

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
LOUISIANA**

MEXICAN GULF FISHING COMPANY, et al.,	:	Civil Action No. 2:20-cv-2312
	:	
	:	Section "E" (1)
	:	
<i>Plaintiffs,</i>	:	Judge Suzie Morgan
	:	
v.	:	Magistrate Judge Janis Van Meerveld
	:	
	:	
U.S. DEPARTMENT OF COMMERCE, et al.,	:	
	:	
	:	Plaintiffs' Motion for Summary Judgment
	:	
<i>Defendants.</i>	:	

**FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF
UNDISPUTED FACTS AND COUNTER-STATEMENT OF UNCONTESTED
MATERIAL FACTS**

Pursuant to Local Rule 56.2, Federal Defendants hereby respond to "Plaintiffs' Statement of Undisputed Facts" (ECF No. 73-2).

The parties in this case are currently briefing cross-motions for summary judgment under Federal Rule of Civil Procedure 56 and Local Rule 56. Federal Defendants are filing herewith papers in support of their motion for summary judgment. Local Rule 56.1 requires the submission of a statement of material facts. For the reasons explained below, however, there are no material facts in this case.

Judicial review of agency action is a unique procedure, different in both nature and scope from the procedures used to resolve civil actions within the original jurisdiction of the federal district courts. It is well-established that, in cases such as this one, where Plaintiffs seek judicial review of an agency action under the Administrative Procedure Act (APA), 5 U.S.C. § 706, the

scope of that judicial review is properly limited to the administrative record that was before the agency at the time the decision was made. *See, e.g., Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). Consequently, there are no material facts for the Court to resolve in the first instance. Rather, the Court's role is limited to determining whether the facts as found by Federal Defendants are reasonable and supported by the record. *Fla. Power*, 470 U.S. at 743-44 (“The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.”) (citation omitted).

In turn, a statement of material facts as contemplated by Local Rule 56 is inapposite here. Nonetheless, to assure technical compliance with the local rules, Federal Defendants submit the following responses to “Plaintiffs’ Statement of Uncontested Material Facts.” Defendants also provide a Statement of Undisputed Facts summarizing additional material facts contained in the administrative record, in support of their combined cross-motion for summary judgment, and in opposition to Plaintiffs’ motion for summary judgment (ECF No. 73).

STATEMENT OF UNCONTESTED MATERIAL FACTS

Magnuson-Stevens Fishery Conservation and Management Act (MSA)

1. The Magnuson-Stevens Fishery Conservation and Management Act (MSA) establishes a national program for conservation and management of fishery resources with federal jurisdiction over such resources within the exclusive economic zone (EEZ) which extends from the seaward boundary of each coastal State out to 200 nautical miles. 16 U.S.C. §§ 1801(a)(6), 1802(11), 1811(a).

2. Key purposes of the MSA are to “conserve and manage the fishery resources found off the coasts of the United States. . .” and “promote domestic commercial and recreational fishing under sound conservation and management principles. . . .” 16 U.S.C. § 1801(b)(1), (3).

3. The National Marine Fisheries Service (NMFS), acting under authority delegated from the Secretary of Commerce, is responsible for managing fisheries pursuant to the MSA.

4. Congress has recognized that “[t]he collection of reliable data is essential to the effective conservation, management, and scientific understanding of the fishery resources of the United States.” 16 U.S.C. § 1801(a)(8).

5. Regulation of fisheries is accomplished through fishery management plans, amendments to those plans (hereinafter, collectively referred to as FMPs), and implementing regulations. *See N. Carolina Fisheries Ass’n v. Gutierrez*, 550 F.3d 16, 17 (D.C. Cir. 2008) (noting that FMPs “do not themselves have any regulatory effect – implementing regulations must also be enacted in order to effectuate them”); *Gulf Restoration Network, Inc. v. NMFS*, 730 F.Supp.2d 157, 166, 173 (D.D.C. 2010) (same).

6. The MSA sets forth required provisions for FMPs, including that they must contain 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).

7. To address overfishing, FMPs must establish mechanisms for annual catch limits and accountability measures. 16 U.S.C. § 1853(a)(15). *See also* 50 C.F.R. § 600.310(e)(2)(i)(B)-(C) (defining overfishing).

8. The MSA expressly authorizes any FMP to “require the use of specified types and quantities of fishing gear, fishing vessels or equipment for such vessels, including devices which may be required to facilitate enforcement provisions of this [Act].” 16 U.S.C. § 1853(b)(4).

9. FMPs and their implementing regulations must be consistent with ten National Standards (NS) as well as any other applicable law. 16 U.S.C. § 1851(a).

10. NS1 requires that “[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.” 16 U.S.C. § 1851(a)(1).

11. NS2 requires that measures be based on the “best scientific information available.” *Id.* § 1851(a)(2). Advisory guidelines for the NSs are set forth at 50 C.F.R. §§ 600.305 et seq. These NS guidelines do not have the force and effect of law. 16 U.S.C. § 1851(b). *See Tutein v. Daley*, 43 F.Supp.2d 113, 121–125 (D. Mass. 1999) (holding that NS1 advisory guidelines are not subject to judicial review under the MSA and APA).

12. NS8 requires that “[c]onservation and management measures shall, consistent with the conservation requirements of this [Act] (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of [NS2], in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.” 16 U.S.C. § 1851(a)(8).

13. Accurate information about catch, effort, and discards is important to achieve optimum yield from federally managed fish stocks. AR07721; *see also*, 50 C.F.R. § 600.310(e)(3)(iii)(B) (“Councils should consider the management objectives of their FMPs and their management framework to determine the relevant social, economic, and ecological factors used to determine

[optimum yield].”); 50 C.F.R. § 600.320(e) (“An FMP should include discussion of the following: The range and distribution of the stocks, as well as the patterns of fishing effort and harvest ...”).

Electronic Reporting for Federally Permitted Charter Vessels and Headboats in Gulf of Mexico Fisheries - Gulf For-Hire Electronic Reporting Amendment

14. The Gulf of Mexico Fishery Management Council (Gulf Council) prepared an amendment to the Fishery Management Plans for Reef Fish Resources of the Gulf of Mexico (Reef Fish FMP) and Coastal Migratory Pelagic (CMP) Resources in the Gulf of Mexico and Atlantic Region (CMP FMP) that modifies reporting requirements for vessels issued Gulf of Mexico charter vessel/headboat permits (Gulf For-Hire Electronic Reporting Amendment).

15. The Gulf-Council technical data subcommittee supported a for-hire census program with trip level reporting of catch and effort. AR04062.

16. The committee discussed that the recommended program would include trip notification and submission of catch information prior to returning to the dock. AR04062.

17. Location data would be collected passively through a device (e.g., GPS-enabled tablet or equivalent) with a ping frequency of approximately 30 minutes, which would balance the need for spatial information with the privacy concerns of vessel operators as it would be sufficient to establish regions of fishing (and depths) but not exact fishing locations. AR04062. Location data could be archived and transmitted later or enhanced with real-time location capability. *Id.* The proposed program would be integrated into existing dockside validation programs. *Id.*

18. The Gulf Council recognized that improved data reporting for Gulf fisheries could reduce the likelihood that annual catch limits (ACLs) are exceeded and accountability measures are triggered, and that the collection of additional data elements using electronic reporting could improve estimates of bycatch and discard mortality rates. AR07722.

19. The Gulf Council chose three elements to aid in validation and compliance: reporting of logbook prior to offload of fish, vessel monitoring system (VMS) or archival GPS system permanently affixed to the vessel, and declaration (hail-out) with return time and location via approved software. AR 11232.

20. Accurate and reliable fisheries information about catch, effort, and discards is important for stock assessments and the evaluation of management measures. 83 Fed. Reg. 54,069, 54,070 (Oct. 26, 2018).

21. On July 21, 2020, NMFS published the final rule to implement the Gulf For-hire Reporting Amendment (85 Fed. Reg. 44,005). That final rule summarized the management measures described in the Gulf For-hire Reporting Amendment and implemented by NMFS.

22. The final rule contained three components. First, an owner or operator of a vessel with a Federal charter vessel/headboat permit for Gulf reef fish or Gulf CMP species must submit an electronic fishing report (also referred to as a logbook), via NMFS-approved hardware and software, for each fishing trip before offloading fish from that fishing trip. 85 Fed. Reg. 44,005. Second, the final rule requires a Gulf for-hire vessel owner or operator to notify NMFS prior to departing for any trip and declare whether they are departing on a for-hire trip or on another trip type. *Id.* Third, the final rule requires that a Gulf for-hire vessel owner or operator use NMFS-approved hardware and software with global positioning system location capabilities that, at a minimum, archive vessel position data during a trip for subsequent transmission to NMFS. *Id.*

23. These three requirements are necessary to provide the Gulf Council and NMFS with more robust data on catches (landed and discarded), effort, and socio-economic information, which NMFS uses in conducting stock assessments, conducting required analyses under the

MSA and other applicable laws, and monitoring landings to constrain harvest to specified catch limits. *See* AR07730-07731, AR07737-07738, AR07740-07741.

24. The three components of the final rule are necessary to increase the enforceability of the reporting program. *See* AR07730-07731, AR07737-07738, AR07740-07741. Even at minimal levels, the cost of validation and compliance by agents alone is outside current funding available at NOAA Fisheries. AR11232.

25. The elements chosen by the Gulf Council and reflected in the Final Rule will decrease the cost of the compliance and validation. AR11232.

26. Reporting prior to offload allows a capture/recapture statistical design to be used to estimate catch from misreported or unreported trips. AR11232.

27. The VMS or archival GPS monitors vessel location to determine when vessels left for trips, and the notification allows sufficient planning for dockside sampling of catch. AR11232.

28. In the proposed and final rules, NMFS completed initial and final regulatory flexibility analyses, respectively. 83 Fed. Reg. at 54,072-75; 85 Fed. Reg. at 44,013-17.

29. The July 21, 2020 final rule delayed indefinitely the effectiveness of vessel location tracking requirements in 50 C.F.R. §§ 622.26(b)(5) and 622.374(b)(5)(ii)-(v). That final rule stated that NMFS would announce the effective date for those provisions in a subsequent document published in the Federal Register.

30. On September 14, 2021, NMFS published a final rule setting the effective date for the VMS requirement as December 13, 2021. 86 Fed. Reg. 51,014 (Sept. 14, 2021).

31. The NMFS Southeast Regional Office posts all approved vessel location tracking hardware and software for the Gulf for-hire reporting program, including vessel monitoring system units approved by the NMFS Office of Law Enforcement (OLE), on the website for the

Gulf for-hire reporting program. 86 Fed. Reg. 51,104;

<https://www.fisheries.noaa.gov/southeast/rules-and-regulations/approved-vessel-monitoring-system-vms-units-reporting-southeast-hire-integrated> (last visited Sept. 21, 2021).

32. Owners or operators of charter vessels are subject to the Final Rule only if they have a limited-access permit for Gulf reef fish or coastal migratory pelagic fish. 85 Fed. Reg. at 44,005.

33. These owners and operators are required to have the necessary equipment and report timely in accordance with their limited-access permits because they possess the information the Gulf Council and NMFS need to improve management of the fishery. 85 Fed. Reg. at 44,009.

34. Limited-access permits allow the owners and operators of these vessels to take passengers for-hire fishing for federally managed reef fish and CMP species in the Gulf of Mexico EEZ. 50 C.F.R. §§ 622.20(b), 622.370(b), 622.373.

35. Plaintiffs are a class consisting of all “Gulf For-hire vessel charter boat owners and operators who are permitted to fish by the Fishery Management Councils of the Gulf of Mexico and South Atlantic and are harmed by the Final Rule.” ECF No. 48 at 22. Plaintiffs hold permits that allow them the benefit of taking passengers for-hire to fish for federally managed reef fish and coastal migratory pelagic species.

36. “[C]atch from federally permitted for-hire vessels represents a substantial portion of the total recreational catch for some fish species managed by the Gulf Council, such as red snapper, gray triggerfish, greater amberjack, and mutton snapper.” 83 Fed. Reg. at 54,070.

Trip Declaration - “Hail-Out” Requirement

37. The Final Rule requires owners or operators of a vessel for which a charter vessel/headboat permit for Gulf reef fish or coastal migratory pelagic fish has been issued to

notify NMFS before it departs for a trip and declare whether the vessel will be operating as a charter vessel or headboat, or another type of trip. 85 Fed. Reg. at 44,006.

38. The trip declaration aids port agents in knowing when and where a trip will end for sampling. 85 Fed. Reg. at 44,009.

39. NMFS expects the trip declaration requirement to make it easier to track landings in a timely manner and reduce uncertainty in the data. 85 Fed. Reg. at 44,010.

VMS Requirements

40. Each permitted vessel must be equipped with NMFS-approved hardware and software with a minimum capability of archiving GPS locations (i.e., satellite or cellular VMS) once per hour, 24 hours a day, every day of the year. 85 Fed. Reg. at 44,006-07. Cellular-based systems collect and store data while a vessel is not within range of a cellular signal, e.g., during the majority of fishing trips in Federal waters, and then transmit the data when the vessel is within cellular range. Satellite-based systems transmit data as they are collected. *Id.* at 44,007.

41. Permit holders are responsible for purchasing the VMS units. 85 Fed. Reg. at 44,007.

42. Permit holders can be reimbursed for the costs of the VMS units. 85 Fed. Reg. at 44,013 (“NMFS VMS re-imbursement program is available to fishermen for the purchase of approved satellite-based VMS units); *see also* <http://www.psmfc.org/program/vessel-monitoring-system-reimbursement-program-vms> (explaining requirements of VMS reimbursement program, which has been in place since July 2006) (last visited Sept. 21, 2021). At the time the final rule was published, NMFS was undergoing a rulemaking to extend the reimbursement program to approved cellular devices. *Id.* This rule was effective in August 2020. *See* 85 Fed. Reg. 40,915 (July 8, 2020).

43. The Final Rule has two exceptions for the GPS monitoring: (1) an in-port exemption that allows the location data to be transmitted every four hours when the vessel is docked; and (2) a power-down exemption that allows for location data transmission requirements to be suspended when the vessel is out of the water for more than 72 hours. 85 Fed. Reg. at 44,020.

44. The Gulf Council and NMFS determined that VMS units were necessary and appropriate for the management of the fishery to allow NMFS to independently determine when a vessel leaves the dock and to aid with enforcement of the reporting requirements. 85 Fed. Reg. at 44,102; *see also*, AR 11265 (“Archivable GPS data that transmits when a cell signal is detected can provide the location information desired for management, enforcement, and science.”); AR 11232 (“With the understanding that the SRHS [Southeast Regional Headboat Survey] program was not scalable due to staffing and funding needs, alternative methods need to be developed to equate to the port agent validation actions in the SRHS program” and further discussing VMS as an element to decrease costs of compliance and validation).

45. Validation of vessel activity or inactivity is critical to determining compliance with logbook reporting requirements and understanding what the total landings are. AR07866; AR05336.

46. There is no way to know that the position provided or that is being reported is that of the vessel without something affixed to the vessel to validate it. AR5836, AR5837.

47. At the time the final rule was published NMFS had already received several vendor quotes for lower-cost cellular-based location tracking devices, ranging between \$150 and \$800 per year. 85 Fed. Reg. at 44,015. NMFS was actively testing those lower-cost devices with the anticipation that some would be available for use by the time the final rule was implemented. *Id.*

48. In the Final Rule, NMFS assumed that most owners or operators “already have a basic smartphone and data plan in order to meet the needs of their business,” noting that a data plan would be required only for some VMS devices, and that “[s]ome vessel owners and operators may be more or less affected than others...depending on their existing technology.” 85 Fed. Reg. at 44,015.

49. Two cellular based systems are currently available.

<https://www.fisheries.noaa.gov/southeast/rules-and-regulations/approved-vessel-monitoring-system-vms-units-reporting-southeast-hire-integrated>

50. NMFS considered an alternative that would not require a VMS device to be installed on for-hire vessels. *See*, 83 Fed. Reg. at 54,075; 85 Fed. Reg. at 44,016. This alternative was rejected by the Gulf Council because it would not allow for the desired “level of trip validation, because it would not require GPS unit hardware to be permanently affixed to the vessel.” *Id.*, *see also*, AR 11568 (“Validation of vessel activity (or inactivity) is critical to determining compliance with logbook reporting requirements. Information on whether or not a vessel is in or out of port on a particular day can be matched with logbook records or hail out/hail in requirements to determine if vessel activity was accurately reported.”).

Electronic Fishing Report – “Logbook” Requirement

51. If the vessel is operating as a charter vessel or headboat, then an electronic fishing report must be submitted prior to removing any fish from the vessel, or if no fish are landed within 30 minutes of arriving at the dock. 85 Fed. Reg. at 44,005.

52. NMFS stated in the notice of proposed rulemaking that the electronic fishing report would include any species that were caught or harvested, as well as information about the permit-holder, vessel, location fished, fishing effort, discards, and socio-economic data. 83 Fed.

Reg. at 54071. The Final Rule provided additional detail about this data, stating that “NMFS will require the reporting of five economic values per trip: The charter fee, the fuel price and estimated amount of fuel used, number of paying passengers, and the number of crew for each trip.” 85 Fed. Reg. at 44,011.

53. NMFS uses a variety of models to conduct stock assessments. Several of those models use information on catch and fishing effort. <https://www.fisheries.noaa.gov/insight/stock-assessment-model-descriptions#stock-assessment-models> (last visited Sept. 21, 2021).

54. NMFS expects that the collection of economic information in the trip reports will “improve the best scientific information available for regulatory decision-making; will increase the accuracy of economic impacts and value estimates specific to the for-hire industry; and will support further value-added research efforts and programs aimed at increasing net benefits to fishery stakeholders and the U.S. economy.” 85 Fed. Reg. at 44,011.

55. Information proposed for collection “will help generate estimates of lost revenue when a disaster occurs (e.g., hurricane, oil spill).” 85 Fed. Reg. at 44,011.

56. Charter fee information is “[c]ritical for ANY economic analysis/assessment.” AR07849.

57. The Data Collection Technical Subcommittee identified number of crew on boat as an essential data element to be collected in the electronic log-books. AR07842.

58. NMFS determined that collecting economic data directly from vessel owners and operators was both necessary to management and conservation of the fishery and superior to other data sources. 85 Fed. Reg. at 44,011.

RESPONSE TO PLAINTIFFS’ STATEMENT OF UNCONTESTED MATERIAL FACTS

1. Statement disputed as unsupported. The cited website speaks for itself and Defendants cannot verify how Plaintiffs calculated the stated percentages, including which

species of “fish” were included. Further disputed as irrelevant to Plaintiffs’ claims and beyond the APA scope of review. The scope of that judicial review is properly limited to the administrative record that was before the agency at the time the decision was made. *See, e.g., Fla. Power*, 470 U.S. at 744; *Pitts*, 411 U.S. at 142.

2. Statement partially disputed. For the purpose of the Final Generic Amendment to the Fishery Management Plans for the Reef Fish Resources of the Gulf of Mexico and Coastal Migratory Pelagic Resources in the Gulf of Mexico, titled *Modifications to Charter Vessel and Headboat Reporting Requirements* (Generic For-Hire Reporting Amendment), “headboats are federally permitted for-hire vessels that participate in the [Southeast Regional Headboat Survey] and charter vessels are federally permitted for-hire vessels that do not participate in the [Southeast Regional Headboat Survey].” AR07722.

3. Statement not disputed.

4. Statement disputed as unsupported. The cited declarations speak for themselves but do not support the statement that all charter boats are “frequently used in part for personal purposes.” Defendants lack sufficient knowledge to verify the statements in the declaration. Both declarants Bill Wells (ECF No. 25-2) and Allen Walburn (ECF No. 25-3) submitted public comments on the proposed rule. AR08215-16 (comment of Bill Wells); AR08255, 08260, 08262 (comments of Alan Walburn). Walburn’s public comment did not state that he uses his charter vessel for personal use. Wells stated: “Our boats are our cars and the ride is our daily commute. . . .” AR08216. This statement was reasonably interpreted to mean that the “daily commute” was to the fishing spots these for-hire charter vessels take their paying customers to during the fishing trips.

5. Statement not disputed.

6. Statement partially disputed. Defendants agree that all federally permitted charter vessels affected by the Final Rule that implemented the Generic For-Hire Reporting Amendment are small entities. However, at the time Defendants published the Final Rule, the small business size standard for fisheries for-hire businesses was \$8 million in annual gross receipts. 85 Fed. Reg. at 44,014.

7. Statement partially disputed. Defendants agree that 1,260 of 1,368 vessels with at least one Gulf charter vessel/headboat permit have federal permits for both Gulf reef fish and Gulf CMP species. However, there are four types of Gulf for-hire permits: reef fish charter vessel/headboat permit; reef fish historical captain permit; costal migratory pelagic charter vessel/headboat permit; and CMP historical captain permit. AR07765.

8. Statement not disputed. However, Defendants note that only two of those species, gray snapper and red snapper, are managed under the Fishery Management Plan for Reef Fish Resources of the Gulf of Mexico, and one of those species, Spanish mackerel, is managed under the Fishery Management Plan for CMP Resources in the Gulf of Mexico and Atlantic Regions. AR07750, 7751-53.

9. Statement disputed as irrelevant to Plaintiffs' claims and beyond the APA scope of review. The scope of judicial review is properly limited to the administrative record that was before the agency at the time the decision was made. *See, e.g., Fla. Power*, 470 U.S. at 744; *Pitts*, 411 U.S. at 142.

10. Statement disputed as irrelevant to Plaintiffs' claims and beyond the APA scope of review. The scope of that judicial review is properly limited to the administrative record that was before the agency at the time the decision was made. *See, e.g., Fla. Power*, 470 U.S. at 744; *Pitts*, 411 U.S. at 142.

11. Statement disputed. There is no record cite supporting the statement and Defendants cannot verify where Plaintiffs obtained the stated statistics. Plaintiffs have not presented any information on “total recreational fishing in the Gulf” or “all Gulf fishing.” Further disputed as irrelevant to Plaintiffs’ claims and beyond the APA scope of review. The scope of that judicial review is properly limited to the administrative record that was before the agency at the time the decision was made. *See, e.g., Fla. Power*, 470 U.S. at 744; *Pitts*, 411 U.S. at 142.

12. Statement partially disputed. Defendants agree that NMFS published a notice of proposed rulemaking on October 26, 2018. The phrase “two information-collection requirements” is ambiguous. The notice of proposed rulemaking referred to four distinct information collections: electronic logbook, location if submitted separately from logbook, trip declaration, and VMS power-down exemption. *See* 83 Fed. Reg. at 54,071-72. The automatic submission of location information eliminated that proposed collection. *See* 85 Fed. Reg. at 44,008.

13. Statement not disputed.

14. Statement not disputed.

15. Statement partially disputed. Defendants agree that operators of federally permitted charter vessels did not have to report catches electronically. However, operators of federally permitted Gulf charter vessels have not been required to submit paper logs. Under the Marine Recreational Information Program, these operators, when selected, are asked to report all trips taken through a telephone survey (weekly sample of 10% of the charter fleet). AR07728.

16. Statement disputed. There is no requirement that the VMS “continuously transmit the boat’s GPS location to NMFS.” The Final Rule requires that vessels have “NMFS-approved

hardware and software on board with GPS location capabilities that, at a minimum, archive vessel position data during a trip for subsequent transmission to NMFS.” 85 Fed. Reg. at 44,006-07. The Final Rule also includes an in-port exemption that allows use of a four-hour reporting feature and a power-down exemption for vessels that will be out of the water for more than 72 consecutive hours. *See id.* at 44,074.

17. Statement disputed. The cited document speaks for itself, and Defendants do not agree with Plaintiffs’ conclusions drawn therein. The term “same equipment” is ambiguous, but Defendants note that there is no requirement that reports and declarations be submitted through the VMS device. Fishing reports and trip declarations need only be submitted through approved reporting software. 85 Fed. Reg. at 44,005-06.

18. Statement disputed. The record cite does not support the statement. The document cited is a 2016 draft version of the Generic For-Hire Reporting Amendment, which noted that, under the status quo, operators of federally permitted charter vessels were required to report area fished. *See also* AR07728. However, the location tracking or vessel monitoring system requirement does not replace the reporting of area fished. The location fished is required in the electronic fishing report. 85 Fed. Reg. at 44,005. As explained in response to Comment 22 in the Final Rule, the VMS requirement allows NMFS to determine whether the vessel leaves the dock, which will help validate fishing effort and aid with enforcement of the reporting requirements. 85 Fed. Reg. at 44,012.

19. Statement not disputed.

20. Statement not disputed.

21. Statement not disputed.

22. Statement partially disputed. Defendants agree that the VMS requirement is

codified at 50 C.F.R. §§ 622.26(b)(5) and 622.374(b)(5)(ii)-(v). However, the VMS requirement is not codified at 50 C.F.R. § 622.26(b)(6) or 50 C.F.R. § 622.374(b)(6). Those provisions require a trip declaration.

23. Statement partially disputed. Defendants agree that VMS must record the vessel's locations at least once per hour, 24 hours a day, every day of the year. However, Defendants note that there is an in-port exemption that allows use of a four-hour reporting feature and a power-down exemption for vessels that will be out of the water for more than 72 consecutive hours. *See* 50 C.F.R. §§ 622.26(b)(5)(ii)(C), (D), 622.374(b)(5)(iv)(C), (D).

24. Statement not disputed.

25. Statement not disputed.

26. Statement not disputed.

27. Statement disputed. NMFS explains that the referenced estimates assume that the new reporting will result in “a new and distinct explicit labor cost,” but also that “the reporting burden will likely be absorbed by existing vessel personnel, and therefore, labor costs will likely be less.” 85 Fed. Reg. at 44,014-15.

28. Statement partially disputed. The referenced statements regarding cost estimates are incomplete. The Final Rule states: “[T]he estimated startup costs for each affected vessel will range from \$150 to \$800 in the year of implementation. . . . The recurring monthly cost per vessel to use the location tracking device is estimated to be \$10 to \$40. . . . For the affected vessels that currently do not have any wireless carrier contract and who select a location tracking device that does not support fishing report submission, the estimated additional cost for an unlimited data plan will range from approximately \$60 to \$85 per month.” 85 Fed. Reg. at 44,015.

29. Statement not disputed.

30. Statement disputed. This is not purely a statement of fact, but an incomplete and inaccurate statement of the procedural requirements of the Regulatory Flexibility Act. In conducting a regulatory flexibility analysis an agency is not required to consider “lower-cost alternative[s].” Instead, the regulatory flexibility analysis is a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule, and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected. 5 U.S.C. § 604(a)(6).

31. Statement disputed. The regulatory flexibility analysis did consider the lower-cost alternative of not requiring a VMS unit. *See* 85 Fed. Reg. at 44,016. This alternative was not selected because it would not allow for the same level of trip validation. *See id.*

32. Statement not disputed.

33. Statement partially disputed as inconsistent with the plain language, context, and meaning of the cited comments. *See* AR08179-80; AR08237-38; AR11383-84 (“Providing all confidential transiting details is a violation of our 4th Amendment right to privacy and not necessary to manage the fishery. Such details are considered confidential by NOAA and utilized by other agencies not associated with management of the fishery. This is a dangerous precedent. Fish have tails, they move and with the climatic shift and movement of our fish into new areas over the last several years utilizing such historical data for fishery management purposes is flawed and can be misused to deny us access to the fishery. Therefore, to require detailed GPS data for vessels utilized by the for hire community is not necessary for fishery management

purposes, flawed if used for fishery management purposes due to the climatic shift of our stocks and is also a violation of our 4th Amendment rights.”); AR08192-93 (“Providing all confidential transiting details is a violation of our 4th Amendment right to privacy and not necessary to manage the fishery. Such details are considered confidential by NOAA and utilized by other agencies not associated with management of the fishery. This is a dangerous and illegal precedent. To require detailed GPS data for vessels utilized by the for hire community is not necessary for fishery management purposes, flawed if used for fishery management purposes due to the climatic shift of our stocks and is also a violation of our 4th Amendment rights.”).

34. Statement partially disputed. The response to comment 12 in the Final Rule explains how NMFS will protect data from disclosure in accordance with applicable law. 85 Fed. Reg. at 44,010.

35. Statement disputed. The term “many” is vague. In addition, NMFS provided information related to costs of the VMS units in response to Comment 24 in the Final Rule: “NMFS is currently testing six cellular-based units that range in purchase price from \$150 to \$800. The monthly service fee for these units range from \$10 to \$40 per month. The unit vendor determines these costs. The NMFS VMS re-imbusement program is available to fishermen for the purchase of approved satellite-based VMS units, and NMFS OLE is undergoing rulemaking that would also make reimbursement available for cellular-based VMS units.” 85 Fed. Reg. at 44,013. The rulemaking to allow cellular-based VMS units was effective in August 2020. *See* 85 Fed. Reg. 40,915. With respect to the monthly service fee, NMFS explained in response to Comment 25 in the Final Rule: “average monthly cash outflows (fixed and variable costs) for charter and headboat businesses are estimated to be approximately \$5,171 (2018 dollars) and \$15,758, respectively. In comparison to existing costs, NMFS believes the ongoing monthly fee

(estimated at \$10 to \$40 per month) would not materially alter cash flows, profits, or the solvency of for-hire businesses.” 85 Fed. Reg. at 44,013.

36. Statement partially disputed. Use of “several” is vague.

37. Statement disputed. NMFS explained that there was an alternative considered that would have required real-time location information, which would have been more expensive than the archival units allowed under the Final Rule. *See* 85 Fed. Reg. at 44,017. NMFS also explained the status quo “would not allow for the same level of trip validation, because it would not require GPS unit hardware to be permanently affixed to the vessel.” *Id.* at 44,016.

38. Statement not disputed. However, as noted in Paragraph 35, *supra*, NMFS responded to these concerns in the Final Rule and explained that the costs of the approved units are reimbursable.

39. Statement not disputed. However, as noted in Paragraph 35, *supra*, the costs of the approved units are reimbursable.

40. Statement partially disputed. There are currently two cellular VMS units approved for use for Gulf of Mexico for-hire vessels. *See Approved Vessel Monitoring System (VMS) Units for Reporting in the Southeast For-Hire Integrated Electronic Reporting Program*, available at <https://www.fisheries.noaa.gov/southeast/rules-and-regulations/approved-vessel-monitoring-system-vms-units-reporting-southeast-hire-integrated>.

41. Statement disputed. NMFS explained the basis for its cost estimates the Final Rule. *See* 85 Fed. Reg at 44,015 (“In the proposed rule, NMFS presented cost estimates to the for-hire industry for several general options including a tablet-based system, a handheld GPS, and a smartphone-based system, where the smartphone is hardwired to a vessel’s GPS. These cost estimates have been updated since the proposed rule published and are now based on vendor

quotes for six different cellular-based location tracking devices selected for testing by NMFS.”).

42. Statement not disputed.

43. Statement not disputed.

44. Statement not disputed.

45. Statement not disputed. However, NMFS subsequently published a rule establishing an effective date of December 13, 2021. *See* 86 Fed. Reg. 51,014.

46. Statement not disputed.

47. Statement not disputed.

48. Statement not disputed.