Andrew Richards
SULLIVAN & RICHARDS LLP
4005 20th Avenue West, Suite 221
Seattle, Washington 98199
Telephone: (206) 995-8287
Facsimile: (206) 299-0419
E-mail: andrew@sullivanrichards.com

Attorneys for all Plaintiffs –
CP Salmon Corporation, Stephanie Madsen,
Northern Jaeger LLC and Glacier Fish Company LLC

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

CP SALMON CORPORATION, a Washington nonprofit corporation, on its own behalf and on behalf of its members; STEPHANIE MADSEN, in her capacity as representative of CP Salmon Corporation for purposes of 50 C.F.R. § 679.21(f)(8)(ii); NORTHERN JAEGER LLC, a Delaware limited liability company; and GLACIER FISH COMPANY LLC, a Washington limited liability company,

Plaintiffs,

v.

PENNY PRITZKER, in her official capacity as Secretary of the United States Department of Commerce; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; and NATIONAL MARINE FISHERIES SERVICE,

Defendants.

CASE NO. 3:16-cv-00031-TMB

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF, AND PETITION FOR REVIEW

(16 U.S.C. §§ 1801-1891d; 5 U.S.C. §§ 701-706)

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and §§ 2201-2202 (Declaratory Judgment Act); 16 U.S.C. §§ 1855(f) and

1861(d) (Magnuson-Stevens Fishery Conservation and Management Act or "MSA"); and 5 U.S.C. §§ 702 and 706 (Administrative Procedure Act or "APA").

2. Defendants have waived sovereign immunity in this action pursuant to 5 U.S.C. § 702 and 16 U.S.C. §§ 1855(f) and 1861(d).

3. This Complaint and Petition for Review under the MSA and APA ("Complaint") is timely under 16 U.S.C. § 1855(f) because it has been filed within thirty (30) days of Defendants' publication of the cost recovery regulations challenged herein. Those regulations were published in the Federal Register on January 5, 2016. 81 Fed. Reg. 150.

4. Plaintiffs have exhausted all of their administrative remedies.

5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) because this action is brought against an officer of an agency of the United States in her official capacity and against agencies of the United States; Defendants reside in this district; and a substantial part of the events or omissions giving rise to the claims for relief stated herein occurred in this district.

PARTIES

Plaintiffs

6. Plaintiff CP Salmon Corporation (the "Corporation") is a Washington nonprofit corporation bringing this action on its own behalf and on behalf of its members. The Corporation was formed in 2010 as a requirement of Defendants' regulations mandating "one entity to represent the catcher/processor sector [of the Bering Sea directed pollock fishery] for purposes of receiving and managing transferable Chinook salmon [prohibited species catch or "PSC"] allocations on behalf of the catcher/processors eligible to fish under transferable Chinook salmon PSC allocations." 50 C.F.R. § 679.21(f)(8)(i)(C) (alterations supplied). The

Corporation's members are owners of catcher/processor (CP) vessels and catcher vessels named or described in Sections 208(b) and (e) of the American Fisheries Act ("AFA"), Pub. L. No. 105-277, §§ 205-213, 112 Stat. 2681 (note following 16 U.S.C. § 1851).

7. Plaintiff Stephanie Madsen ("Ms. Madsen") is the individual designated by the Corporation in 2010 as the Corporation's representative for purposes of "request[ing] approval by [defendant National Marine Fisheries Service or "NMFS"] to receive transferable Chinook salmon PSC allocations on behalf of the members of the [CP] sector." 50 C.F.R. § 679.21(f)(8)(ii) (alterations supplied).

8. Plaintiff Northern Jaeger LLC is a Delaware limited liability company that owns the CP vessel NORTHERN JAEGER named at AFA Section 208(e)(6). Northern Jaeger LLC is owned by a member of the Corporation, American Seafoods Company LLC.

9. Plaintiff Glacier Fish Company LLC is a Washington limited liability company and a member of the Corporation. Glacier Fish Company LLC owns the CP vessel PACIFIC GLACIER named at AFA Section 208(e)(18).

Defendants

10. Defendant Penny Pritzker is the Secretary of the United States Department of Commerce ("Secretary") and is being sued in her official capacity.

11. Defendant National Oceanic and Atmospheric Administration ("NOAA") is an agency within the Department of Commerce.

12. Defendant NMFS is an agency within NOAA.

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BACKGROUND

13. This case challenges Defendants' unauthorized attempt at collecting "cost recovery fees" from participants in the CP sector of the Bering Sea directed pollock fishery, based on Defendants' incorrect assertion that the CP sector is a "limited access privilege program."

14. Two acts of Congress are particularly significant to this case.

Magnuson-Stevens Act

15. One act is the MSA, which Congress passed in 1976.

16. Through the MSA, Congress authorized Defendants and eight regional fishery management councils ("Councils") to develop "fishery management plans" within the Councils' respective jurisdictions. 16 U.S.C. § 1853(a).

17. Subsequently, Defendants and Councils developed plans that included what became known as "individual fishing quota" or "IFQ" programs.

18. Early IFQ programs proved controversial and, in 1996, Congress amended the MSA in three ways relevant to this case.

19. First, Congress defined IFQ as "a Federal permit under a limited access system to harvest a quantity of fish, expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person." Sustainable Fisheries Act of 1996, Pub. L. No. 104-297, 110 Stat. 3562 ("SFA"), § 102 (codified at 16 U.S.C. § 1802(23)).

20. Second, Congress imposed a moratorium on new IFQ programs by prohibiting Councils from submitting and Defendants from approving or implementing "any fishery management plan, plan amendment, or regulation under this Act which creates a new individual

fishing quota program" before October 1, 2000. SFA § 108(e). Congress later extended the moratorium until October 1, 2002. Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 144(a), 114 Stat. 2763.

21. Third, for certain IFQ programs already in place, Congress authorized defendant Secretary to "collect a fee to recover the actual costs directly related to the management and enforcement of any … individual fishing quota program." SFA §109(c). Congress limited the amount of fees collected to not more than "3 percent of the ex-vessel value of fish harvested under any such individual fishing quota program." Id.

22. Through further amendments to the MSA in 2006, Congress referred to an IFQ as a type of "limited access privilege" but did not otherwise revise the definition of IFQ quoted above. MSA Reauthorization Act of 2006, Pub. L. No. 109-479, 120 Stat. 3575, § 3(b). Consistent with its introduction of the term "limited access privilege," Congress also revised the MSA cost recovery provision to authorize cost recovery from any "limited access privilege program." Id. § 3(d)(2)(B) (replacing reference to "individual fishing quota program") (codified at 16 U.S.C. § 1854(d)(2)(A)(i)).

American Fisheries Act

23. In 1998, while the IFQ moratorium was still in place, Congress passed a second act relevant to this case – the AFA.

24. Through the AFA, Congress divided the total allowable catch ("TAC") of pollock in the Bering Sea and Aleutian Islands Management Area as follows.

25. First, Congress allocated ten percent (10%) of the pollock TAC to the Western Alaska Community Development Quota Program ("CDQ Program"). AFA § 206(a).

26. Second, Congress authorized "allowances for the incidental catch of pollock by vessels harvesting other groundfish species." AFA § 206(b).

27. Third, Congress allocated the remainder of the TAC, after subtraction of the CDQ Program's 10% allocation and incidental catch allowances, as "directed fishing allowances" ("DFAs") available for harvest by eligible vessels in three vessel categories. AFA § 206(b).

28. One of those vessel categories is known as the "CP sector." AFA Section 206(b)(2) allocates forty percent (40%) of the remaining pollock TAC as a DFA to the CP sector.

29. The vessels eligible to harvest pollock available under the CP sector DFA are identified in AFA Sections 208(b) ("Catcher vessels to catcher/processors") and 208(e) ("Catcher/processors"). The members of plaintiff Corporation and plaintiffs Northern Jaeger LLC and Glacier Fish Company LLC own vessels that are identified in those sections of the AFA and are thus eligible to harvest pollock available under the CP sector DFA.

30. Although the AFA identified the vessels eligible to harvest pollock available under the CP sector DFA, the act did not further award any exclusive harvest privileges to any of the vessels or their owners.

31. The AFA does not refer to the CP sector DFA or any of the other DFAs as an IFQ; does not address the moratorium on IFQ programs that was in place at the time of the AFA's enactment; and does not authorize cost recovery from the CP sector.

Challenged Cost Recovery Regulations

32. Nevertheless, over seventeen (17) years after Congress enacted the AFA, Defendants now assert the CP sector DFA qualifies as the type of limited access privilege defined as an IFQ, and that the CP sector is a limited access privilege program subject to cost recovery.

33. Defendants have taken that position in connection with their publication of a final rule on January 5, 2016 implementing regulations under which Defendants would collect cost recovery fees from participants in the CP sector and other sectors. 81 Fed. Reg. 150 (the "Final Rule").

34. In the Final Rule, Defendants state their reasons for now considering the CP sector a limited access privilege program subject to cost recovery:

> The AFA Program is a limited access privilege program because (1) NMFS issues a permit as part of a limited access system established by the AFA Program, (2) this permit allows the harvest of a quantity of pollock representing a portion of the TAC managed under the AFA Program, and (3) this permit is issued for exclusive use by a person, the AFA catcher/processor sector.

81 Fed. Reg. at 158.

35. Defendants further describe the alleged "permit" they believe qualifies as an IFQ as the "harvest specifications, with the AFA directed fishing allowance entitling the catcher/processor sector to harvest a quantity of fish for its exclusive use, … publish[ed] … each year in the Federal Register." Id. at 156 (alterations supplied). Defendants describe the alleged "person" as the CP sector. Id. at 157 ("the catcher/processor sector that is eligible to harvest pollock from that sector's directed fishing allowance defined in section 206(b)(2) of the AFA").

36. The Final Rule includes regulations providing that "the AFA catcher/processor sector will be subject to an AFA fee liability for any Bering Sea pollock debited from its AFA pollock fishery allocation during a calendar year." Id. at 169 (50 C.F.R. § 679.66(c)(5)(i)). The regulations define "AFA fee liability" as "the amount of money for Bering Sea pollock cost recovery, in U.S. dollars, owed to NMFS by an AFA cooperative or AFA sector as determined

by multiplying the appropriate AFA standard ex-vessel value of landed Bering Sea pollock by the appropriate AFA fee percentage." Id. at 165 (50 C.F.R. § 679.2).

37. The regulations require that the cost recovery fee be submitted annually by Ms. Madsen as the representative of the Corporation in its capacity as "represent[ative of] the AFA catcher/processor sector" for purposes of Chinook salmon PSC management. Id. at 168 (50 C.F.R. § 679.66(a)(1)(ii)).

38. If the entire amount of the fee is not submitted, defendant NMFS may withhold the "AFA catcher/processor sector … Bering Sea pollock allocation" in whole or in part and "may pursue collection of the unpaid fees." Id. at 169-70 (50 C.F.R. §§ 679.66(d)(3), (6)).

CLAIMS FOR RELIEF

First Claim for Relief – MSA [16 U.S.C. § 1854(d)(2)(A)(i)], APA [5 U.S.C. § 706(2)(A), (C)]

39. Plaintiffs incorporate and re-allege all previous paragraphs in this Complaint.

40. Defendants do not have authority to collect cost recovery fees from participants in the CP sector because that sector is not a limited access privilege program.

41. Each of the three points made by Defendants regarding their assertion that the CP sector is a limited access privilege program, quoted in paragraph 34 above, is incorrect.

42. As to the first point, the harvest specifications with the CP sector DFA is not a "permit" "under a limited access system."

a. Permit. The harvest specifications with the CP sector DFA is not a permit as that word is used by Congress, for at least two reasons. First, Congress distinguished between a permit and a DFA in the AFA itself, AFA Section 208(e) ("only the following catcher/processors shall be eligible to harvest the directed fishing allowance under section 206(b)(2) pursuant to a federal fishing permit") (emphasis supplied). The relevant permit is an

AFA permit issued to an eligible CP sector vessel and not the DFA itself. Second, Defendants have previously taken the correct position that a harvest allocation like the DFA is a "management restriction on a group of vessels, not a permit to harvest fish." Letter from Patricia A. Kurkul, Regional Administrator, NMFS Northeast Region, to Paul J. Howard, Executive Director, New England Fishery Management Council, September 12, 2007, p. 2. See also 50 C.F.R. § 679.20(a)(5) (describing CP sector DFA under heading of "General limitations … harvest limits … Pollock TAC"). To the extent Defendants are relying on the NMFS Alaska Region definition of permit, 81 Fed. Reg. at 156 (quoting 50 C.F.R. § 679.2), the relevant issue is the meaning of permit as used by Congress in the MSA and AFA. Any more expansive meaning that the NMFS Alaska Region definition of permit may carry should be set aside, at least for cost recovery purposes.

b. Limited access system. The harvest specifications with the CP sector DFA is not "under a limited access system" because the "eligibility criteria or requirements" for harvesting pollock available under the DFA were established by Congress in the AFA rather than by Defendants or Councils in a fishery management plan or regulation. 16 U.S.C. § 1802(27) (defining "limited access system" as "a system that limits participation in a fishery to those satisfying certain eligibility criteria or requirements contained in a fishery management plan or associated regulation.").

43. Regarding Defendants' second point, the harvest specifications with the CP sector DFA does not authorize the "harvest" of pollock because it "does not, by itself, allow [anyone] to catch any fish." *Lovgren v. Locke*, 701 F.3d 5, 27 (1st. Cir. 2012) (addressing similar definition of "limited access privilege") (alteration supplied). The harvest of pollock available under the

CP sector DFA is authorized not by the DFA but by an AFA permit, which does not give any vessel or person the exclusive use of any quantity of pollock.

44. With respect to Defendants' third point, the "AFA catcher/processor sector" is not a "person" and the DFA is not for the CP sector's "exclusive use."

a. Person. The MSA defines "person" as "any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government." 16 U.S.C. § 1802(36). Defendants assert the "person" is the CP sector. 81 Fed. Reg. at 157. As noted above, the CP sector comprises the vessels identified in AFA Sections 208(b) and (e). A list of vessels is not a "person."

b. Exclusive use. The DFA is not for the CP sector's "exclusive use" because it is subject to reduction to account for incidental catch of pollock by vessels outside the CP sector. 50 C.F.R. § 679.20(a)(5)(i)(A)(1) ("Incidental catch allowance. The Regional Administrator will establish an incidental catch allowance to account for projected incidental catch of pollock by vessels engaged in directed fishing for groundfish other than pollock and by vessels harvesting non-pollock CDQ. If during a fishing year, the Regional Administrator determines that the incidental catch allowance has been set too high or too low, he/she may issue inseason notification in the Federal Register that reallocates incidental catch allowance to the directed fishing allowance, or vice versa, according to the proportions established under paragraph (a)(5)(i)(A) of this section.") (emphasis supplied). The reduction of one sector's allocation through harvest by vessels outside the sector was the reason Defendants gave for their conclusion that the hook-and-line CP sector of the Bering Sea directed Pacific cod fishery is not

a limited access privilege program. Proposed Rule, 80 Fed. Reg. 936, 955 (Jan. 7, 2015). Regarding the issue of one sector's allocation being reduced by vessels outside the sector, there is no material distinction between the allocations of the CP sector of the pollock fishery and the hook-and-line CP sector of the Pacific cod fishery. Consequently, there is no rational basis on which to conclude the former is a limited access privilege program when Defendants have determined the latter is not.

45. Defendants' points do not establish that the harvest specifications with the CP sector DFA is the type of limited access privilege defined as an IFQ or that the CP sector is a limited access privilege program. Defendants are therefore not authorized to collect cost recovery fees from CP sector participants and the cost recovery regulations should be set aside to the extent they apply to CP sector participants. 16 U.S.C. § 1854(d)(2)(A)(i) and 5 U.S.C. § 706(2)(A) and (C).

Second Claim for Relief – Judicial Estoppel

46. Plaintiffs incorporate and re-allege all previous paragraphs in this Complaint.

47. Defendants should be judicially estopped from arguing in this Court that the harvest specifications with the CP sector DFA is a "permit" because of the contrary position they previously relied on to win *Lovgren*.

48. In that case, fishing industry plaintiffs sought to set aside a fishery management program in New England on the ground that it was not developed in compliance with certain procedural requirements of limited access privilege programs.

49. Defendants defended the program by arguing it was not a limited access privilege program and therefore not subject to the procedural requirements. 701 F.3d at 17, 19-20. In

taking that position, Defendants argued there was no "permit" qualifying the program as a limited access privilege program.

50. The *Lovgren* plaintiffs pointed to "annual catch entitlement" ("ACE") as the necessary "permit." ACE is defined as "the share of the annual catch limit (ACL) for each NE multispecies stock that is allocated to an individual sector," 50 C.F.R. § 648.2, and is published in the Federal Register. 2015 and 2016 Sector Operations Plans and 2015 Contracts and Allocation of Northeast Multispecies Annual Catch Entitlements, 80 Fed. Reg. 25,143, 25,146-147 (May 1, 2015). Plaintiffs argued that ACE is "a grant of permission to catch a share of fish" and is therefore a "permit." Plaintiffs' Brief, 1st Cir. Case No. 11-1964 (filed Dec. 22, 2011), pp. 27-28.

51. Defendants criticized that position as "invok[ing] the broadest, vaguest sense of the word 'permit'" and "at odds with the entire regulatory scheme and with common sense." NMFS Brief, 1st Cir. Case No. 11-1964 (filed March 8, 2012), p. 37. Defendants argued that a permit is instead a "license" and "specifically in this case … a Northeast multispecies permit," rather than, "as [plaintiffs] suggest, any sort of permission." Id. at 37-38.

52. The First Circuit Court of Appeals decided the case in Defendants' favor. In doing so, that court agreed with Defendants' interpretation of permit, concluding that "[t]here is no indication that Congress intended the term 'Federal permit' to take on a layperson's notion of any permission." 701 F.3d at 25.

53. There is no rational basis on which to conclude the harvest specifications with the CP sector DFA is a permit if ACE is not a permit. Both are management restrictions on a group of vessels rather than permits authorizing the harvest of fish.

54. Nevertheless, in the cost recovery rulemaking at issue here, Defendants echo the *Lovgren* plaintiffs' position by arguing that the harvest specifications with the CP sector DFA is "documentation granting permission to fish" and is therefore a "permit." 81 Fed. Reg. at 156 (citing NMFS Alaska Region definition of permit at 50 C.F.R. § 679.2).

55. Defendants should be judicially estopped from taking that position before this Court because 1) Defendants' position regarding the meaning of permit in *Lovgren* is "clearly inconsistent" with their position on that topic in this cost recovery rulemaking; 2) Defendants succeeded in persuading the First Circuit to accept their prior position; and 3) it would unfairly advantage Defendants and unfairly detriment Plaintiffs if Defendants are allowed to use one meaning of permit when necessary to avoid certain procedural burdens, and another meaning when convenient to their collection of cost recovery fees. New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001) (describing non-exhaustive factors relevant to judicial estoppel).

56. As an alternative to estoppel, the NMFS Alaska Region definition of permit cited by Defendants, which lists a "license" as an example of a "permit," 50 C.F.R. § 679.2, should be construed to have the same meaning Defendants previously advocated in *Lovgren*. NMFS Brief, pp. 37-38 (arguing a permit is a "license" and "specifically in this case … a Northeast multispecies permit," rather than, "as [plaintiffs] suggest, any sort of permission"). When the word permit is so construed, and in light of Congress's distinction between permits and the DFA in the AFA, it is clear the harvest specifications with the CP sector DFA is not a "permit."

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Third Claim for Relief – MSA [16 U.S.C. § 1854(d)(2)(A)(i)], APA [5 U.S.C. § 706(2)(A), (C)]

57. Plaintiffs incorporate and re-allege all previous paragraphs in this Complaint.

58. In the Final Rule, Defendants take the position that cost recovery fees should be paid by “persons who hold a permit granting an exclusive harvesting privilege.” 81 Fed. Reg. at 151.

59. In the alternative, even if Defendants were correct that the harvest specifications with the CP sector DFA is a permit qualifying as an IFQ, the cost recovery regulations still should be set aside because the person required to submit the CP sector cost recovery fee – Ms. Madsen in her capacity as representative of the Corporation – does not hold the alleged IFQ.

60. And to the extent Defendants mean to collect fees from the Corporation as an alleged IFQ holder itself or as the representative of some other purported IFQ holder, there is no rational basis for either of those positions.

61. The Corporation cannot be considered the IFQ holder because it was formed under 50 C.F.R. § 679.21 (“prohibited species bycatch management”) to manage incidental bycatch of Chinook salmon. The Corporation does not receive any allocation of pollock and was not formed to manage directed fishing for pollock, which is the subject of a separate set of regulations at 50 C.F.R. § 679.61 (“formation and operation of fishery cooperatives”). Moreover, one of the Corporation’s members, Ocean Peace, Inc., owns the vessel that Defendants specifically excluded from CP sector cost recovery. 81 Fed. Reg. at 152 (referring to a vessel whose directed harvest of pollock is limited under the AFA).

62. Regarding the alternative position, collecting fees from the Corporation as the representative of some other purported IFQ holder is inconsistent with Defendants’ recognition that the MSA limits the Secretary to collecting cost recovery fees from the IFQ holder itself. The

MSA does not authorize Defendants to unilaterally mandate that some other person pay the fees associated with the purported IFQ holder's harvest.

63. Because there is no rational basis on which to conclude the party or parties apparently responsible for submitting CP sector cost recovery fees actually hold the alleged IFQ, the cost recovery regulations exceed Defendants' cost recovery authority under the MSA and should be set aside to the extent they apply to CP sector participants. 16 U.S.C. § 1854(d)(2)(A)(i) and 5 U.S.C. § 706(2)(A) and (C).

Fourth Claim for Relief – APA [5 U.S.C § 706(2)(A), (D)]

64. Plaintiffs incorporate and re-allege all previous paragraphs in this Complaint.

65. From the proposed rule to the Final Rule, Defendants changed their position regarding the alleged "person" in the CP sector and the party responsible for paying the CP sector cost recovery fee.

66. In the proposed rule, Defendants asserted that a private contract between two pollock harvesting cooperatives is the alleged person and that a representative of that contract should pay the cost recovery fee. 80 Fed. Reg. at 940, 943 table 2.

67. In the Final Rule, Defendants identified the alleged person as a list of vessels described by Congress in federal legislation, the AFA. 81 Fed. Reg. at 157. Defendants also decided that an individual representing a nonprofit corporation formed for purposes of managing Chinook salmon bycatch should pay cost recovery fees based on the value of pollock harvested by other companies' vessels. Id. at 168 (50 C.F.R. § 679.66(a)(1)(ii)).

68. Defendants' position in the Final Rule is not a logical outgrowth of its position in the proposed rule and could not have been anticipated by Plaintiffs or other interested parties. Consequently, to the extent applicable to CP sector participants, the Final Rule was made

without adequate notice and comment and should be set aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and "without observance of procedure required by law." 5 U.S.C. § 706(2)(A) and (D).

Fifth Claim for Relief – APA [5 U.S.C. § 706(2)(A)]

69. Plaintiffs incorporate and re-allege all previous paragraphs in this Complaint.

70. Defendants attempt to justify their conclusion that the CP sector of the Bering Sea directed pollock fishery is a limited access privilege program by pointing to the allocation of pollock to that sector (the 40% DFA) and to the limited number of vessels that may participate in the harvest of pollock made available under that allocation.

71. However, both of those characteristics – a sector allocation and limited participation – were also true of the CP sector of the Pacific whiting fishery when Defendants did not consider that sector to be a limited access privilege program. Reflecting their prior assessment that a sector allocation and limited participation are insufficient to create a limited access privilege program, Defendants did not begin treating the whiting CP sector as a limited access privilege program until 2011, when Defendants implemented additional regulations with the specific intent of subjecting that sector to cost recovery.

72. There is no rational basis for Defendants to now conclude the pollock CP sector is a limited access privilege program when they previously treated the materially indistinguishable whiting CP sector as not such a program. Accordingly, their conclusion that the pollock CP sector is a limited access privilege program is arbitrary and capricious, and the cost recovery regulations should be set aside to the extent they apply to CP sector participants. 5 U.S.C. § 706(2)(A).

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Sixth Claim for Relief – MSA [16 U.S.C. § 1854(d)(2)(A)(i)], APA [5 U.S.C § 706(2)(A)]

73. Plaintiffs incorporate and re-allege all previous paragraphs in this Complaint.

74. The MSA limits Defendants to recovering only those costs that are "directly related to the management, data collection, and enforcement of any … limited access privilege program." 16 U.S.C. § 1854(d)(2)(A)(i).

75. Defendants' longstanding interpretation of that statutory provision holds that recoverable costs are "the incremental costs, i.e., those costs that would not have been incurred but for the IFQ program," which are accounted for through a "'with and without'" comparison of the "cost of running the management program for the specified fishery under the status quo regime" with "the cost of running the management program under the [limited access privilege] program." The Design and Use of Limited Access Privilege Programs, p. 91 (citing NMFS, 2003, *Report to the Fleet*, Restricted Access Management Division, Alaska Region); NOAA Catch Share Policy, p. 16.

76. Defendants largely incorporated their interpretation of the MSA cost recovery provision into cost recovery regulations recently implemented for certain groundfish fisheries off the Pacific coast. 50 C.F.R. § 660.115(b)(1)(i) (defining recoverable "actual incremental costs" as "net costs" that "would not have been incurred but for the implementation of the [Pacific coast] trawl rationalization program [in 2011], including additional costs for new requirements of the program and reduced trawl sector related costs resulting from efficiencies as a result of the program.") (alterations supplied).

77. Defendants have refused to incorporate their interpretation of the MSA cost recovery provision into the cost recovery regulations at issue here, without giving a rational basis for their refusal. The cost recovery regulations should therefore be set aside as arbitrary and

capricious and otherwise not in accordance with the MSA cost recovery provision and Defendants' longstanding interpretation of it. 16 U.S.C. § 1854(d)(2)(A)(i), 5 U.S.C. § 706(2)(A).

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request the following relief:

1. For expedited consideration of this matter pursuant to 16 U.S.C. § 1855(f)(4);

2. For a judicial declaration that the CP sector of the Bering Sea directed pollock fishery is not a limited access privilege program and that Defendants' cost recovery regulations, as applied to CP sector participants, (i) violate the MSA and APA, (ii) are arbitrary, capricious, an abuse of discretion and not in accordance with law, (iii) are in excess of statutory jurisdiction, authority or limitations and short of statutory right, and (iv) were promulgated without adequate notice and comment and procedure required by law;

3. For an order requiring that Defendants' cost recovery regulations be set aside in their entirety to the extent they apply to CP sector participants;

4. For an award of costs of suit and other expenses, including reasonable fees and expenses of attorneys to the extent available; and

5. For such other and further relief as the Court may deem necessary and appropriate.

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DATED this 1st day of February, 2016.

SULLIVAN & RICHARDS LLP

By s/ *Andrew Richards*
Andrew Richards
Alaska Bar No. 1211109

4005 20th Avenue West, Suite 221
Seattle, WA 98199
Telephone: (206) 995-8287
Facsimile: (206) 299-0419
Email: andrew@sullivanrichards.com

Attorneys for all Plaintiffs –
CP Salmon Corporation, Stephanie Madsen,
Northern Jaeger LLC and
Glacier Fish Company LLC