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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT ASS'N, ET AL., Plaintiffs, vs. NATIONAL MARINE FISHERIES SERVICE, ET AL., Federal Defendants and STATE OF ALASKA, Defendant-Intervenor	Case No. 3:21-cv-00255-JMK **FEDERAL DEFENDANTS' RESPONSE BRIEF**

WES HUMBYRD; ROBERT WOLFE; and, DAN ANDERSON,

Plaintiffs,

vs.

GINA RAIMONDO, ET AL.,

Federal Defendants.

TABLE OF CONTENTS

PAGE

INTRODUCTION 2

BACKGROUND 4

I. Statutory Background 4

A. The Magnuson Act 4

B. National Environmental Policy Act 8

II. Factual Background 8

A. History of Salmon Fisheries and Federal Management in Alaska. .. 8

B. Management of Salmon Fisheries 12

C. Amendment 12 to the Salmon FMP 14

D. Development of Amendment 14 in the Council 16

E. NMFS's Approval of Amendment 14 and Promulgation of the Final Rule. 24

STANDARD OF REVIEW 27

ARGUMENT 28

I. UCIDA's Statutory Claims 28

A. The Final Rule is Fully Consistent with the Magnuson Act 28

1. NMFS does not have Authority to Regulate State-Water Fisheries. 28

2. The Final Rule does not Defer Management of the EEZ to the State of Alaska. 32

3. The Final Rule Prevents Overfishing while Achieving Optimum Yield on a Continuing Basis..... 34

4. The Final Rule is a Conservation and Management Measure 42

5. The Final Rule is Consistent with Section 303(b)(2)(C) of the Magnuson Act. 43

6. The Final Rule is Based on the Best Scientific Information Available. 46

7. The Final Rule is not an Assignment of Fishing Privileges..... 47

8. The Final Rule took the Needs of Fishing Communities into Account. 49

B. The Final Rule is Fully Consistent with NEPA. 54

II. NMFS Is Entitled To Judgment On The *Humbyrd* Plaintiffs' Constitutional Claims..... 55

A. If the Court finds a Statutory Violation, it Should Not Reach Plaintiffs' Constitutional Claims. 55

B. Plaintiffs Lack Standing for their Constitutional Claims..... 56

C. Plaintiffs' Constitutional Claims Should Be Rejected On The Merits. 62

1. Council Members Are Not Officers of the United States. 62

a. Council Members Do Not Occupy a Continuing Position..... 64

b. Council Members Do Not Possess Significant Authority. 67

III. Remedy 79

CONCLUSION..... 80

TABLE OF AUTHORITIES

CASES **PAGE**

807 F. App'x 690 (9th Cir. 2020) .....passim

837 F.3d 1055 (9th Cir. 2016).....passim

All. for the Wild Rockies v. Pena,
865 F.3d 1211 (9th Cir. 2017) 8

All. Against IFQs v. Brown,
84 F.3d 343 (9th Cir. 1996)..... 28

Alaska Factory Trawlers Ass'n v. Baldrige,
831 F.2d 1456 (9th Cir. 1987) 59

Anglers Conservation Network v. Pritzker,
70 F. Supp. 3d 427 (D.D.C. 2014)..... 58

aff'd, 809 F.3d 664 (D.C. Cir. 2016) 59

Ashwander v. TVA,
297 U.S. 288 (1936)..... 56

Buckley v. Valeo,
424 U.S. 1 (1976)..... 63, 66, 67

C & W Fish Co. v. Fox,
931 F.2d 1556 (D.C. Cir. 1991)..... 48, 51, 52

City of Los Angeles v. County of Kern,
581 F.3d 841 (9th Cir 2009)..... 56

Comm. for Monetary Reform v. Bd. of Governors,
766 F.2d 538 (D.C. Cir. 1985)..... 57

Confederated Tribes of Siletz Indians of Or. v. United States,
110 F.3d 688 (9th Cir. 1997)..... 61

Conservation Law Found. of New England v. Franklin,
989 F.2d 54 (1st Cir. 1993) 58

Decker Coal Co. v. Pehringer,
8 F. 4th 1123, 1136 (9th Cir. 2021) 80

Dong v. Smithsonian Inst.,
125 F.3d 877 (D.C. Cir. 1997) 76

Edmond v. United States,
520 U.S. 651 (1997) 63

Fence Creek Cattle Co. v. U.S. Forest Serv.,
602 F.3d 1125 (9th Cir. 2010) 28

Fishing Co. of Alaska v. Gutierrez,
510 F.3d 328 (D.C. Cir. 2007) 71

Flaherty v. Ross,
373 F. Supp. 3d 97 (D.D.C. 2019) 59, 73, 75, 76, 79

Freytag v. Comm'r of Internal Revenue,
501 U.S. 868 (1991) 66

Goethel v. Pritzker,
No. 15-CV-497-JL, 2016 WL 4076831 (D.N.H. July 29, 2016) 74

Gulf Restoration Network v. NMFS,
730 F. Supp. 2d 157 (D.D.C. 2010) 58, 74

Indep. Acceptance Co. v. California,
204 F.3d 1247 (9th Cir. 2000) 27

J.H. Miles & Co.,
910 F. Supp. 1138 (E.D.Va 1995) 7, 58, 75

Jensen v. Locke,
No. 3:08-cv-00286-TMB, 2009 WL 10674466 (D. Alaska Nov. 5, 2009) .. 2, 31

Little Bay Lobster Co. v. Evans,
352 F.3d 462 (1st Cir. 2003) 54

Louisiana v. Baldridge,
538 F. Supp. 625 (E.D. La. 1982) 60

Lucia v. SEC,
138 S. Ct. 2044 (2018).....passim

Massachusetts v. Pritzker,
10 F. Supp. 3d 208 (D. Mass. 2014) 52

Melcher v. Fed. Open Mkt. Comm.,
644 F. Supp. 510 (D.D.C. 1986)..... 66

Midwater Trawlers Coop. v. Dep't of,
Com., 282 F.3d 710 (9th Cir. 2002)..... 27

N. Carolina Fisheries Ass'n v. Gutierrez,
518 F. Supp. 2d 62 (D.D.C. 2007)..... 52, 53

Nat'l Coal. for Marine Conservation v. Evans,
231 F. Supp. 2d 119 (D.D.C. 2002)..... 48

New York v. United States,
505 U.S. 144 (1992)..... 32

Novak v. United States,
795 F.3d 1012 (9th Cir. 2015) 61

Nw. Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009)..... 56

Nw. Env't. Def. Ctr. v. Evans,
No. CIV. 87-229-FR, 1988 WL 360476 (D. Or. Aug. 12, 1988) 74

Nw. Env't Def. Ctr. v. Brennen,
958 F.2d 930 (9th Cir. 1992) 56, 57, 74, 80

Occidental Eng'g Co. v. INS,
753 F.2d 766 (9th Cir. 1985) 28

Oceana, Inc. v. Evans,
384 F.Supp.2d 203 (D.D.C. 2005) 52

Oregon Trollers Ass'n v. Gutierrez,
452 F.3d 1104 (9th Cir. 2006) 47, 48

Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank,
693 F.3d 1084 (9th Cir. 2012) 53

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 8

Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt,
442 F. Supp. 3d 53 (D.D.C. 2020) 61

Spector Motor Serv. v. McLaughlin,
323 U.S. 101 (1944) 56

Trawler Diane Marie v. Brown,
918 F. Supp. 921 (E.D.N.C. 1995) 60

Tri-Valley CAREs v. U.S. Dep't of Energy,
671 F.3d 1113 (9th Cir. 2012) 67, 68, 71

United Cook Inlet Drift Ass'n v. NMFS,
No. 3:13-cv-00104-TMB,
2014 WL 10988279 (D. Alaska Sept. 5, 2014) 15

United States v. Arthrex,
141 S. Ct. 1970 (2021) 74, 75

United States v. Germaine,
99 U.S. 508 (1878) 63, 64, 65, 66

Yakutat, Inc. v. Evans,
No. C02-1052R, 2003 WL 1906336 (W.D. Wash. Apr. 10, 2003) 59

STATUTES

5 U.S.C. § 554 30
5 U.S.C. § 706(2)(A) 27
5 U.S.C. § 706(2)(A)-(D) 8
5 U.S.C. § 551-559 1
16 U.S.C. §1852(h)(5) 37
16 U.S.C. § 1801 ..... 1, 4, 5
16 U.S.C. § 1802(33) 38
16 U.S.C. § 1811(a) 29
16 U.S.C. § 1811(b)(1) 31
16 U.S.C. § 1851(a) 6
16 U.S.C. § 1851(a)(1) 34, 43, 68
16 U.S.C. § 1851(a)(2) 6, 46
16 U.S.C. § 1851(a)(4) 47, 68
16 U.S.C. § 1851(a)(8) 50, 68
16 U.S.C. § 1852(a)(1)(G) 60, 65
16 U.S.C. § 1852(b)(1) 61
16 U.S.C. § 1852(b)(2) 64
16 U.S.C. § 1852(b)(3) 64
16 U.S.C. § 1852(d) 65, 71, 72
16 U.S.C. § 1852(e)(3) 65
16 U.S.C. § 1852(h)(1) 30
16 U.S.C. § 1852(h)(3) 7
16 U.S.C. § 1852(h)(5) 37
16 U.S.C. § 1852(h)(6) 41
16 U.S.C. § 1852(i)(1) 72
16 U.S.C. § 1853(b)(2)(A) 44, 45
16 U.S.C. § 1853(c) 76
16 U.S.C. § 1854(a)(1)(A) 68, 69
16 U.S.C. § 1854(a)(3) 70, 77
16 U.S.C. § 1854(b)(1) 69, 70
16 U.S.C. § 1854(c) 75, 78

16 U.S.C. § 1855(d) 71
16 U.S.C. § 1855(f) 77, 78
16 U.S.C. § 1855(f)(1) 7, 8, 27
16 U.S.C. § 1856(a) 30, 31
16 U.S.C. § 1856(a)(3)(B) 32
16 U.S.C. § 1856(b)(1) 18
16 U.S.C. § 1861a(a)(1) 37
16 U.S.C. § 5001-5012 12
16 U.S.C. § 1851 71
16 U.S.C. § 1855(c)-(d) 58
42 U.S.C. § 4321 1
42 U.S.C. § 4332(C) 8
43 U.S.C. § 1301(b) 30

FEDERAL REGULATIONS

40 C.F.R. § 1501.5 8
50 C.F.R. 600.305 6
50 C.F.R. 600.305(c) 34
50 C.F.R. Pt. 679 45
50 C.F.R. § 101.19 (1957) 9
50 C.F.R. § 210.1 9
50 C.F.R. § 210.1 (1971) 10
50 C.F.R. § 210.1 (1966) 9
50 C.F.R. § 600.305 6
50 C.F.R. § 600.310(e)(1)(i) 35
50 C.F.R. § 600.310(e)(3)(i)(A) 35
50 C.F.R. § 600.310(e)(3)(iii) 37
50 C.F.R. § 600.310(b)(1)(iv) 36
50 C.F.R. § 600.310(b)(1)(ii) 36
50 C.F.R. § 600.310(g)(3) 41
50 C.F.R. § 600.325(c)(1) 47
50 C.F.R. § 600.325(c)(3)(i) 49
50 C.F.R. § 679.7 14
50 C.F.R. § 679.7(h)(2) 45
50 C.F.R. § 697.7(b)(1) 43

Other Authorities

21 Fed. Reg. 4932 (July 3, 1956) 9
35 Fed. Reg. 7070 (May 5, 1970) 9
44 Fed. Reg. 33,250 (June 8, 1979) 9
55 Fed. Reg. 47,773, 47,775 (Nov. 15, 1990) 11
60 Fed. Reg. 39,272 (Aug. 2, 1995) 12
77 Fed. Reg. 75,570, 75,587 (Dec. 21, 2012) 15
86 Fed. Reg. 60,568 (Nov. 3, 2021) 1, 60
87 Fed. Reg. 9271 (Feb. 18, 2022) 33
1996 U.S.C.C.A.N. 4120 73
2007 U.S.C.C.A.N. S83 73
2007 WL 892712 (Jan. 12, 2007) 73
Pub. L. No. 579 9

This case involves a challenge to regulations promulgated by the National Marine Fisheries Service ("NMFS") implementing Amendment 14 to the Fishery Management Plan ("FMP") for Salmon Fisheries off the Coast of Alaska. 86 Fed. Reg. 60,568 (Nov. 3, 2021) (hereinafter "Final Rule"). The United Cook Inlet Drift Association *et al.*, ("*UCIDA*"), and Wes Humbyrd, *et al.,* ("*Humbyrd*") (collectively "Plaintiffs") challenge NMFS's Final Rule under the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act" or "Act"), 16 U.S.C. § 1801 *et seq.*, the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, 701-706, and the Appointments, Take Care, Executing Vesting Clauses of the U.S. Constitution.

Consistent with the Court's Orders consolidating and expediting review of these two cases, Federal Defendants are filing a combined response brief that addresses all the claims for relief in both of the Plaintiffs' complaints and petitions for review. ECF Nos. 20, 22. This response brief provides the relevant statutory and factual background for the Final Rule, addresses the statutory claims brought by the *UCIDA* plaintiffs, followed by the constitutional claims brought the *Humbyrd* plaintiffs.

In accordance with Local Rule 16.3(c), Federal Defendants are filing only a response brief, but seek summary judgment on all of the Plaintiffs' claims in these consolidated cases.

INTRODUCTION

This dispute has a long history. The earliest vestiges date back to 2008 when NMFS and the State of Alaska ("State") were sued for salmon management decisions involving federal waters in Cook Inlet.[1] Over time, the claims and arguments have varied, but there has been one constant: UCIDA and its members are dissatisfied with the amount of salmon they are allowed to harvest in Cook Inlet. In seeking a larger harvests, UCIDA and its members have long relied on a novel and erroneous interpretation of the Magnuson Act that would give commercial salmon fishers in federal waters priority over those fishing in state waters. Similarly, but more aggressively, the *Humbyrd* plaintiffs (most or all of which are UCIDA members), seek to eliminate the Magnuson Act's Council process altogether, which they incorrectly believe would somehow result in NMFS managing federal waters

[1] *See, e.g., See Jensen v. Locke,* 08-cv-00286-TMB (D. Alaska), ECF No. 75 (Granting Motion to Dismiss); *UCIDA v. Locke*, 09-cv-00043-RRB (D. Alaska), ECF No. 28 (Order Denying Plaintiffs' Motion for Summary Judgment); UCIDA v. Locke, 09-cv-00241-TMB (D. Alaska), ECF No. 45 (Consent Decree); UCIDA v. NMFS, 13-cv-00104-TMB (D. Alaska), ECF No. 64 (Denying Plaintiffs' Motion for Summary Judgment).

without regard to the State's fisheries. While some of the arguments in this latest round are new, the same fundamental dispute remains.

Contrary to Plaintiffs' arguments, Congress never intended NMFS to manage a fishery solely to benefit one user group, or to completely ignore state fisheries. Consistent with this, Amendment 12 (the previous amendment to the FMP) would have allowed the State to simultaneously manage commercial salmon fishing in federal and state waters. More specifically, under Amendment 12, commercial salmon fishing was prohibited throughout the entire "West Area," with the exception of the three discrete locations, including Cook Inlet, where management was deferred to the State. The Ninth Circuit ultimately faulted this approach and required the Council to expand the geographical scope of the FMP to include the Cook Inlet area. On remand, the Council did just that with Amendment 14. It expanded the geographical scope so that all federal waters in Cook Inlet were now encompassed within the FMP. Only the question of how to manage the commercial fishery in federal waters remained.

There were effectively two choices for NMFS: 1) manage the fishery by implementing a closure, consistent with the FMP's existing management for the West Area, or 2) manage the fishery differently by setting catch levels, season dates, and quotas in federal waters. Implementation of the latter, however, was fraught with uncertainty and would lead to worse management

outcomes than management by closure. And so, NMFS made the reasonable decision to maintain the FMP's closure of commercial salmon fishing in Cook Inlet, consistent with the rest of the West Area.

Plaintiffs in these consolidated cases are yet again dissatisfied. Admittedly, they may harvest less salmon than they did with Amendment 12 because of the closure. But there was no viable option in front of the Council or NMFS that would have avoided this. Nor does the Magnuson Act guarantee user groups a particular share. In their frustration, the *UCIDA* plaintiffs would overturn forty-plus years of NMFS's policy of management by closure of commercial salmon fisheries in the West Area. The *Humbyrd* plaintiffs similarly ask the Court to upend a congressionally-mandated decisionmaking process that has successfully provided a public process for fisheries management decisions for nearly half a century. The statutes and constitutional clauses at issue here do not warrant such extreme results. Nor is NMFS's decision unreasonable. As discussed below, all the Plaintiffs' arguments should be rejected and NMFS's Final Rule should be upheld.

BACKGROUND

I. Statutory Background

A. The Magnuson Act

The Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act"), 16 U.S.C. § 1801 et seq., establishes a national program

for conservation and management of fishery resources. *Id.* §§ 1801(a)(6), 1811(a). Congress passed the Act to "conserve and manage the fishery resources found off the coasts of the United States. . ." and "promote domestic commercial and recreational fishing under sound conservation and management principles. . . ." *Id.* §§ 1801(b)(1), (3).

In the Magnuson Act, Congress established federal management authority over all fishery resources within an "exclusive economic zone" commonly referred to as "Federal waters." This zone extends from the seaward boundary of each State—which is generally three nautical miles from a State's coastline—to 200 nautical miles from the coastline. *Id.* §§ 1802(11), 1811(a). With a limited exception, nothing in the Act "shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries." *Id.* § 1856(a)(1); *cf. id.* § 1856(b)(1) (providing that, under certain conditions and following prescribed procedures, NMFS may preempt state jurisdiction and authority and regulate a fishing area within the boundaries of a State).

The Magnuson Act created eight Regional Fishery Management Councils to advise the Secretary regarding fishery management. *Id.* § 1852(a)-(b). Council members include federal and state fishery management officials and other fishery experts nominated by state governors and appointed by the Secretary. *Id.* § 1852(b). "Each Council shall reflect the

expertise and interest of the several constituent States in the ocean area over which such Council is granted authority." *Id.* § 1852(a)(2); *see also id.* § 1852(a)(1).

Among other duties, each "Council shall . . . for each fishery under its authority that requires conservation and management prepare and submit to the Secretary" a fishery management plan ("FMP") and necessary plan amendments. *Id.* § 1852(h)(1). A "fishery" is "one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics" and "any fishing for such stocks" *Id.* § 1802(13). In addition, all FMPs and their implementing regulations must be consistent with ten National Standards. 16 U.S.C. § 1851(a). National Standard 1 requires that "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry." *Id.* § 1851(a)(1). National Standard 2 requires that measures be based on the "best scientific information available." *Id.* § 1851(a)(2). Advisory guidelines for the National Standards are set forth at 50 C.F.R. § 600.305 *et seq.*

When developing an FMP or amendment, a Council must "conduct public hearings, at appropriate times and in appropriate locations in the geographical area concerned, so as to allow all interested persons an

opportunity to be heard." 16 U.S.C. § 1852(h)(3). Each Council must establish and maintain a committee of experts, commonly referred to as the Scientific and Statistical Committee, to assist in collecting and reviewing scientific information and to provide ongoing scientific advice for fishery management decisions. *Id.* § 1852(g)(1). In addition, a Council may establish other advisory panels "as are necessary or appropriate" to assist the Council in carrying out its functions. *Id.* § 1852(g)(2).

When a Council transmits an FMP or amendment to NMFS, the agency publishes a notice of availability in the Federal Register announcing a 60-day comment period. *Id.* § 1854(a)(1)(B). Within 30 days of the end of the comment period, NMFS must approve, disapprove, or partially approve the FMP based on consistency with law. *Id.* § 1854(a)(3). NMFS reviews proposed regulations for consistency with the FMP and applicable law, and pursuant to a process set forth in the Magnuson Act, publishes proposed rules, solicits public comment, and promulgates final rules. *Id.* § 1854(b). Councils cannot promulgate regulations, and are not considered federal agencies for purposes of the APA. *J.H. Miles & Co.*, 910 F. Supp. 1138, 1159 (E.D.Va 1995).

The Magnuson Act provides for judicial review of final regulations promulgated by NMFS under the Act. 16 U.S.C. § 1855(f)(1). The scope of review and allowable relief that courts may order in such cases is

circumscribed. Regulations may be set aside only "on a ground specified in section 706(2)(A), (B), (C), or (D)" of the APA, 5 U.S.C. § 706(2)(A)-(D). 16 U.S.C. § 1855(f)(1).

B. National Environmental Policy Act

The National Environmental Policy Act ("NEPA") requires federal agencies to take a "hard look" at the environmental consequences of their proposed actions before a final decision to proceed but does not dictate substantive results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989); *All. for the Wild Rockies v. Pena*, 865 F.3d 1211, 1215 (9th Cir. 2017). NEPA requires federal agencies to prepare an Environmental Impact Statement for any proposed agency action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). When it is not clear whether a proposed major federal action requires preparation of an Environmental Impact Statement, the agency may conduct a shorter preliminary examination, called an environmental assessment ("EA"). 40 C.F.R. §§ 1501.5, 1508.1(h).

II. Factual Background

A. History of Salmon Fisheries and Federal Management in Alaska.

There is a lengthy history underlying Federal management of the Alaskan salmon fisheries. In 1952, the United States, Canada, and Japan signed the International Convention for the High Seas Fisheries of the North

Pacific Ocean and Congress subsequently enacted the North Pacific Fisheries Act of 1954 to implement the Convention ("North Pacific Act"). Pub. L. No. 579, 68 Stat. 698 (formerly codified at 16 U.S.C. §§ 1021-1035). Pursuant to the Convention, the North Pacific Act, and implementing regulations promulgated by the Secretary of the Interior,[2] commercial salmon fishing in Federal waters west of Cape Suckling was closed to net fishing. 21 Fed. Reg. 4,932 (July 3, 1956); 50 C.F.R. § 101.19 (1957); 44 Fed. Reg. 33,250 (June 8, 1979). This prohibition only applied, however, in the "North Pacific Area," as defined by the North Pacific Act's implementing regulations, which at that time did not include, *inter alia*, waters three miles seaward "from lines extending from headland to headland across all bays, inlets, straits, passes, sounds and entrances" including Cook Inlet. 21 Fed. Reg. 4932 (July 3, 1956); 50 C.F.R. § 210.1 (1966). In 1970, the Department of the Interior promulgated regulations under the North Pacific Act clarifying that net fishing was prohibited, except for exclusive waters adjacent to Alaska. 35 Fed. Reg. 7070 (May 5, 1970); 50 C.F.R. § 210.1 (1971); AKR_13813. The regulations defined the "exclusive waters adjacent to Alaska" as "those in

[2] Prior to 1970, federal fisheries management was vested in the Department of the Interior. On October 3, 1970, Congress abolished the Bureau of Commercial Fisheries of the Department of the Interior and transferred all of its functions to the Department of Commerce. 84 Stat. 2090 Sec. 1(a) & Sec. 6(a)(2).

which salmon net fishing is permitted under State of Alaska regulations" and declared that federal regulation of net fishing in those exclusive waters outside of State waters would be the same as those promulgated by the State. 50 C.F.R. § 210.1 (1971).

In 1976, Congress enacted the Fishery Conservation and Management Act (the precursor to the Magnuson Act). Pursuant to that Act, the Council developed, and in 1979 NMFS approved, the Fishery Management Plan for the Salmon Fisheries in the EEZ off Alaska (hereinafter, "Salmon FMP") that covered much of the EEZ off the coast of Alaska. *See* 44 Fed. Reg. at 33,250. From its inception and at all times thereafter, the Salmon FMP's management area has included only Federal waters. At no point in its history has the Salmon FMP's fishery management area included any State waters or salmon fisheries occurring within State waters. The 1979 Salmon FMP tracked the existing Federal regulations and divided Federal waters into a West Area and an East Area with the boundary at Cape Suckling.[3] AKR_65. The FMP noted that at that time there were no salmon fisheries in Federal waters west of Cape Suckling, except for those managed by the State of Alaska under the auspices of the North Pacific Act. 44 Fed. Reg. at 33,267.

[3] Prior to the EEZ proclamation in 1983, the Magnuson Act referred to Federal waters as the "U.S. Fishery Conservation Zone." AKR_65.

The FMP provided a "Proposed Management Regime" that contained specific "measures" to manage the fishery. *Id.* at 33,251. When adopting management measures, NMFS approved FMP measures that set season dates for the East Area, but made clear that "all waters west of the longitude of Cape Suckling have no open season," with the exception of the "existing small-scale net fisheries," including the Cook Inlet fishery at issue here, managed by the State of Alaska. *Id.* at 33,251 & 33,267. The FMP explained that closure was the appropriate management regime for the West Area because "[t]he optimum yield for waters west of Cape Suckling addressed by this plan is fully utilized by existing inshore net fisheries. *Id.* at 33,265.

In 1990, the Salmon FMP was comprehensively revised and reorganized. AKR_20136; AKR_13813. The 1990 FMP expanded the West Area's geographic scope to include EEZ waters west of 175 degrees east longitude (*i.e.*, areas near the Aleutian Islands), but otherwise made no material substantive changes to management in the West Area. AKR_20136. This change in the geographic scope of the West Area expanded the area subject to the pre-existing closure of the West Area to commercial salmon fishing and was implemented by changing the definition of the West Area in the regulations. *See* AKR_19969; 55 Fed. Reg. 47,773, 47,775 (Nov. 15, 1990); AKR_19969-70.

In 1992, Congress repealed the North Pacific Act and passed the North Pacific Anadromous Stocks Act of 1992 ("1992 Act") to implement the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean ("1992 Convention"). 16 U.S.C. § 5001-5012. The area addressed under the 1992 Convention included only waters of the North Pacific Ocean and its adjacent seas beyond the EEZ, and thus the 1992 Act did not provide authority for promulgation of federal regulations governing the EEZ. As a result, NMFS repealed the 1954 Act regulations. 60 Fed. Reg. 39,272 (August 2, 1995). The Salmon FMP was not revised to reflect this change in law, and thus the State continued to manage three historical net fisheries as it had done since the time of Alaska statehood in 1959.

B. Management of Salmon Fisheries

The salmon fisheries of Alaska, including Cook Inlet, are complex and target mixed stocks of five species of Pacific salmon (Chinook, pink, sockeye, chum, and coho). AKR_162. In addition to being differentiated by species, each species is also comprised of a number of "stocks," which are generally delineated by the areas that the salmon spawn or the time of year that they spawn (e.g., "Kenai River sockeye salmon"). AKR_170. Salmon are managed to "escapement goals," which are the number of salmon that escape harvest and return to a river to spawn. AKR_163; AKR_167-68 (setting out current escapement goals for Cook Inlet stocks); AKR_447. The State of Alaska

manages Pacific salmon to achieve escapements that provide for sustained yields. AKR_447; *see also* Alaska Constitution, Article VIII, Section 4.

For each fishing season, Alaska develops pre-season forecasts for important salmon stocks. AKR_455. These estimates provide a useful pre-season planning tool, but there is substantial uncertainty associated with these projections and managers must respond in-season to changing information on the actual strength of the runs. AKR_455-56. State fishery managers have authority to issue unilateral emergency orders to quickly respond to the changing conditions and the State employs research and monitoring staff to collect and analyze an assortment of data on run abundance, timing, harvest, escapement, and population structure. AKR_456. This is accomplished through numerous data streams and methods, including test fishing, sonars, counting towers, weirs, aerial and foot surveys, fish wheels, and genetic analysis. *Id.* It is the combination of this timely availability of run, catch and escapement information coupled with manager's emergency order authority that allows Alaska to manage the dynamic salmon fisheries with a high level of precision. *Id.*

In ocean salmon fisheries, different stocks are often caught together. AKR_162. In these so-called "mixed-stock" fisheries, managers must conserve weaker stocks, which can mean reducing effort on more productive stocks to avoid overfishing weaker ones. AKR_163. In such cases, certain

stocks may return to their rivers in numbers exceeding the escapement goals. *Id.*

C. Amendment 12 to the Salmon FMP

The Council and NMFS undertook a major revision of the Salmon FMP in 2011. As part of the deliberations for what would become Amendment 12, the Council recognized that there was ambiguity with respect to management authority for three historical net fisheries in the EEZ because of the withdrawal of the 1954 Act regulations. AKR_13813. In reexamining this issue, the Council recommended and NMFS agreed that the Cook Inlet area should be excluded from the definition of West Area—which is managed by closure—and instead "would allow the State to manage Alaska salmon stocks" in Cook Inlet. AKR_13785. NMFS determined that the fishery did not require federal conservation and management because it had been successfully managed by the State since statehood. AKR_13786. Accordingly, NMFS promulgated a final rule (hereafter, "2012 Final Rule") redefining the West Area to exclude, *inter alia*, "the Cook Inlet Area." AKR_13806. In relevant part, the 2012 Final Rule prohibited "commercial fishing for salmon in the West Area of the Salmon Management Area." 50 C.F.R. § 679.7. "Salmon Management Area" was defined as Federal waters that are "under the authority of the Salmon FMP," and West Area was defined to exclude "the Cook Inlet Area which means the [Federal] waters of

Cook Inlet north of a line at 59° 46.15 N." *Id.* § 679.2; *see also* 77 Fed. Reg. 75,570, 75,587 (Dec. 21, 2012). This exclusion had the effect of "deferring" management of the federal salmon fisheries to the State of Alaska in this particular area of Federal waters. *See id.* at 75,583.

UCIDA and the Cook Inlet Fishermen's Fund brought suit challenging the 2012 Final Rule. The district court upheld the 2012 Final Rule and entered judgment in favor of NMFS. *United Cook Inlet Drift Ass'n v. NMFS*, No. 3:13-cv-00104-TMB, 2014 WL 10988279, at *17 (D. Alaska Sept. 5, 2014) (hereafter "*UCIDA 3*"). The Plaintiffs appealed the judgment and the Ninth Circuit reversed. 837 F.3d 1055 (9th Cir. 2016). In its opinion, the Ninth Circuit held that a Council—as approved by NMFS—was required to issue an FMP for each fishery within its jurisdiction requiring conservation and management, irrespective of whether the State was adequately managing it. *Id.* at 1063. The case was remanded to the district court.

On remand, UCIDA and NMFS jointly filed a motion seeking entry of an agreed-upon judgment. *UCIDA 3*, ECF No. 101. In August 2017, the district court entered verbatim the proposed judgment (hereinafter, "Judgment"). *Id.*, ECF No. 102; AKR_18390. The Judgment provided that its contents did "not bind the Council or NMFS with regard to the contents of the new FMP amendment, which include, but are not limited to, a description of the fishery and conservation and management measures." *Id.* The Judgment

made clear that it applied to an FMP amendment "that addresses Cook Inlet," and not other areas potentially implicated by the Ninth Circuit's ruling. *Id.* It further provided that the "decision on Amendment 12 is remanded without vacatur." *Id.* As a result, Amendment 12 remained in place and the State of Alaska continued to manage the salmon fishery in the Cook Inlet EEZ Area during the remand period.

During preparation of the proposed Judgment, UCIDA sought the formation of a Salmon Committee as a mechanism to participate in the Council process. Stakeholder committees are regularly utilized and can provide important feedback on challenging fishery management issues, however, in NMFS's experience, these committees do substantially lengthen the Council process. Notably the Judgment specifically contemplated that, if the Council created the Salmon Committee, the development of an Amendment would be delayed. *UCIDA 3*, ECF 102 ¶ 5 ("Plaintiffs reserve the right to seek a court-ordered deadline for implementation of a new Salmon FMP amendment that addresses Cook Inlet if the Council does not form a Council committee that includes Cook Inlet salmon fishery stakeholders, including Plaintiffs.").

D. Development of Amendment 14 in the Council

On remand, NMFS went through the statutorily mandated process of engaging the Council to amend the FMP and promulgate a new final rule

that would comply with the decision of the Ninth Circuit. The Council began considering how to amend the FMP to comply with the Ninth Circuit's ruling in April of 2017. AKR_74. Following the entry of Judgment, the Council determined that it would focus the action on meeting the terms of the Judgment—to manage the commercial salmon fishery in the Cook Inlet EEZ—and leave the issue of addressing the other net fisheries for a future action. AKR_18367. In addition, it was understood that the action before the Council would only address commercial fishing in the Cook Inlet EEZ, as required by the Judgment. Neither the Council nor NMFS has ever determined that the recreational fishery in the EEZ requires conservation and management and, while NMFS recommended that the Council evaluate that question at some future date, the Council prioritized incorporating the Cook Inlet EEZ commercial salmon fishery into the FMP. AKR_15107.

The Council began its process with three alternatives focused on commercial salmon fishing in the Cook Inlet EEZ Area. First, take no action and do not amend the FMP ("Alternative 1").[4] AKR_77. Second, amend the FMP to include the Cook Inlet EEZ Area and delegate authority over specific management measures to the State with review and oversight by the Council

[4] The Council acknowledged that this would not be consistent with the Ninth Circuit's opinion or the remand order, but included this no action alternative as a baseline and to comply with the requirements of NEPA. AKR_105.

("Alternative 2"). *Id.* And, third, amend the FMP to include the Cook Inlet EEZ Area and retain all management within the Federal process ("Alternative 3"). AKR_78.

The Council formed a workgroup—the "Cook Inlet Salmon Committee" or "Salmon Committee"—comprised of stakeholders to provide input in the development of the new FMP Amendment. *Id.* The Council established the Salmon Committee largely at the request of UCIDA. *See UCIDA 3*, ECF No. 158 ¶ 8. The Committee, which predominately included members of UCIDA's organization, met a number of times. *Id.* However, as NMFS had warned, the Salmon Committee substantially delayed the Council's development of an FMP amendment. *Id.* ¶¶ 15-17. In fact, in order to address various issues, such as scheduling and location, raised by the Salmon Committee, the length of time needed to develop the FMP amendment extended beyond what was initially estimated, despite steady progress. *Id.* Indeed, stakeholders, Council staff, and NMFS staff continued to work on the analysis required to support an FMP Amendment over the course of the next four years. AKR_74-83.

Throughout the remand period, NMFS had been clear that the Magnuson Act did not permit it to regulate fishing in state waters absent invocation of the Act's preemption provisions, 16 U.S.C. § 1856(b)(1). *See* AKR_411. Certain participants in the Council process, including UCIDA and members of the Salmon Committee, argued that the Magnuson Act and the

Ninth Circuit's decision *required* federal management of state waters. AKR_425-26; AKR_439-40; AKR_17661; AKR_16538. UCIDA also sent a letter to the district court objecting to the Council's focus on developing an FMP for Federal waters. AKR_443-45. In that letter, UCIDA argued that any action that did not place State waters under the Federal management "will not meet the requirements of the Act." AKR_443-45. Following UCIDA's letter to the Court and at the request of the Council, NOAA's Office of General Counsel provided the Council with a legal memorandum explaining the position of the agency and the legal framework under which it operated. AKR_15109. In the memorandum, NOAA's Office of General Counsel explained that the Ninth Circuit's decision did not suggest that the FMP should "include State waters and State water salmon fisheries." AKR_415. It went on to clarify that "[u]nless preemption occurs in accordance with section 306(b), the Magnuson-Stevens Act does not provide the Council or NMFS with the authority to conserve and manage salmon fisheries that occur within State waters in Cook Inlet." AKR_413.

In September of 2019, unsatisfied by the pace of the remand and the scope of the alternatives before the Council, UCIDA filed a motion to enforce the Judgment. *UCIDA 3*, ECF No. 151. In its motion, UCIDA argued that none of the alternatives under consideration by the Council would comply with the Ninth Circuit's order. *Id.* at 19-24. Specifically, in UCIDA's view,

Alternative 2 was impermissible because the proposed delegation to the State of Alaska provided too much consideration of the State's management goals. *Id.* at 16. UCIDA believed Alternative 3 was not consistent with the Judgment because it "would address only the federal part of the fishery" and contemplated closure of the EEZ if the State of Alaska were to catch the entire harvestable surplus in state waters. *Id.* In so doing, UCIDA made the remarkable jump of concluding that the Ninth Circuit's decision required that the Council and NMFS regulate fishing in State waters—an issue that certainly was never squarely presented to the Ninth Circuit. *See* 837 F.3d at 1065.

In response, NMFS explained that it was fully in compliance with the Judgment. *UCIDA 3*, ECF 157 at 13. It further provided the Court with an explanation for the pace of the remand and estimated that the Council's work would be completed by December 2020. *Id.* at 10. The district court agreed that UCIDA had failed to show that NMFS was not complying with the terms of the Judgement. *UCIDA 3*, ECF 168 at 9. The court was further persuaded that the Council was engaged in the good faith development of a new amendment and ordered NMFS to adhere to its estimated timeline, which required a final recommendation from the Council in December of 2020. *Id.* at 11. The court further determined that the additional relief requested by UCIDA was inappropriate. *Id.*

UCIDA once again appealed the district court's order to the Ninth Circuit. On appeal, UCIDA argued that both Alternative 2 and Alternative 3 were inconsistent with the Magnuson Act because they did not provide for NMFS to regulate fishing that occurs in State waters. Ninth Cir. No. 20-35029, ECF No. 15-1 at 27-28. Once again, NMFS explained that it was fully complying with the Judgment. The Ninth Circuit affirmed the district court's decision. 807 F. App'x 690, 691 (9th Cir. 2020).

During the pendency of and following the courts' rulings, NMFS and other stakeholders continued to conduct analyses, hold meetings, and move forward toward final action. Federal and State fisheries scientists and fishery managers developed proposals for all the reference points required by the Magnuson Act for appropriate conservation and management of Cook Inlet salmon stocks. AKR_13814. Throughout the remand period, the Salmon Committee (including some of the Plaintiffs here), continued to press their argument that the FMP amendment under consideration must extend to State waters. *See*, *e.g.*, AKR_15221. As late as May of 2020, the Salmon Committee presented a new proposal that would change the alternatives to encompass State waters (known as, "Alternative 2 – expanded scope"). AKR_17660; AKR_81. This alternative would have the Salmon FMP include all of the EEZ off Alaska, all State waters west of Cape Suckling, and all State internal waters (rivers, streams, and lakes), and impose Federal

management on all of these waters, although some management authority would be delegated back to the State. AKR_152. The Council did not include this alternative in its final range of alternatives because it would have required Federal management of fisheries in the State waters of Cook Inlet and inland Alaska, which are outside the fishery management jurisdiction of the Council and NMFS. AKR_151. As explained in the EA, "[a]t no point in its history has the FMP included State waters, or managed salmon fisheries occurring within State waters" and "expanding Federal management to State waters and State internal waters of Cook Inlet . . . is not authorized under the [Magnuson Act]." AKR_152-53.

At the October 2020 Council meeting, the State of Alaska moved to add a new alternative (Alternative 4) that was similar to Alternative 3 in that it would amend the Salmon FMP to include the commercial net fishery in the Cook Inlet EEZ Area and retain all management within the Federal process. AKR_19263. In fact, before October 2020, a version of Alternative 4 had been a sub-option under Alternative 3. AKR_18979. Alternative 4 proposed to incorporate the Cook Inlet EEZ Area into the FMP's West Area and thereby apply the West Area's pre-existing Federal management regime to the Cook Inlet EEZ Area, rather than developing new management measures.[5]

[5] UCIDA makes much of the fact that Alaska sought input on its motion from NMFS prior to the October Council meeting. ECF No. 38 at 22-23. It is not

AKR_19263. Between the October and December Council meetings, staff continued to work on the analysis that would be presented to the Council for its final decision in December. *See* AKR_6659; AKR_7038. And while this included providing an analysis of Alternative 4, work also continued on other alternatives. *See* AKR_7045. During this time period, NMFS (and NOAA General Counsel, through NMFS) provided technical feedback on Alaska's draft motion, as they would do for any Council member seeking advice on a motion for any other Council action. *See* AKR_711. The record shows that NMFS challenged the State's assertions regarding jurisdiction and authority, sought to ensure that the State was clear about its position, and pushed the State to provide a rationale for its position. *Id.*

At the December 2020 Council meeting, the State of Alaska moved to have the Council select Alternative 4 as its preferred alternative. AKR_7301. It also announced that it would not accept a delegation of management authority under Alternative 2. AKR_7302. The State provided a detailed rationale for its decision. AKR_7303. But, regardless of its reasons, without an agreement from the State to accept the delegation of management

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unusual or nefarious for NMFS to work with Council members on their motions. As the final decisionmaker, NMFS necessarily must be involved in shaping proposals and regularly provides input regarding the type of information NMFS would expect to see in the record during agency review of a Council recommendation, if the Council were to adopt the member's motion.

authority, Alternative 2 was no longer a viable option. This left the Council with the choice of recommending either Alternative 3 or Alternative 4 to NMFS for approval. The Council voted unanimously to recommend Alternative 4. AKR_7319. NMFS's representative to the Council—the Regional Administrator for the Alaska Regional Office—abstained. AKR_7315. He explained that 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." *Id.*

E. NMFS's Approval of Amendment 14 and Promulgation of the Final Rule.

Following the Council's recommendation, NMFS worked to meet the one-year deadline to promulgate a final rule as agreed to in the stipulated Judgment. AKR_18390. NMFS published a proposed final rule and a draft environmental assessment on June 4, 2021. AKR_13812. NMFS explained that the action is "consistent with the Council's longstanding West Area salmon management policy to facilitate salmon management by the State, in accordance with the Magnuson-Stevens Act and applicable federal law" and "reflects a determination by the Council and NMFS that the State is best situated to respond to changing conditions inseason to fully utilize salmon stocks and avoid overfishing consistent with the constraints of weak stock management in a mixed stock fishery." AKR_1445.

In addition, NMFS recognized that the only other management alternative available to the Council and NMFS—Alternative 3—would likely produce worse conservation and management outcomes. NMFS determined that a separately managed Federal commercial salmon fishery in the EEZ would result in significant precautionary reductions in EEZ harvest or closures.[6] AKR_13815. As NMFS explained, the Federal regulatory process does not have the same speed and flexibility as the State process, hindering NMFS's ability to move quickly in response to new information. *Id.* NMFS also noted that Federal harvest would have to be responsive to planned harvest in State waters, to avoid overfishing. *Id.* Because of these limitations, harvest in the EEZ under Alternative 3 would necessarily be lower than harvest under the status quo. *Id.* In addition, enforcement and monitoring required under Alternative 3 would create significant new costs and regulatory burdens for participants. *Id.* These elements are necessary to prevent overfishing and include a Federal Fisheries Permit, completion of a required Federal logbook, and required use of a Vessel Monitoring System. *Id.* Finally, NMFS acknowledged that Federal managers would be dependent

[6] The likelihood that Alternative 3 would reduce harvests was well understood, including by the Salmon Committee, which noted that "[d]riftnet fishery stakeholders have indicated their opposition to Alternative 3 because it would likely reduce harvest opportunities in the Cook Inlet EEZ due to the absence of a federal infrastructure for managing salmon fisheries in Alaska." AKR_17661.

on a high degree of voluntary cooperation from State managers under Alternative 3. In order to open an EEZ commercial salmon fishery, NMFS would need to ensure that there is

> a Federal salmon data gathering process for Cook Inlet that is adequately supported with data from State salmon fisheries in Cook Inlet, a harvestable surplus of salmon available in the EEZ that could support directed fishery openings, and salmon harvest reporting tools that allow the Federal catch accounting system to adequately monitor harvest and bycatch such that overfishing can be prevented.

AKR_13816. Given these challenges, NMFS concluded that "Alternative 3 would pose significant challenges to achieving optimum yield [] on a continuing basis." *Id.* In contrast, Alternative 4 would achieve optimum yield and would maximize utilization of the resource while avoiding overfishing. AKR_13817. NMFS therefore proposed regulations that would codify the Council's recommended amendment to the FMP and incorporate the Cook Inlet EEZ Area into the West Area. AKR_13816.

Following a public comment period, NMFS issued its Final Rule. AKR_13822. The Final Rule amended the Code of Federal Regulations to change the definition of "The West Area" to include "the Cook Inlet EEZ Subarea." *Id.* In issuing its approval, NMFS agreed with the Council's determination that Federal management of the Cook Inlet EEZ through closure of the area to commercial salmon fishing:

> (1) takes the most precautionary approach to minimizing the potential for overfishing, (2) provides the greatest opportunity for maximum harvest from the Cook Inlet salmon fishery, (3) avoids creating new management uncertainty, (4) minimizes regulatory burden to fishery participants, (5) maximizes management efficiency for Cook Inlet salmon fisheries, and (6) avoids the introduction of an additional management jurisdiction into the already complex and interdependent network of Cook Inlet salmon fishery sectors.

AKR_13823; *see* AKR_1445.

STANDARD OF REVIEW

The Magnuson Act authorizes judicial review of regulations implementing an FMP in accordance with Sections 706(2)(A)-(D) of the APA. 16 U.S.C. § 1855(f)(1). Under the APA, a court may set aside agency regulations only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This is a "highly deferential" standard of review, and an agency's action is presumed to be valid and should be affirmed "if a reasonable basis exists for its decision." *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000) (citation omitted). A reviewing court's "only task is to determine whether the Secretary has considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Midwater Trawlers Coop. v. Dep't of Com.*, 282 F.3d 710, 716 (9th Cir. 2002) (citation omitted). The court "cannot substitute [its] judgment of what might be a better regulatory scheme ... if the Secretary's reasons for adopting it were not

arbitrary and capricious." *All. Against IFQs v. Brown*, 84 F.3d 343, 345 (9th Cir. 1996).

"[S]ummary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985). Review is generally "limited to the administrative record on which the agency based the challenged decision." *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010) (citation omitted). Under Local Rule 16.3, Federal Defendants only file a principal brief in opposition to Plaintiffs' motion for summary judgment, which is then treated as a cross motion for summary judgment.

ARGUMENT

I. UCIDA's Statutory Claims

A. The Final Rule is Fully Consistent with the Magnuson Act.

1. NMFS does not have Authority to Regulate State-Water Fisheries.

While carefully avoiding expressly saying so in its brief here (unlike its previous pleadings, *see* supra 20-23), the animating premise of UCIDA's arguments is that NMFS was required to regulate commercial salmon fishing in State waters. *See*, *e.g.*, ECF No. 38 at 31 ("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."); ECF No. 38 at 32 (NMFS "provided no meaningful management consistent with National Standard 1 (or any National Standard) for the fishery throughout its range, instead deferring that to the State" (citation omitted)). From this, UCIDA goes on to misstate the choices available to NMFS at the time it made its decision. Therefore, it is important to establish the bounds of NMFS's authority at the outset.

NMFS's longstanding interpretation is that the Magnuson Act does not provide authority to NMFS to manage fisheries in State waters absent preemption. *See* AKR_415. The plain language of the Act supports this reading. First, section 101(a) establishes the Nation's "sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, *within the [EEZ]*." 16 U.S.C. § 1811(a) (emphasis added). The Act defines the EEZ as the zone established by Presidential Proclamation 5030 (March 10, 1983), in which President Reagan claimed a 200-mile zone within which the United States would assert sovereign rights over natural resources. *Id.* § 1802(11). The Act further clarifies that "the inner boundary of [the EEZ] is a line coterminous with the seaward boundary of each of the coastal States." *Id.* Alaska's seaward boundary is three nautical miles from its coast. 43 U.S.C. § 1301(b). The jurisdiction of the

councils is cabined accordingly. The Magnuson Act sets forth that each council must prepare an FMP for "each fishery *under its authority* that requires conservation and management." 16 U.S.C. § 1852(h)(1) (emphasis added). The North Pacific Council has "authority over the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean *seaward* of Alaska." *Id.* § 1852(a)(1)(G) (emphasis added).

In addition, the Act explicitly recognizes and reserves State jurisdiction over fishery resources. As set forth in the Act, "nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries." 16 U.S.C. § 1856(a). This provision contains one exception, which allows (but does not require) NMFS to preempt a State's authority under very specific circumstances, including an opportunity for a hearing under 5 U.S.C. § 554. *Id.* § 1856(b). At the hearing, NMFS must demonstrate that "the fishing in a fishery, which is covered by a [FMP], is engaged in predominately within the [EEZ] and beyond such zone" and that the State's action or inaction will substantially and adversely affect the implementation of the FMP. *Id.* Notably, this limited preemption authority does not apply to a State's "internal waters," e.g., streams, rivers, and lakes. *Id.* § 1856(b)(1).

The Magnuson Act's regulation of anadromous species—species that spend parts of their lives in both freshwater and saltwater—"beyond" the

EEZ is not to the contrary. The Act asserts authority over "[a]ll anadromous species throughout the migratory range of each such species beyond the exclusive economic zone; except that that management authority does not extend to any such species during the time they are found within any waters of a foreign nation." 16 U.S.C. § 1811(b)(1). The phrase "beyond the exclusive economic zone" is not defined by the Magnuson Act. However, read in context, it plainly means the area seaward of the outer boundary of the EEZ (*i.e.*, *more* than 200 nautical miles from the coast) and does not include State waters that are landward of the inner boundary of the EEZ (*i.e.*, 0-3 nautical miles from the coast). *Jensen v. Locke*, No. 3:08-cv-00286-TMB, 2009 WL 10674466, at *4 (D. Alaska Nov. 5, 2009) ("The term 'beyond' is used in several provisions of the Magnuson-Stevens Act to indicate areas that are outward or seaward, as opposed to areas that are inward or shoreward."); 16 U.S.C. § 1856(a) (differentiating State waters from waters "beyond" the EEZ).

Moreover, NMFS has no authority to force the State to manage its fisheries to Federal standards, despite UCIDA's intimations to the contrary. ECF No. 38 at 31-32. As an initial matter, nothing in the Act provides authority for such a proposition. For example, the delegation provision does not allow NMFS to compel a State to manage to Federal standards, it only provides that NMFS shall rescind the delegated authority if a State's regulations are not consistent with an FMP. 16 U.S.C. § 1856(a)(3)(B). And,

even if such authority existed, it is well settled that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. 144, 188 (1992). UCIDA's claims about NMFS's ability to compel the State to adhere to the Magnuson Act's requirements are simply unsupported by the law.

2. The Final Rule does not Defer Management of the EEZ to the State of Alaska.

This background illustrates why UCIDA's arguments fail. NMFS did not "turn over all management responsibility for the rest of Cook Inlet to the State of Alaska, free of any Magnuson Act obligations." ECF No. 38 at 29. Alaska always had authority to manage its State-water fisheries. *See supra I.A.1.* What NMFS actually did was assert management authority over the portions of the commercial fishery in the Federal EEZ portion of Cook Inlet by incorporating it into the FMP's West Area, as required by the Ninth Circuit's opinion. *UCIDA 3*, 837 F.3d at 1065 ("Amendment 12 is therefore contrary to law to the extent it removes Cook Inlet from the FMP.").

UCIDA nonetheless argues that the Final Rule is an improper deferral of authority to the State and contravenes the Ninth Circuit's decision. ECF No. 38 at 33. First, nothing in the Ninth Circuit's opinion required any particular management regime for the Cook Inlet EEZ Area. 837 F.3d at 1065; 807 F. App'x at 691 (9th Cir. 2020). It required only that NMFS

include the EEZ in the FMP, which it has done. *Id.* Second, acknowledgment of State authority over fisheries conducted in State waters is not a "deferral," but a necessary factor that NMFS must account for. The reality is that salmon do not abide by State/ Federal boundaries in Cook Inlet or elsewhere. Thus, taking into account the management regime in Alaska State waters is critical to managing the resource as a whole.[7]

To the extent that UCIDA is arguing that the Final Rule constitutes an improper deferral of authority to manage *recreational* fisheries in the EEZ, that argument also fails. ECF No. 38 at 33. As an initial matter, UCIDA's complaint raises no claim alleging that the Final Rule impermissibly failed to address recreational fisheries and its arguments regarding the recreational fishery can be disregarded on that basis. ECF No. 1. In any event, the claim would fail on the merits. Early in the Council process, there was a decision to focus this action on meeting the terms of the Judgment, which did not include recreational fisheries. AKR_18367. At this time, neither the Council nor NMFS has determined that the recreational fishery in the EEZ requires

[7] The need to account for State management actions is not unique to Alaska. For example, in another fishery, the Territory of Guam (which is identical to a State for purposes of the Magnuson Act) had not implemented accountability measures to limit catch of an overfished species. 87 Fed. Reg. 9271 (Feb. 18, 2022). NMFS acknowledged that, if catch exceeded the annual catch limit, its only recourse was to close Federal waters to fishing unless and until the Territory implemented a coordinated program. *Id.*

conservation and management—a crucial finding before requiring inclusion of a fishery in an FMP. *See*, *UCIDA 3*, 837 F.3d at 1059 (explaining that FMPs are only required for fisheries that require conservation and management); 50 C.F.R. 600.305(c) (emphasizing that not every fishery requires Federal management, and unless a fishery occurs predominately in Federal waters and is overfished or subject to overfishing, a Council has discretion to determine a fishery does not require conservation and management such that it must be included in an FMP); AKR_15107 (noting that the Council had not made a determination regarding whether the recreational fishery in the Cook Inlet EEZ requires conservation and management). Thus, the question of whether the recreational salmon fishery in the Cook Inlet EEZ Area must be included in the FMP is separate from the Final Rule at issue here and is not before the Court.

3. The Final Rule Prevents Overfishing while Achieving Optimum Yield on a Continuing Basis.

National Standard 1 requires that "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry." 16 U.S.C. § 1851(a)(1). "Optimum" is defined as, *inter alia*, the amount of fish which "will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities"

and "is prescribed on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor." *Id.* § 1802(33).

Under Amendment 14 and the Final Rule, maximum sustainable yield is defined as "the maximum amount of harvest possible under the State of Alaska's escapement goals." AKR_13816. This level represents the largest long-term average catch that can be taken by the fishery under prevailing ecological, environmental conditions and fishery technological characteristics, and the distribution of catch among fishery sectors. 50 C.F.R. § 600.310(e)(1)(i). Optimum yield for the Cook Inlet salmon fishery is the level of catch from all salmon fisheries occurring within Cook Inlet (State and Federal water catch) that would achieve specified escapement goals and would achieve catch levels below the historically sustainable average catch for stocks without escapement goals, except when management measures required to conserve weak stocks necessarily limit catch of healthy stocks. AKR_150; AKR_13816; 50 C.F.R. § 600.310(e)(3)(i)(A) (providing that optimum yield is prescribed on the basis of maximum sustainable yield, "as reduced by any relevant economic, social, or ecological factor").

This specification of maximum sustainable yield and optimum yield was supported by extensive analysis. NMFS—assisted by the Council and its Scientific and Statistical Committee—analyzed the status determination

criteria and reference points[8] that would have served as the foundation for proposed Federal management of the Cook Inlet EEZ under Alternatives 2 and 3. AKR_13814; AKR_184-85. NMFS applied those criteria retrospectively to provide a comprehensive assessment of the State's escapement-based management of Cook Inlet salmon stocks. AKR_13814; AKR_184-85. The analysis found that State management of Cook Inlet salmon stocks had been consistently appropriate for conservation within the bounds of the status determination criteria that would be implemented under Federal management. AKR_184-85. The analysis further determined that the addition of Federal management under any alternative was unlikely to appreciably change salmon conservation metrics and thresholds already established in Cook Inlet (*i.e.*, target harvest ranges and limits). AKR_162-88; AKR_13814. NMFS, the Council, and the Scientific and Statistical Committee all reviewed the State's harvest strategy and found that its escapement-based management consistently achieves harvest levels that fall within the range of optimum yield as defined here, while being adequately conservative to prevent overfishing. AKR_162-88; AKR_13814; AKR_18060; AKR_165-85. Moreover, the Council has a continuing obligation to review its

[8] Status determination criteria allow NMFS to assess whether a stock is overfished or overfishing is occurring. 50 C.F.R. § 600.310(b)(1)(ii). Reference points include status determination criteria, maximum sustainable yield, optimum yield and annual catch limits. *Id.* § 600.310(b)(1)(iv).

specification of optimum yield, so that it is responsive to changing circumstances in the fishery and ensuring that the FMP continues to meet the statutory requirements. 16 U.S.C. §1852(h)(5); 50 C.F.R. § 600.310(e)(3)(iii).

UCIDA is simply wrong when it argues this definition of optimum yield will result in "wasting" fish and will therefore not achieve optimum yield. ECF No. 38 at 38. Notably, UCIDA points to nothing in NMFS's analysis that was incorrect. *Id.* Instead, UCIDA bases its conclusion on what it deems "underutilization" of certain stocks targeted by the drift gill net fishery in past years. *See id.* at 14. In so doing, it ignores the mixed stock nature of the fishery, which necessarily means that some strong stocks will be under-harvested to protect comingled weaker stocks.[9] AKR_186. It also ignores NMFS's conclusion that Federal management of the Cook Inlet EEZ would not have resulted in appreciably different harvest levels during past fishing seasons and all of the alternatives would need to continue to protect the

[9] UCIDA's argument that NMFS's fishery disaster declarations for Cook Inlet fisheries are evidence of supposed mismanagement by the State of Alaska is without merit and contrary to the Magnuson Act. ECF No. 38 at 38. Under the Magnuson Act, the Secretary may only determine that there a "commercial fishery failure due to a fishery resource disaster" for specified reasons. 16 U.S.C. § 1861a(a)(1). Fishery failures that can be mitigated through conservation and management measures are not eligible. *Id.* Mismanagement of fisheries cannot—by the plain terms of the statute—be the basis for a disaster declaration and were not the basis for the decisions at issue here. *Id.*; *see* AKR_1128.

weakest stock to comply with the requirements of the Magnuson Act. AKR_13814. Finally, NMFS and the Council looked closely at whether escapement above maximum sustainable yield reduced recruitment (as UCIDA suggests, ECF No. 38 at 32). AKR_472-92. NOAA's Alaska Fisheries Science Center produced a thorough, quantitative study that determined there was "limited evidence" to suggest that reducing harvest of stronger stocks to protect weaker stocks—such that the stronger stocks may exceed their escapement goals—could negatively affect recruitment. AKR_480.

In addition, when evaluating whether Alternative 4 would "provide the greatest overall benefit to the Nation . . . as reduced by any relevant social, economic, or ecological factor," 16 U.S.C. § 1802(33), NMFS determined that, as compared to the only other viable Alternative (Alternative 3), Alternative 4 would both "take[] the most precautionary approach to minimizing the potential for overfishing" and "provide[] the greatest opportunity for maximum harvest from the Cook Inlet salmon fishery." AKR_13817. As NMFS explained, a separately managed Federal commercial salmon fishery in the Cook Inlet EEZ would have significant management challenges, resulting in precautionary reductions in EEZ salmon harvests or closures of the area. AKR_13815; AKR_136; AKR_325-26.

Many of these management challenges flow from the different regulatory tools available to State managers, but not Federal managers.

First, State fishery managers are able to quickly open and close State water fisheries in response to real time data on escapement (i.e. the number of salmon reaching natal streams). AKR_163; AKR_230. In contrast, federal managers would have to rely on preseason estimates of run strength to establish catch limits, which is less accurate and less responsive than escapement-based management. AKR_145-46; AKR_139-41; AKR_324. Relative to the State, Federal managers could not quickly adjust fishery openings to either avoid overfishing if preseason estimates were too high or avoid foregone yield if preseason estimates were too low. AKR_143; AKR_13815. Given these constraints, and NMFS's overriding mandate to prevent overfishing, NMFS expected that management under Alternative 3 would have been necessarily conservative and could result in lower total commercial harvest (from both State and Federal waters) than under Alternative 4. AKR_143-44; AKR_13815.

In addition to requiring a more conservative approach to setting target catch levels, Alternative 3 would also have resulted in significant closures in the EEZ. Closures could be required for several reasons: insufficient Federal data if the State does not share its data; a move by the State of Alaska to manage the fishery in State waters so as to fully utilize the resource; harvest specifications that are too low to support directed fishing; lack of Federal reporting tools; or an environmental disaster. AKR_136. The data needs in

particular would likely lead to closures in the EEZ under Alternative 3. AKR_137. Furthermore, if NMFS were to open a separate fishery in the EEZ, the uncertainty created by adjacent harvest occurring in both State and Federal waters under separate management would make it difficult to ensure harvest levels across both jurisdictions were within target ranges in any given year. AKR_141-42. If this uncertainty was too great, or if the allowable harvest amount of one or more salmon stocks was too small to support directed fishing (i.e. a harvest period could exceed the allowable catch), then NMFS would also close the Cook Inlet EEZ to commercial salmon fishing. AKR_136; AKR_185-86. Given the variability of salmon runs in Cook Inlet, closures under this management approach could occur unpredictably and suddenly, likely after harvesters and processors had already made investments to participate. AKR_325-26. In contrast, closing the EEZ creates certainty for participants and will likely result in similar harvest totals for Cook Inlet salmon stocks, participants will not have to incur administrative costs for uncertain opportunities in the EEZ, and NMFS can eliminate the risk of overfishing that would be inherent to a bifurcated salmon management regime in Cook Inlet. AKR_13826. Under these conditions, it was reasonable for NMFS to conclude that Alternative 4 would provide a higher benefit to the nation. NMFS determined that optimum yield would be fully achieved in Cook Inlet State water commercial salmon

fisheries and that fishing in those waters would increase to offset decreases in Federal waters. AKR_13816.

Finally, the Magnuson Act requires that NMFS set an "annual catch limit" for managed fisheries "that may not exceed the fishing level recommendations of its scientific and statistical committee or the peer review process." 16 U.S.C. § 1852(h)(6). The Act also requires that FMPs include "measures to ensure accountability" to keep catch "at a level such that overfishing does not occur in the fishery." *Id.* § 1853(a)(15). In compliance with these requirements, NMFS set an annual catch limit of zero for the commercial salmon fishery in the Cook Inlet EEZ Area. AKR_13816. As a management measure to achieve this catch limit, NMFS closed the Area to commercial fishing. *Id.*; 50 C.F.R. § 600.310(g)(3) (explaining that "if an [annual catch level] is set equal to zero and the [accountability measure] for the fishery is a closure that prohibits fishing for a stock, additional [accountability measures] are not required"). UCIDA contends that these accountability measure requirements were not complied with, ECF No. 38 at 39, but this is plainly incorrect. NMFS was not required to set an annual catch limit for the State-waters portion of this fishery—a limit that could not be enforced and for which no accountability measures could be implemented. *See supra* I.A.1. Nor could an alleged failure to set an annual catch limit for the recreational fishery—which NMFS has never declared in need of

conservation and management—be the basis for overturning the Final Rule, which established Federal management of the commercial salmon fishery in the Cook Inlet EEZ Area, as required by the Judgment.

4. The Final Rule is a Conservation and Management Measure

Finally, UCIDA asserts that the Final Rule is not a "conservation measure" and is therefore arbitrary and capricious. ECF No. 38 at 31. There is no support for such a contention. At the outset, "conservation measure" is not a defined term in the Magnuson Act and it is unclear what UCIDA is referring to. ECF No. 38 at 30. To the extent UCIDA is arguing that the Final Rule is arbitrary and capricious because it does not meet the definition of "conservation and management," its argument fails. The Act defines "conservation and management," in part, as "all of the rules, regulations, conditions, methods, and other measures [] which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring or maintaining, any fishery resource" and which assure a supply of food, recreational benefits, avoidance of adverse effects on fishery resources, and a multiplicity of future management options. *Id.* § 1802(5). NMFS often closes areas to commercial fishing sectors in order to achieve conservation and management objectives. *See, e.g.*, 50 C.F.R. § 697.7(b)(1).

As explained above, the Final Rule provided the best opportunity to achieve optimum yield, prevent overfishing, and provide the greatest benefit

to the nation. *Supra* I.A.3. This demonstrates that the Final Rule meets the definition of conservation and management. To the extent UCIDA is arguing that NMFS could not implement measures designed to prevent overfishing if overfishing was not already occurring, *see* ECF No. 38 at 32, there is no support for such an argument.[10] NMFS must ensure that *every* conservation and management measure that it promulgates under the Magnuson Act is consistent with National Standard 1's requirement to prevent overfishing. 16 U.S.C. § 1851(a)(1). As NMFS explained, the drift gill net fishery interacts with stocks that could be vulnerable to overfishing and, under National Standard 1, NMFS has an ongoing obligation to prevent such overfishing. AKR_13829.

5. The Final Rule is Consistent with Section 303(b)(2)(C) of the Magnuson Act.

UCIDA's arguments that the closure of the West Area to commercial salmon fishing triggers the requirements of Section 303(b)(2)(C) of the Magnuson Act, ECF No. 38 at 33, also fails. Section 303 sets forth

[10] UCIDA also claims that NMFS's stated reasons for promulgating the Final Rule are a "pretense," ECF No. 38 at 32, and that the Final Rule was just a way to avoid managing the fishery, *id.* at 31. This allegation is not supported by the record. What the record actually shows was that NMFS worked for *years* and devoted countless hours to working on analyses, consulting with stakeholders, conducting the scientific assessments, and, in particular, developing Alternative 2. AKR_366; AKR_74-83. There is nothing in the record at all to support the contention that NMFS did not engage in this process in good faith.

discretionary provisions of an FMP, which 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." 16 U.S.C. § 1853(b)(2)(A). The Act further requires that "with respect to any closure of an area under this Act that prohibits *all fishing*" an FMP must

> ensure 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;

Id. § 1853(b)(2)(C)(emphasis added).[11] These requirements attach to the rare circumstance in which an FMP prohibits "all fishing" in an area. It does not apply to the closure of a single fishery or fishing sector, as occurred here. Indeed, Congress was clearly able to differentiate between the prohibition of "all fishing" and the other types of closures that NMFS regularly deploys,

[11] Moreover, while this provision is not applicable here, NMFS addressed many of its criteria. NMFS used the best available scientific information in promulgating the Final Rule, as required by National Standard 2. *See infra* I.A.6. Likewise, its decision was based on the costs and benefits of the closure, which were extensively analyzed.

where fishing is prohibited "only by specified types of fishing vessels or with specified types and quantities of fishing gear." *Compare id. with id.* § 1853(b)(2)(A).

Here, the Final Rule incorporated the Cook Inlet EEZ Area into the West Area, where existing regulations prohibit vessels from engaging "in commercial fishing for salmon." 50 C.F.R. § 679.7(h)(2). The prohibition does not apply to "all fishing." Many other fisheries take place in the Cook Inlet EEZ Area, including halibut and groundfish. *See* 50 C.F.R. Pt. 679, Fig. 15 (regulatory areas for the Pacific halibut fishery); *id.* § 679.7 (vessels using hook and line gear with the appropriate permits are not prohibited from fishing for certain groundfish species in Area 630, which includes the EEZ waters of Cook Inlet). Moreover, the Final Rule does not even apply to all salmon fishing in the Cook Inlet EEZ Area. Recreational salmon fishing is still permitted in all of the West Area and the provision therefore does not apply. UCIDA claims that this interpretation renders the provision "largely meaningless." ECF No. 38 at 35. This is not the case; rather, it is a provision that applies under specific circumstances. If Congress wanted the provision to apply to closures of a fishery sector or something less than "all fishing," it easily could have done so. In addition, UCIDA's proffered legislative history says nothing regarding this specific provision and is irrelevant to the

statutory interpretation question, particularly when the statutory language is so clear. ECF No. 38 at 35.

6. The Final Rule is Based on the Best Scientific Information Available.

National Standard 2 sets forth that "[c]onservation and management measures shall be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). NMFS fully complied with this requirement when it promulgated the Final Rule. In its brief, UCIDA points to no scientific information not considered or scientific information that was incorrect. ECF No. 38 at 40. Indeed, it does not identify a single finding or conclusion of NMFS's that it believes was not based on the best scientific information available. *Id.* As explained above, *supra* 18-26, NMFS spent years assembling the scientific information needed to evaluate the Final Rule and those analyses were all reviewed by the Council's Scientific and Statistical Committee. AKR_447-56; AKR_18710; AKR_15505-06.

Instead of engaging with NMFS's analysis, UCIDA argues that *Alaska's* decision not to accept a delegation of authority was a political decision. ECF No. 38 at 40. But it is *NMFS's* Final Rule that is before the Court, not a decision by the State of Alaska. Regardless of Alaska's reasons for refusing delegation, NMFS had no ability or authority to force a delegation on the State, *see supra* 33-34, and Alaska's reasons are immaterial

to NMFS's compliance with National Standard 2. UCIDA has identified nothing in the Final Rule that was not supported by the best available science and its argument fails for this reason. *Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1120 (9th Cir. 2006) ("Bereft of any contrary science, plaintiffs' bare allegation that the agency's distinction conflicts with the 'best scientific evidence available' fails.").

7. The Final Rule is not an Assignment of Fishing Privileges.

National Standard 4 provides specific guidance that is in place "[i]f it becomes necessary to allocate or assign fishing privileges among various United States fishermen." 16 U.S.C. § 1851(a)(4). In its guidelines, NMFS explains that "[a]ny management measure (or lack of management) has incidental allocative effects, but only those measures that result in *direct distributions of fishing privileges* will be judged against the allocation requirements of Standard 4." 50 C.F.R. § 600.325(c)(1) (emphasis added). The Final Rule is not a direct distribution of fishing privileges and therefore is not an allocation. Examples of allocations may "include, for example, per-vessel catch limits, quotas by vessel class and gear type, different quotas or fishing seasons for recreational and commercial fishermen, assignment of ocean areas to different gear users, and limitation of permits to a certain number of vessels or fishermen." *Id.* However, not every management measure of these types is allocative. *Nat'l Coal. for Marine Conservation v.*

Evans, 231 F. Supp. 2d 119, 131 (D.D.C. 2002). Thus, like the closure at issue in *National Coalition for Marine Conservation*, while it is possible that the Final Rule could have *incidental* allocative effects, it is not directly allocative. *Id.* The purpose of the Final Rule was not to redistribute fishing privileges. Indeed, one of the reasons NMFS approved the Council's recommendation of Alternative 4 was that its analysis demonstrated that fishery participants were likely to realize larger catches and less administrative burden under Alternative 4 than under Alternative 3—the only other viable alternative. *See supra* I.A.3.

In any event, the Final Rule is completely consistent with National Standard 4. National Standard 4 "sets forth three requirements that must be met whenever an FMP allocates fishing privileges: (i) the allocation must be fair and equitable; (ii) it must be reasonably calculated to promote conservation; and (iii) it must not allocate an excessive share of privileges to any particular group." *C & W Fish Co. v. Fox*, 931 F.2d 1556, 1563 (D.C. Cir. 1991). NMFS carefully and extensively analyzed the catch expected by the drift gillnet fishery under both Alternative 3 and 4. AKR_226-305; AKR_322-29. Under both alternatives, the EEZ was expected to be closed to fishing much more than under status quo and catch for the drift gill net fishery was expected to be lower. AKR_324-29. It was not possible to estimate the magnitude of those changes, given the complexity of Cook Inlet fisheries, but

they were analyzed and taken into consideration. Moreover, to be fair and equitable, "allocation of fishing privileges should be rationally connected to the achievement of [optimum yield] or with the furtherance of a legitimate FMP objective" and "need not preserve the status quo in the fishery to qualify as 'fair and equitable,' if a structuring of fishing privileges would maximize overall benefits." 50 C.F.R. § 600.325(c)(3)(i). Here, the Final Rule is rationally connected to achieving optimum yield and maximizing benefits. *See supra* I.A.3. Further, the rule applies to all commercial fishery participants equally and does not favor one group over another. It is reasonably calculated to promote conservation by reducing the risk of overfishing and does not result in any participant acquiring excessive shares.

8. The Final Rule took the Needs of Fishing Communities into Account.

National Standard 8 requires that:

> Conservation and management measures shall, consistent with the conservation requirements of this chapter (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of [National Standard 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.

16 U.S.C. § 1851(a)(8). The Final Rule complied with all requirements of National Standard 8 and relied on the best scientific information available.

AKR_263-98. In assessing the potential impacts of the Final Rule on fishing communities, NMFS developed quantitative indicators of community fishery engagement and dependency. AKR_272. This analysis considered where harvesting vessels and permit holders were located, how dependent these entities were on the drift gill net fishery, and how dependent they were on salmon caught in the EEZ portion of the fishery. AKR_277; AKR_282-83. The analysis also looked at shore-based processors and again assessed their dependence on the drift gill net fishery in general and the EEZ portion of the fishery in particular. AKR_279-80. NMFS developed a framework to create quantitative indices of fisheries engagement to explore the degree of community engagement in the drift gill net fishery. AKR_286; AKR_493-504. NMFS then more closely analyzed the communities that had higher levels of community engagement, including Homer, Kenai, and Soldotna. AKR_288-93. Despite this extensive analysis, NMFS could not predict exactly how the fishery would shift due to the Final Rule and therefore could not predict the precise impacts to these communities, but NMFS acknowledged that a loss of revenue from commercial fishing could negatively affect fishing communities on the Kenai Peninsula. AKR_13831. However, NMFS also found that the actual impact was very uncertain and that any negative impacts may be offset by beneficial impacts associated increased harvest in State waters or increased harvest by other commercial sectors. *Id.*; AKR_327-29.

In addition, in analyzing whether the Final Rule minimized the economic impacts on fishing communities to the extent practicable, NMFS considered whether there were other available alternatives that would avoid such impacts. NMFS concluded that—after the State of Alaska determined it would not accept a delegation of authority to manage the EEZ portions of the fishery—there was no option available that would both meet the terms of the Judgment and avoid any changes to the fishery that could affect fishing communities. The only other viable management alternative—establishing a separate commercial salmon fishery in the EEZ—would have significantly constrained or eliminated drift gillnet harvest in the EEZ and, additionally, would have imposed increased costs on vessels, increased uncertainty, and potentially had greater negative impact on fishing communities. AKR_13830-32. It is against this background that NMFS concluded that the Final Rule minimizes adverse economic impacts to the extent practicable and also balances the needs of fishing communities with the required conservation of Cook Inlet salmon stocks. AKR_13830. This determination was not arbitrary and capricious and should be upheld.

None of UCIDA's arguments to the contrary undermines NMFS's determination. UCIDA claims that NMFS did not meaningfully assess the impacts of the Final Rule on fishing communities, but provides no evidence of this. ECF No. 38 at 44. UCIDA seems to imply that NMFS was required to

conduct additional research, that its analysis was conducted too quickly, or that it failed to take public comment into account. *Id.* But, National Standard 8 requires that NMFS use the "best scientific information available" and does not require that NMFS conduct additional studies, as implied by UCIDA. *See Massachusetts v. Pritzker*, 10 F. Supp. 3d 208, 220 (D. Mass. 2014). NMFS relied on the best scientific information available in evaluating community impacts, and fully responded to public comments addressing these impacts. AKR_13830-34.

Likewise, UCIDA objects that NMFS was unable to provide evidence of the "actual impacts" of the Final Rule. ECF No. 38 at 45. "Time and time again courts have upheld agency action based on the 'best available' science, recognizing that some degree of speculation and uncertainty is inherent in agency decisionmaking." *N. Carolina Fisheries Ass'n v. Gutierrez*, 518 F. Supp. 2d 62, 85 (D.D.C. 2007) (quoting *Oceana, Inc. v. Evans*, 384 F.Supp.2d 203, 219 (D.D.C. 2005). So too here, NMFS was not required to perfectly predict the future effects of the action—an impossibility with even unlimited resources and time. Instead, it relied on the best scientific information available to make reasonable predictions and acknowledged uncertainty where it existed. AKR_326-29; AKR_18710-12. This is what National Standard 8 requires.

The arguments offered by amici the cities of Homer, Soldotna, and Kenai (collectively, "cities") and Alaska Salmon Alliance are similarly misplaced. The cities are understandably concerned about the impact of the Final Rule on their communities. As NMFS acknowledged, a loss of revenue from commercial fishing could negatively affect fishing communities on the Kenai Peninsula. AKR_13831; *see Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1093 (9th Cir. 2012) (holding that National Standard 8 does not require a specific outcome). The precise impact and distribution of these changes, however, cannot be predicted. For example, while NMFS provided extensive analysis of shore-based processing, AKR_278-81, it could not predict whether a particular processor would close due to the Final Rule. AKR_13832. This uncertainty is not the result of NMFS failing to use the best scientific information available, but rather results from the unknown response of the fishery to changes in the management regime, uncertainty regarding natural fluctuations of salmon abundance, market conditions, and the processors' own business plans. *Id.* National Standard 8 does not require NMFS to eliminate all uncertainty. *See N. Carolina Fisheries*, 518 F. Supp. 2d at 85. Moreover, Courts have recognized that analysis of alternatives and impacts under National Standard 8 "is subject to a rule of reason"—particularly when the impacts associated with a regulatory change are

multifactorial and will involve future decisions outside NMFS's control. *Little Bay Lobster Co. v. Evans*, 352 F.3d 462, 470 (1st Cir. 2003)

B. The Final Rule is Fully Consistent with NEPA.

Finally, UCIDA argues the Final Rule is invalid because, in its view, NMFS failed to provide "a convincing statement of reasons" as to why its selection of Alternative 4 was not significant under NEPA. ECF No. 38 at 47. Yet, it offers no argument as to why NMFS did not comply with NEPA, instead restating its oft-repeated criticisms of the Magnuson Act process. *Id.* at 47-48. Specifically, that the time spent considering Alternative 4 was too short. This ignores, however, that consideration of Alternative 3 had been ongoing for years and that the impacts of Alternative 3—which also would require closure of the drift gillnet fishery for significant periods—were very similar to Alternative 4. *See* AKR_18710-12. It also claims that Alternative 3 was not given a "hard look" because Alternative 2 was eliminated at the end of the process. ECF No. 38 at 48. Yet it provides no actual argument regarding what in Alternative 3 was lacking or what NMFS should have done to take that hard look. The record speaks for itself in showing years of work developing and analyzing Alternative 3. AKR_221-359. As a result, UCIDA has failed to show that NMFS's NEPA analysis was arbitrary and capricious.

II. NMFS Is Entitled To Judgment On The *Humbyrd* Plaintiffs' Constitutional Claims.

The *Humbyrd* Plaintiffs' constitutional claims, while different than the statutory claims, similarly fail. The Ninth Circuit has held in nearly identical circumstances that plaintiffs lack standing to constitutionally challenge the composition of a regional fishery management council because it is not the cause of any injury, nor can a court provide redress. The Council acts merely as an advisory body and any alleged injury is the result of the Secretary's implementing regulations, not the composition of the Council. This alone is fatal to their claims. But even if the Court reaches these constitutional issues, Council members are not "officers of the United States." Council members do not occupy continuous positions, nor do they wield significant authority. As a result, the restrictions and obligations attendant to the Appointments, Take Care, and Executive Vesting Clauses, do not apply and Plaintiffs' claims fail on the merits. In sum, the Court lacks jurisdiction over Plaintiffs' constitutional claims, but even if it reaches those claims, they lack merit. Summary judgment should be granted in favor of Federal Defendants.

A. If the Court finds a Statutory Violation, it Should Not Reach Plaintiffs' Constitutional Claims.

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on

questions of constitutionality ... unless such adjudication is unavoidable." *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944). "Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *see also City of Los Angeles v. County of Kern*, 581 F.3d 841, 846 (9th Cir 2009).

When a ruling on a statutory claim would afford a plaintiff all the relief it seeks, the principle of constitutional avoidance dictates that there is no cause to reach the constitutional claims. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009). Here, Plaintiffs in these consolidated cases seek the same relief for their constitutional claims as they do for their statutory claims; namely setting aside the Final Rule. *See* ECF 1 (*Humbyrd* Complaint), Prayer for Relief ¶ 2 ("a prohibitory injunction setting aside the challenged rule"); ECF 1 (*UCIDA* Complaint, Prayer for Relief ¶ E (seeking to set aside "Amendment 14 and its implementing regulations . . . ."). Thus, if the Court finds a statutory violation with the Final Rule (and it should not), the Court should avoid reaching Plaintiffs' constitutional claims.

B. Plaintiffs Lack Standing for their Constitutional Claims.

If the Court reaches Plaintiffs' constitutional claims, it is bound by Ninth Circuit precedent to find that Plaintiffs lack standing. *See Nw. Env't*

Def. Ctr. v. Brennen, 958 F.2d 930, 937 (9th Cir. 1992).[12] In *Brennen*, the plaintiffs challenged regulations setting harvest limits for Oregon coastal coho salmon as too high. Among other challenges to the regulation, the *Brennen* plaintiffs, like Plaintiffs here, argued that the "composition of the Pacific Council violates the Appointments Clause and the principle of separation of powers." *Id.* at 937 (citation omitted). The Ninth Circuit declined to reach the alleged constitutional infirmity because the composition of the Council was not the cause of plaintiffs' injury nor would a declaration of unconstitutionality redress that injury. *Id.* The court reasoned that, while the Council may have proposed the challenged regulations, it was the Secretary who implemented those regulations after review. *Id.* Thus, the court found no standing for the constitutional claims. *Id.* (citing, inter alia, *Comm. for Monetary Reform v. Bd. of Governors*, 766 F.2d 538 (D.C. Cir. 1985) (private individuals and businesses who allegedly suffered financial harm as a result of the policies of the Federal Reserve System lack standing

[12] Plaintiffs should have addressed this controlling Ninth Circuit precedent in their opening brief, but did not. *See* ECF No. 37 at 13 n.2 (merely stating: "Standing is normally self-evident…."). Moreover, all of the purported standing declarations attribute the declarants' alleged harm to the Final Rule, not the composition of the Council. *See e.g.,* ECF Nos. 37-1, 37-2, 37-3 ¶¶ 10 ("*The Rule* also reduces the value of my fishing assets….") (emphasis added). Plaintiffs have thus waived any responsive argument, especially when Federal Defendants do not have an opportunity for a reply under local rules.

to challenge the constitutionality of the composition of the Federal Open Market Committee)). This holding controls the outcome for Plaintiffs' claims here.

The *Brennen* rationale is consistent with other decisions rejecting attempts to directly review Council actions under either the Magnuson Act or the APA. In examining the role and function of the Councils, courts have found that Council members have "no authority to do anything," as their functions are limited to collectively making fishery management recommendations and final decision-making power rests with NMFS. *J.H. Miles & Co.,* 910 F. Supp. at 1157-59 (rejecting challenge to internal Council policy because the Council is not an agency within the meaning of the APA). Once a council recommends an FMP or FMP amendment to NMFS, only the Secretary (acting through NMFS) has the authority to approve and implement it through regulations. *See* 16 U.S.C. §§ 1855(c)-(d), 1852(h)(1), 1854(a)-(c). A Council's proposal has no legal effect whatsoever without implementing regulations. *Gulf Restoration Network v. NMFS*, 730 F. Supp. 2d 157, 174 (D.D.C. 2010) (no cause of action to challenge a fishery management plan when the Secretary did not issue implementing regulations); *Conservation Law Found. of New England v. Franklin*, 989 F.2d 54, 60 (1st Cir. 1993) (the Secretary "is ultimately charged with preventing overfishing as mandated by" the statute); *Anglers Conservation Network v.*

Pritzker, 70 F. Supp. 3d 427, 436 (D.D.C. 2014) (vote of the Council has no legal effect and therefore is not judicially reviewable), *aff'd,* 809 F.3d 664 (D.C. Cir. 2016); *Flaherty v. Ross*, 373 F. Supp. 3d 97, 104-10 (D.D.C. 2019) (lengthy analysis determining the Council is not an "agency" under the APA). Because any proposal by the Council is only that, there is a disconnect between Plaintiffs' challenge to the composition of the Council and the harm alleged from the challenged regulation issued by the Secretary. This is fatal to Plaintiffs' ability to demonstrate they have standing to challenge the composition of the Council.

Because Plaintiffs' alleged injuries are not caused by the allegedly unconstitutional makeup of the Council, Plaintiffs similarly cannot demonstrate redressability. Numerous courts have recognized that an otherwise valid regulation implemented by the Secretary will not be invalidated based on procedural irregularities at the Council level:

> If the Secretary has followed the appropriate rulemaking procedure and has established a rational basis for his action in promulgating regulations based on the submitted amendment, procedural challenges for irregularities at the Council level will not provide a justification for invalidating the regulations.

Alaska Factory Trawlers Ass'n v. Baldrige, 831 F.2d 1456, 1464 (9th Cir. 1987) (per curiam); *Yakutat, Inc. v. Evans*, No. C02-1052R, 2003 WL 1906336, at *3 (W.D. Wash. Apr. 10, 2003), a*ff'd sub nom. Yakutat v.*

Gutierrez, 407 F.3d 1054 (9th Cir. 2005) (same); *Trawler Diane Marie v. Brown*, 918 F. Supp. 921, 928 (E.D.N.C. 1995), *aff'd sub nom. Trawler Diane Marie v. Kantor*, 91 F.3d 134 (4th Cir. 1996) (any irregularities at Council level did not materially affect the Secretary's decisionmaking so as to render rule infirm); *Louisiana v. Baldridge*, 538 F. Supp. 625, 630 n.1 (E.D. La. 1982) (procedural irregularities not "actionable absent affirmative proof that the deviation makes the Secretary's [decision] arbitrary and capricious"). This goes to the principal problem with Plaintiffs' standing: the Final Rule they challenge was proposed and issued by the Secretary, not the Council. 86 Fed. Reg. 60,568. In contrast to a situation where a plaintiff is directly regulated by the individual or entity with alleged constitutional infirmities, here it is the Secretary's action that causes the alleged injury, and Plaintiffs do not contest the Secretary's rulemaking authority. Because the Council has no authority to propose or finalize regulations, there is no action taken by the allegedly unconstitutional body that can be redressed with either declaratory or injunctive relief.

Redressability is even more tenuous here given the makeup of the Council. The Magnuson Act provides that the "North Pacific Council shall have 11 voting members, including 7 appointed *by the Secretary* in accordance with subsection (b)(2) . . . ." 16 U.S.C. § 1852(a)(1)(G) (emphasis added). Thus, even if the Court were to find that Council members are

"inferior officers," the majority of the voting council members (7 of 11) are appointed by the Secretary.[13] U.S. Const. art. II, § 2, cl. 2 ("Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, *or in the Heads of Departments*.") (emphasis added). As a result, even if Plaintiffs are correct that the remaining four Council members appointed under 16 U.S.C. § 1852(b)(1) (the governor appointees and regional administrator) were not properly appointed as inferior officers by the Secretary,[14] the vote on Amendment 14 would have still passed 7-0 without those voting members because the Council acts by majority vote. As such, Plaintiffs cannot demonstrate redressability. *Novak v. United States*, 795 F.3d 1012, 1020 (9th Cir. 2015) ("[t]here is no standing if, following a favorable decision, whether the injury would be redressed would still depend on "the unfettered choices made by independent actors not before the courts.") (citation omitted).

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[13] Plaintiffs do not suggest that Council members qualify as "principal officers."

[14] Moreover, it is not clear that the remaining four voting members, the head officials of the each respective State's fishery agency and NMFS regional administrator, even implicate Appointments Clause concerns. This is true even if they are deemed to have a significant role in Federal activity. *See Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 442 F. Supp. 3d 53, 72 (D.D.C. 2020) (Appointments Clause is "simply is not implicated when significant authority is devolved upon non-federal actors), rev'd on other grounds, 25 F.4th 12 (D.C. Cir. 2022); *but see Confederated Tribes of Siletz Indians of Or. v. United States*, 110 F.3d 688, 698 (9th Cir. 1997) (in dicta).

Brennen is controlling here. The Court must therefore dismiss all of Plaintiffs' constitutional claims for lack of standing.

C. Plaintiffs' Constitutional Claims Should Be Rejected On The Merits.

If the Court reaches the merits of the constitutional claims and finds Plaintiffs have standing to bring them, NMFS is entitled to judgment on the merits of Plaintiffs' various challenges under the Constitution's Appointments, Take Care and Executive Vesting Clauses.

The Magnuson Act's regional council process has been an integral part of the statute and federal fisheries management in the United States without any serious constitutional challenge since the Act's enactment in 1976. Indeed, the North Pacific Council has informed salmon management in federal waters off of Alaska for this entire period, including on Amendment 12, which was fully litigated to the Ninth Circuit in the earlier iteration in this case. At no point did any party previously raise constitutional concerns with the Magnuson Act (even though some of the present *Humbyrd* Plaintiffs are members of UCIDA). Nonetheless, the *Humbyrd* Plaintiffs now for the first time seek to interject constitutional doubts into the Magnuson's more than 40-year old statutory scheme. As shown below, the *Humbyrd* Plaintiffs' arguments should be rejected.

1. Council Members Are Not Officers of the United States.

The Appointments Clause of the U.S. Constitution sets forth requirements related to the appointment of certain government officials:

> [The President] … shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

U.S. Const. art II, § 2, cl. 2. There are two types of officers under the Appointments Clause: principal officers, who must be appointed by the President, with the advice and consent of the Senate; and inferior officers, who may be appointed by the President, the courts, or the head of a department. Inferior officers "are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond v. United States*, 520 U.S. 651, 663 (1997). In either case, the Supreme Court has held that there are two requirements for an individual to qualify as an officer: (1) the individual must "occupy a 'continuing' position established by law," and (2) the individual must exercise "significant authority pursuant to the laws of the United States." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (quoting *United States v. Germaine*, 99 U.S. 508, 510-11 (1878), *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)). Neither requirement is met here.

a. Council Members Do Not Occupy a Continuing Position.

In *Lucia*, the Supreme Court first analyzed whether an individual occupied a continuing position established by law to determine if they were officers within the meaning of the Appointments Clause. Relying on prior precedent, the Supreme Court looked to whether the duties were performed on an "episodic [,] basis…." 138 S. Ct. at 2051-52 ("*Germaine* held that 'civil surgeons' (doctors hired to perform various physical exams) were mere employees because their duties were 'occasional or temporary' rather than 'continuing and permanent.'") (quoting *Germaine*, 99 U.S. at 510). Stressing "ideas of tenure [and] duration," the Supreme Court made clear that if an individual does not occupy a "continuing and permanent" position, they are not an officer. *Lucia*, 138 S. Ct. at 2051.

Unlike the Securities and Exchange Commission Administrative Law Judges in *Lucia*—who receive career appointments—Council members do not occupy continuing positions because they perform their duties only episodically and appointed members serve limited terms. *Lucia,* 138 S. Ct. at 2053 ("Far from serving temporarily or episodically, SEC ALJs 'receive[ ] a career appointment.'"(citation omitted)); *compare*16 U.S.C. § 1852(b)(3) ("Each voting member appointed to a Council by the Secretary in accordance with [§ 1852(b)(2)] shall serve for a term of 3 years. . . ."). While a set term is not necessarily dispositive, the nature of their work while serving in these

terms lacks the hallmarks of both "tenure and duration." *Lucia*, 138 S. Ct. at 2051.

For example, this Council typically meets five times a year, with each meeting lasting only about one week. *See* N. Pac. Fishery Mgmt. Council, Archive of Council Meetings, https://www.npfmc.org/council-meeting-archive/. Thus, a Council member's work is performed only when called upon at discrete moments throughout the year. 16 U.S.C. § 1852(e)(3) ("Each Council shall meet at appropriate times and places in any of the constituent States of the Council at the call of the Chairman or upon the request of a majority of its voting members."). These episodic meetings are only temporary assignments, not unlike the work of the surgeons in *Germaine*. 99 U.S. at 510.

Consistent with the episodic nature of the work, compensation is limited too. Council members, with the exception of the NMFS Regional Administrator, are not employed by the Federal government. *See, e.g.*, 16 U.S.C. § 1852(a)(1)(G) (specifying the composition of the North Pacific Council); *id.* § 1852(b)(2)(B) (requiring that Council appointments provide for a fair and balanced apportionment of the active participants in commercial and recreational fisheries). Pursuant to the statute, 16 U.S.C. § 1852(d), appointed Council members receive "daily rate" compensation only "when engaged in the actual performance of duties for such Council." Indeed, most

Council members have other employment in a variety of fields, including as commercial fishermen, recreational fishing captains, employees or owners of fishing industry suppliers, academics, and representatives of environmental organizations. The seven appointed members of the North Pacific Council are not government employees. *See* https://www.npfmc.org/meet-the-council/. And Council members that are otherwise employed by a State or local government, do not receive any compensation from the Federal government for their Council service. *Id.*

The episodic nature of the Council's activities, combined with Council members' limited compensation, stands in marked contrast to those factual circumstances where courts have found individuals occupying a "continuous and permanent" position. *See, e.g.*, *Buckley*, 424 U.S. 1 (considering whether full-time employees of the Federal Election Commission are officers); *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 881 (1991) (considering whether Federal Tax Court special trial judges are employees or officers); *Lucia*, 138 S. Ct. 2044 (considering whether ALJs with career appointments are officers or employees). To our knowledge, no court has ever found that an individual employed by a State or a private entity, like most of the Council members here, are officers of the United States. *See Melcher v. Fed. Open Mkt. Comm.*, 644 F. Supp. 510, 521 (D.D.C. 1986), *aff'd on other grounds*, 836 F.2d 561 (D.C. Cir. 1987) ("The Appointments Clause governs the selection of

public officers—it says nothing about the exercise of public power by private persons."). These Council members meet only occasionally throughout the year and only some are compensated for serving in an advisory capacity. Because the Council members' work is occasional and intermittent, they do not occupy a "continuing and permanent position" and thus are not officers of the United States.[15]

b. Council Members Do Not Possess Significant Authority.

Plaintiffs claim that the "North Pacific Council wields significant authority pursuant to federal law and its members are therefore officers." ECF No. 37 at 15. Plaintiffs' argument largely distills down to their claim that "[s]ince adjudicators are officers, *a fortiori*, Council members must also be officers." *Id.* at 17. Plaintiffs' logic is faulty and ignores the Magnuson Act's statutory scheme. The Council is strictly an advisory body. It is the Secretary, not the Council, that has the ultimate responsibility for making decisions about fishery management plans and implementing them through regulations.

[15] Tellingly, Plaintiffs fail to address this threshold inquiry. Like standing, Plaintiffs have waived any responsive argument. *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012) ("Claims not made in an opening brief in a sufficient manner to put the opposing party on notice are deemed waived.") (citation omitted).

There are at least two significant steps where the Secretary wields her discretionary rulemaking authority over any proposal recommended by the Council. First, when a Council sends a fishery management plan or amendment to the Secretary, she independently reviews whether it is "consistent with the national standards, the other provisions of this chapter, and any other applicable law." 16 U.S.C. § 1854(a)(1)(A). The National Standards themselves involve the balancing of a broad array of scientific, economic, and policy considerations. *See e.g. id.* at § 1851(a)(1) (requiring FMPs and regulations to, *inter alia*, prevent overfishing while achieving "optimum yield"); § 1851(a)(4) (ensure that measures do not discriminate between residents of different states and allocate or assign fishing privileges fishermen in a manner that is "fair and equitable" to all fishermen); § 1851(a)(8) (take into account the importance of fishery resources to fishing communities). Thus, the assessment of consistency with the National Standards is not some mechanical exercise, but rather is infused with judgment and provides NMFS with wide discretion to determine whether and how to move forward with any action proposed by the council.

Similarly, "other applicable law" includes a broad range of authorities, including, but not limited to, the Endangered Species Act, Marine Mammal National Environmental Policy Act, Regulatory Flexibility Act, and

Administrative Procedure Act.[16] After this review, the Secretary retains the discretion to "disapprove or partially approve" a plan or amendment, provided she explains her reasons for doing so. *Id.* § 1854(a)(3). For example, if the Secretary finds the Council's plan amendment is inconsistent with tribal treaty rights—an issue that seems facially removed from fishery management—she would be well within her authority to disapprove the Council's plan because it does not comply with "other applicable law." And in that situation, after disapproval, the Secretary is not required to take any additional step besides explaining her decision. *Id.* § 1854(a)(3), (4) (the Council "may submit a revised plan…."). The Council's proposed FMP or amendment would thus die on the vine.

Second, when the Secretary approves an FMP or amendment and the Council then sends a proposal for implementing regulations to the Secretary, the Secretary must again independently evaluate whether the proposal is consistent with the relevant fishery management plan, the Act, and any other applicable law. 16 U.S.C. § 1854(b)(1). If the Secretary makes that finding, she publishes a proposed regulation in the Federal Register, as modified for

[16] *See* Operational Guidelines for the MSA Process, Table X at pdf p. 31 <available at https://media.fisheries.noaa.gov/dam-migration/01-101-03.pdf>.

clarity, for public comment.[17] *Id.* § 1854(b)(1)(A). The Act further provides that the Secretary shall promulgate final regulations within 30 days of the close of the public comment period and may revise the proposed regulations after consulting with the Council. *Id.* § 1854(b)(3).

Plaintiffs argue that, because the Secretary "shall" publish final regulations, and the Council may deny any attempt to consult on proposed revisions, the Council is thus exercising "significant authority" by authoring proposed regulations that it can surreptitiously force the Secretary to finalize and publish. ECF No. 37 at 17-22. Plaintiffs read too much into the Act. As noted above, the Secretary can "disapprove" the plan or amendment at the outset, and thus the Council may never have an opportunity to submit proposed regulations. 16 U.S.C. § 1854(a)(3). Second, the Act directs the Secretary only to "promulgate final regulations within 30 days after the end of the comment period," leaving the Secretary discretion to determine what those regulations should contain. *Id.* § 1854(b)(3). If the Secretary uses her discretion to alter the final regulations from what was proposed, consistent

[17] If the Secretary determines the proposal is inconsistent with the relevant fishery management plan, the Act, or other applicable law, the Council is notified in writing and provided with recommended revisions to comply with the standards. *Id.* § 1854(b)(1)(B). In such a situation, the Council may revise the proposed regulations and restart the evaluation process. *Id.* § 1854(b)(2). Regardless, the Secretary still retains the discretion to publish her own regulations. *Id.*

with the Administrative Procedure Act and after considering public comment, the Secretary need only "consult with the Council" about the revision and publish an explanation of the revision in the Federal Register. *Id.* There is nothing more required of the Secretary. Indeed, "[t]he Council is free to submit comments on a proposed rule (as are others), but power to alter the rule before it becomes final rests only with the Secretary." *Fishing Co. of Alaska v. Gutierrez*, 510 F.3d 328, 333 (D.C. Cir. 2007) (citing § 1854(b)(3)). And if that was not enough, Congress explicitly provided that: "The Secretary shall have *general responsibility* to carry out any fishery management plan or amendment . . . [and] *may promulgate such regulations*, in accordance with [the APA] *as may be necessary to discharge such responsibility* or to carry out any other provision of this chapter." 16 U.S.C. § 1855(d) (emphasis added). Thus, the authority to implement FMPs and FMP amendments lies with the Secretary, not the Council.

Other aspects of the Act confirm that the Council acts merely as an advisory body and does not usurp the Secretary's rulemaking authority. 16 U.S.C. §§ 1851, 1852. A Council, at bottom, is a panel of experts who provide advice to NMFS on the conservation and management of specific fisheries through the development of fishery management plans. *Id.* § 1852 (providing that appointed Council members must be knowledgeable regarding conservation and management, or commercial or recreational harvest, of

fishery resources within the geographical area concerned, by reason of occupational or other experience, scientific expertise, or training) and § 1853 (describing the contents of fishery management plans). Congress intended the Council to act as a panel that facilitates information gathering from the general public to better inform fishery related decisions. *Id.* § 1852(h)(3) ("Each Council shall . . . conduct public hearings, at appropriate times and in appropriate locations in the geographical area concerned, so as to allow all interested persons an opportunity to be heard in the development of fishery management plans…."). And it brings forward the expertise of the affected States. *Id.* § 1852(a)(2) ("Each Council shall reflect the expertise and interest of the several constituent States in the ocean area over which such Council is granted authority."). A Council is fundamentally a collection of experts that facilitate public involvement and provide recommendations on complex fishery related matters; it is an advisory body in every sense of the word. 16 U.S.C. § 1852(i)(1) (exempting Councils from the Federal Advisory Committee Act). And the Council members certainly do not wield the type of authority given to the SEC administrative law judges in *Lucia*. 138 S. Ct. at 2053-54. The Council does not usurp the Secretary's rulemaking authority, but rather informs it. The plain language of the statute does not support

Plaintiffs' arguments that the Secretary has lost her rulemaking authority to the Council.[18]

At least two courts have rejected Plaintiffs' constitutional arguments to the contrary on the merits, the first being the district court in the *Brennen*

[18] Throughout Plaintiffs' brief there are several quotes from Samuel Rauch, Deputy Assistant Administrator for Regulatory Programs at NOAA. *See e.g.,* ECF No. 37 at 9. Plaintiffs attempt to use these quotes to make the Council into something more than it is. While Mr. Rauch's quotes have been, at times, selectively edited, Plaintiffs' suggestion that they reflect a change in the government's long-standing position is not accurate. *See* https://voices.nmfs.noaa.gov/sites/default/files/2018-09/rauch_samuel.pdf, last visited March 21, 2022. The Executive Branch has long interpreted the Councils' role under the Magnuson Act to be advisory only, fully subject to the discretion of the Secretary of Commerce. *See* President Trump Signing Statement on 2018 amendments to Magnuson Act, 2018 WL 6839393 (Dec. 31, 2018) ("Keeping with past practice of the executive branch, my Administration will treat the plans promulgated by the Council as advisory only; the adoption of the plans will be subject to the discretion of the Secretary of Commerce as part of the regulatory process described in section 304 of the Magnuson-Stevens Act."); *see also* 2007 U.S.C.C.A.N. S83, 2007 WL 892712 (Jan. 12, 2007) (President George W. Bush signing statement accompanying 2006 Magnuson-Stevens Reauthorization Act) ("The executive branch shall construe these provisions in a manner consistent with the Appointments Clause"); 1996 U.S.C.C.A.N. 4120, 1996 WL 787969 (Oct. 11, 1996) (President Clinton signing statement accompanying 1996 Sustainable Fisheries Act). The Executive Branch has consistently interpreted the Councils' role as purely advisory and subject to NMFS' plenary policymaking and decisionmaking authority. *Flaherty*, 373 F. Supp. at 106 ("At its core, the [Magnuson] Council is an advisory body"). To the extent Mr. Rauch's comments could be interpreted as inconsistent with the Executive Branch's long-standing interpretation and implementation of the Magnuson Act, those informal comments should be disregarded.

case discussed above. While the Ninth Circuit rejected the challenge on standing grounds, *Brennen*, 958 F.2d at 937-38, the District of Oregon reached the merits. *See Nw. Env't. Def. Ctr. v. Evans*, No. CIV. 87-229-FR, 1988 WL 360476 (D. Or. Aug. 12, 1988). The court rejected the argument that the Council exercises "significant authority" over fishery management plans because plans are not self-executing and only the Secretary can promulgate implementing regulations. *Id.* at *8 ("Significant authority over federal government actions comes from the ability to promulgate, not propose, implementing regulations for a fishery management plan or plan amendment."). Relying on *Evans*, the District of New Hampshire more recently summarily dismissed an Appointments Clause challenge to a fishery plan amendment. *Goethel v. Pritzker*, No. 15-CV-497-JL, 2016 WL 4076831 (D.N.H. July 29, 2016), *aff'd on other grounds, Goethel v. U.S. Dep't of Commerce*, 854 F.3d 106 (1st Cir. 2017). The *Goethel* court reiterated that plan amendments cannot establish rights, obligations, or legal consequences without implementing regulations, which can be promulgated only by the Secretary. *Id.* at *10 (citing *Gulf Restoration Network*, 730 F. Supp. 2d at 174).[19]

[19] The Secretary's rulemaking authority under the Magnuson Act is far greater than the ministerial authorities at issue in *United States v. Arthrex*, 141 S. Ct. 1970 (2021). There, the Supreme Court concluded that although the Director of the Patent and Trademark Office alone was tasked with the

More recently, the District of Columbia District Court looked at whether a Council is an "agency" for the purposes of the APA. *Flaherty*, 373 F. Supp. 3d at 104-10. While a different legal inquiry, the court's detailed evaluation of whether a Council has "substantial independent authority" is highly persuasive as to whether the Council here exercises "significant authority" for the purposes of the Appointments Clause. The court recognized that, while the Council is "heavily involved" in the development of plans and implementing regulations, the Council does not have the authority to take final action, which remains with the Secretary. *Id.* at 107. The court found that the entire structure of the Act "reinforces the advisory nature of the Council's role." *Id.* ("Indeed, it appears that the MSA deliberately channels decision-making authority through the Secretary, whose actions Congress expressly made subject to judicial review."). The court further looked to the same conclusion reached in *J.H. Miles*, 910 F. Supp. at 1138, as

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final action of canceling or confirming a patent challenged before the Patent Trial and Appeal Board ("PTAB"), this power was "limited to carrying out the ministerial duty that he 'shall issue and publish a certificate' canceling or confirming patent claims he had previously allowed, as dictated by the PTAB APJs' final decision." *Id.* at 1981. As explained above, under the Magnuson Act, the Secretary's role in promulgating final regulations cannot be characterized as simply ministerial. This is perhaps evidenced best by 16 U.S.C. § 1854(c), pursuant to which the Secretary retains the authority to prepare her own Secretarial plan and implementing regulations, independent of the Council, if she determines that a fishery requires conservation and management and, where the fishery is under the authority of a Council, the Council has failed to act. *Id.*

well as the D.C. Circuit's recitation of *J.H. Miles* as holding that an entity cannot be "an authority of the government" if it does not "exercise" governmental authority. *Flaherty*, 373 F. Supp. 3d at 108 (quoting *Dong v. Smithsonian Inst.*, 125 F.3d 877, 881 (D.C. Cir. 1997)). The *Flaherty* court also evaluated and rejected arguments similar to those advanced by Plaintiffs here—that the Secretary's statutory ability to approve or revise proposed plans and implementing regulations is circumscribed or limited. 373 F. Supp. 3d at 109. Finally, the Court found that, even if the statute restricts the Secretary's ability to repeal a fishery management plan without majority Council approval, such "limited veto power, upon consideration of the Council's otherwise non-binding activities and function within the broader scheme of the [Magnuson Act]" is insufficient to conclude that the Council has "substantial independent authority." *Id.* at 110.

The fact pattern that Plaintiffs rely upon—the Council forcing the issuance of implementing regulations—simply did not occur here. It is true the Council provided proposed regulations, as Congress envisioned it would (*see* 16 U.S.C. § 1853(c)), but then NMFS conducted its own independent analysis of whether the proposed regulations complied with the Magnuson Act. AKR_25-27; AKR_28-33; AKR_34-39 (NOAA decision memoranda). And NMFS found that the Council's proposed regulations did comply with the Magnuson Act, whereupon it engaged in its own rulemaking that culminated

in a regulation issued by the Secretary. AKR_13822. The fact that the Council's proposed regulations complied with the Magnuson Act does not mean the Secretary abdicated rulemaking authority; it means the Council's advice was sound. AKR_29 ("this action optimizes conservation and management of Cook Inlet salmon fisheries when considering the costs and benefits of available management alternatives."). This is exactly what an advisory body is supposed to do: Provide constructive advice that can be acted upon. And if the advice is not sound, the Secretary can always "disapprove" the Council's proposed fishery management plan or amendment. 16 U.S.C. § 1854(a)(3).

Here, the Secretary did not act as an adjudicator or ministerial stamp, but rather weighed and evaluated the advice provided by the Council on complex fishery matters and found that advice to be sound. The Secretary then acted on the advice through independent rulemaking. AKR_29. Unlike adjudications, which usually threshold determinations and involve deferential standards of review, the Secretary here must engage in her own rulemaking, which requires a significant exercise of interpretation and judgment, and stands or falls on the explanation she alone provides. 16 U.S.C. § 1855(f) ("[r]egulations promulgated by the Secretary… shall be subject to judicial review…."). And the Act does not require the Secretary to wait for underlying processes before taking action as it provides ample

authority to develop her own fishery management plan or amendment, and regulations independent of the Council. *Id.* § 1854(c) (allowing for Secretarial fishery management plans or amendments); *id.* § 1854(c)(6) (allowing for Secretarial plan implementing regulations); *id.* § 1855(d) (rulemaking authority). Contrary to Plaintiffs' suggestion that the Secretary's hands are tied, the Executive branch has consistently interpreted the Act to allow the Secretary to exercise her considerable discretion. *See supra* at 75 n.18 (detailing Presidential signing statements).

In sum, the plain language of the statute does not confer significant authority on the Council. The two district courts that evaluated Appointments Clause challenges to the Councils have rejected the argument that the Councils exercise significant authority. Further, the *Flaherty* decision is a persuasive determination, based on detailed examination, that the Councils' roles are purely advisory and the Councils do not have substantial independent authority. This Court should reject Plaintiffs' arguments that Council members exercise "significant authority."

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Because Council members do not occupy a "continuing position" and do not exercise "significant authority," they are not "officers of the United States." This is dispositive of Plaintiffs' constitutional claims. The Court need not reach the remainder of Plaintiffs' Appointments Clause arguments.

Likewise, because Council members are not "officers of the United States," Plaintiffs' Take Care and Executive Vesting Clause arguments must fail, since removal of Council members does not need to meet constitutional standards.[20] In sum, if the Court reaches Plaintiffs' constitutional arguments and finds that they have standing, they should be rejected on the merits.

III. Remedy

Plaintiffs' remedy discussion illustrates the fundamental problem with their constitutional claims. ECF 37 at 40-41. Plaintiffs complain of the Council's composition and seek vacatur of the Council action developing Amendment 14 to the fishery management plan. *Id.* But if the Court were to vacate Amendment 14, nothing would happen at all. Only vacatur of the Secretary's implementing regulations would provide Plaintiffs with relief. But, of course, the Council did not issue the implementing regulations; the Secretary did after APA notice and comment rulemaking. Here lies the fundamental disconnect in Plaintiffs' sought-after relief. The alleged constitutional transgressions do not manifest in any actual harm to Plaintiffs because the Council's recommendations do not have independent legal effect.

[20] Plaintiffs acknowledge that the Take Care and Executive Vesting Clauses apply only to "officers of the United States." ECF 37 at 32 ("Officers therefore exercise executive power on the President's behalf and so must be removable by him….").

That is why the Ninth Circuit found, with good reason, that plaintiffs with nearly identical challenges lacked standing. *Brennen*, 958 F.2d at 937.

Plaintiffs are not entitled to relief on their constitutional claims. But to the extent the Court finds a violation, Federal Defendants respectfully request the opportunity to brief remedy, including severability. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1136 (9th Cir. 2021) ("Even if we were to conclude that [the statute] is unconstitutional, we would sever only one level of protection."). Likewise, Plaintiffs are not entitled to relief on their statutory claims. However, should the court find a violation, the Federal Defendants respectfully request an opportunity to brief remedy.

CONCLUSION

The Court should uphold NMFS's Final Rule, deny Plaintiffs' motions for summary judgment, and enter judgment in favor of Federal Defendants.

Dated: March 23, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2022, I electronically filed the foregoing document with the Clerk of the Court via CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Maggie B. Smith
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