

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
SUSTAINABLE FISHERIES COALITION,)	
)	
Plaintiff,)	
)	
v.)	Civil No. 21-10204-LTS
)	
THE HONORABLE GINA RAIMONDO,)	
Secretary of Commerce)	
)	
Defendant.)	
_____)	

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT (DOC. NOS. 29, 33)

March 4, 2022

SOROKIN, J.

The subject of the pending cross-motions for summary judgment is a challenge to the National Marine Fisheries Services’s¹ final rule amending the Fishery Management Plan for Atlantic Herring. The Plaintiff, Sustainable Fisheries Coalition (“SFC”), is an unincorporated trade association with members that include various participants in the herring fishing industry. Doc. No. 1 ¶ 7.² SFC objects to a portion of the final rule implementing a ban on the use of midwater trawl gear in certain inshore waters. The Defendant opposes SFC’s Motion and seeks summary judgment on all claims, contending that the final rule was rational and supported by the administrative record. For the reasons stated herein, the Court **ALLOWS** the Plaintiff’s Motion for Summary Judgment solely on the grounds that the final rule violates the Administrative

¹ The National Marine Fisheries Service (“NMFS”) is a designee of the Department of Commerce.

² Citations to “Doc. No. __ at __” reference items appearing on the court’s electronic docketing system, and pincites are to the page numbers in the ECF header.

Procedure Act and National Standard 4 (Doc. No. 29). The Court ALLOWS the Defendant's Motion for Summary Judgment insofar as the final rule provides a lawful fishery impact statement but DENIES the Motion on all other grounds (Doc. No. 33).

I. STATUTORY BACKGROUND

The purpose of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. §§ 1801 et seq., is to, inter alia, "take immediate action to conserve and manage the fishery resources found off the coasts of the United States." 16 U.S.C. § 1801(b)(1). The MSA established an "exclusive economic zone" that encompasses waters 3 to 200 miles offshore of the United States, "over which the federal government claims 'sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources' located therein." Campanale & Sons, Inc. v. Evans, 311 F.3d 109, 110 (1st Cir. 2002) (quoting 16 U.S.C. § 1811). The MSA calls for the creation of regional fishery management councils tasked with "prepar[ing], monitoring, and revis[ing]" fishery management plans designed to "achieve and maintain, on a continuing basis, the optimum yield for each fishery." 16 U.S.C. § 1801(b)(4)-(5). Pursuant to this authority, Congress created eight regional fishery management councils "composed of persons with various interests in the region's fisheries" including state fishery officials and the National Marine Fisheries Service ("NMFS") regional director. W. Sea Fishing Co. v. Locke, 722 F. Supp. 2d 126, 130 (D. Mass. 2010); 16 U.S.C. § 1852.

The primary purpose of a Regional Council is to create fishery management plans ("FMP") for overfished species that require conservation in its jurisdiction. 16 U.S.C. § 1852(h)(1). FMPs must take measures to conserve, manage, and protect the fishery with an eye towards its "long-term health and stability." Id. § 1853(a)(1). In addition, FMPs must conform with the ten national standards set forth in the MSA. Id. § 1851(a)(1)-(10). A Regional Council

presents the proposed FMP to the Secretary of Commerce for review and approval. Id. § 1852(h)(1). If approved, the Secretary enacts regulations to implement the FMP. Id. § 1854.

“In sum, ‘[t]he Magnuson–Stevens Act’s main thrust is to conserve the fisheries as a continuing resource through a mixed federal-state regime; the FMPs are proposed by state Councils but the final regulations are promulgated by the Secretary through the Fisheries Service.’” Evans, 311 F.3d at 111 (alteration in original) (quoting Mass. v. Daley, 170 F.3d 23, 27-28 (1st Cir. 1999)).

II. AMENDMENT 8

The subject of this dispute is Amendment 8 to the FMP for Atlantic Herring. Atlantic Herring are silver fish with green or blue backs. Atlantic Herring, NOAA Fisheries, <https://www.fisheries.noaa.gov/species/atlantic-herring#overview> (“Atlantic Herring Overview”). They can reach 14 inches in length and have an impressive lifespan of up to 15 years. Id. Atlantic Herring can be found across the continental shelf waters of the Northeast Atlantic from Labrador to Cape Hatteras but are most prominent in the waters north of Cape Cod. AR24456. A migratory species, Atlantic Herring travel in schools seeking locations to spawn, feed, and spend the winter. Atlantic Herring Overview. Other fish, marine mammals, and seabirds rely on Atlantic herring as prey. Id.

The initial purpose of Amendment 8 was to establish an “acceptable biological catch” (“ABC”) control rule for Atlantic herring that accounted for herring’s role in the ecosystem, including its role as a “forage species” or prey for other species. AR24320; Doc. No. 30 at 18-19. In February of 2015, the New England Fishery Management Council (“the Council”)

launched the process for developing Amendment 8 by publishing a Notice of Intent (“NOI”) and initiating a public comment period. AR24373.

A few months later in August of 2015, the Council published a second NOI announcing that the Council was expanding the purpose of Amendment 8. AR24320. In addition to establishing an ABC control rule, Amendment 8 would address “localized depletion in inshore waters.” Id. Localized depletion “is when harvesting takes more fish than can be replaced either locally or through fish migrating into the catch area within a given time period.” AR24655. A second round of public comments focused on the expansion of the Amendment’s purpose revealed concerns about localized depletion’s biological impact on both herring and herring predators, its economic impact on businesses that rely on predators of herring, and the resulting potential for conflict between competing users of herring. AR24320. In response to such comments, the Council’s “consideration of localized depletion in Amendment 8 included user group conflict, both an evaluation of impacts of the user group conflict and consideration of competing interests for how herring should be used.” Id.

The Council’s Plan Development Team (“PDT”) was tasked with: (1) analyzing the existing literature on relationships between herring and its predators, (2) developing mapping tools to capture areas used by the herring fishery and predator fisheries, (3) undertaking an overlap analysis to identify the existence of user conflict, (4) assessing the impact of the herring fishery on predator fisheries, and (5) determining how fisheries would respond to closures. AR24656. The Council developed ten “alternatives” to address the issue of localized depletion, which were the subject of numerous hearings and public comments. AR24385. Ultimately, the Council settled on Amendment 8, a hybrid of three of the alternatives presented. AR24444. The Council adopted Amendment 8 on September 25, 2018. AR24320. NMFS sought public

comments on the Amendment from August 21, 2019 to October 1, 2019. Id. NMFS then published a proposed rule for the Amendment on October 9, 2019, and, again, sought public comments. Id. Finally, NMFS approved the final rule on November 19, 2019.

According to the Final Rule, Amendment 8 “specifies a long-term acceptable biological catch control rule for herring and addresses localized depletion and user group conflict.”

AR24319-20. The Plaintiff does not challenge the ABC control rule, but only the portions of the Amendment that address localized depletion and user group conflict. Specifically, the

challenged portion of the Amendment creates an exclusion zone of twelve miles from the shore in which Midwater Trawl (“MWT”) vessels are prohibited from fishing (“the exclusion zone”).³

AR24321-22. The exclusion zone, which is in effect all year, runs from the Canadian border to an area east of Long Island and encompasses a buffer of roughly twenty miles off Cape Cod and Nantucket Island. AR24321-22; Doc. No. 30 at 24. Only MWT vessels are prohibited from fishing in the exclusion zone.⁴ AR24321; Doc. No. 30 at 24.

The Plaintiff brings three primary challenges to the exclusion zone. First, it contends that the final rule is arbitrary and capricious and thus violative of the Administrative Procedure Act

³ The United States fishery primarily relies on vessels equipped with “mobile gear,” of which there are three types: (1) MWT gear, (2) purse seine gear, and (3) small bottom trawl gear. Doc. No. 35 at 17 (citing Final Atlantic Herring Fishery Management Plan, New England Fishery Management Council, at 144, 155-56, https://s3.amazonaws.com/nefmc.org/herring_FMP.PDF (“Herring FMP”)). Purse seine and MWT vessels harvest the majority of herring. Doc. No. 30 at 17 (citing AR24530). Purse seine vessels catch fish near the surface of the water by “encircling” and then “pursing” the net. Doc. No. 35 at 17 (quoting Atlantic Herring Overview). MWT vessels tow a cone-shaped net with a wide front and a narrow back, in which fish gather and are trapped. Id. Unlike MWT vessels, purse seines cannot fish offshore or in areas with strong tides and currents. Doc. No. 30 at 17 (citing AR24695).

⁴ The relevant text of the final rule states:

This rule prohibits the use of midwater trawl gear inshore of 12 nautical miles (22 km) from the U.S./Canada border to the Rhode Island/Connecticut border and inshore of 20 nautical miles (37 km) off the east coast of Cape Cod. Specifically, federally permitted vessels are prohibited from using, deploying, or fishing with

(“APA”). Next, it claims that the final rule is inconstant with MSA National Standards 1, 2, 4, 5, 7, and 8. Finally, it argues that the Defendant failed to undertake its statutory duty under the MSA to provide a fishery impact statement.

III. LEGAL STANDARD

Pursuant to the MSA, regulations promulgated by the Secretary are reviewed under the standard set forth by the APA. 16 U.S.C. § 1855(f)(1); Frontier Fishing Corp. v. Pritzker, 770 F.3d 58, 62 (1st Cir. 2014). The APA’s “highly deferential” standard permits courts to set aside an agency decision if it is arbitrary, capricious, or otherwise unlawful. 5 U.S.C. § 706(2)(A)-(D); Locke, 722 F. Supp. 2d 126 at 136. The Court must determine whether the Secretary’s action “was consonant with [the agency’s] statutory powers, reasoned, and supported by substantial evidence in the record.” Associated Fisheries of Me., Inc. v. Daley, 127 F.3d 104, 109 (1st Cir.1997). The burden of proof lies with SFC. Locke, 722 F. Supp. 2d at 136.

Under the arbitrary and capricious standard of review, agency decisions are granted a “presumption of validity,” a presumption that is particularly strong when applied “in a technical and complex regulatory schema, such as fisheries management.” Id. at 136 (citing National Fisheries Inst. Inc. v. Mosbacher, 732 F.Supp. 210, 223 (D.D.C. 1990)). “[A] court should not substitute its judgment for that of the agency.” Adams v. U.S. E.P.A., 38 F.3d 43, 49 (1st Cir. 1994). Though deferential, the standard is not toothless. A court must set aside regulations “if

midwater trawl gear within the inshore midwater trawl restricted area located shoreward of the 12-nautical mile (22-km) territorial sea boundary from Canada to Connecticut and within 30-minute squares 114 and 99 off Cape Cod Midwater trawl vessels are able to transit the inshore midwater trawl restricted gear area provided gear is stowed and not available for immediate use. This measure is in addition to the existing prohibition on midwater trawling for herring in Area 1A during June 1 through September 30.

AR24321.

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 Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). In other words, the regulation “must make sense to reviewing courts.” Puerto Rico Sun Oil Co. v. U.S. E.P.A., 8 F.3d 73, 77 (1st Cir.1993).

IV. DISCUSSION

A. Arbitrary and Capricious Review

The Court first addresses the Plaintiff’s argument that the exclusion zone is arbitrary and capricious in violation of the APA.

Though the Plaintiff contends that there are several deficiencies in the final rule (see Doc. No. 30 at 27-36), the main thrust of its argument is that the exclusion zone “purports to mitigate a problem—localized depletion—which the best scientific information available . . . cannot identify.” Doc. No. 30 at 34. Specifically, the Plaintiff points out that a scientific study intended to identify the existence of localized depletion was inconclusive and that other socioeconomic and conservation benefits alluded to in the final rule are couched in uncertainty. See id. at 30-31, 33. The Secretary counters by explaining that the final rule is justified by the Council’s “overlap analysis,” which identified a high degree of spatial overlap between MWT vessels and other user groups that rely on Atlantic herring as a forage species. Doc. No. 35 at 23-25. The Council reasoned that limiting overlap through the implementation of the exclusion zone would “reduce potential user group conflicts,” provide socioeconomic benefits for predator fisheries, and prioritize fairness by targeting only MWT vessels, which are capable of fishing offshore. Id.

The Secretary also notes that there are “potential biological benefits” that flow from the rule. Id. at 24.

According to the final rule,

[t]he Council recommended the inshore midwater trawl restricted area to minimize local depletion and its associated user group conflict when midwater trawl vessels harvesting herring overlap with other user groups (*i.e.*, commercial fisheries, recreational fisheries, ecotourism) that rely on herring as forage and provide inshore conservation benefits.

AR24322. The rule’s focus on MWT vessels stems from their “short-duration, high-volume” removals and relative ability to fish offshore compared to other vessel types. Id.

As discussed previously, the Council’s Plan Development Team undertook several analyses to examine the impacts of the rule on localized depletion and user group conflict, which are explained in the Amendment’s Final Environmental Impact Statement (FEIS). See AR24386, AR24655-70. At the outset, the FEIS cautions that “[i]t is challenging to identify if and how other fisheries have been impacted by herring catches.” AR24386. In addition to studying herring’s status as a forage species (AR24656), the physical footprint of herring fisheries (AR24657), and how user groups may respond to the alternatives considered (AR24665), the PDT undertook two primary analyses to identify the impact of the proposed alternatives: (1) an overlap analysis (AR24661), and (2) a correlation analysis intended to identify evidence of localized depletion (“localized depletion analysis”) (AR24665).

The overlap analysis identified “spatial, monthly overlaps . . . between the predator user groups and the herring MWT fishery[.]” AR24661. Specifically, the analysis captured the times and places when there was the most significant overlap between the herring MWT fishery and the commercial groundfish fishery, the bluefin tuna fishery, and the whale watching industry. Id. Though the PDT concluded that “reducing overlap may decrease potential user conflicts,” it

noted two important caveats. First, “overlap may not always equate to direct negative impacts on predators and/or predator fisheries.” Id. Second, potential benefits of reduced overlap are contingent on the “herring fishing effort [] not shift[ing] into areas or seasons with higher potential for overlap.” Id.

The localized depletion analysis was intended to determine whether the presence of predator species declined due to a decrease in available prey after MWT fishing activity. AR24665. To examine this potential phenomenon, the analysis compared the herring catch to the reported catch per trip of certain predators one and two weeks after herring catch. Id. The analysis “did not find any evidence of localized depletion.” Id. The PDT noted, however, that this finding “comes with many caveats.” Specifically, the analysis could miss localized depletion that occurs on a timescale other than the one-to-two-week timeframe used in the study, relied on potentially unreliable self-reported data, did not study the impacts on predators for which data was unavailable, and did not attempt to capture potential variations in localized depletion by season or predator-type. Id.

In adopting the exclusion zone, the Secretary provided an overview of the reasoning supporting the final rule, which the Court recites here. Due to the relative scarcity of information quantifying MWT vessels’ impact on other user groups and localized depletion, the Council relied on the overlap analysis to create an exclusion zone that incorporated areas with consistently high levels of overlap between MWT vessels and other fishery users. AR24322. In addition, the Council was influenced by the anecdotal reports of user conflict caused by MWT vessels revealed during the comment process. AR24320. Though the Council recognized that “overlap with the midwater trawl vessels does not necessarily translate into direct negative biological impacts on predators,” it reasoned that “less overlap may reduce potential user

conflicts, provided midwater trawl effort does not shift into other areas and generate additional overlap.” AR24322. As for the harm to MWT fleet, which relies on fishing in the exclusion zone for approximately 30% of its revenue, the Secretary pointed out that MWT vessels can seek fishing opportunities offshore. AR24323. Finally, the Secretary noted that the exclusion zone “may also have biological benefits if moving midwater trawl vessels offshore minimizes catch of river herring and shad, reduces fishing pressure on the inshore component of the herring stock, and helps ensure herring are available to predators.” Id. From this evidence, the Secretary concluded that the exclusion zone is a fair “allocation decision intended to balance the needs of user groups and provide conservation benefits.” Id.

In evaluating a final rule, the Court must assess whether the agency has established a “rational connection between the facts found and the choice made.” State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)). Atlantic Fish Spotters Association v. Daley applied this principle to a regulation that banned the use of small aircraft called spotter planes by certain fishing permit holders harvesting Atlantic Bluefin Tuna. 8 F. Supp. 2d 113, 115 (D. Mass. 1998). The court found the rule arbitrary and capricious due, in part, to the dearth of evidence connecting the use of spotter planes to the rule’s justifications as well as the existence of data that directly refuted such justifications. See id. at 117 (“The fundamental flaw in the Secretary’s argument is his failure to proffer any evidence” that the use of spotter planes results in the harvesting of undersized fish, one of the reasons cited for the rule).⁵ Hadaja, Inc. v. Evans relied on similar reasoning in

⁵ The Secretary contends that Atlantic Fish Spotters is inapplicable because, in that case, there was evidence that contradicted the Council’s findings. Doc. No. 35 at 35. Here, the Secretary argues, there is simply not enough data available to fully evaluate localized depletion. Id. The Court disagrees. The Atlantic Fish Spotters court’s ruling was based both on the lack of scientific evidence for the rule and the existence of contradictory data. 8 F. Supp. 2d at 117.

concluding that the Tilefish Fishery Management Plan's ("TFMP") prohibition of the use of trawl gear by certain permit holders violated National Standard 2, which requires that conservation and management measures be based on the best scientific evidence available. 263 F. Supp. 2d 346, 356 (D.R.I. 2003). The court explained:

[T]he TFMP itself indicates that the Committee needed further scientific information before it could determine whether trawling has a negative impact on the tilefish fishery. Despite this conclusion, the Committee determined that the use of trawl gear should be prohibited in the tilefish fishery. This conclusion, however, while appealing from a common-sense point of view, is not based on scientific evidence.

Id. Ultimately, the Hadaja court determined that the ban violated National Standard 2, explaining that there is a "difference between relying on conflicting evidence or incomplete evidence and relying on no evidence," and that this case fell into the latter category. Id. at 357.

Despite the deferential nature of arbitrary and capricious review, the Court finds that the Secretary has failed to identify a rational connection between the facts found and the choice to implement the exclusion zone. A primary purpose of the rule is to "minimize local depletion and its associated user group conflict when midwater trawl vessels harvesting herring overlap with other user groups[.]" AR24322. Yet, the Secretary could not identify any scientific evidence of localized depletion, let alone establish a link between MWT vessels and localized depletion. See, e.g., Doc. No. 35 at 25 (conceding "a lack of specific data linking MWT fishing to the localized depletion of herring" and framing the rule as "a proactive measure"); AR24322 ("Information to quantify the impact of midwater trawling on other user groups is scarce[.]"); AR24655 ("To date, there has not been research in this area to directly assess the potential impacts of different fishing gears on herring abundance and potential related effects of localized depletion on predators of herring."). Though the Secretary contends that the agency was entitled to rely on the overlap analysis as an alternative to the inconclusive localized depletion analysis,

she fails to put forth any evidence that overlap is associated with localized depletion. In other words, the Secretary has not found overlap to be a reliable proxy for localized depletion. The overlap analysis may accurately predict user group conflict, but it is not a suitable replacement for independent evidence of localized depletion linked to MWT vessels for a rule justified as addressing localized depletion. For this reason alone, the Court finds the rule arbitrary and capricious.

The Court notes a further problem with the localized depletion justification and analysis: the record fails to clearly define localized depletion spatially or temporally. For example, the PDT found no localized depletion caused by MWT vessels in the one-to-two-week time frame in the areas studied. AR24665. The PDT points out that the results might differ using a different time frame or spatial scale, id., but does not suggest a different time frame or spatial scale or present scientific evidence of the localized depletion effect using a different time frame or spatial scale. Id.

The Secretary highlights a series of public comments from fishery users describing the negative impacts of the MWT fleet. Doc. No. 35 at 31-32; see, e.g., AR20708 (“On the issue of localized depletion, I can tell you firsthand it is real. I know the science is thin on this but it is a matter of common sense, you remove millions of fish from a particular geographic area there are millions of less fish for predators to feed on in that area. And absolutely that kind of effort in those specific areas scatters the bait and scatters the predators and shuts off bites, this I know firsthand. Not only does the entire marine food chain get disrupted, but it cripples the small boat fisherman that depend on those aggregations for access to targeted fisheries.”); AR20692 (“We see that fishing is much harder when those boats come through, this would help a lot for the predator fisheries.”). Though these comments can certainly provide anecdotal support for the

final rule, they are not an adequate substitute for scientific evidence of localized depletion and its link to MWT vessels.

In addition, the Secretary's determinations concerning the potential biological and socioeconomic benefits of the rule are highly conditional. The Secretary recognized that the benefits associated with lower degrees of overlap and reduced user group conflict would be undermined or eliminated if MWT fleet shift their efforts to other areas where overlap may continue to occur. AR24322. Similarly, the rule's biological impacts hinge on many factors including whether the measure reduces the intensity of nearshore herring fishing thus making herring more available to predators, and whether the exclusion zone reduces the catch of river herring and shad. See Doc. No. 35 at 38-39. Simply put, the premise of these outcomes are speculative. See AR24655 (noting that it is challenging to identify "if" and "how" other fisheries are impacted by herring catches); AR24665 (explaining that the ability to identify localized depletion is dependent on the temporal and spatial scale of the analysis); id. (stating that the PDT "analysis did not find any evidence of localized depletion"). In sum, the Secretary's findings concerning localized depletion do not justify such a sweeping and economically consequential ban even under this deferential standard of review.

B. National Standard 4

The Secretary contends that the rule can be justified as an "allocation decision" pursuant to National Standard 4 whether or not the Council identified the existence of localized depletion. Doc. No. 35 at 23 (citing AR24323). The Plaintiff points out, and the Defendant seemingly concedes (id. at 46), that the Council did not expressly characterize Amendment 8 as an allocation decision. Instead, it was NMFS that first recognized the rule as allocative in nature, describing the Council's recommendation as an allocation decision that fairly balanced the

competing needs of different user groups. AR24323. The Plaintiff characterizes this statement in the final rule as conclusory and unsupported by the record. Doc. No. 30 at 43. The Defendant counters that NMFS was entitled to recognize the Amendment as an allocation decision “even though the Council did not explicitly call the measure an allocation” because “the Council recognized that it was balancing the competing interests of different users of the herring resource, [and] thereby treat[ed] the measure as an allocation.”⁶ Doc. No. 41 at 23.

National Standard 4 of the MSA discusses allocation decisions. 16 U.S.C. § 1851(a)(4).

It states:

[c]onservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

Id. Assuming without deciding that the Defendant could reasonably recognize the exclusion zone as an allocation for the first time in the final rule, the Court finds that the Defendant did not comply with National Standard 4 and, specifically, its obligation to explain how the rule is “reasonably calculated to promote conservation.”

The Secretary has a “statutory duty to explain how the amendment comports” with each of the three requirements of National Standard 4. Groundfish F. v. Ross, 375 F. Supp. 3d 72, 91 (D.D.C. 2019). Pursuant to Part B the National Standard, the Secretary must elaborate on how the rule promotes conservation. See id. at 92 (finding that NMFS violated National Standard 4 because it did not identify how the rule promoted conservation and instead conceded that the sole

⁶ In support of its argument, the Defendant points to the portion of the FEIS that elaborates on how the Amendment satisfies each National Standard. Yet, even in its discussion of National Standard 4, the Council does not explicitly describe the exclusion zone as an allocation decision. AR24893.

basis of the rule was to provide benefits for a specific group of constituents). The final rule states summarily that exclusion zone “is an allocation decision intended to balance the needs of user groups and provide conservation benefits.” AR24323. It goes on to explain the benefits of the Council’s recommendation, stating that it “ensure[s] herring [are] available inshore for other user groups and predators of herring” while protecting the interests of MWT vessels that have “historically harvested a larger percentage of herring than other gear types” and are capable of fishing offshore. Id.

As for the exclusion zone’s conservation benefits, portions of the final rule imply that addressing localized depletion promotes conservation. See, e.g., AR24326-27 (the rule “balances the needs of user groups and is expected to also provide conservation benefits for inshore areas due to herring's important role in the ecosystem as forage”) (emphasis added). Yet, for the reasons explained previously, alleviating localized depletion cannot provide a conservation basis for the exclusion zone because the Council was unable to confirm its existence. See AR24665 (explaining that the PDT’s analysis “did not find any evidence of localized depletion”). The rule references the exclusion zone’s potential “biological benefits” such as reducing the catch of river herring and shad and benefitting herring inshore. But, once again, these biological benefits are couched in uncertainty:

The measure may also have biological benefits if moving midwater trawl vessels offshore minimizes catch of river herring and shad, reduces fishing pressure on the inshore component of the herring stock, and helps ensure herring are available to predators. Herring is currently assessed as one stock, but it likely has stock components. Reducing fishing pressure inshore would benefit an inshore stock component.

AR24323. Due to the lackluster support for the Secretary’s conclusion that the final rule promotes conservation, the Court finds that the exclusion zone violates National Standard 4. The Court takes no position on whether the exclusion zone can be rationalized as an allocation

decision in the future with a fuller explanation, concluding only that the current explanation on the current record fails to sustain the exclusion zone.

C. The Fishery Impact Statement

For the purposes of completeness and providing clarity for the case going forward, the Court addresses the Defendant's failure to provide a Fishery Impact Statement ("FIS"). The MSA requires FMP amendments to include a FIS "which shall assess, specify, and analyze the likely effects, if any, including the cumulative conservation, economic, and social impacts, of the conservation and management measures and possible mitigation measures for . . . participants in the fisheries and fishing communities affected by the plan or amendment." 16 U.S.C. § 1853(a)(9). The Plaintiff complains that the FEIS prepared by the Council and intended to demonstrate compliance with the FIS requirement neither analyzes the cumulative impacts of the management measures on impacted communities nor proposes possible mitigation measures. Doc. No. 30 at 49.

As the Secretary points out, the FEIS plainly addresses the cumulative impacts of the management measures on the fishing community. AR24340-41; see also AR24878-83; AR24887 ("When the direct and indirect effects of the alternatives are considered in combination with all other actions, (*i.e.*, past, present, and reasonably foreseeable future actions), ***the cumulative effects should yield non-significant low positive impacts on human communities.***") (emphasis in original). Similarly, the FEIS considered various alternatives to the Amendment ultimately adopted and explained that the MWT fleet may mitigate the impacts of the Amendment by switching gear types and focusing fishing efforts offshore. See AR24893; AR24427-47 (providing an overview of the alternatives considered). SFC has not identified additional cumulative impacts or mitigation measures that the Council should have discussed.

Thus, the Court finds that the FEIS fulfills the Defendant's statutory duty to provide a lawful FIS.

IV. CONCLUSION

In light of the determinations explained previously, the Court need not address the Plaintiff's additional arguments.

For the reasons stated herein, the Court ALLOWS the Plaintiff's Motion for Summary Judgment solely on the grounds that the final rule violates the APA and National Standard 4 (Doc. No. 29). The Court ALLOWS the Defendant's Motion for Summary Judgment insofar as the final rule provides a lawful fishery impact statement but DENIES the Motion on all other grounds (Doc. No. 33). Within seven days, the parties shall submit a status report containing their joint or separate proposed schedules for supplemental briefing regarding the appropriate remedy in light of this Order.

SO ORDERED.

/s/ Leo T. Sorokin
Leo T. Sorokin
United States District Judge