No. 22-___

IN THE

Supreme Court of the United States

RELENTLESS, INC., *et al.*,
Petitioners,

v.

U.S. DEPARTMENT OF COMMERCE, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPENDIX

JOHN J. VECCHIONE
Counsel of Record
MARK S. CHENOWETH
KARA M. ROLLINS
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
John.Vecchione@ncla.legal

June 14, 2023

TABLE OF APPENDICES

Appendix A

United States Court of Appeals
For the First Circuit

No. 21-1886

RELENTLESS, INC.; HUNTRESS, INC.;
SEAFREEZE FLEET LLC,

Plaintiffs, Appellants,

v.

UNITED STATES DEPARTMENT OF COMMERCE; GINA M. RAIMONDO, in her official capacity as Secretary of Commerce; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; RICHARD SPINRAD, in his official capacity as Administrator of NOAA; NATIONAL MARINE FISHERIES SERVICE, a/k/a NOAA Fisheries; JANET COIT, in her official capacity as Assistant Administrator for NOAA Fisheries,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

Hon. William E. Smith, U.S. District Judge

Before

Kayatta, Lipez, and Thompson, Circuit Judges.

John J. Vecchione, with whom New Civil Liberties Alliance was on brief, for appellants.

Dina B. Mishra, with whom Todd Kim, Assistant Attorney General, Alison C. Finnegan, Daniel Halanien, Environment & Natural Resources Division, U.S. Department of Justice, and Mitch MacDonald, Office of General Counsel, National Oceanic & Atmospheric Administration, were on brief, for appellees.

March 16, 2023

KAYATTA, **Circuit Judge**. Charged with promoting the sustainability of the nation's fisheries, the National Marine Fisheries Service requires vessels fishing for herring on certain fishing trips to carry monitors on board. Although the government trains and certifies these monitors, it does not always pay them for their work. Instead, the vessel owners must procure and pay for certain monitors by contracting with private entities. Owners of two fishing vessels that harvest herring -- plaintiffs Relentless Inc., Huntress Inc., and Seafreeze Fleet

LLC -- challenge the agency's authority to promulgate this requirement. The district court granted summary judgment for the government, reasoning that the rule is a permissible exercise of agency authority under the statute governing fishery stocks and conservation, that its promulgation followed proper procedures, and that it does not violate the Constitution. On appeal, plaintiffs renew their attacks. Because we agree with the district court that the rule is a permissible exercise of the agency's authority and is otherwise lawful, we affirm. Our reasoning follows.

I.

A.

Atlantic herring fishing is regulated under the Magnuson-Stevens Fishery Conservation and Management Act (the "MSA"), which was enacted to respond to the threat of overfishing and to promote conservation. 16 U.S.C. §§ 1801 et seq. The MSA established eight regional councils that manage the various "fisheries" (defined as "one or more stocks of fish which can be treated as a unit") in their respective regions. Id. §§ 1802(13)(A), 1852(a). The councils accomplish this task primarily by promulgating fishery management plans, which specify the conservation measures "necessary and appropriate" to prevent overfishing, to protect fish stocks, and to promote the sustainability of each fishery. Id. §§ 1852–1853. The MSA sets out elements that fishery management plans shall include, such as a description of the fishery and the optimal yield for the fishery, id. § 1853(a), as well as several elements that plans may include, such as requirements that vessels subject to the plan obtain permits, id. § 1853(b). Fishery management plans must also comply

with ten "National Standards" set out in the MSA that identify broad goals and priorities such as minimizing cost, taking communities into account, prioritizing efficiency, and using the best scientific information available. Id. § 1851(a).

The Secretary of Commerce is tasked with reviewing each fishery management plan or amendment and publishing it along with implementing regulations for notice and comment. Id. § 1854(a)–(b). The Secretary has delegated these responsibilities to the National Marine Fisheries Service (NMFS or the "Agency"), a division of the National Oceanic and Atmospheric Administration (NOAA). Regional councils submit plans and amendments to NMFS, which publishes them for notice and comment while undertaking its own review to ensure that the plans are consistent with the MSA, its National Standards, and "any other applicable law." Id. § 1854(a)(1). The Agency must then approve, disapprove, or partially approve the plan or amendment. Id. § 1854(a)(3). Once a plan or amendment is approved, the Agency works with the regional council and completes a notice and comment procedure to issue implementing regulations. Id. § 1854(b).

B.

The New England Fishery Management Council ("New England Council") regulates fisheries in the Atlantic Ocean seaward of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut. Id. § 1852(a)(1)(A). This includes the Atlantic herring fishery. The New England Council implemented the current fishery management plan for Atlantic herring in 2000. The plan includes an annual catch limit and restrictions on the location and timing of herring

fishing. 50 C.F.R. § 648.200. The Atlantic herring fishery is subject to monitoring, including by government-funded observers using Standardized Bycatch Reporting Methodology (SBRM) to measure bycatch (fish unintentionally caught) on fishing trips.[1] Id. § 648.11(m).

In 2013, the New England Council began a process to provide for the use of industry-funded monitoring to reduce uncertainty around catch estimates. In 2017, the Council approved an Omnibus Amendment, which both provided general guidelines for industry-funded monitoring in all of its fishery management plans and specifically provided for the owners of herring vessels to bear the expense of contracting for

---

[1] The MSA requires that all fishery management plans "establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery." 16 U.S.C. § 1853(a)(11). The New England Council, along with the Mid-Atlantic Council, developed an SBRM omnibus amendment in 2015 that implements this requirement. Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Standardized Bycatch Reporting Methodology Omnibus Amendment, 80 Fed. Reg. 37,182 (June 30, 2015); 50 C.F.R. § 648.18. The methodology in that omnibus amendment, which is primarily implemented through the Northeast Fisheries Observer Program placement of observers on vessels, applies to several fisheries, including the herring fishery. 50 C.F.R. § 648.18. Although the SBRM has been heavily litigated, see Oceana, Inc. v. Ross, 920 F.3d 855, 859–60 (D.C. Cir. 2019), it is not at issue in this appeal.

some of the monitors engaged on their vessels. Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Industry-Funded Monitoring, 85 Fed. Reg. 7414, 7414 (Feb. 7, 2020). The Agency approved the amendment in 2018. It published the final rule implementing the amendment and the industry-funded monitoring program for the herring fishery in 2020. 85 Fed. Reg. at 7414.

The rule implementing industry-funded monitoring for the herring fishery (the "Final Rule" or "Rule") does not require monitors on all vessels. Rather, it sets a target percentage (50%) of herring trips to be monitored. Id. at 7417. Observer coverage required under the SBRM program, which is fully paid for by the government, counts toward this target. Additional monitoring, up to a target of 50%, is covered by industry-funded monitoring (so if SBRM observers are placed on 10% of trips, industry would be asked to pay for monitoring on an additional 40% of trips). Id. The Rule requires the Council to reexamine the monitoring coverage targets after two years to consider the results of increased monitoring, if any, and determine whether to make adjustments. 50 C.F.R. § 648.11(m)(1)(ii)(F). The government bears the administrative expenses associated with the program, including the training and certification of monitors. 85 Fed. Reg. at 7415.

The Rule specifies how industry-funded monitoring will work in practice. Vessels must "declare into" a fishery before beginning a fishing trip, meaning they contact NMFS and announce the species of fish they intend to harvest. 50 C.F.R. § 648.11(m)(2). When a vessel declares into the herring

fishery, the Agency then informs it whether a monitor will be required for that trip. Id. § 648.11(m)(3). Trips may receive a waiver of the monitor requirement under several circumstances: if a monitor is not available, if the vessel is carrying certain fishing gear only and does not intend to carry fish, or if the vessel intends to catch less than 50 metric tons of herring on the trip. Id. § 648.11(m)(1)(ii)(D)–(E), (4)(ii). Vessels using certain types of gear are exempt from the requirement to carry a monitor altogether if they use electronic monitoring and portside sampling instead. Id. § 648.11(m)(1)(iii).

When a nonexempt vessel that does not meet the criteria for a waiver declares into the herring fishery, the Agency will inform the vessel whether it needs to carry a monitor for that trip. If so, the vessel must contact one of the private entities that provide certified monitors, and pay that entity its resulting fees and expenses. Id. § 648.11(m)(4). If the vessel cannot find a monitor after contacting all available providers, it may ask for a waiver. Id.

The precise cost of the industry-funded monitoring program to vessels participating in the herring fishery is unclear. In its notice publishing the Final Rule, the Agency cautioned that "the economic impact of industry-funded monitoring coverage on the herring fishery is difficult to estimate," because it would vary with "sampling costs, fishing effort, SBRM coverage, price of herring, and participation in other fisheries." 85 Fed. Reg. at 7420. The agency also noted that the Environmental Assessment estimated "industry's cost for at-sea monitoring coverage at $710 per day," although this figure would "largely depend on negotiated costs between vessels and monitoring service providers." Id. The Agency further

acknowledged that the Rule could reduce vessel returns-to-owner (gross profits minus fixed and operational costs) by around 20%. In total, the New England Council recognized in its amendment adopting the herring plan that "the impacts of [the Rule] on fishery-related businesses and human communities are negative and result from reductions in returns-to-owner."

Plaintiffs participate in the herring fishery using small-mesh bottom trawl gear. They also participate in the mackerel, butterfish, and squid fisheries. Able to freeze fish at sea, their vessels make longer trips, but also have less processing capacity per day (125,000 pounds of fish per day, they state, which equals approximately 57 metric tons) and higher overhead costs than other herring vessels. Plaintiffs' style of fishing also means that they can choose what to catch at sea, so they often declare into multiple fisheries before leaving the dock in order to catch whatever they encounter on the trip.

Plaintiffs assert that due to their unique fishing style, they are disproportionately burdened by carrying monitors, because they make longer trips (during which they may not even catch herring) and therefore need to pay a monitor for more days at sea. They also claim that they cannot avail themselves of any of the exceptions to having to carry monitors under the Rule because of their style of fishing. In particular, they focus on the exemption for trips taking less than 50 metric tons of herring. While most herring trips only last 2–4 days, the vessels claim, their trips last 10–14 days. So although they may catch less than 50 metric tons of herring every 2–4 days, they might catch far more herring in a single trip, and thus cannot use the exemption that is

available for shorter trips despite having a similar catch per day.

Plaintiffs therefore have a strong incentive to challenge the Rule. They argue that it is not authorized by the MSA, is arbitrary and capricious in violation of the Administrative Procedure Act (APA), violates the National Standards set forth in the MSA, violates the Regulatory Flexibility Act ("RFA"), and violates the Commerce Clause. Defendants (the Agency, along with the Secretary of Commerce, NOAA, and the Administrators of the Agency) disagree on all counts.

The district court granted summary judgment for the Agency. The court found that the MSA is ambiguous regarding authorization for industry-paid monitors, and that under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Agency's interpretation is entitled to deference. It further found that the Rule does not violate any of the National Standards found in the MSA, and also does not violate the RFA because the Agency issued a regulatory flexibility analysis that indicates it considered plaintiffs' concerns, satisfying the statute's procedural requirements.[2] Finally, the court found that the Rule does not violate the Commerce Clause, because it does not force plaintiffs to enter the market for monitors.

II.

---

[2] The district court also found that the Rule did not violate the APA because the comment periods for an amendment and its implementing rule overlapped. Plaintiffs do not challenge this finding on appeal.

We review the district court's grant of summary judgment de novo. Lovgren v. Locke, 701 F.3d 5, 20 (1st Cir. 2012). Judicial review of agency actions under the MSA is governed by the APA. Id.; 16 U.S.C. § 1855(f). We may set aside an agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Lovgren, 701 F.3d at 20 (quoting 5 U.S.C. § 706(2)(A)). Our review is limited to the administrative record. Id.

At issue here, principally, is the interpretation of the MSA. Plaintiffs challenge the Agency's authoritative interpretation of the statute as granting it the power to enact the Rule. In considering such a challenge, we employ "the familiar Chevron two-step analysis." Bais Yaakov of Spring Valley v. ACT, Inc., 12 F.4th 81, 86 (1st Cir. 2021). "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter ...." Id. (quoting Chevron, 467 U.S. at 842, 104 S.Ct. 2778). Second, "[i]f 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." Bais Yaakov, 12 F.4th at 86 (quoting Chevron, 467 U.S. at 843, 104 S.Ct. 2778).

In determining whether a statute has clearly spoken to the question at issue, we "apply the 'ordinary tools of statutory construction.' " Flock v. U.S. Dep't of Transp., 840 F.3d 49, 55 (1st Cir. 2016) (quoting City of Arlington v. FCC, 569 U.S. 290, 296, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013)). Further, "a reviewing court should not confine itself to examining a particular statutory provision in isolation." Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S.

644, 666, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)). Rather, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Id. (quoting Brown & Williamson, 529 U.S. at 132–33, 120 S.Ct. 1291). If, after using these tools, we find that there is still relevant ambiguity, "we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute." Cuozzo Speed Techs. v. Lee, 579 U.S. 261, 277, 136 S.Ct. 2131, 195 L.Ed.2d 423 (2016).

With these principles in mind, we turn to plaintiffs' challenges to the Agency's authority under the MSA to promulgate the Rule. Plaintiffs argue generally that the MSA does not authorize the Rule, and specifically that other provisions of the MSA establishing fee programs make clear that the Agency has no authority to require industry-funded monitoring in this instance. They further argue that the legislative history and definitions in the MSA support their position.

A.

Plaintiffs' primary contention is that the MSA does not authorize industry-funded monitoring and that the Agency therefore exceeded its statutory authority in promulgating the Rule. This argument faces an uphill textual climb. Congress expressly provided that 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." 16 U.S.C. § 1853(b)(8).

But, say plaintiffs, "at-sea monitors" -- as the term is used in the industry-funded monitoring program -- are something entirely different than the "observers" authorized by section 1853(b)(8). We disagree. The statutory definition of "observers" in the MSA is quite broad and includes "any person required or authorized to be carried on a vessel for conservation and management purposes by regulations or permits under this [Act]." 16 U.S.C. § 1802(31). This certainly includes at-sea monitors, who are authorized by regulation to be carried on a vessel to collect data for conservation purposes. 50 C.F.R. § 648.11(m)(1)(i) (requiring at-sea monitors to be carried on Atlantic herring vessels); id. § 648.2 (defining "observer or monitor" as "any person authorized by NMFS to collect ... operational fishing data [or] biological data ... for conservation and management purposes"). The narrow differentiation in the notice promulgating the Final Rule, which at one point notes that at-sea monitors, "in contrast to observers," would not collect whole specimens, 85 Fed. Reg. at 7418, does not mean that at-sea monitors do not form a subset of "observers." Rather, it simply acknowledges that the set of observers is broader than that subset. In short, the MSA explicitly provides for the placement of at-sea monitors on fishing vessels.

Plaintiffs are thus left to argue that Congress somehow conditioned the Agency's right to require monitors on the Agency paying for the cost of the monitors. And this is indeed plaintiffs' most prominently presented argument: Because the statute, they contend, contains no language allowing the Agency to force plaintiffs to pay for those monitors, the Agency lacks the authority to require any such payments (meaning there will be no

monitors on board unless the government pays for the monitors). There are two defects with this argument.

1.

First, the "default norm" as "manifest without express statement in literally hundreds of regulations, is that the government does not reimburse regulated entities for the cost of complying with properly enacted regulations, at least short of a taking. If this statute needs clarification on this point, then so too do hundreds of others." Goethel v. U.S. Dep't of Com., 854 F.3d 106, 117–18 (1st Cir. 2017) (Kayatta, J., concurring). When Congress says that an agency may require a business to do "X," and is silent as to who pays for "X," one expects that the regulated parties will cover the cost of "X."

Plaintiffs insist that the requirement to pay for a monitor does not fall into this default norm because it is not a "traditional regulatory cost" and differs from an ordinary instance of requiring a regulated party to bear its own costs. The daily salary of a monitor, they assert, differs from the cost inflicted by other regulatory requirements, such as those mandating permits or particular fishing equipment, in both type (because it pays for a credentialed individual, rather than a thing or a piece of gear) and degree (because it is larger). Moreover, they argue, the compliance cost the MSA inflicts (and that the Agency should try to reduce per the statute) is represented by the room fishers make available on their vessels to physically host observers -- something far short of paying an at-sea monitor's salary.

To a regulated party, paying the expenses of a credentialed at-sea monitor may well seem different than paying, for example, a vendor who provides

fishing gear mandated by a regulation,[3] or for an EPA-required scrubber or monitoring device on a smoke stack.[4] But plaintiffs offer no authority indicating that these differences are material to the question of who pays. To the extent they also argue that the monitors present a different type of costs because they are "federal officers," we disagree. See infra, Section II.B. We therefore see no reason why the default rule does not apply: When Congress expressly authorized plans promulgated under the MSA to require vessels to carry an observer, it presumed that the vessels' owners would bear the cost of compliance, much like an SEC requirement to submit independently audited financials imposes on the regulated entity the cost of paying an independent accountant. See 15 U.S.C. § 77aa(25)–(27).

---

[3] See 16 U.S.C. § 1853(b)(4) (allowing fishery management plans to "prohibit, limit, condition, or require the use of specified types and quantities of fishing gear"); 50 C.F.R. § 622.188 (requiring certain types of gear in order to possess South Atlantic snapper-grouper).

[4] See 42 U.S.C. § 7412(d)(2) (requiring EPA to promulgate standards "requir[ing] the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section"); 40 C.F.R. § 61.122 (defining emission standard from kilns at elemental phosphorous plants, and noting that compliance will be shown if certain scrubbers are installed and operated); id. § 61.126 (requiring owner or operator of source "using a wet-scrubbing emission control device" to "install, calibrate, maintain, and operate a monitoring device").

Nor are we persuaded that the cost of an at-sea monitor is different than other compliance costs because it may be greater than fees imposed elsewhere in the statute. The vessels decry that they may be subject to costs of up to 20% of returns-to-owner, while in other fishery programs, fees for observers are capped at 2% or 3%. But the fact that costs of complying with one regulatory requirement are greater than the costs of complying with another regulatory requirement does not mean that the former is unlawful.[5] Nor do we have here any costs that are so great as to cause us to think that Congress without so stating did not presume that they would be borne by the regulated entities.

2.

Adding belt to suspenders, the government points out that the statutory support for its position need not rely only on the implication raised by the default norm. Section 1858(g)(1)(D) in the MSA allows the Agency to suspend or revoke the license of any vessel if any "payment required for observer services

---

[5] It is not clear that the plaintiffs will face a 20% reduction in their returns-to-owner. The Final Rule states that the monitoring program "has the potential to reduce annual [returns-to-owner] ... up to 20 percent." But that figure represents an estimate across all types of fishing equipment; the New England Council's Omnibus Amendment shows that for small-mesh bottom trawl vessels, the type of gear Relentless uses, median returns to owner were expected to be reduced only by 5.4%. Applied only to vessels that take more than 50 metric tons of herring per trip, returns to owner could be reduced even less, by a median of 2.5%.

provided to or contracted by the owner or operator [of the vessel] ... has not been paid and is overdue." 16 U.S.C. § 1858(g)(1)(D). This penalty would make no sense if Congress did not anticipate that owners and/or operators of the vessels would be paying the observers.

Plaintiffs concede that Congress expected that some vessels would have to pay for monitors, but they argue that that expectation was limited to payments required in a few specific instances elsewhere in the MSA in which Congress expressly authorized the imposition of monitor costs on vessels (more on these instances later). But the provision penalizing the nonpayment of observers appears in a general part of the MSA applicable to all fisheries and fishery management plans, rather than in the specific provisions creating particular fee programs. If Congress had meant to apply this provision only to certain fee programs, it likely would have included it in the sections creating those programs. Or it would have cross-referenced the specific statutes creating fee programs in the penalty provision. See Silva v. Garland, 27 F.4th 95, 103–04 (1st Cir. 2022) (interpreting statutory language broadly, rather than as limited by other statutes, when potentially limiting statutes were not cross-referenced in the broader statute).

The D.C. Circuit, which recently considered a similar challenge to the very same Rule, relied on just such reasoning in rejecting plaintiffs' position that the penalty provisions apply only to a few statutorily specified fee programs. Loper Bright Enters. v. Raimondo, 45 F.4th 359, 368 (D.C. Cir. 2022) (reasoning that "the penalties in a broadly applicable section of the [MSA] appear to recognize the

possibility of industry-contracted and funded observers beyond [a single] context"). That court sensibly observed that "[i]f Congress had intended for penalties associated with industry-funded monitoring to apply only in 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." Id.

B.

In an effort to rebut the clear textual support for the Agency's lawful authority to require the vessel owners to pay for at-sea monitors, plaintiffs point to other sections of the MSA that expressly authorize the imposition of fees to be paid to the government to cover certain observer costs. Plaintiffs ask us to reason that because Congress expressly authorized the imposition of fees in three instances, its failure to do so in the instance of observer costs under section 1853(b)(8) must mean that no such costs can be imposed on plaintiffs. They also suggest that to read the MSA as authorizing industry-funded monitoring would render those other fee provisions superfluous, a result we usually try to avoid.

The instances to which plaintiffs point in which the MSA expressly provides for payments of a cost by the vessels are as follows: First, section 1853a authorizes and sets requirements for Limited Access Privilege Programs (LAPPs) to be created in certain fisheries. To support a LAPP, a Council may "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." 16 U.S.C. § 1853a(e)(2). Second, section 1862(a) allows the North Pacific

Council to prepare a "fisheries research plan" for any fishery within its jurisdiction except a salmon fishery. Such plans may require that observers be stationed on vessels, and "establish[ ] a system ... of fees." Id. § 1862(a)(1)–(2). Third, section 1827(d) imposes fees "in an amount sufficient to cover all of the costs of providing an observer aboard that vessel" on foreign fishing vessels in certain circumstances which may result in the incidental taking of billfish. Id. § 1827(d). Plaintiffs contend that these are the only instances in which industry vessels may be required to pay for observers.

This argument falters at the threshold because this is not a case in which the agency need rely only on the default presumption that a regulated party presumably bears its own costs. To the contrary, as we have described in Part II.A.2 of this opinion, the statutory text provides affirmative confirmation that Congress presumed that vessel owners would bear the cost of complying with monitoring requirements. So plaintiffs' effort to use these examples to negate reliance on statutory silence is inapt, or at least insufficient. In any event, the three instances to which plaintiffs point do not present apples-to-apples comparators from which one can infer that anything mentioned in those instances but not in the general observer provision was intentionally omitted from the latter.

First and foremost, no money is paid into government coffers under the industry-funded monitoring program. Instead, vessels are required to obtain and pay for a service from a non-governmental source, just as they would have to pay for a certain type of fishing gear. As the Loper Bright court explained, the fact that Congress instituted a

"different funding mechanism" in the North Pacific fishery and for LAPPs, where funds are collected by the Agency and deposited into the Treasury, does not indicate that Congress intended to preclude the entirely different mechanism of industry-funded monitoring. 45 F.4th at 367–68.

Moreover, the North Pacific and LAPP programs are further distinguishable because the fees fund agency programs that include more than direct observer costs. See, e.g., 16 U.S.C. § 1854(d)(2)(A) (allowing fee "to recover the actual costs directly related to the management, data collection, and enforcement of any limited access privilege program," without limiting fee to payment for observers); Fisheries of the Northeastern United States; Amendment 17 to the Atlantic Surfclam and Ocean Quahog Fishery Management Plan, 81 Fed. Reg. 38,969, 38971 (June 15, 2016) (in responding to comment regarding cost recovery program for LAPP, noting that recoverable costs through fee "would include the costs of issuing and renewing ITQ permits, processing cage tag transfers, and tracking cage tag usage"); 16 U.S.C. § 1862(b)(2)(A) (providing that fees not exceed "the combined cost" of stationing observers, "inputting collected data," and assessing the necessity of a risk-sharing pool); Groundfish Fisheries of the Exclusive Economic Zone off Alaska and Pacific Halibut Fisheries; Observer Program, 77 Fed. Reg. 23,326, 23,339 (April 18, 2012) (explaining that in North Pacific fee program which was eventually adopted, "[o]bserver fees would not be linked to the actual level of observer coverage for individual vessels and plants," but rather "each participant" would pay the same percentage regardless of when it carried observers). In the

industry-funded monitoring program at issue here, by contrast, the Agency must pay its own administrative costs and vessels only pay for observers they actually carry. As for the third instance -- fees imposed on foreign vessels for observer costs -- the placement of observers is authorized under a different provision than the one relied on by the Agency, because section 1853(b)(8) authorizes observers only on board "vessel[s] of the United States." But even putting that aside, one can easily see why Congress might opt for a direct fee rather than relying on foreign owners to arrange for observers themselves. With treaties, international agreements, and foreign relations at stake, it makes sense that Congress would have opted for extra specificity.[6]

---

[6] In their reply brief, plaintiffs also point to section 1821(h)(6), which provides that if there are insufficient appropriations to station an observer on each foreign vessel, the Secretary shall "establish a reasonable schedule of fees that certified observers or their agents shall be paid" by foreign fishing vessel operators. 16 U.S.C. § 1821(h)(6). As an initial matter, this argument was raised for the first time on reply, and absent exceptional circumstances we consider it waived. See Gottlieb v. Amica Mut. Ins., 57 F.4th 1, 11 (1st Cir. 2022). Even if we were to consider this argument, we would not find that this provision renders the Agency's interpretation unreasonable. It makes sense that Congress would provide more detail in a sensitive area (foreign relations) where it wanted to ensure observer coverage, rather than leaving such coverage to the discretion of the Agency or a regional Council. Such a provision does not suggest that Congress did not delegate authority to the Agency to

Plaintiffs also contend that the costs under the Final Rule are actually fees paid to the Agency. To build this argument, they claim that privately contracted monitors are government employees or agents. To that end, plaintiffs describe the monitors engaged by private companies as "federal officers." To justify this relabeling, the plaintiffs point to a penalty provision which provides that interfering with an "observer" or "data collector" is prohibited by federal law, 16 U.S.C. § 1857(1)(L), as well as a decision upholding a conviction for sexually harassing an at-sea monitor in violation of this law. See United States v. Cusick, No. 11-cr-10066, 2012 WL 442005, at *6 (D. Mass. Feb. 9, 2012). But, establishing that Congress intended to deter the harassment of monitors falls well short of establishing that Congress intended to turn those monitors into "federal officers." And the MSA expressly distinguishes the provision that prohibits assaulting "any observer" or "data collector," 16 U.S.C. § 1857(1)(L), from a provision prohibiting similar actions against "officer[s]," id. § 1857(1)(D)-(F).

C.

Finally, plaintiffs argue that the legislative history confirms their preferred interpretation of the statute. They note that amendments to the MSA enacted in 1990, which added the fee provisions for observers in the North Pacific, indicated that "nothing in [that] section should be construed as affecting the rights and responsibilities of other Regional Fishery Management Councils." H.R. Rep. No. 101-393, at 31 (1989). We have already explained why the industry-

---

require industry-funded monitoring in other instances. See Loper Bright, 45 F.4th at 367–68.

funded monitoring program at issue here does not impose a fee. And in rejecting plaintiffs' challenge to the observer rule, we do not (nor did the Agency) rely on any contention that anything in that section altered another Council's rights and responsibilities by granting new authority to require plaintiffs to carry observers on board. To the contrary, the Councils already had that authority, as acknowledged in the very legislative history on which plaintiffs rely. See H.R. Rep. No. 101-393, at 28 (1989) (stating that "the Councils already have -- and have used -- such authority" to require that observers be carried on board).[7]

***

In sum, we have no trouble finding that the Agency's interpretation of its authority to require at-sea monitors who are paid for by owners of regulated vessels does not "exceed[ ] the bounds of the permissible." Barnhart v. Walton, 535 U.S. 212, 218, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002). We need not decide whether we classify this conclusion as a product of Chevron step one or step two. Congress expressly authorized NMFS to require vessels to carry monitors. And at the very least, it is certainly reasonable for the Agency to conclude that its exercise of that authority is not contingent on its payment of the costs of compliance.

---

[7] The Agency also points to regulations that implement industry-funded monitoring in other fisheries. See, e.g., 50 C.F.R. § 648.11(k)(4)-(5) (sea scallop vessels required to carry observers must arrange and pay for those observers).

III.

Having found that the MSA authorizes the adoption of a rule requiring vessels to procure at their expense the services of an at-sea monitor, we now consider plaintiffs' other challenges to the Agency's decision process and procedure in adopting the Rule.

A.

Plaintiffs argue that the Rule is arbitrary and capricious because it allows for waivers for trips on which a vessel plans to catch less than 50 metric tons of herring. This exemption benefits mostly small mesh bottom trawlers and single midwater trawlers that make short trips and plan on catches of less than 50 metric tons of herring. Plaintiffs point out that their larger scale operation, having the capacity to freeze and hold more fish, catches around 50 metric tons per day but may harvest many more tons than that on a per-trip basis. Hence, the waiver is practically unavailable to them. The result, they argue, is that plaintiffs would have to pay for an at-sea monitor on a single 14-day trip in which they catch 343 metric tons of herring, but a hypothetical smaller boat catching 49 metric tons on each of seven back-to-back 2-day trips (for a total of the same 343 metric tons) would not have to pay for a monitor at all. Additionally, the flexibility to stay at sea for longer means that plaintiffs declare into multiple fisheries before leaving the dock, which means they may declare that they will catch herring but not actually take any herring. Thus, not only can they not use the exemption, but they may be forced to pay for a herring monitor on a trip where no herring is caught. Plaintiffs argue that these features render the Rule and the exemptions arbitrary and capricious.

"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." Sorreda Transp., LLC v. DOT, 980 F.3d 1, 3 (1st Cir. 2020) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). Under this deferential standard, "[a]n agency rule is arbitrary and capricious if the agency lacks a rational basis for adopting it -- for example, if the agency relied on improper factors, failed to consider pertinent aspects of the problem, offered a rationale contradicting the evidence before it, or reached a conclusion so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise." Associated Fisheries of Me., Inc. v. Daley, 127 F.3d 104, 109 (1st Cir. 1997).

Here, the Agency expressly considered plaintiffs' objections and rejected them. It stated:

> In an effort to minimize the economic impact of industry-funded monitoring, the Council explicitly considered measures to address Seafreeze's concern about disproportional impacts on its vessels, including considering alternatives for coverage waivers for trips when landings would be less than 20-percent herring or less than 50 mt of herring per day. Ultimately, the Council determined that the potential for a relatively high herring catches per trip aboard those vessels warranted additional monitoring and chose the 50 mt per trip threshold.

85 Fed. Reg. at 7426. The Agency also found it highly unlikely that plaintiffs would be paying as much as they claimed for trips that did not take herring, based on cost estimates contained in the Environmental Assessment. Id. So plaintiffs cannot argue that the Agency failed to consider their objections.[8] Nor do they develop any contention that the explanation given by the agency relied on any factors prohibited by Congress or ran counter to the available evidence.

And the rationale given by the Agency -- "that the potential for a relatively high herring catches per trip aboard those vessels warranted additional monitoring" -- does not strike us as "so implausible that it cannot be attributed to a difference in view or the applicable agency expertise." Associated Fisheries of Me., 127 F.3d at 109. To the contrary, determinations as to whether monitoring will be more effective on a per-trip basis or per-day basis seem squarely within the expertise of the Agency. Although we agree that the Agency could have provided a more thorough explanation than it did, we do not find the per-trip waiver to be arbitrary and capricious on its face. Certainly, one can see why monitoring per trip rather than per day may be easier to administer, and why plaintiffs' uncertainty about how much herring they will decide to catch might counsel for including a monitor rather than not. See id. at 111 ("Whether or not we, if writing on a pristine page, would have reached the same set of conclusions is not the issue. What matters is that the administrative judgment, right or wrong, derives from the record, possesses a rational basis, and evinces no mistake of law.")

---

[8] Plaintiffs presented no evidence that their hypothetical scenarios actually occur.

B.

Plaintiffs further contend that the Rule violates several National Standards contained in the MSA. All fishery management plans must be consistent with ten National Standards, which "are broadly worded statements of the MSA's objectives for all fishery conservation and management measures." Lovgren, 701 F.3d at 32. "The purposes of the national standards are many, and can be in tension with one another." Id. As such, "we will uphold a regulation against a claim of inconsistency with a 'national standard' under § 1851 if the [Agency] had a 'rational basis' for it." Id. (quoting Or. Trollers Ass'n v. Gutierrez, 452 F.3d 1104, 1119 (9th Cir. 2006)).

First, plaintiffs allege that the Rule violates National Standard One (which requires plans to "prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery," 16 U.S.C. § 1851(a)(1)) because it disproportionately burdens them although they take less bycatch and herring than other types of trawlers, and because it allows boats taking more herring to harvest without monitors. The government counters that the purpose of the industry-funded monitoring requirement -- more accurately tracking catch -- will allow better calibration of regulation, and thus furthers the goals of National Standard One. We agree that the rule implementing industry-funded monitoring is consistent with the Standard for this reason. The district court also pointed out that plaintiffs' argument here relates to the distribution of herring catch between vessels, not the optimum yield for the fishery as a whole. This mismatch between plaintiffs' complaint and the actual subject of the Standard

further renders their challenge under National Standard One unavailing.

Second, plaintiffs allege that the Rule violates National Standard Two, which requires that plans "be based upon the best scientific information available," 16 U.S.C. § 1851(a)(2), because it burdens them without "scientific evidence of clear increase in Atlantic herring stocks" as a result of the Rule. But they do not actually allege that the Agency ignored specific scientific data or point to better data available. "If no one proposed anything better, then what is available is the best." Massachusetts ex rel. Div. of Marine Fisheries v. Daley, 170 F.3d 23, 30 (1st Cir. 1999). National Standard Two does not require the Agency to wait to regulate because it does not have certain data. See 50 C.F.R. § 600.315(e)(2) ("The fact that scientific information concerning a fishery is incomplete does not prevent the preparation or implementation of an FMP."). Nor does it prohibit an agency from regulating in the face of some uncertainty about the effects of its chosen rule. See Coastal Conservation Ass'n v. U.S. Dep't of Com., 846 F.3d 99, 109 (5th Cir. 2017) (explaining that where economic impacts of rule were uncertain because they depended on the choices of several parties, "[t]he National Standards [did] not require analysis of unpredictable, and thus unavailable, data"). Where, as here, plaintiffs point to no data they say should have been considered or relied upon -- and where the very purpose of the Rule is to gather better data to be used in future fishery management -- we find that the regulation complies with National Standard Two. See Massachusetts ex rel. Div. of Marine Fisheries, 170 F.3d at 30; see also Coastal Conservation Ass'n, 846 F.3d at 109 (finding that National Standard Two was

not violated where no one pointed to data that Secretary had ignored, and citing cases doing the same).

The Rule also does not violate National Standard Six (which requires the Agency to account for "variations among, and contingencies in, fisheries, fishery resources, and catches," 16 U.S.C. § 1851(a)(6)). The regulations implementing this National Standard focus on maintaining flexibility to adjust to uncertainty or changed circumstances. 50 C.F.R. § 600.335; see J.H. Miles & Co. v. Brown, 910 F. Supp. 1138, 1155 (E.D. Va. 1995) ("National Standard Six, on its face, dictates flexibility on the part of fishery managers. It suggests that the Secretary and his designees must be prepared to address uncertainties or changes that might arise."). Plaintiffs' challenge has nothing to do with flexibility to adjust to changing circumstances, but rather protests that the Rule does not adequately take their unique style of fishing or community into account. As with their challenge based on National Standard One, this mismatch between what the Standard requires and the nature of Plaintiffs' challenge renders their complaints unavailing. We do not see anything in the National Standard that requires the Agency to change its regulations to eliminate all differential impacts on all of the varied types of vessels. See Ace Lobster Co. v. Evans, 165 F. Supp. 2d 148, 182 (D.R.I. 2001) ("There is no requirement in national standard 6 or anywhere else in the statute that defendant finely attune its regulations to each and every fishing vessel in the offshore fishery.").

Finally, the Rule does not violate National Standards Seven and Eight, which require the Agency to consider fishery resources and cost

burdens. See 16 U.S.C. § 1851(a)(7) (plans "shall, where practicable, minimize costs and avoid unnecessary duplication"); id. § 1851(a)(8) (plans shall "utiliz[e] economic and social data ... to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities"). Plaintiffs argue that the Rule violates these standards because their boats bear heavier regulatory burdens than other boats. As a result, they claim, National Standard Seven "has been completely ignored," and National Standard Eight "has been violated in the same way" because "Appellants are not more damaging" to the fishery, but their community bears the brunt of severe impacts.

Our precedent suggests that "the required analysis of alternatives and impacts [under National Standard 8] is subject to a rule of reason, for study could go on forever." Little Bay Lobster Co. v. Evans, 352 F.3d 462, 470 (1st Cir. 2003). "About the best a court can do is ask whether the [Agency] has examined the impacts of, and alternatives to, the plan [it] ultimately adopts and whether a challenged failure to carry the analysis further is clearly unreasonable, taking account of the usual considerations ...." Id. Moreover, we are mindful that "the plain language of [National Standard] 8 and its advisory guidelines make clear that these obligations are subordinate to the MSA's overarching conservation goals." Lovgren, 701 F.3d at 35.

Here, the Agency has done what is required under National Standards Seven and Eight. The National Standards require consideration, not adoption, of alternatives; they also require the Agency to minimize costs "where practicable," not to eliminate

cost burdens entirely. The Agency considered various coverage targets to meet its goal of gathering additional data, balanced those targets with costs, and selected a 50% monitoring target. Similarly, it adopted a waiver for boats taking less than 50 metric tons of herring per trip, after considering and rejecting Relentless' proposed alternative waiver. 85 Fed. Reg. at 7425–26. The New England Council's Omnibus Amendment also considered in detail the economic impacts to industry participants using various gear types. The Agency explained how exemptions for vessels catching below a certain weight threshold per trip would minimize cost impacts. 85 Fed. Reg. at 7430. Nothing in our prior opinions suggests that the National Standards require that cost and community impacts, even those disproportionately borne by some regulated parties, must be eliminated or distributed exactly evenly under National Standards Seven and Eight among those who employ different methods of fishing.

Plaintiffs' challenges under each of the National Standards boil down to arguments that the Rule burdens them more heavily than it burdens others without a clear enough justification, or without adopting an alternative they suggested. But they have not proffered the types of evidence or argument under which courts have found that agency actions violate the National Standards. For example, they do not argue that the differential treatment of different fishers under the Rule was based not on scientific data, but on political compromise. See Hadaja, Inc. v. Evans, 263 F. Supp. 2d 346, 354 (D.R.I. 2003); Hall v. Evans, 165 F. Supp. 2d 114, 136 (D.R.I. 2001). They also cannot show that no reason was given either for the Rule itself or for the scope of the exceptions. See

Massachusetts ex rel. Div. of Marine Fisheries, 170 F.3d at 31–32; Hall, 165 F. Supp. 2d at 137–38. The Agency gave reasons for adopting the Rule and the waivers; the fact that those reasons were unsatisfactory to these plaintiffs does not mean that the Rule violates the National Standards.

This is not to say that the Rule, or the Agency's explanation for it, is a model of clarity. Plaintiffs point out several features of the Rule (for example, the hypothetical ability of a boat to take more overall herring with no monitoring under the structure of the exemptions) that might cause one to wonder if the Agency could have tailored the rule more precisely or chosen a different alternative. But adoption of the Rule, and consideration of alternatives, was the Agency's prerogative; it met its obligations to respond to comments and explain the reason for the Rule's adoption and structure. Plaintiffs' criticisms that the Rule does not account for peculiarities of their specific businesses under all hypothetical scenarios do not convince us that the Rule violates the National Standards.

C.

Plaintiffs also contend that the Rule violates the RFA, which requires agencies to consider the effects of their actions on small businesses. Associated Fisheries of Me., 127 F.3d at 110, 116. Agencies must publish interim and final regulatory flexibility analyses in the Federal Register along with Notices of Proposed Rulemaking, and make them available for comment in the same way. 5 U.S.C. §§ 603–04. These analyses are reviewable under the APA in a similar manner to final agency actions. Id. § 611.

Here, the Final Rule states that the Agency considered the impact of the Rule on small

businesses, and, to address that impact, set the monitoring target at 50% of trips (rather than 75% or 100%) and allowed waivers on certain types of trips. 85 Fed. Reg. at 7429–30. Plaintiffs argue that the Agency nonetheless violated the RFA because it did not consider the effect of its actions on, or include recommendations to assist, businesses that freeze catch at sea like themselves. They also argue that the Agency did not adequately respond to comments in response to the RFA, did not consider data regarding a drop in fishermen, and did not make a plan to ensure monitors are allocated fairly across the fleet.

The RFA "does not alter the substantive mission of the agencies" but creates "procedural obligations." Little Bay Lobster, 352 F.3d at 470–71. The Agency met those here. The Agency explained potential impacts on small businesses and accordingly described how it mitigated those impacts, largely by setting the monitoring coverage target at 50% and by setting a weight threshold for monitored trips that would exempt many small businesses from the requirement to carry a monitor. 85 Fed. Reg. at 7429–30. The Agency also explained why it disagreed that small businesses would be forced out of fishing. Finally, as discussed above, it explained why it did not adopt alternative measures that Relentless suggested. 75 Fed. Reg. at 7426. Plaintiffs' suggestion that the Agency could have done more to respond to their specific concerns is not without some appeal. But the RFA only required the Agency to consider and respond to comments and to evaluate the impact of its action on small businesses. It did so here. See Little Bay Lobster, 352 F.3d at 471 (noting that "there is no requirement as to the amount of detail with which specific comments need to be discussed," and that

"[t]he agency's obligation is simply to make a reasonable good faith effort to address comments and alternatives.")

D.

Finally, plaintiffs claim that, by forcing them "to participate in the market" for at-sea monitors, the Rule is an unconstitutional exercise of Congress's commerce power under the Supreme Court's decision in NFIB v. Sebelius, 567 U.S. 519, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012). That case, plaintiffs argue, held that Congress cannot force individuals to become active in a market in which they do not already participate. They argue that because Congress has forced them to become unwilling participants in the market for at-sea monitors, the Rule is unconstitutional since it is beyond the power of the Commerce Clause.

We reject this contention. Plaintiffs harvest a national resource for economic gain. But no one is forcing plaintiffs to participate in any market. Rather, they choose to engage in an activity that has long been subject to regulation. In so doing, they can hardly complain about complying with the otherwise lawful regulations that govern the manner in which they engage in that activity merely because compliance requires some payment to another person, whether a seller of nets or life preservers, or a seller of monitoring services.[9]

---

[9] To the extent plaintiffs challenge the Rule as violating constitutional controls on taxing, appropriations, and spending, U.S. Const. art. I, §§ 1, 7, 8, those challenges are referenced only in passing, are undeveloped, and are therefore waived. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir.

IV.

For the foregoing reasons, we hold that the rule requiring plaintiffs to bear the costs of complying with on-board monitor regulation is authorized by Congress and is otherwise immune to plaintiffs' assorted procedural and substantive challenges. We therefore affirm the judgment of the district court.

1990). Similarly, any potential Fourth Amendment argument was not raised in the briefing on appeal, and is therefore waived.

Appendix B

United States District Court
for the District of Rhode Island

RELENTLESS INC., et al., Plaintiffs,
v.
U.S. DEPARTMENT OF COMMERCE, et al.,
Defendant.

C.A. No. 20-108 WES

OPINION AND ORDER

WILLIAM E. SMITH, District Judge.

A recently promulgated regulation requires commercial herring fishing vessels in New England to pay the daily salaries of at-sea monitors. Plaintiffs argue, inter alia, that the Magnuson-Stevens Act does not permit industry-funded monitoring; the regulation's outsized impact on certain classes of fishing vessels violates the National Standards set forth in the Magnuson-Stevens Act; the process by which the agency adopted the regulation violated the Regulatory Flexibility Act; and the regulation violates the Commerce Clause by forcing fishing vessels to pay for third-party monitors. For the reasons that follow, Plaintiffs' Motion for Summary Judgment, ECF No.

37, is DENIED, and Defendants' Cross-Motion for Summary Judgment, ECF No. 38, is GRANTED.[10]

I. BACKGROUND

A. Magnuson-Stevens Act

In "[r]espon[se] to depletion of the nation's fish stocks due to overfishing[,]" Congress passed the 1976 Magnuson–Stevens Fishery Conservation and Management Act ("MSA" or "Act"), 16 U.S.C. §§ 1801–1884. Goethel v. U.S. Dept. of Com., 854 F.3d 106, 108–09 (1st Cir. 2017) (quoting Associated Fisheries of Me., Inc. v. Daley, 127 F.3d 104, 107 (1st Cir. 1997)). Through the MSA, Congress sought to "take immediate action to conserve and manage the fishery resources found off the coasts of the United States" and "to promote domestic commercial and recreational fishing under sound conservation and management principles." 16 U.S.C. § 1801(b)(1), (3).

The MSA's primary mechanism is the promulgation and enforcement of "fishery management plans," each of which regulates a fishery (defined as "one or more stocks of fish which can be treated as a unit for purposes of conservation and management") in a given region. Id. § 1802(13)(A); see also id. § 1853. A fishery management plan, which is

---

[10] The Court substitutes the Secretary of Commerce, Gina M. Raimondo, for Wilbur L. Ross; Richard Spinrad, NOAA Administrator, for Neil Jacobs; and Janet Coit, Assistant Administrator for NOAA Fisheries, for Chris Oliver. See Fed. R. Civ. P. 25(d).

usually developed by the region's fishery management council, must specify the "conservation and management measures" that are "necessary and appropriate" 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). Similarly, a plan 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." Id. § 1853(b)(14). In addition to the plan itself, the council must develop regulations that would be "necessary or appropriate" to implement the plan. Id. § 1853(c).

The Secretary is tasked with reviewing the plan for consistency with applicable law and publishing it for a sixty-day period of notice and comment. Id. § 1854(a)(1). After considering all comments, "[t]he Secretary shall approve, disapprove, or partially approve [the] plan." Id. § 1854(a)(3). The implementing regulations must, too, be promulgated through notice and comment, with a publication period of fifteen to sixty days. Id. § 1854(b). The Secretary has delegated these responsibilities to the National Oceanic and Atmospheric Administration, the parent agency of the National Marine Fisheries Service ("NMFS"). See Goethel, 854 F.3d at 109 n.1. The adoption of a plan and its implementing rules are subject to judicial review. See id. § 1855(f).

B. Industry-Funded Monitoring Omnibus Amendment

The current herring fishery management plan was implemented by the New England Fishery

Management Council ("Council") in 2000. AR17104.[11] Among other provisions, the plan includes an annual catch limit and various restrictions on when and where herring may be caught. See 50 C.F.R. § 648.200. Since 2007, the fishery has been subject to the Standardized Bycatch Reporting Methodology ("SBRM") program, through which bycatch is monitored by on-board, government-funded observers. See AR17293. The frequency of SBRM coverage varies based on available funding. See MSA Provisions; Fisheries of the Northeastern U.S.; Industry-Funded Monitoring Omnibus Amendment ("Final Rule"), 85 Fed. Reg. 7425 (Feb. 7, 2020) (to be codified at 50 C.F.R. pt. 648) (AR17742).

In 2017, the Council adopted the Industry-Funded Monitoring Omnibus Amendment ("Omnibus Amendment"), later approved by the National Marine Fisheries Service ("NMFS"), which provided for onboard human monitoring to be funded by the herring industry. See Final Rule, 85 Fed. Reg. at 7414-19 (AR17731-36). NMFS pays for administrative costs - such as training and certification of monitors, data processing, and liaison activities with various partners - while the herring industry is required to fund the travel expenses and daily salaries of the monitors. Id. at 7415-16 (AR17732-33). Through data collected by the monitors regarding retained and discarded catch, the program is intended to increase the accuracy of catch estimates for herring and incidental catch species. Id.

---

[11] The Court cites the Administrative Record, ECF Nos. 21-30, 34, using the Bates numbering system utilized by the parties.

at 7417-18 (AR17734-35). The program has a coverage target – including both SBRM and industry-funded monitoring – of fifty percent. Id. at 7417 (AR17734). The two types of monitoring do not co-occur on any one trip. Id. Therefore, industry-funded monitoring only applies to the delta between the percentage of trips with SBRM monitoring (which varies based on available funding) and the fifty-percent target.

For each trip in which a vessel declares that it will catch herring, NMFS informs the vessel operator whether an at-sea monitor is required. However, the monitoring requirement will be waived if (1) an at-sea monitor is not available, (2) the vessel has midwater trawl gear and intends to operate as a wing vessel (meaning that it will not carry any fish), or (3) the vessel intends to land less than fifty metric tons of herring during the trip. Id. at 7418 (AR17735). Midwater trawl vessels - as opposed to bottom trawlers like Plaintiffs, see Lapp Decl. ¶ 4, ECF No. 37-4 – can avoid the at-sea monitoring requirement by using electronic monitoring devices in combination with portside sampling protocols. Id. at 7419-420 (AR17736-37). NMFS estimates that the cost of an at-sea monitor is $710 per day. Id. at 7420 (AR17735).

NMFS published the proposed amendment on September 19, 2018, and the sixty-day comment period ended on November 19, 2018. Id. at 7414 (AR17731) (citing 83 Fed. Reg. 47,326). NMFS received seven comment letters criticizing the proposal, but nevertheless approved the Omnibus Amendment on December 18, 2018. Id. at 7424 (AR17741). In a process that partially overlapped the Omnibus Amendment approval process, NMFS published the proposed rule implementing the

amendment on November 7, 2018, with a forty-seven-day comment period ending on December 24, 2018. Id. at 7414 (AR17731) (citing 83 Fed. Reg. 55,665). Again, notwithstanding twenty comment letters, NMFS adopted and promulgated the rule ("Final Rule"). Id. at 7414, 7422 (AR17731, 17739).

C. Plaintiffs' Regulatory Challenge

Plaintiffs are the operators of two fishing vessels that catch herring and other species. See Letter from Seafreeze to Herring/Observer Committee, June 30, 2015, AR17801. Unlike other fishing vessels, Plaintiffs freeze their catch on-board. Id. Therefore, Plaintiffs' trips are longer, and they have greater flexibility to choose what to harvest during each trip. Id. Seafreeze Ltd., a sister company of Plaintiff Seafreeze Fleet LLC, submitted comments during the regulatory approval process, raising arguments similar to those advanced by Plaintiffs here. See Final Rule, 85 Fed. Reg. at 7422-26 (AR17739-743).

II. LEGAL STANDARD

Challenges to fishery management plans are reviewed pursuant to the Administrative Procedure Act ("APA"). See 16 U.S.C. § 1855(f)(1)(B). "[A] motion for summary judgment is simply a vehicle to tee up a case for judicial review ...." Bos. Redevelopment Auth. v. Nat'l Park Serv., 838 F.3d 42, 47 (1st Cir. 2016) (citing Mass. Dep't of Pub. Welfare v. Sec'y of Agric., 984 F.2d 514, 526 (1st Cir. 1993)). "Because the APA standard affords great deference to agency decisionmaking and because the Secretary's action is presumed valid, judicial review, even at the summary

judgment stage, is narrow." Associated Fisheries of Me., 127 F.3d at 109 (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415–16, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)). The Court will set aside the regulation only if it is " 'arbitrary, capricious, an abuse of discretion,' or 'without observance of procedure required by law,' or otherwise contrary to law." Campanale & Sons, Inc. v. Evans, 311 F.3d 109, 116 (1st Cir. 2002) (quoting 5 U.S.C. § 706(2)(A)-(D)). The Court defers to the agency's factfinding "unless 'the record evidence would compel a reasonable factfinder to make a contrary determination.' " Guzman v. INS, 327 F.3d 11, 15 (1st Cir. 2003) (quoting Aguilar–Solis v. INS, 168 F.3d 565, 569 (1st Cir. 1999)).

III. DISCUSSION

According to Plaintiffs, the Secretary [12] has, "without Congressional authorization, 'erected' a 'new office[ ] and sent hither swarms of officers to harass' Plaintiffs 'and eat out their substance.' " Mem. Supp. Pls.' Mot. Summ. J. ("Pls.' Mot.") 1, ECF No. 37-1 (quoting The Declaration of Independence para. 12 (U.S. 1776)). More specifically, Plaintiffs claim that the Omnibus Amendment and the Final Rule violate the MSA, the APA, the Regulatory Flexibility Act, and the Commerce Clause.

A. Statutory Interpretation of the MSA

[12] The Court refers to Defendants collectively as the "Secretary."

Plaintiffs first argue that the MSA does not allow industry-funded monitoring in these circumstances. The First Circuit has framed judicial review of an agency's statutory interpretation as a three-step process:

> First, we assess the statutory text to determine whether Congress has directly spoken to the precise question at issue. If so, courts, as well as the agency, must give effect to the unambiguously expressed intent of Congress. Second, if Congress's intent is uncertain, we decide whether and to what extent the agency's interpretation is entitled to deference. Finally, we evaluate the agency's interpretation under the governing standard to determine whether it exceeds the bounds of the permissible.

Lovgren v. Locke, 701 F.3d 5, 21 (1st Cir. 2012) (citations and quotations omitted). As explained below, the Court concludes that Congress has not spoken unambiguously on the subject, and that the Secretary's interpretation satisfies Chevron's deferential review. See Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

i. Whether Congress Has Directly Spoken

The Secretary argues that the following statutory provisions of the MSA, when construed in a harmonious fashion, demonstrate that Congress has

unambiguously provided for industry-funded monitoring under these circumstances. See Mem. of Law in Supp. of Defs.' Cross-Motion for Summ. J. and in Opp'n to Pls.' Mot. For Summ. J. 11-12, ECF No. 38-1.

First, 16 U.S.C. § 1853(b)(8) states that a fishery management plan 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." Therefore, the Secretary is indisputably allowed to require the presence of monitors. (Plaintiffs' challenge is directed only at program's funding mechanism. See Pls.' Mot. 26; Pls.' Mem. in Resp. to Defs.' Cross-Mot. for Summ. J. and Reply to Opp'n to Pls.' Mot. For Summ. J. ("Pls.' Resp.") 4, ECF No. 40.)

The Secretary's next interpretive hook is 16 U.S.C. § 1853(a), which requires each fishery management plan to include the "conservation and management measures" that are "necessary and appropriate" 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), (2); see also id. § 1853(c) (requiring a fishery management plan to be accompanied by proposed regulations that are "necessary or appropriate" to implement the plan). The Secretary contends that, to ensure the accuracy of catch estimates and the integrity of annual catch limits in the New England herring fishery, it is necessary and appropriate to place the financial burden of monitoring on industry.

Finally, 16 U.S.C. § 1858(g)(1)(D) allows the Secretary to sanction any vessel owner who has not made "any payment required for observer services provided to or contracted by an owner or operator." Plaintiffs theorize that this provision applies only to those limited fisheries in which Congress has explicitly provided for observer fees. See Pls.' Resp. 4. However, this argument elides the fact that sanctions may be issued for failure to pay for services "contracted by an owner or operator." 16 U.S.C. § 1858(g)(1)(D) (emphasis added). In the three provisions that explicitly allow the Secretary to charge fees for monitoring, there are no contracts between vessel owners and observers. Rather, the vessel owners pay the fees to NMFS, which hires observers and assigns them to fishing trips. Thus, as explained in the only two cases to address this issue, the statute's mention of contracts "would be unnecessary if the MSA prohibited the very type of industry funding at issue in this case." Loper Bright Enters. v. Raimondo, CV 20-466 (EGS), 2021 WL 2440511, at *11 (D.D.C. June 15, 2021) (quoting Goethel v. Pritzker, 15-CV-497-JL, 2016 WL 4076831, at *5 (D.N.H. July 29, 2016), aff'd on other grounds sub nom. Goethel v. U.S. Dept. of Com., 854 F.3d 106 (1st Cir. 2017)).[13] However, the words "or contracted

[13] The district court in Goethel ruled that the claims were both time-barred and lacked merit. Goethel v. Pritzker, 15-CV-497-JL, 2016 WL 4076831, at *1 (D.N.H. July 29, 2016). The First Circuit upheld that decision based on the statute of limitations, without reaching the merits of the

by" are fleeting and unspecific, so it goes too far to say that Congress has directly spoken in the Secretary's favor.

Conversely, Plaintiffs contend that Congress has spoken directly in their favor. As they point out, there are statutes that expressly authorize the Secretary to collect fees to fund observer programs, and none of them apply here. Plaintiffs therefore contend that approbation of this regulation would render the three statutes superfluous because, whether or not Congress provided for the collection of observer costs, the Secretary could charge such costs to fishing vessels. See Pls.' Mot. 23-29.

Three such statutes exist. First, the agency must "collect a fee to recover the actual costs directly related to the management, data collection, and enforcement of any ... limited access privilege program."[14] 16 U.S.C. § 1854(d)(2)(A). These fees, which "shall not exceed 3 percent" of the value of the catch, are deposited into a fund earmarked for the administration and implementation of the program. Id. §§ 1854(d)(2)(B-C), 1855(h)(5)(B). Second, the North Pacific Council may establish fishery research plans that require observers to "be stationed on fishing vessels" and that "establish[ ] a system ... of fees ... to pay for the cost of implementing the plan."

---

claims. Goethel v. U.S. Dept. of Com., 854 F.3d 106, 108 (1st Cir. 2017).

[14] These programs are complicated regulatory mechanisms through which fishing vessels can receive exclusive rights to harvest portions of a fishery's annual catch limit. See 16 U.S.C. § 1802(23), (26), (27); see generally id. § 1853a.

16 U.S.C. § 1862. Third, the Secretary may station observers on certain foreign fishing vessels and require the vessels to make payments into the Foreign Fishing Observing Fund, which is used to maintain the program. Id. § 1827(b), (d), (e).

But, because those statutes involve "fee-based program[s,]" they are distinguishable "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." Loper, 2021 WL 2440511, at *12. This distinction matters. Absent a statutory mandate to the contrary, the Miscellaneous Receipts Statute requires that fees be deposited in the Treasury without being earmarked for NMFS activities. See 31 U.S.C. § 3302(b). Therefore, were NMFS to collect the fees here, it could not keep the money. The above-mentioned statutory programs, on the other hand, allow NMFS to keep the money, using it to pay for any or all aspects of the observer program, including NMFS's administrative costs. See 16 U.S.C. §§ 1827(e), 1853a(d)(2), 1855(h)(5)(B), 1862(d). Instead of collecting fees, the instant program requires fishing vessels to pay third-party monitors directly. Because the payments never enter NMFS's pockets, the Miscellaneous Receipts Statute is not violated. Importantly, though, this framework is less advantageous than the statutory programs, as NMFS must bear all of its internal costs of administering the program.

Accordingly, there is a meaningful difference between the monitoring program created by the Omnibus Amendment and the statutory observer programs. The Secretary's interpretation of the MSA does not render the other three statutory provisions

superfluous. See Loper, 2021 WL 2440511, at *12 (holding the same). With statutory currents flowing in all directions, the Court concludes that Congress's intent regarding industry-funded monitoring is ambiguous, and the inquiry cannot end at step one.[15]

ii. Level of Deference

The next question is "whether and to what extent the agency's interpretation is entitled to deference." Lovgren, 701 F.3d at 21. An agency's statutory interpretation warrants Chevron deference "when it

---

[15] Pointing to Anglers Conservation Network v. Pritzker, 139 F. Supp. 3d 102 (D.D.C. 2015), Plaintiffs argue that the Secretary has already anchored herself to the position that industry-funded monitoring is prohibited under the MSA. See Pls.' Mot. 33-34. In Anglers, the Mid–Atlantic Fisheries Management Council had proposed a plan in which an observer would be stationed on every small mesh bottom trawl mackerel trip. NMFS rejected the proposal, and an environmental group sued, seeking to reverse NMFS's decision. The Secretary argued that the plan would have required NMFS "to augment its budget by accepting fees from the fishing industry[,]" thus violating the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). Anglers, 139 F. Supp. 3d at 116. That argument is entirely consistent with the Secretary's position in the current litigation: that the herring monitoring program cannot be funded through fees paid to NMFS, but that it can operate by requiring industry to pay third-party monitors directly. Thus, Anglers does not help Plaintiffs' cause.

appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." United States v. Mead Corp., 533 U.S. 218, 226–27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001); see also Chevron, 467 U.S. at 842-43, 104 S.Ct. 2778. In other words, Chevron applies where Congress gave the agency the "power to engage in adjudication or notice-and-comment rulemaking." Mead, 533 U.S. at 227, 121 S.Ct. 2164. Conversely, where an agency's interpretation does not have the force of law – such as in an opinion letter – the weaker Skidmore deference usually governs. See Christensen v. Harris County, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (citing Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)).

Here, Congress delegated authority to make rules implementing the MSA to the Secretary, who in turn assigned that power to the National Oceanic and Atmospheric Administration and NMFS. See Goethel, 854 F.3d at 109 n.1. These rules "have the full force and effect of law." Hadaja, Inc. v. Evans, 263 F. Supp. 2d 346, 349 (D.R.I. 2003) (citing 16 U.S.C. §§ 1854, 1855). Therefore, Chevron deference applies.

iii. Reasonableness under Chevron

Under Chevron, the Court must "accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers." Michigan v. EPA, 576 U.S. 743, 751, 135 S.Ct. 2699, 192 L.Ed.2d 674 (2015) (citing Chevron, 467 U.S. at 842-43, 104 S.Ct. 2778). In other words, an interpretation will be upheld if it "represents a reasonable accommodation

of conflicting policies that were committed to the agency's care." Chevron, 467 U.S. at 845, 104 S.Ct. 2778.[16]

Plaintiffs argue that the Secretary's interpretation is unreasonable because it confers on the agency a power not provided by Congress. See Pls.' Mot. 26-27. Specifically, Plaintiffs point to the casus omissus doctrine, which states that "nothing is to be

---

[16] Plaintiffs assert that "Chevron's view of agency deference has ... been curtailed [since Goethel, 2016 WL 4076831], at least through implication, by Kisor v. Willkie, —— U.S. ——, 139 S. Ct. 2400, 204 L.Ed.2d 841 (2019)." Pls.' Mot. 25. But Kisor, which dealt solely with deference to agency interpretations of regulations, has little to say about agency interpretation of statutes. See 139 S. Ct. at 2408. To the extent Plaintiffs assert that Kisor altered Chevron by indicating that Chevron deference is not merely a rubber stamp, that proposition has long been clear. See, e.g., Util. Air Reg. Group v. EPA, 573 U.S. 302, 321, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014) (holding agency's interpretation to be unreasonable, despite Chevron deference); Michigan v. EPA, 576 U.S. 743, 751, 135 S.Ct. 2699, 192 L.Ed.2d 674 (2015) (holding agency's interpretation to be unreasonable under Chevron deference, without step-one analysis); AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 397, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) (same). In a throwaway line, Plaintiffs also state that Chevron "is inconsistent with the Due Process Clause of the Fifth Amendment and judicial independence and should be abandoned." Pls.' Resp. 18. Of course, though, Chevron is binding precedent that cannot be ignored by district courts, including this one.

added to what the text states or reasonably implies." Gorss Motels, Inc. v. Safemark Systems, LP, 931 F.3d 1094, 1102 (11th Cir. 2019) (quoting Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts § 8, at 93 (2012)). As Plaintiffs emphasize, 16 U.S.C. § 1853(b)(8) - which states that the Secretary can force fishing vessels to allow monitors on their boats - does not mention an industry-funding model (or any funding mechanism at all). Indeed, if § 1853(b)(8) were the sole statute relied upon by the Secretary, the casus omissus doctrine might be more helpful. But instead, the Secretary relies on provisions that empower the Secretary to take a wide range of actions to effectuate the goals of the MSA.

To start, Congress has tasked the Secretary with ensuring that the maximum number of fish can be caught, while simultaneously preventing overfishing. 16 U.S.C. § 1851(a)(1). The most valuable tool for accomplishing these goals is the imposition of annual catch limits. See 50 C.F.R. § 600.310(b)(1)(iii). Of course, the Secretary's ability to accurately track annual catches is crucial to her efforts to enforce those limits. To this end, Congress recognized that human observers could play an important role in improving the accuracy and reliability of NMFS's tracking, as shown by the express authorization of observer requirements in fishery management plans. See 16 U.S.C. § 1853(b)(8). As for the funding of these observers, the statutory clues provide some support for the idea that the Secretary can impose costs on industry. See id. § 1858(g) (1) (D) (allowing imposition of sanctions for failure to pay for "observer services provided to or contracted by an owner or operator"). Moreover, Congress gave the Secretary the power to take any measures that are "necessary and

appropriate" to achieve the MSA's conservation goals. Id. §§ 1853(a)(1)(A). Given the integral nature of catch estimates to the MSA's goals, along with the agency's financial incapacity to fully fund a monitoring program, it was reasonable for the Secretary to conclude that industry-funded monitoring is permitted under the MSA. See Final Rule, 85 Fed. Reg. at 7414 (AR17731) ("This amendment remedies NMFS disapprovals of previous Council proposals for industry-funded monitoring that either required NMFS to spend money that was not yet appropriated or split monitoring costs between the fishing industry and NMFS in ways that were inconsistent with Federal law.").

The legislative history reinforces this conclusion. Prior to the passage of § 1853(b)(8), which statutorily authorized at-sea monitoring, the Secretary had operated a North Pacific monitoring program in which vessel operators directly paid third-party monitors. See Loper, 2021 WL 2440511, at *13 (citing Groundfish of the Gulf of Alaska, Groundfish Fishery of the Bering Sea & Aleutian Islands Area, 55 Fed. Reg. 4839-02, 4840 (Feb. 12, 1990)). By enacting § 1853(b)(8), Congress arguably ratified NMFS's usage of industry-funded monitoring programs. Moreover, in the years since, "[c]ongressional committees have continued to take note of such industry-funded programs." Loper, 2021 WL 2440511, at *13 (citations omitted).

Thus, in keeping with the statutory text, the only two on-point decisions (Loper and Goethel), and the legislative history, the Court concludes that the Secretary reasonably interpreted the MSA to authorize the Omnibus Amendment.

B. National Standards

Fishery management plans must comply with ten "National Standards." 16 U.S.C. § 1851(a). Casting a wide net, Plaintiffs contend that the industry-funded monitoring program violates five of them.

i. National Standard One

The first standard provides that "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery." 16 U.S.C. § 1851(a)(1). "The determination of [optimum yield] is a decisional mechanism for resolving the Magnuson-Stevens Act's conservation and management objectives, achieving [a fishery management plan]'s objectives, and balancing the various interests that comprise the greatest overall benefits to the Nation." 50 C.F.R. § 600.310(b)(2)(ii).

Plaintiffs argue that the monitoring exemption for trips landing less than fifty metric tons of herring does not serve these goals. Pls' Mot. 30. They contend that this rule unfairly burdens boats with on-board freezing capacity, which tend to take longer trips, thus leading to larger catches per trip. Id. Instead of a per-trip cutoff, Plaintiffs say, a per-day cutoff should have been used. See id. at 30-32.

However, National Standard One simply states that yield should be as high as it can be while avoiding the risk of overfishing. See 16 U.S.C. § 1851(a)(1). The incongruity between Plaintiffs' argument and this standard is illustrated by Plaintiffs' reliance on Western Sea Fishing Co. v. Locke, 722 F. Supp. 2d 126 (D. Mass. 2010). There, the court held that NMFS's

denial of the plaintiff's application for a fishing license was "not rationally related to achieving optimum yield" because there was "simply no evidence or contention of a current danger of overfishing." Id. at 140. Importantly, relying on the fact that the fishery industry had not been reaching the annual catch limit, the court held that the license denial did not help to avoid surpassing the yearly limit. Id. As Plaintiffs note here, Atlantic herring were not overfished at the time the industry-funded monitoring regulations were implemented. [17] However, Plaintiffs make no argument that the industry-funded monitoring rule will change the optimum yield or the industry's ability to reach that yearly level. Their argument simply concerns equity among the various participants in the herring fishery. National Standard One says nothing about those concerns.

ii. National Standard Two

Under the second standard, fishery management plans must "be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). Noting that herring was not overfished at the time that the

[17] Just because a fishery is not approaching overfished status does not mean that NMFS cannot institute a fishery management plan. See Anglers Conservation Network v. Pritzker, 139 F. Supp. 3d 102, 113 (D.D.C. 2015). And once a fishery management plan is in the works, the Secretary is explicitly tasked with preventing overfishing, not just remediating extant problems. See, e.g., 16 U.S.C. § 1853(a)(1)(A).

regulation was promulgated, Plaintiffs argue there is no scientific data to indicate that more monitoring would help prevent overfishing. Pls.' Mot. 31. The Court disagrees.

First, common sense instructs that additional data collection will lead to more accurate catch estimates. Moreover, National Standard Two " 'does not mandate any affirmative obligation on [NMFS'] part' to collect new data." Massachusetts v. Pritzker, 10 F. Supp. 3d 208, 220 (D. Mass. 2014) (quoting Commonwealth of Mass. by Div. of Marine Fisheries v. Daley, 10 F. Supp. 2d 74, 77 (D. Mass. 1998)). In order to successfully challenge a fishery management plan under National Standard Two, a plaintiff must point to specific scientific data that were ignored by the agency. See Massachusetts ex rel. Div. of Marine Fisheries v. Daley, 170 F.3d 23, 30 (1st Cir. 1999) ("If no one proposed anything better, then what is available is the best."). Because Plaintiffs do not point to any information that was ignored, National Standard Two lends no wind to their sails.[18]

---

[18] Plaintiffs also make the curious argument that observers have been assigned to a higher percentage of Plaintiffs' fishing trips than those of other boats, and that this disparity is unsupported by scientific reasoning. See Pls.' Mot. 9, 31. However, the monitoring program at issue had not yet started when these issues were briefed, so the higher observer rate cited by Plaintiffs must be part of a different program, likely the government-funded SBRM program. See Pls.' Second Notice of Facts Subsequent to Filing Summ. J. 1, ECF No. 45 (explaining that monitoring requirement had not yet begun); AR17805. The Omnibus Amendment seeks to augment the SBRM

iii. National Standard Six

The sixth standard provides that "[c]onservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches." 16 U.S.C. § 1851(a)(6). "There is no requirement in national standard 6 or anywhere else in the statute that defendant finely attune its regulations to each and every fishing vessel in the offshore fishery." Ace Lobster Co. v. Evans, 165 F. Supp. 2d 148, 182 (D.R.I. 2001). Rather, the standard merely requires the regulation to "be flexible enough to allow timely response to resource, industry and other national and regional needs." Id. at 181–82 (quoting J.H. Miles and Co. v. Brown, 910 F. Supp. 1138, 1155 (E.D. Va. 1995)).

Plaintiffs do not contend that the rule lacks flexibility to adapt to future developments. Instead, Plaintiffs complain that "[t]he Final Rule takes no notice that Plaintiffs are multi-species fishers." Pls.' Mot. 31. This harkens back to the argument first made under National Standard One. See Pls.' Mot. 30. Plaintiffs' boats, due to their on-board freezing capabilities, are built to remain at sea for much longer

---

program such that fifty percent of herring fishing trips are covered by one program or the other. Final Rule, 85 Fed. Reg. 7417 (Feb. 7, 2020) (to be codified at 50 C.F.R. pt. 648) (AR17734). Thus, to the extent that Plaintiffs are subject to greater rates of a SBRM monitoring, this disparity will lead to Plaintiffs paying for fewer at-sea monitors than they would have otherwise, not more.

trips (7-14 days) than other boats (2-3 days). See AR17710-15. Under the Final Rule, Plaintiffs bear a greater regulatory burden than other boats. To illustrate, assume that Plaintiffs and certain other boats all tended to catch 15 metric tons of herring per day. Plaintiffs, with average trip lengths exceeding 7 days, would be subject to the monitoring requirement because they would catch far more than 50 metric tons per trip. The non-freezer boats, even at the same rate of 15 metric tons per day, would not hit the cutoff on their 2- or 3-day trips. Thus, a per-day threshold would be better for Plaintiffs.

The Final Rule discussed this exact complaint, stating that "the Council explicitly considered measures to address [Plaintiffs'] concern about disproportional impacts on its vessels, including considering alternatives for coverage waivers for trips when landings would be less than 20-percent herring or less than 50 mt of herring per day." Final Rule, 85 Fed. Reg. at 7426 (AR17743). Nonetheless, the agency decided against those measures because "the potential for a relatively high herring catches per trip aboard [Plaintiffs'] vessels warranted additional monitoring." Id. [19] However, this explanation

---

[19] In the midst of their arguments under the National Standards, Plaintiffs also assert that the per-trip waiver is "[o]ne of the unexplained arbitrary and capricious aspects of the Final Rule." Pls.' Mot. 30. Based on NMFS's determination that the increased burden on Plaintiffs was justified by their capacity for high herring catches, the Court concludes that the waiver is not arbitrary and capricious. See Hall v. Evans, 165 F. Supp. 2d 114, 128 (D.R.I. 2001) (noting that, because a decision between alternative

arguably begs the question: Why should the metric for "high herring catches" be keyed to trips, not days? Especially since the primary goal of monitoring – ensuring optimum yield – is based on a year-long period, not a number of trips.

In Ace Lobster, the Secretary imposed a flat cap on the number of lobster traps that any fishing vessel could utilize. 165 F. Supp. 2d at 153. The plaintiffs pointed out that, prior to the regulation's implementation, certain boats used as many as 5,000 traps, while others used as few as 600. Id. at 182. They thus argued that the flat cap unfairly burdened those vessels with historically larger capacities. Id. However, the plaintiffs asked too much of the standards; the agency's failure to "finely attune its regulations to each and every fishing vessel in the offshore fishery" was insufficient to sink the rule. Id. Moreover, "NMFS included adaptive management measures in the Final Rule that w[ould] enable future consideration of state/federal collaboration efforts, including trap reductions based on historical participation[,]" thus indicating compliance with National Standard Six. Id. (internal quotation marks and citation omitted).

Same here. Plaintiffs note that "the record reveals no other vessels ... in the Atlantic herring fleet" like

---

fishery conservation measures presents "a classic example of a factual dispute the resolution of which implicates substantial agency expertise[,]" an agency's decision cannot be set aside unless "the administrative record is so devoid of justification ... that the decision is necessarily arbitrary and capricious" (internal quotation marks and citations omitted)).

theirs: boats with freezing capacity that catch multiple species during lengthy trips. Pls.' Mot. 10. Although that fact may engender sympathy for two disproportionately burdened businesses, it ultimately weighs against Plaintiffs' argument. The Secretary is not required to alter regulatory metrics in order to accommodate two vessels. As this Court has stated, the National Standards are not violated where the agency reasonably believes that a regulation "would benefit the overall fishery to the (unfortunate) detriment of certain fishermen." Hadaja, Inc. v. Evans, 263 F. Supp. 2d 346, 355 (D.R.I. 2003) (citing Alliance Against IFQs v. Brown, 84 F.3d 343, 349 (9th Cir. 1996); Hall v. Evans, 165 F. Supp. 2d 114, 146-47 (D.R.I. 2001)). Rather, "[t]he Secretary is allowed ... to sacrifice the interest of some groups of fishermen for the benefit as the Secretary sees it of the fishery as a whole." Fishermen's Finest, Inc. v. Locke, 593 F.3d 886, 899 (9th Cir. 2010) (citation omitted). The record indicates that the Secretary did exactly that, determining that the per-trip exemption was the best option for the fishery as a whole and that any extra burden on Plaintiffs would not be as large as they claimed. See Final Rule, 85 Fed. Reg. at 7417 (AR17734). Lastly, after two years, NMFS will review the rule and make "a framework adjustment or an amendment to the Herring [fishery management plan], as appropriate[,]" id., thus complying with the requirement for flexibility. National Standard Six is satisfied.

iv. National Standards Seven and Eight

The seventh standard requires the Secretary, "where practicable, [to] minimize costs and avoid

unnecessary duplication." 16 U.S.C. § 1851(a)(7). Relatedly, the eighth standard provides that "[c]onservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that [are based upon the best scientific information available], in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities." Id. § 1851(a)(8). Despite the concern for the economic health of fishing communities, Congress "inten[ded] 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 MSA." N. Carolina Fisheries Ass'n, Inc. v. Gutierrez, 518 F. Supp. 2d 62, 91–92 (D.D.C. 2007) (citing 50 C.F.R. § 600.345(b)(1)).

This inquiry is deferential, and the Secretary's decision to impose costs on fishing communities is protected by a "rule of reason." Little Bay Lobster, 352 F.3d at 470 (citing Daley, 127 F.3d at 110–111). The Court must "ask whether the Secretary has examined the impacts of, and alternatives to, the plan [she] ultimately adopts and whether a challenged failure to carry the analysis further is clearly unreasonable, taking account of [considerations such as] whether information is available and whether the further analysis is likely to be determinative." Id.

Here, the agency estimated the financial impact on fishing vessels and adjusted the monitoring requirements to reduce that impact. For example, it

chose a 50 percent total monitoring requirement instead of a goal of 75 or 100 percent. Additionally, government-funded SBRM monitoring was included in that target, thus reducing the burden on industry. The regulation also exempts any trip that does not plan to catch more than 50 metric tons of herring. Furthermore, though not applicable to the boats owned by Plaintiffs, the Final Rule allowed certain types of boats to utilize electronic monitoring instead of human monitors.

As discussed, Plaintiffs argue that a per-day metric, which would have eased their burden, should have been used to calculate the weight-based monitoring exemption. But the agency considered such options and determined that they would provide insufficient monitoring capabilities, which would jeopardize the achievement of the optimum yield lodestar. See Final Rule, 85 Fed. Reg. at 7417 (AR17734). Under the standards, that decision was the Secretary's prerogative.

In sum, Plaintiffs have not established that the industry-funded program violates the National Standards. See Loper, 2021 WL 2440511, at *16-19 (holding that Omnibus Amendment did not violate standards seven and eight).

C. Timing of Notice and Comment

In a rather undeveloped argument, Plaintiffs contend that the agency did not follow notice-and-comment requirements. Pls.' Mot. 28. Specifically, Plaintiffs incorrectly state that "the Secretary of Commerce approved the [Omnibus Amendment] before the comment period was over, making a mockery of the comment requirement." Pls.' Mot. 28.

But, to be clear, the Secretary did not approve the amendment before its comment period had concluded. Rather, the Secretary approved the amendment before the separate comment period for the proposed rule had ended. Plaintiffs point to no authority, and develop no argument, indicating that the comment periods for an amendment and its implementing rule cannot overlap. Moreover, Plaintiffs suffered no prejudice based on this overlap, as the Final Rule responded to all submissions from both comment periods. Thus, this timing argument is a belly flop. See Loper, 2021 WL 2440511, at *30 (rejecting similar argument).

D. Regulatory Flexibility Act

Lastly, Plaintiffs argue that the promulgation of the industry-funded monitoring program violated the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601–612. The RFA "does not alter the substantive mission of the agencies under their own statutes; rather, the Act creates procedural obligations to assure that the special concerns of small entities are given attention in the comment and analysis process when the agency undertakes rulemakings that affect small entities." Little Bay Lobster, 352 F.3d at 470. Where, as here, a regulation would "have a significant economic impact on a substantial number of small entities[,]" the agency must analyze "the effect of the proposed rule on small businesses and discuss[ ] alternatives that might minimize adverse economic consequences." N. Carolina Fisheries Ass'n, Inc. v. Gutierrez, 518 F. Supp. 2d 62, 72–73 (D.D.C. 2007) (citation omitted). If the agency decides to issue the regulation despite the impact on small businesses, the agency must issue a

final regulatory flexibility analysis, including "a description of the steps the agency has taken to minimize the significant economic impact on small entities" and "a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency ... was rejected." 5 U.S.C. § 604(a)(5). The RFA does not "require that the agency give explicit consideration to certain classes of small businesses that are affected more gravely than other small businesses." Hall v. Evans, 165 F. Supp. 2d 114, 146-47 (D.R.I. 2001).

Here, the agency did issue a final regulatory flexibility analysis, explaining the potential impacts on small businesses, the concessions made to accommodate their economic interests, the alternatives that could have further lessened that impact, and the reasons why the agency did not adopt those alternatives. See Final Rule, 85 Fed. Reg. at 7427-430 (AR17744-47). Nonetheless, Plaintiffs contend that "[t]he Agency never considered or included the recommendations to make exemptions available for at-sea processors which can take advantage of none of the measures it did consider." Pls.' Mot. 38. This assertion is belied by the plain text of the Final Rule. As discussed, "the Council explicitly considered measures to address Seafreeze's concern about disproportional impacts on its vessels [from the industry-funded monitoring requirement], including considering alternatives for coverage waivers for trips when landings would be less than 20-percent herring or less than 50 mt of herring per day." Final Rule, 85 Fed. Reg. at 7426 (AR17743). Despite these considerations, the agency stuck with the 50-metric-

ton cutoff because "the potential for a relatively high herring catches per trip aboard those vessels warranted additional monitoring." Id.

Therefore, the agency satisfied the RFA's (solely procedural) requirements. See Loper, 2021 WL 2440511, at *28 (holding that Omnibus Amendment did not violate RFA); see also Little Bay Lobster, 352 F.3d at 471 (denying RFA challenge, even though "the final statement did little more than acknowledge that 'several commentators' had objected to the change in the boundary line and responded by referring to the 'current consensus' in support of the new regime as a whole").

E. Commerce Clause

Finally, Plaintiffs contend that the monitoring program exceeds Congress's authority to regulate commerce. Pls.' Mot. 34-36. Under the Commerce Clause, Congress may regulate a wide variety of public and private actions, including those activities that "have a substantial effect on interstate commerce." Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 549, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012) (quoting United States v. Darby, 312 U.S. 100, 118–119, 312 U.S. 657, 118–119, 61 S.Ct. 451, 85 L.Ed. 609 (1941)). In Sibelius, the Supreme Court examined a provision of the Affordable Care Act that imposed a monetary penalty on any individual who failed to maintain health insurance. Id. at 538-39, 132 S.Ct. 2566. Chief Justice Roberts, writing alone, noted that the provision "d[id] not regulate existing commercial activity" but "instead compel[ed] individuals to become active in commerce by purchasing a product." Id. at 552, 132 S.Ct. 2566. The Chief Justice therefore

reasoned that the law could not be justified under the Commerce Clause. Id. at 558, 132 S.Ct. 2566; see also id. at 650-660, 132 S.Ct. 2566 (joint op. of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (agreeing that the individual mandate exceeded the scope of Congress's authority under the Commerce Clause). But see id. at 606-618, 132 S.Ct. 2566 (Ginsburg, J., joined by Sotomayor, Breyer, and Kagan, JJ., dissenting in part) (disagreeing with the Chief Justice's Commerce Clause analysis).

Based on this holding, Plaintiffs contend that the monitoring program unconstitutionally compels them to become active in the market for at-sea monitors. This analogy holds no water. The relevant market is not the monitoring market, but rather the commercial herring fishing market. If Plaintiffs do not want to pay for monitoring, they can decline to fish for herring, limit their herring catches to fifty metric tons per trip, leave the New England region, or purchase fishing vessels that qualify for electronic monitoring. Unlike the involuntary insurance purchasers – who could not, short of leaving the country, avoid the health insurance requirement – Plaintiffs are voluntary market participants. Therefore, the regulatory scheme does not violate the Commerce Clause. See Goethel, 2016 WL 4076831, at *7 (rejecting Commerce Clause argument and concluding that "the costs of monitors are part of the permissible regulation of [the] plaintiffs' commercial fishing activities").

IV. CONCLUSION

The Secretary reasonably concluded that industry-funded monitoring was necessary and appropriate to

effectuate the goals of the Atlantic herring fishery management plan and the MSA. Moreover, the process and rules through which the agency effectuated the monitoring program did not violate the National Standards, the RFA, or the APA. Lastly, the program does not exceed Congressional authority under the Commerce Clause. Plaintiffs' Motion for Summary Judgment, ECF No. 37, is DENIED, and Defendants' Cross-Motion for Summary Judgment, ECF No. 38, is GRANTED.

IT IS SO ORDERED.

William E. Smith
District Judge
Date: September 20, 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. § 1827. Observer program regarding certain foreign fishing

(a) Definitions

As used in this section--

(1) The term "Act of 1976" means the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.).

(2) The term "billfish" means any species of marlin, spearfish, sailfish or swordfish.

(3) The term "Secretary" means the Secretary of Commerce.

(b) Observer program

The Secretary shall establish a program under which a United States observer will be stationed aboard each foreign fishing vessel while that vessel--

(1) is in waters that are within--

(A) the fishery conservation zone established under section 101 of the Act of 1976, and

(B) the Convention area as defined in Article I of the International Convention for the Conservation of Atlantic Tunas; and

(2) is taking or attempting to take any species of fish if such taking or attempting to take may result in the incidental taking of billfish.

The Secretary may acquire observers for such program through contract with qualified private persons.

(c) Functions of observers

United States observers, while aboard foreign fishing vessels as required under subsection (b), shall carry out such scientific and other functions as the Secretary deems necessary or appropriate to carry out this section.

(d) Fees

There is imposed for each year after 1980 on the owner or operator of each foreign fishing vessel that, in the judgment of the Secretary, will engage in fishing in waters described in subsection (b)(1) during that year which may result in the incidental taking of billfish a fee in an amount sufficient to cover all of the costs of providing an observer aboard that vessel under the program established under subsection (a). The fees imposed under this subsection for any year shall be paid to the Secretary before that year begins. All fees collected by the Secretary under this subsection shall be deposited in the Fund established by subsection (e).

(e) Fund

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 section. The Fund

shall consist of the fees deposited into it as required under subsection (d). All payments made by the Secretary to carry out this section 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 section shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

(f) Prohibited acts

(1) It is unlawful for any person who is the owner or operator of a foreign fishing vessel to which this section applies--

(A) to violate any regulation issued under subsection (g);

(B) to refuse to pay the fee imposed under subsection (d) after being requested to do so by the Secretary; or

(C) to refuse to permit an individual who is authorized to act as an observer under this section with respect to that vessel to board the vessel for purposes of carrying out observer functions.

(2) Section 308 of the Act of 1976 (relating to civil penalties) applies to any act that is unlawful under paragraph (1), and for purposes of such application the commission of any such act shall be treated as an act the commission of which is unlawful under section 307 of the Act of 1976.

(g) Regulations

The Secretary shall issue such regulations as are necessary or appropriate to carry out this section.

* * *

16 U.S.C. § 1853(a)(1)(A)-(C), (a)(6).
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;

* * *

(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

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;

* * *

16 U.S.C. § 1853(b)(7)-(8). Contents of fishery management plans

(b) Discretionary provisions

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

* * *

(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;

* * *

16 U.S.C. § 1853(c). Contents of fishery management plans

(c) Proposed regulations

Proposed regulations which the Council deems necessary or appropriate for the purposes of--

(1) implementing a fishery management plan or plan amendment shall be submitted to the Secretary simultaneously with the plan or amendment under section 1854 of this title; and

(2) making modifications to regulations implementing a fishery management plan or plan amendment may be submitted to the Secretary at any time after the plan or amendment is approved under section 1854 of this title.

* * *

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 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. § 1857(1)(L). Prohibited acts

It is unlawful--

(1) for any person--

* * *

(L) to forcibly assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with any observer on a vessel under this chapter, or any data collector employed by the National Marine Fisheries Service or under contract to any person to carry out responsibilities under this chapter;

* * *

16 U.S.C. § 1862(a)-(b). 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.

* * *