**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **BLUE OCEAN INSTITUTE, et al.,** | ) | |
| **Plaintiffs,** | ) | |
| **v.** | ) | **No. 1:06-CV-01869-HHK JMF** |
| **CARLOS M. GUTIERREZ, et al.,** | ) | |
| **Defendants.** | ) | |

**MEMORANDUM OF PLAINTIFFS BLUE OCEAN INSTITUTE AND CARL SAFINA IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

This case presents perhaps the last best chance to save one of the most valued big fish species that lives in United States ocean waters – the western Atlantic bluefin tuna – from population collapse and commercial extinction.

Western Atlantic bluefin tuna (hereinafter "bluefin" or "BFT") are top predators that serve a vital function in the ocean ecosystem. Because they are highly prized as sushi, they can sell for tens of thousands of dollars apiece. As a result, they have been fished relentlessly for the past three decades while their population has declined by more than 80%. Fishing pressure on bluefin is now at its highest point ever, while the bluefin population is at the lowest recorded level in its history. Defendants, the Secretary of Commerce and the National Marine Fisheries Service ("Fisheries Service" or "NMFS"), have followed this inexorable depletion of the bluefin population for many years, but have consistently ignored their legal duty to protect the bluefin.

In particular, for nearly thirty years, defendants have failed to act on their knowledge that the key to saving western Atlantic bluefin is to protect their spawning grounds in the Gulf of Mexico, where bluefin return annually in the early spring. Instead, despite the undisputed importance of the Gulf to the recovery and survival of bluefin, the defendants have allowed longline fishermen to continue to kill spawning bluefin there in significant numbers. Fishermen kill these highly valuable fish "incidentally" in the Gulf as "bycatch" while the longline fleet is purportedly looking to catch other fish species.

This case grows out of the latest refusal by the defendants to protect spawning bluefin in the Gulf of Mexico. In June of 2005, the plaintiffs filed a Petition requesting that defendants comply with their legal duties to prevent overfishing and minimize bycatch, and close the pelagic (open ocean) longline fishery in the bluefin spawning area in the Gulf during spawning season.

*See* "Petition for Immediate Rulemaking to Protect Spawning Atlantic Bluefin Tuna in The Gulf of Mexico" dated June 8, 2005 (hereinafter "Petition") attached as Exhibit A; AR D1.[1] In October 2006, defendants rejected that Petition. Instead, defendants adopted a Fishery Management Plan that arbitrarily adheres to the *status quo*, allowing spawning bluefin to continue to be killed in the Gulf, despite all indications that these measures have consistently proven insufficient to preserve the depleted bluefin population. Unless this Court promptly orders the defendants to grant the Petition and protect western Atlantic bluefin tuna on their spawning grounds in the Gulf of Mexico during the spawning season that will begin in the early spring of 2008, the already critically depleted bluefin population could collapse.

## BACKGROUND

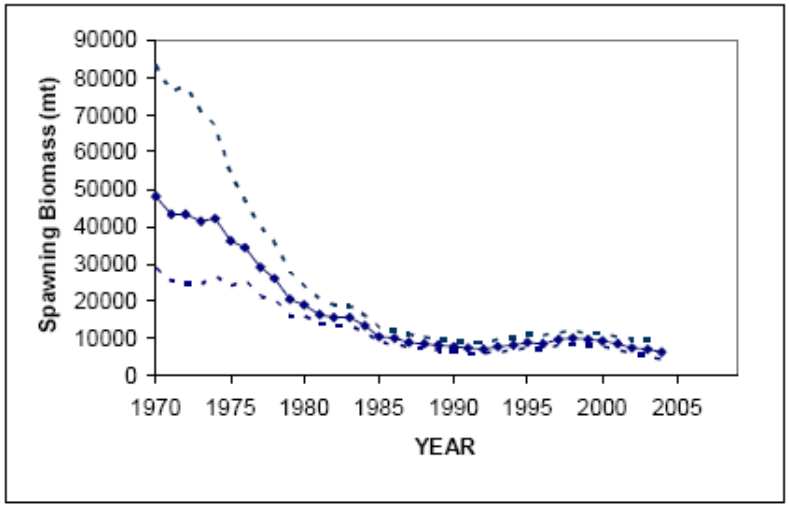
### I. Life History and Population Trend of Western Atlantic Bluefin Tuna

Bluefin tuna (*thunnus thynnus*) are both important ocean predators and staggeringly valuable commodities. Bluefin are among the largest, most wide-ranging, and fastest of animals. They can grow to average sizes of 400-500 pounds, with some giants reaching more than 10 feet in length and weighing as much as 1500 pounds. *See* Carl Safina, *Bluefin Tuna in the West Atlantic: Negligent Management and the Making of an Endangered Species*, 7 Conservation Biology 229, 229 (1993), Exhibit B. Torpedo-like in shape and possessed of a specialized musculature that includes fins which retract into slots during high-speed acceleration, bluefin reportedly can swim at speeds of 50 miles per hour. *Id.* Because they possess a highly developed circulatory exchange system, bluefin are uniquely suited to thrive in both temperate and colder waters. These remarkable physical attributes allow western Atlantic bluefin to range thousands of miles, from Labrador south to the Gulf of Mexico and at least as far as Brazil. *Id.*

[1] Plaintiffs will cite administrative record documents as "AR [document designation] at [page]."

Two separate populations of Atlantic bluefin overlap on North Atlantic Ocean foraging grounds and migrate to independent spawning areas located in the Gulf of Mexico and Mediterranean Sea. These populations do not mix in their respective spawning grounds and are thus genetically separate from one another. *See* Barbara A. Block, et al., *Electronic Tagging and Populations Structure of Atlantic Bluefin Tuna*, 434 NATURE 1121, 1123 (2005); AR G7 (HEREINAFTER "NATURE"). This case concerns management of the western Atlantic bluefin population only; it does not address the separate population of bluefin tuna that migrates throughout the east Atlantic Ocean and spawns in the Mediterranean Sea. Western Atlantic bluefin spawn in the Gulf of Mexico annually, primarily during the months of March through June, and then spend much of their early years foraging off the east coast of the United States and Canada. *See id.* at 1121-27.

Demand for bluefin during the past twenty years—largely in Japan but also increasingly in the U.S.—has driven their commercial market value to astronomical levels; the finest giant bluefin have fetched prices as high as $117 per pound – or $83,000 a fish. *See* Carl Safina, *Song for the Blue Ocean* 14 (1999). Fishing pressure to catch these supremely commercially valuable fish has triggered a precipitous decline in the population of western Atlantic bluefin. As depicted in the following graph, the reproductive population of western Atlantic bluefin (termed the "spawning stock biomass") has declined by 80% since 1975. International Commission for the Conservation of Atlantic Tunas ("ICCAT"), Report of the Standing Committee on Research and Statistics 51 (2006) (hereinafter "2006 ICCAT SCRS Report"), *available at* http://www.iccat.es/Documents/SCRS/SCRS%202006%20ENG.pdf.




*Id.* at 56.

In short, it is undisputed that the population of western Atlantic bluefin tuna has declined dramatically. Defendants in fact admit that "the spawning biomass of western Atlantic bluefin tuna is at its lowest recorded level." Answer at ¶ 2. Moreover, in their most recent annual report to Congress on the status of fish populations, defendants have classified western Atlantic bluefin as both "overfished" and as being subject to ongoing "overfishing." National Marine Fisheries Service Report on the Status of the U.S. Fisheries for 2006, at 25 (2007). Exhibit C. In light of their precarious condition, the World Conservation Union (IUCN) has listed the bluefin as "critically endangered" – meaning that it is "facing an extremely high risk of extinction in the wild in the immediate future." *See* http://www.iucnredlist.org/search/details.php/21864/all

## II. Statutory and Regulatory Structure for the Management of Bluefin

The bluefin tuna fishery is subject to both domestic and international regulation. On the domestic front, the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. §§ 1801-83, establishes a system for conserving and managing fish populations in the exclusive economic zone of the United States, which generally extends from the boundaries of state waters to 200 miles offshore. The MSA requires defendants to prepare Fishery

Management Plans ("FMPs") concerning "any highly migratory species fishery," *id.* § 1854(g)(1) that is within the geographical area of authority of more than one of several regional fishery management councils. *Id.* § 1852(a)(3). The bluefin fishery falls under this description. *See id.* §1802(20). Defendants are regulating bluefin under a 2006 FMP that addresses several "Highly Migratory Species" jointly (the "HMS FMP").

Like all FMPs and their implementing regulations, the 2006 HMS FMP must adhere to ten "national standards" set forth in the MSA. *See id.* § 1851(a). This case focuses on defendants' violations of three of these standards: National Standards One, Two, and Nine.

National Standard One of the MSA requires that "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery . . . ." *Id.* § 185l(a)(1). The statute defines "overfishing" as "a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis." *Id.* § 1802(29). "Optimum" in terms of yield from an overfished fishery, such as the bluefin fishery, is defined as the amount of fish which "provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery." *Id.* § 1802(28)(C).

National Standard Two of the MSA requires that "[c]onservation and management measures shall be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). In 2004, the National Research Council of the National Academy of Sciences conducted a detailed review of this requirement and recommended that the defendants ensure that "scientific reports should explicitly identify the level of uncertainty in results, provide explanations of the sources of uncertainty, and assess the relative risks associated with a range of management

options." *Improving the Use of the "Best Scientific Information Available" Standard in Fisheries Management*, National Research Council 4-6 (2004) at 8.

National Standard Nine of the MSA imposes upon defendants a separate duty to "avoid or minimize bycatch" and "minimize the mortality of bycatch which cannot be avoided." 16 U.S.C. § 1853(a)(11). The National Standard Nine guidelines state that bycatch may "impede efforts to protect marine ecosystems and achieve sustainable fisheries" by increasing the uncertainty as to the amount of fish killed by fishing activity and by precluding "more productive uses of fishery resources." 50 C.F.R. § 600.350(2)(b).

In addition to domestic regulation under the MSA, bluefin are subject to regulation by the International Commission for the Conservation of Atlantic Tunas ("ICCAT") because some bluefin spend part of their lives in international waters. ICCAT manages Atlantic bluefin tuna as distinct western and eastern populations, separated by a management boundary at the 45º W meridian. 2006 ICCAT SCRS Report, at 126. ICCAT establishes bluefin quotas for each member country; thus United States fishermen are limited to catching the amount of western Atlantic bluefin allocated to this country's quota by ICCAT. ICCAT also makes more general recommendations for managing bluefin. Of particular interest for this case, in 1982 ICCAT recommended that all directed fishing targeting bluefin be banned in the Gulf of Mexico in order to protect spawning bluefin. ICCAT, New Regulations for the Atlantic Bluefin Tuna Catch 2 (1982), *available at* http://www.iccat.es/Documents/Recs/compendiopdf-e/1982-01-e.pdf.

ICCAT established a plan to address overfishing of bluefin in 1981 that was designed to halt the population decline and rebuild the stock of both western and eastern bluefin. *See* ICCAT 2006 SCRS Report at 57. However, despite the imposition of "Total Allowable Catch" ("TAC") quotas for the past 25 years pursuant to this ICCAT "rebuilding plan," the population of western

Atlantic bluefin has declined consistently. The latest report of ICCAT scientists notes this decline, and observes that "western bluefin tuna may be less resilient to fishing than previously thought." ICCAT 2006 SCRS Report at 57. In this report, ICCAT scientists also express significant concern that the potential for rebuilding western Atlantic bluefin is "less clear" than it has been in earlier years of the plan, and report that "current regulations may be insufficient to achieve the [rebuilding] objectives." *Id.* at 57, 58.

The Atlantic Tunas Convention Act ("ATCA") is the federal statute that – along with the MSA – provides authority to the Fisheries Service to manage bluefin tuna in conformance with quotas established by ICCAT. *See* 16 U.S.C. § 971. ATCA provides that the defendant Secretary of Commerce shall promulgate regulations that are "necessary and appropriate" to carry out the recommendations of ICCAT that establish the western Atlantic bluefin quota for the United States fishing fleet. *See id.* § 971d(c)(1)(A). In addition, ATCA requires that such regulations "shall, to the extent practicable, be consistent with fishery management plans [FMPs] prepared and implemented under" the MSA. *Id.* § 971d(c)(1)(C). ATCA also provides that no such regulations "may have the effect of increasing or decreasing any allocation or quota of fish or fishing mortality level" set by ICCAT. *Id.* § 971d(c)(3). Inasmuch as ICCAT has for 25 years recommended that no directed fishing for bluefin be allowed to take place in the Gulf of Mexico, it has effectively allocated no bluefin quota in the Gulf for United States tuna fishermen and has set the targeted fishing mortality level for bluefin there at zero.

## III. Defendants' Management Failures in the face of a Declining Bluefin Population

For more than thirty years, scientists, staff, and policy officials within NMFS have been aware of a precipitous decline in the population of western Atlantic bluefin tuna. Yet the

defendants have repeatedly failed to halt the steady decline in the bluefin population. The following points summarize milestones in this thirty-year history:

- In 1975, defendants proposed to list the bluefin as threatened under the Endangered Species Act,[2] but then withdrew that proposal after ATCA became law.[3]

- In 1981, defendants noted that high prices paid for incidental catches of bluefin tuna "encouraged many U.S. fishermen to consider pursing them as a target species." 46 Fed. Reg. 8012, 8013 (Jan. 26, 1981). "Concerned that the resource [was] not strong enough to withstand additional heavy fishing pressure," defendants prohibited directed longline fishing for bluefin in the Gulf of Mexico and set an "incidental catch" limit for bluefin in the Gulf.[4]

- In 1982, ICCAT formally recommended a ban on directed fishing for bluefin on bluefin spawning grounds in the Gulf of Mexico.[5]

- Later in 1982, the Fisheries Service significantly reduced the quota for incidentally caught bluefin for the Gulf, expressing concern that the bluefin being killed with longline gear in the Gulf "are spawning adults" and that "minimizing their capture, therefore, may contribute to increasing stock size."[6]

- Notwithstanding this key 1982 finding, in 1983 the defendants dramatically increased the allowance for "incidental catch" of bluefin.[7]

- During the late 1980s and early 1990s, commercial demand for bluefin spiked and the price of these fish skyrocketed. The result was "the development of a directed fishery in the Gulf," despite the previously adopted incidental catch regulations.[8] In 1988, defendants recognized that their "incidental catch" provisions for bluefin "may have permitted a directed fishery for Atlantic bluefin tuna in the Gulf of Mexico, contrary to the intent of the regulations and the United States' obligations" to ICCAT.[9] Accordingly, defendants sought comments on whether to "close all or a portion of the Gulf of Mexico to longline gear during a specified spawning season."[10]

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[2] 40 Fed. Reg. 14767, 14767 (Apr. 2 1975) ("the scientific consensus . . . is that the data presently available are inadequate to positively determine the status of the Atlantic bluefin tuna stocks, but the data convincingly indicate that adult (or spawning) Atlantic bluefin tuna stocks are substantially reduced in number from previous years").
[3] 40 Fed. Reg. 33978 (Aug. 13, 1975).
[4] 46 Fed. Reg. 8012, 8013 (Jan. 26, 1981).
[5] ICCAT, New Regulations for the Atlantic Bluefin Tuna Catch 2 (1982), *available at* http://www.iccat.es/Documents/Recs/compendiopdf-e/1982-01-e.pdf.
[6] 47 Fed. Reg. 17086, 17089 (Apr. 21, 1982).
[7] *See* 48 Fed. Reg. 27745, 27751-52 (June 17, 1983) (increasing quota allocated to the incidental take of bluefin by the longline fishery from 44 st to 145 st). A "short ton" or "st" is 2,000 pounds, or 907 kilograms.
[8] 56 Fed. Reg. 10227, 10228 (Mar. 11, 1991). *See also* 53 Fed. Reg. 10415, 10415 (Mar. 31, 1988) (noting that existing incidental take provisions "may have permitted a directed fishery for Atlantic bluefin tuna in the Gulf of Mexico, contrary to the intent of the regulations and the United States' obligations" to ICCAT").
[9] 53 Fed Reg. 10415, 10415 (Mar. 31, 1988).
[10] *Id.*

- In 1992, defendants rejected a proposal to close the Gulf of Mexico during bluefin spawning season.[11] Instead, defendants adopted new incidental catch regulations that required "specified amounts of other species to be landed as a condition for landing an incidental bycatch of Atlantic bluefin tuna" and prohibited "retention of Atlantic bluefin tuna harvested from the Gulf of Mexico except for vessels permitted in the Incidental Catch category."[12] In so doing, defendants created a class of fishermen who would be allowed to "incidentally" – *i.e.*, on purpose – catch spawning bluefin in the Gulf. Defendants further noted that "if this measure is proven to be ineffective," "more stringent measures," would be considered in a future rulemaking.[13]

- In 1994, defendants learned that their "incidental catch" approach was "causing an increase in bluefin discard and waste" when ICCAT scientists reported that the spawning population of western Atlantic bluefin had declined 24% in the period 1990-1991,[14] Nevertheless, the defendants again declined to institute a closure for longline fishing in the Gulf, and merely tinkered with their "incidental take" provisions.[15] Again, defendants stated that "more stringent measures, such as area or season closures" could be considered in future rulemaking, should the incidental take provisions prove ineffective at limiting bycatch.[16]

- In 1999, in a consolidated HMS FMP, defendants adopted a measure to close an area off the Mid-Atlantic Bight to longline fishing during the month of June to minimize bluefin bycatch. This closure, although not directed toward protecting spawning fish, reduced dead discards of bluefin tuna.[17]

- Following another decade of steady and significant decline in the bluefin population, in 2002 defendants again recognized that "[d]espite efforts to alter target catch requirements and adjust geographic management areas, bycatch and discards of [bluefin tuna] by U.S. pelagic longline vessels have continued."[18] Once again, however, the defendants did not close longline fishing in the Gulf of Mexico bluefin spawning area; instead, they merely continued to fiddle with the number of "incidentally caught" bluefin that could be retained and sold.[19]

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[11] The proposed closure was rejected "because the location of the spawning areas within the Gulf of Mexico varies from year to year." 57 Fed. Reg. 365, (Jan. 6, 1992). However, as a result of nearly a decade of electronic monitoring of bluefin tuna, scientists have been able to describe a more precise bluefin spawning area. *See Nature* 1123 fig. a (G-7). Accordingly, the grounds for rejecting the proposed closure in 1992 are no longer valid.
[12] 57 Fed. Reg. 365, 365 (Jan. 6, 1992).
[13] 57 Fed. Reg. 365 at 369.
[14] 59 Fed. Reg. 2813, 2814 (Jan. 19, 1994).
[15] 59 Fed. Reg. 2813, 2814 (Jan. 19, 1994). *See also* 59 Fed. Reg. 17723 (Apr. 14, 1994).
[16] 50 Fed. Reg. 2813, 2814.
[17] *See* 67 Fed. Reg. 78404, 78406 (Dec. 24, 2002) ("The available data, based on logbooks submitted by fishermen, indicate a substantial decline in BFT bycatch throughout the year, indicating the closed area may be effective at reducing dead discards.").
[18] 67 Fed. Reg. 78404, 78405-06 (Dec. 24, 2005).
[19] *Id.*

In summary, between 1975 and 2002, the defendants repeatedly recognized that: (1) bluefin were spawning in the Gulf of Mexico; (2) the bluefin population has declined and continues to decline; and (3) the effort to manage the bluefin population by way of "incidental catch" had not only failed, but had encouraged a *de facto* directed fishery for bluefin in the Gulf, in violation of both ICCAT and U.S. policy. They expressed concern over these facts, but consistently failed to take effective steps to halt the bluefin population decline.

Remarkably, defendants abandoned any pretense of protecting the bluefin in the Gulf in their 2002 rulemaking. Rather than aiming to reduce mortality due to dead discards, the 2002 regulations ignored solid evidence that the bluefin population was in serious decline, and focused instead on the fact that U.S. fishermen were not catching the full ICCAT quota allocated for bluefin. Thus, the Service concerned itself with the fact that restrictive incidental catch limits required longline fishermen to discard incidentally caught bluefin. *Id.* at 78406. Acting on this misplaced concern, since 2002 NMFS has sacrificed the long-term future of both the western Atlantic bluefin population, and fishermen who catch bluefin, in order to protect the short-term income of longline fishermen in the Gulf.

The current regulations thus allow fishers in the Gulf to continue killing spawning bluefin tuna.[20] The latest report filed by the defendants with ICCAT shows that 51 metric tons of bluefin – roughly 200 fish – were killed in the Gulf in 2006. Annual Report of the United States to ICCAT, NOAA Fisheries (2007), Exhibit D; *see also* Safina Decl. ¶ 11. Moreover, based on

[20] The regulations currently in effect provide that for all geographic areas:

> One large medium or giant BFT per vessel per trip may be landed, provided that at least 2,000 lb (907kg) of species other than BFT are legally caught, retained, and offloaded from the same trip and are recorded on the dealer weighout slip as sold. Two large medium or giant BFT per vessel per trip may be landed, provided that at least 6,000 lb (2,727 keg) of species other than BFT are legally caught, retained and offloaded from the same trip and are recorded on the dealer weighout slip as sold. Three large medium or giant BFT per vessel per trip may be landed, provided that at least 30,000 lb (13,620 kg) of species other than BFT are legally caught, retained, and offloaded from the same trip and are recorded on the dealer weighout slip as sold.

50 C.F.R. § 635.23(f)(1) (2006).

initial indications from observer data designed to cover all longline vessels fishing in the Gulf during just two months between mid-April and mid-June of 2007, more than 100 bluefin were killed. Safina Decl. ¶ 12.

Indicative of the steep bluefin population decline is that United States fishers have been unable to catch the quota allocated to them for the past four years. They failed – by a wide margin – to catch their quota of western Atlantic bluefin in 2004, 2005, and 2006. ICCAT 2006 SCRS Report at 57. Thus far in 2007, this downward trend continues. *Id.*; *see* Memorandum from Brad McHale to Margo Shulze Haugen, Landings of Large Medium and Giant Atlatnic [sic] Bluefin Tuna (Nov. 9, 2007), Exhibit E. In addition, anecdotal reports reflect that very few bluefin younger than age 3 have been seen in U.S. waters during 2007 – this suggests that there may have been a near total collapse of the entry of sub-adult bluefin ("recruitment") into the western Atlantic population. In short, western Atlantic bluefin tuna simply are disappearing from United States ocean waters. *See* Safina Decl. ¶¶ 2-4.

**IV. Plaintiffs' Petition to Protect Spawning Bluefin**

In the spring of 2005, electronic tagging studies of bluefin tuna conclusively identified a spawning "hot spot" for Atlantic bluefin tuna in the northern Gulf of Mexico. These scientific data published in the journal *Nature* confirmed that spawning-age western Atlantic bluefin tuna were present in United States waters of the Gulf of Mexico during the months of January through June, and that they were spawning there, particularly during the period between March and June. *See* NATURE, AR G7, AT 1121-1127. The *Nature* article found that, even in the case of highly controlled scientific tagging, bluefin that are hooked on longlines tend to die in high percentages, even if they are released. *Id.* at 1123 ("In the [Gulf of Mexico] slope waters, scientific longlining . . . was conducted from pelagic longline vessels . . . and frequently resulted in bluefin tuna

mortalities."). Consequently, the paper concluded that a limited time-area closure of the pelagic longline fishery where it overlaps with the bluefin spawning area would eliminate this often fatal bycatch of spawning bluefin. *Id.* at 1126.

Relying on this new evidence, and in an effort to reverse the dramatic decline in the bluefin population, the Plaintiff Blue Ocean Institute and several other conservation groups submitted their Petition on June 8, 2005, to the Fisheries Service. *See* Petition, attached as Exhibit A, AR D1. The June 2005 Petition emphasized that longline fishing in the Gulf of Mexico bluefin spawning area kills significant numbers of bluefin (largely as "bycatch" while the longline vessels are targeting yellowfin tuna), depletes the bluefin population, and cripples the potential of the bluefin to rebuild to a healthy level. Accordingly, the Petition requested that the Fisheries Service take immediate action to stop all longline fishing in bluefin spawning areas located in the Gulf of Mexico during spawning season. *Id.* at 2. The Petition also requested that defendants initiate a rulemaking designed to permanently prohibit all fishing activity that can catch bluefin tuna (either intentionally, or incidentally as "bycatch") in their spawning areas in the Gulf of Mexico during their spawning season. *Id.*

In response to the Petition, the Fisheries Service declined to take immediate action to prevent bycatch of spawning bluefin in the Gulf, and promised to address the problem and further consider the petition for closure in connection with its Draft Fishery Management Plan for Highly Migratory Species ("HMS FMP"). AR I23. The HMS FMP looked at a number of actions relating to the management not of only bluefin tuna, but also other so-called "highly migratory species." In an environmental impact statement ("EIS") prepared by the Fisheries Service in connection with the HMS FMP during 2005 and 2006, the Fisheries Service acknowledged that bluefin tuna are overfished and subject to continued overfishing, AR E12, at

3-43, but declined to establish a fishing closure of the bluefin spawning area in the Gulf of Mexico. This decision was based primarily upon the Fishery Service's conclusion that the proposed closure would not reduce bycatch for every potentially affected species. AR E12, at 4-66.

The Fisheries Service published the final rule implementing the HMS FMP on October 2, 2006. The rule refused to institute any closure of longline fishing in the bluefin spawning area in the Gulf of Mexico during spawning season, or otherwise to take any action to halt the collapse of the western Atlantic bluefin population. 71 Fed. Reg. 58058, 58152-58153 (Oct. 2, 2006); AR E27. The final rule and the discussion in the HMS FMP included the following reasons for the Fisheries Service decision to reject the plaintiffs' Petition for a closure:

> 1. If the closure resulted in a random redistribution of fishing effort, it could result in an increase in the incidental catch ("bycatch" or "discards") of bluefin, rather than a decrease. *Id*. at 58152.
>
> 2. Even if the closure resulted in a decrease in bluefin bycatch, the redistributed fishing effort could increase bycatch of other species of fish and sharks *Id.* at 58153. In this connection, the Fisheries Service "cannot place more value on one species over another species." Appendix E to the HMS FMP at E-30 (AR E 12 at E-30).
>
> 3. While not relying upon any formal "decision matrix," the Fisheries Service used the analysis of various impacts of the proposed closure on bluefin and other Highly Migratory Species to help "guide" its decision to reject the plaintiffs' Petition. AR E 17 at 6 (NMFS Memorandum For the File dated August 29, 2006).
>
> 4. New data and information needed to be gathered and analyzed before defendants could make a decision regarding the need for a closure of the type sought in the Petition.

As a result of the decision by the Fisheries Service to deny the plaintiffs' Petition, additional bluefin were killed as bycatch by longline fishers fishing in the Gulf of Mexico in 2006 and 2007. *See* Safina Decl. ¶¶ 11-12. Indeed, more than 100 bluefin reportedly were killed in the Gulf in only the two months between April and June of 2007. *Id*. ¶ 12. Absent relief from this Court, more bluefin can be expected to die in that spawning area in 2008, and in subsequent

years, until the Fisheries Service reduces the fishing pressure in that area during bluefin spawning season. These bluefin mortalities contribute to continued overfishing and harm the capacity of the western Atlantic bluefin tuna to survive and to rebuild as a healthy and sustainable fish population. *See id.* ¶¶ 11-14.

## ARGUMENT

### I. STANDARD OF REVIEW AND STANDING

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered if the movants establish that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Taylor v. Federal Deposit Ins. Corp.*, 132 F. 3d 753, 762 (D.C. Cir. 1997). Defendants cannot avoid entry of summary judgment merely by relying on unsupported assertions in their briefs. *See* Fed. R. Civ. P. 56(e); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

This is an administrative record case in which no material facts are now in dispute,[21] and the plaintiffs are entitled to judgment as a matter of law. This memorandum establishes that the defendants' refusal to grant plaintiffs' Petition request to close longline fishing in the Gulf of Mexico on bluefin spawning grounds during bluefin spawning season is inconsistent on its face with the MSA, unreasonable, arbitrary and capricious, and contrary to NEPA. Accordingly, this Court should enter summary judgment in favor of the plaintiffs.

The declaration of plaintiff Carl Safina, President of the plaintiff Blue Ocean Institute, is attached to this memorandum as Exhibit F. Dr. Safina's declaration shows that defendants' decision to reject the Blue Ocean Institute petition to close longline fishing in the Gulf of Mexico during the spawning season directly injures both himself and the Blue Ocean Institute in several

[21] On February 23, 2007, the plaintiffs moved to complete the administrative record on grounds that it was incomplete. Magistrate Judge Facciola denied that motion by Memorandum Opinion and Order dated September 7, 2007.

ways. The defendants' rejection of the plaintiffs' petition has allowed additional spawning bluefin to be killed in the Gulf of Mexico, thereby contributing to the continued depletion of the bluefin population. Safina Decl. ¶¶ 11-13. Therefore, the actions of the defendants have harmed the ability of the plaintiffs to continue to research, observe, and – in the case of Dr. Safina, fish – for bluefin tuna. *Id.* ¶¶ 10-15. In short, because the defendants have injured the environmental, recreational, aesthetic, and professional interests of the plaintiffs with respect to the western Atlantic bluefin tuna, the plaintiffs enjoy standing to maintain this action. *See Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 180-185 (2000); *Natural Res. Defense Council v. EPA*, 489 F.3d 1364, 1370-71 (D.C. Cir. 2007).

## II. THE FISHERIES SERVICE DECISION TO REJECT THE PETITION TO PROTECT THE SPAWNING POPULATION OF BLUEFIN TUNA WAS ARBITRARY AND CAPRICIOUS

Under the Administrative Procedure Act ("APA"), "[t]he reviewing court shall…hold unlawful and set aside agency action, findings, and conclusions found to be…arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. The MSA explicitly imports the APA standard of review. *See* 16 U.S. C. § 1855(f)(1)(B). To uphold an agency's decision under the APA, a court must find that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). In addition, to pass muster under the APA, an agency's decision must be supported by record evidence. *See Taylor v. FDIC*, 132 F.3d 753, 762 (D.C. Cir. 1997) (court "[does] not accept bare conclusory allegations as fact"); *Missouri Public Service Comm. v. FERC*, 337 F.3d 1066, 1073 (D.C. Cir. 2003) (agency must fully explain

predictions or extrapolations from the record). Mere conclusory statements in the record are not enough to support the agency's position. *See, e.g.*, *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659, 664 (D.C. Cir. 1996); *Chem. Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1266 (D.C. Cir. 1994).

The APA requires the courts to examine agency actions closely: "we do not hear cases merely to rubber stamp agency actions. To play that role would be 'tantamount to abdicating the judiciary's responsibility under the [APA].'" *Natural Resources Defense Council, Inc. v. Daley*, 209 F.3d 747, 755 (D.C. Cir. 2000) (quoting *A.L. Pharma, Inc. v. Shalala*, 62 F. 3d 1484, 1491 (D.C. Cir. 1995)) (rejecting NMFS argument that court should defer to fishing quota that had less than a 50% chance of success). The APA's standard of review "requires the reviewing court to engage in a substantial inquiry" and subjects the agency action to a "thorough, probing, in-depth review." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Motor Vehicle Mfg. Ass'n v. State Farm Mut. Ins.*, 463 U.S. 29, 43 (1983). Although courts ordinarily afford some degree of deference to the agency's scientific expertise, such deference is not unlimited. "The [Fisheries] Service cannot rely on reminders that its scientific determinations are entitled to deference in the absence of reasoned analysis to cogently explain why its [decisions]" satisfy statutory requirements. *Natural Res. Def. Council*, 209 F.3d at 755-56 (quotations and citations omitted). Furthermore, "[a] regulation cannot stand if it is based on a flawed, inaccurate or misapplied study." *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 933 (5th Cir. 1998).

This Circuit has emphasized the particular importance of close record review in cases such as this, where the agency has engaged in an analysis of rather technical information. *Ethyl Corp. v. Environmental Protection Agency*, 541 F. 2d 1, 36 (D.C. Cir. 1976) (purpose of review is to "enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors").

The defendants' decision to deny the plaintiffs' Petition to close longline fishing that is killing spawning bluefin in the Gulf of Mexico, and to adopt an FMP that contains no protection for spawning bluefin, is arbitrary and capricious in several respects. This decision "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, . . . [and] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfg. Ass'n*, 463 U.S. at 43. In addition, the defendants failed to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.'" *Id.* (quoting *Burlington Truck Lines, Inc.*, 371 U.S. at 168).

The defendants based their decision on two arbitrary choices. First, they sharply limited their evaluation of the potential benefits of the proposed closure by ignoring key facts, including that all bluefin caught in the Gulf presumptively are western Atlantic spawners, that bluefin are subject to high levels of mortality from incidental catch and discard in the Gulf of Mexico, and that spawning bluefin are more important than non-spawning bluefin. Second, they relied upon various models on redistribution of fishing effort that do not produce meaningful results, and then failed to explain how those models compelled their decision to deny the Petition.

### A. The Fisheries Service Ignored Key Facts About the Life History of the Bluefin and the Nature of the Bluefin Fishery in the Gulf of Mexico

The defendants rejected the plaintiffs' Petition to close longlining in the Gulf of Mexico spawning area for bluefin without considering several vital facts about the life history of bluefin and the nature of the fishery in the Gulf. Moreover, they completely failed to explain their decisionmaking process – which gave no weight to factors unique to bluefin.

Plaintiffs filed their Petition to protect spawning bluefin tuna in a newly-documented Gulf of Mexico spawning "hot spot" in order to "reduce mortalities of reproductive adult bluefin tuna, reduce further overfishing, and promote the rebuilding of the overexploited western Atlantic bluefin tuna population." Pet. at 3-4. However, the Fisheries Service ignored the stated purpose of the Petition – to reduce bluefin overfishing and rebuild the depleted bluefin population – and only considered whether the proposed closure "would reduce the bycatch of all species considered, assuming there is some redistribution of effort." AR E12, at 4-66.

In fact, the HMS FMP simply lacks discussion of the closure's potential to reduce mortalities of reproductive adult bluefin tuna, reduce further overfishing or promote the rebuilding of the overexploited western Atlantic bluefin tuna population. Thus, the Fisheries Service completely failed to address the potential benefits of the proposed closure for the imperiled bluefin population. This failure violated the APA requirement that agencies must directly respond to the substance of the relief sought in any petition for administrative action. *See Fund for Animals v. Babbitt*, 903 F. Supp. 96, 115-116 (D.D.C 1995) ("the right to petition for rulemaking entitles the petitioning party to a response on the merits of the petition"). The defendants were required to "fully and promptly consider" the plaintiffs' petition. *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 813 (D.C. Cir. 1981). The petition asked for a longline closure in a specifically –identified area of the Gulf of Mexico for the express purpose of protecting bluefin

tuna. The defendants' analysis simply failed to come to grips with that request. Therefore, their response violated the APA.

Defendants' failure to focus directly on the substance of the plaintiffs' Petition manifested itself in a failure to address several crucial facts relevant to their decision: (a) bluefin protected by the proposed closure are spawning bluefin and therefore of higher importance than other bluefin; (b) bluefin protected by the closure are presumptively western Atlantic bluefin and therefore of more value to protecting that particular population than are eastern bluefin; (c) because there is a *de facto* directed fishery taking place in the Gulf of Mexico that kills bluefin, mortality of bluefin in the Gulf is higher than reported. This failure to consider highly relevant factors rendered their decision arbitrary and capricious. *See Citizens to Preserve Overton Park*, 401 U.S. at 416 (APA requires agencies to consider relevant factors); *Motor Vehicle Mfg. Ass'n*, 463 U.S. at 43 (agency rule is arbitrary and capricious where agency "entirely failed to consider an important aspect of the problem"); *Ethyl Corp. v. Environmental Protection Agency*, 541 F. 2d 1, 36 (D.C. Cir. 1976) (agency decision must be "rational and based on consideration of the relevant factors").

First, the Fisheries Service failed to adequately consider that the bluefin potentially affected by the proposed closure were spawning bluefin. Over twenty years ago, the Fisheries Service expressed concern about the need to minimize the bycatch of bluefin tuna in the Gulf of Mexico because the tuna caught in that region "are spawning adults." 47 Fed. Reg. 17086, 17089 (Apr. 21, 1982). The Fisheries Service explained that "minimizing their capture . . . may contribute to increasing stock size." *Id.* It is axiomatic that spawning adult fish are absolutely vital to the future of any fish stock. "Clearly, if there are no spawning fish, there can be no recruits . . . ." J.G. Shepherd, *Aide Memoire on Scientific Advice on Fisheries Management*,

Ministry of Agriculture, Fisheries and Food, Directorate of Fisheries Research, UK 18 (1992), Exhibit G.; *see also* Safina Decl. ¶ 10. In this situation, "the prospect of stock collapse is real, even if it only manifests itself as increased risk of poor recruitment when spawning stock size is low." *Id.* Therefore, as the plaintiffs stated in comments on the rule, a full assessment of the closure required consideration of the benefits of protecting spawning bluefin – separate and distinct from the overall bluefin population. Instead, the Fisheries Service merely noted that, if fishing effort from the Gulf of Mexico were displaced elsewhere resulting in an increase of bluefin discards outside of the Gulf of Mexico, "there is not necessarily a 1-to-1 equivalency between benefits to individual spawning BFT in the Gulf of Mexico and individual non-spawning BFT outside of the Gulf of Mexico." HMS FMP 4-39.

The Fisheries Service thus acknowledged that protecting spawning bluefin tuna provides a different level of benefit than does protecting non-spawning bluefin tuna. But this cursory mention of the role of spawning bluefin is not adequate; defendants were required to provide an estimate of the greater level of benefit that should be accorded saving spawning bluefin, as opposed to saving non-spawning bluefin. In the event, the Fisheries Service weighted them exactly the same. This action arbitrarily ignores basic fish population science. *Cf. Public Citizen v. FMCSA*, 374 F.3d 1209, 1216 (D.C. Cir. 2004) (agency's failure to consider the impact of its rule is arbitrary and capricious).

Second, the Fisheries Service failed to acknowledge another unique characteristic of the bluefin encountered in the Gulf of Mexico; those bluefin are exclusively *western* Atlantic bluefin. In contrast, scientists report encountering both eastern and western bluefin throughout other areas of the Atlantic ocean, areas that the alleged redistributed fishing effort would impact. Accordingly, the proposed spawning area closure would have a direct impact on rebuilding the

western population; unlike bluefin found outside the Gulf of Mexico, presumptively every single bluefin protected inside the Gulf would be (a) a member of the western Atlantic bluefin population and (b) a spawning member of that population. Yet the defendants gave this crucial factor absolutely no consideration, and therefore no weight. This failure again ignores the most basic fish population science, as well as the known facts about the life history of the western Atlantic bluefin. In short, this action was both arbitrary and capricious. *Cf. Parravano v. Babbitt*, 837 F. Supp. 1034, 1047 (N.D. Cal. 1993) (Secretary has "duty to demonstrate, through concrete analysis, that he could rationally conclude that his approach would accomplish his legitimate objectives based on the best scientific information available.").

Moreover, this aspect of the Fisheries Service analysis overlooks the elephant in the room: that is, despite years of regulation, a *de facto* directed fishery for bluefin tuna has continued to thrive in the Gulf of Mexico. Stated succinctly, longline fishermen in the Gulf of Mexico who ostensibly are targeting fish other than bluefin are, in fact, seeking out and catching bluefin as "incidental catch" and "bycatch." As a result, there is a significant probability that fishing mortality for bluefin in the Gulf is higher than reported. And the Fisheries Service has long been aware of this situation.

The Fisheries Service has noted throughout the years that the incidental bycatch of bluefin must be closely monitored and regulated in order to comply with ICCAT's recommendation that no directed bluefin fishing be permitted in the Gulf of Mexico. *See, e.g.*, 57 Fed. Reg. 365, 369 (Jan. 6, 1992) (noting that the purpose of the proposed rule adjusting the incidental take rules "is to bring the U.S. fishery into compliance with ICCAT agreements to conserve and manage the resource by prohibiting a directed fishery in the Gulf of Mexico."). In fact, in the HMS FMP, the Fisheries Service acknowledges that bluefin are being targeted in the

Gulf of Mexico despite the prohibition. *See* AR E12, at 4-54 ("fishermen may be targeting the [Gulf] area for the increased opportunity to catch an occasional BFT."). This should be no surprise—the current regulations allow a longliner to retain three giant bluefin on a single trip in the Gulf, a catch that may be valued at well over $100,000. Because the Fisheries Service failed to acknowledge the continuing problem of a directed incidental bluefin fishery in the Gulf of Mexico, the analysis of the proposed closure was woefully inadequate. Without any real discussion of the impact of a fishery directed at spawning members of a dwindling fishery, the HMS FMP is arbitrary and capricious. *See, e.g., Motor Vehicle Mfg. Ass'n*, 463 U.S. at 43 (arbitrary and capricious where an agency "entirely failed to consider an important aspect of the problem").

Finally, the record lacks any explanation for the defendants' decision not to assess the relative importance of mortality for particular species when making decisions on closures. Outside reviewers joined the plaintiffs in suggesting that the Fisheries Service do so, but the Service declined. See AR D70 at [un-numbered page] 7 (outside comments suggesting the need for a decision matrix); AR D67 at 3 (outside peer review agreeing that the respective status of the affected fish populations should be taken into account in an evaluation of the effects of the proposed closure). Instead, defendants evaluated the bluefin bycatch question inside and outside the Gulf as if bluefin were of equal value in both areas. This is plainly a case where the defendants failed to connect the facts found (that bluefin in Gulf are presumptively western Atlantic spawners and are subject to high mortality) with the choice made (that bluefin in the Gulf should be treated as of equal value with bluefin elsewhere). Accordingly, defendants' decision to reject the plaintiffs' Petition for a Gulf closure was arbitrary and capricious. *Cf. Consol. Rail Corp. v. STB*, 93 F.3d 793, 799 (D.C. Cir. 1996) (court must guard against arbitrary

inferences drawn from "facts found"); *Defenders of Wildlife*, 2006 WL 2844232, *20 (D.D.C. Sept. 29, 2006) ("The Court's only role is to determine whether there is a rational connection between the facts found and the choices made during the rulemaking.").

### B. The Fisheries Service Relied Arbitrarily Upon a Fatally Flawed Model and Failed to Explain How it Informed the Decision to Reject the Petition

Defendants also failed to acknowledge and examine key assumptions underlying their "effort redistribution model." While the Fisheries Service has discretion to choose an appropriate model, "[t]he agency retains a duty to examine the 'key assumptions' underlying its model." *Columbia Falls Aluminum Co. v. E.P.A.*, 139 F.3d 914, 923 (D.C. Cir. 1988). Several "key assumptions" underlying the redistribution model are deeply flawed. Moreover, through its use of varying assumptions as to the actual behaviors of fishermen in response to the closure, the Fisheries Service itself demonstrated that the model is essentially arbitrary – it can offer little meaningful information, and it can be used to "justify" a completely boundless range of management choices.

A redistribution of effort model seeks to predict how much of the fishing activity that normally would have occurred in a newly-closed area will relocate elsewhere, and what the impact of that redistributed effort will be on selected species. Simple "random redistribution of effort" models assume that fishing effort will relocate from a closed area randomly to all other possible fishing areas. More advanced redistribution models take account of other known factors that affect where fishing effort may be displaced (such as proximity, previous fishing history, and financial and market conditions), as well as factors relevant to the relative effect of the displaced effort on affected fish populations (such as age, abundance, and breeding status).

The assumptions that form the basis for any model are key. Here, where the defendants tried to determine the effects of closing longline fishing in a specific area of the Gulf of Mexico,

key assumptions included: (a) the rates of bycatch, both in the area to be closed and in the areas to which effort would be redistributed; and (b) the likelihood that effort will be redistributed to any particular area outside the area to be closed. *See* AR Doc. E12, at A-2 (explaining redistribution of effort model).

The Fisheries Service made fatal errors with respect to both of these key assumptions. In fact, the record reflects serious concern with respect to the "redistribution of effort" assumptions that underlie the ultimate conclusion of the Fisheries Service to reject a closure of the type sought in the plaintiffs' Petition. *See, e.g.*, AR D70 at [un-numbered page] 6 (outside comments criticizing NMFS closure analysis and stating that "[t]he assumptions on redistribution of effort and application of corresponding CPUE [Catch Per Unit Effort] are problematic"); AR D67, at 3 (outside peer review of NMFS closure analysis noting that the NMFS data do not support its conclusion on redistribution of fishing effort and stating that "assumptions on effort redistribution need to be rigorously tested").

First, in calculating rates of bycatch for use in the population redistribution model, the Fisheries Service relied upon reported bycatch data, while acknowledging that "discards may be underreported in the HMS logbook data compared to [observed] data." AR E12, at 4-33. The Fisheries Service determined that such underreporting would not impact the reliability of the model by means of a crucial hypothesis. Specifically, it decided that "if there are no differences in underreporting for different species between different regions," then "the relative effect of each closure for each species should be comparable across alternatives." *Id.*

In the event this hypothesis proved incorrect, defendants' reliance on logbook data would render the model largely worthless. In response to comments on the draft HMS FMP that expressed concerns about the impact of underreporting on the reliability of the model, defendants

attempted to test that hypothesis. The Fisheries Service analyzed the ratio of catch estimated from observed data divided by the reported catch in the HMS logbooks – not for bluefin – but for undersized swordfish, sailfish, blue marlin, white marlin, and pelagic sharks from the pelagic longline fishery operating in the US Atlantic, Caribbean and Gulf of Mexico. AR E12, at 4-33.[22] The Fisheries Service concluded, after analyzing those ratios that "there was no difference in underreporting between the POP [observed data] and HMS logbooks [reported data] for the above species in the Atlantic, Caribbean, or Gulf of Mexico." *Id.*

However, even assuming *arguendo* that the data from these non-bluefin fisheries support the conclusion that the underreporting for these particular species is consistent across alternatives, the Fisheries Service failed to explain how that conclusion can be rationally applied to the bluefin fishery. In fact, the bluefin fishery's unique characteristics cast significant doubt on whether such an extrapolation would be justified. Specifically, as discussed above, directed fishing for western Atlantic bluefin tuna is (formally) prohibited in the Gulf of Mexico, but is permitted elsewhere in the Atlantic. Obviously, the prohibition creates considerable incentives to not report any "accidental" catch of bluefin in the Gulf of Mexico. Accordingly, it is highly likely that the rate of underreporting of bluefin catches in the Gulf of Mexico is higher than the rate of underreporting elsewhere in the fishery.

Second, even if the model's data were not suspect, the random redistribution model does not describe where the vessels are likely to go. Under this model, a longliner displaced from the Gulf of Mexico is as likely to resume fishing off of Long Island as it is to relocate to the east coast of Florida. Although the Fisheries Service has demonstrated that it is likely that some effort will be displaced, and that the fleet is mobile, there is no evidence to support the assumption that such widespread redistribution will occur in this situation. In this case, the

[22] *See* J. Cramer, Pelagic Longline Bycatch, 51 Col. Vol. Sci. Pp.l ICCAT 1895-1929 (2000), AR G1.

Fisheries Service "knows that 'key assumptions'" underlying the effort redistribution model "are wrong and yet has offered no defense of its continued reliance on it." *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998). Accordingly, defendants' reliance on the random redistribution of effort model was arbitrary and capricious. *See American Iron & Steel Institute v. EPA*, 115 F.3d 979 (D.C. Cir. 1997)( agency's decision "will be reversed as arbitrary and capricious if there is 'simply no rational relationship' between the model chosen and the situation to which it is applied") (quoting *Chemical Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1265 (D.C. Cir. 1994)); *Eagle-Picher Indus., Inc. v. U.S.* EPA, 759 F.2d 905, 921 (D.C. Cir. 1985).

Equally arbitrary was the defendants' treatment of the results of the redistribution model based on a somewhat more detailed set of redistribution assumptions. This scenario assumed fishermen displaced by the spawning closure would not simply be redistributed randomly, but instead would fish only in other parts of the Gulf of Mexico and "in an area in the Atlantic where many Gulf of Mexico vessels have reported fishing." *See* 71 Fed. Reg. 58152. Tellingly, under these assumptions, "there was a predicted decrease in the bycatch of . . . BFT [bluefin] discards . . ." *Id.* at 58152-53 (emphasis added). In fact, this scenario predicted greater than a 19% decrease in bluefin discards – 122 discards avoided each year. *See* Table A.41, AR E12, at A-61. Notwithstanding this fact, however, defendants relied on their finding that this model also showed an increase in bycatch for certain billfish and coastal sharks to justify rejecting the closure sought in the Petition. *Id.* at 58153.

The net result of these machinations is that the defendants have created a modeling approach that arrogates unto themselves complete power to choose, or reject, whatever management measure they wish to choose. Under their approach, a closure of any part of any federal ocean waters will always result in an increase in bycatch for some species somewhere

else. In fact, as appears in the HMS FMP, the more different assumptions are employed in the model, the more it becomes clear that reliance on the redistribution of effort model will never yield an outcome in which *all* species will experience a decrease in bycatch.

Moreover, because the Fisheries Service has neither explained which model outcomes underlie its decisionmaking, nor justified the assumptions used to generate any model outcomes, the model is simply generating arbitrary results. *See Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1035 (D.C. Cir. 2001)(no excuse where agency relies upon "a methodology that generates apparently arbitrary results, particularly where, as here, the agency has failed to justify its choice"); *cf. American Iron and Steel Inst. v. EPA*, 115 F.3d 979, 1004 (D.C. Cir. 1997) (use of model with "no rational relationship . . . to the situation" is arbitrary); *Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1218-19 (D.C. Cir. 2004) (rejecting a model that "assumes away the exact effect that the agency attempted to use it to justify").

## III. THE FISHERIES SERVICE VIOLATED THE MSA REQUIREMENTS TO PREVENT OVERFISHING, MINIMIZE OR AVOID BYCATCH, AND RELY UPON THE BEST AVAILABLE SCIENCE

In reviewing defendants' interpretation of the MSA, courts follow the analysis established in *Chevron, USA v. NRDC*, 467 U.S. 837 (1984). The first question is whether Congress has spoken directly to the precise matter at issue. *Id*. at 842-43. No agency deference is afforded on the question whether the statute is ambiguous. *Cajun Electric Power Cooperative v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991). "If a court, employing the traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843, n.9.

If the statute is "silent or ambiguous with respect to the specific issue," the analysis proceeds to the second step. *Id*. at 843-44. There, the question is whether the agency's

interpretation is "reasonable." *Id*. at 845; *United States v. Mead Corp.*, 533 U.S. 218 (2001). Reviewing courts "must reject administrative constructions … that are inconsistent with the statutory mandate." *Securities Industry Ass'n v. Board of Governors of the Federal Reserve System*, 468 U.S. 137, 143 (1984)(citations omitted). *See also NRDC v. Daley*, 209 F.3d 747, 753-54 (D.C. Cir. 2000) (NMFS interpretation of the MSA held unreasonable under *Chevron* Step Two). Courts do not grant *Chevron* Step Two deference to agency statements that lack the force of law. *United States v. Mead Corp.*, 533 U.S. 218, 227-231 (2001).

In this case, the defendants have violated the plain language of the MSA. In violation of National Standard One, they have failed to prevent overfishing of bluefin, failed to assure optimum yield for the western Atlantic bluefin fishery, and ignored ICCAT advice to the detriment of an already-inadequate bluefin rebuilding plan. Additionally, they have rendered meaningless the requirement of National Standard Nine to avoid or minimize bycatch of the bluefin. Finally, because they have not relied upon the best scientific information available in their efforts to manage and protect bluefin, they have violated National Standard Two.

### A. The Fisheries Service Has Violated National Standard One By Failing to Prevent Overfishing of Western Atlantic Bluefin Tuna and By Failing to Ensure Rebuilding of the Overfished Bluefin Population

National Standard One of the MSA (the "overfishing prohibition" standard) states that fishery management plans must contain conservation and management measures that "shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery." 16 U.S.C. § 1851(a)(1); *see also* § 1853(10) (plans must "…contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery"). As one court explained: "[t]he ultimate goal, therefore, of any fishery management plan is to establish measures which achieve a rate or level of fishing mortality that allows the fishery to

produce the maximum sustainable yield on a continuing basis." *A.M.L. Int'l v. Daley*, 107 F. Supp. 2d 90, 94 and n.6 (D. Mass. 2000). In other words, the defendants must control the amount of bluefin caught in a manner that is sufficient to ensure that the bluefin population is not reduced below a sustainable level.

For fish populations that are already reduced "below a sustainable level," as is the case with western Atlantic bluefin, the MSA requires that NMFS promulgate a rebuilding plan that will rebuild the population back to sustainable levels. 16 U.S.C. § 1854(e). Currently, the depleted bluefin population is not sustainable and hovers at only 20% of its 1980 population. The law requires that the rebuilding time periods be "as short as possible" and "not exceed 10 years," 16 U.S.C. § 1854(e)(4), but it includes an exception where international organizations or agreements are involved, as is the case with bluefin and ICCAT. In such situations, the rebuilding time period shall "be as short as possible" while "taking into account" recommendations from those international organizations. 16 U.S.C. § 1854(e)(4)(A)(i). In addition, the rebuilding time period shall "not exceed 10 years, except in cases where . . . management measures under an international agreement in which the United States participates dictate otherwise." 16 U.S.C. § 1854(e)(4)(A)(ii).

**1. The Defendants Have Failed to Prevent Overfishing of Bluefin And Have Also Failed to Ensure Optimum Yield in the Bluefin Fishery**

The decision by defendants to deny the plaintiffs' June 2005 Petition – and therefore to adopt an FMP that continues to allow the killing of spawning bluefin in the Gulf of Mexico – violates National Standard One because it fails to prevent overfishing of bluefin, and in fact affirmatively allows overfishing of bluefin to continue. In addition, that decision fails to ensure that optimum yield of bluefin is achieved. In short, it does not ensure that the bluefin population

is being fished in a sustainable manner. For these reasons, the defendants' decision to reject the Petition and adopt an HMS FMP that lacks any protection for spawning bluefin violates the intention of Congress as indicated in the plain language of the MSA, and is unreasonable.

There can be no question that the defendants' decision fails to prevent overfishing of bluefin, and in fact allows overfishing of bluefin to continue. In their most recent report to Congress on the status of fisheries, the defendants classify western Atlantic bluefin as both "overfished" and as undergoing "overfishing." *See* NOAA's National Marine Fisheries Service Report on the Status of the U.S. Fisheries for 2006, at 25 (2006). Moreover, the population of the bluefin has been in steady decline for the past 25 years under the current management plan that allows the killing of scores – if not hundreds – of bluefin as "bycatch" in the Gulf of Mexico during spawning season each year. Under these circumstances, the defendants' decision to reject the plaintiffs' Petition and leave the *status quo* intact is, by definition, a decision that fails to prevent overfishing.

When a fish population is fished excessively (*i.e.*, is fished at a rate that threatens the ability of the population to produce the maximum sustainable yield), that excessive fishing effort is deemed *overfishing*. Under the stress of overfishing, a fish population suffers mortality at a rate that does not allow it to be fished sustainably – in such a circumstance, that population is considered to be *overfished*. Continuing to kill fish whose population is already overfished delays the population's ability to rebuild to a sustainable level and could also push the population closer to population collapse, where the species could prove unable to recover to a healthy level. The fact that – far from recovering – the bluefin population has been in a steady decline for more than 20 years, demonstrates that the decision to continue with the *status quo* simply perpetuates overfishing and leaves the bluefin in an overfished state.

In addition, the defendants' decision does nothing to achieve "optimum yield" from the bluefin fishery. The MSA defines "optimum yield" as the amount of fish that (i) constitutes maximum sustainable yield as reduced by certain factors and (ii) "in the case of an overfished fishery" provides for "rebuilding to a level consistent with producing the maximum sustainable yield." 16 U.S.C. ¶ 1802(33). Since rejecting the plaintiffs' petition and remaining with the *status quo* is allowing the bluefin to remain in an overfished condition, the defendants' action runs afoul of the first requisite for "optimum yield" – clearly it is not a decision that allows the fishery to attain maximum sustainable yield. Moreover, the decision allows a management regime to move forward unchanged despite the fact that it has not resulted in any perceptible rebuilding of the bluefin population. Thus, it runs afoul of the second requirement that "optimum yield" provide for rebuilding.

In short, defendants' decision plainly violates National Standard One. It allows overfishing to continue and perpetuates the overfished condition of bluefin. In addition, the decision fails to ensure that optimum yield of bluefin is achieved. Manifestly, it does not ensure that bluefin population is being fished in a sustainable manner. The decision is therefore unlawful. *See, e.g., Natural Res. Defense Council, Inc. v. Nat'l Marine Fisheries Serv.*, 421 F.3d 872, 881 (9th Cir. 2005).

**2. The Defendants Have Flouted the Recommendations of ICCAT and Violated the Rebuilding Requirements of the MSA**

The defendants have violated the rebuilding provisions of the MSA by rejecting the plaintiffs' Petition and adopting an HMS FMP that allows a *de facto* directed fishery on bluefin in the Gulf of Mexico. Far from "taking into account" the ICCAT concern over the need to protect spawning bluefin in the Gulf, this decision flouts the ICCAT preferences.

Defendants' rejection of the Plaintiffs' petition does nothing to rebuild the overfished bluefin population. The facts speak for themselves: since the "rebuilding plan" for bluefin was initiated by ICCAT in 1981, the population has been in a steady decline. Rather than rebuilding, it has continued to deconstruct. Instead of changing the *status quo*, however, the defendants' decision to reject the plaintiffs' Petition allows this population decline to continue.

Notably, ICCAT has been expressing reservations for the past few years concerning the ability of its rebuilding plan to succeed. The latest report of ICCAT scientists observes that "western bluefin tuna may be less resilient to fishing than previously thought." ICCAT 2006 SCRS Report at 57. In this report, ICCAT scientists also express significant concern that the potential for rebuilding western Atlantic bluefin is "less clear" than it has been in earlier years of the plan, and report that "current regulations may be insufficient to achieve the [rebuilding] objectives." *Id.* at 57, 58. These concerns echo those raised in 2004 by ICCAT scientists, who stated that they were uncertain as to the causes of the relatively poor recruitment for western Atlantic bluefin, but believed that it was extremely unlikely that spawning stock biomass of bluefin could recover to levels that were exhibited in the 1970s in the next 15 years without reducing catch to near zero. ICCAT 2004 SCRS Report at 51-52. Under these circumstances, even closely following the ICCAT recommendations with respect to fishing for bluefin would not guarantee that the bluefin population will rebuild.

But the defendants have in fact directly violated the rebuilding provision of the MSA by acting contrary to ICCAT's recommendations with respect to bluefin. The plain language of the statute requires the defendants to rebuild the overfished bluefin population in a time period that is "as short as possible," while taking ICCAT recommendations into account. 16 U.S.C. § 1854(e)(4)(A)(i). In fact, for more than 25 years, the defendants have countenanced the killing

of bluefin in the Gulf of Mexico in what is a *de facto* directed fishery, in contravention of ICCAT's preferred ban on such fishing.

As noted above, defendants have known for at least 25 years – since 1981 – that the high prices paid for bluefin were encouraging many fishermen to pursue them "as a target species." 46 Fed. Reg. 8012, 8013 (Jan. 26, 1981). In 1982, defendants acknowledged that the bluefin being caught in the Gulf were "spawning adults" and that "minimizing their capture, therefore, may contribute to increasing stock size." 47 Fed. Reg. 17086, 17089 (Apr. 21, 1982). In 1988, after banning directed fishing on bluefin in the Gulf, defendants recognized that their "incidental catch" management approach "may have permitted a directed fishery for Atlantic bluefin tuna in the Gulf of Mexico, contrary to the intent of the regulations and the United States obligations" to ICCAT. 53 Fed. Reg. 10415, 10415 (Mar. 31, 1988).

In short, the record establishes that the defendants have not followed the MSA requirement to take into account the recommendations of ICCAT. Instead, they have allowed a *de facto* directed fishery to kill spawning bluefin in the Gulf, and now have rejected a Petition that would have resolved that problem. This action plainly fails to take into account the long-standing ICCAT recommendation to protect spawning bluefin in the Gulf.[23]

### B. The Fisheries Service Violated National Standard Two By Failing to Rely on the Best Scientific Information Available In Deciding Not to Protect Spawning Bluefin in the Gulf of Mexico

National Standard Two requires that the conservation and management measures contained in the HMS FMP for ending overfishing and rebuilding the bluefin population "shall

[23] Given the significant reservations of ICCAT concerning the ability of the current plan to successfully rebuild the bluefin population, see ICCAT 2006 SCRS Report at 57-58, the defendants' decision to deny the plaintiffs' Petition and hold fast to the *status quo* also does not comport with the requirement that it demonstrate a "fairly high level of confidence" of rebuilding the bluefin population. *See NRDC v. Daley*, 209 F.3d 747, 754 (D.C. Cir. 2000) (quoting *Fishermen's Dock Coop., Inc. v. Brown*, 75 F.3d 164, 169-70 (4th Cir. 1996)).

be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). *See also* 50 C.F.R. § 600.315(b)(2). "Scientific information includes, but is not limited to, information of a biological, ecological, economic, or social nature." 50 C.F.R. § 600.315(b)(1). *See Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1432 (M.D. Fla. 1998) ("Under the 'best scientific information available' standard, the Secretary must derive his determinations from the sum of pertinent and available information.").

This requirement to use the best scientific information available imposes a strict burden on the defendants. Their decision "must be based on concrete analysis that permits the Secretary to 'rationally conclude that his approach would accomplish his legitimate objectives." *The Fishing Co. v. United States*, 195 F. Supp. 2d 1239, 1248 (W.D. Wa. 2002) (quoting *Parravano v. Babbitt*, 837 F. Supp. 1034, 1047 (N.D. Cal. 1993). Moreover, "[c]onclusory statements regarding the consideration of scientific data are not sufficient-the FMP must inform its audience of the actual scientific basis supporting it." *Hadaja v. Evans*, 263 F. Supp. 2d 346, 354 (D.R.I. 2003). As outlined in the HMS FMP, the Fishery Service's decision not to implement the proposed closure sought in the plaintiffs' Petition is based on a series of conclusory statements. Therefore, that decision does not comport with National Standard Two.

As discussed above, the defendants' decision not to implement any new closures was based on the conclusion that no possible closure would reduce bycatch for all potentially affected species. AR E12, at 4-33. In reaching this conclusion, the Fisheries Service utilized the effort redistribution model under a variety of assumptions as to actual redistribution. But the three scenarios described in the HMS FMP with respect to the closure proposed in the petition (alternative B2(c)) resulted in wildly different outcomes for every species considered. The

spearfish estimates provide an illustrative example of the significant range of predicted outcomes under the three scenarios for the estimated change in bycatch for spearfish:

1. with no redistribution of effort = -12.0%
2. with full redistribution of effort = + 2.0%
3. with modified redistribution of effort = -8.3%.

*See* HMS FMP Tables 4.5 & A.40. Similarly, although the Fisheries Service evinces concern that the proposed closure will negatively impact loggerhead turtles, *see, e.g.*, HMS FMP 4-39, under the "no redistribution of effort" model, loggerheads are in fact benefited, and under the "modified redistribution of effort" model, there is no predicted change in bycatch for loggerheads.

Despite the extremely disparate results reached under the different model assumptions, the Fisheries Service never clearly explained which set of assumptions were deemed most reliable. Accordingly, although the varying model runs are clearly laid out in the HMS FMP, there is no way to determine which model runs (or combinations thereof) actually informed the Fisheries Service's opinion. Merely stating in a conclusory fashion that no closure would reduce all bycatch simply does not answer this very important question: it is vital, and it is legally required, that defendants explain the true basis of their decision. In short, under National Standard Two, the Fisheries Service was required, if relying solely relying on this model, to inform its audience how it reached its conclusions using the model. It failed to do so.

This flawed decisionmaking was highlighted in the peer review process. Messrs. Chris Boggs and Keith Bigelow, in reviewing the analysis of the proposed closure, noted that they "couldn't locate any objectives or decision matrix in deciding on the preferred HMS alternatives. Most of the decisions seem to correspond to a percentage of reduction/increases for retained

species/bycatch and associated economics." AR E12, at E-24. In response, the Fisheries Service merely noted that:

> While not a formalized decision matrix, NMFS used the analyses in time/area closure section, which considered all species, to evaluate the effects of the proposed time/area closures, including all species for a combination of closures. NFMS used the results of the analyses to guide the Agency in determining which management measures are appropriate at this time.

*Id.* at E-30. However, nowhere in the HMS FMP does the Fisheries Service further elucidate how the "results of the analyses" were used "to guide the Agency." This explanation is the epitome of a conclusory statement regarding the consideration of scientific data; such a statement is not sufficient under National Standard Two. *Hadaja*, 263 F. Supp. 2d at 354.

Indeed, the Fisheries Service's position that the agency may not choose protections for one species to the detriment of another, HMS FMP at 4-66, begs the question. If an alternative benefits some species and may adversely affect others, then rejecting the alternative may adversely affect the species that would benefit from that alternative. Thus, the agency may not reject an alternative simply because its effects vary among species. Rather the agency must analyze and compare the environmental impacts of all alternatives, including no action, on all relevant species. Such a clear analysis has not occurred here. *See, e.g.*, *The Fishing Co. v. United States*, 195 F. Supp. 2d 1239, 1248 (W.D. Wa. 2002).

### C. The Fisheries Service Violated National Standard Nine By Failing to Minimize Bluefin Bycatch in the Gulf of Mexico

National Standard Nine of the MSA (the "bycatch" standard) states that fishery management plans must contain conservation and management measures that avoid or minimize bycatch and bycatch mortality to the extent practicable. 16 U.S.C. § 1851(a)(9). This provision is echoed in a separate section of the MSA, which states that FMPs must include conservation and management measures that, "to the extent practicable and in the following priority -- (A)

minimize bycatch; and (B) minimize the mortality of bycatch which cannot be avoided[.]" 16 U.S.C. § 1853(a)(11). In addition, the MSA requires defendants to "establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery." *Id.*

The bycatch provision does not exist "in a vacuum;" bycatch minimization is an integral part of the MSA's program for management of fish populations. *See Legacy Fishing Co. v. Gutierrez*, 2007 WL 861143, *7 (D.D.C. March 20, 2007). As one court noted:

> [The Fisheries Service] themselves recognize the threat posed by bycatch: '[B]ycatch can increase substantially the uncertainty concerning total fishing-related mortality', and thus complicates efforts to achieve the [MSA] . . . goals to protect and rebuild threatened fish species.

*Conservation Law Found. v. Evans*, 209 F. Supp. 2d 1, 12 (D.D.C. 2001) (quoting 50 C.F.R. § 600.350(b)).

By denying the plaintiffs' Petition to prevent bycatch of spawning bluefin in the Gulf of Mexico, the Fisheries Service has failed to minimize the bycatch of bluefin tuna to the extent practicable, in violation of National Standard Nine. *See id.* at 15 (failure to minimize bycatch and bycatch mortality violates the MSA). Furthermore, defendants have not established a standardized bycatch reporting methodology for bluefin.

At the time they were presented with the plaintiffs' Petition, defendants were well aware that bluefin bycatch was a problem in the Gulf of Mexico. In 1994, they noted that their "incidental catch" approach in the Gulf was "causing an increase in bluefin discard and waste." 50 Fed. Reg. 2813, 2814 (Jan. 19, 1994). Eight years later, in 2002, they again noted that "despite efforts to alter target catch requirements . . . bycatch and discards of [bluefin] by U.S. pelagic longline vessels have continued." 67 Fed. Reg. 78404, 78406 (Dec. 24, 2002).

Plaintiffs' petition simply asked defendants to comply with the requirements of National Standard Nine with respect to a particularly important kind of bycatch – spawning bluefin. In

refusing that request, the defendants did not engage in a meaningful analysis of practicable steps to minimize bluefin bycatch, and failed to establish the requisite bycatch reporting methodology. Instead, they offered a response that relied upon the possible bycatch effects of the closure sought by the plaintiffs on other species as an excuse to avoid the closure.

Under defendants' non-random effort redistribution scenario, the effort redistribution model predicted that bluefin bycatch would decrease by 19% -- thereby protecting 122 bluefin annually. AR E22, at 16-17. Given this result, National Standard Nine requires defendants to consider whether the closure was "practical" – for it clearly would have avoided, minimized, and reduced bluefin bycatch – not only in the closed area, but throughout all other areas that were part of this model run.

The defendants did not comply with National Standard Nine. They declined to proceed with the closure on the ground that the closure would result in an increase of bycatch for several other species. HMS FMP (AR E12) at 4-66. As we have explained elsewhere in this brief, this explanation is a classic *reductio ad absurdum* on the part of the defendants. Under their modeling scenarios, no part of the federal ocean can ever be closed, because their models will locate at least one species that is predicted to experience an increase in bycatch as a result of the closure. By ensuring that they will always be able to claim that any particular bycatch avoidance measure for one species is not "practical" (because it will adversely affect another species), defendants have robbed National Standard Nine of any meaning. Their concurrent failure to establish any standardized bycatch reporting methodology for bluefin exacerbates the problem by allowing their approach to avoid close scrutiny. All of this is unlawful. *See American Fed'n of Government Employees v. Federal Labor Relations Auth.*, 798 F. 2d 1525, 1528 (D.C. Cir. 1986) (agency interpretation should not "deprive a statutory provision of virtually all effect");

*see also Oceana, Inc. v. Evans*, 2005 WL 555416, *37-43 (D.D.C. Mar. 9, 2005); *Pac. Marine Conservation Council, Inc. v.* Evans, 200 F. Supp. 2d 1194, 1200 (N.D. Cal. 2002).

By way of excuse for its approach, the Fisheries Service stated that "National Standard 9, which requires NMFS to minimize bycatch and bycatch mortality to the extent practicable, applies to all species and fisheries." AR E22, at 16. In addition, in responding to comments from peer reviewers about the need for some sort of decision matrix to better inform its final conclusion, it claimed that it "cannot place more value on one species over another species." AR E12 at E-30, and observed that more research was needed in order to make a determine to close the Gulf. AR E12 at D-17. However, as noted above, choosing not to close the Gulf to protect spawning bluefin plainly values other species more than bluefin. Moreover, relying on future actions does not relieve the agency's duty in *this* FMP to take actions to minimize bycatch to the extent practicable. *Cf. Conservation Law Found. v. Evans*, 209 F. Supp. 2d 1, 9 (D.D.C. 2001) (rejecting argument that future agency rulemaking would remedy legal inadequacies in current regulation). In short, these excuses do not mask the fact that defendants failed to comply with National Standard Nine.

## IV. THE FISHERIES SERVICE VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT

The defendants violated the National Environmental Policy Act ("NEPA") in preparing the Final Environmental Impact Statement ("FEIS") for the HMS FMP that rejected the plaintiffs' Petition. The FEIS fails the most basic requirement of NEPA: to analyze clearly one of the fundamental challenges intended to be addressed by the Petition—ending the precipitous decline of the bluefin tuna population. Defendants essentially ignored a central cause of the overfishing problem—the continuing rise of a *de facto* directed bluefin fishery in the Gulf of Mexico—and failed to consider alternative management measures to solve that problem that are

required by the MSA and that could prove effective. Accordingly, when this case is remanded to the defendants with instructions to prepare regulations that better protect spawning bluefin in the Gulf of Mexico, the defendants must prepare a new environmental analysis to accompany those regulations.[24]

NEPA requires the Fisheries Service to analyze the environmental impacts of a reasonable range of alternative measures for ending overfishing and rebuilding an overfished stock of fish, as well as for avoiding or minimizing bycatch, when it prepares an FMP. 42 U.S.C. § 4332(2)(C); 16 U.S.C. § 1853(a)(1)(C) (providing that FMPs must be "consistent with . . . any other applicable law"). Thus, NEPA requires defendants to analyze the environmental impacts of the HMS FMP and consider alternatives to the Petition, including alternatives that might mitigate the impacts of the FMP on bluefin, while developing the scientific information and analysis necessary to analyze those impacts and alternatives.

### A. The FEIS Failed to Analyze Adequately the Possible Impacts of the Closure Requested in the Petition

The central purpose of NEPA is to ensure that both decision-makers and the public are well informed about the potential environmental effects of a proposed actions. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (NEPA ensures that the agency will "carefully consider detailed information concerning significant environmental impacts" and that such information is available to the public); *accord Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 97 (1983). The regulation promulgated by defendants to govern their NEPA compliance (National Oceanic and Atmospheric Administration Administrative Order 216-6, hereinafter "AO 216-6") emphasizes the defendants' duty to prepare an EIS that adequately

[24] Plaintiffs do not assert that an environmental analysis is required to accompany emergency regulations that plaintiffs request be published immediately upon a ruling from this Court.

informs the public of the environmental impacts of the proposed action: "An EIS must provide a full and fair discussion of significant environmental impacts." AO216-6 § 5.04.a.1.

Notwithstanding these clear mandates, the FEIS here fails to provide a full and fair discussion of the environmental impacts of defendants' decision to deny the plaintiffs' Petition. The FEIS glosses over the problems of bluefin bycatch in the Gulf of Mexico and pays even less attention to the implications of allowing such bycatch to continue in the event the chosen management measures (allowing longline fishermen to kill spawning bluefin in the Gulf of Mexico) fail to prevent overfishing and fail to rebuild the bluefin population.

The FEIS formally identified a "No Action alternative" that "would maintain the existing time/area closures . . . and would not implement any new time/area closures." AR E12, at 4-33. However, the analysis of this alternative focuses exclusively on the "overview of the effectiveness of the existing time/area closures at reducing discards and bycatch and maintaining target catches for the entire fishery." *Id.* Notably absent from this analysis is any discussion of the concerns addressed in plaintiffs' Petition—it does not address the impact of continuing to allow high incidental catch of bluefin in the Gulf of Mexico. As a result, the FEIS fails to comply with NEPA's requirement to adequately consider the "no action" alternative.

The Council on Environmental Quality ("CEQ") has stated that the analysis of alternatives must 'include the alternative of no action.'" Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18027 (Mar. 23, 1981) (citing 40 C.F.R. § 1502.14). In a situation where "no action" is equivalent to "no change" from current management practices – such as this case – the "projected impacts of alternative management schemes" must be "compared in the EIS to those impacts projected for the existing plan." *Id.* Thus, defendants must include in the FEIS (at a minimum) a discussion

and comparative analysis of the impacts of maintaining the *status quo* with respect to the bluefin in the Gulf when contrasted with the impacts of establishing the closure sought by the plaintiffs in their Petition. Such comparison is not in the FEIS. Because the FEIS "does not provide the information necessary for decision-makers to make fully informed choices . . . the [FEIS] is therefore inadequate under NEPA." *Greenpeace v. NMFS*, 55 F. Supp. 2d 1248, 1275 (W.D. Wa. 1999).

Instead of evaluating plaintiffs' concerns about the problems presented by adopting the "No Action alternative" in a meaningful way, the defendants asserted in the most conclusory fashion that "no single closure or combination of closures would reduce the bycatch of all species considered, assuming there is some redistribution of effort." AR E12, at 4-66. This conclusion leaves unaddressed a central question presented by the Petition – whether the proposed closure significantly reduce incidental catch of western Atlantic bluefin tuna, thereby reducing overfishing of that overfished population. By failing to address this question, the FEIS does not provide the "hard look" at environmental consequences required by NEPA. *See Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976) (courts are to ensure that agencies take a "hard look" at the environmental consequences of their actions); *NRDC v. Hodel*, 865 F. 2d 288, 294 (D.C. Cir. 1988) (EIS must "contain[] sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a 'hard look' at environmental factors").

**B. The FEIS Failed to Present a Clear Analysis of the Environmental Impacts of Alternatives to the Closure Requested in the Petition**

A basic requirement of NEPA is that an EIS present information in a clear and comprehensible fashion. *See Tongass Conservation Society v. Cheney*, 924 F.2d 1137, 1142 (D.C. Cir. 1991) (EIS text must be written in plain, readily understandable language). The CEQ guidelines also make clear that EISs "shall be concise, clear, and to the point." 40 C.F.R. §

1502.1. Importantly, the analysis of alternatives must foster "informed decision-making and informed public participation." *See Westlands Water District v. U.S. Department of the Interior*, 376 F.3d 853, 868 (9th Cir. 2004) (analysis of alternatives must foster "informed decision-making and informed public participation") (quoting *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982)); *see also* 40 C.F.R. § 1502.14 (requiring that agencies must analyze alternatives in comparative form "sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public").

As described earlier in this brief, the FEIS failed to clearly and coherently discuss the exact methodologies used by the defendants in making their decision to deny the plaintiffs' Petition. Thus, they failed to explain how they chose the alternative of the *status quo*. They also failed to examine other alternatives for protecting spawning bluefin, such as establishing a bycatch cap. For example, in response to concerns that there was a need for a "decision matrix" that would illuminate the process by which defendants decided not to close the bluefin spawning area in the Gulf, defendants said only that they "used the results" of their closure analyses "to guide the Agency in determining which management measures are appropriate at this time." AR E 17 at 6. Notably, they did not elaborate on the manner in which they relied upon their analysis for any particular guidance. They also noted cryptically – and again without elaboration – that they "cannot place more value on one species over another species." AR E12 at E-30. These failures to explain the bases for their decisions violate NEPA.

### C. The FEIS Failed To Evaluate the Cumulative and Long-term Effects of Denying the Closure Requested in the Petition

Two additional failings of the FEIS are: (1) its lack of any cumulative impacts analysis of the environmental effects of the continuing failure to rebuild the western Atlantic bluefin; and (2) its refusal to examine the long-term effects of this rebuilding failure. As we have shown, the

defendants have been aware for many years that the bluefin population is in a long decline. In fact, ICCAT scientists are now expressing concern that the prospects for rebuilding bluefin under the existing rebuilding plan are "less clear" and that "current regulations may be insufficient to achieve [rebuilding] objectives. 2006 ICCAT SCRS Report at 57-58. Under these circumstances, it is particularly important for defendants to analyze whether the closure sought by the Petition would help prevent the cumulative loss of the bluefin population at a critical time. However, no such discussion appears in the FEIS.

This approach is plainly insufficient to comply with NEPA. The Act expressly requires agencies to analyze "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity." 42 U.S.C. § 4332(2)(C)(iv). As a result, defendants must make a reasonable effort to discern the long-term effects of denying the closure sought by the Petition on the productivity of the bluefin fishery. See *Concerned About Trident* v. *Rumsfeld*, 555 F.2d 817, 829-830 (D.C. Cir. 1977) (agency must examine the future results of its actions). They cannot – at least without any environmental analysis – continue on the path set in their most recent regulations, which favor the short term interests of longline fishermen in the Gulf of Mexico over the long-term interests of all bluefin fishermen and of the bluefin population itself. *See Potomac Alliance* v. *U.S. Nuclear Regulatory Comm'n*, 682 F.2d 1030, 1036 (D.C. Cir. 1982) (NEPA does not allow agency to be short-sighted).

In addition, the CEQ regulations make clear that agencies must evaluate the cumulative impacts of their decisions. 40 C.F.R. § 1508.27; *see Fund for Animals* v. *Clark*, 27 F.Supp. 2d 8, 12 (D.D.C. 1998) (environmental analysis required "where several separate actions may have a cumulatively significant effect on the environment"). Thus, an EIS must address both cumulative and long-term impacts of the action it examines. By neglecting to analyze the long-

term effects – on both bluefin fishermen and bluefin – of their decision to deny the plaintiffs' Petition, the FEIS for the HMS FMP manifestly fails this additional NEPA requirement.

**CONCLUSION**

For each of the foregoing reasons, the plaintiffs respectfully request this Court to enter an order granting summary judgment against defendants in accordance with the accompanying motion.

DATED this 19th day of November, 2007.

Respectfully submitted,

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