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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT ASSOCIATION, AND COOK INLET FISHERMEN'S FUND, Plaintiffs, vs. NATIONAL MARINE FISHERIES SERVICE ET AL., Federal Defendants.	Case. No. 3:13-cv-00104-TMB **FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO ENFORCE JUDGMENT (ECF 151)**

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INTRODUCTION

On the parties' *joint* motion, the Court entered Judgment in this case on August 3, 2017 (ECF 102). As proposed by the parties, the Judgment remanded without vacatur Amendment 12 to the Salmon Fishery Management Plan ("FMP") and directed the National Marine Fisheries Service ("NMFS") to file tri-annual status reports updating the Court and the other parties on the North Pacific Fishery Management Council's ("Council") development of a new FMP amendment. If the Council adopts a new FMP amendment, the Judgment requires that NMFS take final agency action and promulgate a final rule within one year from Council adoption. Aside from these clear mandates, the Judgment sets no other requirements upon NMFS or the Council with regard to the timing or the substance of the FMP amendment. In fact, the Judgment expressly notes that it does "not bind the Council or NMFS with regard to the contents of the new FMP amendment[.]" ECF 102 ¶ 4.

Plaintiffs' motion, purportedly to "enforce" the Judgment, never identifies any issues with NMFS's compliance with the terms of the Judgment.[1] Instead, Plaintiffs claim that the Council's actions to date in developing the FMP amendment are contrary to the letter and spirit of the Ninth Circuit's opinion in *United Cook Inlet Drift Ass'n v. NMFS*, 837 F.3d 1055 (9th Cir. 2016). On this basis alone, Plaintiffs request that the Court set aside the current Judgment, order the Council (a non-party to this litigation) to

[1] Plaintiffs' present motion appears to be a motion to reconsider the parties' joint motion, ECF 102. This clearly does not comply with Local Rule 7(h), and on that basis alone, should be denied.

issue an FMP amendment, and dictate the substance of a future decision on Plaintiffs' terms and timeline. Plaintiffs' request is nothing less than extraordinary and finds no support in the law whatsoever.

Plaintiffs' motion should be denied because Federal Defendants are in compliance with the Judgment and there is therefore nothing further that the Court can "enforce." Because Plaintiffs are seeking to change the Judgment, and not enforce it, Plaintiffs' motion should be construed as a motion to amend or alter the Judgment pursuant to Federal Rule 60(b). But Plaintiffs have not even attempted to meet the applicable requirements for such alteration. Nor could they, as there has been no significant change in factual or legal circumstances that would warrant such relief. Moreover, the Court does not have jurisdiction to entertain Plaintiffs' request for declaratory relief, as it would (1) require the Court to evaluate the non-final actions of the Council, which is not a party to this case, and (2) issue an advisory opinion on whether the Council's process to date complies with Ninth Circuit case law. Plaintiffs' request for "interim relief" should also be denied as Plaintiffs have not shown entitlement under the traditional four-factor test for mandatory injunctive relief. Finally, Plaintiffs' request that the Court appoint a special master should be denied as Plaintiffs have not shown that exceptional circumstances exist so as to justify such an extraordinary remedy.

BACKGROUND AND PROCEDURAL HISTORY

This case involved a challenge to regulations adopted by NMFS implementing Amendment 12 to the FMP for salmon fisheries off the coast of Alaska. This Court

upheld Amendment 12, finding that NMFS's regulations complied with the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act"), the National Environmental Policy Act ("NEPA"), and the Administrative Procedure Act ("APA"). *United Cook Inlet Drift Ass'n v. NMFS*, Case No. 3:13-cv-104-TMB, 2014 WL 10988279 (D. Alaska Sept. 5, 2014). On September 21, 2016, the Ninth Circuit Court of Appeals reversed this Court's judgment and remanded for further proceedings. *United Cook Inlet Drift Ass'n*, 837 F.3d 1055.

Following remand, Plaintiffs filed a motion for entry of judgment, requesting that the Court: 1) vacate Amendment 12 to the Salmon FMP and NMFS's implementing regulations; 2) order NMFS to direct the Council to reissue another Amendment within two years; 3) reinstate the 1990 FMP with the 11 other preceding Amendments; 4) have NMFS supervise the administration of the FMP pursuant to section 9 of the 1990 FMP; and 5) retain jurisdiction to supervise the remand. ECF 78. Federal Defendants opposed this request and argued that, if the Court were to adopt Plaintiffs' proposed judgment and vacate NMFS's implementing regulations, this remedy would require NMFS to close commercial salmon fishing in the West Area, including Cook Inlet, pending development of another Amendment. ECF 87.

Instead of submitting the briefing to the Court, the parties engaged in negotiations regarding final judgment. *See* ECF 92 (order granting Plaintiffs' motion for extension of time to file a reply in support of their motion for final judgment, noting that the parties are "engaged in productive settlement discussion regarding final judgment"). The result,

filed on July 11, 2017, was an "Unopposed Joint Motion for Entry of Proposed Judgment" that set none of the terms that Plaintiffs initially proposed in their motion for entry of judgment. ECF 101. Rather, the joint motion requested that the Court order that: 1) Amendment 12 be remanded without vacatur; 2) NMFS shall file a status report on a tri-annual basis; 3) NMFS will work with the Council to ensure that the affected public has appropriate input in the development of any new Salmon FMP amendments that address Cook Inlet; 4) NMFS take final agency action and/or promulgate a final rule within one year from the Council meeting at which the Council takes final action to adopt a Salmon FMP amendment that addresses Cook Inlet; 5) Plaintiffs be allowed to seek a court-ordered deadline for implementation of a new Salmon FMP amendment if the Council does not form a committee that includes Cook Inlet salmon fishery stakeholders; and 6) Plaintiffs reserve their right to seek fees and costs. *Id.* Importantly, the joint motion requested that any judgment "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.*, Proposed Order ¶ 3. The Court granted the joint motion on these terms and entered Judgment on August 3, 2017. ECF 102.

During preparation of the proposed Judgment, Plaintiffs sought the formation of a Salmon Committee as a mechanism to participate in the Council process. In NMFS's experience, committees substantially lengthen the Council process and notably the Judgment specifically contemplated that, if the Council created the Salmon Committee,

the development of an Amendment would be delayed. ECF 102 ¶ 5 (expressly not setting a deadline if the Council chose to form a committee). The Council established a Salmon Committee (largely at the request of Plaintiffs' members). *See* Declaration of James W. Balsiger ("Balsiger Decl.") (attached) ¶ 8. This Committee has met a number of times. *Id.* However, NMFS' experience with committees proved correct, and the Salmon Committee has 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, which includes members of the Plaintiffs' organizations, the length of time needed to develop the FMP amendment has extended beyond what was initially estimated. *Id.*

Notwithstanding the Salmon Committee delays, the Council has made substantial progress in developing a new FMP amendment. Balsiger Decl. ¶¶ 20-21. Staff from the Council, NMFS, and the Alaska Department of Fish and Game (ADF&G) prepared an extensive discussion paper for the Council and the Salmon Committee to assist in developing the Magnuson Act required management measures necessary in a fishery management plan. The Council has discussed the FMP amendment at four meetings, held a public outreach meeting on the FMP amendment in October 2017, and is scheduled to hold other Council and public outreach meetings to discuss the FMP amendment in October 2019. *Id.* ¶¶ 6-7. Although NMFS does not control the Council's process, the agency estimates that the Council could adopt an FMP amendment by the Council's December 2020 meeting. *Id.* ¶¶ 20-21.

STANDARD OF REVIEW

Although Plaintiffs have identified no procedural basis for their motion and on that basis alone it could be denied, a motion to modify or alter a final judgment or order is governed by Rule 60(b). *Am. Ironworks & Erectors v. N. Am. Constr. Corp.*, 248 F.3d 892, 899 (9th Cir. 2001). Given that Plaintiffs are seeking to impose deadlines and substantive requirements on the Council that the Judgment does not contain, Plaintiffs' motion should be evaluated under Rule 60(b). *See Lou v. Ma Labs.*, No. 12–cv–05409 WHA (NC), 2013 WL 1615785, at *1 (N.D. Cal. Apr. 15, 2013) (noting that courts have found that Rule 60(b) applies not only when changing but also when clarifying a prior order or judgment). The only potentially relevant parts of Rule 60(b) provide that a party may seek relief from a final judgment or order "[o]n motion and just terms;" if "(5) the judgment has been satisfied ... or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief." Fed. R. Civ. P. 60(b). The movant bears the burden of establishing that one of the Rule 60(b) factors applies. *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992).

Plaintiffs' request to establish a timeline for the FMP amendment process also is a request for injunctive relief. An injunction is "an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council,* 555 U.S. 7, 24 (2008) (citation omitted). To obtain a permanent injunction, a plaintiff must show: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships

between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–57 (2010).

These standards are heightened where, as here, a plaintiff seeks a mandatory injunction. A mandatory injunction goes beyond maintaining the status quo and "orders a responsible party to 'take action.'" *Marlyn Nutraceuticals v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (citation omitted). Such an injunction imposes "significant burdens on the defendant and requires careful consideration of the intrusiveness of the ordered act, as well as the difficulties that may be encountered in supervising the enjoined party's compliance with the court's order." *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 892 (7th Cir. 2011) (citation omitted). As such, "'[m]andatory injunctions are particularly disfavored.'" *Fed. Trade Comm'n v. Lake*, 181 F. Supp. 3d 692, 704 (C.D. Cal. 2016) (citation omitted) (denying requests for mandatory relief in issuing a permanent injunction).

ARGUMENT

I. Federal Defendants are in compliance with the Judgment.

"A motion to enforce the court's previous judgment may be granted when the prevailing party demonstrates its opponent has not complied with the judgment's terms." *California v. U.S. Dep't of Labor*, 155 F. Supp. 3d 1089, 1096 (E.D. Cal. 2016) (citing *Heartland Hosp. v. Thompson*, 328 F. Supp. 2d 8, 11 (D.D.C. 2004). "The court may

grant the moving party only that relief to which it is entitled under the original judgment." *Id.*; *Sierra Club v. McCarthy*, 61 F. Supp. 3d 35, 39 (D.D.C. 2014) ("But if a plaintiff 'has received all relief required by that prior judgment, the motion to enforce [should be] denied.'") (quoting *Heartland Hosp.*, 328 F. Supp. 2d at 11).

Plaintiffs do not take issue with NMFS's compliance with the actual terms of the Judgment, which was negotiated, jointly filed, and entered by the Court on August 3, 2017. Nor can they. The only term that proscribes a duty on NMFS has thus far been fulfilled. ECF 105, 119, 136, 139, 147, 150 (tri-annual status reports pursuant to the second paragraph of the Judgment). Accordingly, there is no doubt that Federal Defendants are in compliance with the Judgment.

Realizing this, Plaintiffs instead make the argument that Federal Defendants' actions since the Judgment are not in compliance with the "letter and spirit" of the Ninth Circuit's opinion.[2] Such an argument is without legal support. None of the cases cited in

[2] The vast majority of Plaintiffs' brief shadow-boxes against speculation. But considering the Council has not made any decisions thus far, it is entirely premature to engage on the merits of Plaintiffs' arguments. Even so, Federal Defendants direct the Court to the Ninth Circuit's actual mandate which provides: "The 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 [UCIDA]." 837 F.3d at 1065. From this, Plaintiffs make the remarkable jump to conclude that the Council and NMFS must regulate fishing in State waters – an issue that certainly was never squarely presented to the Ninth Circuit considering that dispute was over *federal* waters. In any event, it is possible that the Council and NMFS may reach decisions that conflict with Plaintiffs' view and admittedly there may be a future lawsuit, but right now, we simply do not know the parameters of the final decisions and therefore cannot engage Plaintiffs' speculation. What is clear, however, is that the Council's current *process* certainly does not fall outside the Magnuson Act and Ninth Circuit's mandate.

the motion to enforce support Plaintiffs' position that a court should hold defendants not to the clear terms of a judgment, but to plaintiff's interpretation of the Ninth Circuit's opinion (which never addressed the issue presented here). These cases are either irrelevant to the issue at hand or are inapposite to Plaintiffs' position. *See e.g.*, *Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th Cir. 2016) ("When a court's order dismissing a case with prejudice incorporates the terms of a settlement agreement, the court retains ancillary jurisdiction to enforce the agreement because a breach of the incorporated agreement is a violation of the dismissal order.") (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994)); *California*, 155 F. Supp. 3d at 1096 ("Although the court cannot enforce an order it did not previously issue, the plaintiffs may yet obtain the relief they seek in a renewed challenge and direct review.").

Indeed, it is Plaintiffs' motion, and not Federal Defendants' actions, that violate the express terms of the Judgment. Despite the fact that the Judgment states that it will "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," Plaintiffs seek through this motion to dictate the contents of the new FMP amendment. ECF 102 ¶ 3 (emphasis added). This is not a modification or amendment, but rather a wholesale reversal of this Court's Judgment (notably that the parties jointly presented to this Court for adoption). And, despite the fact that the Judgment restricted Plaintiffs' ability to seek a court-ordered deadline for the Council's

implementation of the new FMP amendment, Plaintiffs now seek through this motion to set deadlines for the Council to act on the amendment. *Id.* ¶ 5.

Far from seeking to "enforce" the Judgment, Plaintiffs seek to obliterate the Judgment as it currently stands and replace it with terms that are suddenly, and without explanation, more aligned with the current composition of their organizations' membership. This is nothing less than a backdoor attempt to circumvent the well-established procedures for appealing the terms of a Judgment to the Court of Appeals. Besides reneging on their early representations to this Court, Plaintiffs have waived any right to invalidate the Judgment's express and controlling terms and should not be allowed to do so under the auspices of "enforcing" make-believe conditions. For these reasons, Plaintiffs' motion should be rejected.

II. The Court should evaluate and deny Plaintiffs' motion to enforce under Rule 60(b).

Given that Federal Defendants are in compliance with the Judgment, Plaintiffs' motion must be viewed as a motion to alter or amend the judgment. Federal Rule of Civil Procedure Rule 60(b)(5)-(6) governs the Court's inquiry on whether to alter or amend its prior orders.[3] Plaintiffs have the burden under Rule 60(b) to obtain such relief, and have

[3] Rule 59(e) does not apply because Plaintiffs waited more than 28 days after the August 3, 2017 Judgment to file their motion. Fed. R. Civ. P. 59(e). Likewise, Rule 60(b)(1)-(3) do not apply because Plaintiffs waited more than a year after the entry of Judgment to file their motion. Fed. R. Civ. P. 60(c)(1). Rule 60(b)(4) is also inapplicable because the Judgment has not been voided. Fed. R. Civ. P. 60(b)(4).

made no showing that the relief is warranted under any of the available prongs of that Rule.

As relevant here, Rule 60(b)(5) permits a party to obtain relief from a judgment if, among other reasons, "applying it prospectively is no longer equitable[.]" Fed. R. Civ. P. 60(b)(5); *Horne v. Flores*, 557 U.S. 433, 447 (2009). As the Supreme Court explained, Rule 60(b)(5) "provides a means by which a party can ask a court to modify or vacate a judgment or order if 'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'" *Horne*, 557 U.S. at 447 (quoting *Rufo*, 502 U.S. at 384).

Plaintiffs have not shown any "significant change either in factual conditions or in law" that would support their request that the Court set deadlines for the Council to act and dictate the substance of the new FMP amendment. Turning first to Plaintiffs' request that the Court "set a hard deadline on NMFS and the Council to complete the FMP," Plaintiffs note that NMFS had previously estimated that it would take the Council approximately two years to take final action on a new FMP amendment. ECF 151 at 15, 25. But NMFS made this estimate before Judgment was entered and was based on Council procedures without committee involvement. ECF 88 ¶¶ 21-27; Balsiger Decl. ¶ 15. At the behest of Plaintiffs, *see* ECF 102 ¶ 5, the Council formed a committee that includes Cook Inlet salmon fishery stakeholders to participate in the implementation of the FMP amendment. As detailed in the declaration filed concurrently with this opposition, the addition of this committee has significantly delayed the Council's

progress on the FMP amendment. Balsiger Decl. ¶¶ 15-16 (explaining that actions attributable to Plaintiffs' organizations contributed significantly to the delay in the development of the FMP amendment). Plaintiffs are purporting to complain about delay that they, in large part, contributed to. In any event, that the Council has taken longer than two years to complete the FMP process does not constitute a significant change in conditions, as the two-year mark was merely an estimate predicated on the lack of committee involvement. ECF 88 ¶¶ 21-27.

Plaintiffs also fail to demonstrate that there has been a significant change in circumstances that would justify the Court granting Plaintiffs' request to set terms for the substance of the FMP amendment. Plaintiffs make much of the fact that there has been significant debate at Council meetings about the substance of the FMP amendment, but this cannot be considered an unforeseen change in circumstances. Plaintiffs participate extensively before the Council on fishery management issues, and are well aware of the ongoing scientific and policy debates before the Council about the scope of an FMP amendment. Plaintiffs thus can hardly claim that they were unable to foresee, prior to the Judgment, that the FMP process would invoke substantial debate about the FMP amendment contents given the difficult issues and process. Indeed, debate is exactly what Plaintiffs wanted in the Council process.

Nor have Plaintiffs alleged that revision of the Judgment is warranted under the catch-all provision of Rule 60(b)(6). This exception "has been used sparingly as an equitable remedy to prevent manifest injustice" and "is to be utilized only where

extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *Fantasyland Video v. Cty. of San Diego*, 505 F.3d 996, 1005 (9th Cir. 2007) (citation omitted); *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) ("[O]ur cases have required a movant seeking relief under Rule 60(b)(6) to show 'extraordinary circumstances' justifying the reopening of a final judgment."). New circumstances must exist that Plaintiffs could not have anticipated earlier. *Labor/Cmty. Strategy Ctr. v. Los Angeles Cty. Metro. Transp. Auth.*, 564 F.3d 1115, 1120 (9th Cir. 2009). It is decidedly not a provision to circumvent well-established appeal procedures for reversing and/or eliminating the clear terms of a judgment.

Plaintiffs frequently attend and participate in Council meetings and therefore could have easily anticipated that the development of an FMP amendment would be contentious and would require substantial time. But the parties proposed the Judgment that the Court entered, and Plaintiffs could have stood on their remedy briefing that sought a two-year deadline for Council action even though the Council was not a party to the case. But they wisely chose not to. Instead, as proposed by the parties, the Judgment sets no deadlines for the Council to adopt an FMP amendment,[4] and expressly states that neither the Council nor NMFS are bound by the Judgment with regard to the contents of the new FMP amendment. Plaintiffs' request to materially alter these terms now is not based on

[4] The Judgment does require NMFS to take final agency action and/or promulgate a final rule within one year from the Council meeting at which the Council takes final action to adopt the Salmon FMP amendment. ECF 102 ¶4. NMFS is still committed to this term of the Judgment and stands ready to do so. Balsiger Decl. ¶ 21.

any facts that Plaintiffs could not have easily foreseen, and thus their motion does not fall within the narrow ambit of Rule 60(b)(6).

At bottom, Plaintiffs are dissatisfied with the progress being made on the FMP amendment, largely because of their insistence on a Salmon Committee, and are concerned that any new FMP amendment would not best serve their current economic interests. These are not grounds for modifying or amending the Judgment.

III. The Court lacks jurisdiction to evaluate the substance of the FMP amendment process to date and issue declaratory relief.

Even if Plaintiffs' motion satisfied the requirements of Rule 60, this Court lacks jurisdiction to grant Plaintiffs' request for declaratory relief as it requires the Court to issue an advisory opinion on a non-final agency action. Plaintiffs' request for declaratory relief is, at bottom, a request that the Court evaluate the Council's actions on the FMP amendment to date. Such a request cannot be accommodated for at least two reasons.

First, the Council is not a federal agency and its actions – or inaction, for that matter – are not subject to judicial review.[5] *See Flaherty v. Ross*, 373 F. Supp. 3d 97, 110 (D.D.C. 2019) ("[T]he Court concludes that Congress, through the APA, has not waived the federal government's sovereign immunity as applied to the Council. Thus, the Court lack subject-matter jurisdiction over Plaintiffs' claims against it."); *Anglers*

[5] The Court also lacks jurisdiction to review the Council's actions because the Council is not a party to this case. *See Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 669 (D.C. Cir. 2016) ("Besides, the Council is not a defendant in this suit, and we would therefore have no jurisdiction to review its decision.") (citing *Omni Capital In'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987)).

Conservation Network, 809 F.3d at 669-70 (affirming lower court's decision that a fishery management council is not itself an agency subject to judicial review). Here, the Council – and not NMFS – is in the process of developing the FMP amendment. Balsiger Decl. ¶ 20. Plaintiffs' request for declaratory relief would necessarily require the Court to evaluate the Council's actions to date on an unfinished amendment. This request should be denied on the sole basis that the Council is not a party to the litigation and thus the Court lacks jurisdiction.[6]

Second, even if the Council's actions were subject to judicial review, Plaintiffs' request requires the Court to make determinations on non-final agency action. In the absence of a final agency action – *i.e.*, NMFS promulgating a final rule implementing the FMP amendment – Plaintiffs cannot bring a claim asserting a violation under either the Magnuson Act or the APA. 16 U.S.C. § 1855(f)(1)-(2) (The Magnuson Act provides for judicial review of "[r]egulations promulgated by the Secretary under this chapter and . . . actions that are taken by the Secretary under regulations which implement a fishery management plan"); *Anglers Conservation Network*, 809 F.3d at 668-69 (determining that the Court did not have jurisdiction under either the Magnuson Act or APA to review a fishery council's action); *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 987 (9th Cir. 2006) (explaining that a plaintiff must challenge a final agency action in order to

[6] Even if the Council was subject to the Court's jurisdiction and its proposal to NMFS was final agency action, neither of which is correct, any challenge to a *developing* amendment would be unripe. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998).

obtain judicial review under the APA). Nor are courts empowered to prematurely review future agency actions in order to issue prophylactic remedies. *Monsanto*, 561 U.S. at 164 ("Until such time as the agency decides whether and how to exercise its regulatory authority, however, the courts have no cause to intervene."); *see also McKart v. United States*, 395 U.S. 185, 194 (1969) ("The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction.").

Plaintiffs' request for declaratory relief amounts to a request that the Court evaluate the Council's progress on the FMP amendment to date. But the FMP amendment is still a work in progress and has neither been adopted by the Council nor promulgated as a final rule by NMFS. The Court should deny Plaintiffs' request here as it lacks jurisdiction to evaluate the FMP process, and any order expressing opinions on this process would amount to an improper advisory opinion. *Kings County v. Surface Transp. Bd.*, 694 F. App'x 472, 473 (9th Cir. 2017) (holding that it lacked jurisdiction to consider a challenge to a declaratory order that did not constitute final agency action and explaining that "[e]xpressing our views regarding that order would amount to an advisory opinion, which would not resolve 'concrete legal issues, presented in actual cases, not abstractions'") (citations omitted); *ConocoPhillips Alaska v. NMFS*, No. 3:06-cv-0198-RRB, 2007 WL 9718215, at *2 n.13 (D. Alaska Apr. 17, 2007).

IV. Plaintiffs fail to meet the four-factor test for a mandatory injunction.

Plaintiffs have also failed to satisfy the traditional four-factor test for any injunctive relief in the form of court-ordered deadlines for the FMP process. *Monsanto*,

561 U.S. at 158-159 (finding abuse of discretion in the grant of further injunctive relief going beyond vacatur of the challenged agency action, where the four-factor test had not been met); *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 982 (9th Cir. 1994) (treating deadlines for agency action as injunction). Although Plaintiffs characterize the relief that they are seeking as "interim," and do not attempt to satisfy the necessary factors for injunctive relief, there can be no doubt that an injunction is what they are seeking. In *Nken v. Holder*, the Supreme Court supplied a simple description of an injunction; an injunction "is a means by which a court tells someone what to do or not to do. . . . [I]t directs the conduct of a party, and does so with the backing of its full coercive powers." 556 U.S. 418, 428 (2009) (citation omitted). A court order setting hard deadlines for the Council and NMFS to complete the FMP amendment clearly meets the definition of an injunction.

Plaintiffs have not established that they are entitled to injunctive relief.[7] The only factor that they attempt to establish is irreparable harm and, even there, they fall short. Plaintiffs allege that their members are "suffering significant financial injury under the State's continued management of the fishery without the necessary guidance of an FMP" and point to state restrictions on fishing in the exclusive economic zone and reduced salmon run sizes as examples of state management actions that are harming them. ECF

[7] Plaintiffs note that "Ninth Circuit precedent expressly permits imposition of deadlines on the remand process." ECF 151 at 25 (citations omitted). In these cases, however, courts imposed deadlines when fashioning the remedy, not, as here, in modifying a judgment.

151 at 25-26. Even if it were true that the state's management of the fishery is causing Plaintiffs harm – which is unclear – there is no guarantee that a new FMP amendment would alleviate this harm. Moreover, Plaintiffs' alleged harm is, at least in-part, self-inflicted. Any delay in the FMP amendment process is in large part attributable to Plaintiffs' involvement in the committee. *See* Balsiger Decl. ¶ 15. Thus, Plaintiffs' contention that they are irreparably harmed by Federal Defendants' delay in issuing an FMP amendment, and that this harm would be alleviated by requiring the Council to adopt an FMP amendment on Plaintiffs' timeframe, is not persuasive.

Plaintiffs have not even attempted to demonstrate that they have met the remaining three factors. Nor can they, as requiring the Council and NMFS to complete the FMP amendment on a timeframe that benefits Plaintiffs' interests (i.e., prior to the start of the 2020 fishing season) imposes an arbitrary deadline on the Council. Furthermore, it is in the public interest at large for the Council to continue developing the amendment based on a thorough review of the information gleaned from public testimony through the standard Council process. The development of an FMP amendment should not be dictated by the interests of a single group or curtail public involvement.

V. Appointment of a special master is improper in this case.

Plaintiffs' request for appointment of a special master should also be rejected, as no exceptional circumstances exist that would warrant such an extraordinary remedy. *United States v. City of Parma, Ohio*, 661 F.2d 562, 578–79 (6th Cir. 1981) ("The

appointment of a special master to oversee implementation of a court order . . . is an extraordinary remedy.").

Under Federal Rule of Civil Procedure 53(a)(1)(C), the Court may appoint a special master to "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." As the Ninth Circuit has established, a court should appoint a special master only in "exceptional circumstances." *Burlington N. R.R. Co. v. Dep't of Revenue*, 934 F.2d 1064, 1071-72 (9th Cir. 1991) (emphasis added); *see also Shenzhenshi Haitiecheng Sci. & Tech. Co., Ltd. v. Rearden LLC*, No. 15-cv-00797-JST, 2019 WL 1560449, at *6 (N.D. Cal. Apr. 10, 2019). Such circumstances are based on "the complexity of [the] litigation" and "problems associated with compliance with the district court order." *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 775 (9th Cir. 1990) (citation omitted). Additionally, a master may be appointed to aid a district court in the enforcement of its decree, *id.* at 774, especially where a court "lack[s] the resources to constantly monitor compliance with the decree." *Hook v. Arizona*, 120 F.3d 921, 926 (9th Cir. 1997).

No such circumstances exist here. This case, though long-lived, turned on an uncomplicated matter of administrative law resolved through two rounds of dispositive briefing. More importantly, however, Federal Defendants are in compliance with the Judgment, *see supra* Part I, and it is therefore undisputed that there have been no "problems associated with compliance with the district court order." *Suquamish Indian Tribe*, 901 F.2d at 775. For the same reason, a special master is not needed to aid the

district court in enforcing its Judgment and, even if the Judgment needed to be enforced, there is no evidence that the Court "lacks the resources" to do so. *Hook*, 120 F.3d at 926.

Plaintiffs gloss over the "exceptional circumstances" requirement, and instead justify their request for a special master by pointing out that the FMP amendment process is taking longer than originally anticipated and that there has been vigorous debate amongst the stakeholders involved in the amendment development. ECF 151 at 28. These "circumstances," far from being exceptional, are to be expected in a process that involves individuals with a diverse set of opinions on how an FMP amendment should be developed and implemented. These circumstances certainly do not rise to the level considered in cases where special masters were deemed necessary. *Cf. Nat'l Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 543-44 (9th Cir. 1987) (assigning a special master because there was credible evidence that defendants had been disregarding the court's orders); *Hook v. Ariz. Dep't of Corrections*, 107 F.3d 1397, 1403 (9th Cir. 1997) (appointing a special master because of "defendants' history of noncompliance and continuous attempts to alter the orders on their own without pursuing a motion for modification under Federal Rule of Civil Procedure 60(b)"). Plaintiffs' request for this exceptional remedy here, where Federal Defendants are undisputedly in compliance with the Judgment, should be denied.

CONCLUSION

The terms of the Judgment are clear. The parties should be held to those terms unless there is a basis to modify or amend and the moving party meets the standards

under Rule 60(b). Plaintiffs have failed to even invoke this standard, much less carry their burden, and Federal Defendants have fully complied with the Judgment. Thus, Plaintiffs' motion should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was today served via the Court's CM/ECF system on all counsel of record and that this pleading contains 5671 words in compliance with Local Rules.

/s/Coby Howell