funded monitors in the Atlantic herring fishery.); *Goethel v. Pritzker,* No. 15-CV-497-JL, 2016 WL 4076831, at *6 (D.N.H. July 29, 2016), *aff'd sub nom. Goethe! v. United States Department of Commerce.,* 854 F.3d 106, 108 (1st Cir. 2017) (The district court found that the Magnuson-Stevens Act authorized a similar industry-funding scheme in a different fishery, but the First Circuit affirmed on timeliness grounds, expressly declining to decide whether industry funding violated the Act.).

> **require that one or more observers be carried on board a vessel** of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery.[26]

That provision allows the agency to require that fishermen give at-sea monitors a place on their vessels—the fishermen must let the monitor "be carried."

The Fisheries Service argues that such authority implicitly includes the authority to make the fishermen pay the monitors' wages because the wages are simply an incidental cost of complying with the duty to allow monitors onboard. In the agency's eyes, it's no different than, say, the cost of buying statutorily-required fishing gear.

But that analogy doesn't hold up.

First, the Act's language meaningfully differs in its treatment of gear and observers. Section 1853(b)(4) allows plans to "require the use" of certain fishing gear. If the Act similarly allowed plans to *require the use* of an at-sea monitor, perhaps the Fisheries Service could argue that the cost of procuring the monitor was incidental to that command. But § 1853(b)(8) doesn't allow plans to require that fishermen use observers. It only allows them to require that fishermen let observers "be carried on board."

A cost incidental to *carrying* an observer might include the additional fuel costs of a marginally

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[26] 16 U.S.C. § 1583(b)(8) (emphasis added).

heavier boat or the opportunity cost of giving to the monitor a bunk that would otherwise be occupied by a working fisherman. Those are costs that necessarily follow when a fisherman lets a monitor on his boat. By contrast, there is no inherent, or even intuitive, connection between paying a monitor's wage and providing him passage.

Second, inspection requirements and gear requirements are different classes of impositions on regulated parties, and they carry different expectations.[27] Regulatory mandates, such as gear requirements, often carry compliance costs. But the Fisheries Service has identified no other context in which an agency, without express direction from Congress, requires an industry to fund its inspection regime.

Even if the Fisheries Service had found a few outliers, it is not usual to require a regulated party to pay the wages of its monitor when the statute is silent. Nor is it expected. In short, it is not the type of thing that goes without saying. And here, Congress didn't say it.[28]

B.

The Fisheries Service next asks us to find its authority in § 1853's "necessary and appropriate"

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[27] Those expectations, of course, inform our interpretation of how "ordinary people understand the rules that govern them." *NizChavez v. Garland,* 141 S. Ct. 1474, 1485 (2021).

[28] *See Mozilla Corp. v. FCC,* 940 F.3d 1, 83 (D.C. Cir. 2019) ("No matter how desirous of protecting their policy judgments, agency officials cannot invest themselves with power that Congress has not conferred." (citations omitted)).

clauses.[29] The first such clause, § 1853(a)(1)(A), says that fishery management plans:

> **shall contain the conservation and management measures,** applicable to foreign fishing and fishing by vessels of the United States, **which 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.[30]

And the second such clause, § 1853(b)(14), similarly says that fishery management plans:

> **may prescribe such other measures,** requirements, or conditions and restrictions **as are determined to be necessary and appropriate** for the conservation and management of the fishery.[31]

The Fisheries Service argues that because the monitors' data collection is important and because the Fisheries Service can't afford it, it is necessary and appropriate to make the fishermen fund it.

For three reasons, I disagree.

First, context tells us that the Fisheries Service's capacious reading is wrong. Section 1853(a) says that fishery management plans must, for example, describe the fishery, specify a reporting methodology,

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[29] 16 U.S.C. § 1853(a)(1)(A), (b)(14).

[30] *Id.* § 1853(a)(1)(A) (emphases added).

[31] *Id.* § 1853(b)(14) (emphases added).

and identify essential fish habitats.[32] And § 1853(b) says that fishery management plans may, for example, designate protected coral zones, limit the type and amount of fish to be caught, and assess the effect of plan measures on certain fish stocks.[33] Those and the other measures surrounding the "necessary and appropriate" provisions "inform[] the grant of authority by illustrating the kinds of measures that could be necessary" or appropriate.[34] And none of the measures in those sections look anything like the funding scheme that the Fisheries Service contemplates here.

Second, the logic of the Fisheries Service's argument could lead to strange results.[35] Could the agency require the fishermen to drive regulators to their government offices if gas gets too expensive?

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[32] *Id.* § 1853(a)(2), (a)(11), (a)(7).

[33] *Id.* § 1853(b)(2)(B), (b)(3)(A), (b)(9).

[34] *Alabama Association of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485, 2488 (2021); *see also Washington State Department of Social & Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) ("under the established interpretative canons of noscitur a sociis and ejusdem generis, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words" (cleaned up)); *see also NASDAQ Stock Market, LLC v. SEC*, 961 F.3d 421, 428 (D.C. Cir. 2020) (applying the canon to reject an agency interpretation within the *Chevron* framework).

[35] *Merck & Co., Inc., v. United States Department of Health & Human Services,* 962 F.3d 531, 541 (D.C. Cir. 2020) ("the breadth of the Secretary's asserted authority is measured not only by the specific application at issue, but also by the implications of the authority claimed").

Having the agency officials at work may be "appropriate" for "management of the fishery." Yet I doubt that Congress meant to allow for free fisherman chauffeurs.

Or what if Congress were to entirely defund the compliance components of the Fisheries Service—could the agency continue to operate by requiring the industry to fund a legion of independent contractors to replace the federal employees? That generous interpretation of "necessary and appropriate" could undermine Congress's power of the purse.[36] So although the words "necessary and appropriate" may be broad, they cannot be as limitless as the Fisheries Service suggests.[37]

Third, if Congress had wanted to allow industry funding of at-sea monitors in the Atlantic herring fishery, it could have said so. But it instead chose to

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[36] *See, e.g.*, John Holland & Laura Allen, *An Analysis of Factors Responsible for the Decline of the U.S. Horse Industry: Why Horse Slaughter Is Not the Solution*, 5 Kentucky Journal of Equine, Agriculture, and Natural Resources Law 225, 225-27 (2013) (Congress used its funding power in its effort to end commercial horse slaughter by defunding the requisite ante-mortem inspections.).

[37] *See Alabama Association of Realtors,* 141 S. Ct. at 2489 ("It is hard to see what measures this interpretation would place outside the CDC's reach, and the Government has identified no limit . . . beyond the requirement that the CDC deem a measure necessary." (cleaned up)); *Mozilla Corp.,* 940 F.3d at 75 ("even the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority" (cleaned up)).

expressly provide for it in only certain *other* contexts.[38] The existence of specific provisions for industry funding elsewhere—for only certain North Pacific fisheries, foreign fishing, and limited access privilege programs—suggests that the Fisheries Service can't turn to a catchall "necessary and appropriate" prerogative to implicitly authorize industry funding in the Atlantic herring fishery.[39]

Take for example the provision governing the North Pacific fisheries. The statute says that the relevant council may, in certain North Pacific fisheries, "require[] that observers be stationed on fishing vessels" and "establish[] a system . . . of fees . . . to pay for the cost of implementing the plan."[40]

That provision and the "necessary and appropriate" provisions were enacted at the same

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[38] 16 U.S.C. § 1862(a) (North Pacific fishery), § 1821(h)(4) (foreign fishing), § 1853a(e)(2) (limited access privilege programs). A limited access privilege program is one in which an entity is permitted to catch a specified portion of the total allowable catch for all the fishermen per fishing season. Although the fee provision for limited access privilege programs does not itself mention observers, it nevertheless covers them. Section 1853a(c)(1)(H) instructs that a limited access privilege program shall "include an effective system for enforcement, monitoring, and management of the program, including the use of observers," and subsection (e) instructs that "fees paid by limited access privilege holders … will cover the costs of management, data collection and analysis, and enforcement activities."

[39] *Sebelius v. Cloer,* 569 U.S. 369, 378 (2013) ("We have long held that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (cleaned up)).

[40] 16 U.S.C. § 1862(a).

time.[41] It is hard to believe that, when Congress decided to *explicitly* allow industry-funding for observers in one way (fees) in one place (the North Pacific), it also decided to *silently* allow all fisheries to fund observers in any other way they choose.[42] The plainer reading of the text is that Congress's authorization for industry funding was limited to what it expressly authorized.[43]

In its briefing, the Fisheries Service tried to explain away the existence of this specific industry-funding provision by arguing that Congress merely wanted to "mandate" a certain solution in the North Pacific.[44] But that's not what Congress did. The

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[41] Fishery Conservation Amendments of 1990, Pub. L. No. 101-627, § 109(b)(2), 104 Stat. 4436, 4448 (codified at 16 U.S.C. § 1853(b)(8)); *id.* § 118(a), 104 Stat. 4457 (codified at 16 U.S.C. § 1862).

[42] *Gross v. FBL Financial Services, Inc,* 557 U.S. 167, 175 (2009) ("negative implications raised by disparate provisions are strongest where the provisions were considered simultaneously" (cleaned up)).

[43] *See NASDAQ Stock Market LLC v. SEC,* No. 21-1167, 2022 WL 2431638, at *6 (D.C. Cir July 5, 2022) (Although our Circuit has, at times, been skeptical of the *expressio unius* canon, when "a grant of authority . . . reasonably impl[ies] the preclusion of alternatives, the canon is a useful aide." (cleaned up)).

[44] Government Brief 44 ("In this situation, 'the contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion.'" (quoting *Cheney Railroad Co. v Interstate Commerce Commission,* 902 F.2d 66, 69 (D.C. Cir. 1990))).

language of the fee provision in the North Pacific is discretionary, not mandatory.[45]

The Fisheries Service also tries to draw a distinction between (1) making fishermen pay for monitors through a "fee" program like the program used in the North Pacific—where the money goes to the government, and the government then uses that money to pay the monitors' wages—and (2) making the fishermen pay the monitors directly, as here, without the government as a middleman.[46]

But if the Fisheries Service is correct that the two schemes *aren't* analogous, that shows the novelty of the Fisheries Service's scheme for the Atlantic herring fishery- a novelty that cuts even more against the Fisheries Service's reliance on an authority either implied or provided by the catch-all "necessary and appropriate" clauses. And on the other hand, if the two schemes *are* analogous, that suggests that Congress made a deliberate choice when it expressly approved fishermen-funded monitoring only for the North

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[45] 16 U.S.C. § 1862(a)(2) ("The North Pacific council *may*. . . require[] that observers be stationed on fishing vessels" and "establish[] a system . . . of fees . . . to pay for the cost of implementing the plan." (emphasis added)).

[46] The Fisheries Service is not eager to highlight that the North Pacific and limited-access schemes are not at all analogous to the scheme at issue here in at least one respect: their cost. In the North Pacific, if fees are set as a fixed percentage, they may not exceed two percent of the value of what the ship brings in on a trip. 16 U.S.C. § 1862(b)(2)(E). And in the context of limited access privilege programs, the cap is three percent. *Id.* § 1854(d)(2)(B). But here, the required payments to at-sea monitors could reduce the fishermen's financial returns by twenty percent.

Pacific, foreign fishing, and limited access privilege programs - and not here.[47]

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[47] To the extent there is a meaningful difference between paying fees to the government and paying observers directly, the Magnuson-Stevens Act already, explicitly, contemplates both. The Act creates more traditional fee programs in the North Pacific, limited access privilege programs, and foreign fishing generally. But when the Fisheries Service has "insufficient appropriations" to provide full observer coverage for foreign fishing, the Act calls for the implementation of a supplementary observer program under which "certified observers" are "paid by the owners and operators of foreign fishing vessels for observer services." 16 U.S.C. § 1821(h)(6)(C). So we know that Congress is (1) aware of the possibility that appropriations are sometimes insufficient to cover observer programs and (2) capable of creating industry-funding schemes to resolve that dilemma. And the Fisheries Service itself acknowledges both of those points in a document currently posted on its website regarding limited access privilege programs. United States Department of Commerce, National Oceanic and Atmospheric Administration & National Marine Fisheries Service, The Design and Use of Limited Access Privilege Programs 3 (Lee G. Anderson & Mark C. Holliday eds., 2007), https://www.fisheries.noaa.gov/resource/document/design-and-uselimited-access-privilege-programs (last updated June 13, 2019) ("In times of constant or shrinking federal budgets, obtaining the funds to pay for new management plans is a real concern. Congress implicitly took this into consideration by mandating a cost recovery program for LAP programs . . . . **Funds to cover the additional costs of the LAP program will have to come from the current appropriations.** This means that there will have to be cuts elsewhere . . . . The [councils'] decisions should ensure that the costs of implementation and operation do not exceed the appropriated and cost-recovered funds available. Regardless of whether it is a LAP program, the alternative is the potential disapproval of a [fishery management plan] (or part of it) where funds are insufficient to carry out a management choice." (emphasis added)).

* * *

Fishing is a hard way to earn a living.[48] And Congress can make profitable fishing even harder by forcing fishermen to spend a fifth of their revenue on the wages of federal monitors embedded by regulation onto their ships.

But until Congress does that, the Fisheries Service cannot.

I respectfully dissent.

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[48] *Cf* Ernest Hemingway, The Old Man and the Sea (1952); Herman Melville, Moby Dick (1851); The Perfect Storm (Warner Bros. Pictures 2000); Billy Joel, The Downeaster "Alexa" (1990); *The Deadliest Catch* (Discovery Channel 2005-present); Letter from Vincent Van Gogh to Theo Van Gogh (on or about May 16, 1882), https://vangoghletters.org/vg/letters/let228/letter.html ("The fishermen know that the sea is dangerous and the storm fearsome, but could never see that the dangers were a reason to continue strolling on the beach." (emphasis omitted)).

Appendix B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 20-466

LOPER BRIGHT ENTERPRISES, INC., et al.,
Plaintiffs,

v.

GINA RAIMONDO, in her official capacity as Secretary of Commerce, et al.,
Defendants.

Filed: June 15, 2021

MEMORANDUM OPINION

Plaintiffs, "a collection of commercial fishing firms headquartered in southern New Jersey that participate regularly in the Atlantic herring fishery," challenge the U.S. Department of Commerce Secretary's final rule promulgating the New England Industry-Funded Monitoring Omnibus Amendment ("Omnibus Amendment") and its implementing regulations, which establish a process for administering future industry-funded monitoring in Fishery Management Plans governing certain New England fisheries and implement a required industry-funded monitoring program in the Atlantic herring fishery. Pls.' Mem. P. & A. Supp. Mot. Summ. J. ("Pls.'

Mot."), ECF No. 18-1 at 22-23.[1] Plaintiffs allege that the Omnibus Amendment suffers from procedural flaws and violates the directives of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. § 1801 *et seq*.; the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*.; the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq*.; and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. *See* Compl., ECF No. 1. Plaintiffs further contend that the industry-funded monitoring requirement constitutes an unconstitutional tax and violates the Anti-Deficiency Act, 31 U.S.C. § 1341; the Independent Offices Appropriations Act, 31 U.S.C. § 9701; and the Miscellaneous Receipts Act, 31 U.S.C. § 3302. *See* Pls.' Mot., ECF No. 18-1 at 38-40. Defendants—Gina Raimondo,[2] Secretary of the U.S. Department of Commerce; the U.S. Department of Commerce; Benjamin Friedman,[3] Deputy Under Secretary for Operations, performing the duties of Under Secretary of Commerce for Oceans and Atmosphere and National Oceanic and Atmospheric Administration ("NOAA") Administrator; the NOAA; Chris Oliver, Assistant Administrator for NOAA

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[1] When citing electronic filings throughout this Opinion, the Court cites to the ECF page number, not the page number of the filed document.

[2] Pursuant to Federal Rule of Civil Procedure 25(d), the Court substitutes as defendant the United States Secretary of Commerce, Gina Raimondo, for the former United States Secretary of Commerce, Wilbur L. Ross.

[3] Pursuant to Federal Rule of Civil Procedure 25(d), the Court substitutes as defendant the current Official Performing the Duties of NOAA Administrator, Benjamin Friedman, for the former Acting NOAA Administrator, Neil Jacobs.

Fisheries; and the National Marine Fisheries Service ("NMFS")—dispute Plaintiffs' claims.

Pending before the Court are Plaintiffs' Motion for Summary Judgment, ECF No. 18; Defendants' Cross-Motion for Summary Judgment, ECF No. 20; and Defendants' Motion to Exclude Plaintiffs' Extra-Record Declaration, ECF No. 24. Upon consideration of the parties' submissions, the applicable law, and the entire record herein, the Court **DENIES** Plaintiffs' Motion for Summary Judgment, **GRANTS** Defendants' Cross-Motion for Summary Judgment, and **GRANTS** Defendants' Motion to Exclude.

I. Background

A. Statutory and Regulatory Background

1. The Magnuson-Stevens Fishery Conservation and Management Act of 1976

The MSA "balances the twin goals of conserving our nation's aquatic resources and allowing U.S. fisheries to thrive." *Oceana, Inc. v. Pritzker*, 26 F. Supp. 3d 33, 36 (D.D.C. 2014). Congress enacted the MSA to, among other things, "conserve and manage the fishery resources found off the coasts of the United States," and "promote domestic commercial and recreational fishing under sound conservation and management principles." 16 U.S.C. § 1801(b)(1), (3). The MSA tasks the Secretary of Commerce with the pursuit of these goals, and the Secretary has in turn delegated her responsibility to the National Marine Fisheries Service ("NMFS" or the "Service").[4] *See* 16

[4] The Service is a federal agency within the Department of Commerce's NOAA.

U.S.C. § 1855(d). In addition, the MSA divides the country into eight regions, and establishes a Fishery Management Council in each region to manage the region's marine fisheries.[5] *See id.* § 1852. "Together, the Service and the Councils act to address imbalances in aquatic ecosystems." *Oceana, Inc.*, 26 F. Supp. 3d at 37.

Each Fishery Management Council must prepare and submit to the Secretary of the U.S. Department of Commerce a Fishery Management Plan ("FMP"), which is approved by the Service. 16 U.S.C.§§ 1852(h), 1854(a). As is most relevant here, the New England Fishery Management Council ("NEFMC" or the "Council") is responsible for developing and recommending FMPs for fisheries in the Atlantic Ocean seaward of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut, including the Atlantic herring fishery. *See id.* §§ 1852(a)(1)(A), 1852(h)(1).

FMPs contain "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)(A). FMPs must also be consistent with the ten "national standards" provided for in the MSA, as well as all

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[5] The MSA defines a "fishery" as "one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics" and "any fishing for such stocks." 16 U.S.C. § 1802(13).

other provisions of the MSA, and "any other applicable law." *Id.* § 1853(a)(1)(C); *see also id.* § 1851 (setting forth National Standards). In this case, Plaintiffs claim that the Omnibus Amendment violates two of those national standards:

> ["National Standard Seven":] Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.
>
> ["National Standard Eight":] Conservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that 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.

Id. § 1851(a)(7)-(8).

FMPs may also include additional discretionary provisions to conserve and manage fisheries. *Id.* § 1853(b). Among other things, FMPs may "require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery." *Id.* § 1853(b)(8). FMPs may also "prescribe such other measures, requirements, or conditions and restrictions as are determined to be

necessary and appropriate for the conservation and management of the fishery." *Id.* § 1853(b)(14).

After a council prepares an FMP or amendment and any proposed implementing regulations, it submits them to the Service, which acts on behalf of the Commerce Secretary, for review. *See generally id.* § 1854. The Service reviews the submission for consistency with applicable law and solicits public comments for sixty days. *Id.* § 1854(a)(1)(A)-(B). Within thirty days of the end of the comment period, the Service shall approve, disapprove, or partially approve the submission. *Id.* § 1854(a)(3). If the Service approves, a final rule is published in the Federal Register. *See id.* § 1854(b)(3). Approved FMPs or amendments are subject to judicial review under the APA within thirty days. *See id.* § 1855(f)(1).

2. The National Environmental Policy Act

Congress enacted NEPA "to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . fulfill the responsibilities of each generation as trustee of the environment for succeeding generations." 42 U.S.C. § 4331(b). To comply with these obligations, agencies must prepare an Environmental Impact Statement ("EIS") in which the agency takes a "hard look" at the environmental consequences before taking major action. *Id.* § 4332(c). An EIS must "inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts . . . of the human environment." 40 C.F.R. § 1502.1.

To determine whether an EIS must be prepared, the agency must first prepare an environmental assessment ("EA"), which must (1) "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." *Id.* § 1501.5(c). Even if the agency performs only an EA, it must still briefly discuss the need for the proposal, the alternatives, and the environmental impacts of the proposed action and the alternatives. *Id.* If the agency determines, after preparing an EA, that a full EIS is not necessary, it must prepare a Finding of No Significant Impact ("FONSI") setting forth the reasons why the action will not have a significant impact on the environment. *Id.* § 1501.6. An EA and FONSI alone will not be sufficient, however, in certain circumstances. Agencies must prepare a supplement to a draft or final EIS when: (1) "[t]he agency makes substantial changes to the proposed action that are relevant to environmental concerns"; or (2) "[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).

B. Factual Background

Plaintiffs—a "collection of commercial fishing firms headquartered in southern New Jersey that participate regularly in the Atlantic herring fishery," Pls.' Mot., ECF No. 18-1 at 23—challenge the Omnibus Amendment, which the NEFMC finalized in 2018 to establish a standardized process for the development of industry-funded monitoring in FMPs across New England fisheries and to establish

industry-funded monitoring in the Atlantic herring fishery. *See* Administrative R. ("AR") at 17769-71. The approved Omnibus Amendment measures include the following "core elements":

> First, the omnibus measures establish a process for FMP-specific industry monitoring to be implemented through an FMP amendment and revised through a framework adjustment. . . .
>
> Second, the omnibus measures identify standard cost responsibilities for industry-funded monitoring for NMFS and the fishing industry, dividing those responsibilities by cost category. . . .
>
> Third, the omnibus measures establish standard administrative requirements for monitoring service providers and industry-funded observers/monitors as set forth in 50 C.F.R. § 648.11(h) and (i), respectively. . . .
>
> Fourth, the omnibus measures establish a Council-led process for prioritizing [industry-funded monitoring] programs for available federal funding across New England FMPs. . . .
>
> Fifth, the omnibus measures standardize the process to develop future monitoring set-aside programs, and allow monitoring set-aside programs to be developed in a framework adjustment to the relevant FMP.

Defs.' Opp'n, ECF No. 20-1 at 18-19; *see also* Pls.' Mot., ECF No. 18-1 at 22-23.

In addition, there are approved measures establishing industry-funded monitoring in the Atlantic herring fishery,[6] which is managed through the Atlantic Herring FMP. *See* Defs.' Opp'n, ECF No. 20-1 at 20-21; Pls.' Mot., ECF No. 18-1 at 22-23. In other words, this mandate "requires herring fishermen along the eastern seaboard of the United States to carry [NOAA] contractors—called 'at-sea monitors'—on their vessels during fishing trips and, moreover, to pay out-of-pocket for" associated costs. Compl., ECF No. 1 ¶ 1. Among other things, the measures establish a 50 percent monitoring coverage target for all declared herring trips undertaken by a vessel possessing a Category A or B limited access herring permit.[7] *See* Defs.' Opp'n, ECF No. 20-1 at 20;

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[6] Atlantic herring inhabit the Atlantic Ocean off of the East coast of the United States and Canada, ranging from North Carolina to the Canadian Maritime Provinces. AR 17103. Atlantic herring play an important role in the Northwest Atlantic ecosystem, serving as a "forage species" for a number of other fish, marine mammals, and seabirds. *Id.* at 17070, 17161, 17511. There is also a directed fishery for Atlantic herring, composed primarily of vessels using midwater trawl gear, small-mesh bottom trawl vessels, and purse seines. *Id.* at 17104.

[7] "The Atlantic Herring FMP achieves the NEFMC's management goals through a stock-wide annual catch limit ('ACL') that is allocated between four distinct geographic management areas . . . ." Compl., ECF No. 1 ¶ 63 (citing 50 C.F.R. § 648.200(f)). The four areas include: "Area 1A - Inshore Gulf of Maine"; "Area 1B - Offshore Gulf of Maine"; "Area 2 - South Coastal Area"; and "Area 3 - Georges Bank." *Id.* A Category A permit is an All Areas Limited Access permit that allows vessels with such permits to fish in all areas. *See* AR 17135, AR 17152. A Category B permit is an Areas 2/3 Limited Access permit that allows vessels to fish in areas 2 and 3. *Id.* Category A and B permit holders are not restricted in the amount of

Pls.' Mot., ECF No. 18-1 at 22-23. The monitoring coverage target includes a combination of both industry-funded monitoring, as well as NMFS-funded Standardized Bycatch Reporting Methodology ("SBRM") coverage. Defs.' Opp'n, ECF No. 20-1 at 20; Pls.' Mot., ECF No. 18-1 at 23. "Vessel owners would pay for any additional monitoring coverage above SBRM coverage requirements to achieve the 50% coverage target, which is calculated by combining SBRM and [industry-funded monitoring] coverage, thus a vessel will not have SBRM and [industry-funded monitoring] coverage on the same trip." Defs.' Opp'n, ECF No. 20-1 at 20-21. "On any given trip, if a vessel is notified that it will 'need at-sea monitoring coverage' and it has not already been assigned an observer, '[it] will be required to obtain and pay for an at-sea monitor on that trip.'" Pls.' Mot., ECF No. 18-1 at 23 (quoting AR 17735). "Any additional coverage above SBRM is contingent on NMFS having appropriated funds to pay for its administrative costs for [industry-funded monitoring] coverage." Defs.' Opp'n, ECF No. 20-1 at 21 (quoting AR 17737).

There are some exceptions to the coverage requirements. On a trip-by-trip basis, coverage requirements may be waived if: (1) "monitoring coverage is unavailable"; (2) "vessels intend to land less than 50 metric tons (mt) of herring"; or (3) "wing vessels carry no fish on pair trawling trips." *Id.* (citing AR 17735). Furthermore, the Service may "issue an exempted fishing permit (EFP) to midwater trawl vessels that choose to use electronic monitoring

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herring they can catch per trip or land per calendar day. Compl., ECF No. 1 ¶ 68.

together with portside sampling. . . . The EFP exempts midwater trawl vessels from at-sea monitoring coverage, and allows use of electronic monitoring and portside sampling to comply with the 50% [industry-funded monitoring] coverage target." *Id.* (citing AR 17736-37).

NMFS has acknowledged that "[i]ndustry-funded monitoring w[ill] have direct economic impacts on vessels issued Category A and B permits participating in the herring fishery," including an estimated cost responsibility of up to $710 per day and an approximately 20% reduction in annual returns-to-owner in some situations. AR 17735.

C. Procedural History

The NEFMC adopted the Omnibus Amendment on April 20, 2017, and finalized the recommendations for industry-funded monitoring in the Atlantic herring fishery on April 19, 2018. AR 17731. On September 19, 2018, Defendants published a "notice of availability" in the Federal Register, opening a sixty-day comment period for the Secretary of Commerce's decision on the Omnibus Amendment. *Id.* On December 18, 2018, NEFMC was informed by letter that NMFS had approved the Omnibus Amendment on behalf of the Secretary of Commerce. *Id.*

On November 7, 2018, Defendants also published in the Federal Register a proposed rule to implement the Omnibus Amendment and opened a public comment period ending on December 24, 2019. *Id.* Defendants published the final rule implementing the Omnibus Amendment on February 7, 2020. *Id.* at 17731-59. The regulations associated with establishing the standard for developing industry-

funded monitoring programs ("omnibus measures") became effective on March 9, 2020, and the regulations associated with industry-funded monitoring in the Atlantic herring fishery became effective on April 1, 2020. *See* Defs.' Opp'n, ECF No. 20-1 at 23.

Plaintiffs filed suit against Defendants on February 19, 2020. *See* Compl., ECF No. 1. Defendants filed their Answer on April 9, 2020, along with a certified list of the contents of the administrative record. *See* Answer, ECF No. 12; Notice, ECF No. 13. On May 4, 2020, the Court granted Plaintiffs' unopposed motion to expedite the case "in every possible way," pursuant to the MSA, 16 U.S.C. § 1855(f)(4). *See* Min. Order (May 4, 2020).

Plaintiffs filed their motion for summary judgment on June 8, 2020, seeking a Court order "declar[ing] industry-funding monitoring unlawful, enjoin[ing] Defendants from pursuing it, and vacat[ing] the Omnibus Amendment." Pls.' Mot., ECF No. 18-1 at 14. Defendants filed their opposition and cross-motion for summary judgment on July 24, 2020. *See* Defs.' Opp'n, ECF No. 20. Plaintiffs filed their reply brief and opposition to Defendants' cross-motion on August 14, 2020, *see* Pls.' Reply, ECF No. 22; and Defendants filed their reply brief on September 4, 2020, *see* Defs.' Reply, ECF No. 26. In addition, on August 25, 2020, Defendants filed a motion to exclude Plaintiffs' extra-record declaration (ECF No. 22-1). Defs.' Mot. Exclude, ECF No. 24. Plaintiffs opposed Defendants' motion on September 3, 2020, *see* Pls.' Opp'n Exclude, ECF No. 25; and Defendants replied on September 10, 2020, *see* Defs.' Reply Exclude, ECF

No. 27. The cross-motions for summary judgment and the motion to exclude extra-record evidence are ripe for adjudication.

On May 17, 2021, Plaintiffs filed a notice of factual development, informing the Court that Defendants had "pushed back implementation" of the industry-funded monitoring requirement to July 1, 2021. *See* Notice Factual Development, ECF No. 35.

II. Legal Standard

Summary judgment is appropriate where "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Courts review agency decisions under the MSA and NEPA pursuant to Section 706(2) of the APA. *See Oceana, Inc. v. Locke*, 670 F.3d 1238, 1240-41 (D.C. Cir. 2011); *C & W Fish Co. v. Fox, Jr.*, 931 F.2d 1556, 1562 (D.C. Cir. 1991). Accordingly, the Court's review on summary judgment is limited to the administrative record. *See* 5 U.S.C. § 706; *Richards v. INS*, 554 F.2d 1173, 1177 (D.C. Cir. 1977) ("Summary judgment is an appropriate procedure for resolving a challenge to a federal agency's administrative decision when review is based upon the administrative record."); *Nat'l Min. Ass'n v. Jackson*, 856 F. Supp. 2d. 150, 155 (D.D.C. 2012) ("When reviewing agency actions under the APA, the Court's review is limited to the administrative record, either 'the whole record or those parts of it cited by a party.'" (citation omitted)).

Under the APA, courts must set aside agency action that is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege,

or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law." 5 U.S.C. § 706(2)(A)-(D); *see also* 16 U.S.C. § 1855(f)(1) (stating that a court "shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D) of [the APA]"). Under the APA's "narrow" standard of review, "a court is not to substitute its judgment for that of the agency," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); and "will defer to the [agency's] interpretation of what [a statute] requires so long as it is 'rational and supported by the record.'" *Oceana, Inc.*, 670 F.3d at 1240 (quoting *C & W Fish Co.*, 931 F.2d at 1562).

Although "[j]udicial review of agency action under the MSA is especially deferential," *N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 79 (D.D.C. 2007); to meet the APA standard an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made," *PPL Wallingford Energy LLC v. Fed. Energy Regulatory Comm'n*, 419 F.3d 1194, 1198 (D.C.Cir.2005) (quoting *State Farm*, 463 U.S. at 43) (internal quotation marks omitted). An agency acts arbitrarily and capriciously when the agency (1) "has relied on factors which Congress has not intended it to consider," (2) "entirely failed to consider an important aspect of the problem," (3) "offered an explanation for its decision that runs counter to the evidence before the agency," or (4) "is so implausible that it could not be ascribed to difference in view or the product of agency expertise." *Advocates for Highway & Auto*

Safety v. Fed. Motor Carrier Safety Admin., 429 F.3d 1136, 1144-45 (D.C. Cir. 2005) (quoting *State Farm*, 463 U.S. at 43). In addition, when a party challenges an FMP, plan amendment, or regulation as inconsistent with one or more of the ten National Standards set forth in 16 U.S.C. § 1851(a), a court's "task is not to review *de novo* whether the amendment complies with these standards but to determine whether the Secretary's conclusion that the standards have been satisfied is rational and supported by the record." *C & W Fish Co.*, 931 F.2d at 1562 (citing 16 U.S.C. § 1855(d)). "Fisheries regulation requires highly technical and scientific determinations that are within the agency's expertise, but are beyond the ken of most judges." *N.C. Fisheries Ass'n*, 518 F. Supp. 2d at 80; *see also Ocean Conservancy v. Gutierrez*, 394 F. Supp. 2d 147, 157 (D.D.C. 2005) ("Courts defer to NMFS decisions that are supported in the record and reflect reasoned decision making, especially where, as here, the dispute involves technical legal issues that implicate substantial agency expertise."), *aff'd*, 488 F.3d 1020 (D.C. Cir. 2007).

However, the "deferential standard cannot permit courts merely to rubber stamp agency actions, nor be used to shield the agency's decision from undergoing a thorough, probing, in-depth review." *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 47 (D.D.C. 2012) (internal citations and quotation marks omitted). The court should evaluate "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (quoting *Bloch v. Powell*, 348 F.3d 1060, 1070 (D.C.Cir.2003)).

III. Analysis

A. The Court Will Not Consider Plaintiffs' Extra-Record Declaration

As an initial matter, Defendants seek to exclude a declaration signed by Jeffrey Howard Kaelin—the Director of Sustainability and Government Relations at Lund's Fisheries[8]—and any portion of Plaintiffs' reply brief that relies on it. Defs.' Mot. Exclude, ECF No. 24-1 at 1-2; Kaelin Decl., ECF No. 22-1 ¶ 1. Mr. Kaelin's declaration, which Plaintiffs attached to their reply brief, discusses the costs associated with Lund's Fisheries' efforts to install video monitoring system ("VMS") units on several vessels during the months of January, February, and March 2020. *See* Kaelin Decl., ECF No. 22-1 ¶¶ 7-12. The declaration also discusses the economic feasibility of Lund's Fisheries converting three vessels so that they qualify for the Omnibus Amendment's waiver for vessels that catch less than 50 metric tons. *Id.* ¶¶ 13-18. According to Plaintiffs, "Mr. Kaelin's declaration is offered principally for illustrative purposes and to give the Court the full context behind costs associated with vessel monitoring and the nature of several of the boats owned and operated by Plaintiffs." Pls.' Reply, ECF No. 22 at 23 n.8. Thus, because Plaintiffs "do not rely on Mr.

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[8] Lund's Fisheries is not a plaintiff in this case. However, according to Plaintiffs, several Plaintiffs have the same owners and managers as Lund's Fisheries, and, as such, they are operated together as a "single family of businesses." *See* Compl., ECF No. 1 ¶ 19; Pls.' Opp'n Exclude, ECF No. 25 at 6. For example, Plaintiff Loper Bright Enterprises, Inc., co-owns and operates a vessel with the owners of Lund's Fisheries. *See* Compl., ECF No. 1 ¶ 11; Pls.' Opp'n Exclude, ECF No. 25 at 6.

Kaelin's declaration in their discussion of Defendants' failure to properly consider the costs of industry-funded monitoring," Plaintiffs argue that the Court may consider the information contained in the declaration. Pls.' Opp'n Exclude, ECF No. 25 at 7, 10-11.

However, there is no "illustrative purposes" exception to the general rule that review of an agency's action under the APA "is to be based on the full administrative record that was before [the agency] at the time [it] made [its] decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). While a court may consider extra-record evidence in reviewing agency action in limited circumstances, the party seeking admittance of the extra-record evidence must "demonstrate unusual circumstances justifying a departure from [the] general rule." *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010) (quoting *Tex. Rural Legal Aid v. Legal Servs. Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991)). The Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") has identified only three such unusual circumstances: "(1) if the agency 'deliberately or negligently excluded documents that may have been adverse to its decision,' (2) if background information [is] needed 'to determine whether the agency considered all the relevant factors,' or (3) if the 'agency failed to explain administrative action so as to frustrate judicial review.'" *Id.* (quoting *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)). Accordingly, given that "[t]hese narrow exceptions must be applied sparingly to maintain incentives for interested parties to present their evidence and views fully before an agency renders a final decision and to

ensure that courts limit their role to the review of what occurred before the agency," *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, No. 20-cv-103, 2020 WL 5642287, at *9 (D.D.C. Sept. 22, 2020) (citations omitted); the Court declines to review the declaration, even for "illustrative purposes."

Plaintiffs next argue, however, that even if the Court declines to consider the declaration for "illustrative purposes," the Court may consider the declaration under an exception to the general rule precluding extra-record evidence.

First, Plaintiffs argue that "Mr. Kaelin's declaration provides information that is absent from the administrative record and would otherwise 'enable the court to understand the issues [at hand more] clearly.'" Pls.' Opp'n Exclude, ECF No. 25 at 12 (citing *Esch*, 876 F.2d at 991). In making this argument, Plaintiffs rely on the D.C. Circuit case *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989), which recognized eight exceptions to the general rule, including an exception "when a case is so complex that a court needs more evidence to enable it to understand the issues clearly." *Id.* at 991. However, since the D.C. Circuit decided *Esch* in 1989, the case has been "given a limited interpretation." *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (citing *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010)). According to the D.C. Circuit, "at most [*Esch*] may be invoked to challenge gross procedural deficiencies—such as where the administrative record itself is so deficient as to preclude effective review." *Id.*; *see also Butte Cnty., Calif. v. Chaudhuri*, 887 F.3d 501, 507 (D.C. Cir. 2018)

("[T]hose narrow and rarely invoked exceptions apply when evidence is excluded from the record because of some 'gross procedural deficiency.'" (quotation marks and alteration omitted)). Indeed, "the Circuit has gradually winnowed the number of circumstances in which courts may consider extra-record evidence" to only the three exceptions recited above. *Oceana, Inc. v. Ross*, 454 F. Supp. 3d 62, 68 n.5 (D.D.C. 2020) (citing *Dania Beach*, 628 F.3d at 590). Thus, in view of the D.C. Circuit's restricted view of *Esch*, courts in this Circuit may no longer consider extra-record information solely "to understand the issues [at hand more] clearly." And even if the Court did consider it to be a valid exception, the facts in this case are not so complex that it would require extra-record evidence to clearly understand them.

Second, Plaintiffs contend that the declaration should be admitted as extra-record evidence because they "have highlighted serious procedural irregularities in Defendants' approval of the Omnibus Amendment, which suggest prejudgment of the legality of industry-funded monitoring." Pls.' Opp'n Exclude, ECF No. 25 at 12. Specifically, Plaintiffs note that Defendants published the Omnibus Amendment's implementing regulations in November 2018, prior to the Commerce Secretary's approval of the Omnibus Amendment in mid-December 2018. Pls.' Mot., ECF No. 18-1 at 54. In addition, following the Secretary's approval of the Omnibus Amendment, "NOAA informed the NEFMC of that approval in a non-public letter that it never officially disseminated." *Id.* Plaintiffs' contend that these alleged procedural irregularities, coupled with the fact that Plaintiffs raise claims under NEPA and the Regulatory

Flexibility Act, are sufficient reasons to justify admitting extra-record evidence. Pls.' Opp'n Exclude, ECF No. 25 at 12. But this argument also fails. To the extent that evidence of procedural irregularities remains an exception following the D.C. Circuit's narrowing of *Esch*, a review of the MSA's provisions governing the Secretary's review of FMPs and proposed regulations shows that Defendants followed proper procedures, as this Court more fully discusses in Section III.I below. And in any event, Plaintiffs fail to explain how a declaration discussing various costs related to fishing vessels would assist the Court's analysis of any alleged procedural irregularities in promulgating the final rule and regulations.

Third, Plaintiffs appear to seek to include the declaration as "background information," which is an exception to the general rule when the information is needed "to determine whether the agency considered all the relevant factors." Pls.' Opp'n Exclude, ECF No. 25 at 12. The Court remains unpersuaded. "To satisfy the relevant factors exception, the document in question must do more than raise nuanced points about a particular issue; it must point out an *entirely new* general subject matter that the defendant agency failed to consider." *Ross*, 454 F. Supp. 3d at 70 (quoting *Pinnacle Armor, Inc. v. United States*, 923 F. Supp. 2d 1226, 1234 (E.D. Cal. 2013)) (quotation marks omitted). "In a complicated, scientific analysis, . . . consideration of the intermediary evidentiary factors which lead to the ultimate conclusion are the very means by which the agency renders its decision and, generally speaking, any of them can be a 'relevant factor' justifying supplementation of the administrative record if

ignored." *Id.* (quoting *Sw. Ctr. for Biological Diversity v. Babbitt*, 131 F. Supp. 2d 1, 8 (D.D.C. 2001)).

Here, the administrative record is clear that Defendants considered VMS installation costs and how the 50-metric-ton exemption would affect midwater trawl vessels. *See, e.g.*, AR 17742 ("Waiving industry-funded monitoring requirements on certain trips, including trips that land less than 50 mt of herring and pair trawl trips carrying no fish, would minimize the cost of additional monitoring [for certain smaller vessels]. . . . Electronic monitoring and portside sampling may be a more cost effective way for midwater trawl vessels to meet the 50-percent coverage target requirement than at-sea monitoring coverage."); *id.* at 10821 (noting the "highly variable" costs of installing electronic video monitoring systems); *see also id.* at 17250; *id.* at 17264. Plaintiffs also appear to concede as much. *See, e.g.*, Pls.' Opp'n Exclude, ECF No. 25 at 13 ("Here, Defendants and the NEFMC considered VMS and other operating costs. . . . Industry stakeholders presented them with concerns about the limited impact of the proposed 50-metric-ton exemption and the viability of fish[er]men simply moving to a different fishery. Mr. Kaelin's testimony merely provides more concrete detail that shows Defendants failed to adequately consider these issues."). Thus, the Court finds that Mr. Kaelin's declaration "does not add factors that [the agency] failed to consider as much as it questions the manner in which [the agency] went about considering the factors it did." *Corel Corp. v. United States*, 165 F. Supp. 2d 12, 31-32 (D.D.C. 2001).

Finally, Plaintiffs argue that "[i]f the Court excludes Mr. Kaelin's declaration, it may still consider the cost survey and order Defendants to complete the record with the data compiled by" the Mid-Atlantic Fishery Management Council regarding compliance cost information. Pls.' Opp'n Exclude, ECF No. 25 at 15-16. As Plaintiffs did not object to Defendants' compilation of the administrative record and have not filed a motion requesting that the Court supplement the administrative record with such information, the Court declines to order Defendants to produce the information now.

Accordingly, the Court finds that Plaintiffs have not demonstrated exceptional circumstances justifying departure from the general rule against extra-record evidence.

B. The MSA Authorizes Industry-Funded Monitoring

Plaintiffs first contend that Defendants exceeded their statutory authority under the MSA in promulgating the industry-funded monitoring measures within the Omnibus Amendment. *See* Pls.' Mot., ECF No. 18-1 at 27. Plaintiffs argue that the MSA does not authorize industry-funded monitoring in the Atlantic herring fishery or in the other New England fisheries contemplated in the amendment. *Id.* at 28. And because the expected economic impact of such monitoring programs is "possibly disastrous for the herring fleet," Plaintiffs contend that Congress would not grant authority for such significant measures through an implicit delegation. *Id.* Defendants, in opposition, argue that "Congress has spoken directly to the precise question at issue by

including multiple provisions in the MSA that presuppose" industry-funded monitoring. Defs.' Opp'n, ECF No. 20-1 at 26. Even if the Court finds that Congress has not directly spoken on the issue, Defendants argue that NMFS's interpretation of the MSA was reasonable. *Id.*

In reviewing an agency's interpretation of a statute Congress has entrusted it to administer, courts' analyses are governed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under step one of the *Chevron* analysis, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. Courts utilize "traditional tools of statutory construction" to determine whether Congress has unambiguously expressed its intent. *Serono Lab'ys, Inc. v. Shalala*, 158 F.3d 1313, 1319 (D.C. Cir. 1998) (quoting *Chevron*, 467 U.S. at 843 n.9). "When the statute is clear, the text controls and no deference is extended to an agency's interpretation in conflict with the text." *Adirondack Med. Ctr. v. Sebelius*, 29 F. Supp. 3d 25, 36 (D.D.C. 2014) (citing *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195 (2011)). Under step two of the *Chevron* analysis, if Congress "has not directly addressed the precise question" at issue, the agency's interpretation of the statute is entitled to deference so long as it is "reasonable" and not otherwise "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44.

"An agency is owed no deference if it has no delegated authority from Congress to act." *N.Y. Stock*

Exch. LLC v. Secs. & Exch. Comm'n, 962 F.3d 541, 553 (D.C. Cir. 2020); *see also La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."). Furthermore, "[a]gency authority may not be lightly presumed," and "[m]ere ambiguity in a statute is not evidence of congressional delegation of authority." *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) (citing *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 645 (D.C. Cir. 1998)). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (quoting *State Farm*, 463 U.S. at 43).

The Court's analysis begins with the statutory text. *See S. Cal. Edison Co. v. FERC*, 195 F.3d 17, 22-23 (D.C. Cir. 1999). Here, Section 1853 of the MSA explicitly provides that FMPs may require that at-sea monitors "be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery." 16 U.S.C. § 1853(a)(8). In the same section, the MSA provides that FMPs may also "prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery." *Id.* § 1853(a)(14). Significantly, the MSA also states that each FMP "shall contain the conservation and management measures" it finds 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)(A).

Taken together, these statutory provisions "vest[] broad authority in the Secretary to promulgate such regulations as are necessary to carry out the conservation and management measures of an approved FMP." *Nat'l Fisheries Inst., Inc. v. Mosbacher*, 732 F. Supp. 210, 216 (D.D.C. 1990). Indeed, the Supreme Court has recognized that the phrase "necessary and appropriate" is "capacious[]" and "leaves agencies with flexibility." *Michigan*, 576 U.S. at 752 (2015); *see also Coastal Conservation Ass'n v. U.S. Dep't of Commerce*, No. 15-1300, 2016 WL 54911, at *4 (E.D. La. Jan. 5, 2016) (describing "necessary and appropriate" phrase in Section 1853(a)(1)(A) as "empowering language represent[ing] a delegation of authority to the agency"). Moreover, "the MSA defines 'conservation and management' measures in relevant part as 'all of the rules, regulations, conditions, methods, and other measures . . . required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment.'" *Groundfish Forum v. Ross*, 375 F. Supp. 3d 72, 84 (D.D.C. 2019) (quoting 16 U.S.C. § 1802(5)). Given that the MSA expressly authorizes FMPs to contain provisions requiring that vessels carry at-sea monitors, as well any "necessary and appropriate" conservation and management requirements, the Court declines to read the MSA as narrowly as Plaintiffs urge. *See* 16 U.S.C. § 1853(a)(1)(A), (b)(8), (b)(14); *see also Groundfish Forum*, 375 F. Supp. 3d at 84 (D.D.C. 2019) (finding that, given the "broad" definition of "conservation and

management" measures, "the Court has no basis to recognize a strict yet unspoken limitation on the Service's authority").

Plaintiffs, however, contend that, though the MSA authorizes placement of at-sea monitors on vessels, the MSA is silent on whether Defendants may further require that vessel operators pay for the monitoring services. *See* Pls.' Reply, ECF No. 22 at 13. According to Plaintiffs, courts have rejected the "nothing-equals-something argument," based entirely on the existence of the phrase "necessary and appropriate" in a statute, "that presumed congressional silence left the agency a 'mere gap' . . . to fill.'" Pls.' Reply, ECF No. 22 at 13 (quoting *Gulf Fishermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460 (5th Cir. 2020)). Plaintiffs primarily rely on the D.C. Circuit's decision in *New York Stock Exchange, LLC v. SEC*, 962 F.3d 541 (D.C. Cir. 2020), and the Supreme Court's decision in *Michigan v. EPA*, 576 U.S. 743 (2015), in support of their argument. *See* Pls.' Reply, ECF No. 22 at 19.

However, both cases are distinguishable. In *New York Stock Exchange, LLC*, the D.C. Circuit concluded that the Securities and Exchange Commission inappropriately relied on the phrase "necessary and appropriate" under section 23(a) of the Securities and Exchange Act in implementing a rule without any regulatory agenda and without any other statutory authority. 962 F.3d at 557. The D.C. Circuit explained that the Commission had adopted the program "without explaining what problems with the existing regulatory requirements it meant to address." *Id.* Moreover, the costly program was adopted despite the

Exchange Act's command "forbid[ding] the Commission from adopting a rule that will unnecessarily burden competition." *Id.* at 555. Here, in contrast, Defendants have tethered the Omnibus Amendment measures to the congressionally authorized purpose of "conservation and management of the fishery." 16 U.S.C. § 1853(b)(8). For example, the record reflects that Defendants considered the economic impacts to the fishing community as well as the environmental impacts, concluding that the preferred alternatives "may lead to direct positive impacts on the herring resource and non-target species if herring fishing effort is limited, by increased information on catch tracked against catch limits, and that increases the reproductive potential of the herring resource and non-target species." AR 17318.

Similarly, in *Michigan*, the Supreme Court concluded that, among other things, the "established administrative practice" to "treat cost as a centrally relevant factor" and the "[s]tatutory context" requiring consideration of costs in reference to various actions, made it unreasonable for the EPA to read the phrase "appropriate and necessary" to mean that it could ignore cost when deciding whether to regulate power plants. 576 U.S. at 752-57. Here, however, the established administrative practice and statutory context both favor Defendants. First, as Plaintiffs concede, since 1990, the North Pacific Council has managed an observer program that is "funded through a combination of fees and third-party contracts between observer providers and fishing industry members." Pls.' Mot., ECF No. 18-1 at 35. Second, regarding the statutory context, in addition to the provision explicitly authorizing mandatory at-sea

monitors, the MSA recognizes the existence of an at-sea monitoring program in which a vessel may hire and directly provide payment for monitoring services. In Section 1858(g), the MSA authorizes the Commerce Secretary to issue sanctions "[i]n any case in which . . . any payment required for observer services provided to or *contracted by an owner or operator* . . . has not been paid and is overdue." 16 U.S.C. § 1858(g)(1) (emphasis added). "This provision would be unnecessary if the MSA prohibited the very type of industry funding at issue in this case." *See Goethel v. Pritzker*, No. 15-cv-497, 2016 WL 4076831, at *5 (D.N.H. July 29, 2016) (finding that Section 1858(g) "demonstrates beyond peradventure that the MSA contemplates—and most certainly does not prohibit—the use of industry funded monitors"). And while Plaintiffs argue that Section 1858(g) must only refer to other provisions of the MSA establishing fee-based monitoring programs, *see* Pls.' Mot., ECF No. 18-1 at 36-37 (citing 16 U.S.C. §§ 1862, 1821(h)(4), 1853a(e)(2)); Plaintiffs' argument lacks a textual basis. Moreover, by mandating that conservation and management measures, where practicable, "minimize costs" and "minimize adverse economic impacts" on fishing communities, the MSA acknowledges that such measures may result in costs to the fishing industry. *See* 16 U.S.C. § 1851(a)(7), (8).

The Court is mindful that "the mere reference to 'necessary' or 'appropriate' in a statutory provision authorizing an agency to engage in rulemaking does not afford the agency authority to adopt regulations as it sees fit with respect to all matters covered by the agency's authorizing statute." *N.Y. Stock Exch. LLC*, 962 F.3d at 554 (citing *Michigan*, 576 U.S. at 749-51).

But, as demonstrated above, the MSA contains more than only the phrase "necessary and appropriate."

Plaintiffs further argue that certain canons of statutory interpretation demonstrate that Defendants have exceeded their authority. First, Plaintiffs invoke the anti-surplusage canon, "which encourages courts to give effect to 'all of [a statute's] provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Gulf Fishermen's Ass'n*, 968 F.3d at 464-65 (quoting *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 294 (5th Cir. 2020) (en banc)). Plaintiffs contend that if Congress had intended to grant Defendants "implied authority" to require industry-funded monitoring, it would not have specifically authorized the collection of fees or surcharges to cover the cost of three monitoring programs elsewhere in the statute. *See* Pls.' Mot., ECF No. 18-1 at 29-30. Plaintiffs specifically refer to: (1) the "limited access privilege program," which authorizes the Council to collect "fees" to "cover the costs of management, data collection and analysis, and enforcement activities," 16 U.S.C. § 1853a(e)(2); (2) the monitoring program for foreign fishing vessels, which authorizes the Secretary to impose a "surcharge" to "cover all the costs of providing a United States observer aboard that vessel," *id.* § 1821(h)(4); and (3) the North Pacific Council program, which "establishes a system . . . of fees, which may vary by fishery, management area, or observer coverage level, to pay for the cost of implementing the plan," *id.* § 1862(a). Second, Plaintiffs argue that the *expressio unius est exclusio alterius* canon applies for the same reasons: that the inclusion of provisions governing fee-based monitoring programs impliedly excludes other types of industry-

funded monitoring programs. Pls.' Mot., ECF No. 18-1 at 30; *see also* Pls.' Reply, ECF No. 22 at 14.

The Court is unpersuaded. A fee-based program—"where the industry is assessed a payment by the agency, authorized by statute, to be deposited in the U.S. Treasury and disbursed for administrative costs otherwise borne by the agency," AR 17739—is different from the industry-funded observer measures at issue here, in which the fishing vessels contract with and make payments directly to third-party monitoring service providers. Because the Omnibus Amendment does not involve fees or surcharges, the Court cannot not find that the MSA's provisions governing cost recovery are made "superfluous, void or insignificant," *Citizens for Responsibility & Ethics in Wash. v. FEC*, 316 F. Supp. 3d 349, 391 (D.D.C. 2018) (quoting *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018)); nor do the circumstances "support a sensible inference that the term left out must have been meant to be excluded." *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 398 (D.C. Cir. 2017) (citing *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017)); *see also Goethel*, 2016 WL 4076831, at *5 (finding that "the Pacific Northwest fee mechanism is a substantively different animal than A16's industry funding requirement for at-sea monitoring").

Plaintiffs also assert that "[t]here is no evidence of congressional recognition of any sort of pre-existing, implied authority to impose monitoring costs on the regulated industry." Pls.' Mot., ECF No. 18-1 at 31. The Court disagrees. Rather, the legislative history further supports the conclusion that Defendants have acted within the scope of the MSA.

As Defendants point out, prior to Congress adding to the MSA the provisions authorizing the mandatory placement of at-sea monitors on fishing vessels (16 U.S.C. § 1853(b)(8)) and the fee-based observer program in the North Pacific region (16 U.S.C. § 1862), the Secretary had issued regulations implementing an observer program in the North Pacific's FMP in which the vessel operator directly paid a third-party monitoring services provider. *See Groundfish of the Gulf of Alaska, Groundfish Fishery of the Bering Sea & Aleutian Islands Area*, 55 Fed. Reg. 4839-02, 4840 (Feb. 12, 1990) (providing that "[a]ny vessel operator or manager of a shoreside processing facility who is required to accommodate an observer is responsible for obtaining a NMFS-certified observer . . . . [and] *will pay the cost of the observer directly to the contractor*" (emphasis added)). As Plaintiffs acknowledge, to this day, "the North Pacific observer program is still funded through a combination of fees and third-party contracts between observer providers and fishing industry members." Pls.' Mot., ECF No. 18-1 at 35. Congress was thus aware of the industry-funded monitoring program in the North Pacific when it authorized the at-sea monitoring requirement located in Section 1853(b)(8), and, indeed, the Committee on Merchant Marine and Fisheries noted that "the Councils already have—*and have used*—such authority; the amendment makes the authority explicit." *See* Defs.' Opp'n, ECF No. 20-1 at 31-32 (quoting Comm. on Merchant Marine & Fisheries, H.R. Rep. No. 101-393 at 38 (1990)). Congressional committees have continued to take note of such industry-funded programs. *See, e.g.*, S. Rep. No. 114-66 at 31-32 (June 16, 2015); S. Rep. No. 114-239 at 31-

32 (Apr. 21, 2016); H. Rpt. No. 114-605 at 17 (June 7, 2016); S. Rep. No. 115-139 at 34 (July 27, 2017); S. Rep. No. 115-275 at 36 (June 14, 2018); S. Rpt. No. 116-127 at 42 (Sept. 26, 2019).

Accordingly, the Court concludes that Defendants acted within the bounds of their statutory authority in promulgating the Omnibus Amendment. Even if Plaintiffs' arguments were enough to raise an ambiguity in the statutory text, the Court, for the same reasons identified above, would conclude that Defendants' interpretation is a reasonable reading of the MSA. *See Groundfish Forum*, 375 F. Supp. 3d at 85.

C. Industry-Funded Monitoring Does Not Violate Agency Financing and Expenditure Statutes

Plaintiffs next argue that the Omnibus Amendment "impliedly repeals" the Anti-Deficiency Act, 31 U.S.C. § 1341; the Miscellaneous Receipts Statute, 31 U.S.C. § 3302; and the Independent Offices Appropriations Act, 31 U.S.C. § 9701. Pls.' Mot., ECF No. 18-1 at 38-40. According to Plaintiffs, the amendment inappropriately "offload[s] costs" of Defendants' observer programs onto the industry when Defendants exceed appropriated funds. *Id.* at 39. For the reasons stated below, the Court disagrees and concludes that the industry-funded monitoring requirement does not violate the statutes governing agency expenditures and obligations.

Plaintiffs first argue that the industry-funded monitoring requirement violates the Anti-Deficiency Act, 31 U.S.C. § 1341. Pls.' Mot., ECF No. 18-1 at 38. The Anti-Deficiency Act provides that a federal officer

may not "(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation"; or "(B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(A)-(B). Here, however, Defendants are not expending government funds without authorization from Congress. Nor do the monitoring requirements contemplate that NFMS will enter into any contracts or obligations for the payment of money. Rather, it is the vessels that directly make payments to the monitoring service providers, subject to any terms provided for in contracts between the two private parties. Accordingly, based upon the statute's plain language, Defendants have not violated the Anti-Deficiency Act. *See Goethel*, 2016 WL 4076831, at *6 (holding that an industry funding requirement did not violate the Anti-Deficiency Act because "the effect of industry funding is a cessation of government spending").

Plaintiffs also contend that the monitoring requirement violates the Miscellaneous Receipts Act, 31 U.S.C. § 3302, which provides that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b). The D.C. Circuit has explained that this provision "derives from and safeguards a principle fundamental to our constitutional structure, the separation-of-powers precept embedded in the Appropriations Clause, that '[n]o Money shall be drawn from the Treasury, but in Consequence of

Appropriations made by Law.'" *Scheduled Airlines Traffic Offs., Inc. v. U.S. Dep't of Def.*, 87 F.3d 1356, 1361-62 (D.C. Cir. 1996) (quoting U.S. Const. art. I, § 9, cl. 7). "By requiring government officials to deposit government monies in the Treasury, Congress has precluded the executive branch from using such monies for unappropriated purposes." *Id.* at 1362. Here, the service providers are not government officials and do not otherwise receive money for the government, and thus industry-funded monitoring does not involve an "official or agent of the Government" receiving money. *See Carver v. United States*, 16 Ct. Cl. 361, 381 (1880) ("The Treasurer is the official custodian [of public money] for Congress, and unless money is in his custody, or in the hands of the persons authorized by law to receive it on behalf of the United States, it is not in the possession of the United States."), *aff'd*, 111 U.S. 609 (1884). Under the Omnibus Amendment, the vessels pay the monitoring service providers for services rendered under contracts between the vessels and the service providers. "Mindful of both the plain language of the Miscellaneous Receipts statute and its underlying purpose to preserve congressional control of the appropriations power," *Scheduled Airlines Traffic Offs., Inc.*, 87 F.3d at 1362; the Court concludes that the statute is not implicated.

Plaintiffs next argue that the industry funding requirements of the Omnibus Amendment violate the Independent Offices Appropriations Act ("IOAA"), 31 U.S.C. § 9701, which "generally governs user fees collected by the federal government." *Seafarers Int'l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 181 n.1 (D.C. Cir. 1996). "Under the Act, the 'head of each

agency . . . may prescribe regulations establishing the charge for a service or thing of value provided by the agency.'" *Montrois v. United States*, 916 F.3d 1056, 1062 (D.C. Cir. 2019) (quoting 31 U.S.C. § 9701(b)). Here, Defendants are not collecting a fee from any party related to industry-funded monitoring, and Defendants are not providing a "service or thing of value." 31 U.S.C. § 9701(b). As Defendants point out, instead, "a private entity (a monitoring provider) collects a vessel's payment for the service provider's at-sea monitoring, an arrangement under which no government agent or official ever has custody or possession of any public money." Defs.' Opp'n, ECF No. 20-1 at 47. Accordingly, the Court concludes that industry-funded monitoring does not violate the IOAA.

Despite the above, Plaintiffs assert that it is "a distinction without a difference" that "Defendants and the Council seek to require the industry to contract directly with monitoring service providers, in lieu of the government paying those companies." Pls.' Reply, ECF No. 22 at 29. According to Plaintiffs, "the law looks past superficial structures to the heart of what an agency is trying to accomplish." *Id.* The Court is unpersuaded. First, Plaintiffs fail to specify to which "law" they are referring, and they fail to cite any case law in support of their argument. Second, the plain language of the three statutes unambiguously demonstrates that they are not applicable to this case. *See Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 342 (1974) (cautioning that the IOAA should be read "narrowly to avoid constitutional problems"); *Davis & Assocs., Inc. v. District of Columbia*, 501 F. Supp. 2d 77, 80 (D.D.C. 2007) ("The

relevant language of the Anti-Deficiency Act is unambiguous."); *AINS, Inc. v. United States*, 56 Fed. Cl. 522, 539 (2003) ("All the [Miscellaneous Receipts] Act literally requires is that miscellaneous money received by government officials be deposited in the general Treasury."); *see also Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("[W]hen a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.").

Plaintiffs also argue that "it is incorrect for Defendants to assert that NMFS does not closely 'control' monitoring service providers or the contractual relationships they enter with vessel owners" because: (1) "the market for monitoring service providers is highly regulated and controlled by NMFS"; (2) "NMFS must certify the companies permitted to provide monitors," of which there are only four such companies; and (3) of the certified companies, "[n]ot all these companies operate in the same geographic regions." Pls.' Reply, ECF No. 22 at 29. However, none of these details regarding Defendants' regulation and oversight of the required standards set by the Council change the fact that Defendants do not receive any payments related to industry-funded monitoring and do not "maintain control over the contractual relationship between the vessel and the service provider that the vessel itself selects." Defs.' Reply, ECF No. 26 at 23.

Accordingly, industry-funded monitoring does not violate the Anti-Deficiency Act, the Miscellaneous Receipts Act, or the IOAA.

D. The Omnibus Amendment Is Not an Unconstitutional Tax

Plaintiffs argue that the industry-funded monitoring measures—which they characterize as "a government program created by the NEFMC and Defendants, regulated by them in detail, and which they will continue to fund in-part themselves"—are an unconstitutional tax. *See* Pls.' Mot., ECF No. 18-1 at 40. Defendants disagree with Plaintiffs' characterization of the industry-funded monitoring requirement and contend that there is "no resemblance" between the industry-funded monitoring requirement and a tax levied and collected by Congress. *See* Defs.' Opp'n, ECF No. 20-1 at 49. The Court agrees with Defendants.

"A payment made to a third party vendor (in this case, an at-sea monitor) is not a tax simply because the law requires it." *Goethel*, 2016 WL 4076831, at *6. As the Supreme Court has explained, the "essential feature" of a tax is that it "produces at least some revenue for the Government." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 564 (2012); *see also* Black's Law Dictionary (11th ed. 2019) (defining "tax" as "a charge, [usually] monetary, imposed by the government on persons, entities, transactions or property to yield public revenue"). Here, it is undisputed that the payment for industry-funded monitoring flows from the vessels directly to the monitoring service providers. *See* Pls.' Mot., ECF No. 18-1 at 40; Defs.' Opp'n, ECF No. 20-1 at 46-47. The government receives no funds related to the requirement, nor are the funds available to the government to be expended for any public purpose.

And the government's role is limited to approving at-sea monitors employed by private companies to serve as the monitoring service providers.

Accordingly, because industry-funded monitoring generates no public revenue, it does not constitute an unlawful tax.

E. The Omnibus Amendment Does Not Violate National Standard 7 and National Standard 8

Plaintiffs contend that the Omnibus Amendment violates National Standards 7 and 8 because any demonstrated scientific or conservation benefits resulting from increased monitoring services do not outweigh the economic consequences to the fishing community. Pls.' Mot., ECF No. 18-1 at 41.

In reviewing the Omnibus Amendment, the Court's "task is not to review *de novo* whether the amendment complies with [the National Standards] but to determine whether the Secretary's conclusion that the standards have been satisfied is rational and supported by the record." *C&W Fish Co.*, 931 F.2d at 1562.

For the reasons explained below, the Court concludes that the Omnibus Amendment does not violate National Standards 7 and 8.

1. National Standard 7

National Standard 7 provides that "[c]onservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication." 16 U.S.C. § 1851(a)(7). The regulations concerning National Standard 7 instruct that management measures should not impose "unnecessary burdens on

the economy, on individuals, on private or public organizations, or on Federal, state, or local governments. Factors such as fuel costs, enforcement costs, or the burdens of collecting data may well suggest a preferred alternative." 50 C.F.R. § 600.340(b). "Any analysis for fishery management plans 'should demonstrate that the benefits of fishery regulation are real and substantial relative to the added research, administrative, and enforcement costs, as well as costs to the industry of compliance.'" *Burke v. Coggins*, No. 20-667, 2021 WL 638796, at *5 (D.D.C. Feb. 18, 2021) (quoting 50 C.F.R. § 600.340(c)). The regulations also provide that "an evaluation of effects and costs, especially of differences among workable alternatives, including the status quo, is adequate." 50 C.F.R. § 600.340(c).

Plaintiffs first argue that "[a]t a cost upwards of $710 per day, many small business herring fishermen will suffer severe economic consequence." Pls.' Mot., ECF No. 18-1 at 41. Plaintiffs contend that "[a]t no point did Defendants justify the Omnibus Amendment by describing less costly alternatives that the NEFMC seriously considered." *Id.* at 42.

The administrative record reflects, however, that Defendants did consider less costly alternatives and included exemptions to the amendment to minimize costs. NMFS recognized that while industry-funded monitoring coverage would cause "direct economic impacts" on vessels participating in the herring fishery, the requirement also would have positive impacts, including ensuring "(1) [a]ccurate estimates of catch (retained and discarded); (2) accurate catch estimates for incidental species for which catch caps

apply; and (3) affordable monitoring for the herring fishery." AR 17740, 17744. The record also demonstrates that Defendants considered alternatives to determine which monitoring target goal would best achieve the agency's goals while minimizing the economic impact on fishing communities. The analysis within the EA indicates Defendants considered a "no coverage target," a 25% coverage target, a 50% coverage target, and a 75% coverage target. AR 17075, 17082-83; *see also id.* at 17097 ("Different coverage targets (25%, 50%, 75%, or 100%) were analyzed for each gear type (midwater trawl, purse seine, bottom trawl), but the Council selected a 50% coverage target for all gear types."). After weighing the benefits against the costs, Defendants concluded that "[t]he 50% coverage target selected by the Council for vessels with a Category A or B herring permit provides for the benefits of collecting additional information on biological resources while minimizing industry cost responsibilities, especially when compared to non-preferred coverage targets of 100% and 75%." *Id.* at 17315.

The Omnibus Amendment also provides for exemptions from the coverage requirements to minimize costs where practicable. For example, waivers are available if: (1) "monitoring coverage is unavailable"; (2) "vessels intend to land less than 50 metric tons (mt) of herring"; or (3) "wing vessels carry no fish on pair trawling trips." *Id.* at 17735. Furthermore, the EFP "exempt[s] midwater vessels from the requirement for industry-funded at-sea monitoring coverage and allow[s] midwater trawl vessels to use electronic monitoring and portside

sampling coverage to comply with the" 50% monitoring coverage target. *Id.* at 17736-37. Finally, Defendants found that "[a]llowing SBRM coverage to contribute toward the 50-percent coverage target for at-sea monitoring is expected to reduce costs for the industry." *Id.* at 17742. Accordingly, Plaintiffs' contention that Defendants "at no point" discussed less costly alternatives is belied by the record. *See Nat'l Coal. for Marine Cons. v. Evans*, 231 F. Supp. 2d 119, 133 (D.D.C. 2002) (dismissing plaintiffs' arguments that NMFS failed to analyze alternative conservation measures, explaining that they "ha[d] not specified any record evidence showing that NMFS ignored a less costly, practicable approach . . . , as National Standard Seven prohibits").

Plaintiffs, however, argue that Defendants' discussion of alternatives is conclusory and that "[m]ore detailed analysis is required, particularly when the proposed regulation will harm most of the herring fleet." Pls.' Reply, ECF No. 22 at 32. Plaintiffs assert that the Council failed to note that midwater trawlers will bear the brunt of the industry-funded monitoring costs because: (1) they have low observer coverage rates due to differences in SBRM coverage among gear types; and (2) the majority of them would not qualify under the 50-metric-ton exemption. *Id.* However, it is settled law that "in making a decision on the practicability of a fishery management amendment, the Secretary does not have to conduct a formal cost/benefit analysis of the measure." *Alaska Factory Trawler Ass'n v. Baldridge*, 831 F.2d 1456, 1460 (9th Cir. 1987); *see also Nat'l Fisheries*, 732 F. Supp. at 222. As stated above, there is ample evidence in the record that Defendants considered the costs and

benefits of choosing a 50% coverage target, which was neither the most nor the least severe plan considered, and took action to minimize the economic impacts of the industry-funded monitoring measures. *E.g.*, AR at 17005-06, 17030, 17070-71, 17075, 17082-83, 17315, 17346. In addition, the record reflects that Defendants made efforts to minimize the economic impacts by tailoring the industry-funded monitoring requirement to that portion of the industry most in need of regulatory controls. Thus, though Plaintiffs assert that midwater trawls will end up bearing a greater share of the costs, as Defendants assert, the monitoring coverage target is intended to encompass those vessels with the largest herring catch. *See e.g.*, *id.* at 17742 ("Coverage waivers would only be issued under specific circumstances, when monitors are unavailable *or trips have minimal to no catch*, and are not expected to reduce the benefits of additional monitoring." (emphasis added)); *id.* at 17743 ("Ultimately, the Council determined that the potential for a relatively high herring catches per trip aboard those vessels warranted additional monitoring."). Furthermore, in view of the fact that these midwater trawl vessels would be less likely to fall under the 50-metric-ton exception, Defendants found that, via the EFP exemption, "[e]lectronic monitoring and portside sampling may be a more cost effective way for midwater trawl vessels to meet the 50-percent coverage target requirement than at-sea monitoring coverage." *Id.* at 17742.

Plaintiffs also contend that the omnibus measures, which establish a standardized process for developing industry-funded monitoring programs across other New England FMPs, "may lead to the sort

of 'duplication' that National Standard Seven aims to avoid" because "vessels in non-herring fisheries could become subject to concurrent monitoring requirements." Pls.' Reply, ECF No. 22 at 30. Plaintiffs assert that the Omnibus Amendment fails to address this potential future duplication with other NEFMC-administered fisheries. *Id.* at 30-31. But Plaintiffs' argument fails. Defendants explained that "[b]ecause herring and mackerel are often harvested together on the same trip," the Omnibus Amendment "specifies that the higher coverage target applies on trips declared into both fisheries. If the Council considers industry-funded monitoring in other fisheries in the future, the impacts of those programs relative to existing industry-funded monitoring programs will be considered at that time." AR 17742. Further, because the 50% monitoring coverage target is calculated by combining both SBRM and industry-funded monitoring, a vessel will not have SBRM and industry-funded monitoring coverage on the same trip. *See id.* at 17315, 17734. Thus, the industry-funded monitoring requirement in the Atlantic herring fishery "avoid[s] unnecessary duplication." 16 U.S.C. § 1851(a)(7).

Accordingly, the Omnibus Amendment does not violate National Standard 7.

2. National Standard 8

National Standard 8 requires that FMPs and plan amendments "take into account the importance of fishery resources to fishing communities . . . in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such

communities." 16 U.S.C. § 1851(a)(8). The agency "must give priority to conservation measures." *Nat. Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000). "It is only when two different plans achieve similar conservation measures that the [Department] takes into consideration adverse economic consequences." *Id.* But where two alternatives in fact achieve similar conservation goals, the preferred option will be the alternative that provides the greater potential for sustained participation of fishing communities and that minimizes adverse economic impacts. *See* 50 C.F.R. § 600.345(b)(1). "These sometimes conflicting goals of conservation on the one hand and minimizing harm to fishing communities on the other mean that the Secretary has substantial discretion to strike what he deems an appropriate balance." *N.C. Fisheries Ass'n*, 518 F. Supp. 2d at 92 (citing *Alliance Against IFQs v. Brown*, 84 F.3d 343, 350 (9th Cir. 1996)). "In striking that balance, moreover, the Secretary need not conduct an official or numerical cost/benefit analysis." *Id.* (citing *Nat'l Fisheries Inst.*, 732 F. Supp. at 222).

Plaintiffs argue that the Omnibus Amendment violates National Standard 8 because Defendants have failed to establish its scientific and conservation need. Pls.' Reply, ECF No. 22 at 34; *see also* Pls.' Mot., ECF No. 18-1 at 41. The Court disagrees. It is clear from the administrative record that Defendants explained the scientific and conservation benefits of the Omnibus Amendment. Defendants explained that the amendment establishes industry-funded monitoring "to help increase the accuracy of catch estimates," which in turn will "improv[e] catch estimation for stock assessments and management."

AR 17742 ("Analysis in the EA suggests a 50-percent coverage target would reduce the uncertainty around estimates of catch tracked against catch caps, likely resulting in a CV of less than 30 percent for the majority of catch caps."); *see also id.* at 17316. "If increased monitoring reduces the uncertainty in the catch of haddock and river herring and shad tracked against catch caps, herring vessels may be more constrained by catch caps, thereby increasing accountability, or they may be less constrained by catch caps and better able to fully harvest herring sub-ACLs." *Id.* at 17742; *see also id.* at 17789. Furthermore, Defendants explained that "[i]mproving [the] ability to track catch against catch limits is expected to support the herring fishery achieve optimum yield, minimize bycatch and incidental catch to the extent practicable, and support the sustained participation of fishing communities." *Id.* at 17742; *see also id.* at 17789-90. As explained above, those conservation needs were weighed against the associated costs to the industry, and the Council considered significant alternatives and selected measures to minimize adverse economic impacts on the fishing industry and communities. *See id.* at 17316.

Plaintiffs also argue that the cost-minimization efforts "impermissibly benefit a select number of fishing communities where that sliver of the fleet berths and does business." Pls.' Reply, ECF No. 22 at 34. Plaintiffs further contend that "differences in SBRM coverage among different gear types will lead to the midwater trawl fleet carrying more of the financial burden in meeting the herring monitoring coverage target." *Id.* But, as stated above, the

administrative record demonstrates that Defendants took into account the negative economic impacts upon participants in the herring fishery "to the extent practicable." 16 U.S.C. § 1851(a)(8). In taking into account the economic impacts, Defendants weighed the alternatives and reasonably concluded that the 50% monitoring coverage target best met the balance of the costs and benefits of additional monitoring. AR 17257, 17734.

"[C]ourts have consistently rejected challenges under this standard where the administrative record reveals that the Secretary was aware of potentially devastating economic consequences, considered significant alternatives, and ultimately concluded that the benefits of the challenged regulation outweighed the identified harms." *N.C. Fisheries Ass'n*, 518 F. Supp. 2d at 92 (citing cases). Accordingly, the Court concludes that there is no violation of National Standard Eight.

F. The February 7, 2020 Final Rule Is Not Substantively Deficient

Plaintiffs argue that Defendants' responses to comments submitted in connection with the final rule were "substantively deficient." Pls.' Mot., ECF No. 18-1 at 43.

"The APA's arbitrary-and-capricious standard requires that agency rules be reasonable and reasonably explained." *Nat'l Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009). "An agency violates this standard if it 'entirely fail[s] to consider an important aspect of the problem.'" *Carlson v. Postal Reg. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (quoting *State Farm*, 463 U.S. at 43). "An agency also

violates this standard if it fails to respond to 'significant points' and consider 'all relevant factors' raised by the public comments." *Id.* (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977)). "The fundamental purpose of the response requirement is, of course, to show that the agency has indeed considered all significant points articulated by the public." *Nat. Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 188 (D.C. Cir. 1988). However, "[t]he failure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not based on a consideration of the relevant factors." *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984) (internal quotations and citations omitted).

First, Plaintiffs argue that Defendants' failed to cite statutory authority supporting its statement that Section 1853(b)(8)'s requirement "to carry observers . . . includes compliance costs on industry participants" because "there is no statutory authorization for industry-funded monitoring." Pls.' Mot., ECF No. 18-1 at 43 (emphasis omitted) (quoting AR 17739). Plaintiffs contend that Defendants never addressed the argument that if authorization for industry-funded monitoring were "implied, then Congress's efforts to allow it elsewhere would be rendered surplusage." *Id.*

However, the Service explained in its response that its authority derives from Section 1853(b)(8) of the MSA, which authorizes at-sea monitors to be placed on fishing vessels, and explained its view that "[t]he requirement to carry observers, along with many other requirements under the [MSA], includes compliance costs on industry participants." AR 17739

(explaining that "NMFS regulations require fishing vessels to install vessel monitoring systems for monitoring vessel positions and fishing, report catch electronically, fish with certain gear types or mesh sizes, or ensure a vessel is safe before an observer may be carried on a vessel. Vessels pay costs to third-parties for services or goods in order to comply with these regulatory requirements that are authorized by the Magnuson-Stevens Act. There are also opportunity costs imposed by restrictions on vessel sizes, fish sizes, fishing areas, or fishing seasons."). Defendants' response is not "substantively deficient" for failing to expressly mention the surplusage canon, as Defendants had already noted their disagreement with the premise that industry-funded monitoring was unauthorized. *Cf. Del. Dep't of Nat. Res. & Env't Control v. EPA*, 785 F.3d 1, 15 (D.C. Cir. 2015) (stating that an agency need not "discuss every item of fact or opinion included in the submissions made to it" (citation omitted)).

Plaintiffs also assert that "there is a key distinction between regulatory costs—often enumerated by statute—and effectively paying the salary of your direct, government minder." Pls.' Mot., ECF No. 18-1 at 43-44. Plaintiffs contend that the measures within the Omnibus Amendment are more comparable to *inspection* costs than *compliance* costs. *Id.* at 44. Finally, Plaintiffs argue that Defendants "tried to dismiss arguments that industry funding is an unlawful tax." *Id.* at 45.

However, Defendants also sufficiently responded to these concerns raised in submitted comments. Defendants explained that the purpose of monitoring

programs was to "collect[] data necessary for the conversation and management of the fishery" and that "[a]t-sea monitors are not authorized officers conducting vessel searches for purposes of ensuring compliance with fisheries requirements." AR 17740. Defendants further explained that industry funding is not a tax because the government receives no revenue. *Id.*

Accordingly, the Court concludes that the record indicates that Defendants sufficiently considered the relevant factors raised by the submitted comments and provided reasonable explanations in response. *See Nat'l Tel. Coop. Ass'n*, 563 F.3d at 540.

G. Defendants Did Not Violate NEPA

Plaintiffs further argue that Defendants' EA violates NEPA. *See* Pls.' Mot., ECF No. 18-1 at 46.

While NEPA establishes a "national policy [to] encourage productive and enjoyable harmony between man and his environment," 42 U.S.C. § 4321; "NEPA itself does not mandate particular results," *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "Rather, NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756-57 (2004). In reviewing an agency's decision not to issue an EIS, the court's role is a "'limited' one, designed primarily to ensure 'that no arguably significant consequences have been ignored.'" *Taxpayers of Mich. Against Casinos v. Norton* ["*TOMAC*"], 433 F.3d 852, 860 (D.C. Cir. 2006) (quoting *Pub. Citizen v. Nat'l Highway Traffic Safety*

Admin., 848 F.2d 256, 267 (D.C. Cir. 1988)). Thus, courts apply "a 'rule of reason' to an agency's NEPA analysis" and decline to "'flyspeck' the agency's findings in search of 'any deficiency no matter how minor.'" *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322-23 (D.C. Cir. 2015) (quoting *Nevada v. U.S. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006)).

Plaintiffs argue that Defendants violated NEPA because: (1) Defendants failed to take a "hard look" at the Omnibus Amendment's impacts; (2) Defendants did not adequately consider regulatory alternatives or potential mitigation measures; (3) Defendants did not seriously consider alternatives to industry-funded monitoring; and (4) Defendants did not submit a supplement to their environmental impact analysis despite reductions in herring catch. *See* Pls.' Mot., ECF No. 18-1 at 46-51. For the reasons explained below, the Court rejects Plaintiffs' arguments.

1. Plaintiffs Do Not Have a Cause of Action Under NEPA

As a threshold matter, the Court first addresses whether Plaintiffs' interests fall within NEPA's "zone of interests." *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 273 (D.C. Cir. 2015).

"In addition to constitutional standing, a plaintiff must have a valid cause of action for the court to proceed to the merits of its claim." *Id.* (citing *Natural Res. Def. Council v. EPA*, 755 F.3d 1010, 1018 (D.C. Cir. 2014)). As the Supreme Court has explained, courts "presume that a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'"

Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 129 (2014) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

"The zone of interests protected by the NEPA is, as its name implies, environmental; economic interests simply do not fall within that zone." *Gunpowder Riverkeeper*, 807 F.3d at 274. "To be sure, a [party] is not disqualified from asserting a claim under the NEPA simply because it has an economic interest in defeating a challenged regulatory action." *Id.* (citing *Realty Income Trust v. Eckerd*, 564 F.2d 447, 452 (D.C. Cir. 1977). But a party "must assert an environmental harm in order to come within the relevant zone of interests," and that zone of interests "does not encompass monetary interests alone," *id.* (quoting *Eckerd*, 564 F.2d at 452 & n.10, n.11).

Here, while Plaintiffs refer generally to unspecified "environmental impacts," Plaintiffs have not alleged that they will suffer any environmental injury as a result of the Omnibus Amendment. Rather, Plaintiffs' sole concern is with the financial burden on fishing vessels and companies as a result of industry-funded monitoring. In their motion briefing and in their Complaint, Plaintiffs have detailed their fears regarding the economic impact of the Omnibus Amendment. *See, e.g.*, Pls.' Mot., ECF No. 18-1 at 48-51; Pls.' Reply, ECF No. 22 at 36-42; Compl., ECF No. 1 ¶¶ 3-5, 45, 78-80, 86, 91, 98. However, Plaintiffs have failed to name any specific harms to the environment and have not "linked [their] pecuniary interest to the physical environment or to the environmental impacts." *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005) (holding

that plaintiff failed to establish prudential standing under NEPA because plaintiff's "sole interest is in selling phosphate to Agrium").

Accordingly, because Plaintiffs' interest in challenging the Omnibus Amendment is a purely economic interest, and economic concerns are "not within the zone of interests protected by NEPA," *ANR Pipeline Co v. FERC*, 205 F.3d 403, 408 (D.C. Cir. 2000); Plaintiffs cannot sustain a claim under NEPA, *see Goethel*, 2016 WL 4076831, at *8 (dismissing plaintiffs' NEPA claim because their "argument appears limited to the claim that NMFS failed to adequately assess the economic impact of industry funding").

2. Plaintiffs' NEPA Claims Fail on the Merits

Even if the Court found that NEPA was applicable to Plaintiffs' claims, Plaintiffs' arguments would still fail on the merits for the reasons stated below.

a. Defendants Took a "Hard Look" at Environmental Impacts

Plaintiffs argue that Defendants failed to take a "hard look" at the "complete environmental impact" of the omnibus measures, which created a process to implement future industry-funded monitoring programs in other New England FMPs. Pls.' Mot., ECF No. 18-1 at 47. Plaintiffs contend that despite recognizing that future industry-funded monitoring programs will have an "economic impact" if implemented, Defendants undertook no analysis of these future costs. *Id.* at 47-48. In Plaintiffs' view, Defendants' inclusion of these measures into the Omnibus Amendment "suggests an improper attempt

to 'artificially divid[e] a major federal action into smaller components, each without significant impact.'" *Id.* at 48 (quoting *Jackson City v. FERC*, 589 F.3d 1284, 1290 (D.C. Cir. 2009)).

Under NEPA, the EA must "take[] a hard look at the problem." *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2011). "Although the contours of the 'hard look' doctrine may be imprecise," a court must at a minimum "'ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006) (quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97-98 (1983)). A "hard look" includes "considering all foreseeable direct and indirect impacts . . . . [It] should involve a discussion of adverse impacts that does not improperly minimize negative side effects." *N. Alaska Env't Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006) (internal quotation marks and citation omitted).

Here, the Court notes at the outset that while Plaintiffs broadly claim that Defendants failed to take a "hard look" at the *environmental* impacts of the future industry-funded monitoring programs, Plaintiffs only identify alleged *economic* impacts. *See* Pls.' Mot., ECF No. 18-1 at 48 (stating that NEFMC recognized the "economic impact" of future monitoring programs); *id.* (noting that NEFMC had suggested a potential rise in "monitoring costs" due to overlapping requirements); *id.* at 49 (arguing a NEPA violation because the "final EA provides no detail about the potential economic impact"); *id.* (citing to "meager

evidence" in the administrative record regarding the economic impact on the non-herring fleet); Pls.' Reply, ECF No. 22 at 36 (arguing the Council refused to "recognize[] the uniformly negative expected economic pact of future" monitoring programs). As explained above, a party "must assert an environmental harm in order to come within [NEPA's] zone of interests." *Gunpowder Riverkeeper*, 807 F.3d at 274 (citing *Eckerd*, 564 F.2d 447, 452 & n.10 (D.C. Cir. 1977); *see Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 606 (9th Cir. 2018) ("We have 'consistently held that purely economic interests do not fall within NEPA's zone of interests.'" (quoting *Ashley Creek Phosphate*, 420 F.3d at 940)).

However, even if NEPA was applicable here, the Court's conclusion would remain the same. Plaintiffs dispute Defendants' determination that the omnibus measures "do not have any direct economic impacts on fishery-related business or human communities because they do not require the development of [industry-funded monitoring] programs nor do they directly impose any costs." AR 17179. Plaintiffs contend that because Defendants are aware of which New England FMPs are in the position to implement industry-funded programs and "have access to extensive information about the demographics and operation of New England fisheries," Defendants could conduct an analysis of economic impact of future monitoring programs. Pls.' Reply, ECF No. 22 at 37. Defendants, on the other hand, argue that such future costs are too speculative to include in the EA "[w]ithout knowing the goals or the details of the measures to achieve [future industry-funded monitoring] goals." Defs.' Opp'n, ECF No. 20-1 at 50

(quoting AR 17741). Defendants state that "[t]he economic impacts to fishing vessels and benefits resulting from a future . . . program would be evaluated in the amendment to establish that . . . program." *Id.* (quoting AR 17741).

The Court agrees with Defendants. "The 'rule of reason' requires that consideration be given to practical limitations on the agency's analysis, such as the information available at the time." *Wilderness Soc'y v. Salazar*, 603 F. Supp. 2d 52, 61 (D.D.C. 2009) (citing *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 736 (D.C. Cir. 2000)). Because the omnibus measures do not require the development of industry-funded monitoring programs in all FMPs but rather set up a process to be used if such programs are developed in the future, Defendants did not know the location of any future monitoring program or the future program's specific goals at the time of the EA's preparation. Furthermore, "[t]hat [D]efendants may continue to assess impacts as more information becomes available does not indicate that defendants failed to take a 'hard look' at the environmental consequences of its proposed action." *Id.* at 62. Requiring Defendants to analyze future industry-funded monitoring programs without knowing where the programs will be implemented would be unreasonable and beyond NEPA's mandate. *See id.*; *see also WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 66-67 (D.D.C. 2019) (finding that defendant agency did not violate NEPA when the agency "could not reasonably foresee the projects to be undertaken on specific leased parcels, nor could it evaluate the impacts of those projects on a parcel-by-parcel basis"). For the same reasons the Court finds that Defendants

did not improperly segment the Omnibus Amendment. *See Jackson Cnty.*, 589 F.3d at 1291 (finding it reasonable that FERC treated two projects separately when, among other thing, the projects were geographically distinct and triggered separate agency approval decisions).

b. Defendants Adequately Considered Alternatives and Potential Mitigation Measures

Plaintiffs next argue that Defendants violated NEPA because they did not adequately address potential mitigation measures or alternatives to the Omnibus Amendment. Pls.' Mot., ECF No. 18-1 at 49. The Court disagrees.

An EA "must include a 'brief discussion[]' of reasonable alternatives to the proposed action." *Myersville*, 783 F.3d at 1323 (citation omitted). "An alternative is reasonable if it is objectively feasible as well as reasonable in light of the agency's objectives." *Id.* (alterations and quotation marks omitted) (quoting *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 72). An agency's specification of the range of reasonable alternatives is entitled to deference. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). Furthermore, an agency's consideration of alternatives in an EA "need not be as rigorous as the consideration of alternatives in an EIS." *Myersville*, 783 F.3d at 1323. "In assessing whether an agency has shown that a project's environmental impacts are adequately addressed by mitigation measures, a court must ask . . . whether the agency discussed the mitigation measures 'in sufficient detail to ensure that environmental

consequences have been fairly evaluated.'" *Food & Water Watch v. U.S. Dep't of Agric.*, 451 F. Supp. 3d 11, 37 (D.D.C. 2020) (quoting *Indian River Cnty., Fla. V. U.S. Dep't of Transp.*, 945 F.3d 515, 522 (D.C. Cir. 2019)). "NEPA does not, however, 'require agencies to discuss any particular mitigation plans that they might put in place.'" *Id.* (quoting *Theodore Roosevelt Conservation P'ship*, 616 F.3d at 503).

First, regarding consideration of alternatives, the Court finds that Defendants have complied with NEPA's requirements. The EA included a brief discussion of seven alternatives to the omnibus measures, including an option preserving the status quo, "that would modify all the FMPs managed by the Council to allow standardized development of future FMP-specific industry-funded monitoring programs." AR 17046-47. The EA also included a discussion of multiple alternatives regarding increasing monitoring in the Atlantic herring fishery specifically, including a "no additional coverage" alternative, electric monitoring options, and portside sampling options. *See* AR 17069-101. Plaintiffs do not explain how the EA's discussion of these alternatives is inadequate, nor do they argue that there were any alternatives that Defendants improperly excluded from consideration. To the extent that Plaintiffs suggest that "at-sea monitoring under the Omnibus Amendment in the herring fishery is discretionary," "unnecessary to advance conservation goals," and "*less* efficient than shoreside alternatives," Pls.' Opp'n, ECF No. 22 at 34-35; "NEPA does not compel a particular result," *Myersville*, 783 F.3d at 1324. "Even if an agency has conceded that an alternative is environmentally superior, it nevertheless may be

entitled under the circumstances not to choose that alternative." *Id.*; *see also Robertson*, 490 U.S. at 350 ("If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."). Thus, in view of the cursory nature of Plaintiffs' argument, the Court finds that Defendants' discussion of alternatives is sufficient to meet the NEPA obligations. *Cf. Airport Impact Relief, Inc. v. Wykle*, 192 F.3d 197, 205 (1st Cir. 1999) (noting arguments raised "in a perfunctory manner, unaccompanied by some effort at developed argumentation" are waived when they "do not attempt to explain the manner in which the environment will be significantly affected").

Second, regarding mitigation measures, the Court finds that Defendants' EA satisfies the relevant standard. Plaintiffs contend that although the EA contains information regarding the negative effects that industry-funded monitoring will have on businesses and communities, the EA "downplays" such impacts "by referring to the waiver of coverage for vessels that land less than 50 metric tons of herring per trip—a mitigation measure that applies to an especially small portion of the herring fleet . . . — and by vaguely referring to potential adjustments by the NEFMC in the next two years." Pls.' Mot., ECF No. 18-1 at 49 (citing AR 17250, 17327); *see also* Pls.' Reply, ECF No. 22 at 38 (arguing that "the exemption for vessels landing under 50 metric tons of herring will favor a sliver of the fleet and therefore impermissibly benefit a select number of fishing communities").

Again, Plaintiffs' argument regards economic interests, not environmental ones. *See Gunpowder Riverkeeper*, 807 F.3d at 274. Furthermore, Plaintiffs' challenge to the 50-metric-ton exemption is ultimately based on a disagreement with the substance of the exemption rather than on Defendants' compliance with NEPA's procedural requirements. It is well established that "[w]here NEPA analysis is required, its role is 'primarily information-forcing.'" *Mayo v. Reynolds*, 875 F.3d 11, 15-16 (D.C. Cir. 2017) (quoting *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017)). "As the Supreme Court has explained, '[t]here is a fundamental distinction . . . between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other.'" *Id.* (quoting *Robertson*, 490 U.S. at 352). In other words, "NEPA is 'not a suitable vehicle' for airing grievances about the substantive policies adopted by an agency, as 'NEPA was not intended to resolve fundamental policy disputes.'" *Id.* (quoting *Grunewald v. Jarvis*, 776 F.3d 893, 903 (D.C. Cir. 2015)).

To the extent that Plaintiffs refer to environmental impacts in arguing that the Council's plan to re-evaluate the Atlantic herring monitoring program in two years is "vague," Pls.' Mot., ECF No. 18-1 at 49; the EA reflects that Defendants were aware of the environmental impacts of the Omnibus Amendment and its alternatives and the need to incorporate mitigation efforts to reduce any negative impacts. *See, e.g.*, AR 17177-241.

The omnibus measures were determined to have "no direct impacts" on biological resources or the physical environment. *Id.* at 17179. The industry-funded monitoring program in the Atlantic herring fishery was determined to have a "negligible" impact on the physical environment and an "indirect" impact on biological resources because "they affect levels of monitoring rather than harvest specifications or gear requirements." *Id.* at 17179, 17316; *see also id.* at 17326 ("The proposed action is not expected to cause significant environmental impacts because it establishes a monitoring program, rather than specifying harvest specifications, gear requirements, or changes in fishing behavior."). The EA then took into account "variations and contingencies in [the Atlantic herring] fishery by adapting coverage levels to available funding or logistics and allowing vessels to choose electronic monitoring and portside sampling coverage, if it is suitable for the fishery and depending on a vessel owner's preference." *Id.* at 17315. The EA explained that one of the "preferred" alternatives "would require the Council to revisit the preferred Herring Alternatives two years after implementation and evaluate whether changes to management measures are necessary." *Id.* "This requirement to evaluate the impacts of increased monitoring in the herring fishery takes into account and allows for variations and contingencies in the fishery, fishery resources, and catches." *Id.* Given that the Omnibus Amendment's measures may "increase monitoring and that may improve management of the fishery and provide a better opportunity for achieving optimum yield," resulting in indirect benefits for the environment, *id.* at 17312; Plaintiffs have failed to

show that the two-year re-examination provision is an inadequate mitigant under NEPA.

Finally, Plaintiffs contend that Defendants have used the "uncertainty of future management efforts," particularly the two-year re-examination provision, "as a shield to avoid fuller environmental impact analysis." Pls.' Reply, ECF No. 22 at 38 (quotation marks omitted). This argument is without merit. As explained above, the EA includes a thorough description of potential environmental impacts, and Plaintiffs fail to point to any specific deficiencies in Defendants' discussion of environmental impacts or mitigation measures.

Accordingly, the Court finds that, even if the Court found that NEPA was applicable to Plaintiffs' claims, the EA's discussion of environmental impacts and mitigation measures complies with NEPA's mandate.

c. Defendants Did Not Predetermine the Outcome

Plaintiffs next argue that "Defendants pre-judged the outcome of the EA in favor of the NEFMC's preferred alternatives." Pls.' Mot., ECF No. 18-1 at 49. According to Plaintiffs, "[n]othing in the administrative record suggests that NEFMC and Defendants seriously considered preserving the status quo." *Id.* at 50. As evidence, Plaintiffs point to sections of the administrative record in which Defendants state that a cost-benefit analysis could not be "completed" before the Council selected its preferred alternatives, and that the Omnibus Amendment's purpose was to "establish[] a clear delineation of costs for monitoring between the industry and NMFS for all

FMPs." *Id.*; Pls.' Reply, ECF No. 22 at 39. Plaintiffs also assert that Defendants received "overwhelmingly negative feedback from stakeholders and regulated parties," which they argue would cause a "reasonable regulator" to "think twice." Pls.' Mot., ECF No. 18-1 at 50; *see also* Pls.' Reply, ECF No. 22 at 39.

The standard for demonstrating predetermination is high. *See Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714 (10th Cir. 2010); *Stand Up for Calif.! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 304 (D.D.C. 2016). "[P]redetermination occurs only when an agency *irreversibly and irretrievably* commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, *before* the agency has completed that environmental analysis." *Forest Guardians*, 611 F.3d at 714. Indeed, "NEPA does not require agency officials to be 'subjectively impartial,'" *id.* at 712 (quoting *Env't Def. Fund, Inc. v. Corps of Eng'rs of the U.S. Army*, 470 F.2d 289, 295 (8th Cir. 1972)); and "[b]ias towards a preferred outcome does not violate NEPA so long as it does not prevent full and frank consideration of environmental concerns," *Comm. of 100 on the Fed. City v. Foxx*, 87 F. Supp. 3d 191, 205-06 (D.D.C. 2015). Thus, in determining what is an "irreversible and irretrievable" commitment, courts in this Circuit have looked "to the practical effects of [an] agency's conduct rather than whether the conduct suggests subjective agency bias in favor of the project." *Id.* at 207.

Defendants' actions do not rise to the level of predetermination. Regardless of whether Defendants had a bias toward implementing some type of

increased monitoring program in the region, the extensive administrative record demonstrates that any preferred outcome did not "prevent full and frank consideration of environmental concerns." *Id.* at 205-06. Furthermore, while Plaintiffs note that Defendants received negative feedback during the comment periods for the Omnibus Amendment and its implementing regulations, Plaintiffs do not contend that Defendants ignored these comments or provided insufficient responses. *See* Pls.' Mot., ECF No. 18-1 at 49-50. And as Defendants point out, Defendants likewise received positive feedback advocating for greater monitoring coverage than the alternative that was selected. Defs.' Opp'n, ECF No. 20-1 at 54 (citing AR 17668-71, 17742). Put simply, an agency "may work toward a solution, even its preferred one," *Stand Up for Calif.!*, 410 F. Supp. 3d at 61; and here, Defendants did not "irreversibly and irretrievably" commit itself to the measures within the amendment prior to conducting its environmental analysis, *see Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999) (explaining that issuing leases such that agency no longer retains "the authority to preclude all surface disturbing activities" constitutes an irretrievable commitment of resources (quoting *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983)); *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 71 (D.D.C. 2012) ("An administrator's statement of an opinion, based upon review of the action's subject matter and relevant regulatory guidance, suggests conscious thought rather than prejudgment, and does not lead to the conclusion that the administrator would not change his or her mind upon review of the full EA.").

Accordingly, the Court concludes that Defendants did not predetermine the outcome of the EA.

d. Defendants Were Not Required to Supplement the EA

Plaintiffs also argue that Defendants violated NEPA because they did not supplement the EA following herring catch reductions in 2019 and 2020, which Plaintiffs contend "will significantly impact the economics of the fishery and the viability of the fleet under an industry-funded monitoring regime." Pls.' Reply, ECF No. 22 at 39. Plaintiffs argue that the EA "contains no data" supporting Defendants' finding that "increases in total revenue from other fisheries" would "mitigate the negative impacts of reductions to the herring ACL and associated revenue." Pls.' Mot., ECF No. 18-1 at 51; *see also* Pls.' Reply, ECF No. 22 at 42.

Under NEPA, an agency must prepare a supplement to an EA when "[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). However, as the Supreme Court has explained, under the "rule of reason," an agency need not supplement an EA "every time new information comes to light" after the EA is finalized. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989). Rather, "if the new information shows that the remaining action will affect the quality of the environment 'in a significant manner or to a significant extent not already considered,'" a supplemental must be prepared. *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (quoting *Marsh*, 490 U.S. at

374). In addition, the D.C. Circuit has instructed that a supplement "is only required where new information 'provides a *seriously* different picture of the environmental landscape.'" *City of Olmsted Falls v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002); *see also Pub. Emps. for Env't Responsibility v. U.S. Dep't of the Interior*, 832 F. Supp. 2d 5, 29-30 (D.D.C. 2011) ("[W]hether a change is 'substantial' so as to warrant [a supplement] is determined not by the modification in the abstract, but rather by the significance of the environmental effects of the changes.").

Here, Defendants reasonably concluded that the herring catch reductions did not "significantly transform the nature of the environmental issues raised in the [EA]." *Nat'l Comm. for the New River*, 373 F.3d at 1330-31 (finding that new information did not "seriously change[] the environmental landscape" where the agency's process for evaluating the environmental impact was "comprehensive"). First, Plaintiffs do not point to any evidence that herring catch reductions will have significant *environmental* impacts on industry-funded monitoring programs. *See* Pls.' Mot., ECF No. 18-1 at 51; Pls.' Reply, ECF No. 22 at 39-42. Plaintiffs refer solely to the "economics of the fishery and the viability of the fleet" and do not attempt to show how the fleet's revenue stream is "interrelated" with "natural or physical environmental effects." 40 C.F.R. § 1508.1(m) (defining "human environment"); *cf. Blue Ridge*, 716 F.3d at 198 (rejecting argument that new environmental reports were required because the argument "relie[d] on Petitioners' elision of 'safety significance' with 'environmental significance'"). Because "NEPA does not require the agency to assess

every impact or effect of its proposed action, but only the impact or effect on the environment," *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983); Defendants did not run afoul of NEPA's requirements in deciding a supplemental EA was not needed, *see Stand Up for Calif.!*, 410 F. Supp. 3d at 55-56 (finding that alleged impacts to the public safety did not fall within the Court's NEPA review because it was not an "environmental concern").

Second, the record indicates that Defendants undertook a careful evaluation of the significance of the herring catch reductions prior to determining whether a supplement was needed. *See Marsh*, 490 U.S. at 378 (instructing that when reviewing an agency's decision not to supplement an environmental impact statement, courts must be satisfied that "the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of the new information"). Defendants explained that "[t]he EA describes the economic impacts of herring measures on fishery-related businesses and human communities as negative," but that "[t]he economic impact of industry-funded monitoring coverage on the herring fishery is difficult to estimate because it varies with sampling costs, fishing effort, SBRM coverage, price of herring, and participation in other fisheries." AR 17737. Defendants estimated that "at-sea monitoring coverage associated with the 50-percent coverage target has the potential to reduce annual [returns-to-owner] for vessels with Category A or B herring permits up to 20 percent and up to an additional 5 percent for midwater trawl access to Groundfish Closed Areas," and noted that "[e]lectronic monitoring

and portside sampling may be a more cost effective way for herring vessels to satisfy industry-funded monitoring requirements." *Id.*

Defendants then compared herring revenue generated by Category A and B herring vessels from 2014 to 2018 to assess the economic impact of a reduction in herring catch. *Id.* Based on this assessment, Defendants determined that "[e]ven though the 2018 [annual catch limit ("ACL")] was reduced by 52 percent (54,188 mt) from the 2014 ACL, the impact on 2018 revenue was not proportional to the reduction in ACL and differed by gear type." *Id.* Defendants explained that the change in revenue between 2014 and 2018 was affected by several factors, "such as the availability of herring relative to the demand and vessel participation in other fisheries." *Id.* at 17738. Defendants also considered how the level of fishing effort, SBRM coverage, and certain mitigation measures would affect the economic impact of industry-funded monitoring. *Id.* at 17738-39. After analyzing these factors, Defendants determined that reduced herring catch and its impacts fell within the initial EA's scope and that a supplement was unnecessary because: "(1) the action is identical to the proposed action analyzed in the EA and (2) no new information or circumstances relevant to environmental concerns or impacts of the action are significantly different from when the EA's finding of no significant impact was signed on December 17, 2018." *Id.* at 17739.

As the D.C. Circuit has explained, "[t]he determination as to whether information is either new or significant 'requires a high level of technical

expertise'; thus, [courts] 'defer to the informed discretion of the [agency].'" *Blue Ridge*, 716 F.3d at 196-97 (quoting *Marsh*, 490 U.S. at 377); *Advocates for Hwy. & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1150 (D.C. Cir. 2005) ("[C]ourts are not authorized to second-guess agency rulemaking decisions . . . ."). In view of Defendants' considered analysis, Plaintiffs simply have not demonstrated how Defendants' conclusion was arbitrary or capricious. Accordingly, the Court does not find that the Defendants' conclusion was so deficient as to suffer from "want of reasoned decisionmaking." *Advocates for Hwy. & Auto Safety*, 429 F.3d at 1150.

H. The Omnibus Amendment Does Not Violate the Regulatory Flexibility Act

Plaintiffs next argue that Defendants failed to meet their obligations under the Regulatory Flexibility Act ("RFA") when promulgating the Omnibus Amendment.

Under the RFA, agencies must "consider the effect that their regulation will have on small entities, analyze effective alternatives that may minimize a regulation's impact on such entities, and make their analyses available for public comment." *Nat'l Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Serv.*, 416 F. Supp. 2d 92, 99 (D.D.C. 2006). The RFA requires agencies issuing regulations likely to have an "impact" on "small entities" to prepare an initial regulatory flexibility analysis ("IRFA") describing the effect of the proposed rule on small businesses and discussing alternatives that might minimize adverse economic consequences upon publishing a notice of

proposed rulemaking. *See* 5 U.S.C. § 603. Then, when promulgating the final rule, the agency must prepare a final regulatory flexibility analysis ("FRFA"), to be made available to the public and published in the Federal Register. *See id.* § 604.

"Although the RFA compels an agency to make substantive determinations, a court cannot find an agency violated the RFA merely because it disagrees with those determinations." *Alfa Int'l Seafood v. Ross*, 264 F. Supp. 3d 23, 67 (D.D.C. 2017). The D.C. Circuit has explained that the RFA is "[p]urely procedural." *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001) (stating that "RFA section 604 requires nothing more than that the agency file a FRFA demonstrating a 'reasonable, good-faith effort to carry out [RFA's] mandate.'" (quoting *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000)). A court does not "evaluate whether the agency got the required analysis right, but instead examines whether the agency has followed the procedural steps laid out in the statute. What is required of the agency is not perfection, but rather a reasonable, good-faith effort to take those steps and therefore satisfy the statute's mandate." *N.C. Fisheries Ass'n*, 518 F. Supp. 2d at 95. "'Thus, in assessing the adequacy of an FRFA, courts look to see whether the agency made a reasonable attempt to address all five required elements in its FRFA, and do not measure the FRFA under a standard of 'mathematical exactitude.'" *Alfa Int'l Seafood*, 264 F. Supp. 3d at 67 (quoting *Associated Fisheries of Me., Inc. v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997)).

Here, Plaintiffs argue that the NEFMC and Defendants failed to comply with the RFA because the IRFA and the FRFA contained "conclusory findings" regarding the economic effects of the Omnibus Amendment that are "facially unreasonable." Pls. Mot., ECF No. 18-1 at 52. Specifically, Plaintiffs contend that Defendants failed to consider: (1) "economic impacts associated with the omnibus alternatives," *id.* (citing AR 17339); (2) "the full set of costs" that the industry-funded monitoring alternatives would "impose on regulated entities," including "the danger of overlapping monitoring requirements, the effect of significant quota cuts . . . , and the actual feasibility of alternatives," *id.* (citing AR 17341-46); and (3) an "explanation for their conclusion that certain businesses 'were more likely to exit the fishery if the cost of monitoring [were] perceived as too expensive,'" *id.* at 52-53 (citing AR 17342).

As an initial matter, the Court notes that Plaintiffs' arguments appear to be a "non-starter" because Plaintiffs' motion only cites to alleged compliance failures within the IRFA and do not point to any alleged deficiencies within the FRFA. *Alfa Int'l Seafood*, 264 F. Supp. 3d at 67. Pursuant to section 611(a) of the RFA, the adequacy of an agency's IRFA is not reviewable. *See* 5 U.S.C. § 611(a) ("[A] small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7."). Thus, the Court lacks jurisdiction to consider Plaintiffs' challenge to Defendants' IRFA. *See Allied*

Local & Reg'l Mfrs. Caucus v. EPA, 215 F.3d 61, 79 (D.C. Cir. 2000).

Even if the Court construed Plaintiffs' three arguments as "attack[ing] the overall adequacy of Defendants' economic impact analysis," Pls.' Reply, ECF No. 22 at 42; the arguments would still fail. First, while Plaintiffs contend that Defendants did not consider the economic impacts of the omnibus measures, the IRFA and the FRFA explain that those measures are "administrative and have no direct economic impacts." AR 17339, 17744. Indeed, the measures explicitly set out the administrative process to develop and maintain future industry-funded monitoring programs in other New England FMPs. Plaintiffs' contention that "Defendants and the NEFMC conceded its omnibus measures will have 'direct negative economic impacts to fishing vessels," Pls.' Reply, ECF No. 22 at 43, is misleading. In making that statement, Defendants were referring to potential future programs and explained that "any direct negative economic impacts to fishing vessels resulting from a future [industry-funded monitoring] program would be evaluated in the amendment to establish that [industry-funded monitoring] program." AR 17179; *cf. Associated Fishers of Me.*, 127 F.3d 104 at 110 n.5 (finding that, because "the Secretary considered the Coast Guard's estimate to be budgetary in nature and not rooted in cost increases which were likely to accompany the implementation of Amendment 7," "[t]he Secretary must be accorded some latitude to make such judgment calls"). Defendants' conclusion is reasonable.

Second, regarding Plaintiffs' argument that Defendants did not consider the "full set of costs" that would be imposed on regulated entities, Pls.' Mot., ECF No. 18-1 at 52; the record demonstrates that Defendants underwent a reasoned analysis of the economic impacts that vessels would face upon the implementation of the Omnibus Amendment and that Defendants had taken steps to minimize economic impacts on affected entities. *See* AR 17341-46. While it is possible that the agency could have included further detail or more study, the record nonetheless demonstrates that Defendants engaged in a "reasonable, good faith effort" to carry out the RFA's mandate. *U.S. Cellular Corp.*, 254 F.3d at 89; *see also Little Bay Lobster Co. v. Evans*, 352 F.3d 462, 471 (1st Cir. 2003) (noting that the RFA does not include a requirement as to the amount of detail with which an agency must address specific comments).

Third, Plaintiffs argue that Defendants failed to explain their conclusion that certain businesses "were more likely to exit the fishery if the cost of monitoring [were] perceived as too expensive." Pls.' Mot., ECF No. 18-1 at 52-53 (citing AR 17342). "[W]here the agency has addressed a range of comments and considered a set of alternatives to the proposal adopted, the burden is upon the critic to show why a brief response on one set of comments or the failure to analyze one element as a separate alternative condemns the effort." *Little Bay Lobster Co.*, 352 F.3d at 471. Plaintiffs have failed to make such a showing here.

Additionally, *Southern Offshore Fishing Association v. Daley*, 995 F. Supp. 1411 (M.D. Fla. 1998), upon which Plaintiffs rely, is distinguishable.

In that case, the United States District Court for the Middle District of Florida found that an FRFA prepared by NMFS did not comply with the requirements of the RFA. Unlike in *Southern Offshore Fishing*, however, Defendants here prepared both an IRFA and a FRFA. *See id.* at 1436 ("NMFS could not possibly have complied with § 604 by summarizing and considering comments on an IRFA that NMFS never prepared."); AR 17744 ("NMFS prepared a final regulatory flexibility analysis (FRFA) in support of this action. The FRFA incorporates the initial RFA, a summary of the significant issues raised by the public comments in response to the initial RFA, NMFS responses to those comments, and a summary of the analyses completed in support of this action."). And unlike in *Southern Offshore Fishing*, Plaintiffs here have not "point[ed] to plentiful record evidence undermining NMFS's certifications." *Id.* Instead, Plaintiffs' motion merely points to three pages in the IRFA. "Such a meager citation to the record simply cannot upend the deference due to the Department under the RFA." *Alfa Int'l Seafood*, 264 F. Supp. 3d at 68.

Accordingly, the Court finds that Defendants fulfilled the requirements of the RFA in promulgating the Omnibus Amendment.

I. The Approval and Finalization of the Omnibus Amendment Was Procedurally Proper

Finally, Plaintiffs argue that the process of approving and finalizing the Omnibus Amendment was procedurally irregular and raises "procedural due process concerns." Pls.' Mot., ECF No. 18-1 at 54.

However, a review of the MSA's provisions governing the Secretary's review of FMPs, amendments, and proposed regulations demonstrates that Defendants followed the proper procedure.

Under the MSA's regulatory framework, once the Council transmits an FMP or amendment to the Secretary, the Secretary must do two things: (1) "immediately commence a review of the plan or amendment to determine whether it is consistent with the national standards, the other provisions of this chapter, and any other applicable law"; and (2) "immediately publish in the Federal Register a notice stating that the plan or amendment is available and that written information, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the notice is published." 16 U.S.C. § 1854(a)(1). Once the comment period has closed, the Secretary then has 30 days to approve, disapprove, or partially approve an FMP or amendment. *Id.* § 1854(a)(3). "If the Secretary does not notify a Council within 30 days of the end of the comment period of the approval, disapproval, or partial approval of a plan or amendment, then such plan or amendment shall take effect as if approved." *Id.*

Proposed regulations implementing an FMP or amendment that the Council deems "necessary or appropriate" must be submitted to the Secretary "simultaneously" with the FMP or amendment. *Id.* § 1853(c). Once the Secretary receives the proposed regulations, "the Secretary shall immediately initiate an evaluation of the proposed regulations to determine

whether they are consistent with the [FMP], plan amendment, [the MSA] and other applicable law." *Id.* § 1854(b)(1). The Secretary must make a determination within 15 days of initiating such evaluation, and, if the Secretary approves the proposed regulations, she must publish the regulations for comment in the Federal Register, "with such technical changes as may be necessary for clarity and an explanation of those changes." *Id.* § 1854(b)(1)(A). There must be a public comment period of between 15 to 60 days, and, after the public comment period has expired, the Secretary must then promulgate the final regulations within 30 days, consulting with the Council on any revisions and explaining the changes in the Federal Register. *Id.* § 1854(b)(3).

Here, it is "undisputed" that Defendants "followed the statutorily prescribed timelines for approval of an FMP amendment and implementing regulations." *See* Pls.' Reply, ECF No. 22 at 44. Instead, Plaintiffs argue that "[t]he irregularities and due process concerns arise from Defendants presuming the legality of the Omnibus Amendment and proposing implementing regulations *before* any final approval decision for the underlying FMP amendment." *Id.* at 44-45. However, Plaintiffs' argument is belied by the text of the statute. The MSA clearly contemplates such a situation given its mandate that proposed regulations be submitted "simultaneously with the plan or amendment under section 1854 of this title," 16 U.S.C. § 1853(c); and the agency also confirms that this is its usual practice, *see* AR 17741 ("It is our practice to publish an NOA and proposed rule concurrently."). Furthermore, Defendants appropriately set a 60-day comment

period for the FMP amendment and a 45-day comment period for the proposed regulations, with the public comments for both overlapping for 13 days. *See id.* Both the notice of the amendment and the proposed regulations included a statement explaining that any public comments received on the amendment or the proposed rule during the amendment's comment period would be considered in the decision on the amendment. *Id.* The public thus had fair notice and a meaningful opportunity to participate in the process. *See, e.g.*, *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 528 (D.C. Cir. 1982).

Finally, Plaintiffs' description of an inappropriate "secret approval" of the Omnibus Amendment "in a non-public letter [to the Council] that [NOAA] never officially disseminated," Pls.' Mot., ECF No. 18-1 at 54; lacks any basis. Rather, NOAA acted as the MSA requires: upon approval of an FMP or amendment, there must be "written notice to the Council" of the Secretary's decision. 16 U.S.C. § 1854(a)(3). No further publication is statutorily required.

IV. Conclusion

For the aforementioned reasons, the Court **DENIES** Plaintiffs' Motion for Summary Judgment, **GRANTS** Defendants' Cross-Motion for Summary Judgment, and **GRANTS** Defendants' Motion to Exclude. An appropriate Order accompanies this Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
June 15, 2021

Appendix C

RELEVANT STATUTORY PROVISIONS

16 U.S.C. § 1821(h). Foreign fishing

* * *

(h) Full observer coverage program

(1)(A) Except as provided in paragraph (2), the Secretary shall establish a program under which a United States observer will be stationed aboard each foreign fishing vessel while that vessel is engaged in fishing within the exclusive economic zone.

(B) The Secretary shall by regulation prescribe minimum health and safety standards that shall be maintained aboard each foreign fishing vessel with regard to the facilities provided for the quartering of, and the carrying out of observer functions by, United States observers.

(2) The requirement in paragraph (1) that a United States observer be placed aboard each foreign fishing vessel may be waived by the Secretary if he finds that--

(A) in a situation where a fleet of harvesting vessels transfers its catch taken within the exclusive economic zone to another vessel, aboard which is a United States observer, the stationing of United States observers on only a portion of the harvesting vessel fleet will provide a representative sampling of the by-catch of the fleet that is sufficient for purposes of determining whether the

requirements of the applicable management plans for the by-catch species are being complied with;

(B) in a situation where the foreign fishing vessel is operating under a Pacific Insular Area fishing agreement, the Governor of the applicable Pacific Insular Area, in consultation with the Western Pacific Council, has established an observer coverage program or other monitoring program that the Secretary, in consultation with the Western Pacific Management Council, determines is adequate to monitor harvest, bycatch, and compliance with the laws of the United States by vessels fishing under the agreement;

(C) the time during which a foreign fishing vessel will engage in fishing within the exclusive economic zone will be of such short duration that the placing of a United States observer aboard the vessel would be impractical; or

(D) for reasons beyond the control of the Secretary, an observer is not available.

(3) Observers, while stationed aboard foreign fishing vessels, shall carry out such scientific, compliance monitoring, and other functions as the Secretary deems necessary or appropriate to carry out the purposes of this chapter; and shall cooperate in carrying out such other scientific programs relating to the conservation and management of living resources as the Secretary deems appropriate.

(4) In addition to any fee imposed under section 1824(b)(10) of this title and section 1980(e) of Title 22 with respect to foreign fishing for any year after 1980, the Secretary shall impose, with respect to each foreign fishing vessel for which a permit is issued under such section 1824 of this title, a surcharge in an amount sufficient to cover all the costs of providing a United States observer aboard that vessel. The failure to pay any surcharge imposed under this paragraph shall be treated by the Secretary as a failure to pay the permit fee for such vessel under section 1824(b)(10) of this title. All surcharges collected by the Secretary under this paragraph shall be deposited in the Foreign Fishing Observer Fund established by paragraph (5).

(5) There is established in the Treasury of the United States the Foreign Fishing Observer Fund. The Fund shall be available to the Secretary as a revolving fund for the purpose of carrying out this subsection. The Fund shall consist of the surcharges deposited into it as required under paragraph (4). All payments made by the Secretary to carry out this subsection shall be paid from the Fund, only to the extent and in the amounts provided for in advance in appropriation Acts. Sums in the Fund which are not currently needed for the purposes of this subsection shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

(6) If at any time the requirement set forth in paragraph (1) cannot be met because of

insufficient appropriations, the Secretary shall, in implementing a supplementary observer program:

(A) certify as observers, for the purposes of this subsection, individuals who are citizens or nationals of the United States and who have the requisite education or experience to carry out the functions referred to in paragraph (3);

(B) establish standards of conduct for certified observers equivalent to those applicable to Federal personnel;

(C) establish a reasonable schedule of fees that certified observers or their agents shall be paid by the owners and operators of foreign fishing vessels for observer services; and

(D) monitor the performance of observers to ensure that it meets the purposes of this chapter.

* * *

16 U.S.C. § 1853(a)-(b). Contents of fishery management plans

(a) Required provisions

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall--

(1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are—

(A) 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;

(B) described in this subsection or subsection (b), or both; and

(C) consistent with the national standards, the other provisions of this chapter, 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;

(2) contain a description of the fishery, including, but not limited to, the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential revenues from the fishery, any recreational interests in the fishery, and the nature and extent of foreign fishing and Indian treaty fishing rights, if any;

(3) assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specification;

(4) assess and specify--

(A) the capacity and the extent to which fishing vessels of the United States, on an

annual basis, will harvest the optimum yield specified under paragraph (3),

(B) the portion of such optimum yield which, on an annual basis, will not be harvested by fishing vessels of the United States and can be made available for foreign fishing, and

(C) the capacity and extent to which United States fish processors, on an annual basis, will process that portion of such optimum yield that will be harvested by fishing vessels of the United States;

(5) specify the pertinent data which shall be submitted to the Secretary with respect to commercial, recreational,[1] charter fishing, and fish processing in the fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, number of hauls, economic information necessary to meet the requirements of this chapter, and the estimated processing capacity of, and the actual processing capacity utilized by, United States fish processors,[2]

(6) consider and provide for temporary adjustments, after consultation with the Coast Guard and persons utilizing the fishery, regarding access to the fishery for vessels otherwise prevented from harvesting because of weather or other ocean conditions affecting the

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[1] So in original. Probably should be followed by "and".

[2] So in original. The comma probably should be a semicolon.

safe conduct of the fishery; except that the adjustment shall not adversely affect conservation efforts in other fisheries or discriminate among participants in the affected fishery;

(7) describe and identify essential fish habitat for the fishery based on the guidelines established by the Secretary under section 1855(b)(1)(A) of this title, minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat;

(8) in the case of a fishery management plan that, after January 1, 1991, is submitted to the Secretary for review under section 1854(a) of this title (including any plan for which an amendment is submitted to the Secretary for such review) or is prepared by the Secretary, assess and specify the nature and extent of scientific data which is needed for effective implementation of the plan;

(9) include a fishery impact statement for the plan or amendment (in the case of a plan or amendment thereto submitted to or prepared by the Secretary after October 1, 1990) 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;

(10) specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished (with an analysis of how the criteria were determined and the relationship of the criteria to the reproductive potential of stocks of fish in that fishery) and, in the case of a fishery which the Council or the Secretary has determined is approaching an overfished condition or is overfished, contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery;

(11) 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 and in the following priority--

(A) minimize bycatch; and

(B) minimize the mortality of bycatch which cannot be avoided;

(12) assess the type and amount of fish caught and released alive during recreational fishing under catch and release fishery management programs

and the mortality of such fish, and include conservation and management measures that, to the extent practicable, minimize mortality and ensure the extended survival of such fish;

(13) include a description of the commercial, recreational, and charter fishing sectors which participate in the fishery, including its economic impact, and, to the extent practicable, quantify trends in landings of the managed fishery resource by the commercial, recreational, and charter fishing sectors;

(14) to the extent that rebuilding plans or other conservation and management measures which reduce the overall harvest in a fishery are necessary, 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 and;[3]

(15) establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.

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[3] So in original. Probably should be "fishery; and".

(b) Discretionary provisions

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may--

(1) require a permit to be obtained from, and fees to be paid to, the Secretary, with respect to--

(A) any fishing vessel of the United States fishing, or wishing to fish, in the exclusive economic zone or for anadromous species or Continental Shelf fishery resources beyond such zone;

(B) the operator of any such vessel; or

(C) any United States fish processor who first receives fish that are subject to the plan;

(2)(A) designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear;

(B) designate such zones in areas where deep sea corals are identified under section 1884 of this title, to protect deep sea corals from physical damage from fishing gear or to prevent loss or damage to such fishing gear from interactions with deep sea corals, after considering long-term sustainable uses of fishery resources in such areas; and

(C) with respect to any closure of an area under this chapter that prohibits all fishing, ensure that such closure--

(i) is based on the best scientific information available;

(ii) includes criteria to assess the conservation benefit of the closed area;

(iii) establishes a timetable for review of the closed area's performance that is consistent with the purposes of the closed area; and

(iv) is based on an assessment of the benefits and impacts of the closure, including its size, in relation to other management measures (either alone or in combination with such measures), including the benefits and impacts of limiting access to: users of the area, overall fishing activity, fishery science, and fishery and marine conservation;

(3) establish specified limitations which are necessary and appropriate for the conservation and management of the fishery on the--

(A) catch of fish (based on area, species, size, number, weight, sex, bycatch, total biomass, or other factors);

(B) sale of fish caught during commercial, recreational, or charter fishing, consistent with any applicable Federal and State safety and quality requirements; and

(C) transshipment or transportation of fish or fish products under permits issued pursuant to section 1824 of this title;

(4) prohibit, limit, condition, or require the use of specified types and quantities of fishing gear,

fishing vessels, or equipment for such vessels, including devices which may be required to facilitate enforcement of the provisions of this chapter;

(5) incorporate (consistent with the national standards, the other provisions of this chapter, and any other applicable law) the relevant fishery conservation and management measures of the coastal States nearest to the fishery and take into account the different circumstances affecting fisheries from different States and ports, including distances to fishing grounds and proximity to time and area closures;

(6) establish a limited access system for the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account--

(A) present participation in the fishery;

(B) historical fishing practices in, and dependence on, the fishery;

(C) the economics of the fishery;

(D) the capability of fishing vessels used in the fishery to engage in other fisheries;

(E) the cultural and social framework relevant to the fishery and any affected fishing communities;

(F) the fair and equitable distribution of access privileges in the fishery; and

(G) any other relevant considerations;

(7) require fish processors who first receive fish that are subject to the plan to submit data which

are necessary for the conservation and management of the fishery;

(8) require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery; except that such a vessel shall not be required to carry an observer on board if the facilities of the vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized;

(9) assess and specify the effect which the conservation and management measures of the plan will have on the stocks of naturally spawning anadromous fish in the region;

(10)include, consistent with the other provisions of this chapter, conservation and management measures that provide harvest incentives for participants within each gear group to employ fishing practices that result in lower levels of bycatch or in lower levels of the mortality of bycatch;

(11)reserve a portion of the allowable biological catch of the fishery for use in scientific research;

(12)include management measures in the plan to conserve target and non-target species and habitats, considering the variety of ecological factors affecting fishery populations; and

(14)[4] prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.

* * *

16 U.S.C. § 1853a(c)(1), (e). Limited access privilege programs

* * *

(c) Requirements for limited access privileges

(1) In general

Any limited access privilege program to harvest fish submitted by a Council or approved by the Secretary under this section shall--

(A) if established in a fishery that is overfished or subject to a rebuilding plan, assist in its rebuilding;

(B) if established in a fishery that is determined by the Secretary or the Council to have over-capacity, contribute to reducing capacity;

(C) promote--

(i) fishing safety;

(ii) fishery conservation and management; and

(iii) social and economic benefits;

(D) prohibit any person other than a United States citizen, a corporation, partnership, or

[4] So in original. No par. (13) was enacted.

other entity established under the laws of the United States or any State, or a permanent resident alien, that meets the eligibility and participation requirements established in the program from acquiring a privilege to harvest fish, including any person that acquires a limited access privilege solely for the purpose of perfecting or realizing on a security interest in such privilege;

(E) require that all fish harvested under a limited access privilege program be processed on vessels of the United States or on United States soil (including any territory of the United States);

(F) specify the goals of the program;

(G) include provisions for the regular monitoring and review by the Council and the Secretary of the operations of the program, including determining progress in meeting the goals of the program and this chapter, and any necessary modification of the program to meet those goals, with a formal and detailed review 5 years after the implementation of the program and thereafter to coincide with scheduled Council review of the relevant fishery management plan (but no less frequently than once every 7 years);

(H) include an effective system for enforcement, monitoring, and management of the program, including the use of observers or electronic monitoring systems;

(I) include an appeals process for administrative review of the Secretary's

decisions regarding initial allocation of limited access privileges;

(J) provide for the establishment by the Secretary, in consultation with appropriate Federal agencies, for an information collection and review process to provide any additional information needed to determine whether any illegal acts of anti-competition, anti-trust, price collusion, or price fixing have occurred among regional fishery associations or persons receiving limited access privileges under the program; and

(K) provide for the revocation by the Secretary of limited access privileges held by any person found to have violated the antitrust laws of the United States.

*** * ***

(e) Cost recovery

In establishing a limited access privilege program, a Council shall--

(1) develop a methodology and the means to identify and assess the management, data collection and analysis, and enforcement programs that are directly related to and in support of the program; and

(2) provide, under section 1854(d)(2) of this title, for a program of fees paid by limited access privilege holders that will cover the costs of management, data collection and analysis, and enforcement activities.

* * *

16 U.S.C. § 1862(a)-(b), (d)-(e). North Pacific fisheries conservation

(a) In general

The North Pacific Council may prepare, in consultation with the Secretary, a fisheries research plan for any fishery under the Council's jurisdiction except a salmon fishery which--

(1) requires that observers be stationed on fishing vessels engaged in the catching, taking, or harvesting of fish and on United States fish processors fishing for or processing species under the jurisdiction of the Council, including the Northern Pacific halibut fishery, for the purpose of collecting data necessary for the conservation, management, and scientific understanding of any fisheries under the Council's jurisdiction; and

(2) establishes a system, or system,1 of fees, which may vary by fishery, management area, or observer coverage level, to pay for the cost of implementing the plan.

(b) Standards

(1) Any plan or plan amendment prepared under this section shall be reasonably calculated to--

(A) gather reliable data, by stationing observers on all or a statistically reliable sample of the fishing vessels and United States fish processors included in the plan, necessary for the conservation, management, and scientific understanding of the fisheries covered by the plan;

(B) be fair and equitable to all vessels and processors;

(C) be consistent with applicable provisions of law; and

(D) take into consideration the operating requirements of the fisheries and the safety of observers and fishermen.

(2) Any system of fees established under this section shall--

(A) provide that the total amount of fees collected under this section not exceed the combined cost of (i) stationing observers, or electronic monitoring systems, on board fishing vessels and United States fish processors, (ii) the actual cost of inputting collected data, and (iii) assessments necessary for a risk-sharing pool implemented under subsection (e) of this section, less any amount received for such purpose from another source or from an existing surplus in the North Pacific Fishery Observer Fund established in subsection (d) of this section;

(B) be fair and equitable to all participants in the fisheries under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(C) provide that fees collected not be used to pay any costs of administrative overhead or other costs not directly incurred in carrying out the plan;

(D) not be used to offset amounts authorized under other provisions of law;

(E) be expressed as a fixed amount reflecting actual observer costs as described in subparagraph (A) or a percentage, not to exceed 2 percent, of the unprocessed ex-vessel value of fish and shellfish harvested under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(F) be assessed against some or all fishing vessels and United States fish processors, including those not required to carry an observer or an electronic monitoring system under the plan, participating in fisheries under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(G) provide that fees collected will be deposited in the North Pacific Fishery Observer Fund established under subsection (d) of this section;

(H) provide that fees collected will only be used for implementing the plan established under this section;

(I) provide that fees collected will be credited against any fee for stationing observers or electronic monitoring systems on board fishing vessels and United States fish processors and the actual cost of inputting collected data to which a fishing vessel or fish processor is subject under section 1854(d) of this title; and

(J) meet the requirements of section 9701(b) of Title 31.

* * *

(d) Fishery Observer Fund

There is established in the Treasury a North Pacific Fishery Observer Fund. The Fund shall be available, without appropriation or fiscal year limitation, only to the Secretary for the purpose of carrying out the provisions of this section, subject to the restrictions in subsection (b)(2) of this section. The Fund shall consist of all monies deposited into it in accordance with this section. Sums in the Fund that are not currently needed for the purposes of this section shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

(e) Special provisions regarding observers

(1) The Secretary shall review--

(A) the feasibility of establishing a risk sharing pool through a reasonable fee, subject to the limitations of subsection (b)(2)(E) of this section, to provide coverage for vessels and owners against liability from civil suits by observers, and

(B) the availability of comprehensive commercial insurance for vessel and owner liability against civil suits by observers.

(2) If the Secretary determines that a risk sharing pool is feasible, the Secretary shall establish such a pool, subject to the provisions of subsection (b)(2) of this section, unless the Secretary determines that--

(A) comprehensive commercial insurance is available for all fishing vessels and United States fish processors required to have

observers under the provisions of this section, and

(B) such comprehensive commercial insurance will provide a greater measure of coverage at a lower cost to each participant.

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