

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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STATE OF NEW YORK, BASIL SEGGOS, as	:	
Commissioner of the New York State Department of	:	
Environmental Conservation, and the NEW YORK	:	
STATE DEPARTMENT OF ENVIRONMENTAL	:	
CONSERVATION,	:	
	:	
	:	
	:	Case No. _____
Plaintiffs,	:	
	:	
- against -	:	
	:	
	:	COMPLAINT
WILBUR ROSS, in his official capacity as Secretary of:	:	
the United States Department of Commerce, the	:	
UNITED STATES DEPARTMENT OF COMMERCE,	:	
the NATIONAL OCEANIC AND ATMOSPHERIC	:	
ADMINISTRATION, and the NATIONAL MARINE	:	
FISHERIES SERVICE, a/k/a NOAA Fisheries,	:	
	:	
	:	
Defendants.	:	
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Plaintiffs State of New York, Basil Seggos, in his capacity as Commissioner of the New York State Department of Environmental Conservation, and the New York State Department of Environmental Conservation (together “New York”), by their attorney, Letitia James, Attorney General of New York, allege as follows, upon information and belief, against Wilbur Ross, in his capacity as Secretary of the United States Department of Commerce, the United States Department of Commerce, the National Oceanic and Atmospheric Administration, and the National Marine Fisheries Service (collectively “Commerce”):

NATURE OF THE ACTION

1. Summer flounder, also known as fluke, is one of the most sought after saltwater fish along the mid-Atlantic seaboard. Summer flounder has long been a

mainstay of the commercial fishing industry on New York's Long Island. The species migrates between state waters, which extend three miles from the coast, and federal waters, which extend from three miles out to 200 miles.

2. Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801 *et seq.* ("Magnuson-Stevens Act"), Commerce establishes an annual quota setting the total pounds of summer flounder that may legally be commercially landed¹ in the mid-Atlantic fishery and then allocates the quota among the states in the fishery, including New York. Each individual state must implement measures designed to ensure that its commercial fishermen's combined landings in the state do not exceed its annual quota.

3. New York's annual landings quota is based on an allocation between the states adopted by Commerce in 1993 when Commerce amended the Summer Flounder, Scup and Black Sea Bass Fishery Management Plan (together with its implementing regulations at 50 C.F.R. §§ 648.100–648.110, "Summer Flounder FMP"). The 1993 allocation was based on landings data from 1980–1989. In the more than 30 years since those data were collected, the center of the summer flounder stock has shifted significantly northeast to the waters off New York's coast. The commercial summer flounder fishery followed this shift in population, so today the center of fishing activity is also located proximate to Long Island. Boats from North Carolina and Virginia—which have significantly larger quotas than New

¹ To "land" fish is to "begin offloading fish, to offload fish, or to enter port with fish." To "offload" is to move fish from a vessel. 50 C.F.R. § 648.2. "Landings" refers to the amount of fish landed, measured by weight.

York predicated on the now obsolete landings data derived from the vastly different fishery of the 1980s—routinely travel hundreds of miles to waters off Long Island, fish, and then return hundreds of miles back to land their catch. Long Island-based boats have a far shorter trip to the prime fishing grounds, but are constrained by New York’s small allocation—based on the same obsolete data—to return with far fewer fish than their southern counterparts. To eke out a living, some New York boats have had to purchase North Carolina or Virginia licenses, catch summer flounder off Long Island, then sail hundreds of miles south to land their catch. Other New York fishermen do not have the capacity to travel long distances and fish off Long Island adjacent to southern boats, but are restricted to small daily trip limits as low as 50 pounds, while the larger southern vessels simultaneously enjoy multiday limits that allow them to catch several hundred—even thousands—of pounds of summer flounder per day.

4. On December 17, 2018, the National Marine Fisheries Service, a/k/a NOAA Fisheries (“NMFS”), on behalf of Commerce, issued a final rule establishing the 2019 specifications for the summer flounder, scup, and black sea bass fisheries (the “2019 Specification Rule”). 83 Fed. Reg. 64,482. Among other things, the Rule establishes a total commercial summer flounder quota of 7,720,000 pounds for 2019. The Rule then allocates that amount (subject to certain adjustments not relevant here) among the states based on the 1993 allocation in the Summer Flounder FMP, which is:

- 27.44585% to North Carolina;
- 21.31676% to Virginia;

- 16.72499% to New Jersey;
- 15.68298% to Rhode Island;
- 7.64699% to New York;
- 6.82046% to Massachusetts;
- 2.25708% to Connecticut;
- 2.03910% to Maryland;
- 0.04756% to Maine;
- 0.01779% to Delaware; and
- 0.00046% to New Hampshire.

Under this allocation, approximately 3,250,000 pounds of summer flounder may be landed at ports in North Carolina and Virginia in 2019 but only approximately 510,000 pounds may be landed at ports in New York, even though the center of the biomass of summer flounder—and commercial fishing activity—is off Long Island.

5. The Magnuson-Stevens Act requires that fishery conservation and management measures adopted by Commerce—including inter-state allocations—be consistent with ten National Standards. The commercial landings quota assigned to New York in the 2019 Specification Rule, and the allocation to New York in the Summer Flounder FMP on which the 2019 quota was based, are inconsistent with five of those Standards, specifically National Standard 2, which requires that those measures be based upon the best scientific information available; National Standard 4, which requires that measures not discriminate between residents of different states and that they be fair and equitable in assigning fishing privileges; National Standards 5 and 7, which require that measures consider efficiency in the utilization of fishery resources and minimize costs where practicable; and National Standard 10, which requires that measures

promote the safety of human life at sea to the extent practicable. *See* 16 U.S.C. § 1851(a)(2), (4), (5), (7), (10).

6. For all of these reasons, the 2019 Specification Rule and the Summer Flounder FMP as applied in 2019 are arbitrary, capricious, and not in accordance with law under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), because the quota assigned to New York in the 2019 Specification Rule and the allocation to New York in the Summer Flounder FMP are inconsistent with the Magnuson-Stevens Act and are based on obsolete data that ignore substantial changes to the summer flounder fishery. The Court should therefore partially vacate the 2019 Specification Rule by invalidating New York's quota and partially vacate the Summer Flounder FMP by invalidating New York's allocation and remand the Rule and FMP to Commerce for further proceedings.

JURISDICTION AND VENUE

7. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question); 16 U.S.C. § 1855(f) (judicial review under the Magnuson-Stevens Act); and 5 U.S.C. § 702 (the Administrative Procedure Act).

8. Venue over this action is proper in this District pursuant to 28 U.S.C. § 1391(e)(3) because New York resides here.

THE PARTIES

9. Plaintiff State of New York, as a body politic and a sovereign entity, brings this action on behalf of itself, as owner of the fish within the state, and as

parens patriae, trustee, guardian, and representative on behalf of all residents and citizens of New York, particularly those individuals who fish commercially for summer flounder in the waters of the State of New York and of the United States.

10. Plaintiff Basil Seggos is Commissioner of the New York State Department of Environmental Conservation (“DEC”) and, in that capacity, is responsible for the protection, propagation, and management of fish and fisheries of the State.

11. Plaintiff DEC is an executive department of the State of New York.

12. Defendant Wilbur Ross is the Secretary of Commerce of the United States and, in that capacity, is authorized to promulgate rules regulating fishing within United States waters.

13. Defendant United States Department of Commerce is an executive agency of the United States.

14. Defendant National Oceanic and Atmospheric Administration (“NOAA”) is a subdivision within the United States Department of Commerce.

15. Defendant NMFS is an operating branch within NOAA. NMFS is delegated authority over the management, conservation, and exploitation of living marine resources found in federal waters (those waters from 3 miles to 200 miles offshore, known as the Exclusive Economic Zone) and shares concurrent regulatory authority with the states over certain marine resources in state territorial waters (all inland marine waters and ocean waters up to three miles offshore), including summer flounder and other fish species that inhabit both federal and state waters.

STATUTORY AND REGULATORY BACKGROUND

A. The Magnuson-Stevens Act

1. Management of Fisheries

16. The Magnuson-Stevens Act, 16 U.S.C. §§ 1801 *et seq.*, is designed to conserve and manage fishery resources in United States waters and coastal areas.

16 U.S.C. § 1801(b). A “fishery” is “(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and (B) any fishing for such stocks.” *Id.* § 1802(13).

17. In general, the Magnuson-Stevens Act manages fisheries in the waters between three miles and two hundred miles off the coast of the United States, known as the Exclusive Economic Zone or “federal waters,” while states retain regulatory authority over inland marine waters and ocean waters up to three miles offshore of their respective coastlines, traditionally known as “state waters.” *See id.* § 1856(a).

18. To regulate fisheries within federal waters, the Magnuson-Stevens Act establishes eight regional fishery management councils subject to Commerce’s oversight. *See generally id.* §§ 1852–54. The regional council that manages fisheries in the federal waters of the mid-Atlantic region, including the summer flounder fishery, is the Mid-Atlantic Fishery Management Council (“Mid-Atlantic Council”), which is composed of voting representatives from the states of New York,

New Jersey, Delaware, Pennsylvania, Maryland, Virginia, and North Carolina, and from NMFS. *See id.* § 1852(a)(1)(B).

19. Fisheries in state waters off the Atlantic coast, including the summer flounder fishery, are regulated by the Atlantic States Marine Fisheries Commission (“Atlantic Fisheries Commission”) pursuant to an interstate compact formed between the Atlantic states and approved by Congress. Pub. L. No. 77-539 (1942), *as amended by* Pub. L. No. 81-721 (1950). Because summer flounder migrate between the waters of different states in the fishery and federal waters, the Mid-Atlantic Council and the Atlantic Fisheries Commission coordinate joint regulatory oversight of the summer flounder fishery pursuant to the Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. §§ 5101 *et seq.*

2. Fishery Management Plans

20. Under the Magnuson-Stevens Act, each regional council, including the Mid-Atlantic Council, is responsible for management of the fisheries within the federal waters seaward of the states comprising that council, principally through developing and updating fishery management plans (“FMPs”) that establish the rules for each fishery and by proposing regulations to Commerce to implement those plans. 16 U.S.C. §§ 1852(h), 1853. FMPs consist primarily of “conservation and management measures” that are “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.” *Id.* § 1853(a)(1). Such measures may include quotas, size limits, and gear restrictions, among others.

21. A regional council submits any new FMP or FMP amendment to Commerce to review for consistency with applicable law. *Id.* §§ 1853(a), 1854(a). As necessary or appropriate to implement an FMP or amendment, a regional council may also submit proposed regulations to Commerce for review. *Id.* §§ 1853(c), 1854(b).

22. Commerce must approve an FMP or amendment if it is consistent with the Magnuson-Stevens Act and other applicable law and disapprove it (or partially approve) if it is not consistent. *Id.* § 1854(a)(1)(A). Similarly, Commerce must promulgate regulations submitted by a regional council if the regulations are consistent with the Magnuson-Stevens Act, other applicable law, and the corresponding FMP or amendment, and return them to the council for revision if not. *Id.* § 1854(b)(1).

23. If a regional council fails to develop an FMP or any necessary FMP amendment, Commerce may prepare and adopt the FMP or amendment and promulgate any implementing regulations after a notice and comment process. *Id.* § 1854(c). Commerce may also adopt temporary regulations to govern a fishery in the event that it “finds that an emergency exists or that interim measures are needed to reduce overfishing.” *Id.* § 1855(c).

3. The Magnuson-Stevens Act National Standards

24. All FMPs and amendments, and all regulations to implement such plans, must be consistent with the ten National Standards established by the Magnuson-Stevens Act. *Id.* § 1851. Five of those standards are relevant to this case.

25. National Standard 2 provides that “[c]onservation and management measures shall be based upon the best scientific information available.” *Id.* § 1851(a)(2).

26. National Standard 4 provides that “[c]onservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.” *Id.* § 1851(a)(4).

27. National Standard 5 provides that “[c]onservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources[.]” *Id.* § 1851(a)(5).

28. National Standard 7 provides that “[c]onservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.” *Id.* § 1851(a)(7).

29. National Standard 10 provides that “[c]onservation and management measures shall, to the extent practicable, promote the safety of human life at sea.” *Id.* § 1851(a)(10).

30. The Magnuson-Stevens Act directs Commerce to establish guidelines based on the National Standards to “assist in the development of fishery management plans.” *Id.* § 1851(b). These guidelines are codified at 50 C.F.R. §§ 600.305 *et seq.*

B. Management of the Summer Flounder Fishery

31. The summer flounder fishery is governed by the Summer Flounder FMP, including its implementing regulations, 50 C.F.R. §§ 648.100–648.110 (in relevant part).

32. The Magnuson-Stevens Act requires the FMP for a given species to “establish a mechanism for specifying annual catch limits,” representing the total pounds of the species that can be caught during the relevant time period. *Id.* § 1853(a)(15). For fisheries with both commercial and recreational participants, FMPs commonly allocate annual catch limits between a “commercial quota” and a “recreational harvest limit” (or similar terms), with a set-aside for research. *See, e.g.,* 50 C.F.R. § 648.162 (black sea bass specifications). For some commercial fisheries on the Atlantic coast, including the summer flounder fishery, FMPs distribute the commercial quota between the states that participate in the fishery.

33. Thus, each year, Commerce approves an annual fishery-wide catch limit for summer flounder and allocates it between the commercial sector and recreational anglers.

34. Based on the catch limit for the commercial sector, Commerce approves a coastwide commercial quota—the pounds of summer flounder that can be landed at ports in the fishery by commercial vessels.

35. The coastwide commercial quota is then distributed among the states in the fishery based on the 1993 allocation in the Summer Flounder FMP.

36. Because summer flounder are jointly managed in state and federal waters due to their seasonal migratory patterns, the commercial landings quota and the state-by-state quotas approved by Commerce apply to summer flounder caught in both federal and state waters.

37. When the 1993 amendments to the Summer Flounder FMP were adopted, the state allocations were based on commercial landings of summer flounder reported for the respective states between 1980 and 1989.

38. During that period, landings in New York were underreported as a result of the infiltration of organized crime in the state's fishing industry, which subsequently has been eradicated.

39. Landings differences between states were also affected by the different size limits applicable in each state during the 1980s when southern states in the fishery adopted lower size limits, particularly given the truncation in the age and size of the summer flounder stock at that time.

40. The 1993 amendments to the Summer Flounder FMP, as approved by Commerce, acknowledged that data collection methods used to establish the allocation were not uniform between the states, and that in the future, “data collection should be improved” in order to “allow the Council to more finely tune the management system to the needs of the fishery.” Accordingly, the FMP was amended to establish a standardized reporting system to allow Commerce to reliably track catch and landings locations for summer flounder, among other data. These “vessel trip report” data have been compiled ever since.

41. The 1993 amendments to the Summer Flounder FMP distribute the commercial landings quota for summer flounder as follows:

- 27.44585% to North Carolina;
- 21.31676% to Virginia;
- 16.72499% to New Jersey;
- 15.68298% to Rhode Island;
- 7.64699% to New York;
- 6.82046% to Massachusetts;
- 2.25708% to Connecticut;
- 2.03910% to Maryland;
- 0.04756% to Maine.
- 0.01779% to Delaware; and
- 0.00046% to New Hampshire.

This allocation, which is implemented at 50 C.F.R. § 648.102(c)(1)(i), limits the summer flounder that may be landed at the ports in each state, regardless of where the fish are caught.

42. Once the annual commercial landings quota has been formulated and state quotas have been established based on the 1993 allocation in the Summer Flounder FMP, Commerce proposes and finalizes the annual commercial landings

quota and state-by-state quotas—along with other annual management measures, or “specifications”—through a notice-and-comment rulemaking process. *See* 50 C.F.R. § 648.102.

43. Each state implements its own management measures (on top of generally applicable measures under the Summer Flounder FMP and regulations) designed so that commercial summer flounder landings in the ports of that state do not exceed the state’s assigned allocation of the annual commercial quota in the annual specifications. These measures commonly include permitting or licensing requirements, periodic or seasonal landings quotas, and/or landings limits for individual vessels.

44. In New York the DEC regulates the commercial summer flounder industry to keep landings in the state within New York’s allocation. To do so, DEC establishes quota periods throughout the year and distributes New York’s share of the annual commercial quota between those periods, with vessels subject to trip limits and/or weekly limits designed so that landings for a given period do not exceed the period quota. New York Comp. Codes R. & Regs. tit. 6, § 40.1(i), (l). DEC may tighten or loosen trip limits during a given period based upon projections of actual landings compared to that period’s allocated landings. *Id.* § 40.1(l)(3). If DEC determines that landings will exceed the allocation for a given period, DEC must close the fishery for the remainder of the period for most permit holders. *Id.* § 40.1(l)(4).

C. The 2019 Specification Rule

45. On November 15, 2018, Commerce published the proposed 2019 Specification Rule to establish the 2019 total commercial landings quota for summer flounder at 7,720,000 pounds and allocate that quota among the states, along with other measures. 83 Fed. Reg. 57,389, 57,391. The total quota was allocated based on the 1993 allocation in the Summer Flounder FMP. New York received 7.65% of the quota, while its neighbors New Jersey and Rhode Island received 16.72% and 15.68%, respectively, and North Carolina and Virginia 27.45% and 21.32%, respectively.

46. On November 30, 2018, New York timely submitted comments to Commerce asserting that the proposed state quotas and the underlying allocation in the Summer Flounder FMP are inconsistent with the Magnuson-Stevens Act.

47. On December 17, 2018, Commerce published the final Rule in the Federal Register. 83 Fed. Reg. 64,482. The final rule continued to apply the 1993 allocation in the Summer Flounder FMP. Accordingly, the 2019 Specification Rule set New York's quota at 510,054 pounds in 2019, compared to a combined quota of 3,252,466 pounds for North Carolina and Virginia.

FACTUAL ALLEGATIONS

A. Summer Flounder

48. Summer flounder (*Paralichthys dentatus*), also known as fluke, is a demersal (bottom-dwelling) flatfish distributed from the Gulf of Maine through the waters off North Carolina. As an excellent food fish, summer flounder is a valuable

species to the commercial fishing industry along the Atlantic coast. The species is also highly sought after by recreational anglers.

49. Summer flounder are concentrated inshore, in the ocean, bays, and estuaries from late spring through early autumn, when the fish migrate to the outer continental shelf for the colder months. Spawning occurs during autumn and early winter, with the larvae carried by ocean currents toward coastal areas, where the development of post larvae and juveniles occurs.

50. Because summer flounder move northeast up the Atlantic coast as they age and grow, the summer flounder population is spatially distributed with larger individuals more abundant toward northern latitudes. Commercial fishing for summer flounder occurs year-round, with the greatest activity between November and April.

B. Changes in Summer Flounder Distribution Since the 1980s

51. By the 1980s, the summer flounder stock had been overfished and was severely depleted, reaching a low point in approximately 1989. This overfishing also truncated the average age and size of summer flounder. Simply put, fewer fish reached older age and larger size. Because younger fish are more heavily distributed toward the southwest of the species' range, research shows that overfishing caused a southwest-shifting effect on the center of biomass of the stock, toward waters near Virginia and North Carolina. Indeed, Commerce's trawl survey data indicate that in the 1980s, summer flounder were concentrated between the

southern mid-Atlantic waters east of Delaware, Maryland, and Virginia, and the waters east of Long Island and south of Rhode Island.

52. The geographic distribution of commercial fishing activity for summer flounder in the 1980s reflected this distribution. According to Commerce's data, in 1983–1989, 46% or more of commercial summer flounder that were landed were caught in the southern mid-Atlantic—that is, in waters south of the southern tip of New Jersey. Meanwhile, 41% or less were caught in the northern mid-Atlantic and southern New England waters proximate to Long Island—that is, in waters east of New Jersey and New York, and south of Connecticut, Rhode Island, and Massachusetts. The remaining approximately 13% were caught further to the east or north of these waters.

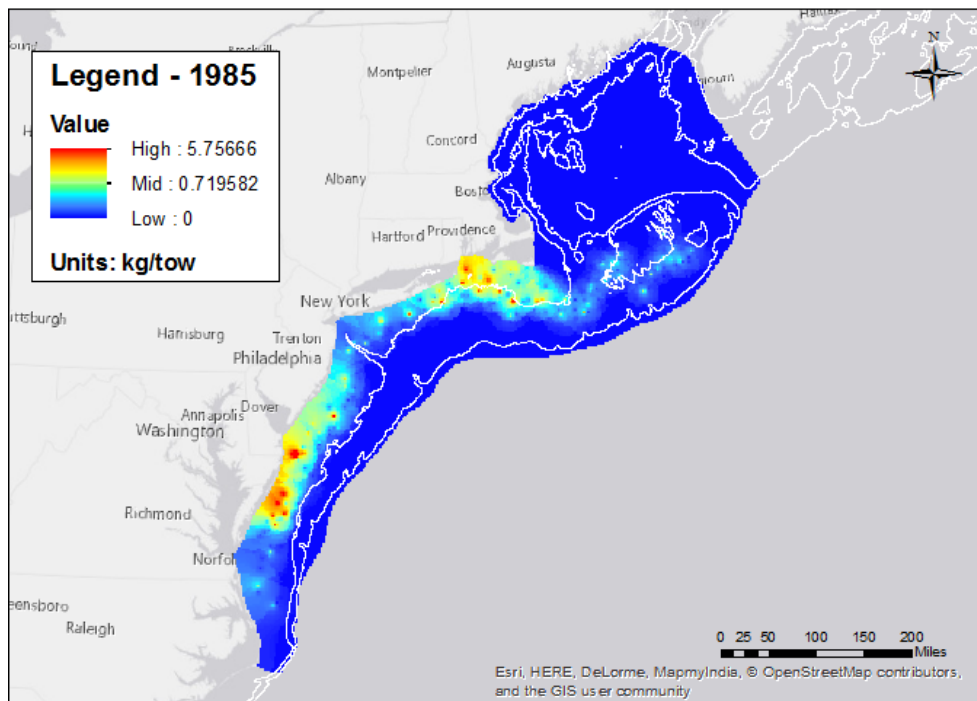
53. Conservation and management measures implemented to address the depleted, overfished condition of the summer flounder fishery in the 1980s have allowed the stock to rebound. Summer flounder have increased in abundance, and age distribution rebounded from its truncated state, with more fish surviving to become older and larger. The most recent stock assessment indicates that the biomass of the summer flounder stock remains multiple times greater than its average level in the 1980s.

54. Because older and larger summer flounder are distributed further northeast in the summer flounder's range, and possibly due to other factors including ocean warming, the center of biomass of the summer flounder stock has shifted northeast since the 1980s. Trawl survey data indicate that the stock is now

concentrated in the northern mid-Atlantic waters east of New Jersey and south of Long Island, and in the southern New England waters east of Long Island and south of Rhode Island and Massachusetts. This shift in the fishery's biomass is well-documented by Commerce.

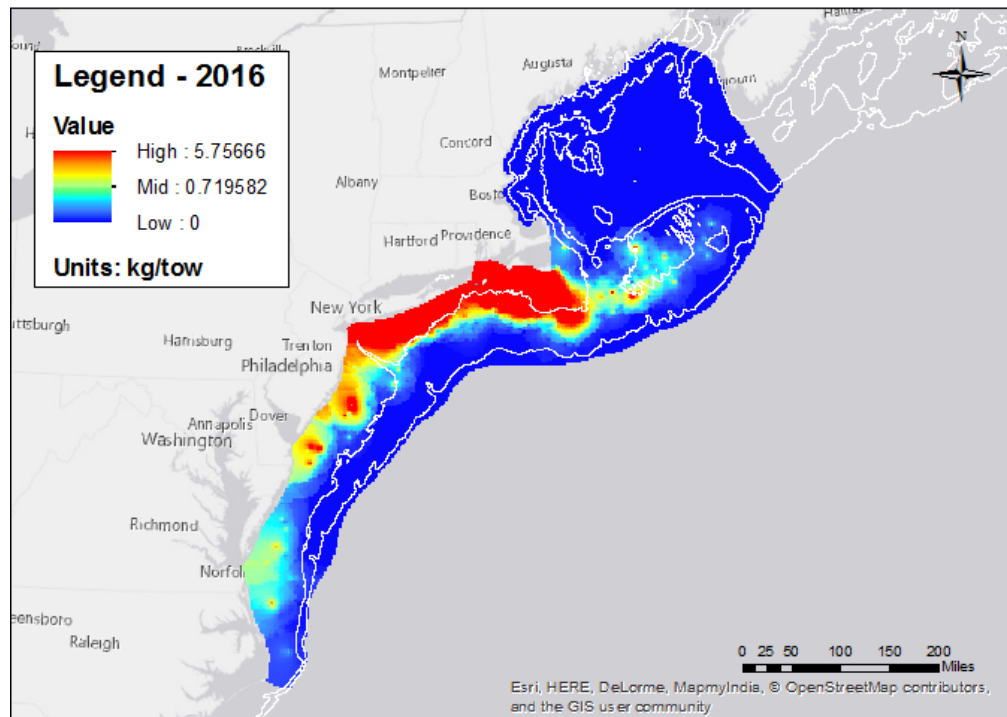
55. Comparison of summer flounder distribution maps from 1985 and 2016 illustrates this shift.

56. The first map shown depicts the results of a survey in the fall of 1985, prepared with Commerce's data by OceanAdapt researchers at Rutgers University, that shows the distribution of summer flounder split between a heavier concentration (red being the heaviest concentration) in the southern mid-Atlantic and a lighter concentration east of Long Island and south of southern New England.



57. The second map shown depicts the results of a fall 2016 survey, prepared with Commerce's data by OceanAdapt, that shows decreased summer

flounder biomass in the southern mid-Atlantic, some increased concentrations off the coasts of Delaware and New Jersey, and a heavy (red) distribution from the northern coast of New Jersey, along the coast of Long Island, and into the waters east of Long Island and south of southern New England.



58. The northeast shift in the center of biomass of the summer flounder stock toward the waters proximate to Long Island has in turn driven geographic changes in commercial fishing activity. In particular, the increase in summer flounder abundance and size in waters offshore of New York has been accompanied by an increase in commercial fishing for summer flounder in these waters, as reflected in catch data collected by NMFS.

59. NMFS data show that in 2015–2016, only approximately 12% of the commercial summer flounder catch was taken from southern mid-Atlantic waters, while more than 80% was taken from northern mid-Atlantic and southern New

England waters. This 80% of the commercial catch is caught in waters within approximately 150 miles of Long Island. These same waters are no closer than 200 miles, and as far as 400 miles or more, from Virginia and North Carolina.

60. A presentation at the February 2018 meeting of the Mid-Atlantic Council—which representatives from NMFS attended—corroborated this trend in commercial fishing concentration and catch. At the council meeting, researchers presented their findings that the average commercial catch location for summer flounder, as determined based on Commerce’s vessel trip report data, has been shifting from the southern mid-Atlantic waters offshore of Delaware, Maryland, and Virginia in the mid-late 1990s to the northern mid-Atlantic waters south of eastern Long Island in the early-mid 2010s. In 2014, the average commercial catch location was approximately 90 miles from Montauk, New York, approximately 300 miles from Hampton, Virginia, and approximately 450 miles from Beaufort, North Carolina (the largest summer flounder ports in these three states). The researchers have subsequently published their findings in a peer-reviewed scientific journal.

C. New York’s 2019 Quota and 1993 Allocation

61. The quota assigned to New York in the 2019 Specification Rule and the 1993 allocation to New York in the Summer Flounder FMP are based on obsolete 1980–1989 landings data even though more reliable and up-to-date information about the fishery is available to Commerce and the Mid-Atlantic Council and shows a strong northeast shift in the fishery.

62. As a result, New York's quota in the 2019 Specification Rule and New York's 1993 allocation in the Summer Flounder FMP, including 50 C.F.R. § 648.102(c)(1)(i), as applied in 2019 are not "based upon the best scientific information available," and therefore inconsistent with National Standard 2, 16 U.S.C. § 1851(a)(2).

63. New York's quota in the 2019 Specification Rule and New York's allocation in the Summer Flounder FMP as applied in 2019 are unfair to fishermen and other market participants (such as pack houses and other downstream businesses) in New York by skewing fishing privileges to fishermen and other market participants in North Carolina and Virginia, contrary to the geographic distribution of the fishery, and without any rational conservation basis.

64. As a result, New York's quota in the 2019 Specification Rule and New York's allocation in the Summer Flounder FMP, including 50 C.F.R. § 648.102(c)(1)(i), as applied in 2019 "discriminate between residents of different States," and are not "(A) fair and equitable to all . . . fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges," and are therefore inconsistent with National Standard 4, *id.* § 1851(a)(4).

65. New York's quota in the 2019 Specification Rule and New York's allocation in the Summer Flounder FMP as applied in 2019 result in substantial waste by distributing significant shares of the commercial quota to southern states

far from the center of the fishery. As a result, boats landing summer flounder in southern ports must, on average, travel further from where they have caught summer flounder to their port of landing than if those same flounder were landed in New York ports. Besides greater inputs of travel time, this longer round trip also requires greater use of fuel and results in greater wear-and-tear on vessels.

Additionally, many of these fish landed in southern ports are transported by trucks back to New York for sale in local markets adding further to the inefficiency of the fishery.

66. As a result, New York's quota in the 2019 Specification Rule and New York's allocation in the Summer Flounder FMP, including 50 C.F.R. § 648.102(c)(1)(i), as applied in 2019 do not "where practicable, consider efficiency in the utilization of fishery resources" or "where practicable, minimize costs and avoid unnecessary duplication," and are therefore inconsistent with National Standards 5 and 7, *id.* § 1851(a)(5), (7).

67. New York's quota in the 2019 Specification Rule and New York's allocation in the Summer Flounder FMP as applied in 2019 cause unnecessarily long trips, exposing fishermen to greater time at sea for a given yield of summer flounder, giving rise to more safety risks, including exposure to storms.

68. As a result, New York's quota in the 2019 Specification Rule and New York's allocation in the Summer Flounder FMP, including 50 C.F.R. § 648.102(c)(1)(i), as applied in 2019 do not "promote the safety of human life at sea," and are therefore inconsistent with National Standard 10, *id.* § 1851(a)(10).

D. Impacts on New York

69. The State of New York owns the summer flounder in New York waters. N.Y. Env'tl. Conserv. Law § 11-0105.

70. New York has a proprietary and sovereign interest in summer flounder in New York waters.

71. New York is injured by the quota imposed by Commerce in the 2019 Specification Rule and the allocation in the Summer Flounder FMP as applied in 2019 because they deprive New York of its fair and reasonable share of summer flounder in New York waters.

72. New York's assigned quota in the 2019 Specification Rule and New York's allocation in the Summer Flounder FMP as applied in 2019 impose a greater regulatory burden on New York regulators and regulated fishermen, because they require New York to impose and enforce more stringent management measures on the summer flounder fishery in order to comply with its small (7.65%) share under the 1993 allocation. This burden includes smaller trip limits (allowed pounds landed) and closer monitoring of catch by New York permitted boats, with more frequent closures of the fishery.

73. As a state, New York has a sovereign and quasi-sovereign interest in ensuring that the allocation among the states of landings of summer flounder caught in New York waters and federal waters is fair and reasonable and complies with the Magnuson-Stevens Act.

74. New York is injured by New York's assigned quota in the 2019 Specification Rule and New York's allocation in the Summer Flounder FMP as applied in 2019 because they do not treat New York fairly and reasonably as compared to other states and are inconsistent with the Magnuson-Stevens Act.

75. New York has a quasi-sovereign interest in ensuring that its residents, including fishermen and market participants in the commercial fishing industry, have fair and reasonable access to summer flounder in New York and federal waters.

76. Historically, fishing for summer flounder has been an essential component of New York's commercial fishing industry. Summer flounder's high value, ready availability, and widespread popularity with consumers make this fishery a reliable source of revenue for New York fishermen. New York has issued a little over 300 commercial summer flounder permits in each year from 2012–2016. On average, 214 of those permits showed summer flounder activity each year during that same time frame.

77. Compared to states with the largest shares of the commercial landings quota (North Carolina, Virginia, New Jersey, and Rhode Island), New York's commercial summer flounder landings are higher during the late spring and summer, when the fish are closer to shore, and a comparatively greater share of New York's landings are from smaller vessels fishing in state waters, rather than larger vessels fishing in federal waters. New York fishermen catch more summer flounder closer to their home ports than fishermen from the other states but are

subject to stringent limits on commercial landings of summer flounder in New York ports. This has made summer flounder fishing no longer an economically viable choice for many fishermen based in New York because the limited revenue generated by a low volume trip often cannot offset the costs, including fuel, time, and vessel wear-and-tear.

78. For many fishermen, this has foreclosed or severely restricted participation in the fishery, and New York's commercial summer flounder industry has suffered considerably. In colder months, when summer flounder are further offshore, it makes little economic sense to travel round trip to and from port under the daily or weekly limits that New York imposes to meet its landings quota. This effectively limits many fishermen to making small day trips in the warmer months—rarely worth the cost or effort for larger vessels—or to landing summer flounder as a secondary catch or bycatch on trips for other fish species. For those New York fishermen who continue to fish for summer flounder in waters in or near New York, they must often do so in direct sight of vessels licensed to land summer flounder in Virginia or North Carolina—pursuing the same fish at the same time—who may catch and land those same fish in their home ports in far greater quantities.

79. While New York fishermen may purchase licenses to land summer flounder in states with larger quota allocations like North Carolina and Virginia, the price of such licenses—often in the range of multiple tens of thousands of dollars—has been prohibitive for many, especially for those operating smaller

vessels. Some operators of larger New York-based boats have made the business decision to purchase out-of-state licenses. These fishermen catch summer flounder in the waters near Long Island—the center of the fishery—and then travel to out-of-state ports to land their catch, only to return to their home ports in New York.

80. In favorable weather conditions, it takes a 70-foot vessel approximately eight hours to travel from prime summer flounder fishing waters to Montauk, New York. In contrast, it takes 30 or more hours to travel to port in Virginia, and 48 or more hours to travel to port in North Carolina—with commensurate increases in fuel use and vessel wear-and-tear. If these New York fishermen, already subject to the added cost of purchasing an out-of-state license, were able to land more of their summer flounder catch in their home ports, the time and cost savings would be substantial. The fishermen would also be able to support more downstream industries in their port communities, such as pack houses that pack landed fish to be shipped to market.

81. Meanwhile, summer flounder that is landed in New York is highly sought after by dealers in New York. Indeed, within the seafood industry, Commerce's data show that New York has among the largest wholesale/distribution and retail sectors of any state in the summer flounder fishery, together with New Jersey and Massachusetts. Much of the seafood supplied to the New York City metropolitan area passes through the New Fulton Fish Market in the Bronx, New York. Yet as one seller at the market estimates, no more than 5% of summer

flounder he handles at Fulton has been landed in New York, while a majority has been landed in Virginia, North Carolina, or New Jersey.

82. New York's assigned quota in the 2019 Specification Rule and New York's assigned allocation in the Summer Flounder FMP as applied in 2019 injure the residents of New York, particularly fishermen and other market participants in the commercial fishing industry.

FIRST CLAIM FOR RELIEF

**The 2019 Specification Rule
Is Not in Accordance with Law**

83. The State hereby incorporates by reference the allegations contained in Paragraphs 1 through 82, as if fully set forth herein.

84. The quota assigned to New York for commercial landings of summer flounder in the 2019 Specification Rule is not based upon the best scientific information available and is therefore inconsistent with National Standard 2 of the Magnuson-Stevens Act, 16 U.S.C. § 1851(a)(2).

85. The quota assigned to New York for commercial landings of summer flounder in the 2019 Specification Rule discriminates against New York residents and allocates fishing privileges in a way that: (A) is unfair and inequitable to fishermen based in New York; (B) is not reasonably related to any conservation interest; and (C) gives an excessive share of fishing privileges to fishermen based in other states in the fishery, notably North Carolina and Virginia. New York's assigned quota is therefore inconsistent with National Standard 4 of the Magnuson-Stevens Act, *id.* § 1851(a)(4).

86. The quota assigned to New York for commercial landings of summer flounder in the 2019 Specification Rule fails to consider efficiency in the utilization of fishery resources where practicable and is therefore inconsistent with National Standard 5 of the Magnuson-Stevens Act, *id.* § 1851(a)(5).

87. The quota assigned to New York for commercial landings of summer flounder in the 2019 Specification Rule fails to minimize costs where practicable and is therefore inconsistent with National Standard 7 of the Magnuson-Stevens Act, *id.* § 1851(a)(7).

88. The quota assigned to New York for commercial landings of summer flounder in the 2019 Specification Rule fails to promote the safety of human life at sea where practicable and is therefore inconsistent with National Standard 10 of the Magnuson-Stevens Act, *id.* § 1851(a)(10).

89. Accordingly, the 2019 Specification Rule is not in accordance with law and should be held unlawful and partially vacated under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

SECOND CLAIM FOR RELIEF

The 2019 Specification Rule Is Arbitrary and Capricious

90. The State hereby incorporates by reference the allegations contained in Paragraphs 1 through 89, as if fully set forth herein.

91. The 2019 Specification Rule is arbitrary and capricious because the quota assigned to New York for commercial landings of summer flounder is based

on obsolete landings data and ignores substantial changes to the summer flounder fishery since those data were compiled, as well as the current state of the fishery.

92. Accordingly, the 2019 Specification Rule should be held unlawful and partially vacated under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

THIRD CLAIM FOR RELIEF

The Summer Flounder FMP as Applied in 2019 Is Not in Accordance with Law

93. The State hereby incorporates by reference the allegations contained in Paragraphs 1 through 92, as if fully set forth herein.

94. The allocation to New York for commercial landings of summer flounder in the Summer Flounder FMP, including 50 C.F.R. § 648.102(c)(1)(i), as applied in 2019 is not based upon the best scientific information available and is therefore inconsistent with National Standard 2 of the Magnuson-Stevens Act, 16 U.S.C. § 1851(a)(2).

95. The allocation to New York for commercial landings of summer flounder in the Summer Flounder FMP, including 50 C.F.R. § 648.102(c)(1)(i), as applied in 2019 discriminates against New York residents and allocates fishing privileges in a way that: (A) is unfair and inequitable to fishermen based in New York; (B) is not reasonably related to any conservation interest; and (C) gives an excessive share of fishing privileges to fishermen based in other states in the fishery, notably North Carolina and Virginia. New York's allocation is therefore inconsistent with National Standard 4 of the Magnuson-Stevens Act, *id.* § 1851(a)(4).

96. The allocation to New York for commercial landings of summer flounder in the Summer Flounder FMP, including 50 C.F.R. § 648.102(c)(1)(i), as applied in 2019 fails to consider efficiency in the utilization of fishery resources where practicable and is therefore inconsistent with National Standard 5 of the Magnuson-Stevens Act, *id.* § 1851(a)(5).

97. The allocation to New York for commercial landings of summer flounder in the Summer Flounder FMP, including 50 C.F.R. § 648.102(c)(1)(i), as applied in 2019 fails to minimize costs where practicable and is therefore inconsistent with National Standard 7 of the Magnuson-Stevens Act, *id.* § 1851(a)(7).

98. The allocation to New York for commercial landings of summer flounder in the Summer Flounder FMP, including 50 C.F.R. § 648.102(c)(1)(i), as applied in 2019 fails to promote the safety of human life at sea where practicable and is therefore inconsistent with National Standard 10 of the Magnuson-Stevens Act, *id.* § 1851(a)(10).

99. Accordingly, the Summer Flounder FMP, including 50 C.F.R. § 648.102(c)(1)(i), as applied in 2019 is not in accordance with law and should be held unlawful and partially vacated under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

FOURTH CLAIM FOR RELIEF

**The Summer Flounder FMP as Applied in 2019
Is Arbitrary and Capricious**

100. The State hereby incorporates by reference the allegations contained in Paragraphs 1 through 99, as if fully set forth herein.

101. The Summer Flounder FMP, including 50 C.F.R. § 648.102(c)(1)(i), as applied in 2019 is arbitrary and capricious because the allocation to New York for commercial landings of summer flounder is based on obsolete landings data and ignores substantial changes to the summer flounder fishery since those data were compiled, as well as the current state of the fishery.

102. Accordingly, the Summer Flounder FMP, including 50 C.F.R. § 648.102(c)(1)(i), should be held unlawful and partially vacated under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, New York requests judgment in its favor and against defendants, upon the claims set forth above, and requests that this Court enter judgment against defendants, as follows:

1. Declaring that the 2019 Specification Rule is arbitrary, capricious, and not in accordance with law under 5 U.S.C. § 706(2)(A) because the quota assigned to New York for commercial landings of summer flounder is inconsistent with the Magnuson-Stevens Act, 16 U.S.C. § 1851(a), and based on obsolete landings data that ignore substantial changes to the summer flounder fishery;

2. Partially vacating the 2019 Specification Rule and remanding the state-by-state quotas for commercial landings of summer flounder to defendants for proceedings consistent with the foregoing declaration;

3. Declaring that the Summer Flounder FMP, including 50 C.F.R. § 648.102(c)(1)(i), as applied in 2019 is arbitrary, capricious, and not in accordance with law under 5 U.S.C. § 706(2)(A) because the allocation to New York for commercial landings of summer flounder is inconsistent with the Magnuson-Stevens Act, 16 U.S.C. § 1851(a), and based on obsolete landings data that ignore substantial changes to the summer flounder fishery;

4. Partially vacating the Summer Flounder FMP, including 50 C.F.R. § 648.102(c)(1)(i), and remanding the state-by-state allocation for commercial landings of summer flounder to defendants for proceedings consistent with the foregoing declaration;

5. Awarding New York its costs of litigation pursuant to Fed. R. Civ. P. 54 or any other appropriate authority; and

6. Ordering such other and further relief, in law or in equity, as the Court deems just and proper.

Dated: New York, New York
January 14, 2019

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