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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION – ROYBAL FEDERAL BLDG.

OCEANA, INC.,

Plaintiff,

v.

WILBUR ROSS, in his official capacity as Secretary of the United States Department of Commerce; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; and NATIONAL MARINE FISHERIES SERVICE,

Defendants.

Case No. 2:17-cv-05146-RGK-JEMx

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Date: September 18, 2018
Time: 9:00 a.m.
Ctrm: 850, 8th Floor
Judge: R. Gary Klausner

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I. INTRODUCTION

Plaintiff Oceana, Inc. ("Oceana") challenges the withdrawal of a regulation, published in the Federal Register as a proposed rule and subjected to public comment, to regulate the California/Oregon large-mesh drift gillnet fishery ("the DGN Rule") by establishing strict limits on the bycatch of marine mammals and sea turtles. The withdrawal of the regulation has no basis in the record and violates both the Magnuson-Stevens Fishery Conservation and Management Act (the "Magnuson-Stevens Act") and the Administrative Procedure Act ("APA"). The agency should be required to vacate the withdrawal of the rule, and promulgate a final bycatch rule to comply with its statutory mandate.

II. STATUTORY AND REGULATORY BACKGROUND

The Magnuson-Stevens Act, first passed in 1976, establishes the regulatory system for conserving and managing fish populations targeted by U.S. fishing vessels. The Act created eight regional fishery management councils that have primary management responsibility for the fisheries in their region, including the Pacific Fishery Management Council ("Pacific Council"). 16 U.S.C. § 1852(a)(1)(F). This fishery includes the waters off the coast of California, where a large number of animals come to feed. Pl. Compl. ¶ 18 (ECF 1); Def. Ans. ¶ 18 (ECF 18). The Magnuson-Stevens Act requires the regional councils to develop fishery management measures for each fishery requiring conservation and management, and to propose regulations to implement those plans. 16 U.S.C. §§ 1852(a)(1); 1852(h)(1)(B); 1852(h)(8); 1853(c).

In 1996, Congress enacted the Sustainable Fisheries Act out of a concern that "[c]ertain stocks of fish have declined to the point where their survival is threatened, and other stocks of fish have been so substantially reduced in number that they could become similarly threatened . . . ." Pub. L. No. 104-297, 110 Stat. 3559 (1996) (codified at 16 U.S.C. § 1801(a)(2)). That legislation responded to Congress's growing recognition of bycatch as "one of the most pressing problems facing the continuation of

sustainable fisheries, and one of the most crucial challenges facing fisheries managers today." 142 Cong. Rec. H11418-02 (daily ed. Sept. 27, 1996) (statement of Rep. Young). Defined as "fish which are harvested in a fishery but which are not sold or kept for personal use," 16 U.S.C. § 1802(2), bycatch can "impede efforts to protect marine ecosystems and achieve sustainable fisheries and the full benefits they can provide to the Nation" because a significant portion of discarded fish do not survive, 50 C.F.R. § 600.350(b). Through the Sustainable Fisheries Act, Congress hoped to better understand and "bring a stop to this inexcusable amount of waste." 142 Cong. Rec. S10794-02 (daily ed. Sept. 18, 1996) (statement of Sen. Stevens, principal sponsor).

The new legislation pursued this goal by amending the Magnuson-Stevens Act. Under the amended Act, the agency is charged with approving fishery management plans designed to protect, conserve, and manage fisheries. 16 U.S.C. § 1852. The Act (as amended) requires each plan to:

> 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.

Id. § 1853(a)(11). The Act also specifies that each plan be consistent with ten national standards for fisher conservation and management. *Id.* § 1851(a). Specifically, these national standards require that each plan to, "where practicable, minimize costs and avoid unnecessary duplication." *Id.* § 1851(a)(7). "Management measures should not impose unnecessary burdens on the economy, on individuals, on private or public organizations, or on Federal, state, or local governments." 50 C.F.R. § 600.340.

The Secretary of Commerce, acting through the National Marine Fisheries Service ("NMFS") within the National Oceanic and Atmospheric Administration ("NOAA"), has been delegated responsibility under the Magnuson-Stevens Act to review proposed regulations transmitted by councils to determine whether they are

consistent with the fishery management plan, the Magnuson-Stevens Act, and other applicable law. 16 U.S.C. § 1854(b)(1). At the conclusion of that review process, the Magnuson-Stevens Act provides for only two courses of action: the agency can make an affirmative determination, in which case the regulation *shall* be published in the Federal Register for public comment, *id*. § 1854(b)(1)(A), or the agency can make a negative determination, in which case it *shall* notify the Council and provide recommendations to make the proposal consistent with the management plan or other applicable law. *Id*. at (1)(B). If the Secretary makes an affirmative determination, the Secretary is required to open a public comment period and subsequently *shall* "promulgate final regulations" following a public comment period. "Revisions" to the proposed regulations following public comment are permitted, but only after consultation with the Council. *Id*. at (b)(3).

III. THE CALIFORNIA DRIFT GILLNET FISHERY

In the Pacific Ocean off California's coast, mile-long drift gillnets are used to capture swordfish and thresher sharks. Nets are deployed at dusk and left to hang 200 feet below the ocean's surface for up to 12 hours. When the nets are pulled in the morning, in addition to their targeted catch, these nets also hold exceptionally high numbers of dead and dying animals that are ultimately thrown back to the sea (called bycatch). A 2017 National Marine Fisheries Service study estimates that despite existing conservation measures, between 2001 and 2015 the California drift gillnet fishery captured 1,460 protected marine species including large whales, sea turtles, dolphins, seabirds, seals and sea lions. Shester Decl. ¶ 10. On average, 61 percent of the total catch (individuals, not weight) is tossed overboard. The nets inflict such devastation to marine life that they have earned the name "Walls of Death." *Id*. ¶ 13.

IV. PROCEDURAL HISTORY

The Pacific Council began its work to further address bycatch in the California Drift Gillnet fishery in March 2012, focused initially on sea turtles. 81 Fed. Reg.

70,660 (Oct. 13, 2016). In June 2014, the Pacific Council, in response to calls for the closure of the fishery and concern from the California legislature, initiated the process to further reduce bycatch in the fishery. *Id*. In developing the proposed rule, the Pacific Council received inputs from members of Congress, AR 6405: 6405, [1] from affected vessel owners, AR 6257: 6274-77, and from components of NOAA, including NMFS regional offices, AR 6319: 6319. The Pacific Council, including the California Department of Fish and Wildlife worked over the course of a year to develop its preferred alternatives for a bycatch rule. 81 Fed. Reg. 70,660, 70,661.

On September 23, 2016, the Pacific Council transmitted to NMFS proposed regulations to establish hard caps (e.g., strict limits) on the incidental catch of certain protected species, including sea turtles, in the DGN fishery. AR 2:2. After review, NMFS made an affirmative finding and, as required by the regulations, published the proposed rule in the Federal Register on October 13, 2016, along with a draft Environmental Assessment, an Initial Regulatory Flexibility Analysis, and a draft Regulatory Impact Review. *Id*.; 81 Fed. Reg. 70,660. NMFS determined in its Final Environmental Assessment that the proposed regulations would result in beneficial effects to the environment, which outweighed potential short-term economic effects. *See* AR 123:192 ("A choice between alternatives will involve tradeoffs between potentially lower conservation impacts and a risk of lost economic benefits to impacted producers, consumers and fishing communities.").

Following public comments on the proposed rule, the agency maintains it "conducted further analysis" in response to some of the comments received. AR 2:2. On June 9, 2017, without explanation or consultation with the Council as provided in

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[1] Citations to the administrative record are presented as "AR [Record No.]:[Bates Page No.].

the Magnuson-Stevens Act, NMFS notified the Pacific Council via letter that NMFS would withdraw the proposed rule. AR 2:3. The letter stated that NMFS' subsequent analysis concluded that there were "significant adverse economic effects to the DGN fleet that were not identified in the draft analyses to support the proposed regulations," and that this purported revelation resulted in the decision to withdraw even though the proposed regulations had already gone through significant process towards final rulemaking. AR 2:2. The withdrawal notice was published in the Federal Register on June 12, 2017. 82 Fed. Reg. 26,902. On July 12, 2017, Oceana filed the operative Complaint in this action challenging the withdrawal of the proposed rule as violating both the Magnuson-Stevens Act as well as the APA.

V. LEGAL STANDARD

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court must view the evidence, including all reasonable inferences, in favor of the non-moving party. *Cortez v. Skol*, 776 F.3d 1046, 1050 (9th Cir. 2015). "An issue of material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party." *Id*. (internal quotation and citation omitted).

VI. OCEANA HAS STANDING TO CHALLENGE THE WITHDRAWAL OF THE PROPOSED DGN RULE

At the outset, Oceana notes that it has standing to challenge the withdrawal of the proposed DGN Rule. In *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333 (1977), the Supreme Court held that an organization has standing if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 343. As demonstrated in the attached Declaration of Dr. Geoffrey Shester, Oceana meets all three prongs of this standard.

First, individual Oceana members have suffered a "concrete and particularized injury" that is "fairly traceable to the challenged [agency] action"; and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). Indeed, the declaration of Dr. Shester, an Oceana member, that he has "viewed animals in the affected region previously, enjoy[ed] doing so, and ha[s] plans to return" satisfies the requirement for a concrete injury in fact with a geographic nexus to the challenged action. *See WildEarth Guardians v. U.S. Dep't of Agriculture*, 795 F.3d 1148, 1155 (9th Cir. 2015). Moreover, under the relaxed causation and redressability requirements of an action seeking the enforcement of a procedural requirement, Oceana has shown that the relief it seeks would protect the "concrete" interests of its members. ("Once plaintiffs seeking to enforce a procedural requirement establish a concrete injury, 'the causation and redressability requirements are relaxed.' 'Plaintiffs alleging a procedural injury must show only that they have a procedural right that, if exercised, *could* protect their concrete interests.'" *Id*. at 1154 (quoting *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011); *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir. 2008)).

Second, through this litigation, Oceana seeks to advance its conservation mission to protect the world's oceans and maintain sustainable fisheries, and the litigation is therefore germane to its purpose. Shester Decl. at ¶¶ 6-8. *Third*, this lawsuit also does not require Oceana's individual member's participation, as declaratory and injunctive relief, not money damages, is sought. *See Freedom From Religion Found. v. Weber*, 628 F. App'x 952, 953 (9th Cir. 2015) (citing *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 799 (9th Cir. 2001)).

VII. ARGUMENT

Once NMFS made an affirmative determination with respect to the Pacific Council's proposed DGN Rule, its options were limited – issue the regulation or confer

with the Pacific Council. Any other action, including withdrawal of the proposed rule, is not in accordance with law. The Court should order the agency to promulgate a final rule in accordance with the requirements of the Magnuson-Stevens Act. Alternatively, even were the agency entitled to some deference, its failure to provide any rationale supporting its apparent determination leaves nothing for the Court to give deference. Moreover, the agency could not provide adequate rationale as its determination was arbitrary and capricious because it lacked a sufficient basis upon which to conclude that the proposed regulation's economic impact warranted its withdrawal.

A reviewing court examines NMFS's interpretation of the Magnuson-Stevens Act under the two-step framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984), to determine whether the agency's interpretation of a statute it administers should be subject to deference from the court. *See Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1119 (9th Cir. 2006). At the first step of *Chevron*, courts determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear," then courts "must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842–43. No deference is owed to an agency when Congressional intent is clear. *Cmty. Hosp. of Monterey Peninsula v. Thompson*, 323 F.3d 782, 789 (9th Cir. 2003). Under step two, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

The APA also governs this Court's review of NMFS's withdrawal of the proposed DGN regulation. 16 U.S.C. §1855(f)(1)(B).[2] Under the APA, courts must set aside

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[2] As a threshold matter, judicial review under the APA (incorporated into the Magnuson-Stevens Act at 16 U.S.C. § 1855(f)) requires a final agency action. 5 U.S.C. § 704. For an agency action to be deemed final, the action must (1) "mark the consummation of the agency's decisionmaking process" and (2) "be one by which rights

agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). An agency action is arbitrary and capricious and must be set aside where the agency has, for instance, "offered an explanation for its decision that runs counter to the evidence before the agency . . ." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Service*, 265 F.3d 1028, 1034 (9th Cir. 2001) (internal citation and quotation omitted). An agency must "examine the relevant data and articulate a satisfactory explanation for its action," to survive judicial scrutiny. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The agency's decision must reflect "reasoned consideration to all the material facts and issues." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

A. STEP ONE: THE PLAIN LANGUAGE OF THE MAGNUSON-STEVENS ACT DOES NOT PERMIT WITHDRAWAL

Statutory interpretation starts "with the language of the statute." *Williams v. Taylor*, 529 U.S. 420, 431 (2000). The Magnuson-Stevens Act is unambiguous on the process to be followed by the agency when a proposed rule is transmitted by the Council, and provides only two options, neither of which permits NMFS to withdraw a

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or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotations omitted). Withdrawal of the DGN Rule meets both prongs of this standard. In the Ninth Circuit, "the core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (internal quotations and citations omitted). This is a flexible, pragmatic standard, and "courts consider whether the practical effects of an agency's decision make it a final agency action, regardless of how it is labeled." *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094–95 (9th Cir. 2014). Withdrawal of a proposed regulation without any indication of follow-up action by the agency meets the finality standard. This decision is not the kind of tentative step in the agency's process that should be shielded from eager litigants who jump the gun. *See Havasupai Tribe v. Provencio*, 876 F.3d 1242, 1249 (9th Cir. 2017). Further, the parties are directly impacted by the withdrawal: Oceana's members have been and continue to be harmed by the withdrawal of the DGN Rule. Pl. Compl. (ECF 1) ¶¶ 41-46.

transmitted regulation. 16 U.S.C. § 1854(b)(1). Upon receipt, the agency is obligated to evaluate and make a determination regarding the consistency of the proposed regulations with relevant laws and the relevant regional fishery management plan. That determination can be "affirmative" or it can be "negative." *Id*. at (b)(1)(A)-(B). If the determination is affirmative, as it was here, the Secretary "***shall*** publish such regulations in the Federal Register" for public comment. *Id*. at (b)(1)(A). Thirty days from the end of that comment period the Secretary "shall promulgate final regulations" and is only permitted to revise the proposed regulations after consultation with the Council. *Id*. at (b)(3) (emphasis added).[3] By publishing the DGN Rule for public comment, 81 Fed. Reg. 70,660, NMFS made an affirmative determination that the DGN Rule was consistent with the relevant laws. It therefore was subsequently required under the statute to promulgate final regulations.

Courts have recognized that the word "shall" in a statute generally denotes a mandatory duty. *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (stating that by using "shall," "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory"); *Brower v. Evans*, 257 F.3d 1058, 1067 n.10 (9th Cir. 2001) ("'Shall' means shall.") (quoting *Ctr. for Biological Diversity v. Norton*, 254 F.3d 833, 837–38 (9th Cir. 2001)). The provision in the Magnuson-Stevens Act which allows for review by the Secretary of transmitted regulatory proposals from the regional Councils uses "shall" in reference to the actions to be taken as well as to indicate their step-wise progression. *See* 16 U.S.C. §§ 1854(b)(1)(A), (b)(3). By designating mandatory actions on the part of the Secretary, Congress limited the range of actions the agency could undertake, highlighting the input of the regional fishery council in managing waters

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[3] Even if the determination is negative, the Magnuson-Stevens Act instructs the Secretary to notify the council in writing of that determination at the end of the initial fifteen-day review period, and provide recommendations on revisions that would lead to an affirmative determination. 16 U.S.C. § 1854(b)(1)(B).

within its purview, while providing the federal agency as an overall consistency check with the high-level national standards for fishery management articulated in other parts of the statute. The statute both limits the actions and also plainly indicates an order of operations for Secretarial review of proposed regulations.

Notably, the word "withdraw" appears nowhere in the statutory provision governing the agency's treatment of a regulation proposed by a council. *See* 16 U.S.C. § 1854(b). Courts will not read words into statutes that were not expressly included by Congress, including when interpreting the Magnuson-Stevens Act. *See Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1095 (9th Cir. 2012) (rejecting a reading of the Magnuson-Stevens Act which "requires inserting the word 'only' or 'solely' into subsection [1853a](c)(5)"); *see also Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1020 (9th Cir. 1993) (stating that courts "lack . . . power" to "read into the statute words not explicitly inserted by Congress"). A plain reading of the statute therefore does not permit the agency to withdraw the regulation.

Here, in its correspondence to the Council announcing the agency's intent to withdraw the rule, NMFS appears to indicate that the agency is making "a negative determination" under 16 U.S.C. § 1854(b)(1)(B) in the context of the decision to withdraw. AR 2:3. This action, which followed the agency's prior affirmative determination by its publication of the proposed regulation is not permitted by the unambiguous text of the Magnuson-Stevens Act. Rather, following the end of the comment period, the Magnuson-Stevens Act requires that the agency "shall promulgate final regulations" and was permitted only to revise the proposed regulations after consultation with the Council. 16 U.S.C. § 1854(b)(3). To be clear, Congress did not tie NMFS to the mast, forcing it to accept proposed regulations from the regional councils without question. The review provision provides several off-ramps should concerns arise. At the outset, NMFS could make an initial negative determination, notify the Council, and not publish the proposed rule. *See* 16 U.S.C. § 1854(b)(1)(B). However,

despite concerns expressed by components of the NOAA Fisheries West Coast Region regarding hard caps (*see, e.g.*, AR 6319:6319-6332), NMFS still made an affirmative determination by publishing the DGN Rule for public comment. 81 Fed. Reg. 70,660. After public comments have been received, the agency may consult with the Council to make revisions addressing those comments before publishing the final regulations. 16 U.S.C. § 1854(b)(3). NMFS took neither off-ramp, instead choosing to ignore the original recommendation of the Council, flaunting statutorily-mandated authorities. The Court should not take the extraordinary step of granting powers to an agency not designated to it by Congress.[4]

Congress provided several mechanisms for the agency to exercise its discretion and amend the proposed regulation together with the Council if it had concerns, even if those concerns were raised during the public comment process. Those mechanisms were not exercised here. Instead of consulting with the Council to address the concerns allegedly raised during the public comment process, NMFS instead unilaterally withdrew the proposed rule. Because the Magnuson-Stevens Act is unambiguous, so doing was contrary to law and the agency must be directed to promulgate the proposed DGN Rule.

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[4] Nor is *Turtle Restoration Network v. U.S. Dep't of Commerce*, 672 F.3d 1160 (9th Cir. 2012), inapposite. There, the Ninth Circuit considered whether NMFS could execute a consent decree temporarily both vacating a portion of a regulation and reinstating a prior rule, pending further agency action. In upholding the consent decree, the Ninth Circuit concluded that the Magnuson-Stevens Act "states that NMFS or the Secretary of Commerce cannot alter Fishery regulations proposed by the Regional Councils," *id*. at 1166 (citing 16 U.S.C. §§ 1852–54), and that the temporary consent decree at issue did not permanently "alter" a Council-proposed regulation. *Id*. at 1166-67. Here, there is no consent decree and the agency's withdraw of the Council's recommended regulation is, by definition, permanent. The import of a permanent action was reaffirmed by the Ninth Circuit in a later opinion. *Conservation Northwest v. Sherman*, 715 F.3d 1181 (9th Cir. 2013). There, the Ninth Circuit rejected a consent decree that allowed the agency at issue, the Fish and Wildlife Service within the Department of the Interior, "effectively to promulgate a substantial and permanent" measure, where no follow-on efforts through normal agency rulemaking procedures were indicated. *Id*. at 1187-88.

B. STEP TWO: NMFS SHOULD RECEIVE NO DEFERENCE ON ITS PURPORTED INTERPRETATION OF THE MAGNUSON-STEVENS ACT

Even if the Magnuson-Stevens Act could be described as ambiguous on the agency's authority to withdraw the proposed DGN Rule after publication for public comment, the agency's actions in the instant case are entitled to no deference. Under step two of *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843, 104 S.Ct. 2778. Under the APA, courts must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D); *see also Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action[.]"). Here, NMFS's withdrawal of the proposed DGN Rule is arbitrary and capricious for two reasons. First, NMFS failed to provide any basis upon which it concluded it had the authority to withdraw the proposed regulation. Second, even if NMFS had the authority to withdraw the proposed regulation, its purported basis for doing so – the economic impact of the proposed regulation on the affected fishery – was irrational.

1. The Agency's Failure to Provide Any Basis For its Purported Determination is Arbitrary and Capricious

Although entitled to deference in its interpretation of an ambiguous statute, the agency remains obligated to provide a rationale for the interpretation. As the D.C. Circuit explained:

> Assuming consistency with law and the legislative mandate, the agency has latitude not merely to find facts and make judgments, but also to select the policies deemed in the public interest. The function of the court is to assure

> that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination.

Greater Boston Television Corp., 444 F.2d at 851. Thus, "[w]here the agency has failed to provide a reasoned explanation, . . . [the court] must undo its action" as both arbitrary and capricious. *Bellsouth Corp. v. FCC*, 162 F.3d 1215, 1221-22 (D.C. Cir. 1998); *see also Pinto v. Massanari*, 249 F.3d 840, 847-848 (9th Cir. 2001) (remanding to the agency for failure to articulate the basis of its determination). Despite 25,851 pages from the administrative record compiled as part of the agency's defense of its withdrawal of the proposed DGN Rule, not one document currently produced articulates, let alone establishes, any authority permitting the agency to withdraw the proposed DGN Rule under the Magnuson-Stevens Act.[5] Its failure to do so is both arbitrary and capricious and therefore, the agency's withdrawal of the proposed DGN Rule must be vacated and the agency instructed to promulgate the proposed regulation in accordance with the Magnuson-Stevens Act.

2. The Agency's Proffered Basis for the Withdrawal of the DGN Rule is Without Basis and thus Arbitrary and Capricious

In its correspondence to the Pacific Council advising that the agency was withdrawing the proposed DGN Rule, the agency concludes that pursuant to National Standard 7 and the "significant adverse economic consequences to the DGN fleet" the

[5] Several documents purportedly containing discussion of the agency's decision were withheld from the administrative record on the basis of attorney-client privilege and the deliberative process privilege. *See* AR INDEX Doc. Nos. 0.7.2066.5125, 0.7.2066.5011, 0.7.2066.5252, 0.7.2066.5182, 0.7.2066.5224, 0.7.2066.5120, 0.7.2066.5150. Given that the agency has chosen to withhold the only documents that purport to provide any basis for its decision to act contrary to the unambiguous text of the Magnuson-Stevens Act, Oceana has filed a motion to compel the production of these records. ECF 48.

regulation was "not warranted at this time." AR 2:2. Even assuming the agency had the statutory authority to withdraw the rule, the purported basis for so doing is arbitrary and capricious because it is irrationally inconsistent with the agency's prior determination and further lacks adequate support in the administrative record.

First, the economic impacts of the proposed regulation were well known to NMFS when it made its affirmative determination and published the proposed DGN Rule. *See, e.g.*, AR 6257: 6274-77 (comment from California drift gillnet permit holders indicating that additional regulations would "put us completely out of business," submitted October 2014); *see also* AR 6809:6817, 6819, 6821 (PowerPoint presentation of "conservation and economic risks" of hard cap alternatives, prepared by NOAA's South West Fisheries Science Center, dated September 2014). Despite the known risks associated with the potential closure of the DGN fishery, the agency nevertheless made an affirmative determination that the proposed DGN Rule complied with all relevant laws and regulations, including the Magnuson-Stevens Act National Standards. So doing was unsurprising given that the total number of vessels in the California DGN fishery is only about twenty, Def. Ans. ¶ 21 (ECF 28), and the agency's own estimate that, based on historic DGN performance, the proposed regulation would have led to a DGN fishery closure just once in the prior fifteen (15) years. AR 2:2. Moreover, the public comments received on this issue were not so unbalanced as to warrant a complete change of course: NMFS received twenty public comments on the proposed rule and supporting documents. AR 123: 131. Fourteen of those comments supported the regulations and only six opposed them. *Id*. Many commenters even urged NMFS to adopt a more stringent hard caps alternative than the proposed regulations did. *Id*.

Indeed, the agency does not dispute the basis for its about-face. Rather, it has defended its determination by citing the one source that supports it: the comments of the Ventura County Commercial Fishermen's Association. *See* AR 339:340-42 ("The fishermen' association . . . provided information showing that it would be difficult for

DGN participants [all 20 of them] to withstand the economic losses in the event of fishery closures [one about every 15 years] and that the participants had little opportunity to participate in other fisheries during the DGN season to mitigate the losses incurred during a closure."). The agency's decision to rely on just one of the numerous comments it received in making its determination – one that contradicts a prior conclusion based on substantially the same information, is both arbitrary and capricious and warrants the vacatur of the proposed regulation's withdrawal. *See e.g. Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1050 n.4 (9th Cir. 2010) (noting that should NMFS directly contradict an earlier factual determination, that it would be required to supply a "reasoned analysis for its change in course") (internal quotations and citation omitted). Second, the agency's withdrawal of the rule was arbitrary and capricious in that it failed to consider all ten of the National Standards under the Magnuson-Stevens Act, instead relying only on National Standard 7. *See* 16 U.S.C. § 1851(a) ("Any fishery management plan prepared, and any regulation promulgated to implement such plan, . . . shall be consistent with the following national standards for fishery conservation and management.").

National Standard 8, for example, requires that any fishery management regulation "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." *Id.* § 1851(a)(8). "Explicit in both the statutory text and the implementing regulations is Congress's intent that conservation efforts remain the Secretary's priority, and that a focus on the economic consequences of regulations not subordinate this principal goal of the [Magnuson-Stevens Act]." *N.C. Fisheries Ass'n v. Gutierrez*, 518 F. Supp. 2d 61-62, 91-92 (D.D.C. 2007) (citing 50 C.F.R. § 600.345(b)(1)). Thus, "[i]t is only when two different plans achieve similar conservation measures that [NMFS] takes into

consideration adverse economic consequences." *Natural Res. Defense Council, Inc. v. Daley*, 209 F.3d 747, 753 (D.C. Circ. 2000).

Here, no alternative bycatch limit was considered by NMFS. Rather, the agency withdrew the proposed DGN Rule without engaging in any statutorily mandated consultations with the Pacific Council. *See* 16 U.S.C. § 1855(b)(3). Whatever its motive to act in contravention of the clear mandate imposed by the Magnuson-Stevens Act, it was without a doubt arbitrary and capricious and this occurred in violation of the APA, and the agency must be instructed to promulgate the proposed DGN Rule.

VIII. CONCLUSION

The Secretary of Commerce, acting through NOAA's NMFS, was not permitted to withdraw the DGN Rule after it had been subjected to public comment, and the agency's decision to take that action was both not in accordance with law and arbitrary and capricious. The Court should grant Oceana's motion and enter judgment vacating the agency's withdrawal of the proposed DGN Rule and instructing the agency to promulgate the proposed regulation in accordance with the Magnuson-Stevens Act.

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