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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE**

UNITED COOK INLET DRIFT
ASSOCIATION, *et al.*,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE, *et al.*,

Defendants.

Case No. 3:21-cv-00255-JMK
3:21-cv-00247-JMK

WES HUMBYRD, *et al.*;

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICES, *et al.*,

Defendants.

CITY OF SOLDOTNA'S AMICUS BRIEF

1. INTRODUCTION

Soldotna submits this brief in support of the motion for summary judgment filed by UCIDA and CAA [*Dkt. No. 38*]. Defendants failed to comply with all required national

standards mandated by the Magnuson Stevens Act when adopting Amendment 14. Therefore, adoption of Amendment 14 was an invalid exercise of the administrative authority delegated to Defendants by Congress. The regulation closing the Exclusive Economic Zone in Cook Inlet to commercial fishing must be invalidated.

A. Issues Presented

1. In *UCIDA v. NMFS*, 837 F.3d 1055 (9th Cir. 2016) the 9th Circuit Court of Appeals ruled NMFS’ “deferring” management of the salmon fishery in the Upper Cook Inlet EEZ (“EEZ” or “UCI”) to the State of Alaska violates the Magnuson Stevens Act (“MSA”). Amendment 14 continues to defer management of sport fishing in the EEZ to the State of Alaska. Does adoption of Amendment 14 fail to comply with the 9th Circuit’s ruling in *UCIDA v. NMFS*?

2. National Standard 4 requires allocations of fishing privileges in federal waters to be fair and equitable. Is allowing recreational/sport fishers to harvest 100% of the salmon in the EEZ while allowing commercial fishers to harvest 0% of the salmon in the EEZ fair and equitable?

3. National Standard 8 required Defendants to take into account the importance of commercial fishing in the EEZ to Soldotna in order to minimize adverse economic impacts to Soldotna from closing the EEZ. The Amendment 14 administrative record contains no quantitative economic analysis of: 1) lost income to UCI drift fishermen; 2) lost revenue to the cities of Soldotna, Kenai and Homer; and 3) social and

economic consequences of lost income to UCI drift fishers and local fishing communities. Does failing to even try to analyze economic and social impacts and minimize adverse economic consequences to Soldotna violate National Standard 8?

B. Background

1. Upper Cook Inlet EEZ and Upper Cook Inlet State Waters

The EEZ begins 3 miles from shore and covers more than 1,000 square miles. Adjacent state waters are divided by state regulation into multiple fishing districts. Drift fishing is limited in state waters between 1 and 2 miles from shore.¹ 47% of salmon harvested by the drift fleet are caught in the EEZ.²

2. City of Soldotna's Connection to the EEZ Salmon Harvest

Soldotna is one of five communities identified as being “heavily engaged” in harvesting salmon within the EEZ. This engagement has been consistent for at least 28 years.³ An average of 31 vessels (7.21% of the drift fleet) are owned by Soldotna residents who fish in the EEZ each year grossing an average of \$1,202,193.⁴ \$578,135 (41%) of this revenue originates from fish caught in the EEZ.⁵

¹ Final Environmental Assessment/Regulatory Impact Review for Amendment 14 to the Fishery Management Plan for the Salmon Fisheries in the EEZ Off Alaska (“EA”), AKR0000226, fn. 56.

² *Id.* Fig. 4.6, [AKR0000235].

³ *Id.* Appendix 14, Table 5, [AKR0000504], Table 4-22, [AKR0000282], Table 4-26 [AKR0000286].

⁴ *Id.* Table 4-14 [AKR0000273], Table 4-15, [AKR000275].

⁵ *Id.* Sec. 4.5.2.3 [AKR0000236], Table 4-16. [AKR0000277].

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Soldotna has a vibrant commercial economy that serves commercial fishers who live outside city boundaries. Soldotna’s role as a regional center includes important facilities that serve persons beyond city boundaries including 7 schools, the regional hospital and the Soldotna Sports Center.

Sport fishing is also a vital component of Soldotna’s economy. But sport fishing revenue and its importance to Soldotna was not analyzed by NMFS beyond the comment there is a “marked concentration” of sport fishing for UCI salmon in the City⁶ and speculative comments of a “potential” growth in sport fishing and “potential” increase in “associated support businesses.”⁷ No examination of the number of commercial guides in Soldotna was undertaken and no effort was made to quantify any connection between increased abundance of “in river” salmon and the Soldotna economy was made. Given the significance of sport fishing to Soldotna one might expect a reduction in commercial harvest in the EEZ to be welcome. But Soldotna believes in a fair sharing of an abundant natural resource between all user groups. Amendment 14 is anything but fair.

3. Magnuson Stevens Act

Amendment 14 to the Fishery Management Plan for the Salmon Fisheries in the EEZ Off Alaska was adopted pursuant to authority delegated to NMFS by the Magnuson Stevens Act (MSA).⁸ The MSA established regional fishing councils to make

⁶ *Id.* AKR0000288.

⁷ *Id.* AKR0000470.

⁸ 16 USC 1801-1891.

recommendations for conserving the nation’s fishery resources. Federal management occurs through management plans specific to each fishery occurring in federal waters (“FMP”).⁹ FMP’s are implemented through regulations. Congress identified standards for FMP’s.¹⁰ Those standards are reflected in regulations.¹¹

4. Prior Deferral to State Management of Fishing in the EEZ

In 2012 the portion of the FMP governing fishing for salmon in the EEZ in Cook Inlet “deferred” management by the United States under the MSA to the State of Alaska. This deferral was ruled illegal in *UCIDA v. NMFS*, 837 F.3d 1055, 1063 (9th Cir. 2016). Defendants were ordered to develop an FMP that either assumed federal management in the EEZ or expressly delegated management to the State of Alaska. The UCIDA court stated, “When Congress directed each Council to create an FMP for each fishery under its authority that requires conservation and management," it did not suggest that a Council could wriggle out of this requirement by creating FMPs only for selected parts of those fisheries.” *Id.* 837 F.3d at 1064 (internal citations omitted).

5. Adoption of Amendment 14 Two Months After Being Identified as an Alternative

Defendants embarked on a lengthy regulatory process to comply with the 9th Circuit ruling. The end result was adoption of Amendment 14 to the FMP for Alaska Salmon. Amendment 14 permanently closes the EEZ to commercial fishing. A permanent

⁹ *Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1108 (9th Cir. 2006).

¹⁰ 16 USC 1853.

¹¹ 50 CFR 600.345 et seq.

closure of the EEZ to commercial fishing was first identified as “Alternative 4” for consideration by the North Pacific Management Council on October 12, 2020.¹² Two months later it was adopted.¹³ The relatively short time between identification of Alternative 4 and adoption of Amendment 14 is one reason for the lack of data and analysis of the economic impact of a permanent ban on commercial fishing for salmon in the EEZ on the Soldotna community.

As explained in greater detail below, Amendment 14 fails to meet two of the national standards. National Standard 4 requires allocation of fishing privileges in the EEZ be “fair and equitable.”¹⁴ National Standard 8 required NMFS to analyze how closing the EEZ to commercial fishing would impact sustaining Soldotna’s historic participation in commercial fishing, the ability of Soldotna to continue the community’s participation and how NMFS might minimize the adverse economic impact to Soldotna of the permanent closure of the EEZ to commercial fishing.¹⁵

C. STANDARD OF REVIEW

The standard of review set forth in the Administrative Procedures Act applies.¹⁶ Amendment 14 must be set aside by this court if it is "arbitrary, capricious, an abuse of

¹² AKR0019263.

¹³ AKR0007319.

¹⁴ 16 USC § 851(a)(4).

¹⁵ 16 U.S.C. § 851(a)(8).

¹⁶ 16 U.S.C. § 1855(f)(1).

discretion, or otherwise not in accordance with law[.]”¹⁷ An “agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”¹⁸

D. ARGUMENT

1. NMFS Failed to Assess the Likely Positive and Negative Social and Economic Impacts of Closing the Cook Inlet EEZ Drift Fishery on Kenai Peninsula Fishing Communities

National Standard 8 states:

Conservation and management measures shall . . . take into account the importance of fishery resources to fishing communities by utilizing economic and social data . . . 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.”¹⁹

The regulation implementing National Standard No. 8 provides that an economic analysis must "identify affected fishing communities and then assess their differing levels of dependence and engagement in the fishery being regulated. . . The analysis should discuss each alternative's likely effect on the sustained participation of these fishing

¹⁷ 5 U.S.C. 706(2)(A), *Pac. Dawn LLC v. Pritzker*, 831 F.3d 1166, 1173 (9th Cir. 2016).

¹⁸ *Oregon Trollers Ass'n v. Gutierrez*, 452 F. 3d 1104, 1116 (9th Cir. 2006) quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43(1983); see also, *Alliance Against IFQ's v. Brown*, 84 F.3d 343, 350 (9th Cir. 1996).

¹⁹ 16 U.S.C. § 851(a)(8).

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communities in the fishery."²⁰ In addition, "[t]he analysis should assess the likely positive and negative social and economic impacts of the alternative management measures, over both the short and the long term, on fishing communities[,] "²¹, as well as "identify those alternatives that would minimize adverse impacts on those fishing communities within the constraints of conservation and management goals of the FMP..."²²

NMFS did half of the required work. It undertook a thorough examination of what communities participated in the EEZ salmon fishery and their differing levels of dependance and engagement ultimately identifying 5 "heavily engaged" communities.²³ This work reflects data gathering and a detailed analysis. But at that point NMFS's analysis swerves from a detailed data driven approach to vagaries and "possibilities" utterly devoid of data and analysis. Compare for example, the fairly exhaustive examination of the impacts of implementing vessel monitoring and purchasing GPS or vessel monitoring equipment²⁴ with such statements as "Potential increased in river fish abundance available to sport, personal use and subsistence fisheries in UCI would also likely occur."²⁵ Likewise, "communities may benefit from a range of special fund revenues associated with taxes or fees related to fisheries infrastructure use"²⁶ a general

²⁰ 50 C.F.R. § 600.345(c)(3).

²¹ *Id.* § 600.345(c)(4).

²² *Id.* 600.345(c)(5).

²³ EA, Appendix 14, AKR0000458.

²⁴ *Id.* AKR 0000340-344.

²⁵ *Id.* AKR0000470.

²⁶ *Id.* AKR 0000297.

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statement with no effort at quantification or analysis. Similarly, there is a discussion of potential impact to fish processors,²⁷ but no mention of how economic impacts to processors would impact local communities.

There is no discussion of mitigation of economic impacts to Soldotna. This is a permanent closure. No connection between the closure and the current condition of the numbers of salmon or the health of the stocks is made. NMFS expressly found “overfishing is not occurring for any Cook Inlet salmon stocks, and none are in an overfished status.”²⁸ There is no mention of implementing the closure for a limited period of time and evaluating the impact on the health of salmon stocks. In fact, NMFS admits the permanent closure of the EEZ is not expected to have any conservation impact. “Fishing patterns will change but whether fish unharvested in the EEZ go unharvested elsewhere is hard to quantitatively predict.”²⁹ “Given that existing escapement goals would be maintained, no increases in the harvest of salmon stocks would be expected under Alternative 4.”³⁰ “[I]t is not possible to precisely predict changes in overall removals of Cook Inlet salmon stocks under Alternative 4.”³¹

²⁷ *Id.* AKR0000259-263.

²⁸ *Id.* AKR0000324, AKR 0001731, *see, Blue Ocean Institute v. Gutierrez*, 585 F. Supp. 2d 36, 45-46(D.D.C. 2008) (closure not required if closure would not prevent overfishing).

²⁹ AKR0000469.

³⁰ AKR 0000187

³¹ *Id.*, *See, Burke v. Coggins*, 521 F. Supp. 3d 31 (D.D.C. 2021)(fisheries management measure invalid if imposes significant short-term economic effects with only minor conservation benefits. Finding that drift fishermen derived more than half their income from fishery justified NMFS decision to reverse previous “hard cap” limit on commercial fishery).

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The excuse for this halfhearted at best effort is that it is “difficult.”³² But there is no “difficult” exception to the National Standards. Evaluation of the over escapement of salmon certainly appears technically difficult. But it was done.³³

NMFS appears able to quantify revenue to fishermen. Yet makes no effort to determine how fishermen income circulates within a community. This is doable. In fact, it has been done.³⁴

There is no evidence in the record indicating that NMFS genuinely tried to assess community impact. No evidence of agency outreach to the City of Soldotna, the City of Kenai or the City of Homer. Not even to gather data.³⁵ This is inconsistent with applicable federal regulation. “In cases where data are severely limited, effort should be directed to identifying and gathering needed data.”³⁶

NMFS calculates the percentage of the total commercial salmon harvest taken within the EEZ. It calculates the value of the EEZ salmon harvest. This would easily establish a base line “worst case” scenario for the economic impact of Amendment 14.

³² *Id.*, AKR 0000469 (not possible to precisely predict if fewer fish will be harvested due to “complexities”).

³³ *Id.*, Appendix 13 AKR 0000472-492

³⁴ *See*, Watson, Reimer, Guettabi and Haynie, *Commercial Fisheries and Local Economies*, Alaska Institute of Social and Economic Research (Jan. 2021) (available online at: <http://www.sciencedirect.com/science/article/pii/S0095069621000024>). The authors conclude that each \$1 increase in fisheries earnings generates a \$1.54 increase in community income.

³⁵ By way of example, jurisdictions with local sales tax have relevant data on levels of economic activity by month and quarter. Communities with business licenses might be able to quantify the number of fishing guides in their community. Property tax data is available from the Kenai Peninsula Borough.

³⁶ 50 CFR 600.345(c)(2).

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From there a range of “less than worse case scenarios” could be calculated. NMFS made no effort to do so. Instead, NMFS posits that perhaps the State will expand fishing opportunities in State waters. But there is no evidence in the record justifying this assumption. In fact, NMFS admits the outcome of future actions by the State on commercial fishing outside the EEZ is unknown.³⁷

NMFS appears to assume that economic loss to Soldotna from closure of commercial fishing can be “made up” through increased abundance of salmon available “in river” to personal use and sport fishers. This assumption is overly simplistic. Revenue to Soldotna from sport fishing is directly related to the number of and frequency of participation from out of town residents in sport fishing. The more people who come to Soldotna to fish the more money flows into the local economy. But there is no evidence in the record that an increased abundance of fish has an impact on the number of people traveling to Soldotna to sport fish. Frequently increased abundance leads to expanded limits on the number of salmon that may be harvested daily. But this increased limit is harvested by the same number of people – they are just allowed to keep more of the fish caught. Without any analysis tying increased in river fish available for harvest to the number of anglers attempting to harvest salmon it is pure speculation to assume loss to the Soldotna economy from decreased income for commercial fishers will be recovered

³⁷ AKR 0000323 (“it is uncertain what proposals will be submitted and approved by the BOF during the next meeting cycle.”).

through additional local tax and user fee revenue from spending by sport and personal use fishers.

The other alternative “on the table” was alternative 3 dual federal and state management. NMFS posits how “hard” this would be requiring coordination between state and federal regulators and possible in season or periodic *temporary* closures of the EEZ pending confirmation state escapement goals had been reached.³⁸ NMFS suggests that this would be hard on commercial harvesters because of having to buy equipment, maintain records and the uncertainty of potential in season closures – something they have been living with for decades under a state managed fishery.

Alternative 3 is not a panacea. But clearly the opportunity to harvest some salmon in the EEZ has less negative economic impact than a permanent closure. The NMFS discussion of alternative 3 makes clear this alternative is pursued to achieve the same purported goal of Alternative 4 – conservation and prevention of overfishing. “Where two alternatives achieve similar conservation goals, the alternative that provides the greater potential for sustained participation of such communities and minimizes the adverse economic impacts on such communities would be the preferred alternative.”³⁹

³⁸ AKR0000323-326, AKR0000348-352 (referencing need for federal and state coordination in management of UCI salmon).

³⁹ 50 CFR 600.345(b)(1); *Conservation Law Foundation v. Ross*, 374 F. Supp. 3d 77, 91 (D.D.C. 2019) (MSA does not require prioritizing conservation measures over economic impacts on fishing communities).

There is an aspect of the “it’s so hard” lamentations in the record that is disturbing. One reason coordinated fishery management for the UCI salmon fishery is difficult is because NMFS has never done it. But NMFS’ failure to manage in the past was itself a MSA violation. The very administrative difficulty of which NMFS complains is of its own making. It should not justify a continuing MSA violation.

2. Closure of the Cook Inlet EEZ to Drift Fishing is an Allocation

NMFS claims Amendment 14 is not an allocation between user groups. This defies logic. The user groups referenced in the record are commercial drift harvesters, commercial set net harvesters, personal use and recreational/sport harvesters. Set nets cannot be deployed in the EEZ. There is no personal use fishery allowed in the EEZ. That leaves sport fishing and drift fishing. If the EEZ is permanently closed to commercial fishing 0% of the salmon in the EEZ are being allocated to commercial users and 100% of the salmon in the EEZ are being allocated to recreational users. One user groups harvest is being eliminated not reduced. The other user group is not sharing in the conservation effort. That Amendment 14 does not expressly state this is irrelevant. This court should consider the substance and impact of the regulation not just the words of the regulation. A permanent closure is a permanent allocation.

National Standard 4 provides in part “If it becomes necessary to allocate. . . fishing privileges . . . such allocation *shall be* (A) fair and equitable.”⁴⁰ There is nothing fair about shutting out one user group and allowing another to fish without restriction in the name of “conservation” or “preventing overfishing.” This is especially true when there is no evidence overfishing is occurring or that there is a biological need to restrict commercial fishing due to continued failure to meet escapement goals.

This allocation is unfair. Unlike the drift fleet, sport fishers have multiple alternate areas to fish. And sport fishers are not economically dependent on being able to fish in the EEZ. There is no data in the administrative record establishing the level of sport fishing in the EEZ. The only harvest data for saltwater sport fishing combines catches in the EEZ and catches in state waters.⁴¹

3. Amendment 14 Continues the Illegal Deferment of Management of
Salmon in the EEZ to Alaska

Amendment 14 regulates commercial fishing. It says nothing about recreational fishing. Recreational fishing in the EEZ continues to be federally “managed” under Amendment 12 which deferred management to the State of Alaska. This deferral was expressly held to be illegal in *UCIDA v. NMFS*. There the court held the salmon fishery needed to be included in a federal fisheries management plan. The court decision does

⁴⁰ 16 U.S.C. 1853(a)(4).

⁴¹ AKR0000275.

not reference the commercial salmon fishery. It refers to the salmon fishery as a whole not one component.⁴²

A plan for the salmon fishery is required. Amendment 14 was required to address both commercial and recreational harvest of salmon. It fails to do so. The remedy is to invalidate the plan with a directive to include management of the recreational fishery in the EEZ. This is not a strange requirement. The East area management plan addresses both commercial and recreational user groups.⁴³

4. There Is No Conservation Purpose to Amendment 14

FMP's are supposed to act to conserve a fishery. The ordinary conservation technique is placing limits on fishing intended to either preserve existing stocks or rebuild depleted stocks. Preventing overfishing is a specified goal of the MSA. But here NMFS has adopted a plan with no intent to change the number of salmon escaping capture. NMFS states this in no uncertain terms. "Fishing patterns will change but whether fish unharvested in the EEZ go unharvested elsewhere is hard to quantitatively predict."⁴⁴ NMFS did this was admitting no overfishing was occurring. For Kenai River sockeye

⁴² "Fishery" is defined as "one of more stocks of fish which can be treated as a unit for purposes of conservation and management" and "any fishing for such stocks". 16 USC 1802(13)(emphasis supplied).]

⁴³ See, Fisheries Management Plan for the Salmon Fisheries in the EEZ off Alaska p. 9, Sec. 2.3.1 (Plan addresses both sport and commercial fishing in the East Area of Alaska); see also: Amendment 7 to the Bluefish Fishery Management Plan <https://www.federalregister.gov/documents/2021/11/24/2021-25649/fisheries-of-the-northeastern-united-states-amendment-7-to-the-atlantic-bluefish-fishery-management> (referencing management of both commercial and recreational fisheries in a single plan).

⁴⁴ AKR0000469.

“overfishing and overfished status were not observed between 2003 and 2018.”⁴⁵ So what is the management response to 15 consecutive years where NO overfishing is observed? Close the EEZ to commercial fishing. This is irrational.

CONCLUSION

Amending a fishery management plan so as to continue to defer management of sport fishing in Upper Cook Inlet federal waters to the State of Alaska defies the prior order of the 9th Circuit. Closing an area to commercial fishing when there is no evidence of overfishing is not logically related to conservation of salmon. Closing an area to commercial fishing while expecting the same number of fish will be harvested elsewhere or by other user groups is an irrational act of “conservation.” It is also an allocation of the resource between drift fishers and sport fishers. NMFS admits closure will result in lost income to drift fishers thereby placing all of the economic consequences of the supposed conservation effort on one user group and the communities dependent on commercial fishing. This was done without analysis of the economic and social impact to Soldotna. And it was done on a permanent basis without setting any “recovery” goals for salmon stocks in the EEZ. A way of life that has endured for generations is endangered by this callous and irrational agency action. This has been done not to preserve the resource but to preserve the parochial interest of the State of Alaska in maintaining primacy in fishery

⁴⁵ AKR0000171.

management in Upper Cook Inlet. This violates federal law. Amendment 14 must be vacated.

DATED: February 14, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.4(a), this memorandum contains 3,359 words, excluding the items exempted by Local Civil Rule 7.4(a)(4).

/s/ Brooks Chandler
BROOKS CHANDLER
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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2022, I filed a true and correct copy of the foregoing document with the Clerk of Court for the United States District Court, District of Alaska by using the CM/ECF system, which will electronically serve a copy of the foregoing on counsel of record.

/s/ Brooks Chandler
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