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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 **REPLY BRIEF BY PLAINTIFFS UNITED COOK INLET DRIFT ASSOCIATION AND COOK INLET FISHERMEN'S FUND** **(Local Civil Rule 16.3)**

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I. INTRODUCTION

The Ninth Circuit instructed that the Magnuson-Stevens Act ("Magnuson 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."[1] The National Marine Fisheries Service's ("NMFS") response to that instruction on remand was to entirely close all commercial salmon fishing in federal waters in Cook Inlet so that commercial salmon fishing can only occur in State waters under the exclusive management of the State of Alaska. NMFS claims this was the "only" solution available because the State refused to accept a delegated program for Cook Inlet and did not otherwise support NMFS's management in federal waters.[2] But NMFS does not work at the State's behest when it is applying "federal rules in the national interest."

Congress charged NMFS, not Alaska, with the duty to manage our nation's fisheries under national standards.[3] Managing salmon fisheries is clearly something that NMFS knows how to do. NMFS and the Pacific Fishery Management Council manage salmon fishing *without* a delegation off the coasts of Washington, Oregon, and California.[4] Closure was not the "only" solution. It was the politically convenient solution

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[1] *United Cook Inlet Drift Ass'n v. NMFS* ("*United Cook*"), 837 F.3d 1055, 1063 (9th Cir. 2016).

[2] NMFS Br. at 24 ("the State's decision to refuse a delegation of management authority left 'us only a solution that's been rejected by all of the impacted users.'").

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

[4] *See* Pacific Coast Salmon Fishery Management Plan for Commercial and Recreational Salmon Fisheries off the Coasts of Washington, Oregon, and California, https://www.pcouncil.org/documents/2016/03/salmon-fmp-through-amendment-20.pdf/.

that allowed the State to avoid "federal and outsider influence."[5] The Ninth Circuit instructed NMFS to not "shirk" its duties, yet it did just that.[6]

Nowhere in their 121 collective pages of briefing does NMFS or the State dispute that the fishery closure was orchestrated by Commissioner Vincent-Lang to support a political "State Right to Manage" agenda and avoid compliance with the Magnuson Act.[7] Nor do they dispute that the State withheld from the public its "unwillingness" to accept a delegated program until the last possible minute, resulting in four years of wasted public effort. These are undisputed facts.

Fishery management decisions—especially fishery management decisions that result in a draconian closure of one of the nation's most productive fishing locations—must be based on sound science, have a conservation basis, meet the national standards, and serve the national interest.[8] But here, the closure was based on "political concerns," and therefore it "should not be upheld."[9]

With no answer to these obvious flaws, NMFS attacks a strawman, harping on its lack of "authority" to regulate fishing in *state* waters and Magnuson Act preemption. But the issue here is whether NMFS's decision to close all commercial salmon fishing in *federal* waters to serve the State's political agenda was arbitrary, capricious, and contrary

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[5] AKR_683.
[6] *United Cook*, 837 F.3d at 1063–64.
[7] Opening Br. at 17-20.
[8] *See* 16 U.S.C. § 1851.
[9] *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 768 (9th Cir. 2007).

to law. Plaintiffs ("UCIDA") have not argued for preemption. Nor is UCIDA pushing some novel or extreme interpretation of the Magnuson Act. UCIDA's view comes directly from NMFS's own regulations, which explain that "[t]he geographic scope of the fishery, for planning purposes, should cover the entire range of the stocks(s) of fish, and not be overly constrained by political boundaries."[10]

In any event, NMFS's and UCIDA's views of the Magnuson Act are not so far apart. NMFS does not dispute that the "fishery" at issue here includes federal and state waters, or that it was required to optimize yield for the *entire* fishery.[11]

The problem here is not the scope of NMFS's authority, but what it did with that authority. NMFS closed fishing in federal waters, and set the optimum yield for the "fishery" as "the combined catch from all salmon fisheries within Cook Inlet" that are authorized by the State of Alaska.[12] In other words, the "optimum yield" is whatever level of harvest happens to occur under a state-managed fishery, and the state-managed fishery is not required to comply with the Magnuson Act, the national standards, or the FMP.[13] It is impossible to reconcile this result with the Ninth Circuit's admonition "that federal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns."[14] Tellingly, neither NMFS nor the State addresses or even references this instruction in their briefs.

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[10] 50 C.F.R. § 600.320(b).
[11] NFMS Br. at 6.
[12] AKR_1917.
[13] *See* 86 Fed. Reg. 60,568, 60,586 (Nov. 3, 2021).
[14] *United Cook,* 837 F.3d at 1063.

UCIDA recognizes that the State has an important role in managing salmon in Alaska. UCIDA's goal is to ensure that the salmon fishery is managed consistent with the goals, standards, and scientific principles set forth in the Magnuson Act, as the Ninth Circuit instructed. Our salmon fisheries are important national resources, and management according to those standards ensures the maximum benefit to the nation. Unfortunately, the State disagrees. Rather than cooperate with NMFS, the State postured on "federal encroachment" and forced its citizens to swallow a "hard pill" by imposing an economically ruinous fishery closure.[15]

There is a path forward that complies with the Ninth Circuit decision, and it does not result in prejudice to the State's legitimate interests in managing the salmon fishery. On any remand ordered by this Court, the State can either rethink its "unwillingness" to accept a lawfully delegated program, or NMFS, the Council, and stakeholders can develop an FMP that separately manages the fishery, similar to what NMFS has done for Washington, Oregon, and California. Either route would satisfy the Magnuson Act. But the politically convenient route selected here is unlawful and should be immediately vacated.

II. ARGUMENT

A. Defendants Disregard the Ninth Circuit's Decision in *United Cook*.

According to NMFS, the Ninth Circuit's opinion required it to "assert management authority over the portions of the commercial fishery in the Federal EEZ

[15] AKR_692.

portion of Cook Inlet by incorporating it into the FMP's West Area."[16] NMFS claims it complied with that requirement by closing commercial fishing in the EEZ so the State could manage the entire fishery.[17] The State also believes that the federal closure "falls exactly in line with the Ninth Circuit's ruling."[18] These interpretations of the Ninth Circuit's decision are not credible.

1. The FMP Must Cover the "Fishery" as Defined by the Act.

In *United Cook*, the Court rejected NMFS's effort to carve the "fishery" into discrete parts because "the statute requires an FMP for a fishery, a defined term."[19] Congress did not intend for NMFS to "wriggle out of this requirement by creating FMPs only for selected parts of those fisheries, excluding other areas that required conservation and management."[20] The Act defines "fishery" as "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."[21] There are numerous salmon stocks returning to 1,300 streams in Cook Inlet,[22] and all fishing on those stocks—whether in State waters or the EEZ, and whether for commercial or recreational purposes—are part of the same "fishery" as defined by the Act. The clear mandate of the Act, as explained by the Ninth Circuit, is to create an FMP that governs this "fishery."

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[16] NMFS Br. at 32.
[17] *Id.*
[18] State Br. at 13.
[19] *United Cook*, 837 F.3d at 1064.
[20] *Id.*
[21] 16 U.S.C. § 1802(13).
[22] AKR_584.

NMFS and the State try to obfuscate by using various permutations of the term "fishery" when convenient for their arguments including, the "federal fishery," the "federal waters fishery," the "State water fishery," the "drift fishery," the "recreational fishery in the EEZ," and the "EEZ commercial salmon fishery." These are not separate fisheries under the Act. They are all "fishing" on the same "stocks," and thus part of the same "fishery."[23]

The Magnuson Act requires an FMP to include various management measures for this "fishery." The required elements of the FMP are set out in 16 U.S.C. § 1853(a)(1)–(15). As relevant here, under 16 U.S.C. § 1853(a)(3), the FMP must assess and specify "the maximum sustainable yield and optimum yield from, *the fishery*."[24] Under 16 U.S.C. § 1853(a)(15), the FMP must also "establish a mechanism for specifying annual catch limits in the plan . . . at a level such that overfishing does not occur *in the fishery*, including measures to ensure accountability."[25]

NMFS concedes that it was required to set "optimum yield" under § 1853(a)(3) (even though it did so unlawfully) based on the "fishery" as defined by the Act, including "State and Federal water catch."[26] However, NMFS also concedes that it did *not* specify "annual catch limits" ("ACLs") or "measures to ensure accountability" ("AMs") for the same "fishery" under § 1853(a)(15). Instead, "NMFS set an annual catch limit of zero for

[23] 16 U.S.C. § 1802(13).
[24] 16 U.S.C. § 1853(a)(3) (emphasis added).
[25] *Id.* § 1853(a)(15) (emphasis added).
[26] NMFS Br. at 6.

the commercial salmon fishery in the Cook Inlet EEZ Area" and claims it was "not required to set an annual catch limit for the State-waters portion of this fishery" or for "the recreational fishery" that will also continue in federal waters.[27] But these are all part of the same "fishery" as defined by the Act and as applied under both § 1853(a)(3) and § 1853(a)(15). NMFS cannot "wriggle out of this requirement by creating FMPs only for selected parts of those fisheries, excluding other areas that required conservation and management."[28]

2. The Closure of Fishing in Federal Waters Is an Improper Delegation.

The Ninth Circuit was also clear that the Magnuson Act puts the burden on NMFS to manage the fishery "in the national interest" and that NMFS cannot turn a fishery over to the State because it is "content with State management."[29] Yet that is exactly what Amendment 14 does. The only so-called "management" that Amendment 14 provides with respect to the "fishery" is to close commercial fishing in federal waters to allow total State control of the fishery. "Optimum yield" is set for the "fishery" at whatever harvest level the State allows in any given year. There are no ACLs or AMs. There are no obligations to otherwise comply with the Magnuson Act. This is complete deferral of management for the "fishery" to the State. Amendment 14 is a sham effort to satisfy *United Cook*.

NMFS tries to justify this sham by arguing that *United Cook* did not require "any

[27] *Id*. at 41.
[28] *United Cook*, 837 F.3d at 1064.
[29] *Id*. at 1057.

particular management regime for the Cook Inlet EEZ Area" and "that salmon do not abide by State/Federal boundaries in Cook Inlet or elsewhere."[30] This is just gobbledygook. The Ninth Circuit plainly required an FMP for the "fishery" and told NMFS that it could not elevate state interests over federal interests. NMFS's own regulations spell out how to develop an FMP for cross-boundary stocks[31] and how to set ACLs for stocks that cross state boundaries.[32] Nothing in *United Cook* or NMFS's regulations suggests that permanent abdication of responsibility to the State is appropriate management under the Magnuson Act.

The State, for its part, wrongly claims there is not "an iota of evidence" to suggest that the State is not managing in a manner consistent with national standards.[33] Legally, State consistency is only relevant if an FMP lawfully delegates a program to the State.[34] But the State here refused delegation. State consistency does not relieve NMFS of its obligation to develop an FMP that lawfully sets optimum yield and ACLs for the entire fishery.

As to evidence, UCIDA provided in the record a comprehensive analysis of how state management is not consistent with the Magnuson Act,[35] as well as sworn testimony from a biologist with "extensive experience in managing the commercial Cook Inlet

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[30] NMFS Br. at 33.
[31] 50 C.F.R. § 600.320(b).
[32] *Id.* § 600.310(f)(4)(iii).
[33] State Br. at 11.
[34] *United Cook*, 837 F.3d at 1063.
[35] AKR_928–50.

salmon fishery" *as the State's regional biologist for Cook Inlet*, explaining that the State is *not* managing in a manner consistent with national standards, that the State's escapement goals "are not scientifically sound," that the State misses its own goals 56% of the time, and that there are "millions" of salmon every year that go wasted under State management.[36] Moreover, there is no disputing the numbers that show a continued decline in the commercial salmon harvest.[37]

Nor is the State blameless for the repeated fishery management disasters. The record low commercial sockeye harvest in 2020 (669,751 sockeye) was due to "insufficient fishing opportunity," not necessarily a lack of fish.[38] Fishermen sat idle while the State allowed an extra 839,906 sockeye (above the high end of escapement goals) into the Kenai and Kasilof rivers alone.[39] The wasted harvest opportunity that year from just those two systems was far greater than *the entire commercial catch.*[40]

Although not legally relevant, the State misleadingly argues that NMFS agrees that "Alaska's management of commercial salmon fishing in Cook Inlet 'is consistent with the policies and standards of the Magnuson-Stevens Act.'"[41] But the language it cites is *from 2012*, and was part of NMFS's effort, rejected in *United Cook*, to try to "wriggle out" of its statutory duties by claiming it was content with State management.

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[36] AKR_901, 909 (¶¶ 2–3, 10–18).
[37] AKR_1052.
[38] AKR_1085, 1087.
[39] AKR_1052–53.
[40] AKR_578–79. This waste is even greater given because the escapement goals are already inappropriately high. AKR_578.
[41] State Br. at 20 (citing 77 Fed. Reg. 75,750, 75,570 (Dec. 21, 2012)).

NMFS made no such finding for Amendment 14, and it instead declined to address the evidence showing that the State's practices and policies in fact do not align with the Magnuson Act.[42]

Ultimately, NMFS did precisely what the Ninth Circuit said it may not do. It decided it was content with State management and allowed the State to continue to fully manage the Cook Inlet salmon fishery free of *any* national standards. Amendment 14 is arbitrary, capricious, and contrary to law and should be immediately vacated.

B. Amendment 14 Is Based on Politics, Not Conservation.

National Standard 2 requires conservation measures to be based on science, and they must be set aside if they were "in any material way influenced by political concerns."[43] The political influence is not disputed. After orchestrating the approval of Amendment 14, Commissioner Vincent-Lang wrote to the Congressional Delegation and told them that closure was the "only option" for "preserving state management" and "ensuring against federal incursion into this and other state-managed salmon fisheries."[44]

NMFS tries to obscure the State's influence, saying that NMFS "worked for *years* and devoted countless hours . . . in particular on Alternative 2."[45] But that was all wasted effort. If the State had revealed its intentions, NMFS could have spent "countless hours" on Alternative 3 and developed it into a meaningful and viable alternative. NMFS's

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[42] *See* 86 Fed. Reg. at 60,568–60,588.
[43] *Hogarth*, 494 F.3d at 768.
[44] AKR_13025.
[45] NMFS Br. at 43 n.10.

Regional Director recognized this sham and refused to vote for the closure, explaining that the State's "failure to communicate" its intentions left the public advocating for the delegation alternative "that the council could not legally take."[46] NMFS concedes that it was boxed in by the State's maneuvering, which "left 'us only a solution that's been rejected by all impacted users.'"[47] The fact that the State may have sandbagged NMFS along with the public does not make the process any better or less political. Rather, it underscores the capriciousness of NMFS's decision to approve Amendment 14 knowing it was a sham.

NMFS tries to minimize the State's influence, saying that the final rule under judicial review is *NMFS's* decision.[48] But UCIDA *is* seeking judicial review of NMFS's decision *to approve Amendment 14*, which adopts the Council's policy decision to close commercial salmon fishing in the EEZ. By law, NMFS's decision was based on the "entire record."[49] As explained above, that record demonstrates the State's improper influence and the political basis for Amendment 14. It also contains evidence that UCIDA presented to NMFS during the public process showing that the Council's approval of Amendment 14 was politically influenced and contrary to the Magnuson Act.[50] NMFS failed to respond to those comments or the supporting evidence and proceeded to rubber stamp Amendment 14. Agency action is arbitrary and capricious

[46] AKR_13023.
[47] NMFS Br. at 24 (quoting AKR_7315).
[48] *Id*. at 46.
[49] *See Bosma v. U.S. Dep't of Agric.*, 754 F.2d 804, 807 (9th Cir. 1984).
[50] AKR_683–85, 692.

when it "fail[s] to consider an important aspect of the problem"[51] or where "the record belies the agency's conclusion."[52] That is precisely what happened here.

Moreover, the record shows that NMFS actively participated in the sham. It is undisputed that NMFS's staff had advance knowledge that the State was going to make a surprise announcement that would torpedo Alternative 2, but said nothing.[53] The result, as Regional Director Balsiger concedes, is a "failure to communicate" that prejudiced the process.[54]

In sum, UCIDA need only demonstrate that the "decision was in any material way influenced by political concerns."[55] That influence is undisputed. UCIDA is not required to prove that politics was the *only* reason (even though that appears to be true) and need not produce a "'smoking gun' document that explicitly admits that the final finding was motivated by larger policy considerations."[56] Because Amendment 14 was influenced by political considerations, NMFS's approval is arbitrary, capricious, and contrary to law.

C. NMFS Failed to Comply with Statutory Closure Requirements.

When NMFS implements "any closure of an area under this chapter that prohibits

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[51] *Pac. Dawn LLC v. Pritzker*, 831 F.3d 1166, 1173 (9th Cir. 2016).

[52] *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999) (citation omitted).

[53] Opening Br. at 15-20.

[54] AKR_13023.

[55] *Hogarth*, 494 F.3d at 768.

[56] *Earth Island Inst. v. Evans*, No. C 03-0007 TEH, 2004 WL 1774221, at *29 (N.D. Cal. Aug. 9, 2004) (finding "plentiful circumstantial evidence" to support this conclusion even when "the scientists at NMFS undertook their research mission extremely seriously"), *aff'd as modified sub nom. Earth Island Inst. v. Hogarth*, 484 F.3d 1123 (9th Cir. 2007), *opinion amended and superseded*, 494 F.3d 757 (9th Cir. 2007).

all fishing," as it did here in the Cook Inlet EEZ, the Act requires NMFS to demonstrate conservation need, assessment of the conservation benefits, and a timetable for reassessment.[57] NMFS admits it did not comply with these requirements, offering two baseless reasons for why it believes it was excused from doing so.

First, NMFS argues that it was not required to comply because it still allows fishing for halibut in the Cook Inlet EEZ. But, the Act's "conservation provisions apply *to each FMP* and *per fishery*."[58] "In other words, the Act requires each management plan to employ conservation techniques for the given fishery, not for all fisheries or the ecosystem as a whole."[59] The terms "fishing" and "all fishing" therefore refer to fishing on the stocks of fish that are the *subject of the FMP*—here, salmon stocks.[60] NMFS limited the FMP to commercial salmon fishing in the Cook Inlet EEZ, and then prohibited all such fishing. It was therefore required to comply with the Act's closure provisions, but unlawfully failed to do so.

Second, NMFS alternatively argues that it did not prohibit all salmon fishing in the EEZ because recreational salmon fishing can still occur there. But NMFS cannot have it both ways. NMFS *excluded* recreational salmon fishing in the EEZ from the scope of the FMP and refused to provide any management at all for recreational fishing, and refused to set ACLs for recreational fishing (all of which was illegal *see infra* Section II.D.1).

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[57] 16 U.S.C. § 1853(b)(2)(C).

[58] *Gulf Fishermens Ass'n v. NMFS*, 968 F.3d 454, 468 (5th Cir. 2020), *as revised* (Aug. 4, 2020).

[59] *Id.*

[60] 16 U.S.C. § 1853(b)(2)(C).

Recreational fishing is therefore not part of "all fishing" addressed in the FMP.[61] NMFS closed "all fishing" for salmon in the EEZ covered by the FMP, and therefore the Act's closure provisions apply. Amendment 14 is therefore contrary to law.

D. Amendment 14 Violates Additional National Standards.[62]

1. National Standard 1.

For many of the reasons already discussed, it is readily apparent that NMFS violated National Standard 1. National Standard 1 requires conservation measures to achieve "optimum yield" on a "continuing basis."[63] "Optimum yield" is supposed to achieve "the greatest overall benefit to the Nation" and be formulated "on the basis of maximum sustained yield from the fishery."[64] Here NMFS punted on optimum yield by setting it at whatever level of fish the State allows to be caught.[65] That is *actual* yield, not optimum yield.

NMFS claims it relied on the "best science" available and suggests that the escapement goals were reviewed by the scientifical and statistical committee ("SSC"). That is beside the point and does not change the fact that NMFS failed to independently determine "maximum sustained yield" for the Cook Inlet salmon fishery and set optimum yield on that basis, or to put in place measures to ensure that optimum yield is achieved on a continuing basis.

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[61] *Gulf Fishermens Ass'n*, 968 F.3d at 468.
[62] NMFS violated National Standard 2 as explained in Section II.B *supra*.
[63] 16 U.S.C. § 1851(a)(1).
[64] 16 U.S.C. § 1802(33)(A)–(B).
[65] AKR_1917.

In any event, science also is not on NMFS's side. UCIDA agrees that the SSC includes capable scientists. But they can only review what is put in front of them. The SSC was *never presented with the last-minute Alternative 4*. Nor was it asked whether the State could achieve optimum yield after permanently closing the single-most productive commercial salmon fishing location in Cook Inlet, and the only geographic area that harvests some stocks.[66] However, the Councils' Advisory Panel (charged by Congress to "provide information and recommendations on, and assist in the development of, fishery management plans and amendments to such plans")[67] did weigh in on Alternative 4 and expressed nothing but unanimous criticism. It found that Alternative 4 was based on unsupported assumptions and "does not consider the migration of displaced fishers and how the amplified effort in State waters will affect harvest strategies."[68] It also observed that the explanation for Alternative 4 "reads more like an arbitrary statement than best available science."[69] These concerns are not addressed in the record. The reality is that optimum yield for the fishery (*i.e.*, whatever catch the State allows to happen) was selected by Regional Director Balsiger outside the Council process, and three months after the Council took final action.[70] The only records of Regional Director Balsiger's action are a one-page letter with a one-page attachment he sent to the Council on March

[66] The last SSC review occurred before Alternative 4 was even proposed. *See* AKR_18677.

[67] 16 U.S.C. § 1852(g)(3)(A).

[68] AKR_16427

[69] *Id.*

[70] Opening Br. at 20.

25, 2021.[71] There was no compliance with, or even a true analysis of, National Standard 1. NMFS simply acceded to the State's desire to avoid "federal and outsider influence" by turning the fishery and the optimum yield determination over to the State.

Regardless, NMFS's invocation of the "best science" does not cure the fact that it entirely failed to set ACLs and AMs for the "fishery" as required by the Act and its own National Standard 1 regulations. NMFS argues that ACLs and AMs "could not be enforced in state waters," and are therefore unnecessary.[72] But this argument is contradicted by its own regulations, which instruct that it is *required* to set ACLs and AMs in state waters regardless of its enforcement ability:

> For stocks or stock complexes that have harvest in state or territorial waters, FMPs and *FMP amendments should include an ACL for the overall stock* that may be further divided. For example, the overall ACL could be divided into a Federal-ACL and state-ACL. However, NMFS recognizes that Federal management is limited to the portion of the fishery under Federal authority. See 16 U.S.C. 1856. When stocks are co-managed by Federal, state, tribal, and/or territorial fishery managers, the goal should be to develop collaborative conservation and management strategies, and scientific capacity to support such strategies (including AMs for state or territorial and Federal waters), to prevent overfishing of shared stocks and ensure their sustainability.[73]

Thus, NMFS was required to set an ACL for "the overall stock" including state waters, but arbitrarily failed to do so.

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[71] AKR_15532–33.
[72] NMFS Br. at 41.
[73] 50 C.F.R. § 600.310(f)(4)(iii) (emphasis added).

As for its failure to set ACLs or AMs or to provide any management *at all* for the recreational fishing in federal waters, NMFS pretends that "UCIDA's complaint raises no such allegation."[74] This is false. UCIDA's complaint states that "under Amendment 14, NMFS continues to defer management decisions for sport fishing within federal waters in Cook Inlet to the State of Alaska without delegation through an FMP. This is directly contrary to the Ninth Circuit's instruction."[75] State of Alaska regulations use the term "sport fishing" to refer to "recreational" fishing, including in Cook Inlet.[76]

NMFS has no defense for its failure to incorporate the recreational fishery. Regional Director Balsiger wrote a letter to the Council explaining that the Ninth Circuits' rationale applied to the "sport fishery" in federal waters.[77] Even assuming that the Council could put off the decision as to whether to actively manage that portion of the fishery to some later date (and continue to ignore the decision in *United Cook* from six years ago), recreational fishing is still part of the "fishery" governed by the FMP and must have ACLs and AMs. NMFS's failure to provide those violates National Standard 1.

[74] NMFS Br. at 33.

[75] Dkt. 1, ¶ 112.

[76] *See, e.g.*, 5 AAC 58.001 (explaining "[t]his chapter applies to saltwater sport fishing . . . .").

[77] AKR_15107–08.

2. National Standard 4.

National Standard 4 requires allocations of fishing privileges to be, among other things, "fair and equitable" and "reasonably calculated to promote conservation."[78] UCIDA's opening brief demonstrates that Amendment 14 does neither, by unfairly: (i) giving all salmon fishing opportunity in federal waters to the recreational fishery and (ii) closing commercial salmon fishing in federal waters and redistributing that catch to fishing in State waters. UCIDA also demonstrated that neither result has a conservation reason.[79]

The State responds with a novel argument (tellingly not joined by NMFS) that National Standard 4 applies only when discriminating against residents of different states. The State misreads the statute. National Standard 4 *both* prohibits discrimination between residents of different states *and* requires that allocations between all fishermen be fair and equitable and serve a conservation purpose.[80] It does not, as the State claims, require allocations to be fair and equitable and serve a conservation purpose *only* when discriminating against fishermen based on residency.[81] NMFS's regulations interpreting

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[78] 16 U.S.C. § 1851(a)(4).

[79] Opening Br. at 35.

[80] 16 U.S.C. § 1851(a)(4).

[81] To the extent relevant, the State does discriminate through its resident-only personal use fishery. AKR_586. The State will now close commercial fishing on weekends "to facilitate movement of fish into the rivers for the personal use fishery." Alaska Dep't of Fish & Game, Upper Cook Inlet 2022 Outlook for Commercial Salmon Fishing at 5-6, http://www.adfg.alaska.gov/static/applications/dcfnewsrelease/1361148761.pdf (Mar. 24, 2022).

National Standard 4 makes this clear. Subsection (b) explains that discrimination between residents of different states is something that an FMP "may not" do.[82] Subsection (c) explains that an FMP "may" allocate fishing privileges if those allocations are fair and equitable and promote conservation.[83] This interpretation is also supported by case law.[84]

NMFS tries to avoid National Standard 4, arguing that "[t]he Final Rule is not a direct distribution of fishing privileges and therefore is not an allocation."[85] In other words, NMFS believes that the complete closure of all commercial fishing in federal waters in Cook Inlet is just an incidental consequence of Amendment 14. NMFS is wrong. Its own regulations provide examples of direct distributions of fishing privileges in the definition of "allocation of fishing privileges," which include "different . . . fishing seasons for recreational and commercial fishermen" and "assignment of ocean areas to different gear users."[86] Even NMFS's staff called the closure a "reallocation from the

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[82] 50 C.F.R. § 600.325(b).

[83] *Id.* § 600.325(c).

[84] *See N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 90 (D.D.C. 2007) (discussing whether National Standard 4 is violated when commercial and recreational fishermen are allegedly treated differently but not mentioning state residency); *Guindon v. Pritzker*, 240 F. Supp. 3d 181, 195 (D.D.C. 2017) (National Standard 4 violation due to unfair and unequal treatment of recreational and commercial fishermen with no mention of state residency).

[85] NMFS Br. at 47.

[86] 50 C.F.R. § 600.325(c)(1); *see Sustainable Fisheries Coal. v. Raimondo*, No. CV 21-10204-LTS, 2022 WL 795456, at *6 (D. Mass. Mar. 4, 2022) (finding exclusion zone that prohibited one gear type was arbitrary and capricious under National Standard 4 because the record failed to demonstrate a conservation need for the allocation).

drift gillnet to other fisheries."[87] The closure plainly allocated fishing privileges from commercial harvesters to recreational and state water harvesters. The closure therefore violates National Standard 4.

3. National Standard 8.

UCIDA's opening brief demonstrates that NMFS was required to "assess, specify, and analyze the *likely* effects" of the fishery closure on fishing communities and minimize the impacts, and that it failed to do so by conducting a cursory, generic analysis.[88] NMFS does not address the standard ("likely effects") at all, points to the same cursory analysis (which it calls "extensive"), and claims that "the actual impact was very uncertain and that any negative impacts may be offset by beneficial impacts associated with harvest in state waters."[89] NMFS does not dispute that it cranked out this "extensive" analysis in less than 30 days or that its data collection effort was limited to sending a questionnaire to the State. According to NMFS, this was a sufficient look at the "best scientific information available."[90]

However, the Act's "best scientific information available" requirement is not an excuse to forgo a thoughtful analysis.[91] NMFS's regulations explain that NMFS may use

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[87] AKR_7281; *see also* AKR_16428 (closure was "allocative" and results in "redistribution of salmon resources"); AKR_468–69 (explaining that the closure will "shrink" drift fleet").

[88] Opening Br. at 37–38.

[89] NMFS Br. at 50.

[90] *Id*. at 52.

[91] *Hadaja, Inc. v. Evans*, 263 F. Supp. 2d 346, 357 (D.R.I. 2003) ("[T]here is a difference between relying on conflicting evidence or incomplete evidence and relying on no evidence.").

data "provided by fishermen, dealers, processors, and fisheries organizations and associations," and that "[i]n cases where data are severely limited, effort should be directed to identifying and gathering needed data."[92] NMFS ignored these instructions and arbitrarily forged ahead with the permanent closure of one of the most productive commercial salmon fishing locations in the State with, at most, limited data on the nature and magnitude of the consequences to fishing communities.

Indeed, the Council acted in disregard of its own Advisory Panel, designed by Congress to advise on exactly this kind of issue. The Advisory Panel unanimously agreed that "Alternative 4 does not meet National Standard 8" and would "maximize negative economic impacts on Kenai Peninsula fishing communities."[93] Even the State has conceded that a closure would be disastrous:

> While it may not be easy to quantify the economic impact of closing salmon fisheries in the federal waters of Cook Inlet, even if state fisheries are kept open, ***it cannot be disputed that such a closure would cause a severe adverse impact on those who depend on the Cook Inlet salmon fishery***.[94]

NMFS failure to "assess, specify, and analyze the likely effects" of the closure, and its decision to approve the alternative that would "maximize" negative economic consequences, violated National Standard 8.

E. NMFS Violated NEPA.

UCIDA's opening brief demonstrated the environmental assessment ("EA") failed

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[92] 50 C.F.R. § 600.345(c)(2).
[93] AKR_16428.
[94] AKR_578–79 (emphasis added).

to provide a "convincing statement of reasons" because the EA concluded that the actual impacts are "not possible" to determine. NMFS makes no effort to defend its "not possible" determination or explain why it could not gather additional information as *required* by the National Environmental Policy Act ("NEPA").[95] "[T]o simply dismiss the environmental affects as 'speculative and uncertain' does not meet the [agency's] obligation 'to supply convincing statement of reasons why potential effects are insignificant.'"[96]

Regarding alternatives, NMFS has conceded that the State's bait-and-switch tactics "left 'us only a solution that's been rejected by all impacted users.'"[97] In other words, the "scope of alternatives" evaluated by NMFS for NEPA purposes was also a sham. It is no wonder that NMFS fails to address the case law holding that "bait-and-switch tactics" defeat "the purpose and intent of NEPA."[98] NMFS violated NEPA by both (i) failing to provide a "convincing statement of reasons" that the impacts of Alternative 4 were "not significant" and (ii) failing to evaluate a *reasonable* range of alternatives.

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[95] *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011) ("We are unpersuaded that these excuses can relieve the Board of its requirement under NEPA to gather information before it can make an informed decision.").

[96] *Greer Coal., Inc. v. U.S. Forest Serv.*, No. CV 06-0368-PHX-MHM, 2007 WL 675954, at *8 (D. Ariz. Mar. 1, 2007) (quoting *Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998)).

[97] NMFS Br. at 24 (quoting AKR_7315).

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

F. The Court Should Immediately Vacate Amendment 14.

UCIDA's opening brief demonstrated that immediate vacatur of Amendment 14 and its implementing regulations is warranted so that fishing can proceed on June 20, 2022.[99] The State is silent on remedy, and NMFS makes no argument against immediate vacatur. Accordingly, the appropriate remedy is (as set forth in the proposed order) immediate vacatur of Amendment 14 and its implementing regulations, and an order requiring 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.

III. CONCLUSION

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

DATED this 6th day of April, 2022.

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Certification: Pursuant to Local Civil Rule 7.4(a)(1), this brief contains 5,694 words.

[99] Opening Br. at 41.

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 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
Jason T. Morgan, AK Bar No. 1602010