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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT ASSOCIATION and COOK INLET FISHERMEN'S FUND, Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE ET AL., Defendants.	Civil Action No.: 3:21-cv-00255-JMK **OPENING BRIEF BY PLAINTIFFS** **(Local Civil Rule 16.3)**

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I. INTRODUCTION

This case stems from the National Marine Fisheries Service's ("NMFS") dogged refusal to manage the Cook Inlet salmon fishery as it is required to do by the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act"), 16 U.S.C. § 1801, *et seq*. The Magnuson Act is our national fishery charter. It expressly recognizes the *national* importance of fishery resources and establishes conservation and management standards to optimize those resources under the guidance of federal fishery management plans (or "FMPs").

The Cook Inlet salmon fishery was historically one of the most productive fisheries in the world. But during the last two decades, the commercial harvest in Cook Inlet has steadily—and more recently, precipitously—declined, resulting in "disaster" declarations by the Secretary of Commerce for 2012, 2018, and 2020.[1] Despite the passage of the Magnuson Act in 1976, NMFS has never taken responsibility for managing this important fishery. Instead, NMFS's policy has been to defer all of its management obligations to the State of Alaska for decades, and the State has irresponsibly managed the entire fishery (including in federal waters) without any effort to adhere to the Magnuson Act.

[1] AKR_001128 (2012 disaster declaration); *see also* NOAA, Secretary of Commerce Issues Multiple Fishery Disaster Determinations for Alaska (Jan. 21, 2022), https://www.noaa.gov/news-release/secretary-of-commerce-issues-multiple-fishery-disaster-determinations-for-alaska (approving disaster declarations for Cook Inlet for 2018 and 2020).

In 2016, the Ninth Circuit Court of Appeals, in *United Cook Inlet Drift Ass'n v. NMFS* ("*United Cook*"), rebuked this policy choice, instructing that NMFS could not "wriggle out of" its duties or "shirk" the statutory command to produce an FMP for the Cook Inlet salmon fishery.[2] The Ninth Circuit explained that the "Act makes plain that federal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns."[3] It remanded the issue to NMFS to produce a fishery management plan to govern the Cook Inlet salmon fishery as the Magnuson Act requires.[4]

Plaintiffs United Cook Inlet Drift Association and Cook Inlet Fishermen's Fund now challenge the result of that remand. Rather than abide by the Ninth Circuit's mandate, NMFS, at the State's goading, approved an FMP amendment ("Amendment 14" to the "Fishery Management Plan for the Salmon Fisheries in the EEZ off Alaska" (or "Salmon FMP")) that closes commercial salmon fishing in federal waters in Cook Inlet altogether. The closure, NMFS explains, "enables the State to manage salmon fisheries" as it has been doing all along and allows the State to manage salmon stocks "seamlessly throughout their range" without federal interference or obligations to comply with federal standards.[5]

There is no plausible way to reconcile this decision with the Ninth Circuit's

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[2] 837 F.3d 1055, 1063–64 (9th Cir. 2016).
[3] *Id.* at 1063.
[4] *Id.* at 1065.
[5] AKR_1554–56.

instruction that the "Act makes plain that federal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns."[6] Even worse, the record shows that Amendment 14 was *intended* to *avoid* the Magnuson Act to ensure the State's continued control of the fishery without "federal and outsider influence."[7] In short, Amendment 14 was a political decision to relieve NMFS and the State of the burden of Magnuson Act compliance.

Amendment 14 will have disastrous consequences for commercial fishermen and processors, their families, and the communities and business that depend on salmon fishing in Cook Inlet. The closed area in Cook Inlet has been commercially fished for over 100 years. As one Alaska legislator explained, Amendment 14 "will likely put an end to commercial salmon fishing in Cook Inlet, and therefore, an Alaskan way of life."[8]

As discussed more fully below, Amendment 14 and its implementing regulations are arbitrary, capricious, and contrary to the Magnuson Act, 16 U.S.C. §§ 1801–1891d; the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*; and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551–59, 701–06. Plaintiffs respectfully request that this Court vacate the decision approving Amendment 14 and its implementing regulations, and order NMFS to comply with the Magnuson Act and develop a lawful FMP as the Ninth Circuit instructed.

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[6] *United Cook*, 837 F.3d at 1063.
[7] AKR_683.
[8] AKR_602.

II. BACKGROUND

A. The Magnuson Act Provides the Nation's Statutory Fishery Management Framework.

The Magnuson Act is the bipartisan legislative innovation of U.S. Senators Warren Magnuson and Ted Stevens.[9] It "creates a 'national program for the conservation and management of the fishery resources of the United States.'"[10] The "declared" purpose of the Magnuson Act is to "take immediate action to conserve and manage the fishery resources found off the coasts of the United States, ***and*** the anadromous species," like salmon throughout their range.[11] The Magnuson Act places these national fishery resources under "sound management" and "to realize the full potential of the Nation's fishery resources."[12] This includes both conservation measures to prevent overfishing and a "national program for the development of fisheries which are underutilized or not utilized by the United States fishing industry."[13]

The primary mechanism for "sound management" is the development of an FMP "which will achieve and maintain, on a continuing basis, the optimum yield from each fishery."[14] The Magnuson Act defines "fishery" to mean "one or more stocks of fish

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[9] A helpful Magnuson Act reference page is available here: NOAA, Laws & Policies, https://www.fisheries.noaa.gov/topic/laws-policies#:~:text=On%20December%2031%2C%202018%2C%20the,management%20of%20mixed%2Duse%20fisheries (last visited Feb. 1, 2022).

[10] *United Cook*, 837 F.3d at 1057 (quoting 16 U.S.C. § 1801(a)(6)).

[11] 16 U.S.C. § 1801(b)(1) (emphasis added); *see id.* §§ 1801(a)(1), 1802(1) (specific references to anadromous fish).

[12] *Id.* § 1801(a)(5)–(6).

[13] *Id.* § 1801(a)(7).

[14] *Id.* § 1801(b)(4).

which can be treated as a unit for purposes of conservation and management" and "any fishing for such stocks."[15] The Magnuson Act requires an FMP for each fishery under the regional council's jurisdiction "that requires conservation and management."[16]

The Magnuson Act requires that an FMP must contain certain elements and be consistent with 10 National Standards.[17] Among other things, an FMP must include "conservation and management measures, applicable to . . . fishing by vessels of the United States, which are . . . consistent with the national standards."[18] The FMP must also "assess and specify . . . the maximum sustainable yield and optimum yield from[] the fishery" and "assess and specify . . . the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield."[19] The FMP must also set "annual catch limits."[20]

The Magnuson Act gives NMFS "exclusive fishery management authority" over "all fish" within the EEZ.[21] The Magnuson Act also gives NMFS "exclusive fishery management authority" over "[a]ll anadromous species" like salmon "throughout the migratory range of each such species beyond the exclusive economic zone."[22] States typically retain concurrent "jurisdiction" over fishing activities within the state, so long

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[15] *Id.* § 1802(13)(A).
[16] *Id.* § 1852(h)(1).
[17] *Id.* § 1853(a).
[18] *Id.* § 1853(a)(1)(C).
[19] *Id.* § 1853(a)(3), (a)(4)(A).
[20] *Id.* § 1853(a)(15).
[21] *Id.* § 1811(a).
[22] *Id.* § 1811(b)(1).

as the state fishing program does not "substantially and adversely affect" the implementation of the FMP for that fishery.[23]

The Magnuson Act expressly constrains the authority of a state to manage fisheries in the EEZ. Although NMFS may "delegate" the implementation of an FMP to a state, it "must do so expressly in an FMP."[24] This may occur *only* if, at all times, the "[s]tate's laws and regulations *are consistent with such fishery management plan*."[25] Of course, this requires that NMFS first establish an FMP under the *federal* statutory principles set forth above (otherwise there would be no point of comparison to determine the consistency of any state laws and regulations).

The Magnuson Act establishes eight regional councils and gives the councils the initial responsibility to develop FMPs in their regions. The North Pacific Fisheries Management Council ("Council") manages fisheries in the EEZ off Alaska's coast.[26] Fishery management councils submit proposed FMPs and FMP amendments to the Secretary of Commerce for review and approval.[27] All FMPs and FMP amendments must be consistent with the requirements of the Magnuson Act, including the 10 National Standards.

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[23] *Id.* § 1856(a)(1), (b)(1)(B).
[24] *United Cook*, 837 F.3d at 1063.
[25] 16 U.S.C. § 1856(a)(3)(B) (emphasis added); *see id.* § 1853(b)(5).
[26] *Id.* § 1852(a)(1)(G).
[27] *Id.* §§ 1853, 1854.

B. Once Famed for Its Productivity, Commercial Salmon Fishing in Cook Inlet Now Withers Under State Mismanagement.

"Cook Inlet is one of the nation's most productive salmon fisheries."[28] The Cook Inlet salmon "fishery" in Magnuson Act terms ("stocks of fish" and "any fishing" on those stocks) includes multiple stocks of Chinook, silver, sockeye, pink, and chum salmon, which are born in scores of Cook Inlet's rivers and tributaries and that migrate to the ocean.[29] The "fishing" on those stocks include international harvests, commercial and recreational harvest in Alaska and federal waters, and subsistence and personal use harvest in Alaska.[30]

Cook Inlet's sockeye run in particular has historically been world class, producing millions of adult salmon returning annually.[31] Unlike many of our nation's fisheries that are fully utilized (or even overutilized), Cook Inlet salmon stocks are underutilized. For example, in 2014 an estimated 20 million pink salmon returned to Cook Inlet, but the State's restrictions limited harvest to 642,754 fish, leaving *an estimated 15 million pink salmon not utilized* and not needed for biological purposes (*i.e.*, wasted).[32]

The Council has never affirmatively managed salmon stocks in Cook Inlet.[33] During the last two decades, the commercial harvest in Cook Inlet under the State's

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[28] *United Cook*, 837 F.3d at 1057.

[29] *See* 16 U.S.C. § 1802(13); AKR_14902, 589.

[30] AKR_42, 108, 111–13, 152.

[31] AKR_577; AKR_982–83 (e.g., 9.1 million sockeye harvested in 1992; 9.4 million sockeye harvested in 1987).

[32] AKR_577; AKR_14904, 14916.* Page numbers marked "*" are estimated pages from documents missing Bates numbers.

[33] *See United Cook*, 837 F.3d at 1058–61.

management has declined dramatically. In the 1980s and 1990s, the *sockeye* salmon harvest alone ranged consistently from four to nine million sockeye per year.[34] But the 10-year average annual commercial catch from 2008 to 2017 was down to just 2.7 million sockeye.[35] The commercial sockeye harvest was about 1.8 million in 2017 and 2019, and commercial sockeye harvest in 2018 was only 814,516—the worst harvest in over 40 years.[36] The 2018 total commercial harvest of *all five* salmon species was approximately 1.3 million salmon: 61% less than the most recent 10-year average (already reduced) annual harvest of 3.4 million fish.[37] In 2020, the commercial salmon harvest in Cook Inlet hit new lows with 669,751 sockeye harvested and a total commercial harvest of 1.2 million for all five salmon species.[38] The average gross receipts for commercial drift net fishermen in 2020 was $4,400 for the e*ntire season*.[39]

These astounding declines are not the result of a lack of fish returning to the Inlet. Rather, they are the result of the State's management decisions that have allowed millions of surplus salmon to go unharvested every year, while the commercial fleet is largely sidelined, to the detriment of UCIDA's members, local fishing communities, and the national interest in this important food source.[40]

A substantial portion of the commercial salmon fishery in Cook Inlet has

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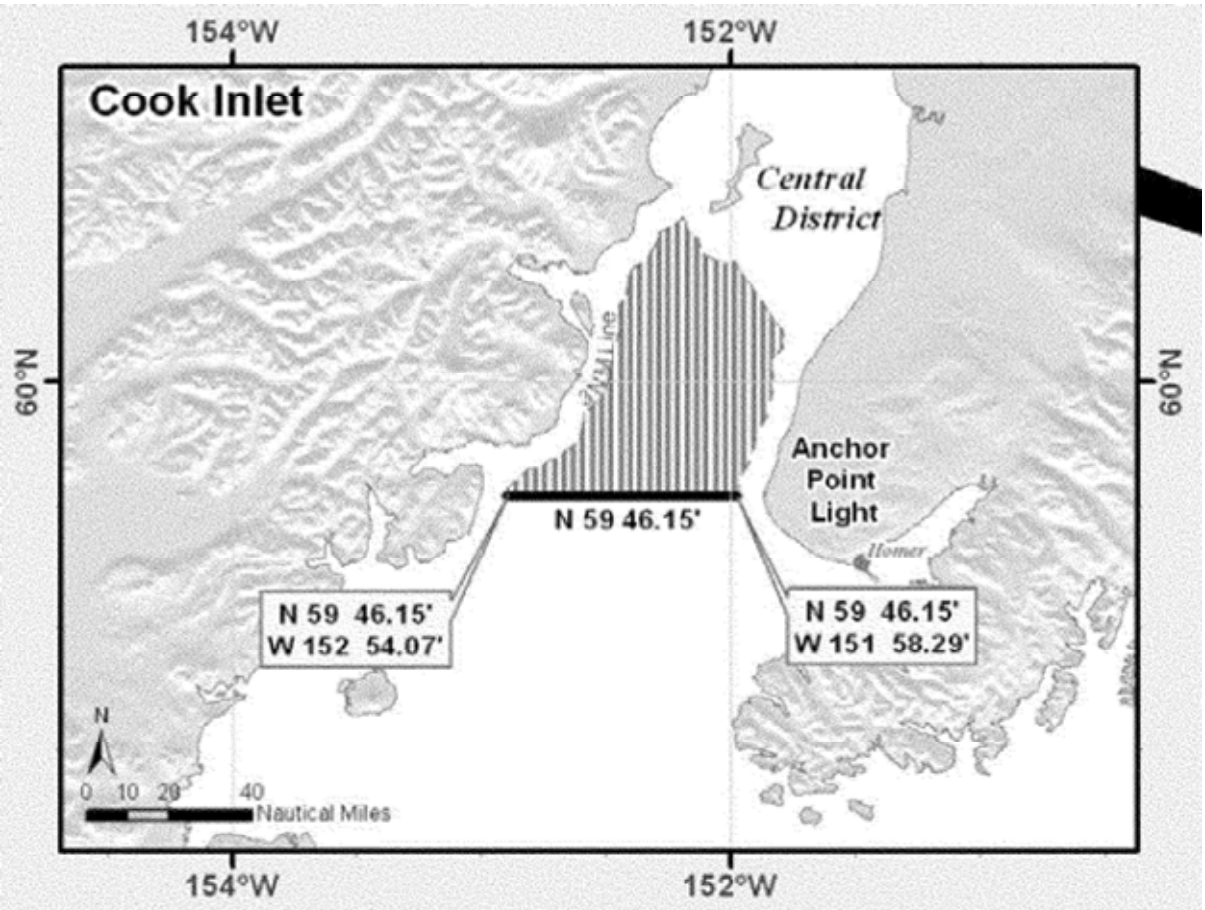
[34] AKR_578.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] AKR_573.
[40] AKR_14902–06*; AKR_14913–17*; AKR_901–09.

historically taken place in federal waters, in what is now the EEZ (the portion of Cook Inlet Amendment 14 closes to commercial fishing).[41] This area is about 1,000 square miles and is one of the best commercial fishing locations in Alaska.[42] It is depicted roughly on the map below: [43]



Commonly, when salmon return from the ocean to their natal streams, they first congregate in natural tidal rips in this shaded area, where they are susceptible to

[41] AKR_582–83; 587–88.
[42] AKR_587–88.
[43] AKR_13807.

commercial harvest.[44] Plaintiffs' members harvest fish in this area using gillnets deployed from fishing vessels as they drift in the current (commonly called "drift net" fishing).[45]

Harvest from the EEZ also provides catch data that is crucial for the management of the salmon fishery.[46] The commercial catch in federal waters provides key early data to inform the annual harvest and allow the duration of the annual salmon run—both harvest and escapement—to be spread over a longer period of time.[47] This elongation of the season is essential for the operation of commercial processers and to avoid "over escapement" events where too many salmon reach the river, resulting in lost harvest opportunities.[48]

C. The Ninth Circuit Held That NMFS Cannot Defer Federal Management of the Fishery to the State.

Despite the passage of the Magnuson Act 45 years ago, NMFS has never managed Cook Inlet salmon stocks. In 1979, the Council produced an FMP for salmon fisheries in Alaska but provided no management for Cook Inlet salmon stocks.[49] Although NMFS and the Council admitted that the fishery was "'technically'" in federal waters, they allowed the State to continue to manage the fishery as a state-water fishery.[50]

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[44] AKR_589.

[45] AKR_960–64. Plaintiffs have standing to challenge the closure of this historic fishing area. *See* Declaration of Erik Huebsch ("Huebsch Decl.") ¶¶ 2–12; Declaration of David Martin ¶¶ 2–12.

[46] AKR_903, 906.

[47] AKR_906.

[48] *Id.*

[49] *United Cook*, 837 F.3d at 1058.

[50] *Id.* (citation omitted).

In 2010, the Council began a comprehensive review of the Salmon FMP.[51] During that review, NMFS and the Council "'realized' that Cook Inlet was 'not exempt from the FMP as previously assumed.'"[52] Instead of correcting that problem, NMFS and the Council decided to amend the "FMP to reflect the Council's salmon management policy, which is to facilitate State of Alaska (State) salmon management."[53] To that end, in 2012 NMFS approved Amendment 12 to the FMP, which removed the EEZ portions of the Cook Inlet salmon fishery from the FMP to "allow[] the State to manage Alaska salmon stocks and directed fishing for those stocks as seamlessly as practicable throughout their range."[54]

UCIDA filed suit challenging Amendment 12, alleging that by deferring its management obligations to the State, NMFS violated its statutory obligation to prepare an FMP "'for each fishery under its authority that requires conservation and management.'"[55] For its part, NMFS argued, *inter alia*, that the Magnuson Act allows NMFS to "cede regulatory authority to a state over federal waters that require conservation and management simply by declining to issue an FMP" and "does not expressly require an FMP to cover an entire fishery."[56] In September 2016, the Ninth Circuit issued an opinion rejecting NMFS's argument and siding with UCIDA.

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[51] *Id.* at 1060.
[52] *Id.*
[53] AKR_13789.
[54] *Id.*
[55] *United Cook*, 837 F.3d at 1061 (quoting 16 U.S.C. § 1852(h)(1)).
[56] *Id.* at 1062, 1064.

The court explained that "the federal government cannot delegate management of the fishery to a State without a plan, because a Council is required to develop FMPs for fisheries within its jurisdiction . . . *and then to manage those fisheries 'through' those plans.*"[57] The court also made clear that a purpose of the FMP requirement was to ensure "that federal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns."[58]

Next, the court rejected NMFS's argument that an FMP need not cover an entire fishery. The court explained that "fishery[] [is] a defined term" and that NMFS's view, if accepted, would allow it to "fulfill its statutory obligation by issuing an FMP applying to only a single ounce of water in that fishery."[59] The court stated that Congress "did not suggest that [the] Council could wriggle out of this requirement by creating FMPs only for selected parts of those fisheries, excluding other areas that required conservation and management."[60] In short, the Ninth Circuit instructed that (1) NMFS must prepare an FMP consistent with the federal standards set forth in the Magnuson Act that reflects the national interest, and (2) the FMP must address the entire Cook Inlet salmon fishery.

D. The Remand Process

On remand, the parties agreed to maintain the *status quo* (State management) while NMFS and the Council developed a compliant FMP amendment.[61] UCIDA agreed

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[57] *Id.* at 1063 (emphasis added).
[58] *Id.*
[59] *Id.* at 1064.
[60] *Id.*
[61] *United Cook Inlet Drift Ass'n v. NMFS*, 3:13-cv-104-TMB, Dkt. 151.

to do so because NMFS said it would otherwise close fishing in federal waters until after an amendment was approved.[62]

The remand took *five years* to complete, resulting in an amendment that closed commercial fishing anyway. The salient facts leading to this decision are summarized below.

The Council first began its work in April 2017, seven months after the Ninth Circuit's decision.[63] At its April 2017 meeting, the Council identified three preliminary alternatives to consider: **Alternative 1** – a no action alternative (which was foreclosed by the Ninth Circuit's decision); **Alternative 2** – amend the FMP "to include three traditional net fishing areas in the FMP's fishery management unit," and then delegate "specific management measures to the State of Alaska" through that plan as the Ninth Circuit instructed was permissible under the Magnuson Act; and **Alternative 3** – include the three traditional net fishing areas within the FMP and provide for federal management of the fisheries that occur in the EEZ.[64]

From the outset of this process, the Council recognized that the Ninth Circuit's holding applied to both commercial and recreational fishing in Cook Inlet.[65] NMFS instructed the Council that it could only exclude the recreational fishery from the FMP if it made a finding that the recreational fishery did not require any conservation and

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[62] *Id*. at Dkt. 88 ¶¶ 18–20.
[63] AKR_14758 at 2*.
[64] AKR_14925.
[65] AKR_15107–08.

management.[66]

Between April 2017 and June 2020, the Council and NMFS continued to work with this three-alternative framework, converting those alternatives from preliminary to draft form.[67] The vast majority of the effort by stakeholders, the State of Alaska, and NMFS and Council staff were devoted to developing Alternative 2.[68]

The Council created a Salmon Stakeholder Committee ("Committee") and encouraged the Committee to "develop recommendations under Alternative 2."[69] There was significant debate between that Committee and Council and NMFS staff regarding the geographic scope of Alternative 2, as well as the slow pace of the remand. These concerns led fishermen to seek judicial intervention to enforce the remand order in September 2019.[70] Although the district court declined to address issues related to the scope of alternatives, it ordered NMFS "to prepare and adopt a salmon FMP compliant with the Ninth Circuit's decision on or before December 31, 2020 and final agency action and/or promulgation of a final rule shall occur within one year thereafter."[71]

In June 2020, the Committee, after working on this issue for two years, recommended an expanded version of Alternative 2 that would establish management requirements for Cook Inlet salmon stocks throughout their range.[72] In response, the

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[66] *Id.*
[67] AKR_17690–99.
[68] AKR_574.
[69] AKR_18504.
[70] *See United Cook Inlet Drift Ass'n v. NMFS*, 3:13-cv-104-TMB at Dkt. 151.
[71] *Id.*, Dkt. 168 at 12 (emphasis omitted).
[72] AKR_17660, 17663.

Council stated that it "is not moving the Cook Inlet Salmon Committee's (Committee's) recommended alternative forward for analysis" and instead "will include it in the section on alternatives considered but ***not*** analyzed further."[73] The Council then dissolved the Committee at its June 2020 meeting.[74] Although there were only two Council meetings left (October and December of 2020) before the court deadline of December 31, 2020, and despite the fact that Council had not yet selected a preferred alternative or produced a draft plan for public review based on that alternative, the Council indicated that it would be ready to take final action in December 2020.[75]

Something changed between the Council's June 2020 meeting and its October 12, 2020 meeting. Around September 30, 2020 (and perhaps earlier) the Deputy Director of the Alaska Department of Fish and Game, Rachel Baker, drafted a motion for the Council that would modify the proposed Council actions.[76] The motion added a new alternative (**Alternative 4**) that would close *commercial* fishing in federal waters altogether, and further limited the other three alternatives so that they only applied to *commercial* fishing (not recreational fishing).[77] NMFS staff thought that this new closure plan "looks great!"[78] NMFS staff then provided the State with "talking points" on how to justify this

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[73] AKR_19262 (emphasis added).

[74] ARK_17690.

[75] AKR_17691.

[76] AKR_6543–46 (email with attachment labeled "Draft Cook Inlet Salmon FMP Council motion 9.30.20.docx"). The Commissioner of the Alaska Department of Fish and Game, Doug Vincent-Lang, is a member of the Council, but he delegates those responsibilities to Deputy Commissioner Baker.

[77] AKR_6548–50.

[78] AKR_6551.

new closure alternative at the upcoming Council meeting.[79]

No one told the public about this new closure alternative before the October 2020 Council meeting. Although NMFS and Council staff knew about the motion, it was not disclosed in the "Action Memo" prepared for the Council.[80] Nor was it discussed in NMFS's staff presentation at the October Council meeting.[81] Instead, the motion was introduced by Deputy Director Baker (sitting as a member of the Council) *after* the public comment opportunity closed. The Council then quickly proceeded to vote to add this new alternative (Alternative 4) without any public input.[82] After passing the motion, Deputy Director Baker then thanked NMFS staff for its good work in pushing through the State's alternative and NMFS staff agreed that it "went really well."[83]

At the close of the October 2020 Council meeting, the Council had still not identified a preferred alternative among the (now) four alternatives and had still not drafted a fishery management plan amendment.[84] The Council indicated, however, that it would be able to take final action at the next meeting in December 2020.[85]

After the October 2020 Council meeting, and before the December 2020 meeting, NMFS and Council staff hurriedly attempted to provide an analysis of the economic

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[79] AKR_6554–55.
[80] AKR_18833–34.
[81] AKR_18654–74.
[82] AKR_19263.
[83] AKR_6584.
[84] AKR_19263.
[85] *Id.*

impacts of the new closure alternative.[86] To gather this information, NMFS asked the State of Alaska to provide its views on the consequences of the closure it was asking for, and attached those responses to the draft Environmental Assessment and Regulatory Impact Review ("EA/RIR").[87] NMFS and Council staff did not make similar inquiries to any commercial fishing interest (fishermen or processors) who are directly impacted by the closure; nor did they reach out to local fishing communities directly impacted by the fishery closure.[88] *Four full years* had now passed since the Ninth Circuit's decision.

Between the October 2020 meeting and the December 2020 meeting, the State publicly stated that it had no preferred alternative and that Alternative 4 was included merely to "provide a full range of alternatives for consideration."[89] Behind the scenes, however, Commissioner Lang determined that the State was unwilling to accept Alternative 2, the delegated state program that had been the primary focus for the entire remand process.[90] According to Commissioner Lang, there is a "State Right to Manage" the fishery, but under a delegated program in Alternative 2, NMFS and the Council "must oversee the state's management of federal water fisheries to ensure its compliance with federal standards."[91] Such a process, he explained "would open management of an Alaskan salmon fishery to federal and outsider oversight," and "the Council would be

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[86] AKR_6642, 7104.
[87] AKR_7105, 7130–33; AR_6662-63.
[88] *See* AKR_7104; AKR_6642.
[89] AKR 700–01.
[90] AKR_683–85.
[91] *Id.*

required to take actions to bring state management in federal waters in line with federal standards."[92] Commissioner Lang intended the State's Alternative 4 to "ensur[e] against federal incursion into this and other state-managed salmon fisheries."[93]

Also during this same time, Deputy Director Baker proceeded to develop her draft motion for the Council to select Alternative 4 as the preferred alternative as well as a draft Council rationale for the motion.[94] She was again aided by NMFS and Council staff as well as the office of NOAA General Counsel, who removed troublesome phrases like the "State's sovereign rights over management of the salmon fisheries" and authored contrived conservation-based reasons for the closure.[95] NMFS staff also counseled the State that if it were to say it was "unwilling" to accept a delegated program, that would eliminate Alternative 2 and force the Council to "focus on comparing the merits and [Magnuson Act] consistency of Alternatives 3 and 4."[96] No one informed the public that Alternative 2 might be removed from consideration or that the State was "unwilling" to accept a delegated program.

Between the October 2020 meeting and the December 2020 meeting, the Council was sent 225 written comments from the public that uniformly urged adoption of some

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[92] AKR_684.

[93] AKR_685. The State currently accepts a delegated programs for salmon in federal waters off southeast Alaska and several other fisheries off the coast of Alaska. AKR_574.

[94] AKR_692, 702–07.

[95] AKR_712 (quote), 709–14, 723 ("NOAA General Counsel provided some suggestions for building the record").

[96] AKR_725.

form of Alternative 2 (unaware that the State had already nixed this option behind the scenes) and in strong opposition to Alternative 4.[97] These comments raised grave concerns about the socioeconomic impacts of Alternative 4, but none of those impacts were added to the draft EA/RIR.[98]

Only after receiving an additional 35 oral testimonies at the December 2020 meeting from individuals and businesses and community leaders that uniformly favored Alternative 2 and opposed Alternative 4 did Deputy Director Baker announce: "the State of Alaska is determined it is unwilling to accept delegated management authority under Alternative 2."[99] This announcement came as a surprise to the public given that the State had spent the previous four years working with the Council, NMFS, and stakeholders to develop a viable delegated program under Alternative 2.[100]

As predicted by NMFS staff, the State's surprise announcement left only Alternatives 3 and 4 on the table for Council evaluation at the December meeting.[101] But Alternative 3 had never been fully developed, as the focus of the work for four years had been Alternative 2.[102] And Alternative 1 (no action) was not viable. So, at the State's urging, the Council voted to accept the State's proposal for Alternative 4—an hour and

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[97] AKR_594–672. Only the sport fishing industry supported Alternative 4. AKR_594.

[98] *See, e.g.*, AKR_595–99 (City resolutions explaining how closure takes out the area "where most of the Cook Inlet Drift Fleet harvest occurs, effectively eliminating the economic viability of the fishery and viability of local seafood processors").

[99] AKR_7301–02.

[100] AKR_574.

[101] AKR_7308–18.

[102] AKR_575.

15 minutes after announcing it was unwilling to accept delegation.[103] After helping to orchestrate the closure behind the scenes, the NMFS Council representative (NMFS Regional Director James Balsiger) abstained from voting due to concerns that this issue will be "litigated."[104]

Following the Council's decision in December 2020, NMFS staff and Regional Director Balsiger drafted FMP Amendment 14 to effect the commercial fishing closure in Cook Inlet.[105] On August 12, 2021, Regional Director Balsiger then reviewed the plan amendment that he wrote and found his own work to be consistent with the Magnuson Act.[106] NMFS published final regulations implementing the closure on November 3, 2021.[107] As a result, commercial fishermen who would otherwise be permitted to fish for salmon in federal waters in Cook Inlet this season, beginning on June 20, 2022, are now prohibited from doing so.

III. STANDARD FOR JUDICIAL REVIEW UNDER THE MAGNUSON ACT

"Actions taken by the Secretary under regulations implementing fishery management plans are 'subject to judicial review to the extent authorized by, and in accordance with,' the Administrative Procedure Act (APA)."[108] "Judicial review under the APA allows courts to 'hold unlawful and set aside agency action, findings, and

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[103] AKR_7319.
[104] AKR_7315.
[105] AKR_15532–33.
[106] AKR_19264.
[107] AKR_13822–42.
[108] *Pac. Dawn LLC v. Pritzker*, 831 F.3d 1166, 1173 (9th Cir. 2016) (quoting 16 U.S.C. § 1855(f)).

conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[109] "To determine whether the agency's decision was arbitrary and capricious, the court must consider whether the decision was based on a consideration of the relevant factors required by the statute, but the court is not empowered to substitute its judgment for that of the agency."[110]

"An agency's decision may 'be found to be arbitrary and capricious if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of the agency's expertise.'"[111] If the Secretary "'has considered the relevant factors and articulated a rational connection between the facts found and the choice made,'" then the decision is not arbitrary or capricious.[112] But if the "'agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action.'"[113]

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[109] *Id.* (quoting 5 U.S.C. § 706(2)(A)).
[110] *Id.* (quotations and citations omitted).
[111] *Id.* (quoting *Yakutat, Inc. v. Gutierrez*, 407 F.3d 1054, 1066 (9th Cir. 2005)).
[112] *Id.* (citation omitted).
[113] *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999) (citation omitted).

IV. ARGUMENT

A. NMFS's Approval of the Fishery Closure Is Arbitrary, Capricious, and Contrary to Law.

In *United Cook*, the Ninth Circuit held that NMFS was *required* to produce a fishery management plan to govern the Cook Inlet salmon fishery, stating that the purpose of the Magnuson Act is to ensure that "federal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns."[114] NMFS's response was to close all commercial salmon fishing in Cook Inlet federal waters and turn over all management responsibility for the rest of Cook Inlet to the State of Alaska, free of any Magnuson Act obligations. In other words, the only substantive change that has occurred in the five-plus years since the Ninth Circuit's decision is that federal fishing is now closed. This violates the Magnuson Act, disregards the Ninth Circuit's clear instruction, and arbitrarily and capriciously elevates the State's interest over the goals and purpose of the Magnuson Act.

1. The Fishery Closure Is Contrary to Law.

As set forth below, the closure was not intended to serve a conservation purpose, as required by the Magnuson Act, but to continue deferring NMFS's responsibilities to the State, contrary to *United Cook*. The closure is therefore contrary to law and should be vacated.

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[114] *United Cook*, 837 F.3d at 1063.

a. Amendment 14 is not a conservation measure.

The purpose of the Magnuson Act is to facilitate utilization of our nation's fishery resources under sound scientific management and "'realize [their] full potential.'"[115] To that end, fishery management plans must "achieve and maintain, on a continuing basis, the optimum yield from each fishery."[116] The Magnuson Act defines "optimum" in part as "the amount of fish which . . . will provide the greatest overall benefit to the Nation."[117]

In limited circumstances, such as where a stock of fish is depleted or overfished, sound principles of conservation and management may require the closure of a fishery. Specifically, an FMP may "designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear."[118]

The closure in Amendment 14, however, is not a conservation measure. The Magnuson Act defines "conservation and management" as measures "which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment" and "which are designed to assure that— (i) a supply of food and other products may be taken, and that recreational benefits may be obtained, on a continuing basis; (ii) irreversible or long-term

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[115] *Groundfish F. v. Ross*, 375 F. Supp. 3d 72, 83 (D.D.C. 2019) (16 U.S.C. § 1801(a)(6)).

[116] 16 U.S.C. § 1801(b)(4).

[117] *Id.* § 1802(33)(A).

[118] *Id.* § 1853(b)(2)(A).

adverse effects on fishery resources and the marine environment are avoided; and (iii) there will be a multiplicity of options available with respect to future uses of these resources."[119] Amendment 14 does none of these things. Rather, it is a political measure that allowed NMFS to avoid the administrative burden of managing a fishery that it has never wanted to manage in the first place while catering to the State's claimed "Right to Manage."[120] For this reason alone, NMFS's approval of Amendment 14 was arbitrary, capricious, and contrary to law.[121]

Moreover, Amendment 14 puts the entire fate of the Cook Inlet salmon fishery in the hands of the State of Alaska. Yet NMFS concedes that "Alaska is not bound by the Magnuson-Stevens Act in its management of salmon in state waters," and thus ignores the Magnuson Act's goals, purpose, and national standards (as it has done for years).[122] NMFS further concedes that it did *not even evaluate* whether the State was managing salmon in a manner consistent with the Magnuson Act, because it viewed such concerns as "outside the scope of this rulemaking."[123] In other words, NMFS arbitrarily approved a *federal fishery* closure that allows the State to have complete management authority over one of the nation's most productive salmon fisheries, without requiring the State to manage the fishery in a manner consistent with the Magnuson Act.

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[119] *Id*. § 1802(5).

[120] *See* AKR_684.

[121] *See Groundfish*, 375 F. Supp. 3d at 88–89 (NMFS's allocation of fishing privileges improper where not reasonably calculated to promote conservation).

[122] 86 Fed. Reg. 60,568, 60,586 (Nov. 3, 2021) (AKR_13822–42).

[123] *Id*. And to be sure, the State is not managing the fishery in a manner consistent with the Magnuson Act. *See, e.g.*, AKR_906.

NMFS's pretense for the closure is that it is a "precautionary management approach to preventing overfishing."[124] But NMFS's statutory duty is to "prevent overfishing while *achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry*."[125] The Cook Inlet stocks are not at risk of being overfished. NMFS's own analysis states that "[o]verfishing is not occurring for any Cook Inlet salmon stocks, and none are in an overfished status."[126] To the contrary, the risk to achieving optimum yield is chronic *underfishing* under the State's mismanagement.[127] And even if "overfishing" was a concern, Amendment 14 does nothing to prevent overfishing. It turns total control of the fishery over to the State with no obligation to comply with the Magnuson Act. NMFS's "precautionary approach" is not supported by the facts in the administrative record.

b. Amendment 14 continues to defer management in violation of *United Cook*.

Instead of promoting conservation, the closure was intended to affect the same kind of improper delegation that was rejected by the Ninth Circuit:

> The Act is clear: to delegate authority over a federal fishery to a state, NMFS must do so expressly in an FMP. 16 U.S.C. § 1856(a)(3)(B). If NMFS concludes that state regulations embody sound principles of conservation and management and

[124] 86 Fed. Reg. at 60,576 (ARK_13830).
[125] 16 U.S.C. § 1851(a)(1) (emphasis added).
[126] AKR_1731.
[127] *See* AKR_905 (describing significant over escapement events in nine of the last 10 years); AKR_17681–89 (Committee report identifying underfishing as significant problem).

> are consistent with federal law, it can incorporate them into the FMP.[128]

In *United Cook*, the court rejected Amendment 12 because it gave the State control over management of the fishery without compliance with federal standards and without management "'through'" the FMP.[129] The Ninth Circuit explained that NMFS and the Council could develop a delegated program under the Magnuson Act, precisely as they had done for salmon fishing in southeast Alaska.[130]

But instead of following the statute, Amendment 14 is just another improper delegation that results in no Magnuson Act oversight.[131] Under Amendment 14, all harvest of Cook Inlet salmon will be managed solely by the State of Alaska, including commercial harvest in state waters and recreational harvest in state and federal waters. The State gets to decide, without *any* federal involvement, what quantity of these fish may be caught each year and who gets to catch them. NMFS and the Council effectively divested themselves of any obligation to manage the fishery and converted an important *national* resource into a state resource. NMFS's decision to approve Amendment 14 is therefore arbitrary, capricious, and contrary to law.

c. Amendment 14 fails to include required protections applicable to fishing closures.

Even if the closure had a legitimate conservation basis (it does not),

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[128] *United Cook*, 837 F.3d at 1063.
[129] *Id.* (citation omitted).
[130] *Id*.
[131] *Id.* ("[T]he federal government cannot delegate management to a State without a plan.").

Amendment 14 fails to include required FMP elements to justify a fishing closure. The Magnuson Act requires NMFS to demonstrate, for "any closure of an area under this chapter that prohibits all fishing, that such closure:

> **(i)** is based on the best scientific information available; **(ii)** includes criteria to assess the conservation benefit of the closed area; **(iii)** establishes a timetable for review of the closed area's performance that is consistent with the purposes of the closed area; and **(iv)** is based on an assessment of the benefits and impacts of the closure, including its size, in relation to other management measures (either alone or in combination with such measures), including the benefits and impacts of limiting access to: users of the area, overall fishing activity, fishery science, and fishery and marine conservation[.][132]

Amendment 14 contains *none* of this information.[133] Nor could it as there was no conservation purpose for Amendment 14 (*see infra*).

According to NMFS, it need only comply with 16 U.S.C. § 1853(b)(2)(C) if "all fishing is prohibited" in a closure area and, under Amendment 14, "recreational fishing can still occur in the Cook Inlet EEZ."[134] In NMFS's view, it can completely and permanently close one of the best commercial fishing locations in the country *without* relying on the best scientific information available, *without* including criteria to assess the conservation benefit of the closed area, *without* establishing a timetable for review of the performance of the closed area, and *without* assessing the benefits and impacts of the

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[132] 16 U.S.C. § 1853(b)(2)(C) (emphases added); *see Pac. Dawn*, 831 F.3d at 1169 (NMFS must take into account the § 1853(b) factors when FMP contains discretionary provision).

[133] *Compare* 86 Fed. Reg. 60568–88 *with* 16 U.S.C § 1853(b)(2)(C).

[134] 86 Fed. Reg. at 60,585.

closure on the overall fishery including the impacts to fishermen and the benefits of conservation.

This renders the statute largely meaningless. Under NMFS's justification, it could close all commercial fishing in federal waters and avoid the requirements of 16 U.S.C. § 1853(b)(2)(C) so long as it allowed the harvest of a single fish by recreational or subsistence fishermen in federal waters. This is no better than the "single ounce of water" argument already rejected by the Ninth Circuit.[135]

NMFS's position also makes no sense in the legislative context. The provisions of 16 U.S.C. § 1853(b)(2)(C) were added to the Magnuson Act effective in 2007 as part of a comprehensive reauthorization of the Magnuson Act.[136] Congress acted against the backdrop of a "radical reduction in sport salmon fishing and an effective closing of the salmon fishing season on most of the west coast" that occurred in 2006, and a sentiment that "[b]y effectively closing the salmon fishery, the administration is not just terminating an economy, it is ending a way of life."[137] Congressman Young, in particular, was concerned that the Magnuson Act's instructions "dealing with ending overfishing, rebuilding overfished fisheries, and setting harvest levels to prevent overfishing all need[ed] to be taken in the context of the National Standards and need[ed] to be viewed

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[135] *See United Cook*, 837 F.3d at 1064 ("But, under the government's interpretation, it could fulfill its statutory obligation by issuing an FMP applying to only a single ounce of water in that fishery.").

[136] Pub. L. No. 109-479, 120 Stat. 3575 (2005).

[137] 152 Cong. Rec. H9206-03, H9234, 2006 WL 3591971 (2006) (statement of Rep. Wu).

with an eye toward balance, flexibility, and common sense," and emphasized that the "act should not be used as a tool for stopping all fishing activities in U.S. waters."[138] The protections of 16 U.S.C. § 1853(b)(2)(C) are meaningless if, as NMFS contends, they do not apply to the closure of *all* commercial salmon fishing in federal Cook Inlet waters.

Besides, NMFS's "recreational fishing" rationalization only underscores the arbitrariness of the commercial closure. NMFS approved a plan amendment that closes commercial fishing in the EEZ completely, while illegally allowing recreational fishing on those same salmon stocks in the same federal areas to continue under State management relying on the "deferral" process in Amendment 12 that the Ninth Circuit found to be illegal.[139]

In sum, NMFS's decision to close commercial fishing is contrary to the purpose, intent, and express requirements of the Magnuson Act, and the instructions of the Ninth Circuit, and consequently, Amendment 14 and its implementing regulations should be vacated.

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[138] *Id.* at H9233 (statement of Rep. Young).

[139] *United Cook*, 837 F.3d at 1063 ("[T]he federal government cannot delegate management to a State without a plan.").

2. Amendment 14 Is Not Consistent with the National Standards and Other Requirements of the Magnuson Act.

For many of the same reasons, Amendment 14 also runs afoul of multiple National Standards and other statutory requirements for fishery management plans.[140] These violations are addressed below.

a. Amendment 14 violates National Standard 1 and fails to provide for the conservation and management of the entire fishery.

National Standard 1 requires that an FMP "prevent overfishing while achieving . . . the optimum yield from each fishery for the United States fishing industry."[141] The term "fishery" means "one or more stocks of fish which can be treated as a unit for purposes of conservation and management" ***and*** "any fishing for such stocks."[142] NMFS's obligation thus expressly extends to *stocks of fish* and *any fishing* for such stocks. Amendment 14 violates National Standard 1 for numerous reasons.

First, Amendment 14 fails to provide any means to ensure that the Cook Inlet salmon stocks are not overfished or to ensure that the fishery is achieving optimum yield on a continuing basis.[143] Instead, it: (a) closes commercial fishing in the Cook Inlet EEZ

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[140] *See Fairweather Fish, Inc. v. Pritzker*, 155 F. Supp. 3d 1136, 1142 (W.D. Wash. 2016) (NMFS "must ensure that the Final Rule is consistent with the National Standards. A bare conclusion that the rule is consistent with a particular standard is arbitrary, capricious, and otherwise not in accordance with law.").

[141] 16 U.S.C. § 1851(a)(1).

[142] *Id.* § 1802(13).

[143] *See Oceana, Inc. v. Ross*, No. 16-CV-06784-LHK, 2018 WL 1989575, at *15 (N.D. Cal. Jan. 18, 2018) (FMP violated National Standard 1 when NMFS failed to consider relevant evidence whether overfishing would be prevented), *enforcement granted*, 359 F. Supp. 3d 821 (N.D. Cal. 2019).

Subarea and sets the optimum yield for commercial fishing at zero; (b) says *nothing* about optimum yield for recreational fishing in that same Subarea; and (c) sets the optimum yield "for the Cook Inlet salmon fishery" as "the combined catch from all salmon fisheries within Cook Inlet" that are authorized by the State of Alaska.[144] In other words, NMFS set "optimum yield" for the entire fishery at whatever level of harvest happens to occur under a state-managed fishery. And that harvest is not required to comply with the Magnuson Act or the FMP.[145]

Second, NMFS's decision to default "optimum yield" to the State's sole discretion is particularly arbitrary given that the State is wasting millions of salmon every year.[146] State management has resulted in commercial fishery disasters three times in the last decade in Cook Inlet alone (2012, 2018, and 2020), and many of the years that were not officially declared disasters were dismal at best.[147] Achieving the "optimum yield" for a fishery is supposed to "provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities" and be prescribed "on the basis of the maximum sustainable yield from the fishery."[148] NMFS's deferral to the State ensures that "optimum yield" will be replaced with a continuous series of fishery disasters.

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[144] AKR_1917.
[145] 86 Fed. Reg. at 60,586.
[146] *See supra* page 7–10.
[147] *See supra* note 1 and accompanying text; AKR_577–78.
[148] 16 U.S.C. § 1802(33).

Third, Congress sought to ensure continued compliance with National Standard 1 by requiring all councils to establish "annual catch limits for each of its managed fisheries that may not exceed the fishing level recommendations of its scientific and statistical committee."[149] Every FMP must provide those annual catch limits, as well as "measures to ensure accountability."[150] But here, NMFS and the Council bypassed that scientific backstop by setting the annual catch limit at zero for commercial fishing in the EEZ and providing no annual catch limit for recreational fishing in the EEZ for those same stocks of fish, and no annual catch limit or accountability measures for the rest of the range of the stock where significant harvest will actually be occurring.[151]

There is no plausible way to reconcile Amendment 14 with National Standard 1. "When Congress directed each Council to create an FMP 'for each fishery under its authority that requires conservation and management,' *id.* § 1852(h)(1), it did not suggest that a Council could wriggle out of this requirement by creating FMPs only for selected parts of those fisheries, excluding other areas that required conservation and management."[152] Yet that is precisely what NMFS did here (*again*); it exempted recreational fishing in federal waters and provided no meaningful management consistent with National Standard 1 (or any National Standard) for the fishery throughout its

[149] *Id.* § 1852(h)(6).
[150] *Id.* § 1853(a)(15).
[151] AKR_1918 (annual catch limit ("ACL") zero); *see* AKR_1912–19.
[152] *United Cook*, 837 F.3d at 1064 (citation omitted).

range,[153] instead deferring that to the State. But NMFS cannot "exempt a fishery under its authority that requires conservation and management from an FMP because the agency is content with State management."[154]

b. Amendment 14 is a political decision that violates National Standard 2.

National Standard 2 requires that "[c]onservation and management measures shall be based upon the best scientific information available."[155] The purpose of this provision is to "employ the 'best available scientific information' as its methodology in making its decisions" and to prohibit making decisions based on "pure political compromise."[156] As the Ninth Circuit has explained, "the best available politics does not equate to the best available science as required by the Act."[157] Thus, "if the agency's decision was in any material way influenced by political concerns it should not be upheld."[158]

Here, Amendment 14 was materially influenced by political concerns. The State's last-minute inclusion of the closure alternative was based on its desire to avoid "federal and outsider influence" in the management of the Cook Inlet salmon fishery.[159] Commissioner Lang wanted to maintain the "State Right to Manage" the fishery and

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[153] 16 U.S.C. § 1851(a)(3) ("To the extent practicable, an individual stock of fish shall be managed *as a unit throughout its range*, and interrelated stocks of fish shall be managed as a unit or in close coordination." (emphasis added)).

[154] *United Cook,* 837 F.3d at 1057.

[155] 16 U.S.C. § 1851(a)(2).

[156] *Midwater Trawlers Coop. v. Dep't of Com.*, 282 F.3d 710, 720 (9th Cir. 2002).

[157] *Id*.

[158] *Earth Island Inst. V. Hogarth*, 494 F.3d 757, 768 (9th Cir. 2007) ("Congress's clear intent was to have the findings be based on science alone.").

[159] *See* AKR_683.

avoid "federal incursion into this and other state-managed salmon fisheries."[160] Commissioner Lang recognized that the closure is "a hard pill to swallow but the side effects [of federal or outsider influence] could kill us."[161] With that political agenda as motivation, the State worked behind the scenes with NMFS and Council staff to produce an outcome that catered to the State's political needs, with the discussion of conservation issues serving as a pretext to justify a political decision.[162] This "led to a decision driven more by politics than science."[163] It also led to a process that was ultimately a sham. The Council never had a meaningful vote on multiple viable alternatives. It presented the FMP amendment the State desired, and NMFS simply rubber-stamped that decision.[164] For all of these reasons, Amendment 14 violates National Standard 2 and is arbitrary and capricious.

c. Amendment 14 violates National Standard 4.

National Standard 4 provides that "[i]f 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

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[160] AKR_684–85.

[161] AKR_692.

[162] *See supra* pages 15–20.

[163] *Earth Island Inst. V. Evans*, No. C 03–0007, 2004 WL 1774221, at *29 (N.D. Cal. Aug. 9, 2004).

[164] *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 54 (D.D.C. 2012) (citing 16 U.S.C. § 1854(a)) (NMFS may not "simply rubber stamp the Council's decisions").

conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges."[165]

Amendment 14 violates this standard. It unfairly eliminates all fishing privileges for commercial permit holders in federal waters in the EEZ (one of the best commercial fishing locations in Alaska) while leaving open this same area to be used solely by recreational fishermen.[166] This closure is not a fair and equitable assignment of privileges.[167] And the closure was calculated to serve political interests and turn fishery control over to the State of Alaska, not promote conservation.[168] This is not consistent with National Standard 4.

NMFS responds that National Standard 4 does not apply because Amendment 14 "does not allocate or assign fishing privileges among commercial salmon fishery participants or other salmon fishery sectors."[169] Not true. NMFS's own regulations explain that "[a]llocations of fishing privileges include . . . different quotas or fishing seasons for recreational and commercial fishermen," and "assignment of ocean areas to different gear users."[170] Amendment 14 clearly fits this definition. The State explains that

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[165] 16 U.S.C. § 1851(a)(4).

[166] *See* AKR_1917–18.

[167] *See Guindon v. Pritzker*, 240 F. Supp. 3d 181, 195 (D.D.C. 2017) ("Amendment 28 therefore places the commercial sector at a permanent disadvantage [to the recreational sector] by failing to take into account the IFQ program and its impact on reallocation. The Court cannot deem such a scenario fair and equitable as required by National Standard Four.").

[168] *See supra* section IV.A.2.b.

[169] 86 Fed. Reg. at 60,582.

[170] 50 C.F.R. § 600.325(c)(1).

the closure will "shrink" the drift fleet and that "[f]ish not harvested in the EEZ would become available to commercial set gillnet, sport, personal use, and subsistence fishermen throughout upper Cook Inlet."[171] This is an allocation. As one NMFS staff person explained, "[o]ne of the results of [Alternative] 4 is *reallocation* from the drift gillnet to other fisheries, and the State could certainly work with sport fishers to increase sport harvest in the EEZ."[172] The fishery closure results in the "usual winners/losers" associated with assignment of privileges[173] and therefore must be done in an equitable manner. There was nothing fair or equitable about completely closing fishing to one user group (commercial driftnet fishing) in federal waters, while providing no restrictions of any kind on any other fishing on those same stocks of fish.

d. Amendment 14 violates National Standard 8 and the obligations it imposes to assess the impacts of the closure.

National Standard 8 provides:

> Conservation and management measures shall . . . take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2), 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.[174]

Thus, to satisfy this requirement, conservation measures must "provide for the sustained participation" of fishing communities, and "minimize economic impacts on such

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[171] AKR_468–69.
[172] ARK_7281 (emphasis added).
[173] *Id*.
[174] 16 U.S.C. § 1851(a)(8).

communities," and the analysis of those concerns must be based on the best scientific and commercial data available.

Amendment 14 runs afoul of these requirements in two ways. ***First***, NMFS and the Council failed to meaningfully assess the actual impact of the closure on fishing communities. NMFS was required to "assess, specify, and analyze the likely effects" of the fishery closure on fishing communities.[175] But the fishery impact statement is cursory at best. NMFS and Council staff asked for the analysis of impacts of the closure following the October 12, 2020 meeting, and it was completed and released to the public less than 30 days later on November 9, 2020.[176]

NMFS's "research" consisted of sending a questionnaire to the State of Alaska to ask what it thought the impacts of the closure (that it requested) would be.[177] No such inquiry was made to commercial fishing interests or fishing communities.[178] And when hundreds of comments came in from the public, the commercial fishing sector, legislators, and local communities showing that Amendment 14 would cause businesses to close, the industry to collapse, the loss of jobs and livelihoods, harm to resources and the culture of the local communities, and basically "put an end to commercial salmon

[175] *Id.* § 1853(a)(9).
[176] *See* AKR_7104.
[177] *See supra* page 17.
[178] *Id.*

fishing in Cook Inlet and therefore, an Alaskan way of life," *those impacts were ignored*.[179]

As a result, the EA/RIR addresses no evidence of *actual* impacts and is instead limited to a three-page discussion of *possible* impacts to commercial fishing and community impact with no analysis of the *likely* effects.[180] For example, the statement says that "drift gillnet vessels displaced by a permanent EEZ closure would have the options of ceasing to fish or relocating their fishing activities to State waters in Upper Cook Inlet," but makes no effort to ascertain which option is *likely* (quitting or relocating), and what the economic consequences of those choices would be.[181] The statement says that "a number of factors *may potentially* make it difficult for vessels to fully offset the loss of access to the EEZ by increasing effort inside State waters," but also that "it is *possible* that State waters catch rates by UCI salmon drift gillnet vessels may improve over what has been historically observed."[182] The statement goes on to discuss effects that "could" or "may" happen "if" other events happen, and then does not even attempt to determine which effects are likely, or provide analysis of their magnitude.[183] This falls short of NMFS's statutory obligation to "assess, specify, and

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[179] *See* AKR_594–672 (public comments); *see also Burke v. Coggins*, 521 F. Supp. 3d 31, 40 (D.D.C. 2021) ("[F]ederal agencies should be willing to reconsider their positions after receiving comments from the public."), *appeal dismissed sub nom. Burke v. Raimondo*, No. 21-5086, 2021 WL 2525310 (D.C. Cir. June 15, 2021).

[180] *See* AKR_326–29.

[181] *Id.* at 327; *see Burke*, 521 F. Supp. 3d at 39 (vacating fishery closure rule that had severe short-term economic impacts on fishermen).

[182] AKR_327 (emphases added).

[183] *See* AKR_326–29.

analyze the *likely* effects" of closing commercial fishing.[184] "General statements about 'possible' effects and 'some risk' do not constitute a 'hard look'" at the consequences of an agency action."[185]

Second, NMFS and the Council failed entirely to identify and discuss "possible mitigation measures"[186] and "minimize adverse . . . impacts" on fishing communities.[187] Had the public been informed that the State was unwilling to accept a delegated program under Alternative 2, everyone involved could have devoted their time and energy to developing Alternative 3 in a way that allowed the fishery to continue in federal waters and minimized negative impacts to people and communities that rely on the federal fishery. NMFS's failure to consider any mitigation or minimization measures violates National Standard 8.[188]

B. NMFS Failed to Comply with NEPA.

Although the Magnuson Act-related violations are alone sufficient to vacate Amendment 14, NMFS's approval of the amendment also violated NEPA. "NEPA imposes procedural requirements designed to force agencies to take a hard look at

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[184] 16 U.S.C. § 1853(a)(9) (emphasis added).

[185] *See Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) (addressing requirements of analogous impact statements under NEPA).

[186] 16 U.S.C. § 1853(a)(9).

[187] *Id.* § 1851(a)(8).

[188] *See, e.g.*, *Groundfish*, 375 F. Supp. 3d at 88 (NMFS provided "inadequate explanation of how A113's obvious, practical effect—in fact, its intended effect—of allocating resources to Adak and Atka is consistent with the plain language of National Standard 8.").

environmental consequences" of their proposed actions.[189] Agencies must prepare an environmental impact statement ("EIS") for federal actions that will "significantly affect[] the quality of the human environment."[190] To determine whether a proposed action will have a significant effect on the quality of the human environment, agencies must prepare an environmental assessment ("EA").[191] The EA must consider a reasonable range of alternatives, and include a reasonably thorough discussion of the direct, indirect, and cumulative impacts of the proposed alternative.[192] If an agency declines to produce an EIS, it must provide "a convincing statement of reasons to explain why a project's impacts are insignificant."[193]

NMFS violated NEPA by failing to provide "a convincing statement of reasons" as to why its unprecedented closure will not have significant impacts.[194] Fishing in the EEZ has been occurring for more than 100 years and is an essential part of proper management and conservation of the fishery and a vital contributor to the socioeconomic vitality of local fishing communities.[195] NMFS and the Council spent a less than 30 days evaluating the impacts of closing a fishery that had been in place for a century, inquiring only to the State for information, before concluding the actual impacts were "not

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[189] *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 763 (9th Cir. 2014) (quotations and citation omitted).

[190] 42 U.S.C. § 4332(2)(C).

[191] 40 C.F.R. § 1508.9(a)(1).

[192] *See id.* § 1501.5(c)(2) (2020).

[193] *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1111(9th Cir. 2015) (quotations and citation omitted).

[194] *Id.* (quotations and citation omitted).

[195] *See supra* page 8–10; AKR_902–03.

possible" to determine.[196] The task of evaluating the impact of a closure is not impossible; NMFS made the task impossible by hurrying the analysis into a few weeks, refusing to seek information from anyone but the State, and ignoring information submitted by the public. This was not the "hard look" required by NEPA.

NMFS's EA also fails to consider a reasonable range of alternatives. The last-minute elimination of Alternative 2 required taking a "hard look" at whether Alternative 3 was *actually* viable in light of this new information that Alternative 2 was dead on arrival. That never occurred. The Council voted to adopt Alternative 4 *immediately* after Alternative 2 was eliminated, without any public input. "The bait-and-switch tactic the [Council and NMFS] employed defeats the purpose and intent of NEPA to allow the public opportunity to participate in the decision-making process."[197]

C. Remedy

In light of the above errors, Plaintiffs request that the Court (1) immediately issue an order vacating Amendment 14 and its implementing regulations so that commercial fishing may proceed beginning June 20, 2022, and (2) include in that order a requirement that the parties meet and confer and propose a briefing schedule to this Court to address appropriate additional relief that is warranted in light of NMFS's failure to carry out its statutory duties. Vacatur is the presumptive remedy for agency actions that are arbitrary,

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[196] *See supra* page 17; AKR_7104–05, 7130–33.

[197] *Friends of Clearwater v. McAllister*, 214 F. Supp. 2d 1083, 1089 (D. Mont. 2002).

capricious, or contrary to law.[198] Vacatur of the implementing regulations will reinstate the prior existing regulations, which do not close commercial fishing in federal waters in Cook Inlet.[199] Vacatur will thus provide some immediate relief this coming summer to commercial fishermen who are harmed by Amendment 14.[200] Additional briefing on the appropriateness of the other relief requested in Plaintiffs' Complaint can and should be addressed separately, when the Court and all parties are not faced with the pending consequences of the fishery closure.

V. CONCLUSION

For the foregoing reasons, NMFS approval of Amendment 14 was arbitrary, capricious, and contrary to law, and the agency action should be set aside.

DATED this 7th day of February, 2022.

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Certification: Pursuant to Local Civil Rule 7.4(a)(1), this brief contains 9,988 words.

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[198] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971).

[199] *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force.").

[200] *See* Huebsch Decl. ¶ 12; Martin Decl. ¶ 12.

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2022, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court, District of Alaska by using the CM/ECF system, which will send notice of such filing to counsel of record.

/s/ Jason T. Morgan
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