

Michael R. Gatti, AK Bar No. 8306033
Kendra Bowman, AK Bar No. 0511109
Max Holmquist, AK Bar No. 0911057
Jermain Dunnagan & Owens, PC
3000 A St., Suite 300
Anchorage, Alaska 99501
907-563-8844 (phone)
907-563-7322 (facsimile)
Email: mgatti@jdolaw.com
kbowman@jdolaw.com
mholmquist@jdolaw.com

Attorneys for proposed *amicus curiae* the City of Homer, Alaska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT
ASSOCIATION, et al.

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICES, et al.,

Defendants,

Civil Action No.: 3:21-cv-00255-JMK
3:21-cv-00247-JMK
CONSOLIDATED

WES HUMBYRD, et al.,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICES, et al.,

Defendants.

BRIEF OF AMICUS CURIAE THE CITY OF HOMER, ALASKA

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I. INTRODUCTION

The City of Homer (collectively “Homer” or “the City”) submits this brief, as amicus curiae, in support of Plaintiff, United Cook Inlet Drift Association’s and Cook Inlet Fisherman’s Fund (“UCIDA”) challenge to the National Marine Fishery Service’s (“NMFS”) adoption of Amendment 14 to the Fishery Management Plan for the Salmon Fisheries in the Exclusive Economic Zone (“EEZ”) off Alaska (“Amendment” or “Amendment 14”).¹ Homer’s Amicus Brief is important to assist the Court in reviewing the negative community impacts to Homer arising from NMFS’ adoption of Amendment 14 and its finding that the requirements of National Standard 8 have been met. Homer concurs with the arguments presented by UCIDA and the Alaska Salmon Alliance and will not restate them here. Instead Homer’s brief will focus on negative community impacts caused to Homer by the adoption of Amendment 14 closing a substantial portion of the EEZ to commercial fishing and NMFS’ failure to analyze this impact or minimize the economic impact in violation of National Standard 8 of the Magnuson-Stevens Act of 2006, 16 U.S.C. § 1801 (“MSA”).

II. INTEREST OF AMICUS CURIAE

In *United Cook Inlet Drift Ass’n v. NMFS*, the Ninth Circuit required NMFS to amend its Fishery Management Plan (“FMP”) for salmon fisheries in the Cook Inlet EEZ.²

¹ 86 Fed. Reg. 60, 568, 60, 586 (Nov. 3, 2021); Dkt. 1; Dkt. 38; Dkt. 35.

² 837 F.3d 1055 (9th Cir. 2016).

It therefore proposed four alternative amendments: Alternative One would have taken no action, and left the status quo of fishing and management of those waters. NMFS determined that alternative was not an option due to the Ninth Circuit Court ruling.³ Alternative Two was to have federal oversight of the waters with certain management delegated to the state. Alternative Three was federal oversight and management of the Cook Inlet EEZ, and the fourth alternative was federal oversight of those waters, with the waters closed to commercial salmon fishing.⁴

NMFS chose Alternative Four which became Amendment 14, the most unreasonable option to adopt as part of the Fisheries Management Plan (FMP). Amendment 14 creates a subarea which closes the western portion of the EEZ to commercial fishing, thereby imposing an extremely unreasonable fishing ban on the drift gillnet fleet from the only source of salmon removal in Cook Inlet with serious economic consequences for Homer and its citizens. According to the Environmental Assessment/Regulatory Impact Review (“EA/RIR”), Alternative Four was erroneously not considered to have a “significant” impact on salmon stocks in Cook Inlet, stating:

Given that drift gillnet fishing in the EEZ is only one source of salmon removals in Cook Inlet, and that compensatory fishery effort would be expected in State waters, any reductions in the harvest of Cook Inlet salmon stocks are not expected to result in significant impacts⁵

³ AKR 0000044.

⁴ *Id.*

⁵ *Id.*

The EA/RIR concluded the closure under Alternative Four is likely to result in an overall reduction of fishing time and space for salmon harvests in Cook Inlet, and that “commercial salmon harvest patterns would be expected to change.”⁶ According to NMFS, “whether fish unharvested in the EEZ go unharvested elsewhere is hard to quantitatively predict”, “However, salmon surplus to escapement needs are expected to be harvested in State waters salmon fisheries, including the State waters drift gillnet fishery whenever possible.”⁷

As set out herein, NMFS’ adoption of Amendment 14 fails to analyze or mitigate the economic impact closing the fishery will have on Homer (who is disproportionately impacted). Homer’s economic livelihood will be irreparably damaged through the loss of tax income, Port and Harbor fees, and it will eliminate jobs currently held by fishermen, seafood processors, truck drivers, ocean shipping companies, fuel distributors, fishing gear dealers, boat builders, mechanics, and all of the other small business that rely on the fishery for their livelihood. Homer will suffer greater social and economic impacts than any other fishing community. Homer has an interest in maintaining the livelihood and the way of life for Homer’s commercial fishermen and fishing-related industries. It is a way of life that is embedded in multi-generations of Homer fishing culture.

⁶ *Id.*

⁷ *Id.*

III. IMPACT OF AMENDMENT 14 ON THE CITY OF HOMER

Homer is a first class general law city incorporated March 31, 1964. In addition to public safety, Homer operates an airport terminal, public library, recreational programs, and it manages a system of trails, parks and campgrounds. Homer's Port and Harbor is a full-service marine trades sector, and operates as a public enterprise.⁸ The Port and Harbor manages the Homer Small Boat Harbor with approximately 1,000 boat stalls, the Pioneer Dock where the US Coast Guard and Alaska State Ferry moor, the commercial Fish Dock (offering eight cranes), which processes over 20 million pounds of commercially caught fish annually.⁹ The Ice production plant which produces and sells an average of 2200 tons of ice annually to the commercial fishing industry, the Fish waste Grinding Facility, and the Deep Water Dock. The Small Boat Harbor is the largest single basin facility in Alaska.¹⁰ Homer owns most of the land on the Homer Spit, which it leases to local businesses. The Port and Harbor employs 18 full time staff members and nine seasonal employees to help with the busy summer season. Taxable sales collected at the Harbor Office render approximately two million dollars per year into the Borough and Homer city budgets.¹¹

⁸ Ex. A at p. 2, Declaration of Brian Hawkins.

⁹ *Id.*; https://www.cityofhomer-ak.gov/sites/default/files/fileattachments/planning/page/30781/2018_homer_comprehensive_plan_final_adopted_version.pdf, Objective D, Port and Harbor.

¹⁰ *Id.* at p. 3.

¹¹ *Id.*

The Upper Cook Inlet commercial salmon drift gillnet fishery is critical to Homer's economy.¹² The 1,000 square miles of waters included in the EEZ are the closest fishing grounds to Homer, present the earliest catch opportunities as the salmon travel up Cook Inlet, and have been part of traditional fishing grounds since statehood.¹³ The drift gillnet fleet is a critical component of Homer, having a vital role in its history, culture, and economy for generations of Alaskans.¹⁴

Section 4.55 of the EA/RIR, identifies (without analysis) those communities most dependent on commercial fishing in the EEZ.¹⁵ With respect to Homer:

Homer has highest vessel participation of any community with participants in the fishery with annual average number 2009-2018 of 104.9, average percent of 24.38 of total participants, and 197 unique vessels;

Homer-based vessels receive the highest gross revenue from the fishery of communities with participants in the fishery with an annual average revenue 2009-2018 of \$5,505,099 and 28.6 percent of total revenue; and

Homer has the highest permit participation in the fishery of communities participating in the fishery with an annual average number 2009-2018 of 107.1, average percent of 23.55 of total permit holders, and 216 unique permits;¹⁶

Homer receives significant revenue from the activities of Cook Inlet commercial drift fleet, namely from harbor fees, ice and crane sales, fish landing tax revenues,

¹² *Id.*

¹³ *Id.*; *see also* AKR 0000598-602.

¹⁴ *Id.*

¹⁵ AKR 0000273-274; 0000269-270.

¹⁶ *Id.*

wharfage, moorage and sales tax revenue.¹⁷ The majority of the drift gillnet permit holders (drifters) in the Cook Inlet Fishery berth their vessels in Homer. The Drifters spend millions of dollars annually into the local economy on vessel repair/upgrades, fishing gear, and provisioning for this vital fishery.¹⁸

The substantial economic impact of closing the EEZ to commercial salmon fishing does not stop at the loss of the livelihoods of Homer-based fishermen who participate in the fishery.¹⁹ It also impacts the businesses who buy, sell and custom process the fish, and fishing vessel crew who seasonally work on the vessels. There would also be direct and significant adverse impact on the local retail and restaurant establishments that conduct commerce with these well-established multi-generational commercial fishing companies. It cannot be overstated the importance of this activity or exchange of goods and services as this commerce pumps tens of millions of dollars into the economy annually.²⁰

Additionally, commerce does not simply stop or stay within the boundaries of Homer. These trade dollars travel out of Homer and into businesses and communities throughout South Central Alaska.²¹

¹⁷ Ex. A, p. 3, Declaration of Bryan Hawkins.

¹⁸ *Id.* at p. 4.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

There are several shore-based seafood processors in Homer that accept deliveries of salmon harvested in the fishery. Multiple boatyards in Homer provide storage and repair services. Homer businesses supply gillnets, and other critical equipment for the Drift fleet. The City maintains ground leases with many of these small businesses on the Homer Spit.²²

Despite a short window for public comment, between October and December 2020, 225 written comments were submitted to NMFS.²³ 224/225 written public comments opposed Alternative 4 (adopted as Amendment 14).²⁴ A large portion of the comments addressed the direct economic impact the closure would have on Homer. More than 30 people testified, the majority of whom were against the closure. Commercial fishermen, both drift gillnetters and set netters, said closing the federal waters will increase competition among user groups, which will likely kill the fishery.²⁵ They testified that the closure will lead to a sharp reduction in catch numbers, which will make it nearly impossible for the few remaining fish processors to stay open. With no one to buy their fish, the fishery will not survive.²⁶

Moreover, with the depth of waters in Cook Inlet, and the historic flow of salmon, harvesting fish effectively within three miles of shore is not feasible.²⁷ To successfully

²² *Id.*

²³ AKR 0000594-672.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 0000635-636.

harvest salmon the drift fleet needs the opportunity to catch where the fish rise to within net depth, is which is why the fisherman need access to larger areas to be effective.²⁸ As one interested person commented, Cook Inlet has the second biggest tides in the world.²⁹ In approximately six hours, the tides vary vertically by as much as thirty feet. On the incoming tide, the strongest currents push northward up the middle of the EEZ, bringing a surge of fish.³⁰ For the commercial drift gillnet fleet, fishing near shore is not an option. Besides the perils of rocks and other navigational hazards and strong currents, state regulations prohibit drift gillnetting within one to two miles of shore in certain circumstances and areas.³¹ The earliest fish are also the freshest fish that command the highest price. If the drift fleet is forced to fish closer to price of their catch will be lower.³² This unsupported reasoning of NMFS overlooks the practical consequences to the drift fleet, higher costs to fish, lower quality fish and fisherman forced to abandon their livelihood due to these factors.

The Cook Inlet salmon fishery is historically recognized as the most productive area for the drift fleet to fish.³³ Commercial fishing in the EEZ in Homer traditionally starts in

²⁸ *Id.*

²⁹ *Id.* at 0000619-620.

³⁰ *Id.*

³¹ *Id.*; *see also* 5 AAC 21.310 (b) (3) (A) through (C)).

³² *Id.* at 0000643.

³³ *Id.* at 0000611, 0000622, 0000645, 0000653.

mid-June and is completed mid-July.³⁴ The salmon harvested up to mid-July are harvested primarily by the drift gillnet fleet and are harvested *almost entirely* in federal waters, in the EEZ.³⁵ This early harvest is pivotal to Homer's economy because the boats would be moored in the Homer harbor and during these openers, the Homer fleet would fish, then return to Homer to deliver their catch, berth their vessels and get fuel and supplies.³⁶ In this early portion of the fishing season Homer receives a large portion of the landings. Because of the closure to the federal waters, most of those landings will bypass Homer.³⁷ That loss of processor activity means a decline in local economic activity and a decline in direct landings revenue to Homer.³⁸ Closing the EEZ would cause a significant portion of the Homer-based fleet to instead base entirely out of northern ports, causing a sharp decline in moorage revenues, fuel purchases and other in-season services that Homer's marine trades businesses provide.³⁹ For those permit holders that cannot (or will not) go to other fisheries, there is a very real threat of commercial vessel abandonment (derelict) in the Homer Port and Harbor or area vessel dry moorage facilities.⁴⁰ Derelict vessels pose a serious risk to the public and to the environment due to lack of maintenance. Abandonment

³⁴ *Id.* at 0000615, 0000622, 0000648.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 0000608-609, 0000611, 0000615-616, 0000626.

³⁸ AKR 0000572-593, 0000625-626.

³⁹ Ex. A at p. 4-5, Declaration of Bryan Hawkins.

⁴⁰ *Id.* at p. 5

of a derelict vessel to the City or area vessel dry moorage facilities could result in expensive remediation costs, as it has in the past.⁴¹

Homer's Mayor and City Counsel responded to the proposed closure of the EEZ through adoption of Resolution 20-127. Their Resolution expresses serious concerns about the impact Amendment 14 on Homer's economy, including the impact on the livelihoods of Homer based fishermen who participate in the fishery, marine trades and other businesses based in Homer. Homer and its residents will suffer negative impacts primarily through the loss of harbor fees, ice and crane sales, fish landing tax revenues, and sales tax revenues.⁴² The Resolution noted the drift fleet vessels get the highest gross revenue from the fishery, with an average annual revenue of \$5.5 million, or 28.6% of the fishery's total revenue.⁴³ Consequently, critical evidence was presented to NMFS demonstrating the devastating social and economic injury to Homer if the fishery was closed.⁴⁴ These compelling impacts were not considered by NMFS. Instead NMFS bootstrapped unreasonable conclusions to support the adoption of Amendment 14.⁴⁵

⁴¹ *Id.*

⁴² AKC 0000598-602.

⁴³ *Id.*

⁴⁴ Homer's Mayor and City Counsel have previously expressed serious concerns over NMFS' treatment of the Cook Inlet EEZ, passing Resolution 14-019(A) and Resolution 21-091 in addition to Resolution 20-127, which are attached hereto as Ex. B.

⁴⁵ A fair balancing of NMFS conclusions claiming to support the adoption of Amendment 14 challenge reasonable minds. When a fair review of the Record and the analysis of UCIDA's and Amicus briefing in this case is performed NMFS' conclusions in support of Amendment 14 must be rejected.

Amendment 14's economic impact reaches beyond the vessels, their owners and captains, and includes wholesale layoffs of crewmembers; undermanned, longer, and more dangerous trips; and mortgage arrearages and eventual foreclosures on the part of fleet vessel owners, to say nothing of the current panicked redirection of effort into other fisheries, which will not be likely to withstand such a displacement without nearing collapse. The result being a large-scale crippling economic loss to Homer and the businesses that serve the Cook Inlet fleet and the related Homer marine economy.⁴⁶

IV. NMFS' ADOPTION OF AMENDMENT 14 VIOLATES MSA NATIONAL STANDARD 8

National Standard 8 of the MSA requires the FMP ensure the sustained participation of fishing communities in a manner consistent with conservation goals while minimizing adverse economic impacts on such communities. National Standard 8 is not satisfied by NMFS merely "looking at" the socio-economic statistics and adopting Amendment 14 as a "precautionary measure" to avoid State of Alaska (SOA) administrative convenience and co-operative State and Federal management of the fishery.⁴⁷ National Standard 8 requires that conservation and management measures, "take into account the importance of fishery

⁴⁶ *Id.*; see also AKR 0000594–671.

⁴⁷ ALASKA CONST. art. 12, § 2 allows the state to cooperate with the federal government on matters of common interest such as fisheries.

resources to fishing communities” “in order to provide for the sustained participation” of the communities and to “minimize adverse economic impacts” on those communities.⁴⁸

In order to meet this obligation, NMFS “must examine the relevant data and articulate findings for its action including a ‘rational connection between the facts found and the choice made.’ ”⁴⁹ Its discussion and analysis must establish that it took a hard look at the potential impacts.⁵⁰ The record must contain sufficient data or analyses so that the agency can consider the relevant factors in a meaningful way.⁵¹ Where an agency fails to consider an important aspect of a problem, offers an explanation for its decision that runs counter to the evidence before it, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, it is irrational, arbitrary and capricious and otherwise not in accordance with law.⁵²

⁴⁸ 16 U.S.C. § 1851(a)(8); 50 C.F.R. § 600.345.

⁴⁹ *Fairweather Fish, Inc.*, 155 F. Supp. 3d 1136, 1142 (W.D. Wash. 2016).

⁵⁰ *National Treasury Employees Union v. Horner*, 854 F.2d 490, 499 (D.C. Cir. 1988) (“[s]tating that a factor was considered ... is not a substitute for considering it.”).

⁵¹ *Id.*; *International Fabricare Institute v. Environmental Protection Agency*, 972 F.2d 384, 392 (D.C. Cir. 1992).

⁵² *See Blue Water Fisherman’s Ass’n v. Mineta*, 122 F. Supp. 2d 150, 177 (D.D.C. 2000) (granting summary judgment motion where the record was “inadequate ... to support [a contested fishing] regulation under National Standards Seven and Eight ... [t]he Secretary failed to set forth a rational connection between the factual record and the choice to impose a blanket ... requirement”). *See also Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Cal. Energy Comm’n v. Dep’t of Energy*, 585 F.3d 1143, 1150-51 (9th Cir. 2009).

NMFS did not meet this obligation because it merely listed economic statistics, failed to analyze the statistics about the economic realities of the fishing industry, and did not seriously take into account the economic impacts and sustainability of fishing communities reliant on the EEZ. NMFS speculates that it is “highly probable” that Amendment 14 will reallocate fish resources from the drift gillnet fishery to the other Cook Inlet user groups. It further indicates that the action is likely to increase escapement which is, in most years, already above upper end goals as UCIDA and ASA argue. However, NMFS provides no analysis or consideration on the impact over-escapement will have on the fishing communities, and more importantly on Homer, the community most disproportionately affected by the EEZ closure. In reality, this not just a minor adjustment of a management plan, it is an unprecedented reallocation of public resources and economic benefits. Amendment 14 creates a profound inequity between two of the primary user groups that share Cook Inlet, commercial and sport fishermen, and eliminates access for commercial fishermen without providing an analysis of the impacts this allocation shift will cause to the fishing communities or the consequences flowing there from.⁵³

⁵³ *Com. of Mass. By Div. of Marine Fisheries v. Daley*, 10 F. Supp. 2d 74, 77 (D. Mass. 1998), *aff'd sub nom. Massachusetts ex rel. Div. of Marine Fisheries v. Daley*, 170 F.3d 23 (1st Cir. 1999) (holding NMFS violated the National Standards when it “ignored existing data” and “promulgated a regulation that [NMFS] knew, or should have known, would allocate fishing privileges in an inequitable manner.”).

NMFS is also required take into account the information, views, and comments received from interested persons.⁵⁴ Public comments (224/225 objecting to closure) urged NMFS not to close the fishery due in large part to the economic cause and effect closure will have on the drift fleet and on Homer. While NMFS indicates Amendment 14 could cause economic harm to communities and businesses reliant on the commercial fishing in the EEZ, and generally lists some limited data regarding Homer (permit numbers), it provides no qualitative or quantitative assessment of the true volume and value of the drift fleet's economic contribution to Homer as raised by the interested parties. Nor does it provide any meaningful analysis of the overall impacts to Homer if the drift fishery in the Cook Inlet EEZ is banned from fishing. All sectors of the marine economy will suffer serious impacts due to the major sea change in the Cook Inlet fishery caused by Amendment 14. "If the notice-and-comment process is to be more than an exercise in futility, federal agencies should be willing to reconsider their positions after receiving comments from the public."⁵⁵ NMFS (in co-ordination with the State) did not undertake serious consideration and analysis regarding the anticipated impacts of Amendment 14 on the Homer marine economy. NMFS' cursory and deficient analysis results in the inescapable conclusion that Amendment 14 is irrational, arbitrary and capricious.

⁵⁴ 16 U.S.C. §§ 1854, 1855(d).

⁵⁵ *Burke v. Coggins*, 521 F. Supp. 3d 31, 41 (D.D.C. 2021), *appeal dismissed sub nom. Burke v. Raimondo*, No. 21-5086, 2021 WL 2525310 (D.C. Cir. June 15, 2021)

National Standard 8 further mandates that the NMFS must “minimize adverse economic impacts on [fishing communities].” A discussion of social and economic impacts should identify those alternatives that would minimize adverse economic impacts” on fishing communities.⁵⁶ It must also assess, specify, and analyze “possible mitigation measures for...fishing communities affected by the plan or amendment.”⁵⁷ Here, NMFS provided a surface-level recitation of possible effects of Amendment 14 on fishing communities, but failed to discuss alternatives that would minimize adverse economic impacts on communities.⁵⁸

NMFS adoption of Amendment 14 results in Homer and the Homer marine economy suffering the vortex of economic loss. NMFS EA/RIR fails to recognize the impact that the reduction of time (the drift fleet fish almost exclusively in federal waters from June through mid-July) and space (fishing within state EEZ waters is not commercially feasible) have on the drift fleet and fishing communities, as time and space are not replaceable. Any such discussion necessarily would have considered whether federal management of the EEZ under Alternative 3 would have minimized such effect.

⁵⁶ 50 C.F.R. § 600.345(c)(5); *Oregon Trollers Ass’n v. Gutierrez*, 452 F.3d 1104, 1122 (9th Cir. 2006). 16 U.S.C. § 1851(a)(8).

⁵⁷ 16 U.S.C. § 1853(a)(9)(A). *See, e.g., Pacific Coast Federation of Fisherman’s Associations v. Blank*, 693 F.3d 1084, 1093 (9th Cir. 2012) (“NMFS proposed, and the Council adopted, various measures to mitigate the impacts of trawl rationalization on fishing communities...”).

⁵⁸ AKR 0000326-329.

Instead, NMFS chose the alternative guaranteed to cause the maximum economic harm. Amendment 14's only mention of potential mitigation involves hypothetical amendments to the Alaska Board of Fisheries plan by the State of Alaska, amendments Homer expects would never be adopted. Accordingly, Homer joins with UCIDA and Cook Inlet Fishermen's Fund's motion and requested remedy presented in its filing at Dkt. 38. Homer further supports the Amicus Brief of Alaska Salmon Alliance at Dkt. 35.

V. CONCLUSION

Homer respectfully requests the Court grant its Motion for Leave to File an Amicus Brief and consider the arguments presented in the public's interest herein to assist the Court with its deliberations in the matter.

DATED this 14th day of February, 2022, at Anchorage, Alaska.

JERMAIN DUNNAGAN & OWENS, P.C.
Attorneys for proposed *amicus curiae* the
City of Homer

By: /s/ Michael R. Gatti

Michael R. Gatti
Alaska Bar No. 8306033
Kendra Bowman
Alaska Bar No. 0511109
Max D. Holmquist
Alaska Bar. No. 0911057

I certify that this pleading contains 3,700 words.

CERTIFICATE OF SERVICE:

I hereby certify that on February 14, 2022, a true and correct copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

By: /s/ Jamie Pierson
Jamie Pierson