IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al., Plaintiffs, v. WILBUR ROSS, et al., Defendants.	Civil Action No. 18-cv-55 Before: Judge Gary S. Katzmann **Plaintiffs' Further Supplemental Memorandum**

INTRODUCTION

Defendants did not moot Plaintiffs' § 706(1) claim by deleting Mexico's illegal gillnet fisheries from the List of Foreign Fisheries. NOAA Fisheries' theory that the Marine Mammal Protection Act's (MMPA) Imports Provision does not apply to illegal fisheries, and thus that the agency can sidestep its obligation to ban those fisheries, contravenes Congress's command and this Court's prior rulings. *Compare* AR 103 at 2815 (ECF No. 71), *with* ECF No. 39 at 6. That the agency failed to execute a statutorily-required action is the crux, not the end, of Plaintiffs' § 706(1) case. *See Lachance v. Devall*, 178 F.3d 1246, 1254 (Fed. Cir. 1999) ("The judiciary is the final authority on issues of statutory construction . . . .").

Defendants' promise to "implement equivalent measures to protect the vaquita if the Court's injunction were dissolved" rests on the declaration of an agency staffer without decision-making authority. Defs.' Further Supp. Mem. at 3, ECF No. 88; *see Ctr. for Food Safety v. Salazar*, 900 F. Supp. 2d 1, 4-5 (D.D.C. 2012) (case not moot where defendants promise future action). Even if Ms. Young could commit the agency to the processes proposed in her declaration—and she cannot—a certificate of admissibility for rodeo-style gillnet-caught curvina is not equivalent to an MMPA import ban. This Court can still fashion "meaningful relief." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992). The agency's limited certificate of admissibility, and a staffer's understanding of a separate regulatory process for shrimp, does not give Plaintiffs all the relief they seek or moot this case.[1] *See NEC Corp. v. United States*, 151 F.3d 1361, 1369 (Fed. Cir. 1998).

[1] Plaintiffs provide the Court with Parties' Stipulation of Dismissal in *Center for Biological Diversity v. Ross*, No. 17-cv-02738-ABJ (D.D.C. Mar. 1, 2019) as Exhibit 1. In that case, unlike this one, Plaintiffs' only requested relief was a "response" to the petition. *See* Compl. ¶ 66, ECF No. 1.

Should this Court disagree, however, and find Plaintiffs' § 706(1) claim moot, Plaintiffs request leave to file a supplemental complaint. *See* CIT Rule 15(d); Fed. R. Civ. P. 15(d).[2] Plaintiffs meet the standard for supplementation, and Defendants do not object. *See* Defs.' Further Supp. Mem. at 1. Defendants' only stated concern regarding the administrative record rests on inapposite authority and is outweighed by considerations of judicial economy. *See Foman v. Davis*, 371 U.S. 178, 181-82 (1962).

I. Defendants do not contest that Plaintiffs meet the standard for supplementation.

Courts typically grant leave to amend or supplement "unless there is a good reason, such as futility, to the contrary." *Willoughby v. Potomac Elec. Power Co.*, 100 F.3d 999, 1003 (D.C. Cir. 1996). Rule 15(d) helps achieve "fair administration of justice," *Griffin v. County School Board*, 377 U.S. 218, 227 (1964), as it is "contrary to the spirit of the . . . Rules of Civil Procedure for decisions on the merits to be avoided," *Foman*, 371 U.S. at 181. Defendants concede that Rule 15's liberal standard is met here.[3] Defs.' Further Supp. Mem. at 1; *see Intrepid,* 907 F.2d at 1131.

II. Complaint supplementation would not cause "confusion."

Defendants previously certified an administrative record in this § 706(1) case containing documents before the agency as it considered whether to ban imports from the four gillnet fisheries at issue in this case. ECF No. 63-1. Defendants now resist complaint supplementation on the basis that the earlier-certified record would be "irrelevant" to a challenge regarding the agency's decision regarding the very same fisheries. *See* Defs.' Further Supp. Mem. at 2. That is nonsense. If the Court

[2] Plaintiffs' request for leave to amend is better characterized as a request for leave to supplement their complaint, as it is based on new events since the filing of the original complaint. *See Hall v. CIA*, 437 F.3d 94, 100 (D.C. Cir. 2006). Courts evaluate the same factors in considering amendment and supplementation. *See, e.g., Intrepid v. Pollock*, 907 F.2d 1125, 1131 (Fed. Cir. 1990).

[3] CIT Rule 15 parallels Fed. R. Civ. P. 15. *Intrepid*, 907 F.2d at 1127.

were to conclude the earlier-certified record was irrelevant, the Court could simply direct the parties not to rely on it. That is hardly a reason to disallow complaint supplementation.

But the existing administrative record is not irrelevant. The Administrative Procedure Act (APA) provides for judicial review based on "the whole record" of agency action, 5 U.S.C. § 706, including all documents before the agency when it made its decision. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993); *Acciai Speciali Terni S.P.A. v. United States*, 24 CIT 1064, 1071, 118 F. Supp. 2d 1298, 1305 (2000). The § 706(1) claim involves the same MMPA provision and the same factual question (whether four gillnet fisheries kill vaquita in excess of U.S. standards) that would be at issue in any supplemental complaint. All documents in the record certified for the § 706(1) claim were before the agency when it made the November 27, 2018 decision. And as for Defendants' perplexing claim that the "vast majority" of the § 706(1) record would be "absent" from the record in a § 706(2) case, Defendants previously requested that this Court keep the § 706(1) record open so that Defendants could "amend or complete the administrative record" when U.S.-Mexico negotiations culminated in a decision.[4] *See* Defs.' Mot. for Ext. at 2, ECF No. 46.

That Defendants already filed a record on the § 706(1) claim is not a basis to deny a Rule 15(d) request to supplement the complaint. If Defendants want to supplement the record with additional documents that were before the agency when it made its November 2018 decision, Plaintiffs would not object. Defendants may also request to amend the record to remove specific documents from the agency's previously submitted record. Finally, Defendants could seek leave to

[4] *Axiom* and *AgustaWestland*, cited by Defendants, are inapposite; both concern a trial court's supplementation of the administrative record with extra-record documents "not before the agency" at the time of its decision. *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1379 (Fed. Cir. 2009); *AgustaWestland N. Am., Inc. v. United States*, 880 F.3d 1326, 1331 (Fed. Cir. 2018). No documents in the present § 706(1) record post-date the agency's November 2018 decisions. If Defendants nonetheless claim these documents were not "before the agency," they are free to explain why. They have not.

file an entirely new administrative record. The burdens of doing that would be no greater than the burdens of filing a new administrative record in an entirely new action.[5]

III. A ban on one city's rodeo-style gillnet curvina fishery is not the functional equivalent of the relief Plaintiffs seek and cannot moot this case.

In a puzzling, post-argument submission, the agency's declarant suggests for the first time that a ban on imports from the sierra and chano fisheries is unnecessary because sierra and chano appear "similar" to curvina. Young Suppl. Decl. ¶ 7, ECF No. 88-2. The MMPA Imports Provision's requirement to ban imports from fisheries that violate U.S. standards contains no exception for fish "similar" to those that have been banned. And while the regulation the agency cites states that an agency "may require" similar-looking fish to be accompanied by a certificate of admissibility, that regulation does not require such a certificate. 50 C.F.R. § 216.24(h)(9)(iii). The predictive declaration of an agency staffer without decision-making authority cannot convert permissive regulatory language into the explicit ban that Plaintiffs seek and Congress commanded.

A certificate of admissibility is also not a ban. A certificate of admissibility merely requires an importer to certify that the fish is not subject to a ban before entry into this country. For example, pursuant to this Court's preliminary injunction, importers whose fish or fish products are covered by one of the identified Harmonized Tariff Schedule (HTS) codes must sign a certificate of admissibility that their fish or fish products are "not caught with gillnets deployed in the range of the vaquita." AR 94 at 2634 (ECF No. 63-8) (certificate of admissibility); *see* 83 Fed. Reg. 43,792, 43,793-95 (Aug. 28, 2018) (listing codes). The future requirement that importers may need to verify that their fish or fish products "were not caught in the Mexican curvina rodeo-style gillnet fishery,"

[5] Whether Defendants seek to amend the present record, supplement the present record, or file a new record, Plaintiffs reserve the right to move to complete or supplement the record, consistent with established exceptions under the caselaw. *See Axiom Res. Mgmt.*, 564 F.3d at 1380.

Young Suppl. Decl. ¶ 11, is in no way equivalent to the present preliminary injunction or the ban Plaintiffs seek on all northern Gulf of California gillnet-caught shrimp, sierra, chano, and curvina.

That Mexican shrimp are subject to "reporting" and "recordkeeping" requirements under the new U.S. Seafood Import Monitoring Program (SIMP), *id.* ¶¶ 8-9, is also not a ban. The SIMP records may help "facilitate enforcement" actions pursuant to the Magnuson-Stevens Act, 50 C.F.R. § 300.324; however, even fish confirmed by the SIMP to be illegally caught are not necessarily banned. *See* 81 Fed. Reg. 88,975, 88,992 (Dec. 9, 2016). The final rule implementing the SIMP describes the array of responses NOAA Fisheries may take, should it discover illegal fish, which "could include, but are not limited to" re-delivery, exclusion from admission, or an enforcement action. *Id.* at 88,992. Further, SIMP regulations exempt small-boat fisheries that "aggregate" their catch—such as shrimp caught with panga boats in the northern Gulf—from key reporting requirements, including the "type(s) of gear" used. *See* 50 C.F.R. §§ 300.324(b)(1); 300.321. The SIMP may aid the efficacy of the Magnuson-Stevens Act, but it does not "excuse the Government from its MMPA obligation[]" to ban gillnet-caught shrimp. ECF No. 39 at 10.

CONCLUSION

Defendants' edits to the agency List did not render it "impossible" for the court "to grant 'any effectual relief whatever.'" *Church of Scientology of Cal.*, 506 U.S. at 12 (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). And Defendants' eleventh-hour assurance that a yet-to-be-written certificate of admissibility implementing a ban on one city's curvina gillnet fishery coupled with the Magnuson-Stevens Act's recordkeeping program would be functionally equivalent to an MMPA imports ban lacks support. Plaintiffs maintain a "legally cognizable interest in the outcome" of this case, and it is therefore not moot. *Powell v. McCormack*, 395 U.S. 486, 496 (1969). However, should this Court disagree, Plaintiffs respectfully request leave to file a supplemental complaint. CIT Rule 15(d).

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Respectfully submitted,

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