UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box 21109
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March 29, 2018

MEMORANDUM FOR: North Pacific Fishery Management Council

THROUGH: Maura A.B. Sullivan
Chief, Alaska Section
NOAA Office of General Counsel

FROM: Lauren Smoker
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NOAA Office of General Counsel

SUBJECT: Scope of the "fishery" to be conserved and managed under the Fishery Management Plan for the Salmon Fisheries in the EEZ Off Alaska

BRIEF BACKGROUND

The North Pacific Fishery Management Council ("Council") is currently in the process of amending the Fishery Management Plan for the Salmon Fisheries in the EEZ Off Alaska (FMP) to add to the FMP the commercial salmon fishery in the exclusive economic zone (EEZ) waters adjacent to Cook Inlet ("Cook Inlet EEZ Area"). The Council is taking this action pursuant to section 302(h)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act or MSA) and the Ninth Circuit's decision in *United Cook Inlet Drift Association v. National Marine Fisheries Service* (*UCIDA v. NMFS*), which interprets section 302(h)(1).[1] At this time, the Council has received two discussion papers on the amendment, one at its April 2017 meeting and another at its October 2017 meeting. At both meetings, the public was invited to submit comments and provide testimony to the Council on the amendment generally and on the discussion papers specifically.

At its April 2017 meeting, the Council adopted a suite of preliminary alternatives, and then refined those alternatives at its October 2017 meeting to focus the FMP amendment on adding the commercial

[1] *United Cook Inlet Drift Association. v. National Marine Fisheries Service*, 837 F.3d 1055 (9th Cir. 2016).

salmon fishery in the Cook Inlet EEZ Area.[2] This FMP amendment will be referred to as the "Cook Inlet EEZ Area amendment" for the remainder of this memorandum. The preliminary alternatives include a no action alternative and two action alternatives. One action alternative provides that NMFS and the State of Alaska (State) would cooperatively manage the fishery in the EEZ. Consistent with MSA section 306(a)(3)(B), this alternative would delegate to the State management of certain measures in the Cook Inlet EEZ Area. The second action alternative would establish Federal management of the fishery in the EEZ. Under both action alternatives, the Federal government will be the entity ultimately responsible for managing the commercial salmon fishery within the Cook Inlet EEZ Area consistent with the FMP, the MSA, and other applicable law.

At both the April and October 2017 Council meetings, representatives for the United Cook Inlet Drift Association (UCIDA) and Cook Inlet Fishermen's Fund (CIFF) submitted comments and provided testimony to the Council on a number of points concerning the Cook Inlet EEZ Area amendment, some of which challenged the scope of the action alternatives.[3] Shortly after the Council's October 2017 meeting, legal counsel for UCIDA and CIFF filed a letter with the Alaska district court objecting to the scope of the Council's action alternatives.[4] In these letters, UCIDA and CIFF state that the action alternatives are not consistent with the Ninth Circuit's decision in *UCIDA v. NMFS* or the requirements of the MSA because they fail to include the entire Cook Inlet salmon fishery occurring in both the EEZ and State waters of Cook Inlet.

At its December 2017 meeting, the Council asked NOAA General Counsel to provide legal guidance on UCIDA and CIFF's objections to the scope of the action alternatives. NOAA General Counsel provides the following legal guidance in response to the Council's request.

QUESTIONS PRESENTED

1. Did the Ninth Circuit in *UCIDA v. NMFS* hold that the Council and NMFS must prepare an FMP amendment that includes salmon fisheries conducted within State waters of Cook Inlet?

2. Does the Magnuson-Stevens Act authorize and require the Council to prepare an FMP amendment that includes salmon fisheries occurring within State waters of Cook Inlet?

[2] The Cook Inlet EEZ Area, with coordinates, is depicted in Figure 1 of the FMP and in Figure 23 of 50 CFR part 679, and is described in regulations at 50 CFR § 679.2 under the definition of "Salmon Management Area" as "the EEZ waters north of a line at 59° 46.15′ N."

[3] See Attachment 1 (Letter dated March 28, 2017, from UCIDA to Dan Hull, Chairman, North Pacific Fishery Management Council) and Attachment 2 (Letter dated September 28, 2017, from UCIDA to Dan Hull, Chairman, North Pacific Fishery Management Council). Attachment 2 includes UCIDA's letter and the first attachment to the letter. The full letter can be obtained at www.npfmc.org.

[4] See Attachment 3 (Letter dated November 21, 2017, from Jason Morgan to the Honorable Timothy M. Burgess, U.S. District Judge, District of Alaska).

SHORT ANSWERS

1. No. At no point did the Ninth Circuit address Federal authority to manage fisheries within State waters. The Ninth Circuit held that under section 302(h)(1) of the MSA,[5] the Council must prepare an FMP for a fishery that (1) is under its authority and (2) requires conservation and management.[6] The portion of the Cook Inlet commercial salmon fishery that occurs in the Cook Inlet EEZ Area was "the fishery" at issue in the litigation. The question before the Ninth Circuit was whether the FMP under Amendment 12, which applies to most of the commercial salmon fishery occurring within the EEZ, but not to the commercial salmon fishery occurring within the Cook Inlet EEZ Area, was consistent with section 302(h)(1). Because the commercial salmon fishery occurring within the Cook Inlet EEZ Area is a fishery, under the Council's authority, and requires conservation and management, the Ninth Circuit concluded that its removal violated the MSA.[7]

2. No. Unless preemption occurs in accordance with section 306(b), the Magnuson-Stevens Act does not provide the Council or NMFS with the authority to conserve and manage salmon fisheries that occur within State waters in Cook Inlet.

DISCUSSION OF QUESTION 1

The Ninth Circuit's decision in *UCIDA v. NMFS* does not support UCIDA and CIFF's position that the Council must include salmon fisheries in State waters in the Federal FMP. The FMP has never managed state water fisheries, and the Ninth Circuit did not address this issue.

Prior to Amendment 12, the FMP's fishery management unit was all of the EEZ off the coast of Alaska and the salmon and fisheries that occur there.[8] At no point in its history did the FMP's fishery management unit include State waters or the salmon fisheries occurring within State waters. Amendment 12 made a number of modifications to the FMP, but these involved changes to Federal fishery management in the EEZ. Specific to Cook Inlet, Amendment 12 removed the Cook Inlet EEZ Area and the commercial salmon fishery that occurs within this area from the fishery management unit and therefore Federal management under the FMP. UCIDA and CIFF sued NMFS over its approval and implementation of Amendment 12, primarily arguing that the exemption of the Cook Inlet EEZ Area from the FMP violated section 302(h)(1) of the MSA.[9]

Although NMFS and the State (as an Intervenor-Defendant) prevailed at the district court, UCIDA and CIFF prevailed on appeal to the Ninth Circuit. The Ninth Circuit considered the language of section 302(h)(1), which states, "Each council shall … for each fishery under its authority that requires

[5] 16 U.S.C. § 1852(h)(1).
[6] *UCIDA v. NMFS*, 837 F.3d, at 1062.
[7] *Id.*, at 1065.
[8] *See* FMP, Chapter 1, at 1-7 (describing history of the FMP through Amendment 12).
[9] 16 U.S.C. § 1852(h)(1).

conservation and management, prepare and submit to the Secretary" an FMP and any necessary amendments to the FMP.[10] Given this language, the Ninth Circuit concluded that section 302(h)(1) "provides that a Council [must] prepare an FMP for a fishery (1) 'under its authority' that (2) requires 'conservation and management.'"[11] During litigation, NMFS agreed that the commercial salmon fishery occurring within the Cook Inlet EEZ Area requires conservation and management by some entity[12] and none of the parties disputed "that the *exempted area* of Cook Inlet is a salmon fishery (emphasis added)."[13] The Ninth Circuit found that, "When Congress directed each Council to create an FMP 'for each fishery *under its authority* that requires conservation and management,' . . . it did not suggest that a Council could wriggle out of this requirement by creating FMPs only for selected parts of those fisheries, excluding other areas that required conservation and management (emphasis added)."[14] Therefore, the Ninth Circuit held Amendment 12's removal of the Cook Inlet EEZ Area and the commercial salmon fishery that occurs within it contrary to the requirement of section 302(h)(1) and in violation of the MSA.

UCIDA and CIFF state that the action alternatives are out of compliance with the Ninth Circuit's decision because they only address part of the "fishery" -- the part of the Cook Inlet fishery that occurs in the EEZ. UCIDA and CIFF point out that the Ninth Circuit rejected the government's argument that section 302(h)(1) "does not expressly require an FMP to cover an entire fishery, noting that 'the provision says nothing about the geographic scope of plans at all.'"[15] They highlight that the Ninth Circuit found that the MSA requires an FMP for a fishery, a term defined at section 3(13), and that "no one disputes that the exempted area of Cook Inlet is a salmon fishery."[16] They also note that the Ninth Circuit said NMFS cannot "wriggle out" of the requirement at 302(h)(1) by preparing an FMP "only for selected parts of those fisheries, excluding other areas that required conservation and management."[17] Because "[t]here are not two separate fisheries in Cook Inlet (a state and a federal fishery) – there is only one fishery,"[18] and because the Cook Inlet fishery as a whole requires conservation and management,[19] UCIDA and CIFF state that the Ninth Circuit's decision mandates the

[10] 16 U.S.C. § 1852(h)(1).
[11] *UCIDA v. NMFS*, 837 F.3d, at 1062.
[12] *Id.*, at 1061.
[13] *Id.*, at 1064. The Court's reference to "exempted area of Cook Inlet" correctly describes what no one disputed – that the "fishery" being litigated was the commercial salmon fishery within the EEZ adjacent to Cook Inlet and that was exempted from the FMP by Amendment 12.
[14] *UCIDA v. NMFS*, 837 F.3d, at 1064.
[15] Attachment 1, at pages 6-7 (quoting *UCIDA v. NMFS*, 837 F.3d, at 1064).
[16] *Id.*
[17] *Id.*
[18] Attachment 1, at page 6.
[19] *See* Attachment 1, at pages 2-5 (stating that the commercial salmon fishery in Cook Inlet is declining and that the State's management decisions are a major reason for the decline); Attachment 3, at page 2 (stating that "the fishery did not have the complete benefit of management under the Magnuson-Stevens Act" and "the longer that the Council and NMFS attempt to 'wriggle out' of their statutory obligations, the greater the continued economic harm upon the fishing industry, fishing communities, and the Nation.")

Council prepare an FMP for the entire Cook Inlet fishery which occurs in both Federal and State waters.[20]

The Ninth Circuit's decision in *UCIDA v. NMFS* does not support UCIDA and CIFF's position, as it did not address Federal management of fisheries in State waters. The Ninth Circuit focused on Amendment 12's removal of a fishery (the commercial salmon fishery) that occurs in an area under the authority of the Council (the Cook Inlet EEZ Area) and extension of State management authority into the EEZ.[21] The decision correctly characterizes the history and scope of the FMP as applying to the entire EEZ prior to Amendment 12, and then applying to something less than the entire EEZ under Amendment 12.[22] The decision also correctly characterizes the "fishery" in question as the salmon fishery within *the exempted area* of Cook Inlet.[23] Amendment 12 exempted the Cook Inlet EEZ Area, which is comprised entirely of Federal waters, from the FMP.

At no point in the decision does the Ninth Circuit suggest that the FMP did, or should, include State waters and State water salmon fisheries. The decision does not describe the "fishery" in question as including State water salmon fisheries managed by the State, or conclude that State water salmon fisheries are under the authority of the Council and NMFS. The decision expressly acknowledged several times that section 302(h)(1) applies to fisheries "under a Council's authority."[24]

All of the action alternatives currently under consideration by the Council would add to the FMP the Cook Inlet EEZ Area and the commercial salmon fisheries that occur within it. Therefore, the action alternatives currently under consideration by the Council are consistent with the holding in *UCIDA v. NMFS*.

DISCUSSION OF QUESTION 2

Separate from the holding in *UCIDA v. NMFS*, UCIDA and CIFF assert that several MSA provisions support their view that the action alternatives for the Cook Inlet EEZ Area amendment must include

[20] See Attachment 1, at 6 (stating that "the Council has a mandatory duty to develop an FMP for [the entire Cook Inlet] fishery"

[21] *See UCIDA v. NMFS*, 873 F.3d, at 1063 (discussing the authority in the Magnuson-Stevens Act to delegate management of a Federal fishery to a State and correctly describing the FMP's delegation of management authority to the State for the salmon fisheries occurring within the East Area EEZ).

[22] See *id.*, at 1058 (explaining "States retained jurisdiction over the first three miles from the coast . . . and the federal government had jurisdiction over the next 197 miles"); *id.* (stating FMP "divided Alaskan federal waters into East and West Areas" and "three historic net fishing areas, including Cook Inlet, . . . are technically in the FCZ, but are conducted and managed by the State of Alaska as inside fisheries."); and *id.*, at 1060 (correctly describing Amendment 12's removal of the three historic net fishing EEZ areas from the Salmon FMP).

[23] *Id.*, at 1064.

[24] *Id.*, at 1061, 1062, 1063, 1064, and 1065.

salmon fisheries within State waters. UCIDA and CIFF cite to broad terms in the MSA, which do not override the state jurisdiction provisions of the Act.

As discussed above, the action alternatives currently under consideration would add into the FMP the Cook Inlet EEZ Area and the commercial salmon fishery that occurs within the Cook Inlet EEZ Area. Neither of the action alternatives would add into the FMP the State waters of Cook Inlet or the salmon fisheries that occur within State waters. Citing to the MSA's definitions of "fishery" and "migratory range" and section 101 (which addresses U.S. sovereign rights),[25] UCIDA and CIFF argue, "There are not two separate fisheries in Cook Inlet (a state and a federal fishery) – there is only one fishery, and the Council has a mandatory duty to develop an FMP for that fishery."[26] UCIDA and CIFF state that the alternatives for the FMP amendment must include the salmon fisheries that occur within the State waters of Cook Inlet to "ensure that the entire fishery is managed to meet the requirements of the MSA."[27] UCIDA and CIFF also state that, "If NMFS and the Council continue to try and force the artificial distinctions on the fishery, the resultant plan will not meet the requirements of the Act."[28]

As discussed earlier, section 302(h)(1) of the MSA states that each council must prepare an FMP for (1) a fishery (2) under its authority that (3) requires conservation and management. "Fishery" is defined at section 3(13) of the MSA as "(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and (B) any fishing for such stocks."[29] While "fishery" is defined broadly under the MSA, this definition does not dictate the scope of Federal fishery management authority. Several provisions of the MSA provide specific limits on such authority.

First, section 101(a) establishes the Nation's sovereign rights and exclusive fishery management authority over all fish and all Continental Shelf fishery resources within the EEZ.[30] Section 3(11) defines the EEZ as the zone established by Presidential Proclamation 5030 (March 10, 1983), in which President Reagan claimed for the United States a 200-mile zone within which the United States would assert sovereign rights over natural resources.[31] Section 3(11) also states that the inner boundary of the EEZ "is a line coterminous with the seaward boundary of each of the coastal States."[32]

Second, section 302(a)(1)(G) states that the North Pacific Council has "authority over the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska."[33] Because Alaska's seaward boundary is 3 nautical miles from its coast (3-nm boundary line),[34] the inner boundary of the EEZ, and

[25] Attachment 1, at 6-7; Attachment 2, at 2 and 5; and Attachment 3, at 1.
[26] Attachment 1, at 6.
[27] Attachment 3, at 2.
[28] *Id.*
[29] 16 U.S.C. § 1802(13)
[30] 16 U.S.C. § 1811(a).
[31] 16 U.S.C. § 1802(11).
[32] *Id.*
[33] 16 U.S.C. § 1852(a)(1)(G).
[34] 43 U.S.C. § 1301(b).

therefore the Council's authority, starts at the 3-nm boundary line and extends 197 miles seaward to the outer boundary of the EEZ at 200 nautical miles seaward of the coast of Alaska.[35]

Third, section 306(a)(1) explicitly recognizes State jurisdiction: "Except as provided in subsection (b), nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries."[36] Under section 306(b), NMFS may preempt a State's authority and regulate a fishery within the boundaries of a State other than its internal waters.[37] However, this may only happen if NMFS finds, after notice and opportunity for a hearing in accordance with 5 U.S.C. § 554, that (a) the fishing in a fishery, which is covered by a fishery management plan, is engaged in predominately within the EEZ and beyond such zone and (b) the State has taken an action, or omitted to take an action, "the results of which will substantially and adversely affect the carrying out of such fishery management plan."[38]

Finally, and importantly given that the salmon stocks managed under the FMP are anadromous stocks, section 101(b)(1) states that the United States also has exclusive fishery management authority over "all anadromous species throughout the migratory range of each such species beyond the exclusive economic zone; except that that management authority does not extend to any such species during the time they are found within any waters of a foreign nation."[39] The term "migratory range" is defined by the MSA as "the maximum area at a given time of the year within which fish of an anadromous species or stock thereof can be expected to be found, as determined on the basis of scale pattern analysis, tagging studies, or other reliable scientific information, except that the term does not include any part of such area which is in the waters of a foreign nation."[40] The phrase "beyond the exclusive economic zone" is not defined by the MSA, but has been interpreted to mean seaward of the outer boundary of the EEZ (*i.e.*, more than 200 nautical miles from the coast) and to not include State waters that are landward of the inner boundary of the EEZ (*i.e.*, 0-3 nautical miles from the coast).[41]

All of the provisions of a statute such as the Magnuson-Stevens Act must be considered as a harmonious whole and one provision cannot be interpreted or applied without regard to other provisions.[42] While "fishery" and "migratory range" are broad definitions with no limits on geographic scope, sections 101(a) and (b)(1), 306(a), and 302(a)(1)(G) provide geographic boundaries on the Council's and NMFS' authority to conserve and manage fisheries. Although the terms "fishery" and "migratory range," when considered alone and without regard to any other provisions of the Magnuson-Stevens Act, appear to give the Council and NMFS broad authority to manage anadromous species and stocks found within the State's internal waters (freshwater rivers, streams and lakes) and

[35] Some exceptions, not relevant to the Cook Inlet EEZ Area, are provided at section 306(a)(2) of the MSA (16 U.S.C. § 1856(a)(2)).
[36] 16 U.S.C. § 1856(a)(1).
[37] 16 U.S.C. §1856(b). For Alaska, this would include the State's marine waters from 0-3 nm but would exclude internal freshwater rivers, streams, and lakes.
[38] *Id.*
[39] 16 U.S.C. § 1811(b)(1).
[40] 16 U.S.C. § 1802(29).
[41] *Jensen v. Locke*, No. 3:08-cv-00286-TMB, 2009 WL10674466, at *4-6 (D. Alaska Nov. 5, 2009).
[42] 2A Norman J. Singer & Shambie Singer, Sutherland Statutory Construction § 46:5 (7th ed. 2014).

marine waters (0 to 3 nautical miles from Alaska's coast), sections 101(a) and (b)(1), 306(a), and 302(a)(1)(G) place geographic limits on the Council's and NMFS' fishery management authority and do not provide authority for the Council and NMFS to manage anadromous species and stocks within the boundaries of the State. Nothing in the Magnuson-Stevens Act indicates that the definitions of "fishery" and "migratory authority" are to take precedence over these other provisions of the MSA. Section 306 explicitly limits Federal management of fisheries within a State's boundaries except under very specific circumstances.

Consistent with the authority provided by the MSA, the Council and NMFS would amend the FMP by adding back to the FMP the Cook Inlet EEZ Area that was removed under Amendment 12. With this amendment, the Cook Inlet EEZ Area will be under Federal management. Under both action alternatives, the Federal government will be the entity ultimately responsible for managing the commercial salmon fishery within the Cook Inlet EEZ Area consistent with the FMP, the MSA, and other applicable law. Absent preemption in accordance with the requirements in section 306(b), any alternative that would add into the FMP the State waters of Cook Inlet and the salmon fisheries that occur within State waters would exceed the statutory authority provided to the Council and violate the MSA.

However, the action alternatives encompass the decision point as to whether the Federal government, through the Council and NMFS, will directly manage the commercial salmon fishery within the Cook Inlet EEZ Area or whether the Council and NMFS will delegate certain aspects of managing the commercial salmon fishery within the Cook Inlet EEZ Area to the State. The action alternative delegating authority to the State to manage the commercial salmon fishery occurring within the Cook Inlet EEZ Area is consistent with MSA section 306(a)(3)(B),[43] which explicitly provides for such a delegation on the condition that the State's management measures and actions *that apply to the commercial salmon fishery within the Cook Inlet EEZ Area* are consistent with the relevant FMP. Under this delegation alternative, the State's management of the commercial salmon fishery within the Cook Inlet EEZ Area would be subject to Federal review and possible modification under Chapter 9 of the FMP. Under either action alternative, State management of salmon fisheries occurring within State waters would not be governed by the FMP and MSA requirements, absent preemption under section 306(b).

As explained in the April 2017 discussion paper, adding the commercial salmon fishery that occurs in Cook Inlet EEZ Area to the FMP will require the Council and NMFS to specify, among other things, maximum sustainable yield, optimum yield, acceptable biological catch, status determination criteria so that overfishing and overfished determinations can be made, and annual catch limits for the stocks of salmon managed by the FMP. In establishing these reference points, NMFS and the Council will consider the best scientific information available on the stocks of salmon without regard to Federal and

[43] 16 U.S.C. § 1856(a)(3)(B).

State boundaries.[44] Once established, these reference points will guide the Council and NMFS in their management (either direct or delegated) of the commercial salmon fishery occurring within the Cook Inlet EEZ Area. Factors that affect the salmon stocks, whether occurring within or outside of the EEZ, will be taken into account and may require additional limitations or restrictions on the commercial salmon fishery occurring within the Cook Inlet EEZ Area in order for the Council and NMFS to prevent overfishing of the stocks or exceeding annual catch limits.[45]

cc: Kristen Gustafson
Adam Issenberg
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[44] For example, section 2.7.2 of the October 2017 Discussion Paper presents a preliminary approach as to how optimum yield (OY) and maximum sustainable yield (MSY) could be described for the commercial salmon fishery in the Cook Inlet EEZ Area under Alternative 2 -- Cooperative Management with the State:

> For the salmon fisheries in the three traditional net fishing areas, several economic, social, and ecological factors are involved in the definition of OY. Of particular importance are the annual variations in the abundance, distribution, migration patterns, and timing of the salmon stocks; allocations by the Board [of Fisheries]; traditional times, methods, and areas of salmon fishing; and inseason indices of stock strength. Further, because the fisheries take place in the EEZ and State waters without formal recognition of the boundary between these two areas, the OY should not and cannot be subdivided into separate parts for the EEZ and State waters.
>
> MSY is established for salmon stocks with escapement goals based on the MSY control rules in section 2.5. For these stocks, MSY is defined in terms of escapement. MSY escapement goals account for biological productivity and ecological factors, including the consumption of salmon by a variety of marine predators.
>
> The OY for the salmon fishery is that fishery's annual catch which, when combined with the catch from all other salmon fisheries, results in a post-harvest run size equal to the MSY escapement goal for each indicator stock. The portion of the annual catch harvested by the salmon fishery reflects the biological, economic, and social factors considered by the Board and ADF&G in determining when to open and close the salmon harvest by the salmon fishery.
>
> The Magnuson-Stevens Act requires Regional Councils to "review on a continuing basis, and revise as appropriate, the assessments and specifications made ... with respect to the optimum yield." In particular, OY may need to be respecified in the future if major changes occur in the estimate of MSY. Likewise, OY may need to be respecified if major changes occur in the ecological, social, or economic factors governing the relationship between OY and MSY.

[45] For State-Federal fisheries, the National Standard 1 Guidelines address annual catch limits (ACLs) to prevent overfishing and accountability measures (AM) as follows:

"***ACLs for State-Federal Fisheries.*** For stocks or stock complexes that have harvest in state or territorial waters, FMPs and FMP amendments should include an ACL for the overall stock that may be further divided. For example, the overall ACL could be divided into a Federal-ACL and state-ACL. However, NMFS recognizes that Federal management is limited to the portion of the fishery under Federal authority. *See* 16 U.S.C. 1856. When stocks are co-managed by Federal, state, tribal, and/or territorial fishery managers, the goal should be to develop collaborative conservation and management strategies, and scientific capacity to support such strategies (including AMs for state or territorial and Federal waters), to prevent overfishing of shared stocks and ensure their sustainability." 50 C.F.R. 600.310(f)(4)(iii).

"***AMs for State-Federal Fisheries.*** For stocks or stock complexes that have harvest in state or territorial waters, FMPs and FMP amendments must, at a minimum, have AMs for the portion of the fishery under Federal authority. Such AMs could include closing the EEZ when the Federal portion of the ACL is reached, or the overall stock's ACL is reached, or other measures." 50 C.F.R. 600.310(g)(6).

March 28, 2017

VIA EMAIL TO NPFMC.COMMENTS@NOAA.GOV

Dan Hull
Chairman
North Pacific Fishery Management Council
605 W. 4th Avenue, Suite 306
Anchorage, AK 99501-2252

Re: Comments by United Cook Inlet Drift Association on Agenda Item C2

Dear Chairman Hull:

I am writing on behalf of the United Cook Inlet Drift Association ("UCIDA") to provide comments and offer UCIDA's assistance with respect to agenda item C2, the Salmon FMP Amendment – Discussion Paper. As you know, UCIDA's members are strongly committed to establishing a Salmon FMP for the Cook Inlet salmon fisheries that protects and develops this important fishery in a manner consistent with the Magnuson-Stevens Fishery Conservation and Management Act ("MSA").

The purpose of this letter is two-fold. *First*, UCIDA below provides specific comments on the Discussion Paper. As detailed below, the Discussion Paper misses some of the context and background essential to properly evaluate the problems facing Cook Inlet salmon fisheries and the solutions needed to address those problems. Due to the short time available for public comment, it is not possible for UCIDA to fully address all of its concerns in this letter. UCIDA will supplement this response in the coming weeks and months, and looks forward to working with you and the other Council members to ensure a successful and effective process.

Second, and relatedly, UCIDA requests that the Council form a committee, in accordance with the North Pacific Council's Statement of Organization, Practices, and Procedures Section 2.3.4 (Council Committees), to help develop the options for a salmon FMP for Cook Inlet. UCIDA's members have decades of invaluable first-hand experience with the Cook Inlet salmon fishery and its particular challenges and opportunities. This critical perspective is currently lacking in the Discussion Paper, and UCIDA respectfully submits that inclusion of its members in the development of alternatives for the Council's consideration is both necessary and essential to producing a workable and effective FMP for Cook Inlet.

I. BACKGROUND

A. The Commercial Salmon Fishery in Cook Inlet Is Declining

Everyone agrees that "Cook Inlet is one of the nation's most productive salmon fisheries."[1] Upper Cook Inlet is home to five species of anadromous salmon – chinook, sockeye, coho, pink, and chum – as well as steelhead. Some of these wild runs are among the largest in the world. But the salmon resources in the Upper Cook Inlet watershed are facing growing threats to their survival, and some stocks are in decline from the effects of climate change, warm water, invasive species, urbanization, and ineffective management schemes.

The harvest numbers demonstrate this decline. By one estimate, there has been "a 51% decline since 1981 in the commercial catch of sockeye salmon" in Cook Inlet.[2] The numbers from the Alaska Department of Fish and Game ("ADF&G") also show major declines: the 2013 salmon harvest was 21% less than the 1966-2012 average; the 2014 harvest was 23% less than the 1966-2013 average; the 2015 harvest was 23% less than the 1966-2014 average; and the 2016 harvest was 23% less than the 1966-2015 average.[3] Even worse, *the forecast for the 2017 harvest is the lowest in the past 15 years.*

B. The State's Management Decisions Are a Major Reason the Commercial Fishery Is Declining

The State of Alaska's management decisions have played a significant role in the decline of these fisheries in Cook Inlet. One major problem is over-escapement. As demonstrated in Fig. 1 below, the State has exceeded the in-river goal in the Kenai River for sockeye (the most important sockeye run in Cook Inlet) ***six years in a row***. And the State is not doing much better with the Kasilof River (the second most important sockeye run in Cook Inlet), exceeding the biological escapement goal for that system ***four of the last six years***. Furthermore, for both of these rivers these goals have been exceeded in eight of the last 10 years.

[1] *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv.*, 837 F.3d 1055, 1057 (9th Cir. 2016).

[2] *Id.* at 1060-61.

[3] Pat Shields & Aaron Dupuis, Alaska Dep't of Fish & Game, Fishery Management Report No. 16-14, Upper Cook Inlet Commercial Fisheries Annual Management Report, 2015, App. B2, at 126 (Apr. 2016), http://www.adfg.alaska.gov/FedAidPDFs/FMR16-14.pdf (Upper Cook Inlet commercial sockeye harvest by gear type and area, 1966-2015).

Fig. 1 Sockeye Escapements and Surplus 2011-2016

	Kenai River				Kasilof River		
Year	Inriver Goal* (Thousands of Sockeye)	Sonar Count (Thousands of Sockeye)	Est. Pounds Over Midpoint of Goal		Escapement Goal (Thousands of Sockeye)	Sonar Count (Thousands of Sockeye)	Est. Pounds Over Midpoint of Goal
2011	1,100-1,350	1,599	2,431,000		160-340	245	-
2012	1,100-1,350	1,582	2,428,000		160-340	375	705,000
2013	1,000-1,200	1,360	1,638,000		160-340	490	1,520,000
2014	1,000-1,200	1,525	2,635,000		160-340	440	1,093,000
2015	1,000-1,200	1,703	3,317,000		160-340	470	1,119,000
2016	1,000-1,200	1,384	1,647,000		160-340	240	-

There are two distinct impacts from this over-escapement. *First*, it is well established that the over-escapement of sockeye in these systems leads to decreased future sockeye returns. The State has over-escaped the Kenai River six years in a row, and the Kasilof River four of the last six years. Unsurprisingly, the worst returns in 15 years are forecast for 2017.

Second, this over-escapement causes immediate financial loss from foregone harvest. As demonstrated in Fig. 2, the foregone harvest from the Kenai and Kasilof Rivers over the last six years amounts to nearly $33 million in ex-vessel value alone.

Fig. 2 Ex-vessel Value of Surplus/Unharvested Kenai & Kasilof Sockeye 2011-2016

Year	Est. Lbs. Over Midpoint of Goal	Avg. Commercial Price/lb. for Sockeye	Est. Ex-Vessel Value of Surplus - Unharvested Sockeye	Surplus/Unharvested as Percentage of Actual Harvest
2011	2,431,000	$1.50	$3,646,500	10.10%
2012	3,133,000	$1.50	$4,699,500	21.00%
2013	3,158,000	$2.25	$7,105,500	26.90%
2014	3,728,000	$2.25	$8,388,000	36.50%
2015	4,436,000	$1.60	$7,097,600	44.30%
2016	1,647,000	$1.50	$2,470,500	11.9%
Total	**18,533,000 lbs**		**$32,964,000**	
Estimated First Wholesale Value Loss				**- $66,000,000**

These reduced returns and foregone harvest have devastated the commercial fishing industry and the communities of Cook Inlet. For example, in 2015, the State's management decisions left nearly a million sockeye unharvested. Not coincidentally, that was the same year the Great Pacific Seafoods Company went bankrupt, taking with it 300 jobs and a payroll of over $2 million. Many other processors in Cook Inlet have suffered similar fates, unwilling or unable to operate in this unstable regulatory environment.

These economic problems are exacerbated by the fact that the escapement goals for these systems are already set well above levels that can be scientifically justified. Since 2001 the ADF&G has been using a method known as the Percentile Approach (Bue and Hasbrouck) to set nearly half the escapement goals across the State, including several goals in Cook Inlet. This methodology was based on incomplete data and was never peer reviewed. Not until 2014 did the ADF&G reveal that the Percentile Approach upper level escapement goals were "unsustainable" and likely exceeded the "carrying capacity" for many stocks.[4]

There are numerous other documented management problems in Cook Inlet. The State's repeated failures to properly count salmon returns to the Susitna River is another prime example. For many years, ADF&G thought that the Susitna River had chronic *under-escapements* of sockeye salmon because, according to the State's counting method, not enough sockeye were getting back to the Susitna River. To address those "problems," ADF&G and the Alaska Board of Fish ("BOF") imposed severe restrictions on driftnet harvests, including strict limitations on fishing in the EEZ portions of Cook Inlet. These unnecessary restrictions arising from the State's counting errors resulted in great financial hardship to the commercial fishing industry.

Indeed, as confirmed by study, these same restrictions proved unnecessary and counter-productive because ADF&G was badly *miscounting fish*. A study conducted by ADF&G from 2006 through 2009 revealed that methods used for counting sockeye salmon in the Susitna River were grossly inaccurate and, in fact, *had been undercounting the fish returns for the prior 27 years*.[5] The ADF&G study revealed the Susitna River sockeye *escapement goal had been exceeded 96% of the time* during that period. In some of those years the goal was exceeded by as

[4] Robert A. Clark et al., Alaska Dep't of Fish & Game, Fishery Manuscript No. 14-06, An Evaluation of the Percentile Approach for Establishing Sustainable Escapement Goals in Lieu of Stock Productivity Information, at 9 (Dec. 2014), http://www.adfg.alaska.gov/FedAidPDFs/FMS14-06.pdf.

[5] Lowell F. Fair et al., Alaska Dep't of Fish & Game, Fishery Manuscript Series No. 09-01, Escapement Goal Review For Susitna River Sockeye Salmon, 2009 (Jan. 2009), http://www.adfg.alaska.gov/FedAidpdfs/FMS09-01.pdf.

much as 300% to 400%.[6] After 2009, ADF&G switched to the Percentile Approach to set escapement goals for the Susitna River system. Recently it determined that those goals were also unsustainable, were set too high, and likely exceeded the carrying capacity for many stocks. Furthermore, genetic studies conducted by ADF&G in 2013 to 2015 also indicated that Susitna-bound salmon were not concentrated in any particular area in Cook Inlet so restrictions on fishing in the EEZ made no difference.[7]

When this data was presented to the BOF, they took no action to walk back the inappropriate fishing restrictions that had been developed for the non-existent problem. These restrictions – based on flawed science and faulty data – are *still being used in the current management plans.*

In short, the entire commercial fishing industry has suffered *and continues to suffer* immense economic loss by not being allowed to harvest these surplus salmon stocks. The BOF and ADF&G have, based on faulty information, systematically reduced commercial salmon harvests in Upper Cook Inlet to a current crisis point where commercial fishing produces such marginal economic returns that fishermen and salmon buyers/processors are being forced out of business here.

C. UCIDA Is Seeking Help from the Council to Help Address These Difficult Problems

UCIDA originally turned to the Council during the Amendment 12 process precisely because of these failures by ADF&G and the BOF. Since the Council passed Amendment 12, things have continued to get worse for Cook Inlet. For example, in 2012, the Secretary of Commerce issued a fishery disaster declaration in Cook Inlet due to the unexpected and unexplained crash in returns of Chinook salmon. This caused widespread fishery closures and severe economic hardship for the commercial fishing industry and communities. As detailed above, this was followed by poor harvests in 2013, 2014, 2015, and 2016, and a projected 15-year low for 2017. Things are getting worse, not better.

[6] Catherine Cassidy & Erik Huebsch, United Cook Inlet Drift Ass'n, Fishery Related Aspects of Faulty Sonar Data, Over-Escapement and Impaired Habitat for Susitna Sockeye (Jan. 2014), http://www.ucida.org/wp-content/uploads/2014/11/Fishery-Related-Aspects-of-Faulty-Sonar-Data-Over-Escapement-and-Impaired-Habitat-for-Susitna-Sockeye1.pdf.

[7] Andrew W. Barclay et al., Alaska Dep't of Fish & Game, Regional Information Report 5J17-03, Genetic Stock Identification of Upper Cook Inlet Coho Salmon Harvest, 2013-2015 (Feb. 2017), http://www.adfg.alaska.gov/static/regulations/regprocess/fisheriesboard/pdfs/2016-2017/uci/AR06.pdf.

UCIDA's motivations for turning to the Council for help have been consistently misrepresented. UCIDA is not looking to reallocate the fishery. UCIDA simply wants management of the fishery to be transparent, based on sound science and rational decision-making, and consistent with the principles of maximum sustained yield established by the MSA. Properly managed, there are enough fish in Cook Inlet for all user groups. As currently managed, the fishery is poised for continued decline and crisis.

The State's process is not working in Cook Inlet. The Council has a more deliberative, transparent, and science-driven management process that can help develop sound management objectives and accountability measures for the Cook Inlet salmon fishery. The problems facing the fishery are difficult. So are the problems associated with coordinating management of the fishery between the State and the Council. But these problems are solvable, and UCIDA is willing to put the time and effort to work with the Council and the State to make that happen.

II. SPECIFIC COMMENTS

A. The Fishery Should Be Managed as a Unit Throughout Its Range

The Discussion Paper states that the Council previously "recognized that salmon are best managed as a unit throughout their range . . . ."[8] UCIDA agrees with that sentiment. The Cook Inlet salmon fishery should be managed as a unit throughout the species' range.

However, the Discussion Paper takes the position that the Salmon FMP must focus solely on management goals and objectives for the portion of the fishery occurring in the EEZ, and that the fishery in the EEZ "would have to be responsive to harvests in state waters" and that the "EEZ portion of the fishery would only occur if there was a harvestable surplus after accounting for removals in state waters."[9]

This position misapprehends the responsibility of the Council. There are not two separate fisheries in Cook Inlet (a state and a federal fishery) – there is one fishery, and the Council has a mandatory duty to develop an FMP for that fishery. As the Ninth Circuit explained in the Amendment 12 case:

> The government argues that § 1852(h)(1) does not expressly require an FMP to cover an entire fishery, noting that "the provision says nothing about the geographic scope of plans at all." But, the statute requires an FMP for a fishery, a defined term.

[8] Discussion Paper at 28.

[9] *Id.* at 33-34.

> *See* 16 U.S.C. § 1802(13). No one disputes that the exempted area of Cook Inlet is a salmon fishery. But, under the government's interpretation, it could fulfill its statutory obligation by issuing an FMP applying to only a single ounce of water in that fishery. We disagree. When Congress directed each Council to create an FMP "for each fishery under its authority that requires conservation and management," *id.* § 1852(h)(1), it did not suggest that a Council could wriggle out of this requirement by creating FMPs only for selected parts of those fisberies, excluding other areas that required conservation and management. *See id.* § 1853(a) (setting out the required contents of FMPs).[10]

Thus, the Council's obligation is over the entire "fishery" – not merely one area of that fishery.

This is confirmed by the definition of fishery. The MSA defines fishery as:

> (A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and (B) any fishing for such stocks.[11]

The five salmon stocks in Cook Inlet "*can be* treated as a unit for purposes of conservation and management" and are currently heing treated as such by the State and the Council. The Council must therefore produce an FMP for the entire fishery, not "only for selected parts of those fisheries."[12]

To be clear, this does not mean that the Council is required to take over the State's job or preempt state fishery management. Rather, it means that the Council, through the FMP, *has to set the standards* for this fishery hased on the requirements of the MSA and its 10 national standards. Whether the State is ultimately willing to voluntarily meet those standards is a separate question, as is the potential need for preemption if the State does not meet those standards. The State previously entered into a memorandum of understanding to manage the entire Cook Inlet salmon fishery in a manner consistent with the MSA, putting aside artificial

[10] *United Cook Inlet Drift Ass'n*, 837 F.3d at 1064.

[11] 16 U.S.C. § 1802(13).

[12] *United Cook Inlet Drift Ass'n*, 837 F.3d at 1064.

boundaries that bear no relationship to the geographic range of the fish. There is no reason why it could not do so again.

Nor is there any legitimate reason why the State should not want to do so. The MSA and the FMP process is the gold standard for sustainable fishery management. Although the State does an excellent job with many fisheries, it is plainly struggling with the Cook Inlet salmon fishery. The State's process is not working, and it should embrace this opportunity to develop a science-based approach to sustainable fishery management.

In any event, regardless of the scope of the FMP, the Council at the very least may not delegate management of the EEZ portion of the Cook Inlet salmon fishery to the State unless "the State's laws and regulations are consistent with" the FMP.[13] The Council cannot adopt and rely on the State's regulatory framework, including escapement goals or time and area restrictions, unless those regulations are "consistent with the national standards, the other provisions of [the MSA], and any other applicable law."[14] While this may require the State to change the way it does business in Cook Inlet, such changes imposing additional scientific rigor and greater accountability are plainly needed.

B. Escapement Goals May Serve as an Appropriate Proxy for Annual Catch Limits, but Only if Those Goals Are Based on Sound Science, Subject to Independent Peer Review

UCIDA agrees, in principle, that escapement-based management is an appropriate way to manage salmon fisheries. However, the escapement goals themselves must be based on sound scientific data and be scientifically defensible.

The Discussion Paper states that:

> The State's salmon management program is based on scientifically defensible escapement goals and inseason management measures to prevent overfishing. Accountability measures include the State's inseason management measures and the escapement goal setting process that incorporates the best available information of stock abundance.[15]

[13] 16 U.S.C. § 1856(a)(3)(A), (B).

[14] 16 U.S.C. § 1853(b)(5).

[15] Discussion Paper at 41.

With respect to Cook Inlet, these statements are not accurate. As detailed above, ADF&G has conceded that it's Percentile Approach (Bue and Hasbrouck) used to set escapement goals sets upper levels that are "unsustainable" and likely exceeded the "carrying capacity" for many stocks.[16] Likewise as detailed above, the BOF has imposed "inseason management measures" based on supposed impacts to Susitna River sockeye that were based on faulty escapement data, and are currently doing more harm than good. The BOF has repeatedly refused (including earlier this year) to make corrections or withdraw these in-season management measures in light of the best available information on escapement data and genetic testing showing the lack of efficacy of these restrictions. Again, these are just examples of the many problems inherent in the State's escapement goals.

The Discussion Paper also suggests that the State has a "peer review" process for setting escapement goals. According to the National Standard Guidelines, "Peer review is a process used to ensure that the quality and credibility of scientific information and scientific methods meet the standards of the scientific and technical community."[17] The "participants in a peer review should be based on expertise, independence, and a balance of viewpoints, and be free of conflicts of interest."[18] The peer review process must also be open and transparent, and the public must have "full and open access to peer review panel meetings."[19]

The State has no such peer review process. As the State's latest escapement goal report plainly demonstrates, the escapement goals for Cook Inlet are reviewed and set entirely by ADF&G staff.[20] ADF&G staff (sitting in committee) recommend escapement goals, and those "recommendations are reviewed by ADF&G regional and headquarters staff prior to adoption as escapement goals."[21] ADF&G may consider this internal review as "peer review," but it plainly

[16] Clark et al., *supra* note 4.

[17] 50 C.F.R. § 600.315(a)(6)(vii).

[18] 50 C.F.R. § 600.315(b)(2).

[19] 50 C.F.R. § 600.315(b)(3).

[20] Jack W. Erickson et al., Alaska Dep't of Fish & Game, Fishery Manuscript Series No. 17-03, Review of Salmon Escapement Goals in Upper Cook Inlet, Alaska, 2016, at 20 (Feb. 2017), http://www.adfg.alaska.gov/static/regulations/regprocess/fisheriesboard/pdfs/2016-2017/uci/FMS17-03.pdf (listing participants).

[21] *Id.* at 2-3.

lacks all the attributes of "peer review" required by the MSA. ADF&G's review process has no independence, has no balance of viewpoints, is plainly hampered by conflicts of interest (it is reviewing its own work), and has zero transparency because the review by "regional and headquarters staff" is entirely internal to ADF&G. What the State calls a peer review process is in reality just ADF&G agreeing with itself.

C. The State of Alaska Cannot Serve as a Proxy for the Scientific and Statistical Committee

Relatedly, the Discussion Paper suggests that the State's peer review process "could serve as a functional substitute for SSC recommendations on acceptable biological catch under the Magnuson-Stevens Act § 302(h)(6)."[22] This is not legally permissible. The Council is required to set annual catch limits ("ACLs") at or below the expert recommendations generated by the scientific and statistical committee ("SSC"); no other body may produce and provide these recommendations. In passing the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, 120 Stat. 3575 ("Reauthorization Act"), Congress intended "to increase the role of science in fishery management."[23] To help accomplish this, the Reauthorization Act added provisions requiring members of the SSC to "have strong scientific or technical credentials and experience."[24] Additionally, Congress "requir[ed] regional fishing councils to set hard, science-based caps on how many fish could be caught each year."[25]

Particularly relevant, the Reauthorization Act amendments provide that, among other things, "[e]ach scientific and statistical committee shall provide its Council ongoing scientific advice for fishery management decisions, including recommendations for acceptable biological catch . . . ."[26] After receiving the SSC's recommendation, "[e]ach Council shall . . . develop annual catch limits for each of its managed fisheries that may not exceed the fishing level

[22] Discussion Paper at 39.

[23] *Lovgren v. Locke*, 701 F.3d 5, 17 (1st Cir. 2012).

[24] 16 U.S.C. § 1852(g)(1)(C).

[25] *Conservation Law Found. v. Pritzker*, 37 F. Supp. 3d 254, 266 (D.D.C. 2014) (emphasis added).

[26] 16 U.S.C. § 1852(g)(1)(B) (emphases added).

recommendations of its scientific and statistical committee . . . ."[27] A plain reading of these provisions unequivocally requires that the SSC produce "hard, science-based" ACLs, and that the Council subsequently adopt ACLs at or below the SSC's recommendations.[28]

Case law confirms that a Council's failure to set ACLs at or below recommendations based on the expertise of, and coming from, the SSC is unlawful. *Lovgren v. Locke*, 701 F.3d 5, 17 (1st Cir. 2012) ("[P]roposed ACLs c[an] 'not exceed the fishing level recommendations of [a council's] scientific and statistical committee.'" (third brackets in original) (quoting 16 U.S.C. § 1852(h)(6))); *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 60 (D.D.C. 2012) ("[I]n the process of setting the final ACL, the council must solicit scientific advice from the SSC and, based on that advice, establish a rule for acceptable biological catch to account for scientific uncertainty, and then set an ACL that permits no greater fishing levels than the SSC recommends." (emphases added)). Any attempt by the Council to circumvent these statutory mandates will be heavily scrutinized and invalidated by a court. *See, e.g.*, *Conservation Law Found. v. Pritzker*, 37 F. Supp. 3d 254, 266-67 (D.D.C. 2014) (rejecting Council's "simply nonsensical" attempt to circumvent requirement to set ACLs at or below SSC recommendations because it "contravenes the plain language of the Act").

Accordingly, while it may be appropriate for the Council to use escapement goals as an alternative approach for ACLs, that alternative approach must still be carefully vetted through the SSC.

D. The Discussion Paper's Treatment of Over-Escapement Is Based on Outdated Information

The Discussion Paper marginalizes the problems associated with over-escapement, citing a 2007 ADF&G study and stating that for the last 15 years "foregone harvest was small" and that "the stock which exhibited the largest foregone harvests were not heavily exploited, lacked fishing power and were unable to fully exploit large runs when they occurred."[29] This discussion presents an inaccurate, incomplete, and outdated picture of the escapement problem in Cook Inlet.

[27] 16 U.S.C. § 1852(h)(6) (emphasis added).

[28] *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("'Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" (citation omitted)).

[29] Discussion Paper at 72.

Critically, the study cited by the Discussion Paper is *10 years old*. During the last 10 years, the Kenai River exceeded the in-river goal eight times, 12 times since the year 2000, including major over-escapements the last six years in a row.[30] Likewise, the Kasilof River also exceeded the biological escapement goal eight times during the last 10 years and 14 times since the year 2000.[31] These were not situations where the "foregone harvest was small." In 2015, the foregone harvest to the Kenai River alone (approximately 500,000 sockeye) was equal to about 50% of the entire catch by the drift fleet for that year. Nor was this a situation where the drift fleet "lacked fishing power" to exploit these runs.[32] The State just over-escaped the fishery through mismanagement – a practice that has unfortunately become the norm, rather than the exception, in Cook Inlet.

In addition, the Discussion Paper incorrectly assumes that the problems of over escapement are limited to situations where ADF&G exceeds its stated escapement goals. But the problems are actually much more pervasive because, as discussed above, ADF&G and/or the BOF have in many cases set their escapement goals at levels that are "unsustainable" or based on data that undercounts actual returns. Over-escapement is a pervasive problem in Cook Inlet.

E. The Discussion Paper Presents an Incomplete Picture of the Cook Inlet Salmon Fishery and the Current and Historical Regulatory Environment

In addition, the Discussion Paper's commentary on the Cook Inlet fishery includes errors and faulty assumptions that miss the larger historical regulatory context of the fishery.

The Discussion Paper uses the State's regulation of Susitna River sockeye beginning in 2008 as an example of how the State manages the Cook Inlet sockeye fishery.[33] As written, the discussion details a seemingly rational process of responding to yield concerns by imposing fishery restrictions. But this superficial discussion misses the context (detailed above) showing

[30] Pat Shields & Aaron Dupuis, Alaska Dep't of Fish & Game, Fishery Management Report No. 17-05, Upper Cook Inlet Commercial Fisheries Annual Management Report, 2016, at 1 (Feb. 2017), http://www.adfg.alaska.gov/FedAidPDFs/FMR17-05.pdf.

[31] *Id.*

[32] It is also estimated that appropriately 200,000 sockeye entered the Kenai River after the ADF&G suspended the sonar counter and the management plans had closed the commercial fisheries in all but the west side of Cook Inlet.

[33] Discussion Paper at 58.

that these same actions were based both on faulty data (namely, grossly erroneous return numbers) and that the area restrictions were based on no data at all (and on assumptions that were later disproven by genetic testing). This example, selected by the Discussion Paper as typical state management in Cook Inlet, is an example of *gross mismanagement*, and the fact that these same baseless restrictions remain in place today only demonstrates the need for the Council to be involved in this fishery.

This Discussion Paper also states that "[c]oho salmon are fully utilized" and that "an increase in commercial opportunity for pink, chum, or coho salmon could result in unsustainable harvest rates on coho salmon" in Upper Cook Inlet.[34] This statement is not correct. The commercial exploitation rate on the total coho return to Northern Cook Inlet is about 10% to 15%,[35] and the sport exploitation rate on the total coho return to Northern Cook Inlet is about 8% to 12%.[36] Combining these rates is far, far below the 60% overall exploitation rate that ADF&G claims is acceptable. The best science actually points to a 77% optimum exploitation rate for MSY management for coho salmon.[37]

The coho salmon return data from 2014 demonstrates this. As shown in the chart below, of the estimated 2.75 million coho salmon returning in 2014, there were 1.5 million coho salmon that went unutilized. Any claim that "[c]oho salmon are fully utilized" in Cook Inlet is not supportable.

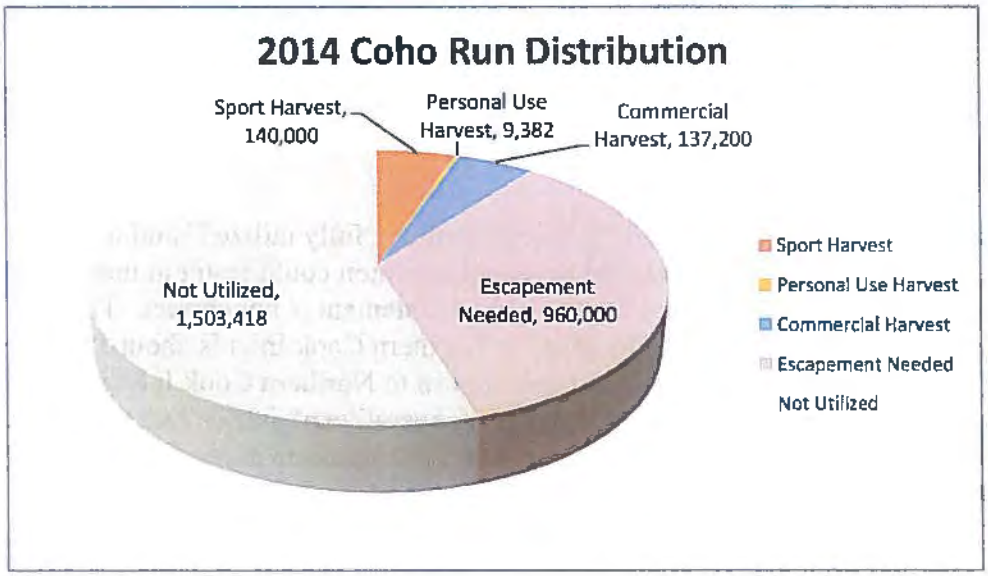
[34] *Id.*

[35] T. Mark Willette, Robert DeCino & Nancy Gove, Alaska Department of Fish & Game, Report No. 2A03-20, Mark-Recapture Population Estimates Of Coho, Pink And Chum Salmon Runs To Upper Cook Inlet In 2002 (June 2003), http://www.adfg.alaska.gov/FedAidpdfs/RIR.2A.2003.20.pdf

[36] Samantha Oslud, Sam Ivey & Daryl Lescanec, Alaska Department of Fish & Game, Report No. 17-07 (February 2017), http://www.adfg.alaska.gov/static/regulations/regprocess/fisherieshoard/pdfs/2016-2017/uci/AR03.pdf.

[37] Barclay et al, *supra* note 7.

Figure 5. Distribution of the 2,750,000 Coho Run in Upper Cook Inlet, 2014



The Discussion Paper's confusion on this point is understandable. For a long time, ADF&G used coho salmon as an excuse not to allow fishing on underutilized stocks like pinks and chums. This position is not scientifically sustainable as coho salmon are plainly not fully utilized. As the charts below illustrate, there are significant, underutilized stocks in the Inlet, and the State's failure to authorize harvest on these stocks based on misinformation has imposed significant and unnecessary hardship on the Cook Inlet commercial fishing industry.

Figure 6. Distribution of the 20,000,000 Pink Run in Upper Cook Inlet, 2014

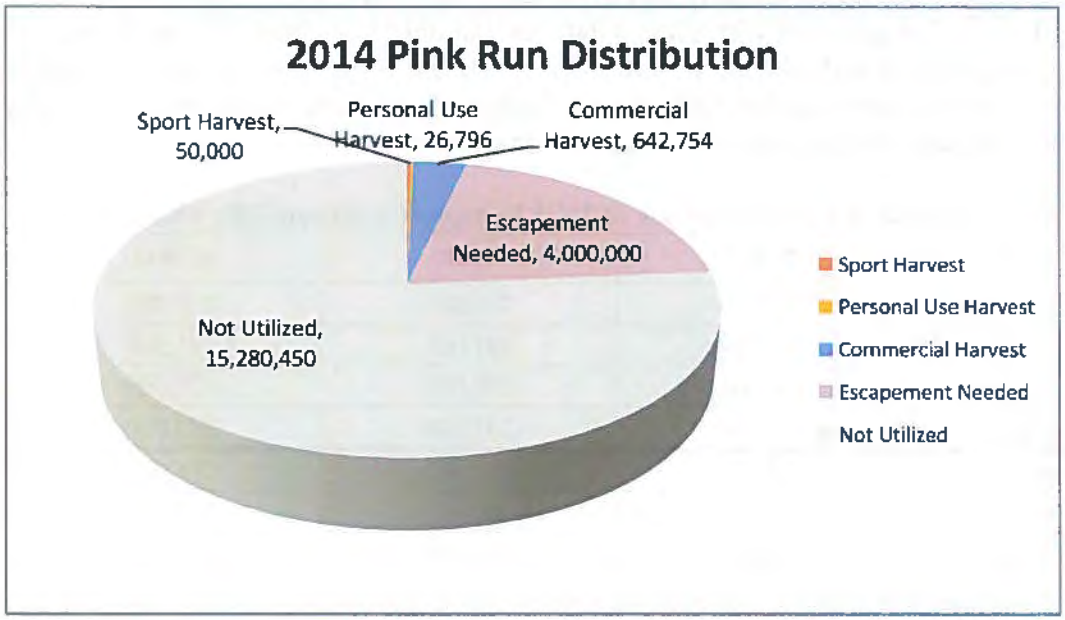
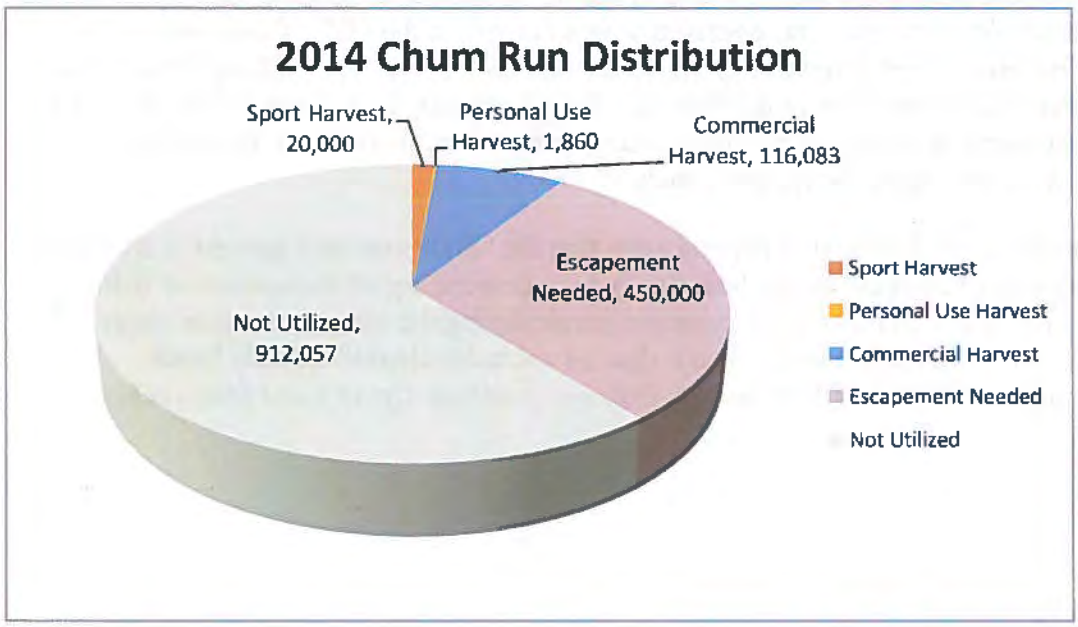


Figure 7. Distribution of the 1,500,000 Chum Run in Upper Cook Inlet, 2014



The Discussion Paper also provides an incomplete picture of the history of state regulation of the commercial fishing fleet in Cook Inlet. For example, the Discussion Paper

provides historical catch data that goes back only to 1991, and states that "ADF&G managers estimate that in recent years approximately half of the drift fleet's salmon harvest comes from waters of the EEZ."[38] The problem with using a data set that only goes back to 1991 is that a lot of the State's restrictions on drift fishing started in the 1990s and then got progressively worse over the years. As demonstrated in the figure below, looking at a broader set of data shows how the average harvests have declined under the State's management.

Fig. 4 Average and Annual Number of UCI Salmon Commercially Harvested

	Coho	Pink	Chum
1975 - 1984	363,000	730,000	833,000
1985 - 1994	506,000	397,000	441,000
1995 - 2004	222,000	209,000	178,000
2005 - 2014	171,000	247,000	123,000
2014 Harvest	137,376	642,879	116,093
2015 Harvest	216,032	48,004	275,960
2016 Harvest	147,469	382,436	123,711

As for the fact that half of the drift fleet harvest currently occurs in the EEZ, that too is a product of historical state regulations. The best fishing locations in Upper Cook Inlet are in the EEZ. Historically, the drift fleet has operated predominately in the EEZ. Given their choice, commercial fishermen would continue to spend the vast majority of their fishing effort in the EEZ today. But beginning in the mid-1990s, the State progressively limited fishing in the EEZ, restricting operations based on erroneous or unsupported assumptions about the fishery and unfounded and unsustainable escapement goals.

Furthermore, the Discussion Paper asserts that the "State monitors harvest in all of the salmon fisheries and manages salmon holistically by incorporating all the sources of fishing mortality on a particular stock or stock complex in calculating the escapement goal range."[39] This gives the State much more credit than is due. A recently released Genetic Stock Composition report (FMS 16-10) documents that *over a million Upper Cook Inlet sockeye*

[38] Discussion Paper at 57.

[39] *Id.* at 69.

salmon were targeted and harvested in just a portion of the Kodiak Management Area in the years 2014 to 2016.[40]

ADF&G did not account for those removals when setting or reviewing its escapement goals for the Upper Cook Inlet fishery, even though it was aware of the problem over a year ago. In 1989 the BOF took action and developed the North Shelikof Straits Sockeye Salmon Management Plan to reduce the interception of Cook Inlet sockeye in the Kodiak Management Area. The express purpose of this plan is stated in the preamble: "*The purpose of the North Shelikof Strait Sockeye Salmon Management Plan is to allow traditional fisheries in the area to be conducted on Kodiak Area salmon stocks, while minimizing the directed harvest of Cook Inlet sockeye salmon stocks. The board recognizes that some incidental harvest of other stocks has and will occur in this area while the seine fishery is managed for Kodiak Area salmon stocks. The board intends, however, to prevent a repetition of the nontraditional harvest pattern which occurred during 1988.*"[41]

That action by the BOF in 1988 was the result of a harvest of Cook Inlet sockeye estimated at less than half a million. The new genetics study (FMS 16-10) and numerous other ADF&G reports from the Kodiak Management Area reveal the magnitude of the interception far exceeds the previous quantity measured in 1988. In spite of this being the best available science and in spite of the directive from the BOF in 1988, the ADF&G has not taken action to alter current management in the Kodiak Management Area or incorporate the new data. As this example demonstrates, the State does not account for all removals from the fishery or utilize the best available science.

Lastly, the Discussion Paper overlooks the significant role that other federal entities currently have (or may have in the future). Much of the core spawning and rearing habitat for Cook Inlet salmon stocks occur on federally managed lands, including, parks, refuges, reserves, and national forests. The agencies that administer these federal areas can control access to the Cook Inlet fishery stocks above and beyond the NPFMC, NMFS, and the State. All of these entities have a say in the management of fish habitat, and some, such as the Federal Subsistence Board and U.S. Fish and Wildlife Service, can authorize or manage harvests without state approval. The State is not the only regulatory entity involved here, and the role of these other federal agencies and entities needs to be carefully considered and discussed.

[40] Kyle R. Shedd et al., Alaska Dep't of Fish & Game, Fishery Manuscript Series No. 16-10, Genetic Stock Composition of the Commercial Harvest of Sockeye Salmon in Kodiak Management Area, 2014–2016 (Dec. 2016), http://www.adfg.alaska.gov/FedAidPDFs/FMS16-10.pdf.

[41] 5 AAC 18.363(a)

Dan Hull
March 28, 2017
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We sincerely appreciate your consideration of these comments and concerns and look forward to working with you to develop a robust, science-based FMP for the Cook Inlet salmon fisheries.

Very truly yours,

Jason T. Morgan

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Attachment 2

United Cook Inlet Drift Association

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• info@ucida.org •

Date: September 28, 2017

Addressee: Dan Hull
Chairman
North Pacific Fishery Management Council
605 W 4th Avenue, Suite 306
Anchorage, AK 99501-2252

RE: Salmon Fisheries Management Plan, Alaska Agenda Item C-8

Dear Mr. Hull,

Once again, United Cook Inlet Drift Association (UCIDA) and Cook Inlet Fishermen's Fund (CIFF) express our willingness to work cooperatively with NOAA/NMFS. NPFMC, State of Alaska and other stakeholders in the construction and development of a new salmon Fishery Management Plan (FMP) for Alaska. We first raised this issue of a legal and adequate salmon FMP a decade ago. Now, after several Federal court cases and rulings, we again ask for a legal and adequate salmon FMP for Alaska.

Conceming the latest Discussion Paper For Revisions to the Fishery Management Plan for the Salmon Fisheries in the EEZ Off Alaska, October 2017, UCIDA offers the following:

Review of Decisions, Orders and MSA Excerpts

1. We would ask that all Council members read the United States Court of Appeals for the Ninth Circuit Decision in Case No. 14-35928, Opinion, Filed September 21, 2016. This case is attached and incorporated into our comments by reference.
2. Additionally, we ask all Council members to read the case settlement Order signed by District Court Judge Timothy M. Burgess on August 3, 2017. This case settlement agreement is attached and incorporated into our comments by reference.

3. Lastly, we would ask that all Council members read "Magnuson-Stevens Act Excerpts," which is also attached and incorporated into our comments by reference.

In referencing these three documents, there are several issues:

A. There is no reference to anadromous species as explained or described by MSA;

B. The anadromous term "migratory range" does not appear anywhere in Discussion Paper;

> **"101-627**
> (29) The term "migratory range" means the maximum area at a given time of the year within which fish of an anadromous species or stock thereof can be expected to be found, as determined on the basis of scale pattern analysis, tagging studies, or other reliable scientific information, except that the term does not include any part of such area which is in the waters of a foreign nation."

C. The October 2017 Discussion Paper avoids or tries to reinterpret this definition.
D. The term "fishery" is a defined term in MSA and is not adequately addressed or incorporated into the Discussion Paper.

Factual Information Errors

In the March 2017 and October 2017 draft Discussion Papers, there are as many as 35 factual errors in the Tables, Figures and general discussions. There are conclusion statements in these documents that are not supportable or supported. We are resubmitting our written comments from March 28, 2017. These comments are attached and incorporated into this paper by reference. In the March 28 comments, we have described certain factual errors and omissions that were found in the March 2017 version of the Discussion Paper. The October 2017 version of the Discussion Paper has not corrected those errors. If the Council's Discussion Paper does not incorporate comments from the stakeholders, then this really isn't an "open and transparent" or meaningful process at all.

Peer Review

Both the March 2017 and the October 2017 Discussion Papers describe a "peer review process" that is nothing more than the State of Alaska agreeing with itself. The described peer review process bypasses all of the stakeholders along with the Science and Statistical Committee (SSC), which was established and mandated by MSA. In our view, there is nothing in MSA that allows a wholesale delegation of the peer review process.

Escapement Goal Management as an Alternative to MSA/OY

Escapement goal management, as a means of achieving the MSA, mandates providing food to the nation and national food security. Following the National Standards 1-10 for this mandate is awkward, incomplete and not well-described. The escapement goal discussion makes no sense in regard to tiers and the use of the percentile approach for setting escapement goals. Structurally and practically, MSY/OY will not be achieved. Just the opposite occurs as millions of salmon are preplanned and pre-prescribed for waste and underutilization; both of which are not in accordance with the stated purposes of MSA.

In the UCIDA comments on the March 2017 Discussion Paper, we raised the issue of the Kodiak Seine Fleet harvests of over a million salmon natal to Cook Inlet. Please read our letter to Mr. John Jensen, AK BOF Chairman, which is attached and incorporated into our comments by reference. Also, see Adjustments for Cook Inlet Reporting Groups to the Addendum to FMS 16-10: Redefinition of Reporting Groups to Separate Cook Inlet into Four Groups for Genetic Stock Composition of the Commercial Harvest of Sockeye Salmon in the Kodiak Management Area, 2014-2016, this document is referenced and incorporated into our comments by reference.

There is no discussion at all regarding the harvesting of salmon natal to Cook Inlet. There is no discussion of how these harvests relate to the National Standards. Lastly, the Discussion Paper is silent on how to approach achieving the National Standards throughout the migratory range of these salmon. We are willing to discuss and work on achieving solutions to these issues related to escapement goal management as an alternative approach to MSA/OY and other MSA mandates.

Stakeholder Working Group

UCIDA has repeatedly asked for a stakeholder salmon committee. Again, we support the formation of such a group. MSA and the August 3, 2017 settlement agreement mandate the formation of a stakeholder group to be established at the very early stages of developing the new FMP. The letter from UCIDA to NPFMC, dated April 6, 2017, is incorporated by reference into our comments. In the Settlement Agreement dated August 3, 2017, the plaintiffs are referenced as being members of the stakeholder committee. UCIDA and CIFF are prepared to provide the names to the NPFMC as appropriate.

In some respects, this letter has been cathartic in the sense that some of the legal issues have been resolved. In other aspects, this letter and the incorporated referenced documents expand the scope of depth of the issues we have regarding the development of a new salmon FMP. We, again, offer our time, energy, thoughtful considerations and suggestions. We believe that if all parties put forward a good faith effort, a draft of the new FMP for Cook Inlet could be ready for review in six to nine months.

Sincerely,

Original Signed Document

David R. Martin, President
United Cook Inlet Drift Association

Magnuson – Stevens Act excerpts

TITLE I—UNITED STATES RIGHTS AND AUTHORITY REGARDING FISH AND FISHERY RESOURCES

SEC. 101. UNITED STATES SOVEREIGN RIGHTS TO FISH 16 U.S.C. 1811 AND FISHERY MANAGEMENT AUTHORITY

99-659, 102-251
(a) IN THE EXCLUSIVE ECONOMIC ZONE.—Except as provided in section 102, the United States claims, and will exercise in the manner provided for in this Act, sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone.

99-659, 101-627, 102-251
(b) BEYOND THE EXCLUSIVE ECONOMIC ZONE.—The United States claims, and will exercise in the manner provided for in this Act, exclusive fishery management authority over the following:
(1) All anadromous species throughout the migratory range of each such species beyond the exclusive economic zone; except that that management authority does not extend to any such species during the time they are found within any waters of a foreign nation.
(2) All Continental Shelf fishery resources beyond the exclusive economic zone.

101-627
(29) The term "migratory range" means the maximum area at a given time of the year within which fish of an anadromous species or stock thereof can be expected to be found, as determined on the basis of scale pattern analysis, tagging studies, or other reliable scientific information, except that the term does not include any part of such area which is in the waters of a foreign nation.

(13) The term "fishery" means—
(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and
(B) any fishing for such stocks.

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November 21, 2017

Hon. Timothy M. Burgess
United States District Judge
U.S. District Court
District of Alaska
222 W. 7th Avenue, Room 229
Anchorage, AK 99513

Re: Response to Status Report in *United Cook Inlet Drift Assn., et al. v. National Marine Fisheries Service et al.* - USDC No. 3:13-cv-00104 TMB

Dear Judge Burgess:

Plaintiffs United Cook Inlet Drift Association and Cook Inlet Fishermen's Fund hereby file this response to the Status Report filed by Defendant National Marine Fisheries Service ("NMFS"), ECF No. 105-1. Plaintiffs appreciate the fact that NMFS and the North Pacific Fishery Management Council (the "Council") have taken the initial steps towards revising the Salmon Fishery Management Plan (Salmon FMP) as required by the Ninth Circuit's decision in *United Cook Inlet Drift Association v. NMFS*, 837 F.3d 1095 (9th Cir. 2016). Plaintiffs further appreciate the initial discussions by the Council regarding the possible formation of a "salmon workgroup committee" to help guide the development of the Salmon FMP.

However, Plaintiffs have serious reservations as to whether NMFS or the Council are taking to heart the instructions from the Ninth Circuit. The Ninth Circuit instructed NMFS that the "Magnuson-Stevens Act unambiguously requires a Council to create an FMP for each fishery under its authority that requires conservation and management." *Id.* at 1065. The Ninth Circuit expressly rejected NMFS's arguments that the Magnuson-Stevens Act "does not require an FMP to cover an entire fishery" explaining that "fishery" is "a defined term." *Id.* at 1064; *see* 16 U.S.C. § 1802(11) (defining fishery as "(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and (B) any fishing for such stocks"). The court clearly explained that Congress "did not suggest that a Council could wriggle out of this requirement by creating FMPs only for selected parts of those fisheries." *United Cook,* 837 F.3d at 1064.

Despite this clear instruction, the Council and NMFS appear intent on trying to "wriggle out" once again. There is no dispute that the salmon stocks of Cook Inlet are a "fishery." Yet the alternatives identified by the Council and NMFS to date address only "selected parts" of the

fishery occurring in the exclusive economic zone of Cook Inlet instead of the fishery as a whole. The Expanded Discussion Paper cited in NMFS's status report claim that NMFS and the Council have no authority in State waters, and thus (apparently) no ability to provide a plan that sets goals or objectives for the fishery, and instead must simply be "responsive to harvests in state waters." *See* Expanded Discussion Paper at 39.

Plaintiffs are very concerned that if NMFS and the Council continue to focus only on the selected parts of the fishery occurring in the EEZ rather than the entire fishery (as instructed by the Ninth Circuit and as required by statute), the entire remand process is likely to be a wasted exercise. Staff for NMFS at the Council's October meeting described the process of trying to manage the salmon fishery only in the EEZ while complying with the requirements of the Act as a "square-peg, round-hole" exercise. *See* Council Audio Files, 10/7/2017.[1] We agree. But the solution is not to keep forcing the peg into the wrong whole, but to do what the Act requires; ensure that the entire fishery is managed to meet the requirements of the MSA. If NMFS and the Council continue to try and force the artificial distinctions on the fishery, the resultant plan will not meet the requirements of the Act.

Furthermore, Plaintiffs are concerned that NMFS and the Council are not sufficiently availing themselves of the opportunity to work with affected fishermen to develop a workable and effective FMP. The initial Discussion Paper was apparently developed without the cooperation of stakeholders (or at least, without Plaintiffs) and Plaintiffs' comments to the Council on the appropriate scope and nature of the FMP do not appear to be reflected in either the Discussion Paper or the Expanded Discussion Paper. Moreover, while Plaintiffs appreciate the initial discussions by the Council regarding the possible formation of a salmon workgroup committee, nonetheless Plaintiffs were told by one Council member that they should not expect any funding for that committee. Moreover, the Council does not appear to be moving with any sense of expediency or urgency as the Council is not even going to reach the issue of whether to have a salmon committee until April of 2018, more than seven months after the entry of judgment in this case.

All of this points to a process that may be heading in the wrong direction. Six years ago, Council refused to produce an FMP for the Cook Inlet Salmon and Plaintiffs were told by member of the Council, on the record, that they were naïve and misguided in seeking an FMP. Plaintiffs had to spend years litigating with NMFS to force the Council to comply with their statutory duties. All the while, the fishery did not have the complete benefit of management under the Magnuson-Stevens Act, and still will not until the Council produces a proper plan. The longer that the Council and NMFS attempt to "wriggle out" of their statutory obligations, the greater the continued economic harm upon the fishing industry, fishing communities, and the Nation.

[1] https://app.box.com/s/5cm1pxn8nn/folder/40339404138

Plaintiffs sincerely expect that the Council and NMFS get this process moving in the right direction, and towards development of a Salmon FMP in full compliance with the Act. Until that happens, Plaintiffs reserve their rights to seek interim relief with this Court.

Very truly yours,

Jason T. Morgan

JTM:sdl

cc: All Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 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/ Jason T. Morgan
Jason T. Morgan