JOHN C. CRUDEN
Assistant Attorney General
SETH M. BARSKY, Section Chief
COBY HOWELL, Senior Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
c/o U.S. Attorney's Office
1000 SW Third Avenue
Portland, OR 97204-2902
(503) 727-1023 / (503) 727-1117 (fx)
Coby.howell@usdoj.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT ASSOCIATION, AND COOK INLET FISHERMEN'S FUND, Plaintiffs, vs. NATIONAL MARINE FISHERIES SERVICE ET AL., Defendants.	Case. No. 3:13-cv-00104-TMB **DECLARATION OF DR. JAMES W. BALSIGER**

I, DR. JAMES W. BALSIGER, declare:

1. I am the Administrator for the Alaska Region of the National Marine Fisheries Service ("NMFS"), National Oceanic and Atmospheric Administration ("NOAA"), within the United States Department of Commerce.

2. As part of my official duties, I assist the Secretary of Commerce, Penny Pritzker ("Secretary"), in carrying out her responsibilities for complying with the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), as that statute applies to

the implementation of fishery management plans ("FMPs") and FMP amendments for fisheries in the exclusive economic zone off Alaska. I am responsible for coordinating the development and implementation of policies governing the management of salmon fisheries off Alaska under the "Fishery Management Plan for the Salmon Fisheries in the EEZ Off Alaska" as amended through Amendment 12 ("Salmon FMP"). As a result, I am familiar with the Salmon FMP, its amendments, and its implementing regulations. I serve on the North Pacific Fishery Management Council ("Council") as NMFS' representative for the Alaska Region.

3. I am familiar with the issues in this litigation and I have read Plaintiffs' Motion for Issuance of Final Judgment, [Proposed] Order of Final Judgment on All Claims, and Memorandum in Support of Motion for Proposed Judgment.

4. The following paragraphs explain why: (1) Plaintiffs' requested relief – vacatur of Amendment 12 and implementing regulations in their entirety and reinstatement of the Salmon FMP as amended through Amendment 11 ("pre-Amendment 12 Salmon FMP") and its implementing regulations – is overly broad with regard to the East Area, will reinstate obsolete and arcane FMP provisions and regulations, and will result in agency action to close the Cook Inlet Area to commercial fishing for salmon until a new Salmon FMP amendment is implemented; and (2) although NMFS does not control the Council, it is reasonable to estimate that it will take approximately three years for the Council to develop and recommend and NMFS to review and implement a new amendment to the Salmon FMP that addresses the Cook Inlet Area consistent with the Ninth Circuit's decision, the substantive and procedural requirements of the Magnuson-Stevens Act, and other applicable law. Granting Plaintiffs their proposed remedy would be extremely disruptive to the Alaska salmon fisheries.

Vacatur of Amendment 12 East Area Salmon FMP Provisions and Regulations

5. Plaintiffs' request for vacatur of Amendment 12 in its entirety, together with its implementing regulations, is unnecessarily broad because it would vacate a number of new or revised Salmon FMP provisions and regulations applicable exclusively to the East Area. These Salmon FMP provisions and regulations were not challenged by Plaintiffs, are not implicated by the Ninth Circuit's decision, and are important to the conservation and management of the salmon fishery in the East Area.

6. Salmon fisheries in the East Area and the West Area have been managed very differently from, and largely independent of, each other since the implementation of the Salmon FMP in 1979. As a result, the Salmon FMP identifies those measures that apply exclusively to the East Area from those measures that apply exclusively to the West Area.

7. As explained in a prior *Federal Register* notice commonly referred to as a "Notice of Availability," among the changes made by Amendment 12 to the Salmon FMP provisions governing the East Area was the addition of a mechanism to establish annual catch limits and accountability measures for the salmon stocks caught in the East Area commercial troll fishery. 77 Fed. Reg. 19605, 19607 (April 2, 2012). The Magnuson-Stevens Act requires FMPs to include annual catch limits and accountability measures and Amendment 12 brought the Salmon FMP as it applies to the East Area into compliance with these statutory requirements. Amendment 12 also added a fishery impact statement to the Salmon FMP in Chapter 8, which includes East Area fishery information required by the Magnuson-Stevens Act at sections 1853(a)(2), (3), (5), (9), (11), and (13). Amendment 12 revised the definition of optimum yield applicable to stocks in the East Area, and revised the Salmon FMP process for Federal review of State of Alaska ("State") management measures applicable to the East Area to more fully

describe the process and bring the process into compliance with Magnuson-Stevens Act requirements at section 1856(a)(3)(B). Finally, Amendment 12 removed Salmon FMP language governing the issuance of Federal salmon permits for the East Area fisheries because the Federal permits were no longer necessary.

8. Most of the regulations implementing Amendment 12 apply exclusively to the East Area and do not affect the West Area or the Cook Inlet Area. These regulations are: 50 C.F.R. § 679.1(i)(2); the definition of the term "The East Area" in paragraph (1) within the definition of the term "Salmon Management Area" at 50 C.F.R. § 679.2; 50 C.F.R. § 679.3(f); the removal and reservation of paragraphs (a)(1)(v) and (h) in 50 C.F.R. § 679.4 (which removed obsolete Federal salmon permit requirements); and 50 C.F.R. § 679.7(h)(1).

9. The East Area Salmon FMP provisions and regulations identified above (in paragraphs 7 and 8, respectively) should not be vacated because none of these were challenged by Plaintiffs nor were they addressed by the Ninth Circuit's decision. More importantly, these Salmon FMP provisions and regulations are necessary for the orderly management of the East Area salmon fisheries. The continued effectiveness of these East Area Salmon FMP provisions and regulations will not affect the development and consideration of alternatives for the new Salmon FMP amendment, the West Area in general, or the Cook Inlet Area specifically.

Vacatur of Amendment 12 West Area Salmon FMP Provisions and Regulations and Reinstatement of the West Area Pre-Amendment 12 Salmon FMP Provisions and Regulations

10. Vacatur of the Amendment 12 West Area Salmon FMP provisions and regulations would be disruptive to the commercial salmon fisheries occurring in the Cook Inlet Area because it would result in agency action to close the Cook Inlet Area to commercial fishing for salmon until a new amendment for the Salmon FMP is implemented. Reinstatement of the

pre-Amendment 12 Salmon FMP would not prevent a closure because the pre-Amendment 12 Salmon FMP, as it applies to the Cook Inlet Area, lacks measures required by the Magnuson-Stevens Act and necessary to determine whether fishing within the Cook Inlet Area is occurring at levels that are consistent with the Magnuson-Stevens Act. Continued implementation of Amendment 12 and the regulations that apply to the West Area generally, and to the Cook Inlet Area specifically, will result in the least disruption to the commercial salmon fisheries as they have been conducted in the Cook Inlet Area for the last several decades.

11. Amendment 12 redefined the West Area to exclude the Alaska Peninsula Area, the Cook Inlet Area, and the Prince William Sound Area. Regulations implementing Amendment 12 define these three historical areas at 50 C.F.R. § 679.2 under the definition of "Salmon Management Area." All three historical areas include waters in the exclusive economic zone, and do not include State waters. The Cook Inlet Area is defined as "the EEZ waters north of a line at 59° 46.15′ N." Except for these three historical areas, Amendment 12 asserted Federal management over the remainder of the exclusive economic zone west of the longitude of Cape Suckling, prohibited commercial fishing for salmon in that area, and established Magnuson-Stevens Act-required provisions for the area, such as specifying a directed harvest optimum yield of zero. By excluding these three historical areas from the Salmon FMP and specifying optimum yield as zero for the remainder of the exclusive economic zone west of the longitude of Cape Suckling, the Salmon FMP complied with the Magnuson-Stevens Act's statutory requirements.

12. If the Court vacates Amendment 12 Salmon FMP provisions and regulations applicable to the West Area, or to the Cook Inlet Area, NMFS would be left with what was in place prior to Amendment 12, which would be the pre-Amendment 12 Salmon FMP provisions

and regulations for the West Area. Under the pre-Amendment 12 Salmon FMP and regulations, the West Area is defined as the entire exclusive economic zone west of the longitude of Cape Suckling and includes the Alaska Peninsula Area, the Cook Inlet Area, and the Prince William Sound Area. Therefore, these three historical areas, including the Cook Inlet Area, would be under FMP management. The pre-Amendment 12 Salmon FMP and regulations prohibit commercial fishing for salmon in most of the West Area, but this prohibition does not extend to the three historical areas. Although the pre-Amendment 12 Salmon FMP and regulations do not prohibit commercial salmon fishing in the three historical areas, the pre-Amendment 12 Salmon FMP and regulations have no provisions governing commercial salmon fishing in the three historical areas. As a result, the pre-Amendment 12 Salmon FMP and regulations include the three historical areas, including the Cook Inlet Area, under Federal management and do not prohibit commercial fishing in these three historical areas, but the pre-Amendment 12 Salmon FMP and regulations have none of the conservation and management measures required by the Magnuson-Stevens Act to ensure that commercial fishing in the three historical areas, including the Cook Inlet Area, occurs in a manner consistent with the Magnuson-Stevens Act. This is one of the reasons the Council developed Amendment 12.

13. In developing Amendment 12, the Council and NMFS recognized that the pre-Amendment 12 Salmon FMP as it applied to the West Area and to Cook Inlet was deficient with respect to a number of Magnuson-Stevens Act requirements. In particular, the pre-Amendment 12 Salmon FMP has no objective and measureable criteria for identifying when the salmon fisheries in the Cook Inlet Area are overfished, and lacks any conservation and management measures to prevent overfishing or end overfishing and rebuild a fishery.

14. FMPs that authorize fishing must have measures that comply with National Standard 1. In order to meet National Standard 1 of the Magnuson-Stevens Act – prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery – the Magnuson-Stevens Act requires each fishery management plan to: (1) contain the conservation and management measures necessary and appropriate for the conservation and management of the fishery to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery (16 U.S.C. § 1853(a)(1)(A)); (2) specify objective and measureable criteria for identifying when the fishery to which the plan applies is overfished and contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery (16 U.S.C. § 1853(a)(10)); and (3) establish mechanisms for specifying annual catch limits to prevent overfishing and include accountability measures to prevent annual catch limits from being exceeded and to correct overages of the annual catch limits if they do occur (16 U.S.C. §1853(a)(15)). The pre-Amendment 12 Salmon FMP as it applies to the West Area and to Cook Inlet does not have any provisions addressing these statutory requirements, or any of the other Magnuson-Stevens Act requirements at 16 U.S.C. § 1853(a).

15. For example, the pre-Amendment 12 Salmon FMP does not specify optimum yield, maximum sustainable yield, status determination criteria (i.e., maximum fishing mortality thresholds, minimum stock size thresholds, and overfishing levels, or their proxies), acceptable biological catch, annual catch limits, or accountability measures for the Cook Inlet Area salmon fisheries. The regulatory guidelines for National Standard 1 state that these items must be included in an FMP in order to address Magnuson-Stevens Act requirements and to ensure consistency of an FMP and implementing regulations with National Standard 1.

16. The reference points listed in paragraph 15 are critical to determining whether commercial salmon fishing occurring in the Cook Inlet Area is consistent with National Standard 1 and the Magnuson-Stevens Act. Without any of these reference points specified in the pre-Amendment 12 Salmon FMP, NMFS has no basis for determining whether any level of commercial salmon fishing within the Cook Inlet Area is achieving optimum yield while preventing overfishing consistent with National Standard 1.

17. As explained in paragraphs 21 – 26 below, there is insufficient time between now and the start of the 2017 commercial salmon fishery in the Cook Inlet Area to develop, consider, submit for Secretarial review, and implement a new Salmon FMP amendment that adequately addresses these, and other, Magnuson-Stevens Act requirements for FMPs.

18. With no criteria for determining whether commercial salmon fishing in the Cook Inlet Area is occurring consistent with National Standard 1, none of the Magnuson-Stevens Act-required measures to manage the salmon fisheries, and no time to develop and implement such criteria and measures, NMFS would have to close the three historical areas, including the Cook Inlet Area, to commercial fishing for salmon until the new Salmon FMP amendment, with the criteria required under National Standard 1 and the measures required by the Magnuson-Stevens Act, is implemented.

19. When faced with a similar situation, NMFS closed the exclusive economic zone off Alaska to commercial fishing for scallops. In March 1995 (60 Fed. Reg. 11054 (March 1, 1995)), NMFS closed the exclusive economic zone off Alaska to fishing for scallops in response to resource conservation concerns that resulted from unanticipated fishing for scallops in the exclusive economic zone by vessels outside the jurisdiction of State regulations governing the scallop fishery. NMFS did not have a Scallop FMP in place at that time, and determined that an

emergency closure was necessary to prevent localized overfishing of scallop stocks and to control an unregulated scallop fishery in the exclusive economic zone until an FMP could be implemented. The reason for the 1995 scallop closure differs from the situation NMFS would be faced with in the Cook Inlet Area if Amendment 12 is vacated because the overfishing threat would not be due to vessels fishing for salmon that are outside State jurisdiction. However, the basis for the 1995 scallop closure would be similar to the situation in Cook Inlet in that no Federal measures would be in place to define what constitutes overfishing and prevent overfishing of salmon stocks in the Cook Inlet Area by vessels fishing in the Cook Inlet Area.

20. NMFS is aware of Plaintiffs' dissatisfaction with the way in which the State manages commercial salmon fisheries in the Cook Inlet Area. NMFS also is aware of Plaintiffs' argument that management of the Cook Inlet Area commercial salmon fisheries will begin to change immediately and in ways more advantageous to Plaintiffs if the pre-Amendment 12 Salmon FMP is reinstated. Plaintiffs' Proposed Judgment Order requests that this Court instruct NMFS "to supervise the administration of the [pre-Amendment 12 Salmon FMP] pursuant to Section 9 thereof *to ensure that the reinstated FMP is administered consistent with the MSA*." (emphasis added). Section 9 of the pre-Amendment 12 Salmon FMP provides fishery participants with an administrative petition for rulemaking process if a participant believes a State law or regulation is inconsistent with the FMP, the Magnuson-Stevens Act, or other applicable law and describes NMFS' role in the review of State management measures. Given the language in Plaintiffs' Proposed Judgment Order and the Declaration of Mr. Huebsch, Plaintiffs appear to expect NMFS "to review each and every regulation issued by the Board of Fisheries [for the Cook Inlet Area] to ensure consistency with the MSA" and "to adopt federal measures in the event [NMFS] finds state measures invalid under the MSA." Huebsch

Declaration, page 10. However, for reasons explained in paragraphs 14-18, NMFS would be unable to reach a consistency determination and the Federal measure that NMFS would implement is closure of the Cook Inlet Area to commercial fishing for salmon until the new Salmon FMP amendment is implemented.

The Council and Secretarial Review Process for a New Salmon FMP Amendment

21. Although NMFS does not control the Council or its scheduling of actions, NMFS estimates that the Council will need approximately two years to develop and take final action on a new amendment to the Salmon FMP that addresses the Cook Inlet Area. This estimate accounts for an expected level of complexity that NMFS believes will exist in developing optimum yield, maximum sustainable yield, status determination criteria, and other measures that the new Salmon FMP amendment would be required to include under the Magnuson-Stevens Act. NMFS sees complexity stemming from the multiple stocks and species in the three historical areas, variable levels of escapement information, issues with origins of stocks caught in the exclusive economic zone, and translating salmon biology into the prescriptive National Standard 1 guidelines requirements at 50 C.F.R. § 600.310. NMFS' estimate also accounts for the Council's need to coordinate and work with NMFS and State fishery managers in developing these measures, and the Council's typical process for reviewing analyses on the impacts of alternatives and obtaining public review and stakeholder input on alternatives and analyses prepared for an action.

22. NMFS bases its estimate on the expectation that it will likely take the Council a year or more to develop alternatives and an initial draft analysis of those alternatives for Council and public review. The initial draft analysis must address the requirements of the Magnuson-Stevens Act, the National Environmental Policy Act, the Endangered Species Act, the

Regulatory Flexibility Act, and Executive Order 12866, in addition to other applicable laws and executive orders. To prepare the initial draft analysis, the Council will need to identify its suite of alternatives for consideration, craft measures necessary to address each requirement in 16 U.S.C. 1853(a) of the Magnuson-Stevens Act, coordinate with State managers if the Council is considering the delegation of management aspects to the State, and possibly hold stakeholder meetings or establish a Council committee to address specific issues.

23. NMFS' estimate of two years for Council action in paragraph 21 specifically applies to the Cook Inlet Area. NMFS recognizes that the Council also will have to address the Alaska Peninsula Area and the Prince William Sound Area in the Salmon FMP and anticipates that, to the extent possible, the Council will work on all three Areas simultaneously. However, if any complications arise with either the Alaska Peninsula Area or the Prince William Sound Area that do not arise for the Cook Inlet Area, NMFS will encourage the Council to bifurcate its work and complete a new Salmon FMP amendment for the Cook Inlet Area as quickly as possible.

24. Once the initial draft analysis is ready, the Council reviews it and receives comments on the analysis and alternatives from its Scientific and Statistical Committee, its Advisory Panel, and the public. Based on its review and the comments received, the Council may modify the alternatives and measures under consideration, request additional analysis, or make other recommendations for revisions. The Council will continue to review and receive public comment on the revised analysis until it determines the analysis is sufficient and the Council can take a final action to select a preferred alternative as the new Salmon FMP amendment. Because the Council typically meets about every two months (for a total of 5 regularly-scheduled meetings a year), NMFS expects the Council's review, comment, and revision period to take 6 to 12 months. Additional information on the Council process can be

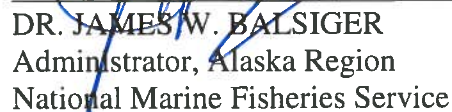
found in Section 3 of the Council's Statement of Organization, Practices, and Procedures, located at http://www.npfmc.org/wp-content/PDFdocuments/membership/SOPPs412.pdf.

25. Once the Council takes final action to select a preferred alternative as the new Salmon FMP amendment, NMFS expects that the agency will need approximately one year to review the new Salmon FMP amendment, prepare and publish the Notice of Availability and proposed rule, consider and respond to public comments received on the new Salmon FMP amendment and proposed rule, decide whether to approve, disapprove, or partially approve the new Salmon FMP amendment, and prepare and publish a final rule to implement the new Salmon FMP amendment if it is approved or partially approved by NMFS.

26. In reaching this estimate, NMFS expects it will take approximately 6 months to prepare the Council's action for Secretarial review and approximately 6 months to conduct Secretarial review. Following Council final action on the new Salmon FMP amendment, NMFS staff will draft the Notice of Availability for the amendment, the proposed rule to implement the amendment, and various memoranda that are required for agency review of FMP amendments and implementing rules. NMFS will also work with Council staff to prepare the analysis for Secretarial review and to draft FMP amendment text. Once these documents are ready, Secretarial review can begin. Under the Magnuson-Stevens Act, the public must be provided a 60-day comment period for an FMP amendment. 16 U.S.C. § 1854(a)(1). The agency then must decide whether to approve, disapprove, or partially approve the FMP amendment within the 30-day period following the close of the comment period on the FMP amendment. 16 U.S.C. § 1854(a)(3). NMFS publishes a final rule implementing the FMP amendment as soon as possible following agency approval or partial approval of the FMP amendment and the final rule is typically effective 30 days after publication of the final rule in the *Federal Register*.

27. Over the next two months, NMFS will begin the process of developing a new Salmon FMP amendment by preparing a discussion paper examining various aspects associated with the development of a new Salmon FMP amendment and will ask the Council to consider the discussion paper at the Council's April 2017 meeting. NMFS is willing to work closely with the Council during this process, but it cannot control the Council or the scheduling of its actions and therefore cannot guarantee the timing of any new amendment.

Pursuant to 28 U.S.C. § 1746, I swear under penalty of perjury that the foregoing is true and correct.



DR. JAMES W. BALSIGER
Administrator, Alaska Region
National Marine Fisheries Service

1.19.2017

DATE

Ryan P. Steen, AK Bar No. 0912084
Beth S. Ginsberg, Admitted *Pro Hac Vice*
Jason T. Morgan, Admitted *Pro Hac Vice*
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, Washington 98101
(206) 624-0900 (phone)
(206) 386-7500 (facsimile)

Attorneys for United Cook Inlet Drift Association and Cook Inlet Fishermen's Fund

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UNITED COOK INLET DRIFT ASSOCIATION AND COOK INLET FISHERMEN'S FUND, Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE ET AL., Defendants.	Case. No. 3:13-cv-00104-TMB

UCIDA'S MEMORANDUM IN SUPPORT OF MOTION FOR PROPOSED JUDGMENT

I. INTRODUCTION

The United Cook Inlet Drift Association and the Cook Inlet Fishermen's Fund (collectively "UCIDA") successfully challenged the National Marine Fisheries Service ("NMFS") decision under the Magnuson-Stevens Fishery Conservation and Management Act ("MSA" or "Act"), 16 U.S.C. §§ 1801-1891d, to remove the Cook Inlet commercial salmon fishery (the "Fishery") from the Fishery Management Plan ("FMP" or "Plan") for salmon

fisheries in the Exclusive Economic Zone (EEZ")[1] off the coast of Alaska. The Ninth Circuit issued a decision on September 21, 2016 overturning this Court's prior decision (2014 WL 10988279) upholding NMFS' "Amendment 12" and granting NMFS summary judgment. *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv.* (*UCIDA*), 837 F.3d 1055 (9th Cir. 2016). The Ninth Circuit held that

> [t]he Magnuson-Stevens Act unambiguously requires a Council to create an FMP for each fishery under its authority that requires conservation and management. The Act allows delegation to a state under an FMP, but does not excuse the obligation to adopt an FMP when a Council opts for state management. Amendment 12 is therefore contrary to law to the extent it removes Cook Inlet from the FMP. We reverse the judgment of the district court and remand with instructions that judgment be entered in favor of United Cook.

Id. at 1065 (footnote omitted).

UCIDA now moves this Court for relief consistent with the Ninth Circuit's opinion. Specifically, UCIDA requests that this Court vacate Amendment 12 together with its implementing regulations (set forth at 77 Fed. Reg. 75570 (Dec. 21, 2012)) with instructions to NMFS to direct the North Pacific Regional Fishery Management Council ("the Council") to re-issue an FMP for the Cook Inlet Salmon Fishery, consistent with the MSA, within two years. With the exception of Amendment 12, during the interim period pending development of a new FMP, UCIDA requests the Court to reinstate the 1990 FMP (together with the 11 other Amendments) and associated implementing regulations. UCIDA requests that the Court instruct NMFS to supervise the administration of the FMP pursuant to section 9 of the 1990 FMP to

[1] The EEZ is defined at 16 U.S.C. §§1801(b)(1),1811 as the area 3-200 miles seaward from the coastline. *UCIDA,* 837 F.3d 1058.

ensure that it is consistent with the MSA, and further requests that the Court retain jurisdiction to supervise the remand consistent with the Court's Order.

II. BACKGROUND

A. The MSA

As explained by the Ninth Circuit in reviewing this Court's prior summary judgment decision in this case, the MSA "creates a 'national program for the conservation and management of the fishery resources of the United States.'" *UCIDA,* 837 F.3d at 1057 (*quoting* 16 U.S.C. §1801(a)(6)). The MSA establishes Regional Fishery Management Councils, which are required to prepare an FMP for "each fishery under its authority that requires conservation and management." 16 U.S.C. § 1852(a), (h)(1). The FMP is the foundational document for management of each fishery and provides the framework for ensuring that fisheries are managed in a manner consistent with the requirements of the MSA and its 10 national standards. *Id*. § 1851(a). NMFS then reviews each FMP to ensure consistency with the Act, including its national standards, and other applicable provisions of the Act. *Id*. § 1854(a)(1).

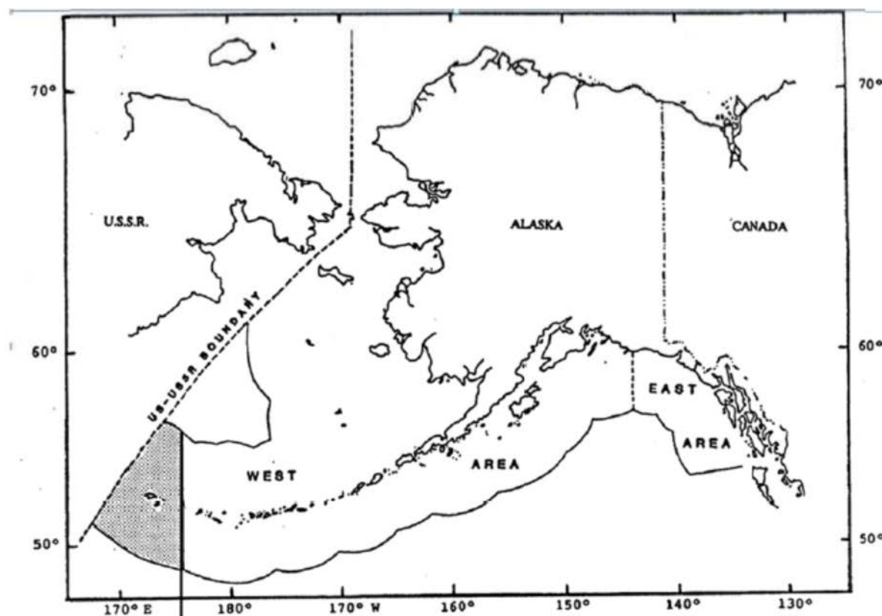
The MSA expressly constrains the authority of a state to manage fisheries in the EEZ. The state may regulate all fishing activities only to the extent that the applicable fishery management plan delegates such authority. *Id.* § 1856(a)(3)(B). Absent such delegation through a fishery management plan, the state's authority is limited. *Id.* § 1856(a)(3)(A).

While granting primacy to the federal government to manage the nation's fisheries, the MSA recognizes the important role that state governments can and should play in management of the federal fisheries. In addition to staffing the Councils with state members (16 U.S.C. § 1852) to "assure that the national fishery . . . management program. . . involves, and is

responsive to the needs of, interested and affected States and citizens" (*id.* § 1801(c)(3)), the MSA expressly contemplates coordinated state and federal management of stocks. It authorizes the Councils to incorporate state conservation and management measures (*id.* § 1853(b)(5)) and authorizes NMFS to delegate management of the fishery to the state provided that the state's laws are "consistent with such fishery management plan" and subject to continuing review to ensure that the state's management remains consistent with that plan (*id.* § 1856(a)(3)(b)). *UCIDA*, 837 F.3d at 1060,1062-63.

B. Historical Management of the Fishery

The last major revision to the Salmon FMP occurred in 1990. ER 177. The 1990 version of the Salmon FMP bifurcated management into two broad areas – the East Area and the West Area – with the dividing line at Cape Suckling as depicted in the map below:[2]



[2] See p. 4 of excerpts of Discussion Paper on the FMP for the Salmon Fisheries in the US EEZ off the Coast of Alaska, North Pacific Fishery Management Council (Dec. 2010), attached as Ex. A to Declaration of Beth S. Ginsberg.

The Council explained that "existing and future salmon fisheries create a situation demanding the Federal participation and oversight contemplated by the Magnuson Act." [3] For the East Area, the 1990 Salmon FMP developed management goals and objectives for the EEZ portion of the salmon fishery, and delegated management to the State. Ex. A to Ginsberg Dec. at 3. By contrast, the 1990 Salmon FMP closed the vast majority of the West Area to all net fishing with three notable exceptions, including: (1) the Cook Inlet area, (2) a portion of the Copper River fishery, and (3) a portion of the Alaska Peninsular fishery. *Id*. It then delegated management of these three fisheries to the State.

Section 9 of the 1990 FMP (attached hereto as Exhibit C to Ginsberg Dec.) provided for review of all State regulations by the Secretary of Commerce. By providing for federal review of state fishery management regulations, the 1990 FMP was, in this manner, consistent with the requirements for delegated programs. 16 U.S.C. § 1856(a)(3)(B) (requiring that state laws be subject to continuing federal review to ensure consistency with the FMP and the Act, more generally). More specifically, section 9 of the 1990 FMP provided an appeal process allowing interested members of the public to appeal state management decisions for the Fishery and ensured that the federal government stood ready to field an appeal once state administrative remedies were exhausted. Ex. C to Ginsberg Dec. The Plan limited secretarial review of appeals to whether the challenged state statute or regulation is consistent with the FMP, the Act, and other applicable federal law. *Id.* The Plan emphasized that the Secretary need not and would not

[3] *See* p. 2 of excerpt of Fishery Management Plan for the Salmon Fisheries in the EEZ Off the Coast of Alaska (Apr. 1990), attached as Ex. B to Ginsberg Dec.

respond to comments that merely object to a state statute or regulation on grounds that an alternative approach would provide for better management of the salmon fishery. *Id.*

Section 9 provided for a federal appeal process for annual and perennial regulations, and a separate, more direct and speedier federal appeal process for in-season management actions that require a more immediate response. It ensured that appeal of state in-season management decisions would be made directly to the Secretary without having to first exhaust state administrative remedies, and again emphasized that any such appeal must be made on MSA or FMP grounds and not on whether the appellant believed that a better or more profitable rule should have been promulgated. *Id.* Thus, section 9 establishes the legal architecture required for a delegated state FMP under 16 U.S.C. § 1856(a)(3) by ensuring continuing federal oversight and providing interested members of the public – like UCIDA – a designated path to obtain timely federal review of state decisions that are inconsistent with the MSA.

The current FMP under Amendment 12, in contrast, was invalidated by the Ninth Circuit precisely because it simply turned over management of the Fishery to the State *carte blanche* with no federal review or oversight process established. Amendment 12 accomplished this feat by simply removing the Cook Inlet Salmon Fishery altogether from the Salmon FMP. As a result, the Cook Inlet Salmon Fishery was and is still managed by the State without federal oversight and without adherence to the MSA, and its national standards. Under Amendment 12, the State has no obligation to manage the Fishery – or vessels that operate in the Fishery – in accordance with the Act's science-based strictures.

C. The State's Management of the Cook Inlet Fishery Has Led to Serious Stock Declines

As a result of the process described above, the State currently manages both the State and

federal portions of the Cook Inlet Salmon Fishery. [4] The State sets its fishery management policies through the Alaska Board of Fisheries ("BOF"), and implements those management policies through the Alaska Department of Fish and Game ("ADF&G"). [5]

The State manages salmon in Cook Inlet based on a series of state management plans that set escapement goals for salmon.[6] Declaration of Erik Huebsch at ¶ 10. An escapement goal represents the number of salmon that the State has determined is necessary or desirable to "escape" past a fishery, to provide spawning stock for successive generations or to meet other biological needs. *UCIDA*, 837 F.3d at 1061; Huebsch Dec. at ¶ 10. The State has had significant difficulty managing salmon in Cook Inlet, especially in recent years, and both the health of the stocks and the regional fishing communities have suffered as a result. *UCIDA*, 837 F.3d at 1060-61 (noting the *51 percent* decline since 1981 in the commercial catch of sockeye salmon); Huebsch Dec. at ¶¶ 11-16. Specifically, the State's policies have led to chronic over-escapements that reduce future salmon runs and waste harvestable surpluses of fish that would otherwise benefit fishers, the seafood industry, and state and local economies. Huebsch Dec. at ¶ 11. The State based these policies concerned about under-escapements, only to subsequently learn that they had been *under-counting fish returns on the Susitna River for a period of 27 years. Id*. at ¶ 13. Studies conducted by ADF& G revealed that on the Susitna River, the sockeye escapement goal had been *exceeded 96 percent of the time* during that 27-year period. *Id.*

[4] See p. 2 of excerpts of Final Environmental Assessment/Regulatory Impact Review for Amendment 12: Revisions to the Fishery Management Plan for the Salmon Fisheries in the EEZ Off the Coast of Alaska (June 2012), attached as Ex. D. to Ginsberg Dec.

[5] Ex. D. to Ginsberg Dec. at 3.

[6] *Id.* at 4 and 5.

The situation for commercial salmon fishers in Cook Inlet, including UCIDA's members, continues to steadily deteriorate. An ADF&G study in 2012 revealed that the commercial harvests in recent years for coho, pink and chum range between *2 and 10 percent* of the total salmon runs for those species, despite the fact that "Cook Inlet is one of the nation's most productive salmon fisheries." *UCIDA*, 837 F.3d at 1057. Since 2002 the State management measures have become even more restrictive and the harvest of coho, pinks and chums have been further reduced. To put this all in context, the consequences of over-escapement and poor management have resulted in recent salmon harvests that are consistently less than *23 percent* of the harvests between 1966 and 2012. Huebsch Dec at ¶16.

The decisions made and implemented by the State have significantly reduced UCIDA's members' ability to harvest and make a productive living. In fact, Mr. Huebsch's average fishing income for the last decade is less than a quarter of what it was 20 years ago. Huebsch Dec. at ¶ 8.

While UCIDA has repeatedly participated in BOF meetings and has exhausted the public process the state affords fishermen to voice their concerns, make their views known, and offer alternative management proposals, they have been utterly unsuccessful in obtaining any relief. *Id.* at ¶ 17. And, when UCIDA subsequently requested the Council to step in and manage the fishery consistent with the MSA, its requests were summarily denied. Instead of providing UCIDA with meaningful relief, the Council developed Amendment 12 to the Alaska Salmon FMP to remove the Council and NMFS from their legally required role in salmon management. *Id*. UCIDA has brought this Motion because it cannot survive much longer in this regulatory

atmosphere that has been consistently hostile to its interests and because the health and condition of the fishery cry out for federal involvement. *Id*. at ¶ 20.

III. ARGUMENT

As a result of the Ninth Circuit's decision, there is no doubt that an FMP is required for the Fishery. The questions presented for this Court concern: (1) the length of time to afford NMFS to work with the Council to produce a new FMP; and (2) what to do in the interim, pending development of the Plan and NMFS' completion of the remand.

Amendment 12 must be vacated because the Ninth Circuit determined that its exemption of the Cook Inlet part of the salmon fishery from the FMP was contrary to the MSA; the Court concluded that because the Cook Inlet Salmon Fishery requires conservation and management, Cook Inlet must be managed under an FMP that implements the MSA. *UCIDA,* 837 F.3d at 1061. The Court then proceeded to hold that the federal government "cannot delegate management of the fishery to a State without a plan, because a Council is required to develop FMPs for fisheries within its jurisdiction requiring management and then to manage those fisheries 'through' those plans." *Id*. at 1063. Delegation can only happen through issuance of an FMP.

Therefore, leaving Amendment 12 in place is not an option; Amendment 12 allows the Cook Inlet Salmon Fishery to continue to be managed exclusively by the State of Alaska, in the absence of an FMP, or any federal oversight, and in contravention of the MSA. While NMFS may delegate authority over a federal fishery to a state if it concludes that state regulations "embody sound principles of conservation and management and are consistent with federal law," it must do so expressly in an FMP by incorporating those regulations in the FMP that it must

supervise . *Id.* Because NMFS, by adopting Amendment 12, delegated management of the Cook Inlet salmon fishery to the State without a plan, the state has no way of managing the fishery consistent with the MSA.

A. The Ninth Circuit's Decision Requires Vacatur of Amendment 12

Vacatur is the "normal remedy" for unlawful actions under the Administrative Procedure Act ("APA"). *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs,* 486 F.3d 638, 654 (9th Cir. 2007), *rev'd on other grounds sub nom. Coeur Alaska, Inc. v. Se. Alaska Conservation Council,* 557 U.S. 261 (2009); *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (noting that when a plaintiff prevails on its APA claim "it is entitled to relief under that statute, which normally will be a vacatur of the agency's order").

Exceptions to vacating unlawful agency actions exist only in rare and unusual circumstances. *See Humane Soc'y v. Locke,* 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) ("In rare circumstances, when we deem it advisable that the agency action remain in force until the action can be reconsidered or replaced, we will remand without vacating [it]."). In fact, "the Ninth Circuit has only found remand without vacatur warranted by equity concerns in limited circumstances, namely serious irreparable environmental injury." *Center for Food Safety v. Vilsack* 734 F. Supp. 2d 948, 951 (N.D. Cal. 2010). Given that vacatur is the standard remedy, defendants seeking to apply an exception to vacatur bear the burden of showing that circumstances warrant such a result. *See, e.g*., *Ctr. for Biological Diversity v. Provencio,* No. 4:10-cv-00330-AWT, slip op. at 4 (D. Ariz. Sept. 28, 2012) ("it is not plaintiffs' burden to show that the equities favor remand or vacatur of an agency decision held [invalid]").

In this case, NMFS will not be able to make such a showing. The Ninth Circuit expressly found that Amendment 12 was not consistent with the MSA because it exempted one of the most productive salmon fisheries in the nation from any federal management or oversight under the MSA. *UCIDA*, 837 F.3d at 1057. The court simply framed the issue on appeal as whether

> NMFS can exempt a fishery under its authority that requires conservation and management from an FMP because the agency is content with State management. The district held that it could. We disagree, and reverse.

Id. In light of this definitive, unequivocal and unanimous ruling, and the compelling need for federal oversight as a result of the state's consistent mismanagement of the fishery (Huebsch Dec. at ¶¶ 11-16), Amendment 12 cannot stand.

B. The 1990 FMP Should Be Reinstated Pending Development of a Valid FMP

The Ninth Circuit has held that the effect of invalidating an agency rule is to reinstate the rule previously in force. *Paulsen v. Daniels*, 413 F.3d 999, 1009 (9th Cir. 2005). Given that Amendment 12 cannot remain in place, the Court should expressly reinstate the 1990 FMP as it applied to the Cook Inlet Salmon Fishery immediately prior to its issuance (*i.e.*, with its preceding 11 amendments). While the Plan should have established management goals and perhaps should have more clearly articulated NMFS' intent to delegate management of the Fishery to the State pursuant to 16 U.S.C. § 1856(a)(3),[7] both NMFS and the State certainly understood that intent. Indeed, the State entered into a Memorandum of Understanding with NMFS agreeing to carry out its management role consistent with the FMP and the MSA more generally.

[7] *UCIDA,* 837 F.3d at 1060.

And, perhaps even more importantly, section 9 of the 1990 Plan established an elaborate process for federal supervision of the State's management activities, and ultimately of the Fishery more generally, as required by 16 U.S.C. § 1856(a)(3). Ex. C to Ginsberg Dec. NMFS and the Council would not have gone to the bother of establishing section 9 had the federal government not expressly intended to delegate management of the Fishery to the State; indeed, the sole purpose of section 9 is to establish a process for federal supervision of state fishery management as required by the MSA for delegation under 16 U.S.C. §1856(a)(3).

Accordingly, a Judgment issued by this Court directing NMFS to reinstate the 1990 FMP would be consistent with the Ninth Circuit's mandate in this case and with the holding in *Paulsen,* 413 F.3d at 1009. It would ensure that the Ninth Circuit's holding requiring federal oversight of the Cook Inlet Salmon Fishery is effectuated in the short term while NMFS and the Council prepare a new FMP. It would allow UCIDA's members to appeal to NMFS state management decisions that are contrary to the MSA, including: (a) its mandate that conservation and management measures prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery; (b) the requirement that fishing privileges be allocated in a manner that is fair and equitable; and (c) its requirement that conservation and management measures minimize, to the extent practicable, the adverse economic impacts on fishing communities while taking into consideration the importance of fishery resource to fishing communities, like that represented by UCIDA. 16 U.S.C. § 1851(a)(1), (4), (8). Any other result would allow the State to continue managing this important fishery in the absence of an FMP and any federal oversight, in derogation of the MSA and the Ninth Circuit's mandate.

IV. CONCLUSION

Given the dire situation faced by UCIDA as a result of the federal government's utter abdication of its MSA responsibilities in this important fishery, the Proposed Judgment sought by UCIDA is immediately necessary. It would ensure that the checks and balances guaranteed by the Act – including the requirement to use the best available science, to manage the fishery in accordance with the 10 national standards, and to achieve optimum yield – are provided to UCIDA and the fishery in the short term while NMFS works with the Council to produce a new FMP. For these reasons, UCIDA respectfully requests the Court to grant its Proposed Judgment.

DATED: January 5, 2017

/s/ Beth S. Ginsberg
Ryan P. Steen, AK Bar No. 0912084
Beth S. Ginsberg, Admitted *Pro Hac Vice*
Jason T. Morgan, Admitted *Pro Hac Vice*
jtmorgan@stoel.com
Attorneys for United Cook Inlet Drift Assn. and
Cook Inlet Fishermen's Fund

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2017 I filed a copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Alaska by using the CM/ECF system. All participants in this Case No. 3:13-cv-00104-TMB are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Beth S. Ginsberg
Beth S. Ginsberg

Ryan P. Steen, AK Bar No. 0912084
Beth S. Ginsberg, Admitted *Pro Hac Vice*
Jason T. Morgan, Admitted *Pro Hac Vice*
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, Washington 98101
(206) 624-0900 (phone)
(206) 386-7500 (facsimile)

Attorneys for United Cook Inlet Drift Association and
Cook Inlet Fishermen's Fund

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT ASSOCIATION AND COOK INLET FISHERMEN'S FUND, Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE ET AL., Defendants.	Case. No. 3:13-cv-00104-TMB [PROPOSED] ORDER OF FINAL JUDGMENT ON ALL CLAIMS

[PROPOSED] ORDER OF FINAL JUDGMENT ON ALL CLAIMS

Pursuant to Rules 54 and 58 of the Federal Rules of Civil Procedure and upon the request of Plaintiffs United Cook Inlet Drift Association and Cook Inlet Fishermen's Fund this COURT hereby enters FINAL JUDGMENT in favor of Plaintiffs and against Defendants National Marine Fisheries et al ("NMFS") pursuant to the Ninth Circuit's decision and order entered in this case, *United Cook Inlet Drift Association v. National Marine Fisheries Service*, 837 F.3d 1055 (9th Cir. 2016).

IT IS HEREBY ORDERED that:

1. Amendment 12 to the Fishery Management Plan for Salmon Fisheries in the Exclusive Economic Zone off the Coast of Alaska, together with its implementing regulations as set forth at 77 Fed. Reg. 75570 (Dec. 21, 2012) are hereby VACATED.

2. NMFS shall direct the North Pacific Regional Fishery Management Council to ensure that a Fishery Management Plan ("FMP") for salmon fisheries in the EEZ off the coast of Alaska is issued consistent with the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. §§1801-1819d, within two years of the date of this Order.

3. With the exception of Amendment 12, the 1990 FMP as subsequently amended is hereby reinstated pending development and issuance of a new FMP. NMFS is hereby instructed to supervise the administration of the 1990 FMP pursuant to Section 9 thereof to ensure that the reinstated FMP is administered consistent with the MSA.

4. The Court shall retain jurisdiction to supervise the remand consistent with this Order.

5. Plaintiffs are entitled to attorneys' fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) at an amount to be subsequently determined by the Court.

IT IS SO ORDERED this ____ day of January, 2017.

____
The Honorable Timothy M. Burgess
United States District Court Judge

JAHNA LINDEMUTH
ATTORNEY GENERAL
Seth M. Beausang (Alaska Bar No. 1111078)
Assistant Attorney General
State of Alaska - Department of Law
Natural Resources Section
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
Telephone: (907) 269-5232
Facsimile: (907) 279-2834
Email: seth.beausang@alaska.gov
Attorney for State of Alaska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT ASSOCIATION, and COOK INLET FISHERMAN'S FUND,	)	CIVIL ACTION NO.: 3:13-cv-00104-TMB
Plaintiffs,	)	
v.	)	**MEMORANDUM IN OPPOSITION TO UCIDA'S MOTION FOR ISSUANCE OF FINAL JUDGMENT**
NATIONAL MARINE FISHERIES SERVICE, et al,	)	
Defendants.	)	

INTRODUCTION

This Court has two options when it enters judgment in favor of plaintiffs (UCIDA). First, having the power under the Administrative Procedure Act (APA) to "hold unlawful and set aside" final agency action, 5 U.S.C. § 706(2), the Court may vacate the invalid part of the 2012 final rule by the National Marine Fisheries Service (NMFS), 77 Fed. Reg. 75570, and remand to the agency for further consideration. Specifically, because the Ninth Circuit held that "Amendment 12 is therefore contrary to law *to the extent it removes Cook Inlet from the FMP*," *UCIDA v. NMFS*, 837 F.3d 1055, 1065 (9th Cir. 2016) (emphasis added), the Court can hold

unlawful and set aside the part of 50 CFR 679.2 that implemented Amendment 12's removal of the Cook Inlet Area from the fishery management plan (FMP) by redefining the FMP's West Area to exclude Cook Inlet. 77 Fed. Reg. at 75587. The effect of such an order would be to *include* the Cook Inlet Area within the West Area. Commercial salmon fishing is prohibited in the West Area. 50 CFR 679.7(h)(2). For the first time ever, there would be a federal prohibition on commercial salmon fishing in the federal waters of Cook Inlet.

Second, having the discretion when equity demands it to keep in place a rule promulgated contrary to the APA while the rule is remanded to an agency for further proceedings, *see, e.g.*, *California Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012), the Court may—and should—temporarily keep in place the invalid part of the 2012 rule, and remand to NMFS for further proceedings. Such an order would maintain the status quo and keep the federal waters of Cook Inlet open for commercial salmon fishing this year, thereby realizing the expectations of thousands of Alaskans whose livelihoods depend on this fishery. Keeping Cook Inlet open for commercial salmon fishing also protects salmon stocks by decreasing the chance of overescapement.

Remanding the rule to NMFS without vacatur would also continue (for the time being) state management of the fishery. Contrary to the claim by the commercial fishermen at UCIDA that state management has led to "serious stock declines" of Cook Inlet salmon (UCIDA Br. at 6-9), the independent experts at NMFS and the North Pacific Fishery Management Council found that the State's management of commercial salmon fishing in Cook Inlet "is consistent with the policies and standards of the Magnuson-Stevens Act," 77 Fed. Reg. at 75570, and is "a more effective management system for preventing overfishing of Alaska salmon than a system that places rigid numeric limits on the number of fish that may be caught," *id.* at 75571. Thus, the

record in this case shows that the State manages the Cook Inlet commercial salmon fishery consistent with the National Standards of the MSA and does a better job of managing the fishery to prevent overfishing than how the fishery can be managed under an FMP. The Ninth Circuit did not disturb these findings by NMFS.

The Court should not grant any of the following requests by UCIDA:

- The Court should not vacate all of the 2012 final rule that implements Amendment 12, especially not the parts of the rule that affect the East Area, the Prince William Sound Area, and the Alaska Peninsula Area, since the Ninth Circuit's decision was explicit and limited, only holding that Amendment 12 was "unlawful to the extent it removes Cook Inlet from the FMP."
- The Court should not direct NMFS to take any specific action, since the Court's power under the APA is generally limited to the authority to "hold unlawful and set aside" final agency action; only in "rare circumstances" not present here should a court remand with specific instructions to the agency.
- The Court should not declare that the 1990 FMP is "hereby reinstated" because that FMP is outdated and invalid, and because what UCIDA really wants is the Court to re-write the 1990 FMP.

For all of these reasons, and as explained below, the Court should deny UCIDA's Motion for Issuance of Final Judgment.

BACKGROUND

I. The three historical commercial salmon net fisheries: Cook Inlet, Prince William Sound, and Alaska Peninsula.

As the Ninth Circuit explained, the federal waters of the Cook Inlet commercial salmon fishery is one of three historical commercial salmon net fisheries in Alaska that extend into the

exclusive economic zone, but have always been managed by the State. *UCIDA*, 837 F.3d at 1057-58. The origin of these fisheries dates to the 1950's when the United States, Canada, and Japan created the International Convention for the High Seas Fisheries of the North Pacific Ocean, which generally banned commercial salmon net fishing in the federal waters adjacent to Alaska, but exempted from the ban the three traditional salmon net fisheries. *Id.*

The convention was implemented by the North Pacific Fisheries Act of 1954. *Id.* Under the 1954 Act, the Federal government issued regulations prohibiting commercial salmon net fishing in the exclusive economic zone adjacent to Alaska except as allowed under state regulations. *Id.* At the time and continuing until the present, the State permitted and managed three salmon net fisheries partly extending into the exclusive economic zone: in the (1) Cook Inlet Area, (2) Prince William Sound Area (also known as Copper River), and (3) Alaska Peninsula Area (also known as False Pass). 44 Fed. Reg. 33250, 33267 (June 8, 1979). In these three areas, commercial salmon net fishing was allowed and federal regulation was to mirror State regulation. *UCIDA*, 837 F.3d at 1058 (citing 50 C.F.R. § 210.10 (repealed)).

In 1976, Congress passed the Magnuson–Stevens Act (MSA), establishing a national program for the conservation of fishery resources, and providing the Secretary of Commerce with fishery management authority in the exclusive economic zone (between three and 200 miles from the coastline of the United States); the Secretary's authority under the MSA is in large part delegated to NMFS. *Id.* After passage of the MSA, the State continued to manage these three fisheries.

In 1978, the Council adopted an FMP for salmon fisheries near Alaska; the FMP was approved and published by NMFS in 1979. 44 Fed. Reg. 33250; RULEFMP_0001060. The FMP

has been amended numerous times; the last major revision prior to 2012 was in 1990. RULEFMP_0001062.

II. The 1990 salmon FMP.

Under the 1990 FMP, Alaskan federal waters were divided into East and West Areas. NPFMC_0000975. In the East Area, which is east of Cape Suckling and includes all of Southeast Alaska, the troll fishery is the only commercial salmon fishery allowed. NPFMC_0000975-76. The 1990 FMP established six objectives for management of the commercial salmon troll fishery in the East Area, recognized that management was to be consistent with the MSA and Pacific Salmon Treaty, and deferred management of the East Area to the State. NPFMC_0000997-99. At the time the 1990 FMP was adopted, the MSA provided that a state could regulate in-state fishing vessels in the exclusive economic zone, subject, of course, to the Supremacy Clause's requirement that the state regulations be consistent with federal law. 16 U.S.C. § 1856(a)(3) (1990). At that time, the MSA did not provide for explicit delegation of fishery management authority to a state through an FMP.

In the West Area, which is west of Cape Suckling and included (prior to Amendment 12) the Cook Inlet, Prince William Sound, and Alaska Peninsula Areas, the 1990 FMP did not establish any management objectives because under the plan commercial salmon fishing in the West Area was not allowed except in the three historical salmon net fisheries, which were provided for by "other Federal law." NPFMC_0000975.

Section 9 of the 1990 FMP provided for review by the Secretary of Commerce of State salmon fishing regulations relating to fisheries in the exclusive economic zone off the coast of Alaska, and of State inseason management actions, all for consistency with the FMP, the MSA, and other applicable Federal law. NPFMC_0001012-14.

III. The Sustainable Fisheries Act of 1996.

Section 306(a) of the MSA was amended by the Sustainable Fisheries Act of 1996 to allow FMPs to explicitly delegate management of a fishery in federal waters to a state, after which the state could regulate all vessels in the fishery. Pub. L. No. 104-297, § 112(a), 110 Stat. 3559, 3595-96 (1996) (codified at 16 U.S.C. § 1856(a)(3)(B)). For fisheries delegated to state management, the Secretary reviews state fishing regulations and notifies a state and the appropriate council when the Secretary determines that state regulations are not consistent with the FMP. *Id.* If the notified state does not correct the inconsistencies identified by the Secretary the authority of the state to regulate vessels in the fishery terminates. *Id.*

UCIDA states that the "sole purpose" of Section 9 was to "establish a process for federal supervision of state fishery management as required by the MSA for delegation under 16 U.S.C. § 1856(a)(3)," (UCIDA Br. at 12), but UCIDA may have overlooked the fact that in 1990 when Section 9 was adopted the MSA did not explicitly provide for delegation of management authority to a state through an FMP—as noted, that provision of the MSA was not added until 1996. It was also not until 1996 that the MSA required Secretarial review of state fishing regulations promulgated pursuant to authority delegated through an FMP.

IV. Amendment 12.

Amendment 12 made it clear that management of commercial and sport salmon fishing in the East Area is explicitly delegated to the State through the FMP. 77 Fed. Reg. at 75570 ("In the East Area, Amendment 12 maintains the current scope of the FMP and reaffirms that management of the commercial and sport salmon fisheries in the East Area is delegated to the State."); *see also* 50 CFR 679.3(f) (2012) ("Management of the salmon commercial troll fishery and sport fishery in the East Area of the Salmon Management Area, defined at § 679.2, is

delegated to the State of Alaska."). Amendment 12 also provides for the Secretarial review of State management measures in the East Area required for delegated programs under the Sustainable Fisheries Act. RULEFMP_0001114-18.

UCIDA is incorrect in its assertion that the procedure outlined in Section 9 of the 1990 FMP for Secretarial review is consistent with the Sustainable Fisheries Act, 16 U.S.C. § 1856(a)(3)(B). Section 9 does not explicitly provide for the Secretary to "promptly notify the State and the appropriate Council of such determination [that a state regulation is inconsistent with the FMP] and provide an opportunity for the State to correct any inconsistencies identified in the notification," after which if the inconsistency is not corrected the state's authority to regulate the fishery terminates. § 1856(a)(3)(B). By contrast, Amendment 12's procedure for Secretarial review explicitly and precisely complies with § 1856(a)(3)(B). *See* RULEFMP_0001117 ("NMFS will promptly notify the State of Alaska and the Council, and the petitioner if applicable, of its determination and provide the State with an opportunity to correct the inconsistencies identified in the notification.") & RULEFMP_0001118 (providing that if the State does not correct the inconsistency NMFS may withdraw authority delegated to the State).

Among other changes to the FMP, Amendment 12 identified six new management objectives to guide salmon management under the FMP. RULEFMP_0001063; 77 Fed. Reg. at 75570. Amendment 12 also excluded the sport salmon fishery and the three historical commercial salmon net fisheries from the West Area. *Id.* In adopting Amendment 12, the Council considered whether to include Cook Inlet within the FMP and delegate management of the fishery to the State through the FMP, and rejected that alternative. RULEFMP_0000696-98; *see also* RULEFMP_0000706 (noting that if Cook Inlet were managed under an FMP it "would

result [in] harvests being [unnecessarily] restricted in years when returns were above forecast and harvests too high in years when returns were below forecast").

V. UCIDA's complaint.

UCIDA filed this case to challenge "NMFS's decision to approve changes to the Salmon FMP to eliminate federal waters in Cook Inlet from that FMP." (Complaint ¶ 2.) UCIDA mentioned the Prince William Sound and Alaska Peninsula fisheries just once in its complaint, in a paragraph providing background, and never suggested that Amendment 12's removal of these two fisheries from the West Area violated the MSA. (Complaint ¶ 54.) UCIDA never mentioned Amendment 12's removal of the sport fishery from the West Area. UCIDA also never suggested that there was anything improper about Amendment 12 explicitly delegating to the State management of the commercial and sport salmon fisheries in the East Area—just the opposite, UCIDA averred that Amendment 12's explicit delegation of management authority over those fisheries was appropriate. (Complaint ¶ 75.)

Otherwise, UCIDA's complaint focused exclusively on Cook Inlet. (*See, e.g.*, Complaint ¶ 96 (alleging that Amendment 12 violated the MSA because "because the Cook Inlet salmon fishery clearly requires conservation and management" and needs to be included within an FMP); Request for Relief ¶ C (requesting an order that NMFS be instructed to "to develop an FMP for Cook Inlet").)

VI. The Ninth Circuit's decision.

Likewise, the Ninth Circuit focused exclusively on Amendment 12's treatment of Cook Inlet. *See, e.g.*, *UCIDA*, 837 F.3d at 1062 (noting that "The government concedes that Cook Inlet is a fishery under its authority that requires conservation and management."). The Ninth Circuit's explicit and limited holding was that "Amendment 12 is therefore contrary to law to the extent it

removes Cook Inlet from the FMP." *Id.* at 1065. The Ninth Circuit did not reach any of UCIDA's other challenges to Amendment 12. *Id.* at 1065 n.4.

Among other things, the Ninth Circuit did not disturb NMFS's conclusion that the State's management of the Cook Inlet fishery is "consistent with the policies and standards of the Magnuson-Stevens Act," 77 Fed. Reg. at 75570, and is "a more effective management system for preventing overfishing of Alaska salmon than a system that places rigid numeric limits on the number of fish that may be caught," *id.* at 75571. The court simply held that under the MSA it was contrary to law for NMFS to approve an FMP amendment that removed Cook Inlet from the FMP for the purpose of deferring to State management. According to the Ninth Circuit: "The Act is clear: to delegate authority over a federal fishery to a state, NMFS must do so expressly in an FMP." *UCIDA*, 837 F.3d at 1063.

ARGUMENT

The appropriate remedy in this case is for the Court to remand but keep in place the part of the 2012 rule that the Ninth Circuit found to be invalid.

I. The Court should remand but temporarily keep in place the invalid part of the 2012 rule.

"[U]nder settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *N. Carolina Fisheries Ass'n, Inc. v. Gutierrez*, 550 F.3d 16, 20 (D.C. Cir. 2008) (quoting *PPG Indus. v. U.S.*, 52 F.3d 363, 365 (D.C. Cir. 1995), citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943)); *see also Earth Island Inst. v. Hogarth*, 494 F.3d 757, 770 (9th Cir. 2007) ("ordinary remedy … is to remand for further administrative proceedings").

The only error in Amendment 12 identified by the Ninth Circuit was the removal of Cook Inlet from the FMP for the purpose of deferring to state management. Therefore, the only invalid part of the 2012 rule is the part that implemented Amendment 12's removal of Cook Inlet from the FMP; in other words, the part of 50 CFR 679.2 that redefined the West Area to exclude the Cook Inlet Area.[1]

The Court will have to decide whether to keep the invalid part of § 679.2 in place during remand. "A flawed rule need not be vacated." *California Communities*, 688 F.3d at 992. A court has discretion as a matter of equity to temporarily keep the invalid rule in place. *Id.* "Whether agency action should be vacated depends on how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'" *Id.* (quoting *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). Even when there is no question that a rule is substantively flawed, the Court "must balance the[] errors against the consequences of [vacatur.]" *Id.* The Court should exercise its discretion here and remand without vacatur for the following reasons.

First, temporarily keeping the invalid part of § 679.2 in place will allow the vitally important Cook Inlet salmon fishery to remain open this year. It has been estimated that the seafood industry in Southcentral Alaska—which includes Prince William Sound and Cook Inlet—directly employs more than 10,000 workers and creates approximately 7,000 full time equivalent jobs. The McDowell Group, *The Economic Value of Alaska's Seafood Industry, December 2015*, at 16 (available at https://goo.gl/LLYfvQ). Salmon represents 86% of the wholesale value of fish species harvested in Southcentral Alaska. *Id.* at 17. While it may not be

[1] Even though the Ninth Circuit did not find fault in any other part of Amendment 12, it is possible that the Council will decide to adopt an FMP amendment that includes all of the three historical salmon fisheries, and not just the Cook Inlet Area, when it revisits the FMP.

easy to quantify the economic impact of closing salmon fisheries in the federal waters of Cook Inlet, even if state fisheries are kept open, it cannot be disputed that such a closure would cause a severe adverse impact on those who depend on the Cook Inlet salmon fishery. (*Cf.* Huebsch Decl. ¶ 8 (Cook Inlet drift fisherman alleging that "Our average fishing income for the last decade is less than a quarter of what it was twenty years ago" due to alleged declining harvests of salmon).)[2]

Second, temporarily keeping the federal waters of the Cook Inlet salmon fishery open will make it easier for state managers to control escapement of salmon through the commercial harvest of Cook Inlet salmon stocks. UCIDA in particular has been concerned about the effects of overescapement on salmon stocks. (Huebsch Decl. ¶ 11 ("Chronic over-escapements like these not only reduce future runs of salmon, they also waste harvestable surpluses of fish that would otherwise benefit fishers, the seafood industry and the regional and State economies.").)

Third, keeping the rule in place will not harm UCIDA. Although UCIDA attempts to use affidavits—that are not part of the administrative record—to relitigate its claim that the State does not manage the Cook Inlet salmon fishery consistent with the National Standards, the record in this case shows just the opposite. The Ninth Circuit did not disturb this Court's finding that it was not arbitrary and capricious for NMFS to agree that the State manages the Cook Inlet salmon fishery consistent with the National Standards.

UCIDA appears to agree that the Cook Inlet salmon fishery should remain open, although UCIDA contends the fishery should remain open and be managed under the (invalid) 1990 FMP. Whatever the method of keeping the fishery open, UCIDA contends that the Court should give

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[2] The economic impact on Alaskans of vacating all of Amendment 12's implementing regulations, if that also led to a closure of the Prince William Sound and Alaska Peninsula salmon fisheries, would undoubtedly be even more severe.

NMFS and the Council just two years to develop a more permanent path forward for the fishery. If the Council determines that a new FMP with management measures should be adopted for the Cook Inlet fishery, as opposed to simply closing the fishery, the State submits that three years may be reasonably needed to develop the new FMP, conduct the related reviews (Endangered Species Act, National Environmental Policy Act, etc.), and issue a final rule. As a comparison, the process that led to Amendment 12 began in 2010, and the final rule was not issued until December 2012. The State would otherwise defer to NMFS's view about what is a reasonable time frame.

II. The Court should deny UCIDA's request to vacate all of Amendment 12.

Inexplicably, in its motion UCIDA requests that the Court vacate all of Amendment 12's implementing regulations. UCIDA provides no support for that request. UCIDA's complaint focused exclusively on Cook Inlet and made no substantive allegations about any other aspect of Amendment 12. Likewise, the Ninth Circuit's opinion only discussed Cook Inlet and the court's holding was limited and explicit in that it only found invalid the part of Amendment 12 relating to Cook Inlet. The Court should therefore deny UCIDA's request to vacate all of Amendment 12 and the 2012 rule.

Based on the allegations in the complaint, it appears plaintiffs do not even have legal standing to complain about management of the commercial and sport salmon fisheries in the East Area, the commercial salmon fisheries in the Prince William Sound or Alaska Peninsula Areas, or the sport salmon fishery in the West Area. (*See* Complaint ¶ 8 (UCIDA represents commercial fishermen in Cook Inlet); ¶ 14 (Cook Inlet Fishermen's Fund's "mission is to advocate on behalf of all commercial fishermen in Cook Inlet and for the coastal community more generally").)

III. The Court should deny UCIDA's request that the Court order NMFS to direct the Council to take specific action.

Only in "rare circumstances" should the Court remand with specific instructions to an agency. *Earth Island*, 494 F.3d at 770. In *Earth Island*, for example, a decision by the Secretary of Commerce that a purse seine fishery was not having an adverse impact on dolphin populations had been challenged in court twice; both times the Ninth Circuit agreed that the Secretary's finding was arbitrary and capricious. *Id.* at 760-61. After the second appeal, the Ninth Circuit concluded based on the record that the Secretary would not be able to make a finding of no adverse impact even if the agency continued to study the matter, and remanded with instructions that the finding be vacated instead of simply for further proceedings. *Id.* at 770-71.

No "rare circumstances" like those in *Earth Island* are present in this case. This is a garden variety APA case in which a court has found an agency action to be contrary to law. The appropriate remedy is to remand to the agency for further proceedings. The holding of the Ninth Circuit is clear: for the State to manage the Cook Inlet fishery the Council must adopt an FMP that explicitly delegates management authority to the State. *UCIDA*, 837 F.3d at 1063. But the Council has at least three options for this fishery moving forward: prepare an FMP that delegates management authority to the State; prepare an FMP that allows NMFS to manage the fishery; or simply close the fishery. The Council should be permitted to choose the appropriate path forward without any "instructions" from NMFS. In any event, NMFS lacks the authority to direct the Council.

IV. The Court should deny UCIDA's request that the Court declare that the 1990 FMP is "hereby reinstated."

The Court should not declare that the 1990 FMP is "hereby reinstated" and order NMFS to supervise the Cook Inlet fishery pursuant to Section 9.

For one reason, the 1990 FMP is outdated and invalid. For example, the 1990 FMP does not include the annual catch limits or accountability mechanisms for the West Area that under the MSA Reauthorization Act of 2006 must be included within an FMP. Pub. L. No. 109-479, § 104, 120 Stat. 3575, 3584 (2007) (codified at 16 U.S.C. § 1853(a)(15)). There is no basis for the Court to declare that an invalid FMP is reinstated.

Second, what UCIDA is really asking is that the Court re-write the 1990 FMP to read as if that plan explicitly delegated management of the Cook Inlet salmon fishery to the State. The plan did not do that, and moreover in 2012 the fishery management experts at the Council considered whether to develop an FMP for Cook Inlet, and delegate management authority to the State, and the Council rejected that alternative for sound fishery management reasons. While it is possible that the Council will reconsider that option, the Court is ill equipped to predict what NMFS and the Council might do. The Court certainly should not order that the fishery be managed in a way the Council rejected when the Council has other options.[3]

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[3] UCIDA's reliance on *Paulsen v. Daniels*, 413 F.3d 999 (9th Cir. 2005) is misplaced. In that case, the court found that an entire rule was invalid because of the agency's failure to provide public notice and an opportunity to comment. *Id.* 1004-05. Here, the Ninth Circuit only held that part of Amendment 12 is contrary to law. Also, in *Paulsen* after finding the challenged rule invalid the court declined to reinstate a previous rule that had also been found invalid. *Id.* at 1008. UCIDA's request that the Court enter a remedial order that reinstates the invalid 1990 FMP should therefore be denied.

CONCLUSION

For all of these reasons, the Court should deny UCIDA's Motion for Issuance of Final Judgment.

DATED January 19, 2017.

Respectfully submitted by,

JAHNA LINDEMUTH
ATTORNEY GENERAL

By: /s/ Seth M. Beausang
Seth M. Beausang (Alaska Bar No. 1111078)
Assistant Attorney General
State of Alaska - Department of Law
Natural Resources Section
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
Telephone: (907) 269-5232
Facsimile: (907) 279-2834
Email: seth.beausang@alaska.gov
Attorney for the State of Alaska

Certificate of Service

I certify that on January 19, 2017 the foregoing MEMORANDUM IN OPPOSITION TO UCIDA'S MOTION FOR ISSUANCE OF FINAL JUDGMENT was served electronically via the CM/ECF system.

/s/Seth M. Beausang
Seth M. Beausang
Assistant Attorney General