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12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **WESTERN DIVISION**

14 OCEANA, INC.,

15 Plaintiff,

16 v.

17 WILBUR ROSS, in his official
18 capacity as Secretary of the U.S.
19 Department of Commerce;
20 NATIONAL OCEANIC AND
21 ATMOSPHERIC
22 ADMINISTRATION; and
23 NATIONAL MARINE
24 FISHERIES SERVICE,

25 Defendants.

NO. 2:17-cv-05146 RGK-
JEMx

AMICUS CURIAE BRIEF OF
THE STATE OF
WASHINGTON

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1 **I. INTRODUCTION**

2
3 The Magnuson-Stevens Act, as amended by the Sustainable Fisheries Act
4 of 1996, seeks to establish sustainable fishing practices that protect the long-term
5 viability of fisheries and limit exploitation of marine resources for short-term
6 economic gain. The Act does so, in part, by creating a unique federal/regional
7 regulatory partnership that places authority in the hands of eight regional fishery
8 management councils to formulate fishery management plans for their respective
9 jurisdictions and develop necessary or appropriate regulations to implement those
10 plans. The Secretary of Commerce’s role in this management regime, which the
11 Secretary delegated to the National Marine Fisheries Service (NMFS), is limited
12 to making an affirmative or negative determination that the plans and regulations
13 are consistent with applicable law. In fact, the Secretary can only adopt his or her
14 own fishery management plan where a regional council refuses to act.

15 In 2012, the Pacific Fishery Management Council (Pacific Council) began a
16 multi-year effort to address incidental catch (“bycatch”) of endangered and
17 threatened marine species by the California Drift Gillnet fishery. After extensive
18 public process and policy deliberations, the Pacific Council proposed a regulation
19 establishing hard caps on bycatch of these protected species, with the fishery
20 temporarily shutting down once the caps were exceeded. After review, NMFS
21 made an affirmative finding of consistency and published the proposed rule in the
22 Federal Register on October 13, 2016. Following public comment, however,
23 NMFS reversed its affirmative determination, claiming new concerns over short-
24 term economic impacts from the hard cap requirement. NMFS then refused to
25 publish the final regulation.
26

1 *Amicus curiae* the State of Washington agrees with the Plaintiff that
2 NMFS's actions in this case violate the plain language of the Magnuson-Stevens
3 Act and its strict procedures for NMFS's review and approval of council-proposed
4 fishery regulations. By rejecting the proposed rule, NMFS upset the role that the
5 Act assigns to states like Washington in the development of regulations through
6 the regional fishery management councils. As a result, the Court need not look
7 beyond this plain language to resolve this case in Plaintiff's favor. If the Court does
8 find the statute ambiguous, however, the legislative history of the Act (set out
9 below) also firmly establishes that NMFS's actions should be invalidated.

10 **II. IDENTITY AND INTEREST OF *AMICUS CURIAE***

11 Washington's interest in the current case is significant. Congress gave
12 certain states a direct role on regional fishery management councils to help shape
13 federal fishery rules. Because Washington's fisheries are within the jurisdiction of
14 the Pacific Council, Washington, through its designated regulatory agency the
15 Washington Department of Fish and Wildlife, is a permanent voting member of
16 the Pacific Council. In this capacity, Washington participated directly in crafting
17 the proposed fishery regulations that are at issue in this case. Washington, thus,
18 has a vested interest in ensuring that NMFS properly adheres to the Magnuson-
19 Stevens Act's procedures for review of regional councils' fishery management
20 plans and implementing regulations—both as related to the proposed hard cap
21 regulations and as precedence for other regulations that may be proposed by the
22 Pacific Council in the future.

23 Washington also has a significant interest in benefits provided to the species
24 targeted for protection by the proposed hard cap rule. Many of the species
25 vulnerable to bycatch under the California drift gillnet fishery are migratory in
26 nature and frequent Washington waters, including humpback and sperm whales,

1 sea turtles (leatherback, loggerhead, and green turtles), and a host of other marine
 2 animals. Because many of these species are listed as endangered or threatened
 3 under Washington State law, Washington expends significant resources on
 4 protecting these species and their habitat. These efforts are undermined by bycatch
 5 in the California drift gillnet fishery, particularly when Washington has for decades
 6 prohibited the use of drift gillnets in state coastal waters because of the adverse
 7 impacts. As NMFS has acknowledged, the hard cap rule—if implemented—will
 8 likely decrease bycatch rates. As a result, NMFS’s reversal of its affirmative
 9 decision on the proposed rules means that neither the anticipated reduction of
 10 bycatch of protected species, nor Washington’s burden of protecting these species,
 11 will be lessened.

12 III. BACKGROUND

13 A. Regulatory Framework

14 The California drift gillnet fishery is subject to several other statutes in
 15 addition to the Magnuson-Stevens Act, including the Endangered Species Act, 16
 16 U.S.C. § 1531 *et seq.*, and the Marine Mammal Protection Act, 16 U.S.C. § 1361
 17 *et seq.*¹ The Magnuson-Stevens Act, however, remains the primary regime for
 18 managing fisheries in United States waters. *Compare* 16 U.S.C. § 1361(6) (stating
 19 “the goal to obtain an optimum sustainable population” of marine mammals); *with*
 20 16 U.S.C. § 1531(c) (stating policy “to conserve endangered species and threatened
 21 species”); 16 U.S.C. § 1801(b) (act designed to “conserve and manage the fishery
 22 resources found off the coasts of the United States”).²

23
 24 ¹ The National Marine Fisheries Service, an office of the National Oceanic and
 25 Atmospheric Administration within the Department of Commerce, implements each statute.
 See 16 U.S.C. §§ 1362(12); 1532(15); 1533; 1802(39); 1851(b).

26 ² Under the Marine Mammal Protection Act, “take” means “to harass, hunt, capture, or
 kill, or attempt to harass, hunt, capture or kill any marine mammal.” 16 U.S.C. § 1362(13).

1 As described above, the Magnuson-Stevens Act created regional fishery
 2 management councils “to exercise sound judgment in the stewardship of fishery
 3 resources through the preparation, monitoring, and revision” of fishery
 4 management plans and proposed regulations to implement such plans. 16 U.S.C.
 5 §§ 1801(b)(5); 1852, 1853; *Turtle Island Restoration Network v. U.S. Dep’t of*
 6 *Commerce*, 672 F.3d 1160, 1166 (9th Cir. 2012). Under the Magnuson-Stevens
 7 Act, any fishery management plan or regulation implementing such a plan, must
 8 be consistent with the ten national standards set forth in 16 U.S.C. § 1851(a).
 9 Significant to this case, National Standard 9 requires that “[c]onservation and
 10 management measures shall, to the extent practicable, (A) minimize bycatch and
 11 (B) to the extent bycatch cannot be avoided, minimize the mortality of such
 12 bycatch.” 16 U.S.C. § 1851; 50 C.F.R. § 600.350. As NMFS has previously
 13 observed, this requirement to minimize bycatch or to minimize the mortality of
 14 bycatch “is clearly not discretionary.” Magnuson-Stevens Act Provisions; National
 15 Standard Guidelines, 63 Fed. Reg. 24,212, 24,224 (May 1, 1998) (codified at 50
 16 C.F.R. pt. 600).

17 **B. The California Drift Gillnet Fishery**

18 The California drift gillnet fishery targets swordfish and to a lesser extent
 19 thresher sharks. To catch these target species, fishing boats deploy specially
 20 designed nets that form a vertical wall in the ocean and entangle swordfish and
 21 thresher sharks as they swim into the net. *See* AR 134 (figure 2); *Conti v. U.S.*, 291
 22 F.3d 1334, 1336 (Fed. Cir. 2002).

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 Under the ESA, “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture,
 or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Although these
 definitions differ slightly, “generally, any interaction between a protected species and fishing
 gear is considered a take” Under both statutes. AR 5848.

1 Drift gillnets, however, cannot distinguish between the species targeted by
2 the fishery and other non-target species that become entangled in the net. *See*
3 *Humane Soc’y of U.S. v. Clinton*, 236 F.3d 1320, 1322 (Fed. Cir. 2001); *cf. Conti*,
4 291 F.3d at 1336–37 (discussing national and international concern over drift
5 gillnets ensnaring significant numbers of sea turtles and marine mammals).
6 Although some of the non-target species may be retained and sold or kept, most
7 bycatch is discarded. *See* AR 6842; AR 5856 (estimating annual bycatch of
8 finfish). The Federal Circuit has described the drift gillnet fishery and the
9 inevitable bycatch that occurs as a result of the indiscriminate fishing method:

10 Though intended to catch fish, the nets indiscriminately
11 catch virtually all aquatic life including fish, whales,
12 dolphins, sea turtles, and sea birds. The fish are
13 captured when the mesh catches behind their gills, and
14 the whales, dolphins, and other air-breathing sea life are
15 caught when they become entangled in the net. At
16 dawn, fishermen collect the driftnets, remove the target
17 fish, and discard any non-target species, often drowned,
18 that were caught in the nets.

19 *Humane Soc’y of U.S.*, 236 F.3d at 1322.

20 Concerns over growing use of drift gillnets on international waters led the
21 United Nations to adopt a moratorium on the use of large-scale driftnets beyond
22 the exclusive economic zone of any nation. *See* 16 U.S.C. § 1826(b)(5); *Humane*
23 *Soc’y of U.S.*, 236 F.3d at 1322. In implementing the moratorium, Congress found
24 that “the continued widespread use of large-scale driftnets beyond the exclusive
25 economic zone of any nation is a destructive fishing practice that poses a threat to
26 living marine resources of the world’s oceans” 16 U.S.C. § 1826(b)(1).

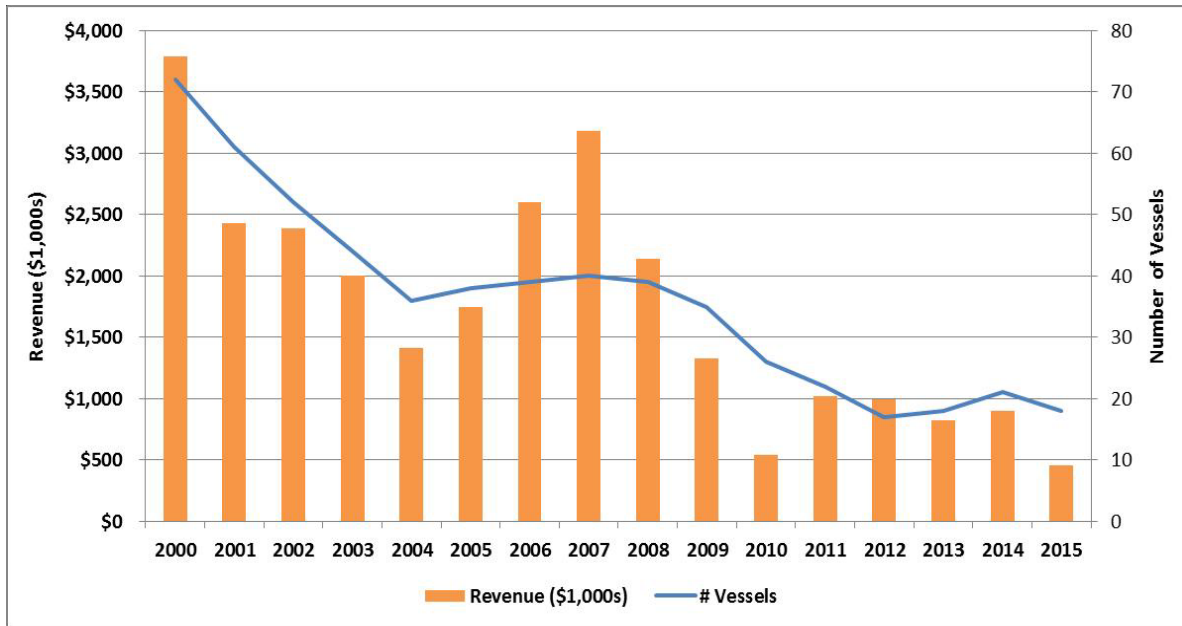
1 Many areas within the exclusive economic zone have also been closed to
2 drift gillnet fishing in response to concerns about its impacts. The use of driftnet
3 gear is prohibited in the Atlantic tuna and swordfish fisheries and off the
4 Washington Coast. *See* 50 C.F.R. § 635.71(a)(17); Atlantic Swordfish Fishery;
5 Mgmt. of Driftnet Gear, 64 Fed. Reg. 4055 (Jan. 27, 1999) (codified at 50 C.F.R.
6 pt. 630); *see also* 50 C.F.R. § 660.713(d)(8); Wash. Admin. Code 220-355-080(2);
7 AR 25–26. In addition, Oregon closed its drift gillnet fishery program due to
8 inactivity in the Oregon fishery from 2006 to 2008. AR 38–39. Some California
9 leaders have also expressed a desire to transition away from the use of drift gillnets
10 in the West Coast swordfish fishery. *See* AR 2934–35 (Letter from Senators
11 Feinstein, Boxer, and Wyden advocating for transition from drift gillnets to more
12 environmentally sustainable fishing gears and the use of enforceable limits to
13 reduce bycatch); AR 2932–33 (supplemental letter from Senators reiterating
14 support for transitioning the fishery); AR 4447–48 (letter from Congressman
15 Huffman encouraging the Pacific Council to develop a comprehensive transition
16 plan and minimize bycatch); AR 5268–69 (letter from five California Assembly
17 Members advocating for a transition away from drift gillnets); AR 7237
18 (discussing legislation proposed in California House to prohibit use of drift gillnets
19 to take sharks and swordfish for commercial purposes in State waters; the bill did
20 not pass).

21 Although the California drift gillnet fishery remains open, it is subject to
22 strict time and location restrictions in an effort to limit bycatch impacts from the
23 fishery. *See e.g.*, 50 C.F.R. § 660.713; AR 22 (Final Environmental Assessment)
24 (all drift gillnets must be fished at a minimum depth of 10.9 meters below the
25 surface); AR 23–25 (describing Pacific Sea Turtle Conservation areas and other
26 federal closures); AR 26 (describing state restrictions on drift gillnet fishery); AR

1 1176 (Proposed Rule) (describing seasonal closures to drift gillnet fishery). To
2 protect endangered leatherback and loggerhead sea turtles, a large area off the
3 California coast extending north to Cape Falcon, Oregon is seasonally closed to
4 the fishery, and these restrictions are extended during El Niño events. 50 C.F.R.
5 § 660.713(c); AR 1175 (Proposed Rule). Driftnet gear also must meet certain
6 criteria, including length limitations on the nets, 50 C.F.R. § 660.713(b), and the
7 use of acoustic deterrent devices to try to minimize bycatch, AR 22. In addition,
8 NMFS places observers on drift gillnet fishery vessels to monitor bycatch, but, due
9 to funding constraints, observers monitor only about 30 percent or less of the drift
10 gillnet fleet. AR 1175 (Proposed Rule); AR 7267 (describing role of observers in
11 monitoring and accountability of fishery).

12 California Department of Fish and Wildlife also limits the number of permits
13 issued to the California drift gillnet fishery. AR 1176 (Proposed Rule). Under
14 California's permitting regime, California will not issue any new permits and
15 current permits may only be transferred to another individual currently holding or
16 eligible for a general gillnet/trammel net permit under California law. AR 26.
17 Although currently 73 individuals hold valid permits to engage in the fishery, only
18 about 20 vessels participate in the fishery each season. AR 1176–77 (Proposed
19 Rule); AR 18894–95 (NOAA Technical Memorandum). These numbers represent
20 a significant decline from the peak of the California drift gillnet fishery in the mid-
21 1980s when the number of permits in the fishery reached 251 permits with 200
22 vessels participating in the fishery. AR 357 (Final Regulatory Impact Review); AR
23 18895 (NOAA Technical Memorandum). As shown below, the revenue from the
24 fishery also has declined steadily, reaching an all-time low of \$454,000 in 2015.
25
26

AR 358 (Final Regulatory Impact Review).



Although past regulatory efforts decreased bycatch rates in the California drift gillnet fishery, AR 6845, bycatch remains a reality, *see* AR 6838 (Report on Routine Management Measures to Establish Hard Caps); Mem. of Points and Auths. In Supp. of Fed. Defs.’ Cross-Mot. for Summ. J. & in Opp. To Pl.’s Mot. for Summ. J. 9, ECF No. 67-1. Between 2001 and 2015, bycatch from the fishery included approximately six humpback whales, nine sperm whales, more than 12 leatherback turtles, 20 loggerhead sea turtles, 14 short-fin pilot whales, and more than 6 bottlenose dolphins. *See* ECF No. 67-1 at 9. Most of these species are protected as endangered or threatened under the Endangered Species Act and Washington law and the whale and dolphin species are further protected under the Marine Mammal Protection Act. AR 56–57, 65–67 (Final EA).³ Although NMFS previously concluded that this bycatch level does not jeopardize listed species or significantly impact listed marine mammals, AR 6510, strong public opposition

³ *See* Washington Dep’t of Fish & Wildlife, Species of Concern in Washington State, available at <https://wdfw.wa.gov/conservation/endangered/All/>.

1 exists to the California drift gillnet fishery and the associated bycatch, including
2 the number of other, non-protected species that the fishery discards as bycatch. *See*
3 *e.g.*, AR 6864–7160, 7165–7236. The Pacific Council estimates that each year the
4 California drift gillnet fishery catches and discards an average of nearly 12,000
5 finfish, including sharks, tuna, marlin, mackerel, and common mola. AR 5856.
6 Close to 3,000 of those species are discarded dead. *Id.*

7 **C. The Pacific Council’s Process for Developing the Proposed Rule**

8
9 In October 2016, NMFS published the proposed regulation to implement an
10 immediate closure of the drift gillnet fishery when observed mortality or injury to
11 high priority species—including fin, humpback, and sperm whales, leatherback,
12 loggerhead, olive ridley, and green sea turtles, short-fin pilot whales, and
13 bottlenose dolphins—meets or exceeds the established hard cap for any of these
14 species during a rolling 2-year timeframe. AR 1176 (Proposed Rule). The Pacific
15 Council issued the proposed rule implementing hard caps after several years of
16 consideration. *See* AR 1175 (Proposed Rule); AR 13008–09 (March 2012 Decision
17 Summary Document). During this time, the Pacific Council engaged in several
18 wide-ranging discussions on the status and future prospects for the California drift
19 gillnet fishery, including the prospect of transitioning the fishery to full federal
20 management under Magnuson-Stevens Act authority and ultimately eliminating
21 drift gillnet gear in favor of “more environmentally and economically sustainable
22 gear types.” AR 7237–38; AR 7426–27. In response to these discussions, the
23 Pacific Council received thousands of public comments and signatures, including
24 from business owners, chefs, and game fisherman, encouraging the Pacific Council
25 to phase out the drift gillnet fishery and transition to a more sustainable fishery.
26 *See, e.g.*, AR 4620–5013, 5927–6256, 6864–7160, 7165–7236. NMFS received

1 only limited comments in favor of retaining the drift gillnet fishery. *See e.g.*, AR
2 6853–63.

3 As part of its consideration of the future of the California drift gillnet fishery,
4 and more broadly the West Coast swordfish fishery, the Pacific Council
5 enumerated several policy objectives for managing the West Coast swordfish
6 fishery, including using hard caps to reduce bycatch of high priority species,
7 increasing observer coverage on vessels to help facilitate implementation of hard
8 caps and other bycatch reduction efforts, and supporting collaboration between
9 stakeholders to “develop alternative fishing gears, conduct research to further
10 minimize bycatch in the DGN fishery, maintain a viable domestic West Coast
11 highly migratory species fishery, and reduce capacity in the DGN fishery through
12 buyouts and other incentives.” AR 7266–67 (June 2014 Decision Summary
13 Document). The Pacific Council’s policy objectives also included routinely
14 reviewing the performance of the DGN fishery “to evaluate its ability to operate
15 within hard cap levels and successfully minimize bycatch of other discard species
16 according to bycatch performance standards to be adopted by the Council.” AR
17 7267. Although the Pacific Council “discussed a policy goal to end the DGN
18 fishery and transition to a swordfish target fishery that excludes DGN gear at some
19 point in the future,” the Pacific Council instead decided to pursue a policy of
20 “strong management measures designed to improve the target performance of the
21 DGN fishery, while at the same time encouraging alternative gears that can provide
22 for a viable commercial fishery with significantly better bycatch performance than
23 the past DGN fishery.” AR 6338 (November 2014 Decision Summary Document).
24 The hard caps were a key part of implementing this policy. *See* AR 5842 (Proposed
25 Management and Monitoring Plan); AR 6338–39.

26 The Pacific Council engaged in a detailed process to implement its policy

1 objectives culminating in transmitting the proposed hard cap rule to NMFS in
2 September 2016. *See* AR 1326–27 (letter transmitting proposed regulations to
3 implement hard caps). During this process, the Pacific Council considered different
4 alternatives to implement its hard caps, observer monitoring and bycatch
5 performance objectives, AR 5842 (report on proposed management and
6 monitoring plan); AR 5068–69 (June 2015 Decision Summary Document), created
7 a proposed California Drift Gillnet Management and Monitoring Plan, AR 5842–
8 64, and developed a regulatory impact review, AR 1589–1602. Notably, in
9 proposing the hard caps, the Pacific Council sought “to protect certain non-target
10 species and increase incentives to reduce bycatch.” AR 1326. Although the Pacific
11 Council could have sought to reduce bycatch by proposing to close the drift gillnet
12 fishery, the Pacific Council instead proposed hard caps as an incentive for the
13 fishery to voluntarily change their fishing practices to avoid or reduce bycatch. The
14 Pacific Council did not intend “to manage marine mammal or endangered species
15 populations, but rather to enhance the provisions of the Endangered Species Act
16 and the Marine Mammal Protection Act through implementation of MSA section
17 303(b)(12) and National Standard 9.” *Id.*

18 In its Draft Environmental Assessment, NMFS agreed with the Pacific
19 Council that the hard caps would result in a beneficial effect to hard cap species.
20 AR 1290. Although unable to definitively quantify, NMFS also acknowledged that
21 potential benefits to protected species could flow from incentives the hard cap rule
22 would place on vessel operators to reduce future bycatch of hard cap species to
23 avoid fishery closures. *See* AR 1177.

IV. ARGUMENT

A. **The Magnuson-Stevens Act Limits NMFS's Role in Crafting Regional Management Plans and Places Conservation Interests Over Short-Term Economic Impacts**

What is now commonly known as the “Magnuson-Stevens Act” originated as the Magnuson Fishery Conservation and Management Act of 1976. In its original form, the Act sought to both gain control over U.S. coastal fisheries by establishing an exclusive economic zone off coastal waters, and respond to a general lack of regulatory oversight that was leading to overfishing. Robin Kundis Craig & Catherine Danley, *Federal Fisheries Management: A Quantitative Assessment of Federal Fisheries Litigation Since 1976*, 32 J. Land Use & Envtl. L. 381, 386-87 (2017). After 20 years of fisheries management under the Magnuson Act, however, serious cracks were showing.

First, the “conservation” aspect of the original Magnuson Act proved ineffective. Despite shutting out foreign fishing within the exclusive economic zone, fish stocks and marine species continued to decline precipitously. By the 1990s, certain stocks were threatening to collapse completely. Second, in addition to continued overfishing, the Magnuson Act’s process for establishing effective, de-centralized management policies became bogged down by inefficiencies. The Magnuson Act placed primary responsibility for fishery management with eight regional fishery councils in order to place local knowledge at the heart of fishery policy. However, the Secretary of Commerce (again, delegated to NMFS) was given responsibility over reviewing and adopting regional fishery management plans and implementing regulations. As originally drafted this process was cumbersome, and timelines for approving these plans and regulations often stretched out for months, leaving fisheries in limbo.

Congress responded to these and other problems via the Sustainable

1 Fisheries Act of 1996, Pub. L. No. 104-297, 110 Stat. 3559 (1996). As set out
2 below, this massive overhaul of the Magnuson Act, now dubbed the Magnuson-
3 Stevens Act, sheds light on the problems Congress sought to address in the
4 amendments and explains why Defendants' actions in this case violate both the
5 letter and the intent of the 1996 amendments.

6 **1. The 1996 amendments purposefully limited NMFS's role in**
7 **approving fishery management plans and implementing**
8 **regulations**

9 Defendants' interpretation of the procedures and process for approving or
10 disapproving proposed fishery management plan regulations cannot be reconciled
11 with either the plain language of the Magnuson-Stevens Act or its legislative
12 history and should be rejected.

13 The statutory provisions central to this case (codified at 16 U.S.C. § 1854)
14 were grafted onto the Magnuson Act by the Sustainable Fisheries Act in 1996 as
15 part of Congress' efforts to "streamline the approval process for fishery
16 management plans and regulations[.]" S. REP. No. 104-276, at 1 (1996).
17 Streamlining was certainly necessary in 1996. As is common for many regulatory
18 efforts, regional councils often employed "framework" fishery management plans
19 that relied on separate implementing regulations to establish key parameters such
20 as season openings and closures, allowable catches, and harvest allocations. S.
21 REP. NO. 104-276 at 18. The 1976 Magnuson Act, however, did not contain
22 provisions setting sideboards on NMFS's review and approval of such regulations.
23 As a result, many months would often lapse prior to approval, leaving regional
24 councils and regulated vessel operators in the dark as to critical aspects of how the
25 fishery would be regulated right up to (or beyond) its opening. *Id.* This led to
26 "growing frustration" that the Magnuson Act's attempt to de-centralize fishery
policy was mired in "redtape" and led to calls for "limiting the role of the Secretary

1 [i.e., NMFS] in modifying Council decisions[.]” 142 Cong. Rec. S10794-02,
2 S10820, 1996 WL 528720; 1995 WL 227474.

3 Congress heeded those calls. The Sustainable Fisheries Act reworked the
4 Magnuson Act to place *significant* limitations on NMFS’s review and approval of
5 regulations crafted by regional councils.

6 First, and as with review of fishery management plans, Congress limited
7 NMFS’s review of implementing regulations to only a determination of whether
8 the regulation is consistent with the fishery management plan itself, the goals and
9 policies of the Magnuson-Stevens Act, and “other applicable law.” 16 U.S.C. §
10 1854(b)(1). NMFS was only allowed to develop its own regulations in the event a
11 regional council failed to discharge its duty to do so. *See* 16 U.S.C. § 1854(c).

12 Next, Congress imposed strict timeline restrictions on NMFS by providing
13 only 15 days after receipt of proposed regulations to complete review. Following
14 that review, and within those 15 days, Congress required NMFS to make one of
15 two possible actions: (1) an affirmative determination of consistency; or (2) a
16 negative determination of consistency. 16 U.S.C. § 1854(b)(1)(A)–(B). If
17 affirmative, Congress required NMFS to immediately publish the regulations in
18 the Federal Register for a public comment period not to exceed 60 days and then
19 publish a final rule within 30 days from the close of public comment. *Id.* If
20 negative, Congress did not allow NMFS to reject the regulations outright; rather,
21 Congress required NMFS to provide written recommendations to the appropriate
22 regional council on how the proposed regulations could be made consistent. *Id.*
23 These duties are mandatory, and no other options were provided. *See id.*

24 There is no dispute that Defendants did not follow this procedure in this
25 case. Rather, Defendants argue that—within this extremely circumscribed
26 framework—Congress intended an unwritten, “third” path. Specifically,

1 Defendants assert that 16 U.S.C. § 1854(b) tacitly allows NMFS to make a
 2 tentative or preliminary affirmative determination, later convert that determination
 3 into a negative one following public comment, and then refuse to publish final
 4 regulations. ECF No. 67-1 at 13. But Defendants’ interpretation is belied by the
 5 language and structure of the statute and its legislative history and represents
 6 precisely the kind of delay and inefficiency Congress sought to tamp out in the
 7 Sustainable Fisheries Act.

8 In fact, in 1995 and 1996, the House of Representatives considered language
 9 that would have allowed NMFS to do what was done in this case, i.e., “decline to
 10 publish” final regulations following the public comment period based on some
 11 objection to the proposal. *See* H.R. REP. NO. 104-171, at 10 (1995). However,
 12 drafters struck this language from the final bill during the reconciliation process in
 13 favor of the much more rigid procedures proposed by the Senate and now codified
 14 in the statute.⁴ *C.f.* H.R. REP. 104-171, at 10 *with* S. REP. 104-276, at 106–07
 15 (1996). Because there is no evidence that Congress was unaware of this change in
 16 language, this Court should presume the change was purposeful and that Congress
 17 intended exactly what the statute now says: once an affirmative determination is
 18 made, NMFS must publish a final rule after public comment. *Miccosukee Tribe of*
 19 *Indians of Florida v. U.S. Army Corps of Engineers*, 619 F.3d 1289 at 1300 n. 18
 20 (11th Cir. 2010) (recognizing that changes between subsequent drafts of a statute
 21 provide evidence of legislative intent); *see also* Standards of Judgment: Intent of
 22 the Legislature, 2A Sutherland Statutory Construction § 45:5 (7th ed.) (recognizing

23 ⁴ The process Congress ultimately adopted is even more rigorous when it comes to the
 24 approval of fishery management plans. The Sustainable Fisheries Act’s amendments prohibits
 25 NMFS from responding to public comments through revisions to a regional council’s proposed
 26 fishery management plan. *See* 16 U.S.C. § 1854(a)(3). The limits on review and approval of
 fishery management plans further demonstrate Congress’s clear intent to streamline the fishery
 plan and implementing regulations approval process.

1 same).

2 Defendants also attempt to counter the plain language of the statute by
 3 insisting that Congress could not have intended NMFS to fail to correct problems
 4 or conduct a public process and then ignore the content of any public feedback
 5 received. ECF No. 67-1 at 14. But that result does not flow from either the statutory
 6 language or the position asserted by Plaintiff in this case. Indeed, Congress
 7 expressly gave NMFS the ability to modify council-proposed regulations
 8 following public comment, so long as NMFS consults with the appropriate regional
 9 council prior to making such changes. *See* 16 U.S.C. § 1854(b)(3). This allows
 10 NMFS and the regional council to work together and be responsive to public
 11 feedback while maintaining the efficiencies and strict timelines set out in the
 12 statute for timely approving fishery regulations.⁵ There is no dispute that this is not
 13 what happened in this case and, as a result, there should be little dispute that NMFS
 14 strayed beyond what the statute allows when it failed to follow these procedures.

15 In short, given the limitations of NMFS's authority relative to the Pacific
 16 Council's actions, NMFS should have expressed its concerns based on the public
 17 comment period to the Pacific Council and worked with the Pacific Fishery
 18 Council to ensure timely finalization of the regulations, as the Magnuson-Stevens
 19 Act requires. Instead, NMFS undercut the strict process laid out in the Act by
 20 unilaterally reversing its original "affirmative" determination, refusing to publish
 21 a final rule, and leaving the fishery in limbo. There is no basis in the law for doing
 22 so, and this Court should invalidate NMFS's action.

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 25 ⁵ It also avoids the "parade of horrors" (such as being forced to adopt an
 26 unconstitutional regulation) trotted out by Defendants in their attempt to skirt the Act's
 requirements. *See* ECF No. 67-1 at 14.

1 **2. The 1996 amendments forbid NMFS from doing precisely what it**
 2 **did here, i.e., placing short-term economic interests over**
 3 **conservation**

4 In addition to violating the mandatory procedures for reviewing proposed
 5 regulations, Defendants' actions in this case also violate the policies set out in the
 6 revised Act.

7 The Sustainable Fisheries Act did not just tackle the inefficiencies in the
 8 regional council management plan and regulation approval process discussed
 9 above. The Act constituted a wholesale re-alignment of the policy priorities of U.S.
 10 fisheries regulation. Where the 1976 Magnuson Act focused on curtailing foreign
 11 fishing within the exclusive economic zone and maximizing U.S. fisheries yields,
 12 the Sustainable Fisheries Act amendments sought to prevent overfishing by U.S.
 13 vessels and rebuild limited and threatened fishery resources. S. REP. NO. 104-276,
 14 at 1 (1996).

15 Key to these efforts, the Sustainable Fisheries Act reworked the Magnuson
 16 Act to recognize that individualized and short-term economic interests are
 17 antithetical to the long-term survival of U.S. fisheries. *See Nat. Res. Def. Council,*
 18 *Inc. v. Nat'l Marine Fisheries Serv.*, 421 F.3d 872, 879 (9th Cir. 2005). As a result,
 19 Congress chose in the revised Act to “give conservation of fisheries priority over
 20 short-term economic interests.” *See id.* While impacts to individual affected fishing
 21 communities are taken into account, those economic impacts are “subordinate” to
 22 the Act’s “overarching conservation goals” and “must not compromise the
 23 achievement of [the Act’s] conservation requirements....” *Lovgren v. Locke*, 701
 24 F.3d 5, 35 (1st Cir. 2012), *citing* 50 C.F.R. § 600.345(b)(1).

25 Congress' focus on fishery conservation is now embodied throughout the
 26 Act, including the express targeting of bycatch, which Congress viewed as

1 particularly wasteful and harmful to all U.S. fisheries. 16 U.S.C. § 1851(a)(9); *see*
2 *also* S. REP. 104-276, at 5–6. Indeed, National Standard 9 requires that
3 “[c]onservation and management measures shall, to the extent practicable, (A)
4 minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the
5 mortality of such bycatch.” 16 U.S.C. § 1851(a)(9).

6 As set out in greater detail above, the Pacific Fishery Council reasonably
7 determined in this case that hard caps were necessary, appropriate, and practicable
8 measures to minimize bycatch of non-target species and help protect the long-term
9 health and stability of the California Drift Gillnet Fishery—consistent with
10 National Standard 9. NMFS reversed that determination (purportedly under
11 National Standard 7) based solely on a “new economic analysis of short-term
12 effects on individual [drift gillnet] Fishery participants.” ECF No. 67-1 at 7; AR
13 1023.

14 But this focus on short-term interests directly violates the bycatch-related
15 conservation mandates of the Act. *See* 16 U.S.C. § 1853(a)(1), (11). Thus, even if
16 NMFS had the authority to reverse its initial affirmative determination, NMFS
17 action here should still be invalidated under Section 706 of the Administrative
18 Procedures Act as contrary to law because it elevates economic concerns over
19 conservation. *See Lovgren*, 701 F.3d at 35; *see also* 5 U.S.C. § 706. Furthermore,
20 from a procedural standpoint and in light of the existing “affirmative”
21 determination, any “new economic analysis” developed by NMFS should have
22 been shared with the Council along with a request that the Council work with
23 NMFS to revise the regulation in light of the new data. *See* 16 U.S.C. § 1854(b)(3).
24 In this manner, the Council could have then reviewed the new analysis and
25 determined whether, as a matter of policy, the short-term effects on individual
26 fishery participants actually outweighed the greater risks to conservation, which is

1 the proper role of the Council.

2 NMFS’s justifications—namely that the hard cap rule would permanently
3 drive drift gillnet fishermen to “other professions”—is irrational. ECF No. 67-1 at
4 7. NMFS itself invalidated this argument when it acknowledged the improbability
5 of the caps ever being reached, and further recognized the potential effectiveness
6 of incentives to avoid risky fishing practices created by the hard caps. *See* AR
7 1290; AR 1177 (recognizing that hard caps would only be reached approximately
8 every *thirteen* fishing seasons and that fishermen’s deliberate efforts to avoid
9 reaching the hard caps may further reduce the frequency of hard cap species catch
10 in the future). Put another way, NMFS claims a need to reject the Pacific Council’s
11 hard cap rule based on impacts that NMFS itself agrees will rarely—if ever—
12 happen because of the hard caps. *Id.* NMFS’s explanations are implausible,
13 contrary to the law, and should be rejected.

14 **V. CONCLUSION**

15 Defendants’ actions in this case violate both the spirit and letter of the
16 Magnuson-Stevens Act. NMFS violated the strict mandates Congress set out for
17 review and approval of fishery regulations proposed by regional councils, and its
18 focus on short-term economic impacts over conservation measures render its action
19 contrary to law. *Amicus curiae* the State of Washington respectfully requests that
20 this court grant Plaintiff’s Motion for Summary Judgment.

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DATED this 17th day of September, 2018.

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