No. 17-___

IN THE

Supreme Court of the United States

DAVID GOETHEL, *et al.*,

Petitioners,

v.

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

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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July 12, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

The questions presented by this petition are:

1. Whether the First Circuit erred in departing from the Court's precedents on the availability of pre-enforcement review after the thirty-day statute of limitations for facial challenges to an implementing action under Section 1855(f) of the Magnuson-Stevens Act has run.

2. Whether an email setting a date certain for regulated entities to incur costs qualifies as an "implementing action" under Section 1855(f)(2) of the Magnuson-Stevens Act.

PARTIES TO THE PROCEEDING

Petitioners are David Goethel and XIII Northeast Fishery Sector, Inc. They were plaintiffs in the District Court and appellants in the Court of Appeals.

Respondents are the United States Department of Commerce; Wilbur Ross, in his official capacity as Secretary of Commerce; Benjamin Friedman, in his official capacity as Acting Administrator of the National Oceanic and Atmospheric Administration; the National Oceanic and Atmospheric Administration; Samuel D. Rauch III, in his official capacity as Acting Assistant Administrator for Fisheries for the National Marine Fisheries Service; and the National Marine Fisheries Service. They were defendants in the District Court and appellees in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner David Goethel is a natural person to whom the corporate disclosure obligations of Rule 29.6 do not apply.

Petitioner XIII Northeast Fishery Sector, Inc. is a Massachusetts corporation, it has no parent corporation, and no publicly held company owns a 10% or greater ownership interest in it.

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INTRODUCTION

This case turns on the interpretation of the Magnuson-Stevens Act's judicial review provision, 16 U.S.C. § 1855(f)(1), the plain meaning of an "implementing action" under Section 1855(f)(2) of the Magnuson-Stevens Act, and that provision's interplay with the Court's well-established doctrine of pre-enforcement review.

The First Circuit, in defiance of this Court's precedents, refused to reach the merits of the fishermen's challenge, holding that even though the fishermen would certainly face enforcement action for failure to comply with the Government's unlawful monitoring requirement, they missed any opportunity to seek pre-enforcement review of that regulation. By requiring Petitioners to, quite literally, "bet the boat," the First Circuit has committed clear error in ignoring this Court's precedents on pre-enforcement review.

The First Circuit also clearly erred by ignoring Congress's intent in revising Section 1855(f)(2) of the Magnuson-Stevens Act to permit timely challenges to an "implementing action." In providing for judicial review within thirty days of an "implementing action," Congress created an avenue for judicial review in a situation such as the present case, where the Government promulgated a regulation and then deferred its application until years after the fact—and, importantly, long after the Magnuson-Stevens Act's extremely short statute of limitations period had passed. Rather than requiring small-boat fishermen to immediately retain counsel and run to court as soon as a regulation is promulgated, Congress wisely decided to allow fishermen to wait until they faced imminent practical effects from a regulation to bring a challenge. Not only does this allow economically efficient challenges to

regulations, but it promotes judicial economy. There is no reason to litigate a regulation that an agency never intends to apply or enforce.

These questions come before the Court at a critical juncture for the New England fishing industry, one of America's oldest. Increasing regulatory pressure has made it difficult for small-boat fishermen to continue a trade that many of their families have plied for generations. These fishermen deserve a day in court to challenge *ultra vires* agency action that requires the fishermen to pay Government-mandated third-party monitors to ride their boats and watch them fish. The courts below denied them this opportunity.

Here, the Government waited five years before deciding to implement the industry-funding requirement for the groundfish At-Sea Monitoring Program. Petitioners promptly filed suit, but, so far, have been denied a decision on the merits of their case. This Court should grant review to settle these two important questions of law and vindicate its own precedents, which will give the New England fishing industry a second chance at life.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 854 F.3d 106 and is reprinted at Pet. App. 1a. The opinion of the District Court is available at 2016 WL 4076831 and 2016 U.S. Dist. LEXIS 99515. It is reprinted at Pet. App. 23a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on April 14, 2017. Pet. App. 1a. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Magnuson-Stevens Act, in relevant part, provides that:

> (1) Regulations promulgated by the Secretary under this chapter and actions described in paragraph (2) shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of Title 5, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable; except that–
>
> (A) section 705 of such Title is not applicable, and
>
> (B) the appropriate court shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D) of such Title.
>
> (2) The actions referred to in paragraph (1) are actions that are taken by the Secretary under regulations which implement a fishery management plan, including but not limited to actions that establish the date of closure of a fishery to commercial or recreational fishing.

16 U.S.C. § 1855(f)(1)–(2).

STATEMENT OF THE CASE

I. Legal Background

A. The Magnuson-Stevens Act

The Magnuson-Stevens Act ("Magnuson-Stevens" or "the Act"), 16 U.S.C. § 1801 *et seq.*, provides the statutory framework for the Federal Government's management of domestic fisheries. 16 U.S.C. § 1801(a)(6), (b)(1), (b)(3). Congress granted primary administrative authority for the Act to the Secretary of Commerce ("Secretary"). *Id.* § 1802(39).

Magnuson-Stevens establishes eight Fishery Management Councils ("Councils") that are each charged with their own geographic portion of the Nation's coastal waters. The Councils relevant to this case are the New England Fishery Management Council ("New England Council"), *id.* § 1852(a)(1)(A), and the Mid-Atlantic Fishery Management Council ("Mid-Atlantic Council"). *Id.* § 1852(a)(1)(B).

The Councils' principal responsibility is to propose and amend Fishery Management Plans ("FMPs"), which regulate the harvesting of particular fish species or sets of species within a Council's region. Each FMP is proposed by a Council, but approved, implemented, and enforced by the Secretary. *See id.* § 1853(a)–(b). The Act sets out the provisions that must be included in a FMP. *See id.* § 1853(a). Any FMP must, for example, "contain the conservation and management measures . . . which are . . . necessary and appropriate for the conservation and management of the fishery[.]" *See id.* § 1853(a)(1)(A).

The Act also authorizes Councils to include certain "discretionary provisions." *Id.* § 1853(b). Relevant to the case at bar, a Council may require the placement

of observers—or, presumably, at-sea monitors—on a vessel. *Id.* § 1853(b)(8). Yet several statutory provisions speak directly to the Government's authority to collect fees and assess regulated parties for the funding of such observers and monitors. *See id.* § 1821(h)(4) (foreign fishing); *id.* § 1853a(e) (limited access privilege programs); *id.* § 1862(a)(2) (North Pacific fishery research plans).

The Magnuson-Stevens Act has a unique judicial review provision that incorporates most review provisions of the Administrative Procedure Act ("APA"). *Id.* § 1855(f). Section 1855(f) applies to facial challenges to "[r]egulations promulgated by the Secretary" under the Act, *id.* § 1855(f)(1), and "actions that are taken by the Secretary under regulations which implement a fishery management plan." *Id.* § 1855(f)(2).

Judicial review is available "if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable[.]" *Id.* § 1855(f)(1). Section 1855(f) does not contain any language explicitly discussing the availability of pre-enforcement review outside of this thirty-day period.

B. The Northeast Multispecies Fishery Management Plan and the At-Sea Monitoring Program

This case concerns "groundfish" (*i.e.*, fish that live at the bottom of the water they inhabit, such as cod, flounder, hake, halibut, and haddock) off the Atlantic coast. Groundfish migrate within the waters of both the New England and Mid-Atlantic Councils and are governed throughout their range by the Northeast Multispecies Fishery Management Plan ("Northeast Multispecies FMP"), which was developed jointly by

the two Councils thirty years ago.[1] *See* 16 U.S.C. § 1854(f)(1). The Northeast Multispecies FMP has been altered since its promulgation by a series of major modifications, called "amendments," and minor changes, called "framework adjustments."

Under Amendment 16 to the Northeast Multispecies FMP, enacted in 2010, fishermen became subject to different types of fishing restrictions depending on whether they were part of the "common pool" or a member of a "sector." *See generally* Northeast (NE) Multispecies Fishery; Amendment 16, 75 Fed. Reg. 18,262 (Apr. 9, 2010). A "sector" is an association of fishermen who contract with each other to abide by catch restrictions and management requirements compiled in a sector operations plan and approved by the Government on a yearly or biyearly basis. 50 C.F.R. § 648.87(b)(2), (c).

As part of Amendment 16, sectors were required to participate in the At-Sea Monitoring Program. 75 Fed. Reg. at 18,278 (requiring sectors to develop operational plans that provide for "adequate independent third-party at-sea/electronic monitoring . . . no later than FY 2012"); *id.* at 18,342; *see* 50 C.F.R. § 648.87(b)(1)(v)(B), (b)(2)(xi). At-sea monitors are responsible for "verify[ing] area fished as well as catch and discards," and monitoring "utilization of sector [annual catch entitlements]." 75 Fed. Reg. at 18,342. Historically, monitoring services have been supplied by third-party companies operating under contract with the Government. *See, e.g.*, 75 Fed. Reg. at 18,278, 18,342; *see also*

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[1] New Eng. Fishery Mgmt. Council & Mid-Atl. Fishery Mgmt. Council, Fishery Management Plan, Environmental Impact Statement, Regulatory Impact Review & Initial Regulatory Flexibility Analysis for the Northeast Multi-Species Fishery (Aug. 1985), *available at* http://goo.gl/4n9Y1n.

Northeast Multispecies Fishery; Approved Monitoring Service Providers, 81 Fed. Reg. 25,650, 25,650–51 (Apr. 29, 2016) (listing approved companies).

Amendment 16 required that sectors eventually take over the At-Sea Monitoring Program by contracting directly with the at-sea monitoring providers and paying the associated at-sea costs themselves. 75 Fed. Reg. at 18,342.[2] But after Amendment 16 was promulgated, the Government never put the industry-funding requirement into effect. *See, e.g.*, Framework Adjustment 45, 76 Fed. Reg. 23,042, 23,043 (Apr. 25, 2011); Framework Adjustment 48, 78 Fed. Reg. 26,118, 26,119 (May 3, 2013). By the Government's own estimation, that transition would have disastrous effects.[3] Instead, the Government always paid for the At-Sea Monitoring Program with congressionally-appropriated funds. *See, e.g.*, Standardized Bycatch Reporting Methodology Omnibus Amendment, 80 Fed. Reg. 37,182, 37,185 (June 30, 2015) ("To date, we have

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[2] A Government-sponsored study estimated the cost for the industry-funding requirement at $710 per day per vessel when a monitor is present. *See* Greater Atl. Reg'l Fisheries Office & Ne. Fisheries Sci. Ctr., Nat'l Oceanic & Atmospheric Admin., A Preliminary Cost Comparison of At Sea Monitoring and Electronic Monitoring for a Hypothetical Groundfish Sector at 6 (June 10, 2015), *available at* http://goo.gl/m3ZRYt.

[3] A Government-funded report concluded that "nearly 60% of the fleet could see negative returns to owner when full 2015 ASM costs are factored in." *See* New Eng. Fisheries Mgmt. Council, Draft Report: Preliminary Evaluation of the Impact of Groundfish-Sector Funded At Sea Monitoring on Groundfish Fishery Profits at 10 (June 19, 2015), *available at* http://goo.gl/WbCeSq. Those costs are predicted to be heaviest for the small vessels least able to bear them. *Id.* at 13, Table 12 (showing declines in numbers, crew shares, and owner returns for vessels smaller than 50 feet). These results were described as a "restructuring of the fleet." *Id.* at 10.

been able to provide sufficient funding for the groundfish sector at-sea monitoring program such that industry did not have to pay for at-sea monitoring.").[4] All this finally changed in 2015, when the Government turned the industry-funding requirement from a threat into a reality.

II. Factual Background

In May 2015, the National Marine Fisheries Service published its approval of sector contracts and operations plans for the next two seasons. 2015 & 2016 Sector Operations Plans & 2015 Contracts and Allocation of Northeast Multispecies Annual Catch Entitlements, 80 Fed. Reg. 25,143, 25,155 (May 1, 2015). In that publication, the Government asserted for the first time that "sector vessels will be responsible for paying the at-sea portion of costs associated" with sector monitoring "before the end of the 2015 fishing year." *Id.*

On November 10, 2015, the National Oceanic and Atmospheric Administration's Northeast Fisheries Science Center announced that "federal funds in the major at-sea monitoring contracts for northeast groundfish sectors will be expended by December 31, 2015," and that "[t]ransition of monitor sea-day costs to industry will therefore be effective January 1, 2016." Pet. App. 8a.

Petitioners David Goethel and XIII Northeast Fishery Sector, Inc. ("Sector 13") (collectively, "Petitioners")

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[4] *See also, e.g.*, 2013 Sector Operations Plans & Contracts and Allocation of Northeast Multispecies Annual Catch Entitlements, 78 Fed. Reg. 25,591, 25,597 (May 2, 2013); 2014 Sector Operations Plans & Contracts and Allocation of Northeast Multispecies Annual Catch Entitlement, 79 Fed. Reg. 23,278, 23,284 (Apr. 28, 2014).

are participants in the groundfish fishery, subject to the Northeast Multispecies FMP, the At-Sea Monitoring Program, and the industry-funding requirement.

III. Procedural History

Petitioners filed suit on December 9, 2015, fewer than thirty days after the Government's November 10 announcement that industry funding would be required by January 1, 2016. Pet. App. 9a. Petitioners moved at the same time for a temporary restraining order or, in the alternative, a preliminary injunction to stay the industry-funding requirement until resolution of Petitioners' claims on the merits.

Petitioners argued that the industry-funding requirement for at-sea monitoring is beyond the Government's statutory powers under Magnuson-Stevens. They also argued that, even if the industry-funding requirement were permitted by statute, the Government imposed it without observance of statutory procedures. Finally, even if the industry-funding requirement were allowed by statute and properly implemented, Petitioners argued that the At-Sea Monitoring Program, as currently defined, and the Magnuson-Stevens process for enacting FMPs, violates the United States Constitution.

On July 29, 2016, following the denial of Petitioners' motion for a temporary restraining order or, in the alternative, a preliminary injunction, the District Court denied Petitioners' summary judgment motion and granted the Government's cross-motion. The court held that Petitioners' challenge to the industry-funding requirement was late because Magnuson-Stevens required Petitioners, at the latest, to file within thirty days of the May 1, 2015 Federal Register announcement that sector vessels would be responsible for paying the at-sea portion of costs associated with

industry-funded monitoring before the end of the 2015 fishing year. Pet. App. 28a–30a. The District Court also rejected Petitioners' arguments on the merits. *See* Pet. App. 24a. The District Court entered final judgment for the Government on August 1, 2016.

The Court of Appeals for the First Circuit affirmed on timeliness grounds, rejecting Petitioners' argument concerning the availability of pre-enforcement review and instead ruling that such review had to be sought within Section 1855(f)(1)'s thirty-day period. Pet. App. 14a–16a. The First Circuit also held that the Government's November 10, 2015 notice did not qualify as an "implementing action" under 16 U.S.C. § 1855(f)(2). Pet. App. 17a–19a.

While the First Circuit did not address the merits of Petitioners' claims, two of the panel members noted that the case "may be a situation where further clarification from Congress would be helpful for the regulated fisheries and the agency itself as it balances the competing goals of conservation and the economic vitality of the fishery." Pet. App. 19a–20a.

REASONS FOR GRANTING THE PETITION

I. The First Circuit erroneously held, contrary to this Court's precedents, that pre-enforcement review is only available within thirty days of the issuance of a regulation, even if it is not implemented for half a decade.

This case first presents a simple, yet significant, procedural question: Is pre-enforcement review still available to a regulated party after a short, statutorily-prescribed period for raising facial challenges to a regulation or implementing action has expired?

The First Circuit answered that question in the negative, erroneously holding that the Magnuson-Stevens Act precludes pre-enforcement review after the exhaustion of the thirty-day period that follows either the promulgation of a fishery regulation or an implementing action. *See* 16 U.S.C. § 1855(f)(1)–(2).

In doing so, the First Circuit effectively eliminated the doctrine of pre-enforcement review and the possibility of meaningful judicial review of delayed agency implementing actions. This error undermines this Court's precedents and flies in the face of the Court's repeated rulings establishing the right of pre-enforcement judicial review for parties aggrieved by agency action. The First Circuit's error all but precludes judicial review prior to an enforcement action where a statutory scheme provides an already abbreviated window for facial challenges to a regulation, and it rewards agencies that delay implementation of such regulations by making their later actions immune to challenge.

This Court should grant certiorari so that it may vindicate its precedents and settle the question of whether Congress intended the Magnuson-Stevens Act to preclude fishermen from seeking pre-enforcement review of a regulation that was only recently applied against them, years after its promulgation and the exhaustion of the statutorily-prescribed period within which a direct challenge would normally be raised.

A. The doctrine of pre-enforcement review gives force to the fundamental principle that regulated parties should have a meaningful right to challenge unlawful administrative action.

It is a well-established and critical principle of administrative law that a regulated party may seek judicial review of agency action prior to facing enforcement proceedings. *Abbot Labs. v. Gardner*, 387 U.S. 136, 148, 151–53 (1966). Such recourse relieves the regulated party of the Hobson's choice between "costly compliance with [a] regulatory directive" and the penalties for noncompliance. *Ciba-Geigy Corp. v. Envtl. Prot. Agency*, 801 F.2d 430, 438–39, 438 n.10 (D.C. Cir. 1986).

As this Court has unequivocally stated, a regulated party need not "'bet the farm . . . by taking [a] violative action' before 'testing the validity of the law[.]'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010) (citing *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007)). Instead, pre-enforcement review is available once three criteria have been satisfied:

- *First*, an agency must take "a 'definitive' legal position" concerning its statutory authority. *CSI Aviation Servs. v. Dep't of Transp.*, 637 F.3d 408, 412 (D.C. Cir. 2011) (citing *Ciba-Geigy Corp.*, 801 F.2d at 436); *see Abbott Labs.*, 387 U.S. at 151–52; *see also Fed. Trade Comm'n v. Standard Oil Co. of Calif.*, 449 U.S. 232, 239 (1980).
- *Second*, the issue presented must be "a 'purely legal' question of statutory interpretation." *CSI Aviation Servs.*, 637 F.3d at 412; *see Abbot*

Labs., 387 U.S. at 149–52; *see also Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 171 (1967).

- *Third*, the agency's action must impose an "immediate and significant" practical burden on a regulated party. *CSI Aviation Servs.*, 637 F.3d at 412; *Ciba-Geigy Corp.*, 801 F.2d at 439.

Particularly with respect to heavily-regulated industries—which offer abundant examples of agency overreach—pre-enforcement review allows a party to speedily settle a dispute over the legality of a contentious rule in an economically efficient manner. The public interest is served by the availability of such review. Threats to pre-enforcement review, such as the First Circuit's erroneous holding in this case, should therefore be carefully scrutinized and corrected.

B. Pre-enforcement review is available once an agency rule has been applied, regardless of statutory restrictions on a party's ability to raise a facial challenge at some earlier time.

As the Sixth Circuit has intimated, the heart of the pre-enforcement review doctrine is the simple proposition that "[w]hen a party *first* becomes aggrieved by a regulation that exceeds an agency's statutory authority," even years after its promulgation, it "may challenge the regulation without waiting for enforcement proceedings." *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 822 (6th Cir. 2015) (citing *Free Enter. Fund*, 561 U.S. at 490–91).

The availability of judicial review in these situations depends on the threat of an enforcement action rather than promulgation of a regulation as such. *Indep. Cmty. Bankers of Am. v. Bd. of Governors of the Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999) ("[A]

party against whom a rule is applied may, at the time of application, pursue substantive objections to the rule, including claims that an agency lacked the statutory authority to adopt the rule, even where the petitioner had notice and opportunity to bring a direct challenge within statutory time limits.").

It is irrelevant whether a regulated party is afforded an opportunity to raise a facial challenge at some earlier time. Assuming that a limitations period for raising any direct claims has already run upon an agency's application of the regulation at issue, the fresh threat of enforcement gives rise to an opportunity to seek judicial review. *Functional Music, Inc. v. Fed. Commc'ns Comm'n*, 274 F.2d 543, 546–47 (D.C. Cir. 1958) ("[T]he statutory time limit restricting judicial review . . . is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further [agency] action applying it.") (citing *Columbia-Broad. Sys. v. United States*, 316 U.S. 407, 421 (1941)).

This approach to the interplay between pre-enforcement review—*i.e.*, judicial review of a rule following its effective application—and statutory time limits for facial challenges has been adopted by several circuits in differing statutory contexts, including the Sixth Circuit, *Herr*, 803 F.3d at 822; the D.C. Circuit, *Indep. Cmty. Bankers of Am.*, 195 F.3d at 34; and at least four other courts of appeal. *See Wind River Mining Corp. v. United States*, 946 F.2d 710, 714–15 (9th Cir. 1991); *Commonwealth Edison Co. v. U.S. Nuclear Regulatory Comm'n*, 830 F.2d 610, 613–15 (7th Cir. 1987); *Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985); *Tri-State Motor Transit Co. v. Interstate Commerce Comm'n*, 739 F.2d 1373, 1375 n.2 (8th Cir. 1984).

In this case, the First Circuit departed from this approach, and competes with this Court's precedents, in favor of a rigid interpretation of the statute that provides no practical opportunity for fishermen to challenge the delayed application of the at-sea monitor funding requirement short of defending themselves in an actual enforcement proceeding.

C. The Magnuson-Stevens Act does not contain the clear and convincing evidence of congressional intent that is required to preclude pre-enforcement review.

When Congress aims to require regulated parties to raise all potential legal challenges within specific statutory deadlines, it does so with explicit language. *See, e.g.*, *Indep. Cmty. Bankers*, 195 F.3d at 34–35. And this Court has accordingly required "clear and convincing evidence of . . . legislative intent [to] restrict access to judicial review." *Abbott Labs.*, 387 at 141; *see also Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670–72 (1986); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349, 351 (1984). That requirement flows from this Court's long recognition of the "heavy burden of overcoming the strong presumption" of judicial review of agency action. *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975).

The plain text of Section 1855(f) lacks any reference to pre-enforcement review, and it does not contain the sort of explicit language that would be required to preclude pre-enforcement review after the exhaustion of the statutorily-prescribed thirty-day period for raising direct challenges. The Magnuson-Stevens Act simply provides that "[r]egulations promulgated by the Secretary" and "actions . . . which implement a fishery management plan" are subject to review, "if a petition for such review is filed within 30 days after

the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable[.]" 16 U.S.C. § 1855(f)(1), (2).

Section 1855(f) does not require that *all* forms of judicial review, let alone pre-enforcement review, be sought within this thirty-day period. Thus, Congress likely intended to leave regulated parties with the option of pre-enforcement review at any later applicable time, *cf. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987), so long as the relevant criteria for pre-enforcement review are satisfied. This includes situations, such as in the case at bar, when an agency delays effective application of a regulation until long after its promulgation.

Section 1855(f)'s marked silence on the availability of pre-enforcement review is in stark contradistinction to other statutes that employ explicit language to limit the forms of judicial review available after a specified time period, including in enforcement proceedings. These statutes include the:

- *Federal Mine Safety and Health Amendments Act*, 30 U.S.C. § 811(d) ("The procedures of this subsection shall be the exclusive means of challenging the validity of a mandatory health or safety standard.");
- *Federal Water Pollution Control Act*, 33 U.S.C. § 1369(b)(2) ("Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.");
- *Noise Control Act*, 42 U.S.C. § 4915 ("Action of either Administrator with respect to which review could have been obtained under this

subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement.");

- *Solid Waste Disposal Act*, *id.* § 6976(a)(1) ("[A]ction of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement[.]");
- *Clean Air Act*, *id.* § 7607(b)(2) ("Action of the Administrator with respect to which review could have been obtained . . . shall not be subject to judicial review in civil or criminal proceedings for enforcement."); and,
- *Comprehensive Environmental, Response, Compensation, and Liability Act*, *id.* § 9613(a) ("Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceedings for enforcement[.]").

The legislative history of the Magnuson-Stevens Act is also instructive as it demonstrates that pre-enforcement review would not frustrate the legislative purpose of Section 1855(f), as amended. *See* Fishery Conservation Amendments of 1990, Pub. L. No. 101-627, § 101(b), 104 Stat. 4436, 4452 (1990).

In 1990, Congress revised the Act to permit legal challenges within thirty days of an "implementing action," in addition to publication of a regulation in the Federal Register. This was done to avoid situations where the Government—intentionally or not—created a "time lapse between publication or [sic] a regulation and Secretarial action[.]" H.R. Rep. 101-414, at 22 (Aug. 2, 1990); *see* 136 Cong. Rec. S14974 (Oct. 11,

1990) (statement of Sen. Sanford) (describing the "catch-22" that led to the addition of "implementing action" to Section 1855(f)); *see generally* H.R. Rep. 101-393, at 28 (Dec. 15, 1989) ("The amendments . . . will allow a challenge within 30 days of the time that a regulation is implemented.") (citing *Kramer v. Mosbacher*, 878 F.2d 134 (4th Cir. 1989)).

Congress was keenly aware that fishermen could face a significant delay between the publication of a regulation and its effective date. *See, e.g.*, 136 Cong. Rec. H240 (Feb. 6, 1990) (statement of Rep. Jones) ("[Section 1855(f) prior to the 1990 Amendments] place[d] persons affected by the regulations in an impossible situation: if they sue in anticipation of possible future adverse impacts, their challenge can be dismissed as premature and not ripe for judicial review. If they wait until they suffer actual injury from implementing measures . . . they can be thrown out of court because the 30-day statute of limitations has expired.").

The legislative intent behind Section 1855(f) is clear: Congress sought to liberalize regulated parties' access to judicial review, particularly when the formalism of the Magnuson-Stevens Act did not correspond with the difficult reality of domestic fishing and regulatory bureaucracy. The Government should not be permitted to forego the scrutiny of an Article III court by delaying the implementation of a regulatory provision, such as the industry-funded at-sea monitoring requirement, long past its promulgation and publication. These requirements will only be enforced against regulated fishermen, *see* 16 U.S.C. §§ 1857–59, and it is only they who will be capable of raising pre-enforcement challenges. There is no fear of "opening the floodgates" to litigation. The First Circuit's

erroneous holding cannot stand, lest it have a deleterious effect on the doctrine of pre-enforcement review.

D. Limitations on the availability of pre-enforcement review raise due process concerns that warrant the Court's attention.

The First Circuit's decision to disallow pre-enforcement review outside Section 1855(f)'s thirty-day window raises important due process concerns. *See, e.g.*, *Am. Rd. & Transp. Builders Ass'n v. Envtl. Prot. Agency*, 705 F.3d 453, 457 n.2 (D.C. Cir. 2013) (citing *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 n.9 (1980), and *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 289–91 (1978) (Powell, J., concurring)); *see generally* Frederick Davis, *Judicial Review of Rulemaking: New Patterns and New Problems*, 1981 Duke L.J. 279, 286 (Apr. 1981) ("The constitutionality of the particular review provisions," which proscribe judicial review after a limited time period, even in enforcement actions, "is not free from doubt.").

This is particularly true when, as here, a regulation threatens to destroy a regulated party's economic livelihood, *see* Davis, *Judicial Review*, *supra* at 288–90 (discussing *Matthews v. Eldridge*, 424 U.S. 319 (1976)), or otherwise rests on dubious constitutional grounds. *Cf. Steffel v. Thompson*, 415 U.S. 452, 454 (1974). Moreover, as the First Circuit itself commented in passing, its holding fails to address the rights of other fishermen who may only become "subject to the regulations for the first time more than thirty days after the May 2015 final rule[.]" Pet. App. 19a n.12. That sort of ambiguity should not be permitted to exist. The Court should therefore consider granting the petition in order to address and diffuse the

constitutional implications of the First Circuit's decision.

E. No authoritative case law supports the First Circuit's erroneous holding.

The First Circuit's holding finds no support in authoritative case law, despite the court's claim that other jurisdictions "that have encountered this question appear to have uniformly concluded that the thirty-day statute of limitations cannot be sidestepped" through pre-enforcement review. Pet. App. 15a. The sole circuit decision cited, *Turtle Island Restoration Network v. Department of Commerce*, 438 F.3d 937, 939 (9th Cir. 2006), did not even involve a pre-enforcement review claim by a regulated party.

The First Circuit relied on district court decisions that similarly lacked any mention of pre-enforcement review. *See N.C. Fisheries Ass'n, Inc. v. Evans*, 172 F. Supp. 2d 792, 798–99 (E.D. Va. 2001); *F/V Robert Michael, Inc. v. Kantor*, 961 F. Supp. 11, 15 (D. Me. 1997). The only Magnuson-Stevens case law that does mention pre-enforcement review involved timely-filed claims. *Stinson Canning Co. v. Mosbacher*, 731 F. Supp. 32, 34–35 (D. Me. 1990). But that court's dicta on Section 1855(f)(1)'s application to pre-enforcement was merely explanatory, rather than a limiting rule. This Court should therefore grant certiorari to establish a clear rule on the availability of pre-enforcement review outside of Section 1855(f).

II. The First Circuit's construction of an "implementing action" under the Magnuson-Stevens Act defies this Court's precedents on "final agency action."

This case also presents another important question concerning the reviewability of agency action undertaken to implement fishery regulations. If the First Circuit's interpretation of 16 U.S.C. § 1855(f)(2) were to stand, small-boat fishermen across the nation may be practically unable to ever challenge another regulation in court. This is an inequitable result and it stems from a misreading of the Magnuson-Stevens Act and this Court's administrative law jurisprudence.

A. The Government's notice of a date certain for the application of a regulatory requirement must be understood as an "implementing action."

Section 1855(f) authorizes judicial review of "actions that are taken by the Secretary under the regulations which implement a fishery management plan," 16 U.S.C. § 1855(f)(2), so long as the suit is filed within thirty days of these "implementing actions." In this case, Petitioners had no obligation—legal, practical, or otherwise—to make payments of any specified amount for at-sea monitors until the Government's November 10, 2015 notice, which set a date certain for the transition to industry funding. Petitioners filed their challenge to the industry-funding requirement in the District Court on December 9, 2015, fewer than thirty days after the Government's November 10 implementing action. Their suit is timely.

Understanding the November 10 notice to qualify as an implementing action accords with the familiar standards of the APA. The Magnuson-Stevens Act

incorporates many of the APA's judicial review standards, 16 U.S.C. § 1855(f)(1), which define agency action to include any "whole or a part of an agency rule, order, license, sanction, relief or the equivalent . . . thereof[.]" 5 U.S.C. § 551(13); *id.* § 701(b)(2). The Government's November 10 notice mandated that Petitioners, among others, begin complying with the industry-funding requirement for the At-Sea Monitoring Program. That requirement was part of Amendment 16 to the Northeast Multispecies FMP. For years, it was intentionally unenforced, and the Government willingly undertook responsibility for funding the entirety of the program. The decision to finally apply the industry-funding requirement and give effect to the mandated legal obligation to pay for at-sea monitors is assuredly an action "taken by the Secretary . . . which implement[s] a fishery management plan," at least in any common sense understanding of that phrase.

The First Circuit's analysis centered on the use of the phrase "order . . . or the equivalent thereof" in Magnuson-Stevens's judicial review provision. Citing the APA definition of an "order," which calls for it to be the result of an agency adjudication, the Circuit wrote, "there is no suggestion that the November 10th email was the product of an agency adjudication." Pet. App. 18a (citing 5 U.S.C. § 551(6)). As a threshold matter, Magnuson-Stevens does not require the "implementing action" to meet the literal definition of order from the APA, but merely be the "equivalent thereof."

Secondly, the agency plainly engaged in an "adjudication." The APA defines adjudication broadly as "the agency process for the formulation of an order[.]" 5 U.S.C. § 551(7). In order to implement the fishery regulation, the agency had to deliberate to come up with the date, November 10, 2015, and the amount

charged to the fishermen. This decision, and even the act of determining that the agency coffers were no longer full, clearly qualified as a "process for the formulation" of an agency decision. The November 10 email, by virtue of the legal consequences that flow from it and its equivalency to an agency order, is an "implementing action" under Section 1855(f)(2) of Magnuson-Stevens.

B. The Government's decision to finally apply the regulatory requirement at issue qualifies as "final agency action."

This Court has held that agency actions are reviewable under Section 704 of the APA when they (1) "mark the 'consummation' of the agency's decision-making process" and (2) are events "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennet v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted). There was nothing "tentative or interlocutory" in this case about the agency's direction that sector fishermen start paying the at-sea costs associated with the groundfish monitoring program. *Id*. By requiring sectors for the first time to shift from hosting at-sea monitoring provided under *government* contracts to those supplied under *industry* contracts—and not just in theory, but as of a date certain—the Government changed petitioners' legal obligations and effected legal consequences. *See id.*; *see also Natural Res. Def. Council v. Envtl. Prot. Agency*, 643 F.3d 311, 320 (D.C. Cir. 2011).

An agency action is "'definitive', not 'informal' or 'tentative'" if it has "'an immediate and *practical* impact.'" *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1817–18 (2015) (Ginsburg, J., concurring) (emphasis added) (citing *Abbott Labs.*, 387 U.S. at 151, and *Frozen Food Express v. United States*,

351 U.S. 40, 44 (1956)). That the Government subsequently changed its decision as to when Petitioners and other sector fishermen would be legally required to pay for industry funding is inconsequential. "Th[e] possibility [of revising or revisiting a decision based on new information] is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." *Id*. at 1814 (citing *Sackett v. Envtl. Prot. Agency*, 132 S. Ct. 1367, 1372 (2012)).

Simply put, the Government's November 10, 2015 announcement had a practical and legal effect on Petitioners. Before the announcement, they could fish without paying for at-sea monitors or facing enforcement action for failure to pay. With the announcement, the Government set a date certain by which the legal consequences of the regulation would finally flow to Petitioners. Moreover, the Government's notice created, for the first time, the threat of enforcement for noncompliance with the industry-funding requirement.

C. Legislative history supports Petitioners' reading of the statute.

The history of the Magnuson-Stevens Act and relevant case law demonstrates the error of the First Circuit's interpretation. Two federal circuits have held that when the Government applies Magnuson-Stevens regulations for the first time, the regulations themselves are reviewable even when the time for direct review has passed. *Gulf Fishermen's Ass'n v. Gutierrez*, 529 F.3d 1321, 1323 (11th Cir. 2008); *Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1111–16 (9th Cir. 2006). This was the very purpose of the statutory language.

As already discussed, when Magnuson-Stevens was reauthorized in 1990, Congress amended Section 1855(f) to ensure that judicial review of regulations would be available at the time of their application, even if the regulations were not challenged following their promulgation. *See Or. Trollers Ass'n*, 452 F.3d at 1114; *see also* 136 Cong. Rec. H229-06, H240 (Feb. 6, 1990) (statement of Rep. Jones). The Government's decision to stop funding the At-Sea Monitoring Program and to shift that cost onto the industry is thus a reviewable agency action.

D. The First Circuit's interpretation of an "implementing action" would deprive small-scale fishermen of meaningful access to judicial review.

The First Circuit erroneously relied on the transitory nature of the November 10, 2015 communication—an email—to find that it is not an implementing action. But agencies cannot avoid review of their actions by selecting informal modes of action over formal ones. *Ciba-Geigy Corp.*, 801 F.2d at 438 n.9 ("[A]n agency may not avoid judicial review merely by choosing the form of a letter to express its definitive position[.]"); *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 701 (D.C. Cir. 1971); *see Abbott Labs.*, 387 U.S. at 140–41 (explaining that statutory authorization for review of one type of agency action does not preclude review of other types of action); *Free Enter. Fund*, 561 U.S. at 490 (similar).

Important practical considerations underlie this rule. Petitioners, after all, "cannot be expected to anticipate all possible future challenges to a rule and bring them within [a set period] of the rule's promulgation, before a later agency action applying the earlier rule leads to an injury." *Cal. Sea Urchin Comm'n v.*

Bean, 828 F.3d 1046, 1050 (9th Cir. 2016). The Government "should not be able to sidestep a legal challenge to one of its actions by backdating the action to when the agency first published an applicable or controlling rule." *Id*. at 1051. Allowing fishermen to wait until further agency action gave industry funding an imminent, legal, and practical effect makes an otherwise "theoretical" issue "concrete," thus aiding judicial review. *Id*. It also promotes judicial economy, lessening the burden on the courts. *Bethlehem Steel Corp. v. Envtl. Prot. Agency*, 723 F.2d 1303, 1306 (7th Cir. 1983) ("[I]t makes no sense at a time of heavy federal judicial caseloads to encourage people to challenge regulations that may never harm them.").

Allowing the First Circuit's ruling to stand would effectively force fishermen to immediately file suit anytime the Government finalizes a regulation that may theoretically, at some point in the future, harm them. Expecting small-business fishermen to retain and pay for counsel, or fortuitously rely on *pro bono* counsel, and file suit against an enabling regulation before facing any practical consequences defeats the clear congressional purposes of the implementing action provision of 16 U.S.C. § 1855(f)(2).

It bears repeating that Congress strove to ensure that judicial review under Magnuson-Stevens would be available both at the "implementation" of fishery regulations and their "promulgation." 136 Cong. Rec. S14953, 14974 (Oct. 11, 1990) (statement of Sen. Sanford); *see* 136 Cong. Rec. H229-06, H240 (Feb. 6, 1990) (statement of Rep. Jones) (explaining that the amendments would "permit suit either when initial management plan regulations are issued or when implementing actions are put into effect"); H.R. Rep. No. 101-393, at 28 (1989) ("The amendments made by

this subsection will allow a challenge within 30 days of the time that a regulation is implemented."). None of this suggests that Congress intended to allow the Government to avoid judicial review at the time of actual implementation. As the November 10 email plainly qualifies as an implementing action, the fishermen must be given the opportunity to challenge the merits of the at-sea monitoring provision in federal court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 12, 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[Filed 04/14/2017]

No. 16-2103

DAVID GOETHEL, XIII NORTHEAST FISHERY SECTOR, INC.,

Plaintiffs, Appellants,

v.

U.S. DEPARTMENT OF COMMERCE; WILBUR ROSS, in his official capacity as Secretary, U.S. Department of Commerce; BENJAMIN FRIEDMAN, in his official capacity as Acting Administrator, National Oceanic and Atmospheric Administration; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; SAMUEL D. RAUCH III, in his official capacity as Assistant Administrator for Fisheries (Acting) for the National Marine Fisheries Service; NATIONAL MARINE FISHERIES SERVICE,[*]

Defendants, Appellees.

Appeal from the United States District Court for the District of New Hampshire

[Hon. Joseph Laplante, *Chief U.S. District Judge*]

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[*] Pursuant to Fed. R. App. P. 43(c)(2), the following substitutions have been made among the appellees: Wilbur Ross, U.S. Secretary of Commerce, for former Secretary Penny Pritzker; Benjamin Friedman, Acting Administrator, National Oceanic and Atmospheric Administration, for former Administrator Kathryn Sullivan; and Samuel D. Rauch III, Assistant Administrator for Fisheries (Acting) for the National Marine Fisheries Service, for former Assistant Administrator Eileen Sobeck.

Before

Kayatta, Circuit Judge,
Souter, Associate Justice,[**]
and Stahl, Circuit Judge.

Julie A. Smith, with whom Eric R. Bolinder, Ryan P. Mulvey, Cause of Action Institute, and James C. Wheat, Pierre A. Chabot, and Wadleigh, Starr & Peters, P.L.L.C., were on brief for appellants.

Thekla Hansen-Young, with whom John C. Cruden, Assistant Attorney General, Andrew C. Mergen, Robert Lundman, Alison C. Finnegan, Andrea Gelatt, Environment & Natural Resources Division, U.S. Department of Justice, and Mitch MacDonald, Gene Martin, National Oceanic and Atmospheric Administration, Office of General Counsel, Northeast Section, were on brief for appellees.

April 14, 2017

STAHL, Circuit Judge. This case arrives on the court's deck from regulations promulgated by the National Marine Fisheries Service (NMFS), which require that on certain commercial fishing trips, fishermen must be accompanied on their vessels by at-sea monitors to ensure compliance with catch quotas, and that the industry must foot the bill for these unwelcome guests. David Goethel, a New Hampshire fisherman joined in these proceedings by a group of

[**] Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

commercial fishermen subject to this "industry funding" requirement, brought suit in federal district court in New Hampshire, claiming that the industry funding requirement violates several pertinent statutes and is also unconstitutional.

The district court granted summary judgment in favor of the government, reasoning that Goethel's suit was not filed within the applicable statute of limitations and that Goethel's statutory and constitutional challenges would have failed even if timely. On appeal, Goethel renews the bulk of his constitutional and statutory arguments, and urges this court to find that his suit was not time-barred. Because we agree with the district court that Goethel's suit was not timely, we AFFIRM the grant of summary judgment in favor of the government, and do not reach the question of whether the industry funding requirement contravenes the edicts of the relevant statutes or the Constitution.

I. Facts & Background

A. The Regulations

The Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. §§ 1801–1884, was passed by Congress in 1976 in "[r]espon[se] to depletion of the nation's fish stocks due to overfishing." *Associated Fisheries of Me., Inc. v. Daley*, 127 F.3d 104, 107 (1st Cir. 1997). The stated goals of the MSA were, *inter alia*, to "conserve and manage the fishery resources found off the coasts of the United States" and "to promote domestic commercial and recreational fishing under sound conservation and management principles." 16 U.S.C. § 1801(b)(1), (3). The MSA tasked the Department of Commerce[1] with regulating comer-

[1] The Department of Commerce in turn delegated this role to the National Oceanic and Atmospheric Administration ("NOAA"),

cial fishing throughout the Exclusive Economic Zone of the United States, which extends 200 nautical miles from the seaward boundary of each coastal state. *Id.* § 1802(11); *see also* Pres. Proc. No. 5030, Exclusive Economic Zone of the United States, 48 Fed. Reg. 10,605 (Mar. 10, 1983) (defining the geographic scope of the Exclusive Economic Zone of the United States and the sovereign rights exercised therein under international law).

Pursuant to the MSA, eight regional Fishery Management Councils (FMCs) were established and charged with preparing, and, if circumstances warranted, amending, regional Fishery Management Plans (FMPs), which set certain standards for the fishing industry within the given FMC's regional purview. The MSA was amended in 2007 to include a requirement that each FMP include "measures to ensure accountability" with respect to catch limits. *See* 16 U.S.C. § 1853(a)(15). In an effort to effectuate this requirement, the regional FMP at issue in this case, the Northeast Multispecies FMP, was amended by the New England Council (the relevant FMC) to include a requirement that commercial fishermen within the purview of the Northeast Multispecies FMP must, on occasion, be accompanied by at-sea monitors (ASMs) who would collect certain data related to the particular fishing trip and the vessel's catch. *See generally* Northeast (NE) Multispecies Fishery, Amendment 16, 75 Fed. Reg. 18,262 (Apr. 9, 2010). The amendment that added this monitoring requirement was known as

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which regulates the fisheries through its sub-agency, the National Marine Fisheries Service ("NMFS"). For simplicity's sake, these entities (all of which are named as defendants-appellees along with their respective chiefs in their official capacities) are referred to throughout this opinion as the "government."

"Amendment 16," and was published on April 9, 2010, following a period of public comment. Goethel was a council member at the time of the enactment of Amendment 16 and voted against the proposal.

The at-sea monitors are human employees of private, third-party contractors who accompany the fishermen on board their vessels during certain fishing trips, observe their activities to ensure compliance with fishing limits, and file reports upon their return to port. While catch quotas had previously been imposed, and overall catch hauls recorded upon a fisherman's return to port, at-sea monitors were intended to verify the specific geographic areas in which a boat fished, and also to monitor fish discards at sea. *See* 75 Fed. Reg. at 18,342. While not every fishing journey is monitored, costs for the monitors when a particular fishing trip is selected for such monitoring are estimated at $700–$800 per trip. *See Goethel v. Pritzker,* No. 15-CV-497-JL, 2016 WL 4076831, at *1 (D.N.H. July 29, 2016). Application of the at-sea monitoring program depends on whether a particular fishmerman is a member of a "sector," an association of "vessels that have voluntarily signed a contract and agree[d] to certain fishing restrictions," most notably catch restrictions and management requirements compiled in a sector operations plan. *See Lovgren v. Locke*, 701 F.3d 5, 15–16 (1st Cir. 2012) (citing Northeast (NE) Multispecies Fishery, Amendment 13, 69 Fed. Reg. 22,906, 22,945 (Apr. 27, 2004)). The sector program is voluntary and those vessels that choose not to join a sector are still able to fish from the "common pool" allocation of fish under a separate program that tracks number of days spent at sea, rather than using catch limits, and that does not require at-sea monitoring. *See generally* 50 C.F.R. § 648.82 (discussing days-at-sea restrictions for members of the common pool). The

relevant sectors in this case are comprised of those fishing for groundfish.[2]

As is the case with many government regulations, Amendment 16 requires compliance without offering to pay or reimburse the regulated entity for the cost of compliance. To the contrary, Amendment 16 itself requires that the sector fishermen bear the costs of the at-sea monitors. *See* Northeast (NE) Multispecies Fisheries, Amendment 16, 75 Fed. Reg. 18,262, 18,342 (April 9, 2010) ("Beginning in fishing year 2010, a sector must develop, implement, and pay for, to the extent not funded by NMFS, an independent third-party dockside/roving and at-sea/electronic monitoring program that is satisfactory to, and approved by, NMFS . . . ."). Notwithstanding this clear requirement, the government paid the ASM costs throughout the first several years of the program's existence. *See, e.g.*, Standardized Bycatch Reporting Methodology Omnibus Amendment, 80 Fed. Reg. 37,182, 37,185 (June 30, 2015) ("To date, we have been able to provide sufficient funding for the groundfish sector at-sea monitoring program such that industry did not have to pay for at-sea monitoring.").

However, a 2011 ruling by the D.C. Circuit required NMFS to fund a separate reporting program, *see Oceana v. Locke*, 670 F.3d 1238 (D.C. Cir. 2011), which in turn depleted the funds that the agency had available for the at-sea monitoring program in the Northeast. Beginning in 2015, responding to funding shortfalls caused by the requirements of the D.C. Circuit ruling, NMFS took a series of steps to inform the sectors

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[2] "Groundfish" is a generic term for various bottom-dwelling fish species including, most notably, cod, haddock, halibut, and flounder. *Goethel,* 2016 WL 4076831, at *2 n.4.

that it could no longer fund the at-sea monitoring costs, and the sectors themselves and their constituent fishermen would soon be on the hook for these costs, as envisioned by Amendment 16. Because of the importance of the various dates in 2015 for purposes of the statute of limitations, we explain the relevant communications between the agency and the regulated sectors below.

- March 9, 2015: NMFS published a Proposed Rule to approve seventeen sector operations plans for fishing years 2015 and 2016. While noting that the agency had been able to pay the costs of ASM coverage during the years 2012 to 2014, the agency explained that this would change: "Due to funding changes . . . we expect that sector vessels will be responsible for paying at-sea costs associated with the ASM program before the end of the 2015 fishing year." Proposed Rule, 2015 and 2016 Sector Operations Plans for Northeast Multispecies Fishery, 80 Fed. Reg. 12,380, 12,385 (Mar. 9, 2015).
- May 1, 2015: NMFS published a final rule that reiterated the same language from the March 9th proposed rule, namely, that the agency "expect[ed] that sector vessels will be responsible for paying the at-sea portion of costs associated with the sector ASM program before the end of the 2015 fishing year." Final Rule, 2015 and 2016 Sector Operations Plans for Northeast Multispecies Fishery, 80 Fed. Reg. 25,143, 25,148 (May 1, 2015). The notice also added that "funding for our portion of ASM costs is expected to expire before the end of the 2015 fishing year" but "we have begun working on an implementation plan to help ensure a seamless transition when the

industry assumes responsibility for at-sea costs in 2015." *Id.* at 25,149.

- November 10, 2015: NOAA Northeast Fisheries Science Center announced that "federal funds in the major at-sea monitoring contracts for northeast groundfish sectors will be expended by December 31, 2015," and that "[t]ransition of monitor sea-day costs to industry will therefore be effective January 1, 2016." This announcement was sent to the relevant sectors in an email, but was not published in the Federal Register. The email, titled "Update: Federal Funding for At-Sea Monitoring Ends December 31, 2015," stated, in pertinent part:

  > Based on the data we have on actual fishing effort, we have determined that federal funds in the major at-sea monitoring contracts for northeast groundfish sectors will be expended by December 31, 2015. Transition of monitor sea-day costs to industry will therefore be effective January 1, 2016.

Although the November 10th email notification purported to establish a date certain when industry funding would kick in (January 1, 2016), the government was ultimately able to continue paying ASM costs through mid-February 2016. Additionally, on June 23, 2016, a NOAA email notification informed the Northeast Sector that the agency would fully fund the shore-based monitoring program and would "use remaining funds to offset some of industry's costs of the groundfish at-sea monitoring program."

B. The Parties

Plaintiff-appellant David Goethel is a New Hampshire-based commercial fishermen and sector

member who is subject to the various provisions of the Northeast Multispecies FMP, including the industry funding requirement for the at-sea monitoring program. Plaintiff-appellant XIII Northeast Fishery Sector, Inc. ("Sector 13"), one of the approved groundfish sectors, is a corporation organized under Section 501(c)(5) of the U.S. Internal Revenue Code, and consists of thirty-two fishermen and twenty active boats. The members of Sector 13 are also subject to the Northeast Multispecies FMP, including the at-sea monitoring program. Goethel and Sector 13 presented evidence that the industry funding requirement for the at-sea monitoring program would impose draconian costs on the Sector and its members, including citing a NOAA report which concluded that "nearly 60% of the fleet could see negative returns to owner when full 2015 ASM costs are factored in." Plaintiffs-appellants are concerned that the industry funding requirement will essentially render the groundfish industry no longer viable from a commercial standpoint.

The defendants-appellees are the U.S. Department of Commerce, the NOAA, and the NMFS, as well as their respective directors in their official capacities.

C. The Lawsuit

Goethel filed his suit on December 9, 2015. As discussed in greater detail below, Goethel argues that because his complaint was filed within thirty days of the November 10th email notification, it was therefore timely under the MSA's thirty-day statute of limitations. In his complaint and subsequent briefing to the district court, Goethel advanced a multitude of alleged statutory and constitutional violations, falling into one of three categories: an allegation that the industry funding requirement is unlawful, a challenge to the at-sea monitoring requirement in general, and a facial

attack on the entire Magnuson-Stevens framework. We briefly describe these claims below.

First, Goethel alleged that the industry funding requirement was unlawful because the agency acted in excess of its statutory authority under the MSA and failed to follow proper procedures, resulting in agency action that was arbitrary, capricious, and an abuse of discretion, in violation of the requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A).[3] In addition to alleging a violation of the APA, Goethel cast his net even further, alleging that the industry funding requirement was an improper tax in violation of the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, the Anti-Deficiency Act (ADA)[4], 31 U.S.C. § 1341, and the Miscellaneous Receipts Act (MRS)[5], 31 U.S.C. § 3302, and also constituted the imposition of improper user fees in violation of the Independent Offices Appropriations Act (IOAA)[6],

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[3] With some exceptions not relevant to the present case, the MSA generally incorporates the APA's judicial review provisions. *See* 16 U.S.C. § 1855(f)(1)(B).

[4] In relevant part, the ADA prohibits federal officers from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation" and from "involv[ing] [the United States] in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(A)–(B).

[5] This statute provides that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b).

[6] The IOAA permits an agency to "prescribe regulations establishing the charge for a service or thing of value provided by

31 U.S.C. § 9701. He also alleged that the industry funding requirement violated the interstate commerce clause, U.S. Const. art. I, § 8, cl. 3, by requiring that the fishermen enter the market for at-sea monitors and purchase those services. Finally, he alleged two procedural violations: that the agency failed to prepare a Regulatory Flexibility Analysis, as required by the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601–612, and that it failed to assess the impact of its regulatory actions on the environment, as required by the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370e. All of these arguments are preserved on appeal, with the exception of the alleged NEPA violation, which is not raised in Goethel's opening brief.

Second, Goethel challenged the at-sea monitoring program itself (as distinct from the requirement that the sectors pay for it) on constitutional grounds. The sheer volume of constitutional claims that Goethel made initially suggests that he was, in a manner of speaking, on a fishing expedition. Specifically, he alleged that the at-sea monitoring requirement violates the First Amendment by "compelling fishermen to join sectors"[7]; violates the Port Preference Clause[8] by

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the agency," 31 U.S.C. § 9701(b), in effect recouping fees from those who receive services provided by the agency.

[7] This argument was abandoned by the plaintiffs during an early phase of the proceedings below, was not addressed by the district court in its opinion, and is not raised on appeal.

[8] *See* U.S. Const. art. I, § 9, cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another."). Goethel likewise abandoned this argument prior to summary judgment, and does not raise it on appeal.

discriminating between the various States, leading fishing vessels to prefer one state's port over another; and violates the Fourth Amendment's prohibition on unreasonable searches and seizures. Not content to leave any part of the kitchen sink unused, Goethel also alleged that the at-sea monitoring program violates the Third Amendment's prohibition on the quartering of soldiers during peacetime because fishermen were compelled to accommodate federally-mandated monitors on multi-day fishing voyages.[9] Of these arguments, only the Fourth Amendment claim is preserved in this appeal.

Third, Goethel alleged that the entire MSA regulatory framework was unconstitutional. First, he alleged that the regional FMCs are improperly constituted, in violation of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, because members of the councils are "inferior officers" whose appointments could thus only be vested "in the President alone, in the Courts of Law,

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[9] *See* U.S. Const. Amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."). The Third Amendment was a response to the Quartering Acts of 1765 and 1774, in which Parliament authorized British military commanders to requisition private homes as barracks, *see Engblom v. Carey*, 677 F.2d 957, 967 (2d Cir. 1982) (Kaufman, J., concurring in part and dissenting in part), and its application to private contractors engaged in on-board monitoring of the fishing industry is a dubious proposition to say the least. However, as with the Port Preference Clause and First Amendment claims, the plaintiffs conceded their Third Amendment argument before summary judgment, thus depriving this court of the rare opportunity to opine on the scope and application of the Third Amendment. *See Goethel*, 2016 WL 4076831, at *9 n.13 ("Earlier in this litigation, plaintiffs also argued that industry funding of ASM also violated the Third Amendment's prohibition against quartering of soldiers. They no longer advance that claim.").

or in the Heads of Departments." Goethel argues that because the governors of the various coastal states are involved in nominating individuals to the councils, and because state executive officials are not among the permissible entities in which Congress can vest the appointment power for inferior officers, the councils are constitutionally infirm and actions taken by those councils, including the Northeast Multispecies FMP, are void. Second, Goethel argues that the MSA conscripts state officers by requiring that they participate in the councils, in turn violating the Tenth Amendment anti-commandeering doctrine. *See Printz v. United States,* 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."). The alleged violations of the Appointments Clause and the Tenth Amendment are preserved in this appeal.

D. The District Court Ruling

After the parties cross-moved for summary judgment, the district court, in an order dated July 29, 2016, rejected Goethel's various challenges and granted summary judgment in favor of the government. First, the court found that the claims were not timely because "the plaintiffs [sic] 30-day window to challenge the industry funding component of ASM closed, at the latest, in June 2015, well before this suit was filed." *Goethel*, 2016 WL 4076831, at *4. The district court rejected Goethel's argument that the November 10th email notification was a separately reviewable "action" under the MSA, but also declined the government's invitation to find that the statute of limitations began to run in 2012 when the regulations implementing Amendment 16 took effect, which would have meant

Goethel's claims were time-barred by a matter of years. *See id.* at *3–4.

Second, the court, after concluding that Goethel's suit was time-barred, proceeded to analyze Goethel's statutory and constitutional claims, and found that they would have failed on the merits even if his suit had been filed within the MSA's thirty-day statute of limitations.

This timely appeal followed.

II. Analysis

The district court determined that Goethel's complaint was barred by the MSA's statute of limitations, a finding that we review de novo. *See Santana-Castro v. Toledo-Dávila*, 579 F.3d 109, 113 (1st Cir. 2009). The MSA includes provisions that govern judicial review. Specifically, parties may challenge "regulations promulgated by" NMFS, 16 U.S.C. § 1855(f)(1), and they may also seek review of "actions that are taken by the Secretary under regulations which implement a fishery management plan, including but not limited to actions that establish the date of closure of a fishery to commercial or recreational fishing," *id.* § 1855(f)(2). Furthermore, as relevant (and ultimately dispositive) to this case, judicial review is only available if a complaint "is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable." *Id.* § 1855(f)(1).

As an initial matter, we address an argument that Goethel spends much time advancing in both his opening and reply briefs: that he is entitled to pre-enforcement review under the APA, in lieu of violating the statute and then bringing his statutory and constitutional arguments as a defense to an enforcement

action. The thirty-day statute of limitations embodied in the MSA, Goethel argues, does not apply to pre-enforcement review. Not so. Of course pre-enforcement review is available as a general matter under the MSA, but, as the district court noted below, "plaintiffs cite no authority which permits the court to waive the statute of limitations applicable to pre-enforcement review" of agency action under the MSA. *Goethel*, 2016 WL 4076831, at *4 n.4.

On appeal, Goethel renews this same argument, but fails to cite any authority for the proposition that the thirty-day statute of limitations in the MSA can be deep-sixed simply by the fact that the party seeking judicial review is making a pre-enforcement challenge to the statute in question. Indeed, the courts that have encountered this question appear to have uniformly concluded that the thirty-day statute of limitations cannot be sidestepped when a party is challenging a regulation promulgated pursuant to NMFS authority under the MSA. *See, e.g.*, *Turtle Island Restoration Network v. U.S. Dep't of Commerce,* 438 F.3d 937, 939 (9th Cir. 2006) (concluding that although the appellant's claims were "framed . . . in terms of violations of the APA [and environmental statutes]," they were "in actuality . . . challenge[s] to the reopening of the [swordfish] Fishery" and thus subject to the MSA's thirty-day statute of limitations); *N.C. Fisheries Ass'n, Inc. v. Evans*, 172 F. Supp. 2d 792, 798–99 (E.D. Va. 2001) (holding that challenges to regulations arising from an FMP amendment must be filed within the thirty-day statute of limitations period from the promulgation of the amendment itself); *F/V Robert Michael, Inc. v. Kantor*, 961 F. Supp. 11, 15 (D. Me. 1997) (concluding that lobstermens' challenge to the Department of Commerce's denial of permits, on the grounds that such a denial violated the MSA, was time-barred because

"[p]laintiffs' quarrel lies with the regulation itself" and that regulation had been promulgated long before the plaintiffs sought review); *Stinson Canning Co. v. Mosbacher*, 731 F. Supp. 32, 34–35 (D. Me. 1990) ("Plainly, Congress intended pre-enforcement review since it provided that a petition for such review must be filed thirty days from promulgation."). We agree with these cases and hold that Goethel's pre-enforcement challenge only can proceed if it was filed within thirty days of the "action" in question as required by § 1855(f)(1).

Goethel's case, therefore, hinges on whether the November 10th email is a separately reviewable "action" for purposes of the thirty-day statute of limitations, since any of the other pertinent dates – the 2010 promulgation of Amendment 16 which included by its own terms a requirement of industry funding, and the March 9th and May 1st, 2015, proposed and final rules announcing the expected exhaustion of government contributions to the at-sea monitoring program – would fall well outside the thirty-day window. Goethel argues that it was on November 10th, for the first time, that the government established a "date certain" when industry funding would finally take effect, and therefore this date should be treated as the relevant "action."

In support of this argument, he cites to *Bennett v. Spear,* 520 U.S. 154 (1997), where the Supreme Court explained that agency actions are reviewable under Section 704 of the APA when they (1) "mark the 'consummation' of the agency's decision-making process" and (2) are events "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 177–78. Here, Goethel argues, the November 10th date was both the "consummation of the agency's decision-making process" by setting a date

on which money would no longer be expended by the agency, and also when "obligations" had been "determined," namely who would pay the monitoring costs. Goethel also argued to the district court, and argues again on appeal, that prior to having a date certain on which industry funding actually would kick in, a potential suit would have been dismissed as unripe. *See Goethel,* 2016 WL 4076831, at *4 n.6 (rejecting Goethel's ripeness argument as "necessarily speculative," but also observing that it was "inconceivable that a suit filed within 30 days of the Rule's publication in May 2016 [sic] would have been found unripe").

We are not convinced by Goethel's argument. First, the language of § 1855(f) itself requires that for judicial review to be available, a complaint must be "filed within 30 days after the date on which the regulations are *promulgated* or the action is *published in the Federal Register,* as applicable." 16 U.S.C. § 1855(f)(1) (emphasis added). Goethel does not argue that the November 10th email is a stand-alone "regulation," which, although not defined in the MSA, generally "refers to legally binding obligations placed upon a council and/or the agency which have the force and effect of law and, as such, are analogous to substantive rules issued by an administrative agency which are subject to APA review." *Tutein v. Daley*, 43 F. Supp. 2d 113, 121 (D. Mass. 1999) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–302 (1979)). Nor was the November 10th email published in the Federal Register.

Second, to the extent that the language of the statute allowing for review within thirty days of the time when "the action is published in the Federal Register, as applicable," envisions a category of "actions"

for which publication is *not applicable*,[10] we disagree that the November 10th email would qualify. Agency "action" for purposes of administrative law generally "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Goethel's argument, that the email notification was the equivalent of an agency "order," clearly fails, as the APA defines an order as resulting from agency adjudication, *see id.* § 551(7), and there is no suggestion that the November 10th email was the product of an agency adjudication. Rather, the email was one of several updates sent to regulated parties throughout 2015, a routine effort to keep the sectors abreast of developments pursuant to a final rule which had been published in May of 2015.[11] In short, the November

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[10] In briefing and at oral argument, Goethel emphasized that insulating all non-published agency actions from review might create incentives for agencies to announce changes in particular regulatory programs that do shift certain legal obligations for regulated parties, and avoid legal challenges by refraining from publishing such decisions. While documents "having general applicability and legal effect" are generally "required to be filed for public inspection with the Office of the Federal Register and published in the Federal Register," 1 C.F.R. § 5.2(c), we do share Goethel's concern that a bright-line rule requiring publication in order for judicial review to be available under the MSA might preclude judicial review in cases where an unpublished action taken by an agency does, in fact, lead to a change in the legal position of regulated parties. Because we find that NOAA's November 10th email had no such effect, we save for a later day whether, under certain circumstances, unpublished agency actions could still be subject to judicial review under the MSA.

[11] While we need not reach this issue given that the November 10th email does not meet the basic requirements for reviewable agency "action," we think, as a factual matter, that the sectors' obligation to pay was certainly consummated, at the latest, with publication of the May 2015 final rule. Therefore, *Bennett v.*

10th notification does not have the significance that Goethel seeks to assign to it, and we conclude that it is not a separately reviewable agency "action" for purposes of § 1855(f)(1).[12]

We agree with the district court that the most recent "action" that could have plausibly been challenged was the May 2015 final rule, and for that reason we agree with the district court that the "plaintiffs [sic] 30-day window to challenge the industry funding component of ASM closed, at the latest, in June 2015, well before this suit was filed." *Goethel,* 2016 WL 4076831, at *4. Therefore, the suit is time-barred.

III. Conclusion

Because we find that Goethel's suit was not filed within the MSA's thirty-day statute of limitations, we need go no further, and we take no position on the district court's statutory and constitutional rulings. However, given NOAA's own study which indicated that the groundfish sector could face serious difficulties as a result of the industry funding requirement,

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Spear, which observed that for agency action to be "final," it must "mark the 'consummation' of the agency's decision-making process," 520 U.S. at 178 (internal citation omitted), is of no help to Goethel in this case because the November 10th email had no such effect.

[12] Goethel and Sector 13 were subject to the applicable regulations at the time NMFS promulgated Amendment 16, and at the time that the government announced, in the May 2015 final rule, that the industry funding requirement would kick in at the beginning of the 2016 calendar year. Therefore, we need not consider what other rights, if any, a party who became subject to the regulations for the first time more than thirty days after the May 2015 final rule would have, nor do we take any position on how the MSA's thirty-day statute of limitations would apply to a claim by such a party.

we note that this may be a situation where further clarification from Congress would be helpful for the regulated fisheries and the agency itself as it balances the competing goals of conservation and the economic vitality of the fishery.

While the concurring opinion suggests that this is inappropriate, we note that it is not uncommon in this and other circuits to include language in opinions that flags potential issues for Congress to consider, should it choose to do so.[13] *See, e.g.*, *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 490 (1st Cir. 2011) (commenting, in the context of a copyright infringement suit, that the case "raises concerns about application of the Copyright Act which Congress may wish to examine"); *Slayton v. Am. Express Co.*, 604 F.3d 758, 772 (2d Cir. 2010) (noting, while not deciding the issue, that "Congress may wish to give further direction on how to resolve [a] tension" in the Private Securities Litigation Reform Act); *Holender v. Mut. Indus. N. Inc.*, 527 F.3d 352, 357 (3d Cir. 2008) (observing, in a dispute over the scope of the Age Discrimination in Employment Act, that "Congress may wish to revisit this regulatory regime if it proves unworkable"); *Elsenety v. Health Care Fin. Admin.,* 85 F. App'x 405, 410 (6th Cir. 2003) (acknowledging that the statutory framework in question created a "harsh rule" and that "[a]t some point in the future, Congress

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[13] Indeed, beginning in 1995 with the Long Range Plan for the Federal Courts, the Judicial Conference and Congress have collaborated on the Project to Provide Congress with Appellate Opinions Bearing on Technical Matters of Statutory Construction, and we have occasionally sent opinions to Congress that we believe may warrant additional clarification via legislation, precisely because, as the concurring opinion suggests, the judiciary lacks expertise on the policy trade-offs faced by Congress.

may wish to reexamine" the statute); *Cefalu v. Vill. of Elk Grove,* 211 F.3d 416, 428 (7th Cir. 2000) (suggesting that certain in-trial evidence presentations are likely reimbursable under statute governing fees for exemplification, but noting that "[g]iven the costs associated with some of these" practices, "this is an area that Congress may wish to revisit and supply further guidance"); *see also United States v. Godin,* 534 F.3d 51, 65 (1st Cir. 2008) (Lynch, J., concurring) (noting that "Congress may wish to clarify in new legislation the scope of the enhanced penalties" under an aggravated identity theft statute); *Schafer v. Am. Cyanamid Co.,* 20 F.3d 1, 7 (1st Cir. 1994) (Stahl, J., concurring) (agreeing with the majority's interpretation of the National Childhood Vaccine Injury Act, but "respectfully suggest[ing] that this is an issue which Congress may wish to revisit."); *Olson v. Gen. Dynamics Corp.,* 960 F.2d 1418, 1425 (9th Cir. 1991) (Reinhardt, J., concurring) ("The proliferation of ERISA [Employee Retirement Income Security Act] preemption cases, in my view, raises a question as to whether ERISA is having an effect that is substantially contrary to that intended by those who favored its adoption. This is a matter which Congress may wish to examine carefully."); *United States v. Collins,* CR No. 03-51 S, 2016 WL 6477031, at *3 n.1 (D.R.I. Nov. 2, 2016) (suggesting that "Congress may wish to consider amending the enumerated offenses clause of [the Armed Career Criminal Act] to include those crimes, such as murder, which previously were understood to fall squarely within the residual clause.").

Because Goethel's claim is untimely, however, we AFFIRM the grant of summary judgment in favor of the government.

–Concurring Opinion Follows–

KAYATTA, Circuit Judge, concurring. I join in the panel's opinion with the exception of its call on Congress to provide further clarification. The nicely reasoned conclusion that the petition is untimely means that we lack jurisdiction to consider the merits of the appeal. *See Norbird Fisheries, Inc. v. Nat'l Marine Fisheries Serv.,* 112 F.3d 414, 416 (9th Cir. 1997). My colleagues nevertheless call on Congress to provide "further clarification" not concerning the matter of our jurisdiction, but rather concerning "the industry funding requirement" in light of the "competing goals" at stake. To the extent my colleagues imply that the statute is unclear, or that the "competing goals" at stake trigger some sort of express statement preference in these circumstances, I respectfully disagree. The default norm, manifest without express statement in literally hundreds of regulations, is that the government does not reimburse regulated entities for the cost of complying with properly enacted regulations, at least short of a taking. If this statute needs clarification on this point, then so too do hundreds of others. Additionally, given that we have no jurisdiction to hear the merits of this appeal, nor any expertise on the policy trade-offs made by Congress in deciding how best to protect our fisheries from overfishing, and who should pay for that protection, I think it prudent to be more parsimonious with our advice. *See* Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 5 (2005) ("The judge, compared to the legislator, lacks relevant expertise.").

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

[Filed 07/29/16]

Civil No. 15-cv-497-JL
Opinion No. 2016 DNH 127

DAVID GOETHEL, et al.

v.

PENNY PRITZKER, et al.

MEMORANDUM ORDER

This case involves legal challenges to the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801 et seq. ("MSA" or "the Act"), and actions taken thereunder by the National Marine Fisheries Service ("NMFS"). The plaintiffs are Hampton, New Hampshire-based commercial fisherman David Goethel, and XIII Northeast Fishery Sector, Inc. ("Sector 13").[1] Of particular relevance is a requirement that commercial fishermen must, on occasion, be accompanied by at-sea monitors ("ASMs") who collect certain fishing-related data. As promulgated by NMFS, the ASM provision called for the industry to pay the costs of the monitors. Nevertheless, the government paid the cost of the monitors (estimated at

[1] A "sector" is a self-selected "group of vessels that have voluntarily signed a contract and agree[d] to certain fishing restrictions" regarding, inter alia, catch limits. *Lovgren v. Locke*, 701 F.3d 5, 15–16 (1st Cir. 2012) (citing 69 Fed. Reg. 22,906, 22,945).

$700–$800 per trip) from the inception of the ASM regime in fishing year ("FY") 2012[2] until March 2016, and recently notified the court that it would be "reimbursing some of the industry's [at-sea monitoring] costs" as of July 1. Doc. no. 69.

Plaintiffs advance several legal arguments in support of their claim that the industry funding requirement is illegal. Generally speaking, however, plaintiffs contend that the defendants lack the legal authority to require fishermen to pay the monitors' costs. Presently before the court are the parties' cross-motions for summary judgment.[3] Following a thorough review of the parties' submissions, including the administrative record, the court finds that much of plaintiffs' case is barred by the applicable statute of limitations, and even if timely filed, their claims fail on the merits. Accordingly, the defendant's motion for summary judgment is granted and the plaintiffs' motion is denied.

I. Background

Congress enacted and codified The Fishery Conservation and Management Act, Congress enacted MSA in 1976. The Court of Appeals noted that it was enacted in "[r]espon[se] to depletion of the nation's fish stocks due to overfishing . . . ." *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 107 (1st Cir. 1997). The MSA's codified goals were, *inter alia*, "to conserve and manage the fishery resources found off the coasts of

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[2] A "fishing year" (FY) runs from May 1 to April 30 of the following year.

[3] Finding that the governing statutory scheme prohibited preliminary injunctive relief, the court previously denied plaintiffs' request for an injunction to prevent the industry funding requirement from taking effect. *Goethel v. Pritzker*, No. 15-cv-497 (D.N.H. Jan. 27, 2016) (doc. no. 44).

the United States" and "to promote domestic commercial and recreational fishing under sound conservation and management principles." 16 U.S.C. § 1801(b)(1), (3). Pursuant to the Act, eight regional Fishery Management Councils ("FMCs") were established "to exercise sound judgment in the stewardship of fishery resources. . . ." *Id*. §§ 1801(b)(5), 1852(a)(1)(A). The FMCs are charged with preparing – and subsequently amending, if necessary – Fishery Management Plans ("FMPs"), which regulate conservation and management of the fishery. *Id.* § 1853(a)(1)(A).

Central to this case is such an amendment: Amendment 16 ("A16") to the Northeast Multispecies FMP. This FMP was developed jointly by the New England and Mid-Atlantic Councils in 1985, and addresses groundfish[4] – those that live on, in, or near the bottom of the body of water they inhabit – which migrate between the waters within the purview of those two FMCs. Amendment 16 had its genesis in the MSA Reauthorization Act, which took effect in January 2007 and established new conservation mandates for all FMPs. *Lovgren v. Locke*, 701 F.3d 5, 17 (1st Cir. 2012).[5] In response, the New England Council included in A16 the at-sea monitoring program pursuant to the Reauthorization Act's requirement that FMPs include "measures to ensure accountability" with respect to catch limits. *See* 16 U.S.C. § 1853(a)(15); *see also*

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[4] Species of groundfish within the Northeast Multispecies FMP include different types of cod, haddock, halibut and flounder. See Northeast Multispecies (Groundfish) Fishery Management Plan Overview, available at http://s3.amazonaws.com/nefmc.org/GroundfishFMPOverview.pdf (last visited July 23, 2016).

[5] Amendment 16 had actually been proposed prior to the Reauthorization Act, but the Act's mandates caused the New England Council to delay its implementation. *Lovgren v. Locke*, 701 F.3d 5, 17 (1st Cir. 2012).

Oceana, *Inc. v. Pritzker*, 26 F. Supp. 3d 33, 39 (D.D.C. 2014). Accordingly, commercial fishermen within the purview of the Northeast Multispecies FMP must, on occasion, be accompanied by ASMs who collect certain data related to the particular fishing trip and the fishing vessels' catch. 75 Fed. Reg. 18262 (April 9, 2010).

As written, A16 requires that the industry pay the costs of such monitors. *Id*. at 18277–78, 18291. Despite this language, however, the government had paid the ASM costs (estimated at $700–$800 per trip) throughout the program's existence. In 2015, a court ruling required NMFS to fund a particular reporting requirement. *See Oceana v. Locke*, 670 F.3d 1238 (D.C. Cir. 2011); 16 U.S.C. § 1853(a)(11). This requirement depleted NMFS coffers, and in mid-2015, NMFS informed fishery sectors that the industry would have to pay the monitoring costs going forward. A rule proposed in March and finalized in May of that year made NMFS's position official. 80 Fed. Reg. 12385 (March 9, 2015); 80 Fed. Reg. 25155 (May 1, 2015). NMFS subsequently updated sectors on the anticipated date of federal funds exhaustion, first projecting October 31 and then, in November, projecting a December 31, 2015 exhaustion. The projection was extended to March 1, but NMFS announced that funding was exhausted in mid-February 2016. Nevertheless, NMFS delayed the industry funding requirement until March 1, before recently indicating its reimbursement plan, *supra*, p. 2. It is the November 10, 2015, update to which this lawsuit was initially directed. *See* Complaint (doc. no. 1).

II. Applicable legal standards

A. Summary judgment

Summary judgment is appropriate when the moving party "shows that there is no genuine dispute as to any

material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine dispute is one that a reasonable fact-finder could resolve in favor of either party and a material fact is one that could affect the outcome of the case." *Flood v. Bank of Am. Corp*., 780 F.3d 1, 7 (1st Cir. 2015). Reasonable inferences are taken in the light most favorable to the nonmoving party, but unsupported speculation and evidence that "is less than significantly probative" are not sufficient to avoid summary judgment. *Planadeball v. Wyndham Vacation Resorts*, *Inc*., 793 F.3d 169, 174 (1st Cir. 2015) (internal quotation marks omitted).

On cross motions for summary judgment, the standard of review is applied to each motion separately. *Mandel v. Bos. Phoenix*, *Inc*., 456 F.3d 198, 205 (1st Cir. 2006) ("The presence of cross-motions for summary judgment neither dilutes nor distorts this standard of review."). Accordingly, the court must determine "whether either of the parties deserves judgment as a matter of law on facts that are not disputed." *Adria Int'l Group*, *Inc. v. Ferré Dev*., *Inc*., 241 F.3d 103, 107 (1st Cir. 2001).

B. Administrative Procedure Act

With some exceptions not pertinent here, Congress authorized judicial review of agency actions taken under the MSA to follow the dictates of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. *See* 16 U.S.C. § 1855(f). The court's review is limited to the administrative record. *Lovegren*, 701 F.3d at 20. As relevant here, the court can set aside agency action only if such action is found to be: A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; B) contrary to constitutional right, power, privilege or immunity; C) in excess of statutory jurisdiction, authority, or limitations, or short of stat-

utory right; or D) without observance of procedure required by law. 5 U.S.C. § 706(2). "Because the APA standard affords great deference to agency decisionmaking and because the Secretary's action is presumed valid, judicial review, even at the summary judgment stage, is narrow." *Associated Fisheries of Me*., *Inc. v. Daley*, 127 F.3d 104, 107 (1st Cir. 1997). Finally, the MSA contains a 30-day statute of limitations. 16 U.S.C. § 1855(f).

III. Legal analysis

Plaintiffs claim that the industry funding requirement runs afoul of the MSA in three different ways: 1) there is no statutory authority for the requirement; 2) the government failed to follow required procedural steps in implementing the funding requirement; and 3) at-sea monitoring is unconstitutional and the relevant FMPs are invalid. The defendants dispute the legal bases for those arguments, but also assert that they are barred by MSA's 30-day limitations period. The court turns to that issue first.

A. Statute of limitations

The MSA requires that suits seeking judicial review of regulations and "actions" taken by the Secretary of Commerce (or her designee) be filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register. 16 U.S.C. § 1855(f). An "action" is further defined as "actions that are taken by the Secretary under regulations which implement a fishery management plan, including but not limited to actions that establish the date of closure of a fishery to commercial or recreational fishing." *Id.* at § 1855(f)(2).

The Secretary argues that the 30-day limitations period began to run when the regulations implement-

ing A16 (which explicitly called for industry funding) went into effect in FY 2012 or, at the latest, in May 2015, when the Rule announcing that industry funding would begin during FY 2015 was published. Plaintiffs argue that the November 10, 2015, notice from the Northeast Fisheries Science Center that federal funds would be exhausted by the end of 2015 triggered the 30-day deadline. Therefore, plaintiffs assert, their December 9, 2015, complaint was timely filed. The court rejects plaintiffs' argument. The court need not decide whether the original publication of A16 in 2012 started the 30-day limitations clock because it finds that the May 15, 2015 Rule explicitly announcing that industry funding would begin during the 2015–16 fishing year is the "action" referred to in 16 U.S.C. § 1855(f).

Plaintiffs argue that the November 10 letter is a separately reviewable "action," i.e., implementation of the ASM funding regulation. They rely on two cases, *Gulf Fishermen's Ass'n v. Gutierrez*, 529 F.3d 1321 (11th Cir. 2008) and *Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104 (9th Cir. 2006). Neither case, however, can support the weight that plaintiffs assign to them. *Gulf Fishermen's Ass'n* involved a rule requiring fishing vessels to use a particular vessel monitoring system. Shortly before scheduled implementation of that rule, NMFS published another rule delaying the effective date by four months. 529 F.3d at 1322. Suit was filed within thirty days of publication of the second rule, challenging the legality of the monitoring system requirement. The court rejected the Secretary's statute of limitations defense, observing that "the plain text of § 1855(f) does not preclude judicial review of a regulation beyond thirty days after its publication where there has been subsequent Secretarial action

under the regulation." *Id.* at 1323 (citing *Oregon Trollers*, 452 F.3d at 1113).

While plaintiffs go to great lengths to convince the court that the November 10 email notice is an "action" within the meaning of section 1855(f), they ignore additional discussion in *Gulf Fishermen's Ass'n* and that case's explication of *Oregon Trollers* which is fatal to their claim. Specifically, *Gulf Fishermen's Ass'n* agreed with *Oregon Trollers* that it is not just agency action," in general, that is separately reviewable, but "actions," in particular, that are "published in the Federal Register," as set forth in section 1855(f). *Id*. at 1323–24; (quoting *Oregon Trollers*, 452 F.3d at 1113). Indeed, *Gulf Fishermen's Ass'n* held that "a petition filed within thirty days *of the publication of a Secretarial action*, as defined in § 1852(f)(2)" is timely. (Emphasis added); *see also Green v. Locke*, No. 10-707 (MLC), 2010 WL 3614216, (D.N.J. Sept. 8, 2010) (rejecting, in the context of analyzing the MSA's statute of limitations, plaintiffs' claims that permit denials were "actions" within the meaning of § 1855(f)(2) because they were neither "promulgated" nor "published in the Federal Register"). Here, plaintiffs do not claim that the November 10 email notice was a promulgated regulation or that it was published.

The court finds that plaintiffs 30-day window to challenge the industry funding component of ASM closed, at the latest, in June 2015, well before this suit was filed.[6] As explained below, however, even if plaintiffs' claims were timely filed, defendant is nevertheless entitled to summary judgment.

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[6] Plaintiffs also argue that they could not have brought suit any earlier because such a suit would have been dismissed as unripe. While necessarily speculative, it seems inconceivable that

B. Plaintiffs' substantive claims

1. Industry funding is contrary to law

Plaintiffs assert several arguments in support of their allegation that the industry funding component of ASM is contrary to law. 5 U.S.C. § 706(2). None prevail. The court addresses them seriatim.

a. Lack of MSA authorization

Plaintiffs first argue that industry funding is unlawful because it is not authorized by the MSA. While it is true that the MSA does not explicitly authorize industry funding (with one exception to be addressed), the court's inquiry does not end there, as "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron, U.S.A, Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

To start with, the MSA explicitly authorizes at-sea monitors. 16 U.S.C. §§ 1853(b)(8), 1881(b). Next, the MSA also contains the broad mandate that FMPs *shall* "contain the conservation and management measures . . . necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery[.]" 16 U.S.C. § 1853(a)(1)(A). Finally, and

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a suit filed within 30 days of the Rule's publication in May 2016 would have been found unripe. In addition, as plaintiffs point out, pre-enforcement review is available to aggrieved parties and plaintiffs cite no authority which permits the court to waive the statute of limitations applicable to pre-enforcement review.

as explained below, significantly, section 1853(b)(14) allows FMPs to "prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery."

Although it examines a different statutory scheme, this court finds instructive the First Circuit Court of Appeals's treatment of the Federal Power Act's "necessary and appropriate" provision, 16 U.S.C. § 825h, in *Boston Edison Co. v. FERC*, 856 F.2d 361, 369–70 (1st Cir. 1988). There, the Court of Appeals concluded that the provision "augments whatever existing powers have been conferred on [the Federal Energy Regulatory Commission] by Congress," although it does not comprise an independent source of authority to act. *See also*, *Coastal Conservation Ass'n v. United States Dep't of Commerce*, Civ. No. 15-1300, 2016 WL 54911 at *4 (E.D. La. Jan. 5, 2016) (describing "necessary and appropriate" language in 16 U.S.C. § 1853(a)(1)(A) as "empowering language represent[ing] a delegation of authority to the agency."). NMFS and the Council permissibly found A16's industry funding provision "necessary and appropriate for the conservation and management of the fishery" and there is no dispute that the provision is a "measure, requirement or condition" as contemplated by 16 U.S.C. § 1853(b)(14). Accordingly, the court finds that the MSA does authorize industry funding of monitors.

Apart from the above statutory language, another provision of the MSA, added in 1996, demonstrates beyond peradventure that the MSA contemplates – and most certainly does not prohibit – the use of industry funded monitors. 16 U.S.C. § 1858(g)(1)(D) allows the Secretary to issue sanctions against any vessel owner or operator who has not made "any payment

required for observer services provided to *or contracted by* an owner or operator . . .” (emphasis added). This provision would be unnecessary if the MSA prohibited the very type of industry funding at issue in this case. *See generally*, *Richards v. United States*, 369 U.S. 1, 11 (1962) (“in fulfilling our responsibility in interpreting legislation, we must not be guided by a single sentence or member of a sentence, but (should) look to the provisions of the whole law . . . .”) (citation and internal quotation omitted).

In addition to arguing that the MSA does not authorize industry funding, plaintiffs also assert that the MSA *prohibits* industry funding. Although not expressly cited by the plaintiffs, this contention is based on the statutory interpretation canon *expresio unius est exclusion alterius*, which instructs that “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Duncan v. Walker*, 533 U.S. 167, 173 (2001); *see also United States v. Councilman*, 418 F.3d 67, 73 (1st Cir. 2005). Here, plaintiffs point to 16 U.S.C. § 1862(a)(2), which expressly authorizes the imposition of fees to cover the costs of, *inter alia*, observer coverage in North Pacific fisheries. From this, they argue that the canon requires a conclusion that the lack of similar express authorization elsewhere in the statute dooms A16’s industry funding requirement.[7]

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[7] Relatedly, the plaintiffs argue that if industry funding is implicitly authorized by the MSA, the Pacific Council fee provision would be surplusage, and thus run afoul of the court’s obligation “to attempt to give meaning to each word and phrase.” *United States v. Flores*, 968 F.2d 1366, 1371 (1st Cir. 1992).

The court disagrees. The Court of Appeals has cautioned that the canon "is an aid to construction and not an inflexible rule," *Hewlett-Packard Co*., *Inc. v. Berg*, 61 F.3d 101, 106 (1st Cir. 1995), and the Pacific Northwest fee mechanism is a substantively different animal than A16's industry funding requirement for at-sea monitoring. While plaintiffs correctly observe that § 1862 allows Councils to establish a fee schedule, details the requirements of such a schedule and directs how funds received are handled, see *id.* §§ 1854(d)(2)(A)–(c) and 1862(b),(d), A16's industry-funding provision does not establish, provide for, or in any way implicate fees.[8] Instead, A16 requires industry contracts with ASM providers, with whom they are free to negotiate contract terms. *See Cumberland Farms*, *Inc. v. Tax Assessor*, *State of Me*., 116 F.3d 943, 946 (1st Cir. 1997) ("The classic 'regulatory fee' is imposed by an agency upon those subject to its regulation."). Finally, the court also agrees with the Secretary's analogizing ASM costs to those of mandatory vessel monitoring systems, the cost of which is the responsibility of the vessel owner, although that funding responsibility is not expressly authorized by statute. *See Nat'l Fed'n of Indep. Bus. V. Sebelius*, 132 S. Ct. 2566, 2645 (2012) ("Government regulation typically imposes costs on the regulated industry."). The Secretary also cites to provisions of the Clean Air Act and Clean Water Act which do not specify a particular funding mechanism but pursuant to which the industry funds monitoring equipment. Doc. no. 72 at 15. Plaintiffs primarily attempt to diminish the import of these examples through semantics, referring to them as "true compliance costs" relating

[8] Similarly, plaintiffs list several other fee-based provisions of the MSA in their supplemental memorandum, doc. no. 76 at 2, 4. For the reasons stated above, these are inapposite.

to "primary conduct." Doc. no. 76 at 4. But plaintiffs do not support this purported distinction with any examples of a court invalidating a payment regime such as the one at issue here.

The fact that fees are addressed in § 1862 but not § 1853 does not "support[] a sensible inference" that the MSA forbids an FMP under which industry must bear the cost of certain regulations. The court therefore declines to rule that the MSA prohibits industry funding of at-sea monitors.

b. Industry funding as a tax

Alternatively, the plaintiffs suggest[9] that industry funding is a tax, which can only be levied by Congress. Doc. no. 53-1 at 10 (citing *Nat'l Cable Television Ass'n, Inc. V. United States*, 415 U.S. 336, 340 (1974) ("Taxation is a legislative function, and Congress . . . is the sole organ for levying taxes[.]")). Again, the court disagrees. A payment made to a third party vendor (in this case, an at-sea monitor) is not a tax simply because the law requires it.

As the Court of Appeals has observed, a "'tax' is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community." *Cumberland Farms, Inc. v. Tax Assessor, State of Me.*, 116 F.3d 943, 946 (1st Cir. 1997) (quoting *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n*, 967 F.2d 683, 685 (1st Cir.

[9] Plaintiffs' argument on this point consists of one sentence and two cited cases. It is only for the sake of completeness that the court did not decline to address this argument as insufficiently developed. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

1992)). Here, payments for ASMs are made directly to the vendors and not to NMFS.[10] Funds paid by industry sources to third party at-sea monitors are not collected by the government, received by the government, or otherwise available to the government to be expended for any public purpose. The rates or terms of monitor payments are not set by government officials, or even known to them. The industry funding of at-sea monitoring does not involve taxation, and thus constitute an unlawful tax.

c. Anti-Deficiency Act

Plaintiffs further suggest that the industry funding requirement violates the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A)–(B), which prohibits federal officers from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation" and from "involv[ing] [the United States] in a contract or obligation for the payment of money before an appropriation is made unless authorized by law[.]" This argument fails because the Anti-Deficiency Act simply has no bearing on or application to A16's industry funding requirement. The entire point of industry funding – in fact, the very reason the plaintiffs object to it – is that it requires private expenditures, not public ones. There is nothing in the record to suggest that industry funding of at-sea monitors involves the government or any government official spending public money, unappropriated or otherwise, or entering into a contract. *See Mack Bros. v. Me. State Hous. Auth.*, No. 2:10-cv-00087-GZS, 2011 WL 2633084, at

[10] Further, the court is aware of no record evidence or argument that the vendors supplying ASM services remit any of the monies paid by fisherman to any government agency.

*12 (D. Me. June 24, 2011) quoting *Hercules v. United States*, 516 U.S. 417, 427 (1996) (noting that Act "bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation."). Indeed, the effect of industry funding is a cessation of government spending. The Anti-Deficiency Act is simply not implicated here.

d. Miscellaneous Receipts Act

The plaintiffs' argument based on the Miscellaneous Receipts Act fails for reasons similar to its taxation and ADA-based arguments: industry funding doesn't involve the receipt of money by any government entity. Under 31 U.S.C. § 3302(b), "an official or agent of the Government receiving money for the Government from any source must deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." As A16 calls for contracting directly with ASM providers, it involves no "official or agent of the Government" receiving money.

Plaintiffs nevertheless argue that the required payments to the ASM providers contracting with the various fishing sectors is "money for the government" because monitoring is a "government program." Doc. no. 53–1 at 11. But this semantic argument also fails. Even if the payments to contractors were somehow considered "money for the government" and used to fund the ASM program,

> "[t]he Miscellaneous Receipts Act cannot in any way be construed to prohibit the deposit of receipts of [a] self-financing program in a special fund or account distinct from that of the general Treasury fund. All the Act literally requires is that miscellaneous money

> received by government officials be deposited in the general Treasury."

AINS, Inc. v. United States, 56 Fed. Cl. 522, 539 (2003). A16 does not provide for – and is not alleged to provide for – the receipt of money by government officials. Accordingly, the industry funding requirement does not run afoul of the Miscellaneous Receipts Act.

e. Commerce Clause

Plaintiffs next allege that the industry-funding requirement for ASMs violates the Commerce Clause of the United States Constitution[11] because it compels sectors to enter contracts with private companies, in contravention of the Supreme Court's mandate in *Nat'l Fed'n of Indep. Bus.*, in which the Court held that the Commerce Clause did not permit the government to "compel individuals to *become* active in commerce by purchas[ing]" health insurance. 132 S. Ct. at 2587 (emphasis in original). Here, plaintiffs argue, A16 unconstitutionally compels them to enter the market for at-sea monitors.

The Commerce Clause is not a barrier to the enforcement of A16, at least for the reasons advanced by the plaintiff. The underlying factual premise of this argument is flawed because nothing in the Magnuson-Stevens Act compels at-sea monitoring to begin with. Fisherman who do not participate in the sector system would not be required to have monitors, regardless of who is paying for them. See A16 at 861 ("sector vessels will be afforded greater flexibility [, but] will have to bear the administrative costs associated with prepar-

[11] Pursuant to art. I, § 8, cl. 3, Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

ing an environmental assessment as well as the monitoring costs associated with a sector manager, dockside monitoring and at-sea monitoring."). Fisherman who do not participate in the sector system fish in the "common pool," which does not require ASM. A16 at 149.

But even if, as plaintiffs assert, the sector system is only theoretically voluntary, [12] the Secretary here, unlike in *Nat'l Fed'n of Indep. Bus.*, is not "regulat[ing] individuals because they are doing nothing." *Id.* at 2587. As pointed out repeatedly supra at pp. 16–18, nothing in Magnuson-Stevens or A16 taxes, assesses fees, or otherwise penalizes [fishermen] for choosing a course of action (like the sector system) that does not require at-sea monitoring. Instead, the costs of monitors are part of the permissible regulation of plaintiffs' commercial fishing activities. The court finds no Commerce Clause violation based on the arguments advanced by the plaintiffs.

2. Procedural requirements

Plaintiffs next claim that even if the industry funding requirement for ASMs is permissible, NMFS failed to satisfy two procedural requirements imposed by the MSA – those imposed by the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 603–04 and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(C). The court addresses these claims in turn.

a. Regulatory Flexibility Act

The MSA requires that the Secretary comply with the Regulatory Flexibility Act. *See* 16 U.S.C. § 1855(e).

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[12] At A16's inception, 55 percent of permit holders joined a sector; these vessels accounted for 98% of the previous decade's catch. *Lovgren*, 701 F.3d 5.

The RFA requires agencies to conduct a "regulatory flexibility analysis" whenever they propose rules that will have "a significant economic impact on a substantial number of small entities." 5 U.S.C. §§ 601–605. The agency must prepare an initial analysis when a proposed rule is published and a final analysis when it publishes a final rule. *Id.* §§ 603(a), 604(a).

There is no dispute that NMFS complied with the letter of RFA by preparing both the initial analysis and the final analysis. Plaintiffs argue, however, that in doing so, the NMFS insufficiently analyzed the economic impacts on the relevant fisheries. But as the Court Appeals has observed, there is no requirement under the RFA as to the "specific amount of detail" with which an agency must discuss various alternatives presented to it. *Little Bay Lobster Co. v. Evans*, 352 F.3d 462, 471 (1st Cir. 2003); *see also*, *City of New Bedford v. Locke*, No. 10-10789-RWZ, 2011 WL 2636863 at *9 (D. Mass. June 30, 2011), *aff'd*, *Lovgren*, *supra* ("Arguments about the substantive merits of a new rule . . . are beyond the scope of [the] procedural requirements" of the RFA). The court accordingly rejects plaintiffs' RFA-based argument.

b. National Environmental Policy Act ("NEPA")

The MSA also requires NMFS to comply with NEPA, 42 U.S.C. § 4332(c), which, in turn, requires agencies to prepare environmental impact statements prior to implementing "significant acts." Plaintiffs' argument appears limited to the claim that NMFS failed to adequately assess the economic impact of industry funding, as their briefing makes no mention of environmental concerns. Doc. no. 53–1 at 15. This posture is fatal to the argument as a party "must assert an environmental harm in order to come within [NEPA's]

zone of interests." *Gunpowder Riverkeeper v. F.E.R.C.*, 807 F.3d 267, 273 (D.C. Cir. 2015) (citing *Realty Income Tr. v. Eckerd*, 564 F.2d 447, 452 & n.10 (D.C. Cir. 1977); *see also*, *Lexmark Int'l*, *Inc. v. Static Control Components*, *Inc.*, 134 S. Ct. 1377, 1388 (2014) ("presum[ing] that a statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked.") (internal quotation and citation omitted)).

Plaintiffs' argument fails substantively as well. The environmental impact statement issued in conjunction with A16 acknowledged the potential negative consequences of industry funding. As explained in detail, *supra*, at pp. 7–10, the time for challenging A16 itself has long passed. Plaintiffs further argue that the environmental assessment accompanying approval for 2015 sector operations plans did not address the transition to industry funding. This argument fails because supplementation is only required "if the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner *or to a significant extent not already considered*." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373–74 (quoting 42 U.S.C. § 4332(2)(c) (emphasis added). Here, the impact of industry funding was already considered, and plaintiffs have failed to identify any new circumstances that would require a supplemental statement. Accordingly, the court rejects plaintiffs' argument premised on NEPA.

3. Constitutional claims

Plaintiffs' final arguments rest on the United States Constitution. The court notes at the outset that none of the plaintiffs' constitutional arguments challenge *industry funding*; rather, they challenge *at-sea monitoring*, a provision which has long been in place, for

which the time to challenge has long expired. Nevertheless, plaintiffs specifically argue that the ASM requirement itself violates the 4th and 10th Amendments, as well as the Appointments Clause, U.S. Const., art. II, § 2, cl. 2.[13] As explained below, the court finds each argument meritless.

a. Fourth Amendment

Plaintiffs first argue that the presence of at-sea monitors amounts to an unconstitutional warrantless search. The court disagrees. Even assuming that ASM presence constitutes a search – an assumption the Secretary accepts only for purposes of argument – warrantless administrative searches of closely regulated industries are valid. *See New York v. Burger*, 482 U.S. 691 (1987). The test for determining if an industry is "closely regulated" is whether the regulatory presence is "so pervasive that business owners cannot help but know that their commercial properties may be periodically inspected for specific purposes." *Rivera-Corraliza v. Morales*, 794 F.3d 208, 217 (1st Cir. 2015) (citing *Burger*, 482 U.S. at 705 n. 16)). So it is here. *See Lovgren v. Byrne*, 787 F.2d 857, 865 n.8 (3rd Cir. 1986) (noting "pervasive regulation" of the fishing industry "since the founding of the Republic."); *see also Balelo v. Balridge*, 724 F.2d 753, 765 (9th Cir. 1984) (applying "closely regulated" doctrine in holding that presence of monitors to support compliance with Marine Mammal Protection Act does not violate Fourth Amendment, given long national history of commercial fishing regulation).

[13] Earlier in this litigation, plaintiffs also argued that industry funding of ASM also violated the Third Amendment's prohibition against quartering of soldiers. They no longer advance that claim.

Given the closely regulated nature of commercial fishing, the ASM "searches" are reasonable within the meaning of the Fourth Amendment if the government has a substantial interest in regulating the business, the monitors' presence furthers this interest, and the regulations offer notice to the regulated. *Rivera-Corraliza*, 794 F.3d at 216–217. Here, all three criteria are met. Plaintiffs do not seriously dispute the government's interest – as expressed by the MSA – in protecting fishery resources. *See* 16 U.S.C. § 1801. Nor do they dispute that ASMs further that interest. And finally, the explicit provisions of the MSA give fishermen notice "that the government will conduct periodic inspections for specific purposes." *Balelo*, 724 F.2d at 765 (citing *Donovan v. Dewey*, 452 U.S. 594, 600 (1981)); 16 U.S.C. §§ 1853(b)(8), 1881b. On this record, there is no basis for this court to find or rule that the ASM program does not violate the Fourth Amendment.[14]

b. Appointments Clause

The Appointments Clause "makes nomination and confirmation the requisite appointment protocol for what have come to be known as 'principal officers' of

[14] Plaintiffs urge the court to rely on *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), in which the Court found that a municipal code requiring motel operators to provide guest information to police violated the Fourth Amendment. In so doing the Court observed that it had identified only four industries as "closely regulated." *Id.* at 2454. Commercial fishing was *not* one of the four. The Court, however, did not hold that no other industry could be considered "closely regulated." *See*, *Patel*, 135 S. Ct. at 2461 (Scalia, J., dissenting) (listing various industries held by courts of appeals to be "closely regulated"). Given that the Court of Appeals's criteria post-dates *Patel* and does not restrict "closely regulated" industries to those listed in *Patel*, this court adheres to the Court of Appeals's criteria as set forth in *Rivera-Corraliza*, 794 F.3d at 217.

the United States but allows Congress to permit a limited class of officials to appoint 'inferior officers' without the need for confirmation." *United States v. Hilario*, 218 F.3d 19, 24 (1st Cir. 2000) (citing *Edmond v. United States*, 520 U.S. 651, 659–60 (1997)); U.S. Const., art. II, § 2, cl. 2. The clause applies only to the appointment of officers "exercising significant authority pursuant to the laws of the United States." *Edmond*, 520 U.S. at 662–63.

Plaintiffs claim that appointment of members to the various Regional Councils established by the MSA runs afoul of the Appointments Clause because of the extent to which Governors of states within a particular council are involved in those appointments. Because the Councils do not exercise "significant" authority, the court rejects this argument. "Significant authority over federal government actions comes from the ability to promulgate, not propose, implementing regulations for a fishery management plan or plan amendment. Under the [MSA], only the Secretary of Commerce can promulgate implementing regulations." *Nw. Envtl. Def. Ctr., Or., Inc. v. Evans*, No. 87-229-FR, 1988 WL 360476 at *8 (D. Or. Aug. 12, 1988); *Gulf Restoration Network, Inc. v. Nat'l Marine Fisheries Serv.*, 730 F. Supp. 2d 157, 174 (D.D.C.) ("the FMP does not constitute final agency action without promulgation of the corresponding regulations: neither approval of the FMP nor failure to act on it marks the end of the decisionmaking process; nor does the FMP establish any rights or obligations or create any binding legal consequences. Adoption of implementing regulations is mandatory[.]").

c. Tenth Amendment

Plaintiffs' final argument is that the inclusion of state marine fishery officials among council members "con-

scripts" state officers to administer the MSA, in violation of the Tenth Amendment. *See Printz v. United States*, 521 U.S. 898, 935 (1997). The argument warrants little discussion. State officials are placed on Councils to provide advice regarding state concerns. *See* 16 U.S.C. § 1801(b)(5). They can also influence FMPs through their votes. 16 U.S.C. § 1852 (b)(1)(A). This is not a case of Congress attempting to "conscript state [officials] into the national bureaucratic army." *Nat'l Fed. Of Indep. Bus*., 132 S. Ct. at 2606–07. Unlike the Affordable Care Act at issue in *Nat'l Fed. of Indep. Bus*., where Congress intended to penalize states that did not participate in an expanded Medicaid program, the MSA imposes no penalties or coerced force where Councils are concerned. A state which does not provide a representative will simply not have representation. The court therefore rejects plaintiff's Tenth Amendment challenge.

IV. Conclusion

Ultimately, the voluminous administrative record demonstrates that A16 – including the industry funding requirement – was the end product of a lengthy period of deliberation and public comment. *See Lovgren*, 701 F.3d at 12 ("The N.E. Council adopted . . . Amendment 16[] after 3 years' work, which included several publications in the federal register, eight public hearings, and receipt of numerous comments."). The record demonstrates that the Secretary received considerable feedback on the ASM plan in general and the industry funding aspect in particular. Some comments from industry interests supported the monitor requirement and, in at least one case, expressed the understanding that such costs, while a potential burden, are an expected expense of doing business. *See* doc. no. 58, Ex.

3 (comments by Cape Cod Commercial Hook Fisherman's Association & Georges Bank Fixed Gear and Hook Sectors). At the same time, the Secretary received comments from other industry interests pointing out the financial hardship that monitoring costs would create, *id*. at Exs. 7, 16. Against this legal and factual backdrop, and for the reasons set forth herein, the court finds that plaintiffs' suit is untimely and, in the alternative: 1) that the industry funding requirement is authorized by the MSA and does not violate the Anti-Deficiency Act, The Miscellaneous Receipts Act or the Commerce Clause; 2) that the government did not violate the Regulatory Flexibility Act or the National Environmental Policy Act in implementing the funding requirement; and 3) that Amendment 16 does not violate the 4th or Tenth Amendments.

Accordingly, the Secretary's motion for summary judgment[15] is GRANTED. The plaintiffs' motion for summary judgment[10] is DENIED.

SO ORDERED.

/s/ Joseph N. Laplante
Joseph N. Laplante
United States District Judge

Dated: July 29, 2016

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[15] Doc. no. 56.

[10] Doc. no. 53.