

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MIDCOAST FISHERMAN'S
ASSOCIATION, *et al.*,

Plaintiffs,

v.

GARY LOCKE, *et al.*,

Defendants.

Civil Action No. 07-2336 (HHK/JMF)

REPORT & RECOMMENDATION

Judge Kennedy has referred Motion of Plaintiffs Midcoast Fishermen's Association and Curt Rice for Summary Judgment [#35] ("Pls. Mot.") and Federal Defendants' Cross-Motion for Summary Judgment [#37] ("Def. Mot.") for my report and recommendation. Having considered the administrative record, the pleadings of the parties, *amicus curiae* briefs, and the arguments of counsel and *amici* at a hearing held on March 15, 2010, and for the reasons stated herein, I recommend that summary judgment be denied *pendente lite* and that the question of the sufficiency of the data analyzed in denying the petition for rule-making be remanded for the agency's consideration.

I. Background

The background and regulatory history related to United States' fisheries is as important to understanding this case as is the specific administrative record. Thus, in this section, I begin with a discussion of the general background of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), a significant component in understanding the regulation of fisheries. I then narrow the discussion to the New England fisheries and regulations of that fishery specific to this case. I then discuss the

contents of the plaintiffs' petition for rulemaking. Lastly, I discuss the agency's denial of the petition.

A. Magnuson-Stevens Fishery Conservation and Management Act

Since at least 1996, Congress has been concerned with how fishing boats can catch large quantities of fish that they do not keep but which nevertheless are dead or dying when they are returned to the ocean as unwanted "bycatch."¹ See Fishing Co. of Alaska v. Gutierrez, 510 F.3d 328, 330 (D.C. Cir. 2007).

The National Oceanic and Atmospheric Administration ("NOAA") is a part of the United States Department of Commerce² and regulates United States' fisheries through its National Marine Fisheries Service ("NMFS"). The NMFS is responsible for the management, conservation, and protection of living marine resources within the United States' fisheries. The comprehensive Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. §§1801-1883, is the tool by which the NMFS conducts its work.³ The MSA created eight "regional fishery management councils," which devise conservation and management measures to fulfill the purposes of the Act.

¹ "In 1996 Congress responded to environmental concerns about bycatch by amending its formal statement of policy in the [Magnuson-Stevens Fishery Conservation and Management Act], adding a goal of 'minimiz[ing] bycatch' (subject to various constraints)." Fishing Co. of Alaska, Inc., 510 F.3d at 330 (citing 16 U.S.C. § 1801(c)(3)). Bycatch is defined by statute as "fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. Such term does not include fish released alive under a recreational catch and release fishery management program." 16 U.S.C. § 1802(2). All references to the United States Code, the Federal Register or the Code of Federal Regulations are to the electronic versions in Westlaw or Lexis.

² See 15 U.S.C. § 1511.

³ "Under the MSA's unusual regulatory framework, the Council is required to implement congressional policies in its region by developing a fishery management plan ("FMP"), as well as necessary amendments thereto." Fishing Co. of Alaska, 510 F.3d at 330 (citing 16 U.S.C. § 1852(h)(1)). Congress adopted 16 U.S.C. § 1801(c)(3) as an element of its formal policy for the American fisheries, with the goal of minimizing bycatch. See 16 U.S.C. § 1801(c)(3).

16 U.S.C. § 1852(a)(1). The Court of Appeals explained in Fishing Co. of Alaska how the NMFS and the councils work together:

Under the statute, “[p]roposed regulations which the Council *deems necessary or appropriate* for the purposes of . . . implementing a fishery management plan or plan amendment shall be submitted to the Secretary simultaneously with the plan or amendment.” § 1853(c) (emphasis added). The Secretary must then review the proposed regulations for consistency with the FMP and amendments, as well as with the MSA and other applicable law. § 1854(b)(1). If he finds them inconsistent, he must return the regulations to the Council with proposed revisions. § 1854(b)(1)(B). Otherwise, he must publish the regulations for comment in the Federal Register, “with such technical changes as may be necessary for clarity and an explanation of those changes.” § 1854(b)(1)(A). After the public comment period has expired, the Secretary must then promulgate final regulations, consulting with the Council on any revisions and explaining his changes in the Federal Register. § 1854(b)(3).

Fishing Co. of Alaska, 510 F.3d at 330.

B. The New England Fisheries and the Actions of the NEFMC

The New England (“NE”) area is the home of a great fishery immortalized in Rudyard Kipling’s Captains Courageous.⁴ The Council responsible for the fisheries in this area is the New England Fishery Management Council (“NEFMC”).⁵ The fisheries within the management of the NEFMC include: the Atlantic mackerel, squid, and butterfish fisheries; Atlantic salmon fishery; the Atlantic sea scallop fishery; the Atlantic

⁴ See Rudyard Kipling, Captains Courageous: A Story of the Grand Banks (1897).

⁵ The NEFMC consists of the states of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut and has authority over the fisheries in the Atlantic Ocean “seaward of such States,” with the exception of highly migratory species fisheries, over which the Secretary retains authority. 16 U.S.C. § 1852(a)(1)(A).

surf clam and ocean quahog fisheries; the NE multispecies⁶ and monkfish fisheries; the summer flounder, scup, and black sea bass fisheries; the Atlantic bluefish fishery; the Atlantic herring fishery; the spiny dogfish fishery; the Atlantic deep-sea red crab fishery; the tilefish fishery; and the NE skate complex fisheries. 50 C.F.R. § 648.1(a).

In 1994, the NMFS, at the NEFMC's emergency request, closed three large areas of the New England fishery to "all fishing gear capable of catching multispecies." See Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Framework Adjustment 18 ("Proposed Framework Adjustment 18"), 62 Fed. Reg. 49,193 (Sept. 19, 1997) (citing Fishery conservation and management: Northeast multispecies, 59 Fed. Reg. 63,926 (Dec. 12, 1994), amended at 60 Fed. Reg. 3,102 (Jan. 13, 1995)). The three areas, Closed Areas I and II and the Nantucket Lightship Closed Area, covered some 4,800 square miles. Id. In 1996, Amendment 7 to the New England Fishing Management Plan continued the existing year-round closures and closed seasonally three additional large areas in the Gulf of Maine. See Northeast Multispecies Fishery; Amendment 7, 61 Fed. Reg. 27,710-50 (May 31, 1996).

There is a variety of fishing gear employed in the New England fisheries, according to the type of fish sought. One group of fishermen use pelagic⁷ midwater

⁶ "NE multispecies" refers to the following species: American plaice; Atlantic cod; Atlantic halibut; Atlantic wolffish; Haddock; Ocean pout; Offshore hake; Pollock; Redfish; Red hake; Silver hake (whiting); White hake; Windowpane flounder; Winter flounder; Witch flounder; and Yellowtail flounder. 50 C.F.R. § 648.2.

⁷ Pelagic refers to a category of fish. The standard definition of the term is "[o]f or relating to the open sea, as distinguished from the shallow water near the coast; dwelling on or near the surface of the open sea or ocean; oceanic. Now chiefly: (Ecol.) designating, relating to, or inhabiting that region of the sea which consists of open water of any depth, away from or independent of both the shore and the sea floor (and so contrasted with the littoral and benthic regions)." Oxford English Dictionary: OED Online (2d ed. Dec. 2004), available at <http://dictionary.oed.com/cgi/entry/50174154>

trawling⁸ to fish the mackerel and herring fisheries. In 1997, at the NEFMC's request, NMFS promulgated a regulation that permitted such midwater trawling in the areas closed to gear capable of catching multispecies (Closed Areas I and II and the Nantucket Lightship Closed Area) under certain conditions. Id. The NMFS explained why it was doing this as follows:

Recently, the NEFMC was requested by fishery participants to allow pelagic midwater trawling for herring and mackerel in the multispecies closed areas. According to the participants, the herring and mackerel fisheries capture negligible amounts of regulated multispecies due to the spatial separation of pelagic and demersal species in the water column. Because of the low value of herring and mackerel, it is important to industry that vessels have unimpeded access to these species throughout their migration to ensure that the harvesting and/or processing capacity of the vessels is maximized. Large closed areas impede access and make fishing for herring and mackerel less economically feasible. These pelagic species are very important for commercial fishing vessels in New England that participate in joint ventures or in the directed domestic fishery. Due to the prohibition on fishing in closed areas and an increased reliance on closed areas for multispecies mortality reduction, it has become increasingly difficult to conduct these pelagic fishing operations.

Proposed Framework Adjustment 18 at 49,193.

(last accessed July 16, 2010). The NEFMC has provided definitions for technical terms for the fishery, and defines pelagic fish to be those "fish that spend most of their life swimming in the water column as opposed to resting on the bottom." NEFMC Definition of Fisheries Technical Terms, available at http://www.nefsc.noaa.gov/techniques/tech_terms.html#pel (last accessed July 16, 2010).

⁸ The gear used in midwater trawling, called "midwater trawl gear," refers to gear "that is designed to fish for, is capable of fishing for, or is being used to fish for pelagic species, no portion of which is designed to be or is operated in contact with the bottom at any time. The gear may not include discs, bobbins, or rollers on its footrope, or chafing gear as part of the net." 50 C.F.R. § 648.2.

The NEFMC had reviewed NMFS sea-sampling data from the fisheries and “determined that pelagic midwater trawls, when fished properly, can operate in closed areas with a minimal bycatch of regulated multispecies.” Id. NMFS indicated that it agreed with this determination, but conditioned pelagic midwater trawling for herring and mackerel in the Closed Areas subject to the following conditions: (1) a letter of authorization must be secured; and (2) harvesting or processing vessels must carry observers if required by NMFS. Id. at 49,193-94. NMFS also warned that if the Regional Administrator determined, on the basis of sea-sampling data or other credible information, that “bycatch of regulated multispecies in the closed areas for the fishery or for an individual vessel is likely to exceed, or exceeds, 1 percent of the catch (by weight) [i.e. the catch of herring and mackerel by pelagic midwater trawling],” the Regional Administrator could place further restrictions or even suspend “all midwater trawl activities in the closed areas.” Id. at 49,194.

On May 9, 2005, the Regional Administrator reported that in the summer of 2004, the herring fleet fishing on Georges Bank (in the New England Fisheries) reported that it was difficult to avoid catching haddock from the large 2003-year class. Haddock Bycatch Allowance Emergency Rule Categorical Exclusion, Administrative Record (“AR”) at 000035-37. Since the standing regulations prohibited herring vessels from taking haddock, the herring fleet was reluctant to return to the Georges Bank in the summer of 2005, because herring boats had been fined when they were found to have taken haddock onboard. Id. To ensure that the herring boats would fish in the Northeast fisheries that summer, the Regional Administrator modified the existing regulatory prohibition on possession of haddock by establishing a 1,000 pound haddock incidental bycatch trip

allowance for Category 1 herring vessels within the remainder of the 2005 fishing year.

Id.

On May 23-24, 2005, the NEFMC's Groundfish Oversight Committee ("the Committee") met and considered (*inter alia*) bycatch of haddock in the herring fishery. The Committee accepted the recommendation of its Herring Committee that imposed a catch cap for haddock on the herring fleet. Groundfish oversight committee meeting summary ("Groundfish Committee Mtg. May 23, 2005") at 10 (May 23, 2005) (as cited in Complaint, Ex. 1, Petition for Immediate and Permanent Rulemaking to Protect Groundfish from Midwater Trawl Fishing In Northeastern Groundfish Closed Areas [#1-1] ("Petition") at 12 n.5). There is an apparent inconsistency between considering midwater trawling gear and purse seine gear⁹ as exempted gear,¹⁰ because exempted gear was understood as not being able to catch non-pelagic species when in fact the gear on the herring boats was catching non-pelagic species. Therefore, the Committee decided to exempt the purse seine and midwater trawl vessels only from the zero possession of regulated species in all areas so that the herring boats would be subject to current regulatory requirements for all boats irrespective of gear. Id. Thus, the "sole exception is that possession of groundfish would be allowed consistent" with the recommendation of

⁹ "Purse seine gear means an encircling net with floats on the top edge, weights and a purse line on the bottom edge, and associated gear, or any net designed to be, or capable of being, used in such fashion." 50 C.F.R. § 648.2.

¹⁰ "Exempted gear, with respect to the NE multispecies fishery, means gear that is deemed to be not capable of catching NE multispecies, and includes: Pelagic hook and line, pelagic longline, spears, rakes, diving gear, cast nets, tongs, harpoons, weirs, dipnets, stop nets, pound nets, pelagic gillnets, pots and traps, shrimp trawls (with a properly configured grate as defined under this part), and surfclam and ocean quahog dredges." 50 C.F.R. § 648.2.

the Herring Committee on a catch cap on the amount of haddock that could be taken by the herring fleet. Id.

Consistent with that recommendation, NMFS, on June 21, 2006, proposed regulations to implement a rule that had been adopted by the Council to address the catching of haddock by the herring fleet. Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Framework Adjustment 43 (“Framework Adjustment 43”), 71 Fed. Reg. 35,600 (June 21, 2006). As finally adopted, the regulations permitted herring boats that fish for herring in the Gulf of Maine/Georges Bank Herring Exemption Area to possess incidentally-caught haddock up to a certain cap. See 50 C.F.R. § 648.85(d). Once that cap was achieved, the herring boat was limited to 2,000 pounds of herring per trip. Id. at § 648.86. Thus, the more haddock a herring boat brought on board as bycatch, the sooner it would have to stop fishing for herring and return to port.

C. The Petition

On October 27, 2007, plaintiffs, Northwest Atlantic Marine Alliance and Midcoast Fishermen’s Association, submitted their Petition for Immediate and Permanent Rulemaking to Protect Groundfish from Midwater Trawl Fishing in Northeastern Groundfish Closed Area to the Secretary of Commerce. See Petition.

The Petition asked the Secretary of Commerce to take “emergency action to address continued overfishing in the Northeastern multispecies fisheries by excluding midwater trawl vessels from groundfish closed areas.” Id. at 2. The Petition demanded that the Secretary “issue emergency regulations and initiate permanent rulemaking necessary to exclude midwater trawlers from New England groundfish closed areas not

later than January 1, 2008.” Id. at 22. Specifically, petitioners demanded that the Secretary:

(1) exercise his authority under 16 U.S.C. § 1855(c) to promulgate emergency regulations and interim measures necessary to exclude midwater trawl vessels from all year round and seasonal groundfish closed areas implemented beginning in 1994 to reduce groundfish mortality and protect juvenile and spawning ground fish; and

(2) exercise his authority under 16 U.S.C. § 1855(d) to initiate rulemaking designed to make such protections permanent.

Petition at 2-3.

The Petition argued that “[t]he use of closed areas to reduce groundfish and to protect spawning and juvenile groundfish mortality and to protect spawning and juvenile groundfish has shown promise as a method for reducing overfishing of groundfish and of rebuilding overfished stocks.” Id. at 8. It claimed, however, that permitting midwater trawlers to fish in closed areas where they catch regulated groundfish as bycatch would contravene the purpose of closing an area to fishing in the first place. Id.

To support its argument, the Petition relied on a variety of evidence and scientific analysis. First, the Petition relied on a report issued by NMFS entitled Report on the Status of the U.S. Fisheries for 2006, which, according to the Petition, indicated that “the New England Groundfish FMP [Fishing Management Plan] had not reduced groundfish mortality to levels sufficient to end overfishing and keep overfished stocks on the rebuilding trajectory established under that FMP.” Petition at 8 (citing Report on the Status of the U.S. Fisheries for 2006 at 7, 19). According to the report, Gulf of Maine and Georges Bank haddock continued to be considered overfished like other species. Report on the Status of the U.S. Fisheries for 2006 at 19.

Second, focusing on a dearth of data, the Petition attacked the core assumption in Framework Adjustment 18, that midwater trawl vessels did not catch groundfish or caught only negligible amounts, as incorrect. Petition at 9-10 (citing NE Multispecies Fishery; Framework Adjustment 18, 63 Fed. Reg. 7,727, 7,728 (Feb. 17, 1998) (hereinafter “Framework Adjustment 18”). According to plaintiffs’ petition, this core assumption was based on limited data, and more recent information indicated that such vessels caught groundfish in significant amounts. Petition at 10. According to petitioners, this assumption was undermined by the NMFS observer data from 46 midwater trawl trips in 2006 showing bycatch of haddock of over 18,000 pounds. Id. (citing Memorandum from Lori Steele, Herring Plan Development Team Chairman, Atlantic Herring Stock/Fishery Update (“Steele Memo.”) 15-16 (Sept. 7, 2007). That assumption was further weakened when, in 2007, observer data from 14 midwater trawl trips showed bycatch (of unspecified species) of 400 pounds. Petition at 10 (citing Steele Memo. at 17-18).

Third, as additional evidence that the underlying assumption of Framework Adjustment 18 was flawed, the Petition also pointed to the 2004 enforcement action that the NMFS took action against herring midwater trawl vessels that were “found illegally attempting to land thousands of pounds of juvenile haddock and hake bycatch in Maine and Massachusetts.” Petition at 10. One vessel was estimated to have 48,000 pounds of juvenile haddock on board. Id. at 10-11. According to the Petition, it was because of this action that the midwater trawl industry had to admit that it was catching significant amounts of bycatch and would not be able to prevent doing so once groundfish populations were rebuilt. Id. at 11.

Fourth, the Petition raised concerns about current bycatch reporting methodology, emphasizing that a judge of this Court found that live observers are an essential component of an adequate bycatch reporting methodology. Id. at 13 (quoting Oceana v. Evans, No. 04-CV-811, 2005 WL 555416, at *40 (D.D.C. Mar. 9, 2005)). According to Oceana, there should be a level of coverage by observers that provides “statistically reliable bycatch estimates.” Oceana, 2005 WL 555416, at *40 (citing 68 Fed. Reg. 11,504 (Mar. 11, 2003)). The Petition then insisted that insufficient numbers of observers were deployed to monitor bycatch such that “the full impact of midwater trawl fishing in the groundfish closed areas remain[ed] unknown.” Petition at 13. The Petition indicated that the level of observer coverage for herring vessels using midwater trawl gear was 16 percent of all voyages in 2005, but in 2007, when the Petition was submitted, it was one percent. Id. at 14.

Fifth, the Petition indicated that while NMFS had proposed a new standardized bycatch reporting methodology, an independent peer review of the new methodology by Dr. Murdock McAllister found the methodology deficient because of insufficient quality control testing. Id. at 15 (citing Murdock K. McAllister, *Review of the Northeast Region Standardized Bycatch Reporting Methodology* (September 2007)). In his article, Dr. McAllister opined that the new methodology would be unlikely to provide reliable discard (of bycatch) estimates for the “vast majority of fishing mode and species combinations including groundfish and other trawl fishery discards.” Id. at 15 (quoting McAllister at 4, Attachment D to Petition). According to petitioners, since the present observation coverage was at a level lower than the one proposed in the new methodology, the present system would necessarily underestimate significantly the

bycatch in the midwater trawl fishery. Id. In addition, the petitioners raised concerns of bias in the observer data, emphasizing that “there is considerable evidence suggesting that the observer data on discards are not representative of unobserved trips.” Petition at 16 (quoting McAllister at 5).

In addition to concerns about bias, the petitioners raise the concern that there is unobserved bycatch even on observed trips, such as catch left in the nets after pumping operations have concluded that is discarded without examination. Petition at 16. According to the Petition, this prevents any estimation of how much bycatch was dumped and whether the fish being dumped were dead. Id. Further, the Petition argues that reliable observation data is hampered by a device on the midwater trawlers that prevents larger bycatch from being pumped on board, because this bycatch is dumped back into the water without being observed or estimated by the onboard observers. Id.

For these reasons, the petitioners argued that the means of estimating bycatch were seriously deficient and ensured that the estimate of groundfish caught by the midwater trawlers would be seriously underestimated. Thus, the Petition concluded, immediate and emergency action by the Secretary was warranted “to reduce the overfishing of groundfish and rebuild depleted groundfish populations.” Id. at 21.

D. The Agency’s Denial of the Petition

Patricia Kurkul, Regional Administrator, National Marine Fisheries Service, reviewed the Petition. On November 1, 2007,¹¹ Kurkul transmitted a memorandum to William T. Hogarth, Assistant Administrator for Fisheries, in which she reviewed the

¹¹ Much of the procedural history of the agency’s denial is outlined in a previous opinion. See Midcoast Fishermen’s Ass’n v. Gutierrez, 592 F. Supp. 2d 40, 42-43 (D.D.C. 2008).

adoption of Framework Adjustment 43 in 2006.¹² AR 911. Framework Adjustment 43 established a herring exempted fishery and created a bycatch allowance or cap for NE multispecies taken as bycatch by herring boats in the fishery. Framework Adjustment 43 at 35,600. In her memorandum, Kurkul stated:

To date, there have been no indications that this cap has been caught. Although observer coverage in this fishery is not as high as the Council requested in [Framework Adjustment 43] (20% or more), reports have not indicated an increase in bycatch in this fishery over levels previously considered. The Petitioners provide no significant new information to justify emergency action at this time.

Note that we have reviewed the most recent observer data and found no cause for concern or belief that an emergency exists.

AR at 911.

Kurkul also indicated that her recommendation to deny the Petition would be controversial because members of the fishing industry would “contend, despite absence of supporting data, that continued access to the closed areas allows midwater trawl vessels to have a significant negative impact on the recovery of groundfish stocks.” AR at 912. Nevertheless, she concluded that the “substance of the petition” was not sufficient and recommended its denial. Id. The Regional Administrator concurred and, on December 28, 2007, Hogarth wrote a letter to plaintiffs’ counsel denying the Petition. AR 915-16 (hereinafter “Hogarth Letter”)

¹² In their petition, plaintiffs briefly addressed Framework Adjustment 43, dismissing it as irrelevant to the instant petition because it did not address midwater trawl vessels’ access to groundfish closed areas. Id. at 12, 12 n.5 (citing Groundfish Committee Mtg. May 23, 2005 at 10).

According to Hogarth:

The New England Fishery Management Council has considered prohibiting midwater trawls in these closed area before, and has determined that the bycatch of NE multispecies was not sufficient to justify this action. The observer data continue to suggest that bycatch levels are within the range considered acceptable by the Council. Your petition does not contain significant new information that demonstrates an emergency in the fishery . . .

Hogarth Letter.

Plaintiffs filed suit in this Court on December 28, 2007, seeking review of the agency's decision. Both parties have filed motions for summary judgment.

II. Legal Standard

"FMPs, plan amendments, and regulations promulgated by the Secretary are subject to judicial review under the MSA." North Carolina Fisheries Ass'n v. Gutierrez, 518 F. Supp. 2d 62, 72 (D.D.C. 2007) (citing 16 U.S.C. § 1855(f)). A court reviews the Secretary's actions pursuant to the judicial review provisions of the Administrative Procedure Act ("APA"). See, e.g., Oceana, Inc. v. Evans, 384 F. Supp. 2d 203, 211 (D.D.C. 2005); see also North Carolina Fisheries Ass'n, 518 F. Supp. 2d at 72. A court considering a challenge to the Secretary's actions may set aside such action only in accordance with the grounds specified in section 706(2)(A), (B), (C), or (D) of the APA. 16 U.S.C. § 1855(f)(1)(B) (citing 5 U.S.C. § 706(2)(A)-(D)). The section of the APA relied upon by the MSA "obliges courts reviewing agency action to 'hold unlawful and set aside' that action if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' or if the agency has exceeded its authority, violated a party's constitutional rights, or failed to comply with procedural requirements." North Carolina Fisheries Ass'n, 518 F. Supp. 2d at 72 (citing 5 U.S.C. § 706(2)(A)-(D)).

The Supreme Court has determined that an agency rule is “arbitrary and capricious” if (1) “the agency has relied on factors which Congress has not intended it to consider,” (2) “entirely failed to consider an important aspect of the problem,” (3) “offered an explanation for its decision that runs counter to the evidence before the agency,” or (4) the explanation is “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The agency is required to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)) (internal quotation marks removed). Thus, the agency has a responsibility “to explain the rationale and factual basis for its decision,” even if the court must “show respect for the agency’s judgment in both.” Bowen v. American Hosp. Ass’n, 476 U.S. 610, 627 (1986). While the court may not “substitute its judgment for that of the agency,” it is obliged to conduct “a thorough, probing, in-depth review” of the agency’s contested action or decision. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-16 (1971). The court must “consider whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. at 43 (citing Bowman Transp. Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285 (1974); Citizens to Preserve Overton Park, 401 U.S. at 416)).

III. Analysis

A. Standing

As a preliminary matter, defendants have not challenged plaintiffs' standing to bring this case. Plaintiff Curt Rice has submitted a declaration demonstrating that the defendants' rejection of the Petition "harms him by adversely affecting the ability of groundfish populations to recover from their current state of being overfished and depleted; in turn, this prevents him from catching groundfish." Pls. Mot. at 16 and at Ex. D. Glen Libby, president of the Midcoast Fisherman's Association, also submitted a declaration, which indicated that "defendants' decision to reject the Petition to close groundfish closed areas to herring trawlers directly injures both himself and the Midcoast Fisherman's Association," for example, by allowing additional spawning groundfish to be killed, thereby contributing to "the continued depletion of the groundfish population." Id. at 16 and at Ex. C. According to plaintiffs, "these declarations make clear that the actions of the defendants have directly injured the environmental, recreational, aesthetic, business and professional interests of the plaintiffs, and that the relief they seek here will remedy those injuries." Id. at 16. Thus, plaintiffs maintain that they have standing pursuant to Friends of the Earth v. Laidlaw Environmental Services, 528 U.S. 167, 180-85 (2000) and Natural Resources Defense Council v. Environmental Protection Agency, 489 F.3d 1364, 1370-71 (D.C. Cir. 2007). As indicated, defendants have not raised any objection to plaintiffs standing, and thus, I recommend that the Court find that plaintiffs have standing to maintain this action.

B. The Agency Failed to Adequately Explain Its Actions

Plaintiffs sought emergency rule-making under 16 U.S.C. § 1855(c) of the MSA, which provides for emergency action and/or interim measures to be taken by the Secretary:

If the Secretary finds that an emergency exists or that interim measures are needed to reduce overfishing for any fishery, he may promulgate emergency regulations or interim measures necessary to address the emergency or overfishing, without regard to whether a fishery management plan exists for such fishery.

16 U.S.C. § 1855(c)(1). NMFS has provided Councils a working definition of the phrase “an emergency exists involving any fishery,” which it defines as

a situation that: (1) Results from recent, unforeseen events or recently discovered circumstances; and (2) Presents serious conservation or management problems in the fishery; and (3) Can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process.

62 Fed. Reg. 44,422 (Aug. 21, 1997). The NMFS has identified the following as four situations under which emergency action would be justified: (1) Ecological; (2) Economic; (3) Social; or (4) Public Health. Id. The Petition concerned an ecological situation, defined as a situation that would justify emergency rulemaking that would be either (1) “to prevent overfishing as defined in an FMP, or as defined by the Secretary in the absence of an FMP,” or (2) “to prevent other serious damage to the fishery resource or habitat.” Id.

Plaintiffs also petitioned the Secretary for permanent rule-making on the issue, pursuant to 16 U.S.C. § 1855(d), which provides that:

The Secretary shall have general responsibility to carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this chapter. The Secretary may promulgate such regulations, in accordance with section 553 of Title 5, as may be necessary to discharge such responsibility or to carry out any other provision of this chapter.

16 U.S.C. § 1855(d).

Defendants denied the application, indicating that “the Petition lack[ed] sufficient information to justify emergency rulemaking.” Hogarth Letter. According to defendants, the NEFMC had reviewed the issue of prohibiting midwater trawls in closed areas and determined that the bycatch of NE multispecies “was not sufficient to justify this action.” Id. Defendants also indicated that the available observer data “continue[d] to suggest that bycatch levels are within the range acceptable by the Council.” Id.

While the decision to deny a petition for rulemaking is judged by the deferential “arbitrary and capricious” standard, a remand is in order if the agency’s denial is not justified by the agency’s reasoning and the administrative record. See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. at 43. In my view, that is the situation here.

The central theme of the Petition was that (1) the assumption (that midwater trawls do not catch NE multispecies bycatch) the NMFS relied upon to allow midwater trawling in the closed areas, under Framework Adjustment 18, and (2) the means by which the agency made its determination that the bycatch levels in the area were acceptable are both fundamentally flawed. In other words, the Petition concluded that reliance on them was improper. To that end, the Petition marshaled evidence:

(1) a NMFS report that the New England Groundfish Fishing Management Plan had not reduced groundfish mortality;

(2) observer data from 46 midwater trawl trips in 2006 showing bycatch of haddock of over 18,000 pounds;

(3) evidence that during an enforcement action, one vessel was found to have 48,000 pounds of juvenile haddock on board;

(4) admissions by the midwater trawl industry that it was catching significant amounts of bycatch and would not be able to prevent doing so;

(5) evidence that the level of observer data, crucial to ascertaining the actual bycatch, was low and in 2007 it was one percent of all voyages by the herring fleet;

(6) analysis by Dr. McAllister concluding that the proposed methodology was deficient;

(7) analysis by Dr. McAllister concluding that data from the discards on observed trips were not representative of unobserved trips; and

(8) analysis by Dr. McAllister concluding that even on observed trips bycatch escaped detection.

See generally Petition.

In contrast, the agency relied on the very data called into question by plaintiffs for its decision to deny the Petition, without any explanation as to why it found the data sufficient and worthy of reliance. See, e.g., Hogarth Letter. The agency's denial indicated that the Petition did not "contain significant new information that demonstrates an emergency in the fishery,"¹³ but the agency did not provide an explanation of its

¹³ Hogarth Letter.

“rationale and factual basis for its decision”¹⁴ that the information provided in the Petition was insignificant. See Hogarth Letter. The agency did not address in any manner plaintiffs’ assertion that midwater trawlers’ access to the closed areas, via Framework Adjustment 18, was based on an incorrect assumption (that pelagic midwater trawling captures “negligible amounts of regulated multispecies due to the spatial separation of pelagic and demersal species in the water column.”¹⁵).

Instead, the agency indicated that the NEFMC had considered “prohibiting midwater trawls in these closed areas before,” and that it had “determined that the bycatch of NE multispecies was not sufficient to justify this action.” Hogarth Letter. What is unclear is whether the agency is referring to the consideration of the Council in implementing Framework Adjustment 18, which was based on the assumption that there was negligible bycatch of NE multispecies, or Framework Adjustment 43, which focused on the NE multispecies fisheries generally. Either way, the Court is left without sufficient indication of the factual basis upon which the agency made its decision. Further, the agency did nothing in its denial of the Petition to address the plaintiffs’ concerns that the bycatch data is fundamentally flawed. The agency provided no explanation as to its consideration that the NE multispecies bycatch was insubstantially related to the outcome of the NMFS report that the New England Groundfish Fishing Management Plan had not reduced groundfish mortality. The agency did invoke observer data, but only indicated that “bycatch levels are within the range considered acceptable by the Council.” Hogarth Letter. The agency did not indicate what bycatch

¹⁴ Bowen, 476 U.S. at 627.

¹⁵ Proposed Framework Adjustment 18, 62 Fed. Reg. 49,193 (Sept. 19, 1997).

observer data it relied upon, only that it had used “available” observer data. Further, it did not indicate what level of bycatch is considered acceptable by the Council (the level indicated in Framework Adjustment 18, in Framework Adjustment 43, or some other level). The agency drew a scientific conclusion that the data suggested an acceptable level of bycatch, but it did not provide anything to support this conclusion, not even the data itself or the level considered acceptable. Lastly, the agency implicitly rejected without explanation the Petition’s concern about the quality of observer data, both due to low levels of observers, and deficiencies in the methodologies. See generally Petition.

The agency is required to “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. at 43 (internal quotation marks omitted). The Court must respect that decision,¹⁶ but I cannot clearly ascertain either the agency’s rationale or factual basis for its decision from the agency’s letter denying the Petition. While the agency expounds upon its decision in its summary judgment briefings, a post-hoc rationalization will not suffice. See, e.g., Wedgewood Village Pharmacy v. D.E.A., 509 F.3d 541, 550 n.13 (D.C. Cir. 2007) (rejecting an agency argument that came “too late”) (citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (“[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.”)); see also Owner-Operator Indep. Drivers Ass’n, Inc. v. Fed. Motor Carrier Safety Admin., 494 F.3d 188, 204 n.4 (D.C.

¹⁶ Bowen, 476 U.S. at 627.

Cir. 2007) (“[W]e cannot affirm [the agency decision] on the basis of a post-hoc explanation by agency counsel.”).

Thus, the petitioners and the agency passed like ships in the night. The petitioners provided reasons why, in their view, the estimates of the bycatch by the herring fishing boats were gravely mistaken. The agency, on the other hand, relied on those very estimates without explaining why petitioners’ arguments against the data are themselves mistaken. That the agency failed to provide a clear rationale for its decision robs its conclusion of validity, and its ultimate conclusion cannot stand because of its failure to do so. I therefore recommend that the cross-motions for summary judgment be denied, *pendente lite*, and that the matter be remanded to the agency for an explanation of why it rejected the assertion by petitioners that the bycatch estimates are unreliable and cannot serve as the premise of the refusal to prohibit midwater trawling by herring boats in the closed areas.

I note another benefit from such a remand. Both the letters from Kurkul and Hogarth, written in 2007, speak of efforts being made by the Council to develop another amendment to the New England Multispecies Fishing Management Plan. Hogarth also indicates that “[s]tock assessments on the managed groundfish stocks are also underway, which will provided up-to date information on the stock status and fishing mortality rates on these stocks.” Hogarth Letter. It is possible that there have been significant developments since 2007 that may bear on the accuracy of the estimates upon which Kurkul and Hogarth premised the agency’s rejection of the Petition.

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE