IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN TUNABOAT ASSOCIATION, *Plaintiff,* v. WILBUR ROSS, *et al.*, *Defendants.*	Case No. 1:19-cv-01011-TNM

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Although this controversy may seem narrow, filled with technical jargon, and animated by the parochial interests of one segment of the American fishing industry, its implications are broad and important. At issue is whether the National Marine Fisheries Service ("NMFS")[1]—one of the two federal agencies that administers the Endangered Species Act ("ESA")—can exclude from formal participation in the Section 7 consultation process an entire sector of permittees whose ability to pursue their livelihoods will be restricted through that process, simply by refusing to recognize them, or the association representing them, as "applicants" under the ESA. Here, NMFS has unlawfully refused to recognize the American Tunaboat Association ("ATA") and its members as applicants under the ESA. Underlying NMFS's unlawful decision is the agency's interpretation that applicants and their statutorily conferred rights vanish the moment NMFS says it will undertake a "programmatic consultation." NMFS's unfounded interpretation erases applicant rights for entire industries whose members operate under federal permits and licenses (*e.g.*, fisheries, geological and geophysical surveyors, offshore oil and gas development).

NMFS's interpretation violates the Administrative Procedure Act ("APA") because it conflicts with the ESA, NMFS's own regulations and Consultation Handbook, as well as every case to have addressed this issue. Tellingly, NMFS bases its crabbed interpretation—not on the ESA, applicable regulations, or caselaw—but on its reading of *two sentences* in the agency's non-binding 315-page Consultation Handbook, a reading that no court to have addressed this issue has agreed with. NMFS's *post hoc* attempt to justify its failed interpretation with concerns about administrative workability crumbles because NMFS readily can respect applicant rights while maintaining efficiency during the consultation process.

[1] This memorandum uses "NMFS" as shorthand for all Defendants in this action.

Besides being rooted in untenable interpretations of the ESA and its implementing regulations, NMFS's denial decision violates the APA because it lacks the hallmarks of reasoned decision-making, relying on conclusory, inconsistent, and inapposite statements. NMFS's decision is also inconsistent with its continued recognition that a similarly situated fishery association is an applicant and its statements in its proposed rule to amend its regulations. For these reasons, ATA respectfully urges this court to fully grant the requested relief.

BACKGROUND

I. The Endangered Species Act ("ESA")

The ESA, 16 U.S.C. § 1531, *et seq.*, establishes a legal framework for preventing the extinction of plant and animal species. The purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). To accomplish this purpose, NMFS identifies and lists species that qualify as "endangered" or "threatened" and designates critical habitat for listed species. *See generally* 16 U.S.C. § 1533. Based on these listings and designations, the ESA requires and prohibits certain conduct. *See, e.g.*, 16 U.S.C. § 1536 (imposing consultation requirements); *id.* § 1538 (identifying prohibition on "take" of ESA-listed species). In addition to conservation purposes, the ESA provides some mechanisms to "prevent uneconomic" outcomes. *See Bennett v. Spear*, 520 U.S. 154, 177 (1997) (Scalia, J.) ("[E]conomic consequences are an explicit concern of the ESA.").

A. The Consultation Process

The "consultation process" requirement underlies this controversy. Section 7 of the ESA, 16 U.S.C. § 1536, prohibits federal agencies from taking actions that are "likely to jeopardize the continued existence" of listed species or likely to destroy or adversely modify critical habitat for those species. *Id.* § 1536(a)(2). Accordingly, the ESA requires a federal agency (the "action

agency") to consult with NMFS *before* taking action that may adversely affect listed species or their critical habitat. *Id.*

The consultation process generally involves two steps: "informal consultation" and "formal consultation." During its early planning stages, after determining that its proposed action may affect a listed species or critical habitat, the action agency engages in informal consultation with NMFS. During informal consultation the action agency communicates with NMFS to identify listed species and critical habitat that may exist in the proposed action area and to determine whether the proposed action is likely to adversely affect listed species or critical habitat. If such effect is likely, formal consultation (*i.e.*, a deeper analysis) is required. 50 C.F.R. § 402.13(a)-(b). In some instances, the agencies may conclude after initial discussions that the proposed action is not likely to have adverse effects on listed species or habitat, at which point consultation ends. *Id.* § 402.13(a). If these discussions do not sufficiently support such a conclusion, the action agency or its designated representative will usually prepare a biological assessment ("BA") providing more detailed analysis to determine whether the action likely will adversely affect listed species or critical habitat. *Id.* § 402.12(a), (k); *id.* § 402.02 (defining BA). Where a BA concludes no adverse effects to listed species or critical habitat are likely to occur, consultation ends.

Where the action agency determines through its BA that the proposed action *is* likely to adversely affect a listed species or critical habitat, the action agency must engage in formal consultation with NMFS, the result of which is a biological opinion ("BiOp"). *See id.* §§ 402.12(k)(1), 402.14(a)-(b). During formal consultation, the action agency and NMFS share information that NMFS uses to determine whether the proposed action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. *Id.* § 402.14(h). If so, NMFS issues a "jeopardy BiOp" that must include any reasonable

and prudent alternatives ("RPAs"), which are alternative actions that can be implemented to avoid the likelihood of jeopardizing listed species or destroying or adversely modifying critical habitat. *Id.* § 402.14(h)(3). Where no RPAs exist, the action agency may not take the proposed action (*e.g.*, cannot issue permits). If a proposed action is not likely to jeopardize listed species or destroy or adversely modify critical habitat, NMFS issues a "no jeopardy BiOp." *Id.*

Where a proposed action may proceed—either because of a "no jeopardy BiOp" or "jeopardy BiOp" with RPAs—NMFS prepares an incidental take statement ("ITS"). *Id.* § 402.14(i)(1). The ESA prohibits the "take" of listed species absent coverage from an ITS adopted in accordance with Section 7 of the ESA, or an incidental take permit issued under Section 10 of the ESA. 16 U.S.C. §§ 1538(a)(1)(B); 1536(o)(2); 1539(a)(1)(B). "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Incidental take is unintentional (but not unexpected) take. An ITS first must specify the allowed amount or extent of incidental taking of a listed species. *Id.* § 402.14(i)(1)(i). For fisheries, NMFS sometimes limits the number of "interactions" with a listed species (*e.g.*, entanglement of a listed shark in a seine) that a fishery can have. *See, e.g.*, 50 C.F.R. § 665.813. Second, the ITS must include binding reasonable and prudent measures ("RPMs"), which are those actions "necessary or appropriate to minimize" the "amount or extent[] of incidental take." 50 C.F.R. §§ 402.02; 402.14(i)(1)(ii). Third, the ITS must set forth terms and conditions (*e.g.*, reporting requirements) "that must be complied with by the [action] agency or any applicant" to implement RPMs. *Id.* § 402.14(i)(1)(iv). In other words, the ITS imposes prerequisite restrictions on those who will engage in the action NMFS is consulting on (*e.g.*, ATA members).

B. Applicants and Associated Rights

During informal and formal consultation, the ESA and implementing regulations provide key procedural rights to those persons whose activities will be regulated as a result of an action agency's consultation. These persons are known as "applicants." Notably, the ESA addresses three kinds of applicants: applicants, prospective applicants, and unsuccessful applicants. *See* 16 U.S.C. § 1536(a)(2), (b) (applicants); *id.* § 1536(a)(3) (prospective applicants); *id.* §§ 1532(12); 1536(g)-(h) (unsuccessful applicants). This case involves the first kind—applicants.

An **"applicant"** is "any person, as defined by section 3(13) of the [ESA], who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action." 50 C.F.R. § 402.02. The ESA defines "person" to include "an individual, corporation, partnership, trust, association, or any other private entity." 16 U.S.C. § 1532(13). Implementing regulations define "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas."[2] 50 C.F.R. § 402.02. The regulatory preamble provides that the NMFS intended to "broadly define[] 'applicant.'" 51 Fed. Reg. 19,926, 19,930 (June 3, 1986).

Applicants have many important rights for both informal and formal consultation.[3] During formal consultation, applicants: (1) have the right to "submit information for consideration during

[2] Actions include, among other things, "the promulgation of regulations," "the granting of licenses, contracts, leases, easements, right-of-way, permits, or grants-in-aid," and "actions intended to conserve listed species or their habitat." 50 C.F.R. § 402.02.

[3] During the informal consultation (which includes the BA stage), applicants: (1) may veto the action agency's choice of a designated non-Federal representative for informal consultation, 50 C.F.R. §§ 402.08; 402.02 (defining "designated non-Federal representative" as person selected by action agency to represent it during informal consultation); (2) are to be involved in informal consultation "to the greatest extent practicable" and have a right to receive and review the conclusions and recommendations from this process, *id.* § 402.10(a), (c), (e); and (3) must receive written notification and explanation if the 180-day completion-time requirement for a biological assessment needs to be extended, *id.* § 402.12(i).

the consultation," 50 C.F.R. § 402.14(d); (2) must approve agency-requested extensions of time to complete formal consultation before they are granted and have the right to review BiOps, *id.* § 402.14(e); (3) have the right to discuss with NMFS and the action agency NMFS's review and evaluation during formal consultation, "the basis for any finding in the biological opinion," and the "availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued)," *id.* § 402.14(g)(5); (4) are entitled to review and comment on the draft BiOp before NMFS issues a final BiOp, *id.* § 402.14(g)(8); and (5) are entitled to have NMFS "in good faith honor [their] procedural rights" as applicants, including fairly considering their comments. *Haw. Longline Ass'n v. NMFS*, No. 01-765, 2002 WL 732363, at 14 (D.D.C. Apr. 25, 2002) ("*HLA*").

NMFS has recognized that providing applicants with these rights, which include the rights to receive, review, and submit information throughout the consultation process, is consistent with the ESA. 51 Fed. Reg. at 19,926-27 (stating that the ESA "provide[s] an opportunity for permit or license applicant involvement in *all phases of the consultation procedures*" (emphasis added)). Applicants provide necessary expertise to help NMFS fulfill its statutory duty to ensure that BiOps are based on the best scientific and commercial information available. 16 U.S.C. § 1536(a)(2); 80 Fed. Reg. 26,832, 26,844 (May 11, 2015); Consultation Handbook, at xxii, 2-13.[4]

"Unsuccessful applicants," or those persons whose requests for authorizations were denied under 16 U.S.C. § 1536(a), have limited rights. *Id.* § 1532(12). An unsuccessful applicant may request that its denied authorization be allowed by "exemption." *Id.* §§ 1532(12); 1536(g)-(h). This case does not involve unsuccessful applicants because NMFS is engaged in ongoing consultation and has not denied any authorizations based on that consultation.

[4] NMFS and FWS Consultation Handbook, *available at* https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf.

"Prospective applicants" are persons who initiate a new "early consultation" by following NMFS-established procedures. *See* 16 U.S.C. § 1536(a)(3); 50 C.F.R. §§ 402.02 (defining "early consultation"); 402.11 (providing requirements for and procedures related to "early consultation"). Prospective applicants are to "be involved throughout the consultation process." 50 C.F.R. § 402.11. This case also does not involve prospective applicants and related "early consultation."

C. Relevant Regulatory History

NMFS adopted regulations implementing the ESA, including its definition of "applicant," in 1986. 51 Fed. Reg. at 19,930. NMFS amended its implementing regulations in 2009, 2015, and 2016, but did not alter its definition of "applicant." In the 2015 amendments, NMFS adopted definitions for "framework programmatic action" and "mixed programmatic action." *See generally* 80 Fed. Reg. 26,832. To date NMFS has neither adopted a regulation limiting the definition of "applicant" nor a regulation defining "programmatic consultation."

NMFS has a pending proposed rulemaking to amend its implementing regulations, but it would not alter the regulatory definition of "applicant." *See generally* 83 Fed. Reg. 35,178 (July 25, 2018). The pending rulemaking proposes "to codify an optional consultation technique that is being used with increasing frequency" by adopting the following definition:

> *Programmatic consultation* is a consultation addressing an agency's multiple actions on a program, region, or other basis. Programmatic consultations allow the Services to consult on the effects of programmatic actions such as: (1) Multiple similar, frequently occurring or routine actions expected to be implemented in particular geographic areas; and (2) A proposed program, plan, policy, or regulation providing a framework for future proposed actions.

83 Fed. Reg. at 35,184, 35,191-92. For "Type 1" programmatic actions, which include those "looking across numerous individual actions at the programmatic level," NMFS recognizes applicants exist and have a role, stating that "the Federal action agencies *and applicants* can

propose project design criteria, best management practices, standard operating procedures, and/or standards and guidelines that avoid, minimize, or offset the action's effects on listed species and/or designated critical habitat." *Id.* at 35,184 (emphasis added). NMFS states that these types of programmatic consultations "align with the suite of activities described in the 2015 rule"—*i.e.*, that NMFS presently recognizes applicants and their role in "Type 1" programmatic actions. *Id.* at 35,185. Type 2 programmatic actions are forward-looking and do not address present activities.

II. The U.S. Purse Seine Fishery Operating in the Western and Central Pacific Ocean ("the Fishery") and American Tunaboat Association ("ATA")

The U.S. purse seine fishery operating in the western and central Pacific Ocean ("the Fishery") presently consists of 31 large U.S. flag purse seine vessels that commercially fish for tuna. 83 Fed. Reg. 42,640, 42,640 (Aug. 23, 2018). Fishery participants operate in the Western and Central Pacific Fisheries Convention's ("WCPFC's") Convention Area ("Convention Area"), which includes areas on the high seas (international waters), foreign economic exclusive zones ("EEZs"), and the U.S. EEZ.[5] Declaration of Raymond Clarke, April 6, 2019 ("Clarke Decl."), Ex. 1 (Convention Area map). There is an annual limit on the total "purse seine fishing effort," measured in "fishing days," that the Fishery is allowed in the high seas and U.S. EEZ. *See* 83 Fed. Reg. 45,849, 45,849 (Sept. 11, 2018). If the Fishery exceeds that effort, NMFS closes the Fishery for the year. *See id.* The Fishery historically has provided important benefits to the U.S. economy as it has been the second largest fleet operating in the Convention Area, where the total estimated delivered value of catch among the fleets of 18 nations in 2017 was $5.84 billion.[6]

[5] In general terms, the EEZ includes waters 200 miles off the coast of a nation.
[6] *See* Overview of Tuna Fisheries in the Western and Central Pacific Ocean, including Economic Conditions – 2017, at iv, 4 n.3 (Aug. 5, 2018), *available for download at* https://www.wcpfc.int/node/32051.

ATA represents the interests of its members, who include all Fishery participants. Declaration of Brian Hallman, April 7, 2019 ("Hallman Decl.") ¶ 4. On behalf of its members, ATA advocates for a robust, sustainable, fairly-managed, and economically strong fishery. Hallman Decl. ¶¶ 4-5. Among doing other things on behalf of its members, ATA participates in regulatory matters, international trade negotiations, and meetings regarding the conservation and management of fish stocks. *Id.* ¶ 5.

ATA's members operating in the Fishery are heavily regulated by NMFS, which imposes and enforces fishing effort limits. *Id.* ¶ 6. Statutes with which ATA members must comply to operate throughout the Fishery include the High Seas Fishing Compliance Act, 16 U.S.C. § 5501, *et seq.*; the South Pacific Tuna Fishing Act,[7] 16 U.S.C. § 973, *et seq.*; the Western and Central Pacific Fisheries Convention ("WCPFC") Implementation Act, 16 U.S.C. § 6901, *et seq.*; the ESA, 16 U.S.C. § 1531, *et seq.*; the Marine Mammal Protection Act, 16 U.S.C. § 1361, *et seq.*; and the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801, *et seq*. ATA members are also subject to the regulations implementing these statutes. Hallman Decl. ¶ 6.

To operate lawfully in the Fishery, ATA members must obtain, maintain, and renew numerous NMFS-issued authorizations, required by these statutes and their implementing regulations. *Id.* ¶ 7. These authorizations include: (1) High Seas Fishing Compliance Act permits to fish in international waters, *see* 50 C.F.R. Part 300, Subpart R; (2) vessel licenses to fish in the Licensing Area for the South Pacific Tuna Treaty, *see* 50 C.F.R. Part 300, Subpart D; and (3) WCPFC Area Endorsements to fish for highly migratory species in the high seas of the Convention Area, *see* 50 C.F.R. Part 300, Subpart O. Hallman Decl. ¶ 7; Clarke Decl. ¶ 6.

[7] This Act implements the Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America, also known as the South Pacific Tuna Treaty. 16 U.S.C. §§ 973(17); 973b.

When operating in the Fishery, ATA members also are subject to, and impacted by, regulations arising from, and requirements set forth in, the existing BiOp ("2006 BiOp") for the Fishery. *See* Hallman Decl. ¶¶ 8-9; Clarke Decl. ¶¶ 8-11; *see also* AR000160-164. The ITS in the 2006 BiOp, among other things, limits the amount of incidental take, including interactions, that Fishery participants can have with certain ESA-protected species. AR000161; Hallman Decl. ¶ 9. Moreover, the ITS itself constitutes a permit, which allows NMFS to authorize the continued fishing activities for ATA members (*e.g.*, issue permits and licenses). *Bennett*, 520 U.S. at 170.

III. The 2006 Biological Opinion ("BiOp") for the Fishery and the New BiOp for the Continued Operation of the Fishery

NMFS adopted the 2006 BiOp, which presently covers fishing operations in the Fishery, after consulting with itself (*i.e.*, NMFS acted as both the action agency and the consulting agency).[8] The 2006 BiOp defined the agency action subject to consultation under the ESA as the "continued authorization" of the Fishery. AR000022-23. The 2006 BiOp includes findings and conclusions that provide the bases for incidental take limits, RPMs, terms and conditions, and other requirements that relate to, and ultimately regulate, Fishery operations. *See* Hallman Decl. ¶¶ 8-9; Clarke Decl. ¶¶ 8-11; *see also* AR000160-164. Although these requirements are directed to NMFS as the action agency, NMFS imposes them as conditions for Fishery participants' (ATA members') continued lawful fishing under their existing permits and licenses. AR000160-161 (providing that NMFS "has a continuing duty to regulate the activity covered by" the ITS and to

[8] This is called "internal consultation" and occurs where NMFS engages in an action (*e.g.*, authorizing continued operations in the Fishery) that triggers section 7 consultation because the action may adversely affect listed species or critical habitat over which NMFS has regulatory jurisdiction under the ESA. *See HLA*, 2002 WL 732363, at *2 n.4; AR000022 (acknowledging one NMFS division was the action agency, while another NMFS division was the consulting agency). One of the perks of internal consultation—for the agency—is that NMFS can indefinitely extend its 90-day deadline for formal consultation that applicants like ATA and its members could otherwise prevent. *See* 16 U.S.C. § 1536(b)(1).

"implement the terms and conditions" of the 2006 BiOp); *compare id.* at AR000161-162 (describing RPMs for authorized fishing operations related to sea turtles) *and* 50 C.F.R. § 300.223(f) (implementing same). NMFS can suspend, modify, or revoke Fishery participants' permits for not complying with these requirements. *See, e.g.*, 50 C.F.R. § 300.212 (acknowledging that endorsement and permit may be suspended or revoked); *id.* § 300.333(i) (same).

Apparently, in June 2016, NMFS publicly revealed, for the first time, that it had reinitiated consultation under the ESA for the Fishery. *See* 81 Fed. Reg. 41,239, 41,242 (June 24, 2016). Since reinitiating consultation for the Fishery, NMFS has neither requested, nor allowed for, input from Fishery participants on the BA or the development of the BiOp. Hallman Decl. ¶ 11; Clarke Decl. ¶ 16 (recognizing NMFS's growing lack of transparency and unwillingness to work with the Fishery). Until last fall, ATA was unaware that NMFS actively was developing a new BiOp for the Fishery. Hallman Decl. ¶ 10. The new BiOp will include new findings, conclusions, interaction limits, RPMs, terms and conditions, and other requirements, which ultimately will alter the regulatory landscape for ATA's members. *Id.* ¶¶ 12, 19; Clarke Decl. ¶ 10; Supplemental Declaration of Raymond Clark, May 12, 2019 ("Supp. Clarke Decl.") ¶¶ 6-10.

IV. Procedural History

A. The National Marine Fisheries Service's ("NMFS's") Denial Decisions

On or about November 19, 2018, ATA member South Pacific Tuna Corporation ("SPTC") submitted an applicant-request letter to NMFS, seeking information related to the ongoing consultation and to exercise applicant rights. AR000015-18; Clarke Decl. ¶¶ 15, 20. NMFS subsequently denied SPTC's applicant request, noting that the company does not represent the entire Fishery. AR000013-14; AR000008-11 (NMFS denying SPTC's reconsideration request).

On or about February 7, 2019, ATA submitted an applicant request letter to NMFS, seeking information on the ongoing consultation and other applicant rights. AR000005-7. ATA supported

its claim to applicant status by relying on statutes, regulations, agency guidance, and applicable caselaw. *Id.* ATA noted that unlike SPTC, ATA does, in fact, represent the entire Fishery. AR000006. NMFS issued a decision denying ATA's request for applicant status. AR000001-3.

B. This Court's Hearing on ATA's Motion for a Preliminary Injunction

On April 10, 2019, ATA initiated this action and filed an application and motion for a preliminary injunction requesting that ATA and its members be deemed applicants and afforded associated rights for the remainder of NMFS's ongoing consultation and receive at minimum 90 days to (1) review NMFS's completed BA, subsequent findings and conclusions, and a copy of the draft BiOp; and (2) submit supplemental information and comments for NMFS's good-faith consideration. *See* ECF Nos. 1; 2; 2-1; 2-4. The Court heard arguments on ATA's motion on April 30, 2019. During those arguments, at the Court's request, ATA withdrew its request for a preliminary injunction based on the understanding that, should ATA prevail, it would be entitled to the relief requested in its injunction.

STANDARD OF REVIEW

Summary judgment is required when "there is no genuine dispute as to any material fact" and the movant is otherwise "entitled to judgment as a matter of law." Fed. R. Civ. P. 56. When reviewing agency actions under the APA, district courts "do not resolve factual issues, but operate instead as appellate courts resolving legal questions." 5 U.S.C. § 706; *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996). "The entire case on review is a question of law, and only a question of law." *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). Thus, summary judgment simply "serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA." *Zevallos v. Obama*, 10 F. Supp. 3d 111, 117 (D.D.C. 2014).

This case challenges NMFS's interpretation of "applicant," application of its regulation defining that term, and procedures. When an agency has not defined a term by regulation or its regulatory definition merely parrots the statute, courts consider whether *Chevron*, *Skidmore*, or no deference applies. *See Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1136 (D.C. Cir. 2014); *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995) (explaining that interpretive challenges focus on an agency's authority). But where the agency has adopted a regulatory interpretation of a statutory term, courts focus on that regulation's language to determine the lawfulness of the agency's interpretation. *See, e.g.*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512-513 (1994). An agency interpretation cannot exceed the bounds set by Congress or the agency's regulatorily established interpretation of those bounds.

It is also well-established that agency action violates the APA and is "arbitrary and capricious if the agency fails to comply with its own regulations." *Nat'l Envtl. Dev. Ass'ns Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014). And although "[r]eview of agency action for arbitrariness and capriciousness sometimes entails essentially the same inquiry as review of an agency's exercise of statutory interpretation under *Chevron*'s second step," the standards governing interpretation and application should not be conflated, especially where an interpretive question does not get past *Chevron*'s first step or where *Skidmore* deference or no deference applies. *See ACA Int'l v. FCC*, 885 F.3d 687, 695 (D.C. Cir. 2018).

When reviewing agency action, courts "focus on the reasons stated in the orders under review" and "neither supply their own reasoning for the agency decision . . . nor consider the agency's post-hoc rationalizations." *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018). "[T]he agency decision itself must be reasonable and reasonably explained," "must give a reasoned analysis to justify the disparate treatment of regulated parties that seem similarly

situated," and "its reasoning cannot be internally inconsistent." *Id.* "The reviewing court should not attempt itself to make up for such deficiencies" and cannot "supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENTS

NMFS's interpretation and application of "applicant" exceeds the agency's authority under the ESA, arbitrarily and capriciously conflicts with the plain language of the ESA and implementing regulations, and otherwise works procedural violations to the detriment of ATA and its members. The ESA plainly and unambiguously provides that permittees participate in consultations involving their permitted activities and thereby inform agency decision-making by, *inter alia*, contributing to the best scientific and commercial evidence available. NMFS's regulations confirm the broad meaning of "applicant." Yet NMFS ignores the governing statue and regulations by invoking the term "programmatic consultation," a term without any regulatory definition, to categorically deprive the permittees comprising entire industries of their applicant rights in one fell swoop. If this were not enough, NMFS's decision denying ATA and its members applicant status is otherwise based on flimsy and inconsistent reasoning that cannot satisfy the APA's requirement of reasoned decision-making. For these reasons, the Court should fully grant ATA's requested relief.

I. ATA Has Standing.

During the injunction hearing, NMFS stated it would challenge ATA's standing. As explained below, that challenge would fail as ATA has associational and organizational standing.

A. ATA's Associational Standing.

To establish associational standing, ATA must show that one of its members has independent standing, the interests it seeks to protect are germane to its purpose, and that no claim or requested relief requires an individual member to participate in the lawsuit. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013) (quotation marks and citation omitted). The latter two requirements are quickly shown. Whether ATA and its members are ESA applicants entitled to attendant procedural rights is germane to ATA's mission, which includes efforts to further a robust, sustainable, fairly managed, and economically strong Fishery. *See id.*; Supplemental Declaration of Brian Hallman, May 12, 2019 ("Supp. Hallman Decl.") ¶¶ 5-6. This lawsuit also addresses questions of law common to all members' interests and does not require any individual member's participation. *See* 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.9.5 (3d ed. 2019). The subsections below show the remaining requirement—*i.e.*, that at least one ATA member has independent standing—is readily satisfied.

Standing requires a plaintiff to show three elements: that plaintiff has (1) "suffered an injury in fact" (2) "fairly tracible to the challenged conduct" and (3) "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). An injury in fact is "concrete and particularized" harm that is "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). Particularized harm requires that a plaintiff personally suffer "some actual or threatened injury." *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979). A plaintiff must show an invasion of his individualized interests. *Spokeo*, 136 S. Ct. at 1548. Concreteness means that a harm is "'real,' and not 'abstract.'" *Id.* And, importantly, an injury need not be uniquely suffered by the plaintiff. *United States v. SCRAP*, 412 U.S. 669, 688 (1973).

1. ATA Member South Pacific Tuna Corporation ("SPTC") Has Shown Injury Traceable to NMFS's Refusal to Recognize the Company as An Applicant.

SPTC has suffered informational injury. A plaintiff "suffers an 'injury in fact' when [it] fails to obtain information" subject to disclosure. *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998). An agency's violation of statutes or regulations requiring disclosure of certain information gives rise to an injury-in-fact. *Action All. of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 937 (D.C. Cir. 1986). The corollary for this is that injury also occurs when statutes or regulations require an agency to timely receive and review information before proceeding with an action. *See, e.g.*, 5 U.S.C. § 553; *Friends of Blackwater v. Salazar*, 691 F.3d 428, 446 (D.C. Cir. 2012) ("[T]he purpose of notice-and-comment procedures is 'to ensure that affected parties have an opportunity to participate in and influence agency decision making at an *early stage*, when the agency is more likely to give real consideration to alternative ideas.'"). So long as the plaintiff is "arguably within the zone of interests protected or regulated by the law on which the complaint is founded," the harm from an agency's failure to provide information is cognizable. *Action All. of Senior Citizens*, 789 F.2d at 936.

Both the ESA and implementing regulations require two-way information sharing between the applicant and NMFS. Some disclosure and receipt requirements must occur in a specific order or within a fixed period of time. NMFS must, for example, "provide any applicant with the opportunity to submit information" and NMFS must review that information. 50 C.F.R. § 402.14(d), (g)(1). Then, following review, NMFS must "[d]iscuss with . . . any applicant [NMFS's] review and evaluation conducted . . . , the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives . . . ." *Id.* § 402.14(g)(5). The applicant also has a right to request and comment on a copy of the draft BiOp and to receive the BiOp and ITS. *Id.*; 16 U.S.C. § 1536(b)(3)(A) (requiring "prompt[]" disclosure to applicant of written

statement and summary of NMFS opinion); *id.* § 1536(b)(4)(C) (requiring disclosure to applicant of ITS).[9]

NMFS's decision denying ATA-member SPTC applicant status establishes informational injury in two directions. NMFS's action has prevented SPTC from timely receipt and review of information to which the company is entitled and from submitting responsive and independent information for supplementary and corrective purposes to inform key aspects of the BiOp. Having access to, and being able to respond to, this information would provide economic and other benefits to SPTC and allow it to ensure NMFS is not harming the company's interests. *See* Supp. Clarke Decl. ¶¶ 6-15; Clarke Decl. ¶¶ 14, 21-23; *see also Bennett*, 520 U.S. at 176-77 (applicant participation helps "avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives"); 50 C.F.R. § 402.14(d); *see also Nat'l Educ. Ass'n v. DeVos*, 345 F. Supp. 3d 1127, 1148-49 (N.D. Cal. 2018) (explaining that loss of disclosures and "the opportunity to use them to make a more informed decision is itself a concrete injury"). In short, SPTC's "failure to obtain [and submit] relevant information [here] is injury of a kind that [the regulations] seek[] to address." *Akins*, 524 U.S. at 20.

SPTC has suffered procedural injury. A "procedural right" arises from a procedure "designed to protect some threatened concrete interest." *Lujan*, 504 U.S. at 573 n.8. The touchstone of a procedural injury is demonstrating "concrete interests" and personalized injury—

[9] Applicants also routinely act as the "designated non-Federal representative" ("DNFR") who also is entitled to receive information from, and submit information to, NMFS. 50 C.F.R. §§ 402.02; 402.08; 402.12(c)-(d); 402.14(d). NMFS's refusal to include SPTC as an applicant eliminated the opportunity for ATA to act as the DNFR and to receive information related to the consultation. NMFS's refusal to recognize SPTC as an applicant also deprived SPTC of information on NMFS's recommended DNFR and of having a say in the selection of the DNFR, if SPTC were not itself selected as the DNFR. *Id.* § 402.08.

as one "can assert that right without meeting all the normal standards for redressability and immediacy." *Id.* at 572 n.7

"The violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact," meaning no additional harm needs to be shown. *Spokeo,*, 136 S. Ct. at 1549–50, *as revised* (May 24, 2016); *see, e.g.*, *Akins*, 524 U.S. at 20-25 (holding that a group of voters' "inability to obtain information" Congress decided to make public is an injury in fact); *Public Citizen v. Department of Justice,* 491 U.S. 440, 449 (1989) (concluding that two advocacy organizations' failure to obtain information subject to disclosure under statute "constitutes a sufficiently distinct injury to provide standing to sue"). Under this precedent, SPTC's inability to obtain and submit information because of NMFS's decision denying SPTC applicant status is sufficient to show injury in fact.

Some procedural injuries require an additional showing of "harm" or some "material risk of harm." *See Spokeo*, 136 S. Ct. at 1550; *Mendoza v. Perez*, 754 F.3d 1002, 1013 (D.C. Cir. 2014) (stating "plaintiffs simply need to show the agency action affects their concrete interests in a personal way"). SPTC has established that NMFS's refusal to recognize the company as an applicant and engage in information sharing with SPTC harms the company's concrete economic and other interests, including its business planning that would otherwise be enhanced by the access to information and agency insight applicants receive. *See, e.g.*, Supp. Clarke Decl. ¶¶ 6-19; Clarke Decl. ¶¶ 10, 14, 21-23; Supp. Hallman Decl. ¶ 9; Hallman Decl. ¶ 18. It is also unquestionable that the new BiOp will include new measures and that those "new measures will increase costs and create burdens on Fishery participants operating in the Fishery." Suppl. Clarke Decl. ¶ 10. SPTC's involvement as an applicant would ensure that the agency does not adopt uninformed or overly burdensome measures and would allow the company to minimize economic harm by

identifying least-costly measures for the agencies to adopt. *Cty. of Del. v. Dep't of Transp.*, 554 F.3d 143, 148 (D.C. Cir. 2009) (stating that "a demonstrable *risk* . . . of injury to the particularized interests of the plaintiff" confers standing. (emphasis added)).

There can be no denying that adding new species to the BiOp will increase compliance costs for SPTC and other ATA members. Supp. Clarke Decl. ¶¶ 7-10. A "substantial probability" of increased costs associated with new regulations are "sufficient to demonstrate injury-in-fact." *City of Waukesha v. EPA*, 320 F.3d 228, 237 (D.C. Cir. 2003); *see also Mendoza*, 754 F.3d at 218. Regulated entities "have a concrete interest not only in being able to meet their regulatory responsibilities but in avoiding regulatory obligations above and beyond those that can be [legally] imposed upon them." *Iowa League of Cities v. EPA*, 711 F.3d 844, 871 (8th Cir. 2013) (finding injury in fact related to purported procedural deficiencies); *cf.* Supp. Clarke Decl. ¶ 11; Clarke Decl. ¶ 23; Hallman Decl. ¶¶ 21, 27-28. Required notice-and-comment-type procedures are "designed to protect the concrete interests of such regulated entities by ensuring that they are treated with fairness and transparency after due consideration and industry participation." *Id.*

Indeed, NMFS's preclusion of SPTC from participating as an applicant in this process has already generated a real harm, indeed a harm strong enough to qualify as irreparable in the injunction context—the bureaucratic-steamroller effect. *Compare Sierra Club v. Marsh*, 872 F.2d 497, 500-04 (1st Cir. 1989) (Breyer, J.) *with* Clarke Decl. ¶¶ 21-23 (confirming the bureaucratic-steamroller effect and explaining harm); *and* Supp. Hallman Decl. ¶ 11; *and* Supp. Clarke Decl. ¶¶ 11-15 (explaining additional related harms). In discussing the harm that comes from agencies failing to follow the procedural protections in environmental statutes like NEPA, then-Judge Breyer recognized the harm that can come from being unable to influence agency decisionmakers before they commit to a course of action. *See id.* at 500 ("It is far easier to influence an initial

choice than to change a mind already made up."). The purpose of procedures like the consultation process is to "present[] governmental decision-makers with relevant environmental data *before* they commit themselves to a course of action." *Id.* As something moves up the "chain of bureaucratic commitment," it "will become progressively harder to undo the longer it continues." *Id.* Indeed, even though statutes like NEPA are procedural, the court was quick to note that harm done is more—namely, "the added *risk* to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects." *Id.*

Judge Breyer's opinion is hardly a one-off—indeed, it has been applied in the BiOp context. In *NRDC v. Houston*, the agency failed to seek consultation and obtain a BiOp before entering into water-usage contracts. 146 F.3d 1118, 1127 (9th Cir. 1998). The agency did issue a "no jeopardy BiOp," leading defendants to claim that the alleged failure to follow the required consultation process was moot. *Id.* at 1128. The court disagreed, explaining that the process "itself offers valuable protections" and that the procedural violations had "negated" the plaintiffs' ability to adequately challenge the BiOp. *Id.* at 1128-29. Indeed, even if the agency ultimately issued a "no jeopardy BiOp," the BiOp would have at least been informed by input from the plaintiffs and potentially could have included recommendations based on that input. *Id.* at 1129. Thus, plaintiffs suffered harm—the bureaucratic-steamroller effect. "The failure to respect the process mandated by law *cannot be corrected with post-hoc assessments of a done deal*." *Id.* (emphasis added).

In short, the harm posed by NMFS's charging ahead without including SPTC as an applicant is very real and personalized to those whose livelihoods are threatened. It bears emphasis that courts have found the bureaucratic steamroller to sufficiently demonstrate irreparable harm in the injunction context. *Marsh*, 872 F.2d 504. Injury sufficient to show irreparable harm is more

than sufficient to support standing. *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016). SPTC, therefore, has shown injury sufficient to confer standing.

2. SPTC Has Shown Injury from NMFS's Refusal to Recognize the Company as An Applicant, and that the Injury is Redressable.

The "relaxed redressability requirement" means that procedural-rights plaintiffs "need not show that 'court-ordered compliance with the procedure would alter the final [agency decision.]'" *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 185 (D.C. Cir. 2017) (alteration in original). For procedural injuries, "the normal standards for immediacy and redressability are relaxed." *Mendoza*, 754 F.3d at 1010. Redressability is satisfied so long as following the procedure *could allow for* the agency to reach a favorable conclusion. *Ctr. for Biological Diversity*, 861 F.3d at 185. Requiring NMFS to treat SPTC as an applicant *would* redress SPTC's injuries. *See, e.g., id.* Given the impending BiOp, the relaxed immediacy requirements are easily met, but, regardless, SPTC is suffering an ongoing injury in the form of the bureaucratic-steamroller effect—NMFS is not hearing or responding to the Company's interests but rather plowing ahead with the new BiOp.

B. ATA's Organizational Standing.

Like SPTC, ATA has suffered informational injury. An organization suffers informational injury when the alleged wrongful denial-of-access affects the organization's ability to represent and assist members before a regulatory body. In *Friends of Animals v. Jewel*, the plaintiff organization asserted that an agency's failure to release information that plaintiff was entitled to receive harmed its ability to "meaningfully participate" in a permitting process "as well as engage in related advocacy efforts" on behalf of antelope conservation. 824 F.3d 1033, 1041 (D.C. Cir. 2016). The D.C. Circuit agreed. *Id.*

ATA's main purpose is to represent its members' economic, regulatory, and other interests before regulatory and governmental bodies. Suppl. Hallman Decl. ¶ 5. To do this, ATA depends

on having access to relevant regulatory information to which it is entitled or could otherwise obtain. *Id.* ¶¶ 5-7, 11. ATA routinely acquires, reviews, and shares this information with its members to understand new regulatory developments, anticipate future regulatory developments, and to formulate a unified position with its members and to plan for responses. *Id.* With respect to the impending BiOp, ATA has not been able to accomplish these routine activities because NMFS refuses to recognize ATA as an applicant. As a result, ATA lacks access to information to which it is entitled as an applicant. *Id.*

Although ATA has been involved in litigation in the past, ATA does not regularly file lawsuits, and the most recent lawsuit ATA was involved in occurred nearly 25 years ago. Supp. Hallman Decl. ¶ 8. For this reason, ATA does not have an operational budget for litigation activities and was required to seek a special collection from its members. *Id.* ¶¶ 8, 10. The costs for this litigation are beyond those ATA normally expends. *Id.* ¶ 10. However, ATA member recognized the importance of initiating this action to allow ATA to engage in its normal activities with respect to the BiOp given that even the modest increases in costs, which are virtually certain to come about from the new BiOp, will impose material burdens on their businesses and impinge on their livelihoods. *Id.* ¶¶ 9-10; Suppl. Clarke Decl. ¶¶ 6-10.

NMFS's decision precludes ATA from engaging in the two-way information sharing requirements NMFS must provide applicants. ATA's inability to access, review, and share information and to submit supplementary and responsive information constitutes a concrete and specific injury. *See People for the Ethical Treatment of Animals v. U.S. Dep't of Agriculture*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) (discussing how the lack of access to information harmed an organization's goals and operations). Granting requested injunction would alleviate the injury here by giving ATA the full ability to participate in—and hence gain information through—the

consultation process. NMFS's decision also injures ATA under the bureaucratic-steamroller principle. Supp. Hallman Decl. ¶ 11. Making ATA an applicant and affording the organization its requested relief would redress these injuries. ATA therefore has organizational standing.

II. NMFS's Interpretation of "Applicant" Is Unlawful.

An "agency is not free to ignore or violate its regulations while they remain in effect." *Nat'l Envtl. Ass'ns Clean Air Project*, 752 F.3d at 1011; *Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) ("[It is] axiomatic that an agency is bound by its own regulations."); *Stand Up for Cal.! v. U.S. Dep't of Interior*, 298 F. Supp. 3d 136, 143 (D.D.C. 2018) (McFadden, J.). Yet NMFS, by blocking persons like ATA and its members from participating in the consultation as applicants by declaring a consultation "programmatic," does exactly that. NMFS's interpretation of "applicant" ignores the unambiguous, plain language of its regulatory definition which the agency itself, when it promulgated the regulation, explained is to be broadly construed. *See generally* AR000001-3. By misinterpreting its regulation, NMFS seeks to do something it could not have lawfully done (and did not do) when promulgating that regulation—define the statutory term "applicant" so narrowly as to exclude ATA and its members from the consultation governing their activities authorized by NMFS. That crabbed interpretation contradicts the ESA's plain language and structure, undermining the law's broad consultation provisions and directive to use the best scientific and commercial information available, and would not survive *Chevron*'s step one. Moreover, the two sentences from its thick Consultation Handbook upon which NMFS primarily relies for its erroneous interpretation are untethered from the ESA and its implementing regulations and can provide no sanction for NMFS's impermissible interpretation of its regulation. Not surprisingly, the only two courts to face the question presented here ruled against NMFS.

A. NMFS's Interpretation of "Applicant" Is Wholly Disconnected from and Inconsistent with Its Regulations.

NMFS's interpretation of its regulatory definition of "applicant" is the basis for its decision denying ATA applicant status.[10] NMFS recognizes that the ESA's definition of "permit or license applicant" does not apply in the consultation context. *Compare* 16 U.S.C. § 1532(12) (limiting definition to persons seeking an exemption from a permit denial), *with* 51 Fed. Reg. at 19,930 (explaining that the ESA's definition in section 1532(12) "is of limited use in the consultation context because it focuses on the exemption process under section 7"). Accordingly, NMFS said in the preamble to the regulation that it "broadly defined 'applicant'" as follows:

> Applicant refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

50 C.F.R. § 402.02; 51 Fed. Reg. at 19,930; *see also Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) (stating that a regulatory preamble is "evidence concerning contemporaneous agency intent"); *Stand Up for Cal.!*, 298 F. Supp. 3d at 144 n.10. This unambiguous, plain language—"any person . . . who requires formal authorization" from a federal agency to conduct an action—reflects NMFS's intent to define the term broadly.

Despite the expansive definition of "applicant" and NMFS's insistence that it intended to define the term broadly, NMFS now asks this Court to approve its exceedingly narrow interpretation which precludes permit-applicant-members of entire industries (*e.g.*, fisheries and oil and gas exploration) from ever being applicants. *See* ECF No. 11-1, Declaration of Michael D. Tosatto, April 22, 2019 ¶ 17 (NMFS only uses programmatic consultations to authorize Fishery

[10] NMFS has relied on its interpretation in one other instance, but the agency did not include any documentation for its interpretation between 2003 when the *HLA* decision issued and 2013. *See* AR000662-665. Although the agency has denied another request for applicant status from associations seeking such status, that decision did not rely on the "programmatic" interpretation that NMFS invokes here. AR000666.

operations); AR000001-3 (same); 000662-665 (same for offshore geological and geophysical surveying industry and offshore oil and gas development sector). NMFS says there are no applicants for consultations the agency deems "programmatic." *See* AR000002; 000662-665.

NMFS's interpretation is unlawful. Two sentences in a 315-page guidance document—which make no connection to language in NMFS's regulatory definition of "applicant" *and* have been held by the courts to consider them to mean the exact opposite of NMFS's position—is a slim reed to lean on. But even if there were substantial agency guidance and practice for NMFS to lean on, an agency cannot "ignore its own regulation." *Transactive Corp. v. United States*, 91 F.3d 232, 238 (D.C. Cir. 1996). NMFS's interpretation, if sustained, would amount to the agency having re-written its regulations without following the APA's rulemaking process in a manner unsupportable by the ESA. *See, e.g.*, *Sentara-Hampton Gen. Hosp. v. Sullivan*, 980 F.2d 749, 759 (D.C. Cir. 1992) ("An agency may not, under the interpretative rule exception, 'constructively rewrite [a] regulation' or 'effect a totally different result.'" (citation omitted)).

Putting aside these statutory and procedural impediments to NMFS, its other existing and proposed regulations refute its proffered interpretation. In 2015, NMFS amended its implementing regulations to add two definitions: "framework programmatic action" and "mixed programmatic action." 50 C.F.R. § 402.02; 80 Fed. Reg. 26,832, 26,844. Despite ATA bringing these definitions to the Court's attention in its opening memorandum in support of its injunction, NMFS completely ignored them both in its opposition and during the injunction hearing. *Compare* ECF No. 2, at 17-18, *with* ECF No. 11. This raises red flags. Why would NMFS, which relies entirely on its construct of programmatic consultations, not discuss the regulatory definitions addressing programmatic consultations? The answer is simple—the "programmatic action" definitions refute NMFS's proffered interpretation.

First, the agency recognizes two kinds of programmatic actions, whereas NMFS's interpretation lumps them together as simply "programmatic." Second, these definitions show that NMFS has characterized this action as a "mixed programmatic action," which is bad for NMFS. NMFS cannot claim to be engaged in a purely programmatic action—*i.e.*, a framework programmatic action—because NMFS is preparing an ITS for the Fishery. *See* 50 C.F.R. § 402.14(i)(6) (explaining that "[f]or a framework programmatic action, an incidental take statement is not required"). NMFS has avoided admitting that its ongoing consultation is, at most, a "mixed programmatic action" because then it has to admit that the BiOp requirements in the ITS will condition and restrict ATA members' continued ability to lawfully operate in the Fishery.

Presently, NMFS has a proposed rule to amend its implementing regulations to add a definition of "programmatic consultation." *See* 83 Fed. Reg. 35,178, 35,184-85. Although the proposed rule recognizes that programmatic consultations are being codified as an "optional consultation technique . . . that can improve both process efficiency and conservation in consultations," even that rule involves applicants. "[B]y looking across numerous individual actions at the programmatic level, the Federal action agencies *and applicants* can propose design criteria, best management practices, standard operating procedures, and/or standards and guidelines that avoid, minimize, or offset the action's effects on listed species and/or designated critical habitat." *Id.* at 35,184 (emphasis added). The proposed type 1 programmatic action is comparable to the existing "mixed programmatic action," and the proposed type 2 programmatic action is comparable to the existing "framework programmatic action." *Id.* at 35, 185. Although this rule has not been finalized, NMFS states that these "types of programmatic consultations . . . align with the suite of activities described in the 2015 rule." *Id.*

NMFS's interpretation is therefore unlawful because it is inconsistent with the plain meaning of "applicant" (in both the agency's regulation and the ESA itself), deprives entire industries of applicant rights, and is unsupported by other existing regulations. NMFS also has acknowledged that applicants are entitled to participate in programmatic actions adopting ITSs. NMFS's disregard of the text of its regulations plainly violates the APA.

B. NMFS's Interpretation of Applicant Unlawfully Circumvents the Plain Language, Structure, and Clear Intent of the ESA.

As noted above, the ESA's provisions confirm that NMFS's interpretation of "applicant" is unlawful. NMFS's interpretation renders statutory language meaningless, frustrates congressional design to allow those whose agency-authorized actions would be impacted by consultation to be involved as an applicant, and undermines the requirement for agencies to use the best scientific and commercial information available.

1. NMFS's Interpretation Erases the ESA's Applicant Provisions for All U.S. Fisheries and Other Similarly Situated Industries.

The ESA expressly provides for applicant involvement in the consultation process. At a minimum, applicant rights are triggered whenever "an agency action involve[s] a permit or license applicant." 16 U.S.C. § 1536(b)(1)(B). NMFS's interpretation, however, allows the agency to render this broad language meaningless for entire industries of permittees and licensees. *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (showing that courts construe "involve" broadly). Under NMFS's interpretation, it can (1) deem something "programmatic" whenever there are multiple permittees engaged in similar conduct in an area, (2) combine groups of distinct activities into a single "program," (3) conduct one consultation that regulates the conduct of all permittees engaged in those activities, and (4) not allow actual applicants an opportunity to provide their expertise. This interpretation circumvents the ESA's requirements and frustrates its purposes.

Consider the following example. NMFS completed a single "programmatic consultation" for oil and gas exploration activities (*e.g.*, geological and geophysical surveys) *and* oil and gas development activities (drilling on the outer-continental shelf) for the Gulf of Mexico. AR000662-665. These are two different industries involving distinct activities, but NMFS lumped them into a single "programmatic consultation" and then denied applicant requests from the trade associations representing the permittees in those industries. *Id.* The outcome would not have been different if a single permittee or a single person with a permit application pending sought applicant status. *See* AR000013 (denying SPTC applicant status because it "does not represent the entire [Fishery]"). While this is undoubtedly convenient for NMFS, it deprives legitimate applicants of their rights to participate in "all phases of the consultation procedures." 51 Fed. Reg. at 19,926-27. Nothing in the ESA allows NMFS to circumvent applicant rights for administrative convenience. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1105 (D.C. Cir. 2019) ("[S]uch practical concerns do not trump express statutory [or regulatory] directives.").

Here, too, NMFS's ongoing consultation on the continued operation and authorization of the Fishery involves *and* affects permit and license applicants. NMFS does not dispute that the new BiOp requirements will condition Fishery participants' continued operations under existing and new permits. Additionally, throughout the five years NMFS has been engaged in this consultation, the agency has received numerous permit and license applications from Fishery participants. *See, e.g.*, Supp. Clarke Decl., Ex. 1. In other words, there have been plenty of pending permit applications during NMFS's ongoing consultation. In sum, no rational reading of Section 1536(b)(1)(B) ends with the conclusion that NMFS's ongoing consultation for the Fishery does not involve permit or license applicants. NMFS's interpretation is thus unlawful.

2. NMFS's Interpretation Conflicts with Other ESA Provisions.

NMFS's interpretation conflicts with the ESA's definition of "permit and license applicant" for exemption purposes. 16 U.S.C. § 1532(12). That provision provides:

> The term 'permit or license applicant' means, when used with respect to an action of a Federal agency for which exemption is sought under section 1536 of this title, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 1536(a) of this title to such agency action.

Id. Unless exempted, the ESA prohibits agencies from approving permits likely to jeopardize the continued existence of ESA-listed species or result in the destruction or adverse modification of their habitat. *Id.* § 1536(a)(2), (g)-(h). NMFS's proffered interpretation of "applicant" cannot be squared with the statute's exemption provisions, confirming its unlawfulness.

Under NMFS's proffered interpretation, Fishery participants are not applicants for a "programmatic consultation," even when they have a pending permit before the agency. This is so, NMFS insists, even though the "programmatic" BiOp will restrict fishing operations under existing permits and could result in denial of a Fishery participant's pending permit application under section 1536(a)(2). If the permit application were denied on the basis of a jeopardy finding, the Fishery participant could then seek an exemption and would be, as a matter of law, a "permit or license applicant" under ESA section 1532(12). This result is absurd—under NMFS's interpretation, an ATA member with a pending permit application cannot be an applicant for the developing BiOp, but that member would be transformed into a "permit or license applicant" under section 1532(12) by seeking an exemption. That cannot be the law. But it is the necessary result of NMFS's proffered interpretation of "applicant."

3. NMFS's Interpretation Undermines the ESA's Mandate to Use the Best Scientific and Commercial Information Available.

NMFS's interpretation also undermines the requirement that the agency "use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). "While this no doubt serves to advance the ESA's overall goal of species preservation," it also "avoid[s] needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett*, 520 U.S. at 176–77.

Applicants' providing important scientific and commercial information brings a twofold benefit. It leads to a better-informed BiOp and installs a critical check to ensure agencies are not acting overzealously and/or unintelligently. The Consultation Handbook expressly acknowledges the importance of sharing, receiving, and discussing information with applicants. Consultation Handbook at xxii ("[A]pplicants should be fully informed and involved in the development of Reasonable and Prudent Alternatives, Reasonable and Prudent Measures, and Terms and Conditions to minimize the impacts of incidental take."); *id.* at 1-2 (NMFS "work[s] with applicants and agencies during this analytical process."); *id.* at 1-14 (providing "applicants an opportunity to discuss a developing biological opinion, preliminary opinion, or conference may result in productive discussions that may reduce or eliminate adverse effects"); *id.* 2-13 (NMFS will "seek the applicant's expertise in identifying reasonable and prudent alternatives"); *Id.* at 4-53 ("Reasonable and prudent measures and terms and conditions should be developed in coordination with the action agency and applicant, if any, *to ensure that the measures are reasonable*" (emphasis added)); *cf.* ECF No. 11, at 16, 25 (recognizing expertise of ATA and its members).

ATA and its members rightly question NMFS's practical knowledge and expertise about purse seine fishing operations. They also fear the agency's general disregard for the economic

consequences of conservation and other measures. Providing NMFS with practical perspectives is a vital role of applicants, a role that NMFS claims disappears when it addresses multiple individual actions "programmatically." Supp. Clarke Decl. ¶ 19. By aggregating individual actions into a "programmatic" action, NMFS closes itself off from receiving applicants' scientific and commercial expertise during the consultation process. Applicant information is especially important given that NMFS "has no affirmative obligation to conduct its own research to supplement existing data." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 918 (D.C. Cir. 2011). This is yet another reason why Congress intended for applicant involvement "in all phases of the consultation procedures." 51 Fed. Reg. 19,926, 19,926-27.

C. NMFS's Interpretation of Applicant Is Inconsistent with Its Consultation Handbook.

The inconsistencies between NMFS's proffered interpretation and the Consultation Handbook not already identified also confirm its unlawfulness. First, the Consultation Handbook acknowledges that "[i]f there is an applicant for a permit or license *related to* the [action]," then that person is an applicant. Consultation Handbook at 2-6 (emphasis added). NMFS's proffered interpretation does not comport with this statement. Once NMFS deems the consultation programmatic, regardless of permit applications pending before consultation begins or the submission of new applications during the consultation process, the permit applicants will not be deemed applicants for the consultation. Clarke Suppl. Decl., Ex. 1 (showing SPTC vessel permit application was filed during NMFS's ongoing consultation and SPTC was not made an applicant).

Second, NMFS's interpretation is inconsistent with the primary examples the agency relies on to support its proffered interpretation:

> Users of public resources (e.g. timber companies harvesting on National Forests) are not parties to programmatic section 7 consultations dealing with an agency's overall management operations, including land management planning and other program

> level consultations. However, users who are party to a discrete action (i.e., where they are already the successful bidder on a timber sale that becomes the subject of later consultation or reinitiation when a new species is listed or new critical habitat is designated) may participate as applicants in the section 7 process.

Consultation Handbook at 2-12. These two examples are comparable to "framework programmatic actions" (*e.g.*, land management planning) and "mixed programmatic actions" (*e.g.*, successful bidder on a timber sale that becomes subject to later consultation). But NMFS's proffered interpretation treats them the same, despite the fact that the Consultation Handbook recognizes that there are applicants for mixed programmatic actions. This inconsistency renders NMFS's interpretation arbitrary.

D. NMFS's Interpretation of Applicant Is Inconsistent with the Court Decisions That Have Addressed the Issue.

This court has already concluded that an association—like ATA—which represents all licensees in a fishery is an "applicant" for consultations under the ESA concerning that fishery. *See generally HLA.*[11] That interpretation is correct and there is no factual difference between the *HLA* case and this case that cuts against ATA's position. Although *HLA* involved a *post hoc* rationale such that the court did not apply greater deference under *Auer*, its conclusions about NMFS's unlawful interpretation would apply even under *Auer* because the regulatory definition of "applicant" is unambiguous and NMFS's interpretation is plainly erroneous. *HLA*, 2002 WL 732363, at *8 ("NMFS'[s] attempt to limit applicant status to consultations over a specific permit or license *contradicts the unambiguous and broad language of its regulations*." (emphasis added)). Moreover, unlike in *HLA*, this situation is far more discrete as the agency is consulting on the continued authorization of a fixed number of vessels engaged in fishing operations for a specific

[11] *Haw. Longline Ass'n v. NMFS*, 281 F. Supp. 2d 1, 16 (D.D.C. 2003) (affirming the magistrate judge's recommendations and decision recognizing the Hawaii Longline Association's applicant status).

gear type in a single geographic area. *See* AR000002 (consulting on the continued operation "of up to 40 purse seine vessels in the WCPO"). The U.S. District Court for the District of Oregon reached the same conclusion in a similar case and there was no *post hoc* rationale implicated in that decision. *See Oregon Nat. Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 1000-01 (D. Or. 2010) (concluding that holders of grazing permits were applicants for consultation on "grazing management program").

Although neither of these decisions is binding, both thoroughly analyze the ESA, NMFS regulations, and the Consultation Handbook. Tellingly, NMFS appealed neither decision and has not revised its regulatory definition of "applicant" or adopted any other regulations that limit the broad scope of that definition. These decisions and NMFS's post-decisional actions (or lack thereof) confirm the unlawfulness of NMFS's proffered interpretation of "applicant."

E. NMFS's Interpretation of Applicant Deserves No Deference.

Because the ESA itself does not include a separate definition of "applicant" for the consultation context, *see* 51 Fed. Reg. at 19,930, NMFS adopted its own definition contemporaneously explaining that applicant was "broadly defined." In these circumstances, where the statute does not itself define the term, the agency's regulatory definition of the term is to be upheld so long as it is reasonable. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). And ATA does not dispute that the broad regulatory definition of "applicant" is reasonable. Indeed, as noted above, NMFS's proffered interpretation of "applicant" would not survive *Chevron*'s step one if the agency tried to embody it by regulation. Thus, no reasonable basis for *Chevron* deference exists. Independently, *Chevron* deference does not apply because NMFS's interpretation, allegedly coming from an informal policy statement, lacks the force of law. *Orton Motor, Inc. v. U.S. Dep't of Health & Human Servs.*, 884 F.3d 1205, 1211 (D.C. Cir. 2018); *Fogo De Chao (Holdings) Inc.*, 769 F.3d at 1136.

Nor does *Auer* deference apply to NMFS's proffered interpretation. As explained above, NMFS's proffered interpretation conflicts with the agency's expressed intent at the time it adopted the regulation that "applicant" be interpreted broadly. *See supra* § II.A. *Mellow Partners v. Comm'r of Internal Revenue Serv.*, 890 F.3d 1070, 1079 (D.C. Cir. 2018); *AT&T Corp. v. FCC*, 841 F.3d 1047, 1054 (D.C. Cir. 2016) ("An interpretation at odds with the agency's expressed intent at the time of adoption enjoys no judicial deference."); *HLA*, 2002 WL 732363, at *8 ("NMFS'[s] attempt to limit applicant status to consultations over a specific permit or license contradicts the unambiguous and broad language of its regulations."). Regardless of that intent, the regulatory definition of "applicant" is unambiguous and NMFS's interpretation is inconsistent with the plain its plain language. *See HLA*, 2002 WL 732363, at *8 ("NMFS's attempt to limit applicant status to consultation over a specific permit or license contradicts the unambiguous and broad language of its regulations.").

What is more, *Auer* deference also does not apply because NMFS has inconsistently interpreted its regulatory definition of "applicant" as described below. "To defer to the [NMFS]'s position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen v. Harris Cty.*, 529 U.S. 576, 587–88 (2000). Notably, even where *Auer* deference does apply, "it is the court that ultimately decides whether a given regulation means what the agency says." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1208 n.4 (2015); *see also id.* ("*Auer* deference is not an inexorable command in all cases.").

Finally, none of the circumstances is presented here that would allow a court to give some weight to NMFS's proffered interpretation, even though that interpretation is not entitled to deference. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944). NMFS has exercised little care in dismissing the *HLA* case as "wrongly

decided," has taken an inconsistent position for ATA (given its treatment of HLA), has not taken this position through rulemaking procedures, demonstrates no expertise in construing statutes or regulations, and has taken an unpersuasive position. *HLA*, 2002 WL 732363, at *7 ("Unfortunately for NMFS, its argument is not very persuasive at all.").

Based on the foregoing, NMFS's interpretation should receive neither any deference nor any weight from this Court.

III. NMFS's Denial Decision Is Arbitrary and Capricious.

NMFS's decision does not withstand scrutiny under the APA. First, ATA and its members easily qualify as applicants under NMFS's own regulations and this court has already held that associations like ATA qualify as applicants. Second, NMFS's denial cannot qualify as reasoned decision-making for several reasons—including its disparate treatment of ATA and its members.

A. ATA and Its Members Are Applicants Under the Plain, Unambiguous Language of NMFS's Regulations.

NMFS's decision refusing to recognize ATA and its members as applicants under the ESA conflicts with the agency's regulations which NMFS "is not free to ignore or violate." *Nat'l Envtl. Dev. Ass'ns Clean Air Project*, 752 F.3d at 1011. "**Applicant** refers to any person, as defined in section 3(13) of the [ESA], who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action." 50 C.F.R. § 402.02 (emphasis added). This unambiguous, plain language clearly conveys the capacious meaning of "applicant," which the regulatory preamble confirms. *Tilden Mining Co. v. Sec'y of Labor*, 832 F.3d 317, 324 (D.C. Cir. 2016) ("[A] regulation's ambit comes from the natural import of its text."); 51 Fed. Reg. 19,926, 19,930 (confirming "rule broadly defines 'applicant'").

First, ATA and its members are "**persons**" as defined by section 3(13) of the ESA because each of them is either "an individual, corporation, partnership, trust, association, or [some] other private entity." 16 U.S.C. § 1532(13) (emphasis added). NMFS has not disputed this.

Second, "**Action** means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas" and includes, among other things, "the promulgation of regulations," "the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid," and "actions intended to conserve listed species or their habitat." *Id.* (emphasis added). The "action" for NMFS's ongoing consultation, as defined by NMFS in its most recent memorandum for the record, is "the continued operation of the [Fishery], as currently managed under NMFS regulations." AR000495.

Third, ATA members "require[] formal approval or authorization from a Federal agency as a prerequisite to" their continued operations. 50 C.F.R. § 402.02. As a prerequisite for beginning and continuing fishing operations, ATA members must obtain, maintain, and reobtain (upon their expiration) authorizations from NMFS. *See, e.g.*, Clarke Suppl. Decl., Ex. 1. Stated differently, ATA members cannot fish without permits and licenses issued by NMFS, and NMFS cannot issue these permits and licenses without an ITS covering ATA members' fishing activities. To lawfully fish under these permits and licenses, ATA members must continuously comply with, among other things, requirements established by the existing 2006 BiOp. *See, e.g.*, Clarke Suppl. Decl., Ex. 1; *see also* AR000160-161 (2006 BiOp) (providing that NMFS "has a continuing duty to regulate the activity covered by" the ITS and to "implement the terms and conditions" of the 2006 BiOp); AR000161-62 (2006 BiOp) (describing RPMs for authorized fishing operations related to sea turtles); *and* 50 C.F.R. § 300.223(f) ("purse seine fishing restrictions" implementing same). NMFS can suspend, modify, or revoke Fishery participants' permits for failing to comply with these requirements. *See generally* 50 C.F.R. § 300.212 (acknowledging that endorsement and permit may be suspended or revoked); *id.* § 300.333(i) (same).

Presently, NMFS is consulting on ATA members' existing and continued fishing activities, which the agency has characterized as the "continued authorization" of the Fishery. Like the 2006 BiOp, the new BiOp resulting from this consultation will include an ITS that provides requisite coverage for ATA members to continue lawfully fishing under their existing permits and licenses. But this coverage will be conditioned on *new* incidental take limits, *new* RPMs, *new* RPAs (if applicable), *new* terms and conditions, and other *new* requirements set forth in the new BiOp. In other words, the new ITS will condition ATA members' continued fishing activities on compliance with the new limitations and requirements established by the ITS. Therefore, not only do ATA members require authorizations from NMFS as a prerequisite to lawfully begin *and* continue their fishing activities, *see* 50 C.F.R. § 402.02 ("applicant" definition), they also must conduct their continued fishing activities in accordance with the new requirements set forth in the new ITS. ATA members (and ATA on their behalf) are thus applicants under NMFS regulations.

"So long as this regulation remains in force the Executive Branch is bound by it," *United States v. Nixon*, 418 U.S. 683, 696 (1974), and courts do not "allow [an agency] to ignore its own regulations in an attempt to save its imperfect/unsatisfactory decision-making." *Transactive Corp.*, 91 F.3d at 238–39. Accordingly, NMFS's denial decision violates the APA. Further, NMFS's decision flouts the APA because it is inconsistent with the ESA and the Consultation Handbook as described above. *Supra* § II.B.-C.

B. This Court Has Already Resolved This Issue in ATA's Favor.

An association like ATA, which represents the interests of fishery participants, is an "applicant" for consultation concerning the fishery. *See generally HLA*2002 WL 732363; *cf. Oregon Nat. Desert*, 716 F. Supp. 2d at 1000 (concluding that individual permit holders are applicants for new consultations implicating their existing permits). NMFS flouts *HLA* and identifies no distinction between *HLA* and the present case in its decision denying ATA applicant

status. In *HLA*, like here, consultation was not for an individual, pending permit application. This court rejected NMFS's attempt to excise applicant rights by considering a factor Congress did not intend for the agency to consider—whether NMFS was consulting on a group of permits, or what NMFS calls "programmatic consultation" *Nat'l Envtl. Dev. Ass'ns Clean Air Project*, 752 F.3d at 1009; *cf.* AR000666 (NMFS denying applicant status to fishing association without invoking "programmatic" rationale).

C. NMFS's Denial Decision Otherwise Does Not Constitute Reasoned Decision-Making Required by the APA

When reviewing an agency decision under the APA, courts "focus on the reasons stated in the order[] under review" and do not supply "reasoning for the agency decision." *ANR Storage*, 904 F.3d at 1024. At a minimum, the agency decision itself must be "reasonable and reasonably explained." *Id.* "In particular, the decision must give a reasoned analysis to justify the disparate treatment of regulated parties that seem similarly situated, . . . and its reasoning cannot be internally inconsistent." *Id.*; *Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999) ("A long line of precedent has established that an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently."). Courts do not accept conclusory statements as reasoned decision-making. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (An agency's "conclusory statements do not suffice to explain its decision."); *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985).

NMFS's denial decision violates the "reasoned decision-making" requirement under the APA for several reasons. *First*, NMFS's decision simply states that the *HLA* case "was wrongly decided." AR000001. "This statement, however, is merely conclusory and does not explain why [NMFS] believes" *HLA* was wrongly decided. *WildEarth Guardians v. Salazar*, 741 F. Supp. 2d 89, 101–02 (D.D.C. 2010). This is not reasoned decision-making and is especially problematic

given that other courts have recognized *HLA*'s validity. Neither NMFS's *post hoc* reasons nor judicial supplementation can fill this absence of explanation. *ANR Storage*, 904 F.3d at 1024; *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

Second, NMFS's decision arbitrarily treats ATA different from similarly situated persons. For example, ATA and HLA are both associations representing their respective fisheries, but NMFS refuses to grant ATA applicant status and continues to grant HLA applicant status. AR000596; Clarke Decl. ¶ 14. NMFS states that it gives HLA applicant status based on the *HLA* decision and that the decision has no broader application. AR000001. But this is not reasoned.

NMFS cannot reasonably state that *HLA* was "wrongly decided" but then continue to apply it prospectively, especially considering NMFS emphasizes that the decision is not binding and was limited to a specific administrative record showing NMFS's decision denying HLA applicant status for the 2001 BiOp relied on a *post hoc* rationale. *Id.*; ECF 11, at 19-21; ECF No. 11-13, at 7. Yet NMFS unflinchingly continues to grant HLA applicant status for BiOps implicating the deep-set or shallow-set fisheries HLA represents. Although ATA agrees that HLA is an applicant, NMFS's reasoning (or lack thereof) for treating ATA differently than HLA is unsupportable. *Nat'l Envtl. Dev. Ass'ns Clean Air Project*, 752 F.3d at 1009 (stating agency action is arbitrary when its explanation runs counter to the evidence before the agency); *Erie Boulevard Hydropower, LP v. FERC*, 878 F.3d 258, 269 (D.C. Cir. 2017) ("An agency decision that departs from agency precedent without explanation is similarly arbitrary and capricious."); *ANR Storage*, 904 F.3d at 1024 (internally inconsistent agency decisions are arbitrary).

NMFS also unreasonably treats ATA members holding agency authorizations differently from persons holding agency authorizations in other industries. For example, the Consultation Handbook describes persons who have already received logging authorizations through timber

sales in a national forest are treated as applicants for a subsequent consultation implicating those authorizations. But NMFS refuses to afford applicant status to Fishery participants who have already received authorizations (*i.e.*, fishing permits) in the Convention Area for a subsequent consultation implicating those authorizations. Consultation Handbook, at 2-12. NMFS "is treating similar cases dissimilarly, the paradigmatic arbitrary and capricious agency action." *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1221 (D.C. Cir. 2014) (Kavanaugh, J., dissenting); *Muwekma Ohlone Tribe v. Salazar,* 708 F.3d 209, 215–16 (D.C. Cir.2013). To compound the offense, NMFS refuses to acknowledge or explain this differential and changed treatment. *Encino Motorcars, LLC*, 136 S. Ct. at 2125-26.

Third, NMFS's decision arbitrarily equates ATA members, who already hold permits and licenses subject to NMFS's ongoing consultation, to "prospective permit applicants" who have no permits. AR000001-2. Any alleged limitation on prospective permittees does not apply to current permit or license holders in the Fishery, who will be immediately subject to the new BiOp's requirements after NMFS completes its ongoing consultation. Contrary to prospective permittees who hold no permits and must initiate early consultation, 50 C.F.R. § 402.11, ATA's members hold permits and are to be "involved in the consultation process *as a result of* [] specific permit or license application[s]" they hold. 51 Fed. Reg. at 19,930 (emphasis added); *cf.* Consultation Handbook at 2-12 (showing that holders of logging authorizations—*i.e.*, timber sales—are applicants for reinitiations of consultation implicating those authorizations).[12]

[12] NMFS's denial decision unremarkably observes that not everyone is an applicant. AR000002. NMFS's example to support its decision to withhold applicant status from ATA and its members, which involves persons seeking funding without any connection to a permit or other authorization, is inapposite because the consultation for ongoing activities in the Fishery is coupled with agency authorizations.

Fourth, NMFS arbitrarily claims that ATA and its members are not applicants because there is no pending permit application such that they could influence terms and condition of that license. AR000002. But there have been numerous pending permit applications submitted to NMFS during its ongoing five-year consultation that will be governed by the new BiOp's requirements. *See, e.g.*, Clarke Suppl. Decl., Ex. 1; *see also Oregon Nat. Desert*, 716 F. Supp. 2d at 1003 ("The BiOp and ITS contain binding obligations on permittees requiring compliance with the conservation measures and those obligations are not hollow."). And if ATA and its members were made applicants, they would, in fact, have the opportunity to influence BiOp requirements that condition their continued operation under their existing permits in the Fishery. *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) ("[A]n agency cannot ignore evidence that undercuts its judgment; and it may not minimize such evidence without adequate explanation.").

NMFS's refusal to consult on individual permit applications when they are submitted does not change the reality that its consultation on the ongoing operations of the Fishery is actually consultation on all existing, pending, and future permits for the Fishery, at least for the next 13 years until NMFS develops the next BiOp. NMFS's reasoning here and its systematic refusal to treat permit holders as applicants during the consultation are arbitrary. *HLA*, 2002 WL 732363, at *8-9 (rejecting NMFS's attempt to shut applicant out of consultation by "drawing a rigid fence around the defined 'action'").

Fifth, NMFS's decision is arbitrary because it is internally inconsistent. NMFS suggests that it is denying ATA's applicant request because the consultation does not involve an individual permit application and the agency is engaged in a non-discrete programmatic action. AR000002. But the Consultation Handbook and the nature of this action refute NMFS's reasoning. The Consultation Handbook contemplates that more than one applicant can exist during a consultation, stating that "users who are party to a discrete action" are applicants and that "users party to a discrete

action . . . may participate as applicants in the consultation." Consultation Handbook at 2-12. Additionally, as the administrative record and decision shows, this consultation is for a discrete action—the continued operation of 40 vessels using a specific gear type in the Convention Area. AR000002. The BiOp's requirements will condition the continued operations of each permit holder in the Fishery. NMFS's decision is therefore unreasonable.

Based on the foregoing, NMFS's decision violates the APA, and ATA's requested relief should be granted in full. Granting this relief will be an important first step in preventing NMFS from continuing to systematically and unlawfully exclude entire industries from participating as applicants during the consultation process.

IV. NMFS's Newfound Fear About Administrative Unworkability Is Easily Allayed.

As a threshold matter, NMFS cannot rely on concerns about administrative efficiency to support its denial decision. *ANR Storage*, 904 F.3d at 1026 (explaining that courts may not rely on rationales "not asserted in the orders under review"). Thus, the Court need not even engage with this *post hoc* rationale.

Regardless, NMFS's concerns about "administrative convenience . . . cannot override" statutory or regulatory requirements. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 604 (1981). Indeed, "such practical concerns do not trump express statutory directives," and an "agency is not free to ignore or violate its regulations while they remain in effect." *Hoopa Valley Tribe*, 913 F.3d at 1105; *Nat'l Envtl. Dev. Ass'ns Clean Air Project*, 752 F.3d at 1011.

But even if the Court considers NMFS's administrative-efficiency rationale, it is unpersuasive. Agencies like NMFS routinely receive information from, share information with, and otherwise engage with a multitude of persons during regulatory developments. Agencies

sometimes receive, review, and respond to hundreds of thousands of comments.[13] Engaging with up to 31 applicants in NMFS's ongoing consultation on the Fishery hardly seems like a heavy lift, and engaging with a single association on their behalf would be significantly easier.

If necessary, NMFS could develop a seamless framework that ensures formal applicants may participate during "all phases of the consultation." 51 Fed. Reg. at 19,926-27. Here, that framework could include the following: (1) NMFS provides advance notice to Fishery participants that NMFS is preparing to reinitiate or begin a new consultation, which would allow interested applicants to begin reviewing and compiling relevant scientific and commercial information they would like NMFS to consider; (2) NMFS shares preliminary information on data sources, proxies, methodologies, and modes of analysis the agency plans to use with all applicants and requests feedback and informational submissions within a fixed period of time; (3) NMFS shares preliminary findings, conclusions, alternatives, measures, and terms and conditions with applicants in advance of holding a webinar in which they will be discussed; (4) NMFS provides applicants with the draft BiOp and a deadline for comments; and (5) NMFS shares the final BiOp with applicants. A straightforward process like this one would maintain administrative efficiency, provide for applicants' rights, and ultimately lead to a better-informed BiOp. Although the specter of increased administrative burdens appears to be a reasonable concern at first blush, a closer look confirms there is nothing to be worried about. NMFS's decision "by administrative fiat smacking of convenience of administration [and] not by properly balanced adjudication" should be invalidated. *Stuart v. F.C.C.*, 105 F.2d 788, 789 (D.C. Cir. 1939).

[13] *See, e.g.*, Administrative Docket for Removing the Gray Wolf from the List of Endangered Species, https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0097-0001 (showing that NMFS's sister agency, FWS, received 635,074 public comments).

REMEDY

Granting ATA's requested relief, including affording ATA 90 days to review and comment upon the draft BiOp, is an appropriate remedy. *See* 50 C.F.R. § 402.14(e) (generally requiring NMFS to complete BiOp in 90 days); *id.* § 402.14(g)(5) (providing applicant 45 days to review and submit comments on the BiOp). The ongoing consultation has dragged on for five years without input from ATA or its members and they should have been involved from the start.

NMFS has violated the ESA and its implementing regulations and issuing declaratory judgment to that effect is appropriate. 28 U.S.C. § 2201. The remainder of ATA's requested relief flows from NMFS's serious legal violations. First, the APA's default remedy is vacatur. 5 U.S.C. § 706. Regardless, the seriousness of NMFS's substantive errors described above is severe and vacating NMFS's order (informal adjudication) would not unduly disrupt any regulatory program. *See Comcast Corp. v. F.C.C.*, 579 F.3d 1, 9 (D.C. Cir. 2009); *see also Humane Soc'y of United States v. Zinke*, 865 F.3d 585, 614-15 (D.C. Cir. 2017). Second, the requested injunctive relief is warranted and necessary to protect ATA's and its members' rights as applicants related to NMFS's ongoing consultation concerning the Fishery and for future consultations. *See* 5 U.S.C. § 706(1) (requiring courts to compel unlawfully withheld agency action); ECF Nos. 2-1; 13; *see generally* Hallman Decl.; Supp. Hallman Decl.; Clarke Decl.; Supp. Clarke Decl.; *cf. Ridgely v. Lew*, 55 F. Supp. 3d 89, 98 (D.D.C. 2014) (identifying permanent injunction factors and holding that such an injunction was warranted to prevent unlawful agency action).

Third, courts routinely order agencies to take or refrain from taking actions based on specified time periods. *See, e.g.*, *Am. Gas Ass'n v. FERC*, 888 F.2d 136, 153 (D.C. Cir. 1989); *Nat'l Coal. Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875, 884-85 (D.C. Cir. 1987); *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 364 (D.C. Cir. 1981); *Poett v. United States*, 847 F. Supp. 2d 1, 4 (D.D.C. 2012); *Ctr. for Auto Safety v. Tiemann*, 428 F. Supp. 118, 122 (D.D.C.

1977). Adopting these remedies is especially appropriate where persistent delay has already hampered a plaintiff's case. *See, e.g., Bayshore Cmty. Hosp. v. Azar*, 325 F. Supp. 3d 18, 25 (D.D.C. 2018) ("To mitigate the prejudice to Plaintiffs . . . the court directs the Board to act on Plaintiffs' request for expedited judicial review within 30 days from this date."). Given that NMFS has prejudiced ATA by sandbagging its rightful participation in the consultation process, NMFS has no grounds for complaint.

CONCLUSION

Based on the foregoing, the Court should restrain NMFS from depriving ATA and its members of the rights to which they are entitled under the ESA and implementing regulations and grant the relief requested in full.

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Respectfully Submitted,

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