



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
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**Litigation Updates for the
June 2024 Meeting of the North Pacific Fishery Management Council**

UCIDA v. NMFS

Parties:

Plaintiff: United Cook Inlet Drift Association (UCIDA); Cook Inlet Fishermen’s Fund

Federal Defendants: National Marine Fisheries Service (NMFS); National Oceanic & Atmospheric Administration (NOAA); Secretary of Commerce, Gina M. Raimondo; and Assistant Administrator for NOAA, Janet Coit.

Defendant-Intervenors: State of Alaska

Case Activity:

On May 24, 2024, plaintiffs filed a motion in the United States District Court for the District of Alaska alleging Amendment 16 to the Salmon Fishery Management Plan and implementing regulations—issued May 1, 2024—are inconsistent with the Court’s order that NMFS implement a new rule that complies with previous court orders and the Magnuson-Stevens Fishery Conservation and Management Act (MSA) by May 1. The motion to enforce requests that the Court vacate Amendment 16. Federal Defendants and Defendant-Intervenors filed their respective responses opposing to the motion to enforce on June 4, and a status conference was held June 5.

Separately, on May 29, 2024, plaintiffs also filed a new complaint challenging Amendment 16 as inconsistent with the MSA, the Administrative Procedure Act, and the National Environmental Policy Act.

Status/Next Steps:

Plaintiffs stated they will file a reply to the oppositions to the motion to enforce by Monday, June 10. The court has scheduled oral argument on that motions for Friday, June 14. Federal Defendants must file an answer and an administrative record in the new action 45 days from the date the complaint was served on the U.S.

Attached: Plaintiffs’ Motion to Enforce Judgment and Complaint, Federal Opposition to the Motion to Enforce, and the State of Alaska’s Opposition to the Motion to Enforce.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT
ASSOCIATION and COOK INLET
FISHERMEN'S FUND,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE, et al.,

Defendants.

Civil Action No.: 3:21-cv-00255-JMK

**PLAINTIFFS UNITED COOK INLET
DRIFT ASSOCIATION AND COOK
INLET FISHERMEN'S FUND'S
MOTION TO ENFORCE**

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I. INTRODUCTION

On December 20, 2023, the Court held a status conference. *See* Dkt. 119. Plaintiffs United Cook Inlet Drift Association and Cook Inlet Fishermen’s Fund (collectively “UCIDA”) alerted the Court to its concern that this case was heading for a trainwreck in May 2024. *See* Dkt. 121-1 at 2. That trainwreck is here.

NMFS issued regulations implementing Amendment 16 to the Salmon FMP on April 30, 2024. Unfortunately, Amendment 16 did not cure many of the defects of its predecessor, Amendment 14. Instead, NMFS continues to try and preserve, adopt, and defer to state management objectives for the Cook Inlet salmon fishery. The result is worse than the status quo. State management objectives, policies, and decisions are still driving the management framework, but UCIDA members now must (in the next few weeks) secure new federal permits and install expensive and unnecessary monitoring equipment in order to even have the very limited opportunity to fish in federal waters.

The Court, however, is not powerless to prevent this endless cycle. The Court’s Remedy Order requires NMFS to “issue regulations implementing a new FMP amendment that is consistent with the Court’s Summary Judgment Order [(“SMJ Order”)] and the previous orders in this litigation, and complies with the Magnuson-Stevens Act [(“MSA”)], the APA, and all other applicable laws by no later than May 1, 2024.” Dkt. 103 at 10. NMFS met the deadline, but not the substance. Amendment 16 does not comply with the Court’s SMJ Order, the previous orders in this litigation, or the MSA. UCIDA requests that

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the Court enforce its Remedy Order, vacate Amendment 16, and require NMFS to produce a compliant FMP amendment.

II. BACKGROUND

The Court’s SMJ Order contains a detailed history of this litigation, *see* Dkt. 67 at 3–13, and UCIDA does not repeat it here other than to provide context to understand NMFS’s current decision.

Amendment 12

On December 21, 2012, NMFS approved Amendment 12 to the Salmon FMP. *See* Dkt. 67 at 8. Amendment 12 removed Cook Inlet from the Salmon FMP in order to defer management to the State of Alaska. *See id.* In 2016, after four years of litigation, the Ninth Circuit concluded that NMFS had “shirk[ed]” its statutory duty to provide an “FMP for each fishery within its jurisdiction requiring conservation and management.” *United Cook Inlet Drift Ass’n v. Nat’l Marine Fisheries Serv.*, 837 F.3d 1055, 1063 (9th Cir. 2016) (*UCIDA I*). The court explained, “[t]he Act makes plain that federal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns.” *Id.* The court *rejected* arguments that the MSA “does not expressly require an FMP to cover an entire fishery” because “the statute requires an FMP for a fishery, a defined term. *See* 16 U.S.C. § 1802(13).” *Id.* at 1064. The case was remanded to NMFS to fix this problem.

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Amendment 14

On November 3, 2021, NMFS approved Amendment 14 to the Salmon FMP. With Amendment 14, NMFS tried to defer to the State of Alaska in a different way—by closing all fishing in federal waters. Amendment 14 determined that “[t]he Cook Inlet salmon fishery includes the stocks of salmon harvested by *all* sectors within State and federal waters of Cook Inlet,” Dkt. 67 at 20 (quoting record), and that Optimum Yield (“OY”) “for the Cook Inlet salmon fishery is set to ‘the level of catch from all salmon fisheries occurring within Cook Inlet (State and Federal water catch)’” *Id.* at 23 (quoting record). In other words, OY is whatever the state has allowed under state management. But the Court explained that this was another unlawful deferral as it made “federal management standards in form rather than substance,” violating the instructions in *UCIDA I*. *See id.* at 22–23.

The Court also explained that OY based on state harvest levels violated National Standard 1—the obligation to set the “optimum yield from each fishery” and to do so on “the basis of maximum sustainable yield [“MSY”] from the fishery.” *Id.* at 26–27 (quoting 16 U.S.C. § 1802(33)). As the Court explained, “[b]ootstrapping statutorily required management measures, such as MSY and OY, to the actual number of fish caught in the Cook Inlet, as determined by the State of Alaska, summarily casts the decision of what constitutes ‘the amount of fish which . . . will provide the greatest overall benefit to the Nation’ to the Alaska Department of Fish and Game.” Dkt. 67 at 29 (quoting 16 U.S.C. § 1851(a)(1)).

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As a result of these (and many other) violations, the Court ordered that NMFS “shall issue regulations implementing a new FMP amendment that is consistent with the Court’s [SMJ] Order and the previous orders in this litigation and complies with the [MSA], the APA, and all other applicable laws by no later than May 1, 2024.” Dkt. 103 at 10.

Amendment 16

NMFS violated the substantive requirements of the Court’s order when it published final regulations implementing Amendment 16. Dkt. 132 at 1. As the Court is aware, the North Pacific Fishery Management Council (“Council”) refused to develop an amendment, so NMFS had to do it alone. Dkt. 98-1 at 2. Unfortunately, Amendment 16 finds yet another way to defer to the State of Alaska.

In Amendment 16, NMFS concludes that the MSY is either (a) the number of surplus fish over the state’s escapement goals or (b) the historical harvest that has been allowed by the state. Ex. 1 at 2. NMFS determined that MSY applies to *all* fishing for stocks in state and federal waters. Ex. 1 at 2 (“MSY is specified for salmon stocks and stock complexes in Cook Inlet”). NMFS then determined that OY would be a range that includes all historical catches that the State of Alaska has allowed *in federal waters only*, between 1991 and 2021, and that all other surplus fish are allocated to the state to manage as it pleases. Ex. 1 at 2. And although in Amendment 14 NMFS claimed that “the OY for the Cook Inlet salmon fishery is set to ‘the level of catch from all salmon fisheries occurring within Cook Inlet (State and Federal water catch) . . .’” (Dkt. 67 at 23), NMFS now claims that OY is only for federal waters. Ex. 1 at 2.

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The salmon season is set to begin in the middle of June. The total surplus of sockeye salmon alone (above escapement goals) in Cook Inlet is expected to be more than 3.72 million fish. Ex. 6 at 1. NMFS’s proposed harvest limits this summer will allow harvest of only (at most) 492,100 sockeye, not to mention the unknown significant surpluses of other salmon species in Cook Inlet that will go unharvested. Ex. 7 at 3; *see also* Ex. 6 at 7.

III. LEGAL STANDARD

The Court retained jurisdiction during remand “to ensure full and timely compliance with all aspects of the remedy” detailed in its Remedy Order. Dkt. 103 at 11. The applicable legal benchmarks—the MSA and other applicable law—are described in the Court’s SMJ Order. *See* Dkt. 67 at 13–15. Amendment 16 must comply with these laws and with “the Court’s [SMJ] Order and the previous orders in this litigation.” Dkt. 103 at 10.

A federal court has authority to manage its proceedings, vindicate its authority, and effectuate its decrees. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Peacock v. Thomas*, 516 U.S. 349, 356 (1996). A motion to enforce a court’s previous judgment may be granted if the moving party demonstrates that its opponent has not complied with the terms of the judgment. *State of California v. U.S. Dep’t of Lab.*, 155 F. Supp. 3d 1089, 1096 (E.D. Cal. 2016). The exercise of this authority is “particularly appropriate” when a case returns to a court on a motion to enforce the terms of its mandate to an administrative agency. *See Int’l Ladies’ Garment Workers’ Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984).

“The Court should grant a motion to enforce if a ‘prevailing plaintiff demonstrates

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that a defendant has not complied with a judgment against it.” *Sierra Club v. McCarthy*, 61 F. Supp. 3d 35, 39 (D.D.C. 2014) (citation omitted). “In determining whether an agency has complied with the terms of a remedial order on remand, the Court is guided not only by the text of that order but also by its relevant opinions.” *Anglers Conservation Network v. Ross*, 387 F. Supp. 3d 87, 93 (D.D.C. 2019) (citing *City of Cleveland, Ohio v. Fed. Power Comm’n*, 561 F.2d 344, 346–47 (D.C. Cir. 1997)). Conversely, if a plaintiff “has received all relief required by that prior judgment, the motion to enforce is denied.” *Flaherty v. Pritzker*, 17 F. Supp. 3d 52, 55 (D.D.C. 2014) (citation omitted).

On a motion to enforce, a court is permitted to grant relief necessary to ensure compliance with the court’s prior orders and the law. *See Armstrong v. Newsom*, No. 94-CV-02307 CW, 2024 WL 1221955, at *20 (N.D. Cal. Mar. 20, 2024) (granting motion to enforce when defendants failed to comply with the court’s order and the Americans with Disabilities Act). When defendants persist in non-compliance, multiple motions and orders to enforce may be necessary. *See id.* at *3, *20 (describing two prior motions to enforce that were granted and ruling that a third enforcement order was necessary). When additional remedial measures are necessary to bring defendants into compliance with the court’s order and the law, these additional measures—if intended and tailored for this purpose—may be awarded. *See id.* at *18. A court’s enforcement jurisdiction is grounded in “the interest of the judicial branch in seeing that an unambiguous mandate is not blatantly disregarded by parties to a court proceeding.” *Int’l Ladies’ Garment Workers’ Union*, 733 F.2d at 922.

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IV. ARGUMENT

UCIDA’s members have run out of time. If administrative law really permits a perpetual cycle of litigation with repeated violations by the government that are never corrected—as NMFS has suggested—then UCIDA’s members will lose (despite winning on the merits) because they cannot outlast the government. This Court ordered NMFS to prepare a lawful FMP amendment that complied with the Court’s Orders. Amendment 16 is neither lawful nor compliant, and this motion focuses on two foundational reasons why it is not. They go to the very heart of Amendment 16 and form the bedrock that the amendment’s infrastructure is built on. Like a house of cards, when these foundational errors are corrected, the remainder of Amendment 16 falls. UCIDA respectfully requests that this Court immediately vacate Amendment 16 for failure to comply with the Court’s Remedy Order and order the parties to mediation to develop interim measures for the period until a lawful and compliant FMP is developed.

A. Amendment 16’s OY defers entirely to the state in violation of the Court’s SMJ Order and in violation of the law.

The MSA requires that “[a]ny [FMP] which is prepared by any Council, or by the Secretary, with respect to any fishery, shall . . . assess and specify the present and probable future condition of, and the maximum sustainable yield and *optimum yield from, the fishery*, and include a summary of the information utilized in making such specification.”

16 U.S.C. § 1853(a)(3) (emphasis added). The MSA provides further that:

The term “optimum,” with respect to the yield from a fishery, means the amount of fish which—(A) will provide the greatest overall benefit to the

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Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems; (B) is prescribed on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor; and (C) in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery.

16 U.S.C. § 1802(33). The MSA also provides that an FMP’s “[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.” 16 U.S.C. § 1851(a)(1). NMFS acknowledges these statutory provisions. *See, e.g.*, Ex. 4 at 38.

In Amendment 16, NMFS explains that “the OY range for the Cook Inlet EEZ salmon fishery is specified as the range between the average of the three lowest years of total estimated EEZ salmon harvest and the three highest years of total estimated EEZ salmon harvest from 1999 to 2021.” Ex. 4 at 49. This definition of OY violates the Court’s Orders and the MSA for multiple reasons.

First, NMFS has chosen a measure of OY that ensures full-scale deferral to the State of Alaska. The Court explained that under state management, “the commercial harvest of salmon from the Cook Inlet has decreased significantly over the past two decades.” Dkt. 67 at 7. Yet, inexplicably, NMFS relies entirely on performance *from the past two decades of unlawful management* to define the level of yield that is optimum in the Cook Inlet EEZ. *See* Ex. 2 at 128–29. Because NMFS’s OY range includes the average of the three lowest years and the average of the three highest years of total estimated EEZ salmon harvest from 1999 to 2021, *see* Ex. 2 at 128–29, NMFS has set an OY range that accounts for nearly

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every possible harvest scenario that has occurred in the last two decades under state management. This is deferral.

In Amendment 14, NMFS closed the Cook Inlet EEZ so that the state could exclusively manage the Cook Inlet salmon fishery by permitting commercial fishing only in state waters. Ex. 2 at 5. NMFS was told it cannot just close the EEZ so, with Amendment 16, it did the next closest thing. It created a “Cook Inlet EEZ salmon fishery” that is designed, quite intentionally, to maintain the status quo—i.e., facilitating state management. In the final rule, NMFS itself explains that “[b]ecause EEZ fishing opportunity is expected to be similar to the status quo under this action, salmon harvests in the Cook Inlet EEZ Area and other areas of Cook Inlet are expected to remain at or near existing levels.” Ex. 1 at 30. NMFS states that “[i]n the near-term, this action is not expected to result in the harvesting of significantly more or less salmon in the Cook Inlet EEZ.” *Id.*; *id.* at 34 (“This action is expected to maintain Cook Inlet EEZ salmon harvests at or near existing levels.”).

But the Court explained in its SMJ Order:

“[F]ederal fisheries are to be governed by *federal rules* in the *national interest*.” Bootstrapping statutorily required management measures, such as MSY and OY, to the actual number of fish caught in the Cook Inlet, as determined by the State of Alaska, summarily casts the decision of what constitutes “the amount of fish which . . . will provide the greatest overall benefit to the Nation” to Alaska’s Department of Fish and Game. . . .

. . . . The plan for continuous federal management cannot consist of the agency abandoning its responsibilities in favor of deferral to the State. This approach would open the door for state management that is inconsistent with, and free from, oversight by the federal agencies ultimately tasked with

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conservation and management of the fishery. . . .

The administrative record is replete with justifications from NMFS for why the State of Alaska should continue to manage salmon stocks in the Cook Inlet EEZ, but fails to wed State management of the Cook Inlet salmon with proper standards for determining the OY of that fishery.

Dkt. 67 at 29–31 (emphasis in original). This is déjà vu all over again. The only substantive difference between Amendment 14 and Amendment 16 for OY purposes is that a portion of the fishing under the state’s management goals will take place in the EEZ. NMFS has “[b]ootstrapp[ed] statutorily required management measures, [i.e.,] OY, to the actual number of fish caught in the Cook Inlet, as determined by the State of Alaska.” *Id.* at 29. This directly violates the Court’s SMJ Order.

Second, NMFS’s measure of OY violates National Standard 1. It’s been said that “if you aim at nothing, you will hit it every time.” This is precisely what NMFS has done by setting OY “as the range between the average of the three lowest years of total estimated EEZ salmon harvest and the three highest years of total estimated EEZ salmon harvest from 1999 to 2021.” Ex. 4 at 49. National Standard 1 requires the FMP amendment to include “[c]onservation and management measures [to] prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.” 16 U.S.C. § 1851(a)(1). But NMFS’s OY is set to achieve the status quo—deferral to the state—not the optimum yield from the Cook Inlet salmon fishery as the MSA directs. This Court already held that OY based on state harvest levels violates National Standard 1. *See* Dkt. 67 at 26–27.

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Third, NMFS’s measure of OY is not based on MSY, as required. The MSA provides that OY must be prescribed “on the basis of the maximum sustainable yield from the fishery.” 16 U.S.C. § 1802(33). In Amendment 16, “MSY is specified for salmon stocks and stock complexes in Cook Inlet,” but for OY, NMFS has arbitrarily cut these salmon stocks and stock complexes up based on a jurisdictional boundary. *See infra* Section IV.B. Further, OY is based on a range of catch under state management, not on MSY. This too is deferral and a violation of the MSA.

Fourth, the FMP must set and specify the OY from the “fishery,” a defined term. 16 U.S.C. § 1853(a)(3). The FMP only sets OY for NMFS’s artificially defined “Cook Inlet EEZ salmon fishery.” Ex. 4 at 49; *see also* Ex. 1 at 11; Ex. 2 at 128–29. As explained below, NMFS has improperly defined the “fishery” for purposes of the scope of its FMP amendment, which is another reason Amendment 16 is unlawful. *See infra* Section IV.B.

Because NMFS has chosen to include an OY measure that is entirely deferential to the State of Alaska, Amendment 16 violates the Court’s Orders, which do not permit deferral to the state.

B. NMFS again shirks its duty by disregarding the statutory definition of “fishery.”

1. The FMP, OY, and MSY all must cover the “fishery.”

The MSA requires NMFS to prepare an FMP “for each *fishery* under its authority that requires conservation and management.” 16 U.S.C. § 1852(h)(1) (emphasis added). Each FMP must achieve “the optimum yield from each *fishery*.” *Id.* § 1851(a)(1) (emphasis

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added). Optimum yield must be prescribed “on the basis of the maximum sustained yield from the *fishery*” *Id.* § 1801(33) (emphasis added).

“Fishery” is “a defined term.” *UCIDA I*, 837 F.3d at 1064. It 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.” 16 U.S.C. § 1802(13). “Fishing” is defined broadly to include all catching and harvesting of fish. *See* 16 U.S.C. § 1802(16). In addition, a “stock of fish” means “a species, subspecies, geographical grouping, or other category of fish capable of management as a unit.” 16 U.S.C. § 1802(42).

There is some discretion built into subsection (A) of the MSA’s definition of a “fishery.” For example, a “fishery” can be one stock of fish or more than one stock if the stocks can be combined as a unit for purposes of conservation and management. *See* 16 U.S.C. § 1802(13)(A). The stock or stocks of fish that make up a fishery are to be identified based on “geographical, scientific, technical, recreational, and economic characteristics.” *See* 16 U.S.C. § 1802(13). But subsection (B) of the definition of a “fishery” does not contain any discretion. Once the stock or stocks of fish at issue have been defined based

on the listed characteristics, subsection (B) requires that a “fishery” includes “any fishing for such stocks.”¹ 16 U.S.C. § 1802(13)(B).²

Simply put, the definition of “fishery” dictates the scope of the FMP that NMFS is required to prepare. It dictates the scope of both OY and MSY. A fishery includes “any fishing for such stocks” without distinction for whether such fishing is occurring in waters under NMFS’s authority or in waters under state authority.

2. Amendment 16 contorts the definition of fishery to unlawfully allow continued state control over the fishery.

This Court already admonished NMFS that “[d]efinitional semantics cannot substitute for actual management” SMJ Order at 25. NMFS did not get the message.

With Amendment 16, NMFS agrees that MSY must be set for the “fishery,” which includes all fishing for salmon stocks in Cook Inlet, both in state and federal waters. Ex. 1 at 2. NMFS explains the MSA requires that “[b]ecause MSY must be defined in terms of stocks or stock complexes, this definition of MSY does not subdivide between State and EEZ waters in Cook Inlet.” Ex. 1 at 11. This is logical and required by the statute. The

¹ The MSA does not say “any [federal] fishing for such stocks.”

² This definition of “fishery” makes sense in the historical context of the MSA. Prior to the MSA, “the United States asserted authority only over waters up to twelve nautical miles from the coastline, and *there was substantial concern that foreign fishers were depleting American fisheries.*” *UCIDA I*, 837 F.3d at 1058 (emphasis added). In response, the MSA “extended federal jurisdiction to 200 miles from the coastline and regulated foreign fishing in that area.” *Id.* (citations omitted). The MSA also included a requirement that the scope of an FMP include “any fishing” taking place in the “fishery,” in what was likely a response to concerns about fishing outside of the EEZ harming American fisheries and national interests.

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MSA *requires* every FMP to “assess and specify ... the maximum sustainable yield and optimum yield from [] the fishery,” 16 U.S.C. § 1853(a)(3) (Required Provision 3), and as explained above, “fishery” is defined in terms of stocks of fish and *any* fishing on those stocks, 16 U.S.C. § 1853(13).

But NMFS’s next step is inexplicable. NMFS concludes that for OY, the word “fishery” means something different. For OY, NMFS says “the fishery is properly defined as all harvest of co-occurring salmon stocks in the Cook Inlet EEZ.” Ex. 1 at 11. This is definitional semantics run amuck. When Congress instructed that every FMP must “assess and specify ... the maximum sustainable yield and optimum yield from [] the fishery,” assuredly it did not mean “the fishery” was a different thing for “maximum sustainable yield and optimum yield.” 16 U.S.C. § 1853(a)(3). Indeed, Congress left no room for such semantics when it defined the term fishery to mean a “stock of fish” and “*any* fishing for such stocks.” 16 U.S.C. § 1802(13) (emphasis added). This defined term means the same thing regardless of whether it applies to the scope of the FMP (for “each fishery”), the obligation to set OY (for “each fishery”), or the statutory definition of OY (as the “yield from a fishery” established on the basis of “maximum sustained yield from the fishery”). 16 U.S.C. § 1852(h)(1), § 1853(a)(3), § 1802(33). In each case, “fishery” is the same “defined term.” *UCIDA I*, 837 F.3d at 1064.

Equally problematic, this is just deferral all over again. NMFS is required to “assess and specify” the OY for the fishery, which ensures the “yield from a fishery” that will “provide the greatest overall benefit to the Nation.” 16 U.S.C. § 1853(a)(3), § 1802(33).

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NMFS did not do that here. Instead, it described OY for part of the fishery, leaving OY for the entire fishery to the discretion of the State of Alaska. NMFS thus, again, improperly elevates state parochial interests over the federal interests, and the MSA’s standards. *UCIDA I*, 837 F.3d at 1063. By cabining OY to federal waters, NMFS ensures that it has no involvement in how the “fishery” as a whole—the stocks of fish and any fishing for those stocks—will be managed to meet the goals of the MSA.

NMFS tries to create jurisdictional roadblocks for itself by claiming the scope of the FMP must only cover the EEZ waters and that it has no authority to require the state to *comply* with OY within state waters. Ex. 1 at 9. But “fishery” is defined in terms of a “stock of fish” and “any fishing” on that stock, not on the basis of jurisdictional boundaries.³ NMFS is statutorily required to prepare an FMP for the “fishery” and “*assess and specify* ... optimum yield from [] the fishery.” 16 U.S.C. § 1852(h)(1), § 1853(a)(3). The fact that a stock passes through more than one jurisdiction may present logistical challenges in

³ NMFS’s jurisdictionally bound “fishery” completely leaves out the non-discretionary subsection (B) of the definition. As explained above, the term “fishery” for purposes of dictating the scope of an FMP is defined to include “any fishing on such stocks.” 16 U.S.C. § 1802(13)(B). NMFS readily acknowledges that there are multiple fishing sectors that fish for the same stocks of fish that pass through the EEZ. *See* Ex. 1 at 9 (“NMFS will establish catch limits for the Cook Inlet EEZ that are based on achieving escapement goals as defined in the Federal stock assessment, while accounting for both State and Federal expected harvests”; “total harvest of Cook Inlet salmon stocks will continue to occur predominately within State waters”); *id.* at 9–10 (“NMFS must necessarily account for projected removals from State-managed fisheries in setting the harvest levels for the Cook Inlet EEZ Area.”). The MSA requires that the scope of NMFS’s FMP must include “any fishing on such stocks.” There is no jurisdictional wiggle room in subsection (B) of the definition of “fishery.”

achieving OY for the “fishery,” but NMFS cannot shirk its statutory duty to “assess and specify” OY for the fishery just because Congress gave it a difficult task. Indeed, until NMFS prepares an FMP for the fishery and assesses and specifies OY for the fishery, there is no way to know whether the state can, or will, manage fishing in state waters in a manner consistent with OY.⁴ Simply put, NMFS cannot shirk its statutory duty to assess and specify OY simply because OY (once specified) might be difficult to achieve in practice. As the Court explained, ““avoid[ing] the introduction of an additional management jurisdiction”” is an “insufficient justification[] for the abdication of federal management authority.” Dkt. 67 at 29.

Indeed, NMFS’s own regulations contemplate that an FMP should include conservation and management measures for state waters, even though it may not be able to enforce them. 50 C.F.R. § 600.320(d)(2) (FMP “should include conservation and management measures for that part of a management unit *within U.S. waters*,^[5] although the Secretary can ordinarily implement them only within the EEZ.” (emphasis added)). NMFS’s regulations further explain that “[w]here state action is necessary to implement measures within state waters to achieve FMP objectives, the FMP should identify what

⁴ The State has publicly said that it “would not accept a delegation of management authority for the Cook Inlet EEZ salmon fishery under the conditions that would be necessary to comply with the MSA,” i.e., that it will not manage fishing in state waters consistent with the MSA. Dkt. 98-1 at 2. The State’s failure to manage in state waters to meet OY or MSY, or based on the best available science, has caused Plaintiff’s members significant harm over the past two decades.

⁵ The term “U.S. waters” includes state waters. 16 U.S.C. § 1802(45) (“The term ‘United States’ when used in a geographic context, means all the States thereof.”).

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state action is necessary, discuss the consequences of state inaction or contrary action, and make appropriate recommendations.” *Id.*

NMFS did not do any of that here. By limiting the scope of its FMP and its measure of OY to federal waters, NMFS makes no assessment of what level of fishing on Cook Inlet stocks will provide the greatest benefit to the nation (the primary purpose of OY as a conservation and management measure under National Standard 1), makes no assessment of what state actions are necessary to achieve that (unidentified) level of optimal harvest, provides no discussion of the consequences of the state continuing the status quo, and provides no recommendations to the state on what it could do differently. Instead, NMFS continues to defer to the state, repeating the same problems from Amendments 12 and 14.

The artificially narrow scope of NMFS’s FMP and NMFS’s failure to assess, specify, or set measures to achieve OY for the fishery is a foundational, pervasive error, which leads to bizarre results throughout the FMP, including definitions of the stocks in the “fishery” that artificially cut the stocks up based on where they are harvested and that are inconsistent with NMFS’s own harvest specifications.⁶ NMFS states that these stocks will receive “tier assignments.” Ex. 2 at 116. Tier 1 is assigned to “salmon stocks with escapement goals and stock-specific harvests.” *Id.* But none of the stocks—as NMFS defined them to only include salmon harvested in the EEZ—can have escapement goals.

⁶ Compare Ex. 2 at 116 (defining Kenai and Kasilof stocks as the Kenai and Kasilof “sockeye salmon harvested in the Cook Inlet EEZ Area”) with Ex. 5 at 29, 34 (defining the Kenai and Kasilof stocks to include “harvest, spawning escapements, and associated spawning escapement goals corresponding with the SOA definition[s]”).

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There cannot be an escapement goal for “Kenai Late Run sockeye salmon harvested in the Cook Inlet EEZ Area.” *Id.* The stock is defined by Amendment 16 as fish that are “harvested,” so by definition, any fish that “escape” harvest and spawn cannot be included in that stock. This is the absurd result of NMFS’s “definitional semantics.”

In short, NMFS has once again found a new and clever way to try and continue to defer to the state’s historic management practices, even as commercial harvests continue to dwindle. NMFS’s obligation is to prepare an FMP for the “fishery” and to ensure that the “fishery” is managed consistent with the MSA and its national standards. It has once again failed in that duty.

C. Relief requested.

“At some point,” a court “must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough.” *Pub. Citizen Health Rsch. Grp. v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987). This is now the third time that NMFS has approved an FMP amendment that tries to defer its statutory duties to the State of Alaska in violation of the MSA. NMFS has repeated errors by failing to establish OY for the fishery based on federal, rather than state, interests, and by engaging in definitional semantics to evade clear statutory requirements. UCIDA respectfully requests that the Court vacate Amendment 16. As the Court explained in its SMJ Order, “[t]he ordinary practice is to vacate unlawful agency action.” Dkt. 67 at 53 (quoting *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019)). As explained above, Amendment 16 is unlawful because it violates the MSA, other applicable law, and the Ninth Circuit’s and this Court’s

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Orders. Vacatur is particularly appropriate here given that the foundation of the FMP amendment is erroneous.

In the meantime, UCIDA's members need interim relief to achieve some semblance of MSA compliance until NMFS can produce a compliant FMP amendment. UCIDA respectfully requests that the Court order the parties to immediately engage in mediation regarding interim measures.

V. CONCLUSION

For the foregoing reasons, Amendment 16, the associated final rule, and implementing regulations fail to comply with the Court's Orders and therefore should be vacated.

DATED this 24th day of May, 2024.

/s/ Jason T. Morgan

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2024, I filed a true and correct 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, which will send notice of such filing to counsel of record.

/s/ Jason T. Morgan

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT)	
ASSOCIATION and COOK INLET)	
FISHERMEN'S FUND,)	
)	CASE NO. 3:21-cv-00255-JMK
Plaintiffs,)	
)	
v.)	
)	FEDERAL DEFENDANTS'
NATIONAL MARINE FISHERIES)	OPPOSITION TO PLAINTIFFS'
SERVICE, ET AL.,)	MOTION TO ENFORCE THE
)	JUDGMENT
Defendants,)	
)	
STATE OF ALASKA,)	
)	
Intervenor-Defendant.)	

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Federal Defendants oppose Plaintiffs United Cook Inlet Drift Association and Cook Inlet Fishermen’s Fund’s (collectively, “UCIDA”) Motion to Enforce the Judgment, ECF No. 133 (“Mot.”). The National Marine Fisheries Service (“NMFS”) fully complied with this Court’s May 15, 2023 Order, ECF No. 103 (“Am. Remedy Order”), by timely issuing a new Fishery Management Plan (“FMP”) Amendment and implementing regulations that address the deficiencies that the Court found with the agency’s previous rule governing salmon fishing in the Cook Inlet Exclusive Economic Zone (“EEZ”). 89 Fed. Reg. 34,718 (April 30, 2024) (“Amendment 16”). Amendment 16 did exactly what the Court ordered and exactly what UCIDA has supposedly been seeking—it created a new, federally-managed salmon fishery in the Cook Inlet EEZ Area. It established all the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson Act”) required elements for Federal management and developed a harvest specifications system that provides the greatest benefits for the Nation.

Despite this new legal backdrop, UCIDA returns to a familiar theme. It argues that NMFS failed to comply with the Court’s judgment because Amendment 16 “defers” management to the State of Alaska (“State”). But Amendment 16 does no such thing. Under Amendment 16, NMFS will actively manage the salmon fishery in the EEZ; the State plays no role and NMFS does not rely on the State. To be sure, UCIDA is unsatisfied with *how* NMFS will manage the salmon fishery in the EEZ, but dissatisfaction does not equate to “deferring” management to the State. And that fact is dispositive for this motion.

UCIDA seeks to completely circumvent the judicial review provisions of the Magnuson Act and the Administrative Procedure Act (“APA”) and begs this Court to vacate Amendment 16 without the benefit of any administrative record or summary judgment briefing. This request is extraordinary and granting it would be even more so. To our knowledge, no court has ever cast

aside basic administrative law principles on such flimsy theories. Indeed, as explained below, the relevant case law cuts severely against UCIDA. This case concluded when NMFS issued Amendment 16 and thereby completed the Court’s remand. UCIDA’s sole legal avenue for judicial review of Amendment 16 is to file a new action, which it has already done. *UCIDA v. NMFS*, Case No. 3:24-cv-116 (D. Alaska, May 29, 2024). Anything else would circumvent the legal requirements for judicial review of agency action. When given a fair opportunity to defend Amendment 16, NMFS will demonstrate that Amendment 16 met all legal requirements. UCIDA does not want to give NMFS that opportunity, because it recognizes that Amendment 16 is fundamentally reasonable and that its best avenue for success lays in avoiding a full hearing on the administrative record. For these and other reasons, the Court should deny the motion.

BACKGROUND AND PROCEDURAL HISTORY

In its Order, this Court held that Amendment 14—which closed the Cook Inlet EEZ Area to salmon fishing—was inconsistent with the Magnuson Act. The Court held that the EEZ closure impermissibly “delegates conservation and management measures to the State” and reiterated the Ninth Circuit’s holding that “federal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns.” ECF No. 67 (“Order”) at 20, 21-22 (quoting *UCIDA v. NMFS*, 837 F.3d 1055, 1063 (9th Cir. 2016)). On remand, NMFS issued a federal rule, just as this Court and the Ninth Circuit required, that implements all of the required components of federal fisheries management and prioritizing the national interest over the wishes of the State of Alaska.

Throughout the remand period, the State actively worked to prevent NMFS from developing an FMP Amendment that complied with this Court’s Order. Kurland Dec. ¶ 10. Before the North Pacific Fishery Management Council (“Council”), the State opposed any effort

by NMFS to develop any management framework for the EEZ. *Id.* Because of the State’s conduct and statements at the Council, NMFS needed to take direct Secretarial action to comply with the terms of the remand. Accordingly, NMFS independently developed a management plan for the federal fishery in the Cook Inlet EEZ Area that is completely separate from the State fishery. This ensured that NMFS could carry out its obligation to manage the EEZ and achieve optimum yield (“OY”) without deferring or delegating management to the State.

To do this, NMFS developed a Secretarial FMP amendment—Amendment 16 to the Council’s Fishery Management Plan for the Salmon Fisheries in the EEZ off Alaska (“Salmon FMP”). On October 19, 2023, NMFS published proposed regulations and a notice that the proposed FMP amendment was available for public comment. 88 Fed. Reg. 72,314 (Oct. 19, 2023). Among the comments was a letter from the State of Alaska, which opposed the rule because, in its view, “it conflicts with State conservation and management measures that are intended to protect weak stocks and achieve allocation policies established by the Alaska Board of Fisheries” and “places the burden of conservation entirely on the State if pre-season catch limits are over-forecasted.” Ex. 1 at 1. After considering public comments, NMFS approved Amendment 16, which established the harvest specifications process and other management measures for the Cook Inlet EEZ Area salmon fishery. 89 Fed. Reg. 34,718. Implementing regulations for the Salmon FMP now govern all salmon fishing in the Cook Inlet EEZ, including the commercial drift gillnet sector. Amendment 16 establishes a separate, federally managed salmon fishery in the Cook Inlet EEZ, the area over which the Council and NMFS have jurisdiction. The State no longer plays any management role in the EEZ.

A. Maximum Sustainable Yield and Optimum Yield

All FMPs must define two key components of federal management: maximum

sustainable yield (“MSY”) and OY. MSY identifies the maximum sustainable harvest level an individual stock could theoretically support if it was possible to target that stock in isolation and without uncertainty. 89 Fed. Reg. at 34,730. Amendment 16 defines MSY as the total run size minus the escapement goal for each stock in Cook Inlet.¹ In the Cook Inlet EEZ Area, it is impossible to target individual stocks of salmon and it is therefore not possible to design conservation and management measures to fully harvest MSY for each stock. *Id.*

OY, in contrast, is a long-term management target that represents the average amount of fish harvested in a fishery that will provide the greatest overall benefits for *the Nation* (as distinct from the greatest benefits for the drift gillnet fleet or any other single user group). 16 U.S.C. § 1802(33). OY is prescribed on the basis of MSY, as reduced by any relevant economic, social, or ecological factors. *Id.* In mixed-stock fisheries (like this one), OY is often specified for the fishery as a whole, while other reference points (like MSY) are specified for individual stocks. 50 C.F.R. 600.310(e)(3)(iv)(C). When determining the greatest benefit to the Nation, OY is reduced from MSY to identify the harvest levels that will continue to support multiple active fishery sectors without resulting in overfishing for any one stock. *Id.* §§ 600.310(e)(3)(iii)(A); 600.310(b)(2)(ii). In Amendment 16, NMFS determined that the best scientific information available for prescribing OY is the estimates of historic catch in years of high and low abundance across stocks from 1999 to 2021. Fed. Reg. at 34,731. This data was admittedly collected during the time of State management because this is the only previous management regime and

¹ An escapement goal is the number of salmon that need to escape harvest (and other sources of mortality) and spawn to maintain a sustainable population. Under Amendment 16, NMFS reviews the best scientific information available to identify appropriate escapement goals for managed stocks of salmon and this information is vetted by the SSC during the stock assessment process. 89 Fed. Reg. at 34,726 (“NMFS will establish catch limits for the Cook Inlet EEZ that are based on achieving escapement goals as defined in the Federal stock assessment . . .”).

necessarily the source of much of the best scientific information available. *Id.*

B. Defining the “Fishery”

The Magnuson Act defines “fishery” as “one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics,” and “any fishing for such stocks.” 16 U.S.C. § 1802(13). This first part of this definition grants NMFS substantial discretion to determine how to best group stocks of fish for the purpose of management, while the second part of the definition clarifies the activity that makes the grouping relevant: “fishing.”

In Amendment 16, NMFS defined the “fishery” as all commercial and recreational salmon fishing within the geographic boundary of the Cook Inlet EEZ Area. NMFS primarily focused on the geographic extent of the Cook Inlet EEZ because NMFS’s management jurisdiction under the Magnuson Act is limited to EEZ waters. 89 Fed. Reg. at 34,725; 16 U.S.C. § 1811(a) (claiming exclusive U.S. management authority over all fish in the EEZ); *id.* § 1802(a)(1)(G) (granting the Council jurisdiction over fisheries “seaward of Alaska”); *id.* § 1856(a).

Another important factor in defining the fishery for Amendment 16 is the unique characteristics of drift gillnet gear. 89 Fed. Reg. at 34,743. Drift gillnet gear is not selective of a particular stock or species and captured salmon cannot be released without a high mortality rate. *Id.* In EEZ waters, salmon stocks are highly mixed, and drift gillnet gear therefore harvests fish from stocks of both high and low abundance. *Id.* In contrast, within nearshore State waters, individual salmon stocks can be targeted by fishing near the river to which a specific salmon stock is returning. *Id.* The salmon fishing in the EEZ Area is also economically unique because of the exclusive commercial use of the Area by the drift gillnet fleet. *Id.* Within State waters,

there are multiple commercial, recreational, subsistence, and personal use fishery sectors operating to selectively target specific individual stocks. *Id.*

C. Other Components of Amendment 16

Amendment 16 is a significant rule establishing a new fishery. To accomplish this, NMFS was required to create a management framework that includes the mechanism for setting annual catch limits, gear restrictions, enforcement provisions, record keeping requirements, and the other nuts and bolts of fisheries management. Accordingly, as required by the Magnuson Act, Amendment 16 specifies objective and measurable criteria for determining when a stock or stock complex is subject to overfishing or overfished. 16 U.S.C. § 1853(a)(10). The reference points informing status determination criteria used to evaluate harvest rates and biomass of stocks will be peer reviewed by the Council’s Scientific and Statistical Committee (“SSC”) each year.² 89 Fed. Reg. at 34,719. These status determination criteria are mandated by the statute and NMFS cannot manage a fishery without them. 16 U.S.C. § 1853(a).

Amendment 16 establishes the open and closed period for the fishery, the inseason management provisions, and the rules for bycatch of nontarget species. 89 Fed. Reg. at 34,721. Amendment 16 establishes that harvesting vessels, processors, and all other entities receiving deliveries of salmon from the Cook Inlet EEZ Area will have to obtain federal permits. *Id.* at 34,721-22. Harvesting vessels will also need to obtain vessel monitoring systems and complete logbooks to provide required information for management and enforcement—in particular, to successfully manage commercial fishing in the EEZ, NMFS must know where catch is

² The Court was troubled by the SSC’s lack of review of Amendment 14. Order at 34. That has been completely rectified with Amendment 16. NMFS sought and relied on the SSC’s independent peer review of all scientific information relied on in the development of Amendment 16. Kurland Decl. ¶ 5-6.

occurring. *Id.* at 34,722. Every delivery must be reported through NMFS’s eLandings program so that NMFS has timely access to the data on harvest amounts that will inform inseason management decisions. 89 Fed. Reg. at 34,753. These vessel monitoring and reporting requirements are standard in federal fishery management programs off Alaska. This is not an exhaustive list of the many necessary components of this rule. Any federal fishery—regardless of its OY—must have these elements to manage the fishery in compliance with the law.

STANDARD OF REVIEW

“A motion to enforce the court’s previous judgment may be granted when the prevailing party demonstrates its opponent has not complied with the judgment’s terms.” *California v. U.S. Dep’t of Lab.*, 155 F. Supp. 3d 1089, 1096 (E.D. Cal. 2016). “The court may grant the moving party only that relief to which it is entitled under the original judgment.” *Id.*; *Sierra Club v. McCarthy*, 61 F. Supp. 3d 35, 39 (D.D.C. 2014) (“But if a plaintiff ‘has received all relief required by that prior judgment, the motion to enforce [should be] denied.’”). “Were this not the rule, motions to enforce would allow an end run around the prevailing party’s original burden to establish an injury and entitlement to relief.” *California*, 155 F. Supp. 3d at 1096.

ARGUMENT

I. **As a matter of law, the Court cannot review Amendment 16 on Plaintiffs’ Motion.**

Plaintiffs expressly asks this Court to determine the validity of Amendment 16 in the context of resolving its motion. Mot. at 1-2. But to do so would be improper. A court must adjudicate the legal validity of a rule before issuing any remedy, including vacatur. *Louisiana v. Am. Rivers*, 142 S. Ct. 1347 (2022); *In re Wash. Cattlemen’s Ass’n*, No. 22-70194, 2022 WL 4393033, at *1 (9th Cir. Sept. 21, 2022); *Ctr. for Biological Diversity v. Haaland*, No. 19-CV-05206-JST, 2022 WL 19975279, at *2 (N.D. Cal. Nov. 16, 2022) (“the Court erred in reaching

the conclusion that it could vacate the challenged regulations before ruling on the merits of Plaintiffs' claims . . ."). And to adjudicate the legal validity of Amendment 16, this Court must review that Rule in accordance with the judicial review provisions of the Magnuson Act and APA. As explained below, Plaintiffs' motion seeking vacatur does not comply with the Magnuson Act or APA judicial review provisions.

A. Judicial Review Under the Magnuson Act and APA.

Under the Magnuson Act, “[r]egulations promulgated by [NMFS] under this Act shall be subject to judicial review to the extent authorized by, and in accordance with chapter 7 of title 5, United States Code [the APA], if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register.” 16 U.S.C. § 1855(f)(1). Nothing in this language authorizes judicial review, let alone vacatur, of Amendment 16 in the context of an existing case challenging a prior agency action. To the contrary, APA Section 706(2)(A) provides that the Court may “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” but that “[i]n making the foregoing determinations, the court shall review *the whole record* or those parts of it cited by a party.” 5 U.S.C. § 706(2)(A) (emphasis added).

In addition, Magnuson Act Section 1855(f) “precludes preliminary injunctive relief, a remedy ordinarily available under the APA.” *Turtle Island Restoration Network v. U.S. Dep’t of Com.*, 438 F.3d 937, 944 (9th Cir. 2006) (citing 16 U.S.C. § 1855(f)(1)(A)). The Ninth Circuit has held that the provisions of Section 1855 apply, even when plaintiffs ostensibly bring their challenge under another statute, whenever their claims “are properly cast as challenges to [Magnuson Act] regulations.” *Id.* This provision of the Magnuson Act “forbids this Court from

staying enforcement of an administrative rule pending review on the merits.” *Blue Water Fishermen’s Ass’n v. NMFS*, 158 F. Supp. 2d 118, 121 (D. Mass. 2001); *UCIDA v. NMFS*, No. 3:21-CV-00247-JMK, 2022 WL 17252075, at *2 n.14 (D. Alaska Nov. 28, 2022) (“It is plain that § 1855(f)(1)(A) precludes preliminary injunctive relief under the Magnuson-Stevens Act.”). UCIDA’s motion is a transparent attempt to circumvent Congress’s clear instruction that rules promulgated under the Magnuson Act must be evaluated on the merits following the lodging of the administrative record and in accordance with Section 1855(f).

B. UCIDA’s Motion is Precluded by the APA and the Well-Established Requirement for the Review of Agency Action.

As recognized by the Ninth Circuit, summary judgment following the submission of the administrative record is the only appropriate mechanism for resolving whether the facts found by the agency and the agency’s decision are supported by that record. *Occidental Eng’g Co. v. Immigr. & Naturalization Serv.*, 753 F.2d 766, 770 (9th Cir. 1985) (“summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did”). Moreover, this Court has specific rules for review of final agency action. L.R. 16.3(b)(1) (“The agency must serve and file the agency record. . . .”); *id.* 16.3(c)(1) (“Plaintiff’s opening brief must be filed not later than 30 days following the filing of the agency record.”).

Here, not only has no administrative record been filed for Amendment 16, the Federal Defendants have not been afforded a full and fair opportunity to brief the issues and discuss the record basis for the rule in the context of summary judgment briefing. Instead, UCIDA proposes that the Court conclude that Amendment 16 does not comply with applicable law with minimal briefing and no record. As a practical matter, granting Plaintiffs’ motion would supplant and moot its new case challenging Amendment 16, and turn this case challenging a prior agency

action into a shortcut for challenging a new agency action, without the required process.

In at least three cases, courts have rejected similar motions seeking to challenge a new agency action under the guise of a motion to enforce a judgment. In a case directly on point, a court refused to review a new Magnuson Act rule on the plaintiff's "motion to compel compliance." *Oceana v. Coggins*, No. 19-CV-03809-LHK, 2021 WL 1788516, at *1 (N.D. Cal. May 5, 2021). In *Oceana*, the district court remanded NMFS's rule setting harvest specifications for anchovy, set a defined remand period, and retained jurisdiction to ensure compliance with the remand order. *Id.*; *Oceana v. Ross*, 483 F. Supp. 3d 764, 788 (N.D. Cal. 2020). The Court ordered NMFS to issue a new rule within 120 days that was "consistent with this order" and "in compliance with the Magnuson-Stevens Act and the APA." *Id.* at 788. After NMFS issued its new rule on remand, plaintiffs filed a "motion to compel compliance" with the court's remand order, arguing that the new harvest specifications violated the court's remand order, requesting that the court find NMFS in contempt, and requiring NMFS to issue a new rule. *Oceana*, 2021 WL 1788516, at *3.

The court rejected plaintiffs' attempted end run around the APA's record review provisions. It concluded that both the Magnuson Act and the APA precluded review of NMFS's new specifications rule on a motion to compel, holding that "[l]ike other courts that have considered this issue, the Court concludes that Plaintiff cannot move to enforce a court order that concluded that a prior rule was arbitrary and capricious, but rather must challenge the new rule based on its own administrative record." *Id.* at *5. The court recognized that its earlier order was specific to the administrative record that was before it at the time and that review of the new rule was impossible without the filing of that new record. *Id.* The court denied plaintiffs' motion, concluding that "rather than moving to enforce a judgment that pertained to a different rule and a

different administrative record, Plaintiff must challenge the [new specifications rule] based on its own administrative record.”³ *Id.* at 7.

In *Nat’l Wildlife Federation v. U.S. Army Corps of Eng’rs*, No. Civ. 99–442–FR, 2001 WL 34045735 (D. Or. Aug. 21, 2001), the court found a 1998 U.S. Army Corps of Engineers (“Corps”) record of decision unlawful and ordered the agency to issue a new decision addressing its legal obligations under the Clean Water Act. *Id.* at *1-2. Following issuance of the new decision, plaintiffs moved the court to declare that the Corps failed to comply with its prior order because the new decision allegedly “does not address the compliance of the Corps with its legal obligations under the Clean Water Act as ordered by the court.” *Id.* at *1. The court denied the motion and stated that it “will address the plaintiffs’ complaints relating to the merits of the [new decision] when an amended complaint is filed and the administrative record is available for examination.” *Id.*

In *Fund for Animals v. Norton*, 390 F. Supp. 2d 12 (D.D.C. 2005), the court denied a motion to enforce an order and judgment premised on an alleged agency failure to follow that order and judgment in a new decision. *Id.* at 14-16. The court acknowledged that while “district courts clearly have the authority to enforce the terms of their mandates,” the court was “not in a position to evaluate the merits of plaintiffs’ claims.” *Id.* at 15. The court observed the decision was “a new ‘final agency action’ resulting from an entirely new rule making process; it imposes different substantive requirements, involves a different scope, and is based upon a different administrative record, including a new Environmental Assessment (“EA”) and Finding of No

³ Despite the plaintiffs’ claims that NMFS’s new specifications rule conflicted with the judgment and should result in contempt proceedings, once the rule was reviewed with the benefit of its administrative record the court found that it fully complied with the law and upheld it in its entirety. *Oceana, Inc. v. Coggins*, 606 F. Supp. 3d 920, 922 (N.D. Cal. 2022).

Significant Impact (“FONSI”), which are not before the Court in this case.” *Id.* The court held that “the proper avenue for plaintiffs’ arguments is a new lawsuit squarely challenging the validity of the 2004 Decision.” *Id.*

As in these cases, the proper avenue for UCIDA to challenge the merits of Amendment 16 is to pursue its newly filed case, allow NMFS to file an administrative record, and conduct briefing in accordance with this Court’s Local Rules.

II. NMFS Complied with the Court’s Order.

UCIDA seeks to bypass this overwhelming weight of authority by appealing to the false notion that it should be able to avoid the review dictated by the Magnuson Act and APA because otherwise “UCIDA’s members will lose (despite winning on the merits) because they cannot outlast the government.” Mot. at 7. UCIDA’s argument is incorrect. Review of the record in merits proceedings would demonstrate that NMFS met its obligations in good faith. And compliance with the judgment—which required NMFS to manage salmon fishing in the Cook Inlet EEZ Area—is what UCIDA won in the prior case, not a particular management rule that benefits a particular sector of the fishery. *See Pac. Coast Fed’n of Fishermen’s Ass’n v. Blank*, 693 F.3d 1084, 1093 (9th Cir. 2012) (“There is nothing in the MSA that guarantees a particular group a directed fishery.”) (cleaned up).

A. NMFS Did Not “Defer” to the State of Alaska in Setting OY.

As explained above, “[OY] is not a year-by-year number, but a long-term average amount of desired yield from a stock. As such, it is distinct from metrics like annual catch limit or annual catch target which are set on an annual basis.” *Oceana, Inc. v. Bryson*, 940 F. Supp. 2d 1029, 1046 (N.D. Cal. 2013) (cleaned up). OY is not used to set harvest levels in any particular year, but is used as a long-term metric for evaluating the success of the management framework.

In prescribing OY on the basis of MSY, NMFS used the best scientific information available to identify the range of harvest levels in the EEZ that will provide the greatest net benefit to the Nation by ensuring *all stocks* harvested in the EEZ can meet their MSY escapement goals and the greatest number and diversity of stakeholders and fishery sectors will retain access to the resource. 89 Fed. Reg. at 34,731. NMFS therefore defined OY as the “harvest levels that are expected to capture *as much yield in excess of escapement goals as possible in the EEZ* without any individual stock routinely not achieving these escapement goals and risking overfishing, thereby maintaining a harvestable surplus for all other salmon users.” *Id.* (emphasis added). The best scientific information available regarding what this level would be was the historic catch between 1999 and 2021, which captured various conditions, resulted in many viable fisheries, and prevented stocks from becoming overfished. *Id.*

In no way is this definition of OY a “deferral” to the State. To be sure, NMFS relied on data collected by the State and information about the past conduct of EEZ fisheries, but that is because that data is not only the best scientific information available (and therefore must be used under National Standard 2), it is also the *only* scientific information available. Kurland Dec. ¶ 9. But this does not grant Alaska any management authority over the EEZ; it represents NMFS’s own, independent judgment (informed by scientific peer review by the SSC) regarding the maximum levels of catch that the EEZ can sustain without overfishing any stocks. 89 Fed. Reg. 25,857 (April 12, 2024) (proposing overfishing limits as recommended by the SSC). The comments from the State make this clear. Alaska contended that Amendment 16 would not achieve OY because it is “likely to provide additional fishing time and harvest opportunity for the EEZ commercial fishery compared to the status quo, which would reduce harvestable surplus available for individuals and businesses that do not participate in the federal fishery and require

the State to implement more restrictive conservation and management actions for non-federal fishery participants in response.” Ex. 1, at 5. UCIDA’s allegation that NMFS’s definition of OY is a “full-scale deferral to the State of Alaska[,]” Mot. at 8, is simply not borne out by the facts.

In addition, NMFS purposefully developed an OY that did not rely on the State to achieve any federal management targets and instead meets the statutory requirements without any input or help from the State of Alaska. *Id.* at 34729; Ex. 1 at 5 (“the State cannot commit to altering its data analysis and reporting timelines to accommodate a new federal management program for the EEZ fisheries . . .”). This Court held that “hinging federal management targets on the changing landscape of state decisions is an improper delegation of management authority to the State.” Order at 28. NMFS has addressed this precise issue by choosing an OY that is independent of State decisions and represents NMFS’s own judgments about the amount of harvest that should occur in the EEZ. Even if UCIDA can quibble with this definition in the context of merits briefing in its newly filed case, it cannot have violated the judgment.

B. The Magnuson Act Does Not Authorize NMFS to Regulate Fishing in Cook Inlet State Waters.

UCIDA next contends that NMFS improperly defined “fishery” in violation of the Court’s Remand Order because it did not extend federal jurisdiction into State waters. Mot. 15 (“NMFS tries to create jurisdictional roadblocks for itself by claiming the scope of the FMP must only cover the EEZ waters and that it has no authority to require the state to comply with OY within state waters.”). But the Court’s summary judgment order did not address this issue and therefore NMFS did not—indeed could not—violate the Court’s Order.

The Order provides:

Although briefly stating that the fishery at issue in this case should include federal and state waters, UCIDA Plaintiffs appear to agree that, for purposes of this litigation, ‘the issue here is whether NMFS’s decision to close all commercial salmon fishing in federal waters to serve the State’s political agenda was arbitrary,

capricious, and contrary to law.’ Docket 57 at 6–7. The Court does not address NMFS’s authority, if any, to manage state waters because it is not pertinent to its decision. *The Court cabins its analysis to the federal waters of the Cook Inlet.*

Order at 18 n.87 (emphasis added). Unsatisfied with this outcome, UCIDA took another shot at it in remedy briefing. ECF No. 69 at 4-5. Once again, the Court declined: “To the extent that UCIDA Plaintiffs seek an order regarding NMFS’s authority to manage state waters, the Court expressly cabined its analysis to the federal waters of the Cook Inlet. The Court will not revise or expand that analysis in this Remedy Order.” Am. Remedy Order, ECF No. 103 at 7 n.23 (citation omitted). Twice the Court declined to address whether the definition of “fishery” requires NMFS to manage in State waters.

As in previous briefing, this “fishery” issue animates UCIDA’s primary objective—forcing NMFS to preempt management in State waters with the hope that UCIDA will obtain a larger allocation of salmon. *See UCIDA v. NMFS*, 807 F. App’x 690, 691 (9th Cir. 2020) (rejecting UCIDA’s appeal where the fishery issue was fully briefed); *Jensen v. Locke*, No. 3:08-CV-00286-TMB, 2009 WL 10674336, at *1 (D. Alaska Nov. 9, 2009). But there is no credible argument that this Court required NMFS to regulate fishing in State waters under the auspices of “fishery” in its remand orders. And if the Court declined to address the issue, NMFS could not possibly violate the remand orders. Pre-merits vacatur of Amendment 16, based on an argument that the Court never addressed, certainly does not meet the standard for a motion to enforce judgment.

Perhaps recognizing this history, UCIDA attempts to disguise its jurisdictional argument by casting it in terms of OY. Mot. at 14, 17. But this is less than forthcoming. It contends that OY must include State waters,⁴ but if the Court were to take the bait, UCIDA will surely argue

⁴ In so doing, UCIDA reads the term “capable of management as a unit” out of both the definition of “fishery” and “stock of fish.” 16 U.S.C. §§ 1802(13), 1802(42). NMFS reasonably

that NMFS must regulate those State waters to achieve OY. In fact, it already has. Mot. at 15 (“NMFS is statutorily required to prepare an FMP for the ‘fishery’ and ‘assess and specify ... optimum yield from [] the fishery.’”). Most revealing, UCIDA never explains how NMFS could define “fishery” to include State waters for purposes of OY and not preempt State management—a question UCIDA was repeatedly asked during Court-ordered collaboration, yet never answered. The parties will no doubt continue this legal dispute, but trying to backdoor federal preemption of State waters in the context of a motion to enforce judgment, when the Court explicitly declined to address this issue twice in the relevant orders, would be nothing less than legal error. This Court may ultimately be asked to decide whether the Magnuson Act silently allows NMFS to preempt State management without adherence to 16 U.S.C. § 1856(b) and over the objection of that State, but a future dispute is not grounds for pre-merits vacatur.

III. Amendment 16 should not be vacated.

For all the reasons provided above, the Court should deny UCIDA’s motion. But even if the Court were to find that NMFS did not comply with the judgment it should not vacate Amendment 16. A court’s decision to vacate an agency action is an equitable remedy. *Nat’l Wildlife Fed’n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995); *United States v. Texas*, 599 U.S. 670, 702 (2023) (Gorsuch, J., concurring) (describing vacatur as an “expansive equitable power”). Vacatur should not be granted as a matter of course but only in accordance with the traditional balancing of equitable considerations. *Cal. Cmty. Against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (per curiam) (court must first consider the seriousness of the agency’s errors and, second, the disruptive consequences that would result from vacatur). Thus, for example,

concluded that the “unique technical, ecological, and economic features of salmon fishing in the Cook Inlet EEZ” supported its establishment as a separate fishery. 89 Fed. Reg. at 34,743. But even if this decision were somehow faulty, it in no way conflicts with this Court’s judgment.

when a district court vacated an incidental take permit, the Ninth Circuit stayed its ruling pending appeal because the “substantial impacts of the district court’s vacatur on the Alaskan salmon fishing industry outweigh the speculative environmental threats posed by remanding without vacatur.” *Wild Fish Conservancy v. Quan*, No. 23-35322, 2023 WL 4167879, at *1 (9th Cir. June 21, 2023).

UCIDA cannot establish the serious errors part of the balancing test because 1) Amendment 16 is not before this Court and, 2) as explained *supra* Section II, NMFS fully complied with the Court’s judgment. As for the rest of the test, UCIDA does not even try to demonstrate disruptive consequences or that it will be injured without vacatur. Nor could it. Equity requires that Amendment 16 remain in place.

UCIDA calls Amendment 16 a “trainwreck,” but its motion offers no explanation for why Amendment 16’s management framework does not work or how its implementation would cause harm. Instead, UCIDA only briefly maintains that Amendment 16 is “worse than status quo” because it provides “very limited opportunity to fish in federal waters” and requires fishery participants to obtain a permit and monitoring equipment. Mot. at 1. Accordingly, UCIDA’s only equitable argument is that it should not have to comply with federal management requirements and the fishing limitations in Amendment 16 because the Amendment will not result in significant increases in EEZ harvests.⁵ *Id.* at 9.

First, it is factually untrue that Amendment 16 results in “very limited opportunity to fish in federal waters.” Mot. at 1. The proposed 2024 harvest specifications would set catch levels for

⁵ This argument reveals the true reason for the decade-plus of litigation: UCIDA is not really concerned with who manages the EEZ or ensuring the fishery includes all the required elements of federal management; rather, UCIDA wants to catch more fish, and hoped NMFS would be less inclined to follow scientific advice than the State.

all stocks other than coho salmon, which are experiencing elevated conservation risks and high uncertainty, that are higher than the recent 10-year average estimated Cook Inlet EEZ Area harvest under State management. 89 Fed. Reg. at 34727; 89 Fed. Reg. 25857, 25859 (April 12, 2024). Contrary to UCIDA’s representations, Amendment 16 offers significant and meaningful harvest opportunities equal to or above past management regimes. What UCIDA wants, however, is to fully exploit the MSY for sockeye salmon. Mot. at 5. And that cannot be provided (regardless of whether Amendment 16 is vacated) because of the serious overfishing consequences for less abundant stocks, which would conflict with the Magnuson Act’s clear mandate to prevent overfishing. 89 Fed. Reg. at 34,727; 16 U.S.C. § 1851(a)(1).

NMFS’s decision on the appropriate harvest levels was a scientific judgment that significantly increasing harvest would impermissibly allow overfishing. *See* 89 Fed. Reg. at 34,732. In considering Amendment 16, NMFS concluded that the Cook Inlet EEZ cannot support major increases in salmon harvests without a significant risk of overfishing weaker salmon stocks. *Id.*; Kurland Decl. ¶ 6. This fact was shown consistently in the stock assessments, including the 2024 stock assessment reviewed by the SSC that supported the 2024 harvest specifications under Amendment 16. *Id.*; 89 Fed. Reg. at 34,720; Ex. 2 at 13-19 (reviewing 2024 harvest specifications). The management measures adopted in Amendment 16 were adopted on the recommendation of the SSC—the statutorily mandated scientific advisory body—as the best scientific information available. 89 Fed. Reg. at 34,720 (“This SSC review constitutes the official peer review of scientific information used to manage the Cook Inlet EEZ Area salmon fishery for purposes of National Standard 1”). In reviewing the historic catch data NMFS determined that increased harvest levels would pose unacceptable risk to weaker stocks and conflict with the Magnuson Act’s directive to “prevent overfishing.” 89 Fed. Reg. at 34742

(“This method and the results were reviewed and approved by the SSC, which agreed that the Analysis and harvest specification process relies on the best scientific information available.”). In other words, the best scientific information establishes that NMFS cannot authorize the increase in fishing levels that UCIDA is seeking. Indeed, any significant increase in fishing levels would irreparably harm Cook Inlet salmon stocks and result in disruptive consequences. Kurland Decl. ¶ 11. UCIDA focuses on Kenai and Kasilof stocks as an example of the supposed “irrationality” of NMFS’s management. But Kenai and Kasilof sockeye salmon can be caught only in the EEZ along with salmon from other stocks that are much weaker. *Id.*; 89 Fed. Reg. at 34,729. And any significant increase in EEZ harvest is likely to result in overfishing a number of these less abundant stocks. Kurland Decl. ¶ 12.

Even if NMFS erred in setting OY or defining the “fishery” (which it did not), any such error could be easily adjusted during a regular remand and would not require vacatur of every component of the rule implementing Amendment 16. Recognizing this, UCIDA seeks to inflate its claims by alleging that it has identified “a foundational, pervasive error” and hopes that it can achieve vacatur of *every single regulation establishing the fishery*. Mot. at 17. But it simply does not follow that, for example, the regulations establishing recordkeeping and recording (50 C.F.R. § 679.115), should be vacated because the definition of OY is supposedly flawed. And vacating these provisions—which are required for the functioning of a federal fishery in the EEZ—is counterproductive and unwarranted. But UCIDA’s efforts fail at an even more fundamental level—even if NMFS made some error in defining terms used in the Amendment, at the end of the day there cannot be a significant increase in harvest levels. And UCIDA has not demonstrated otherwise.

In addition, such increases in EEZ harvest would cause other harms. NMFS received

public comment from Alaska Native tribes and northern Cook Inlet communities concerned that EEZ harvests that would be set under Amendment 16 would be too high. Kurland Decl. ¶ 13. If NMFS implemented a more aggressive harvest strategy, these communities could lose harvest opportunity because of the overfishing of weaker stocks that spawn in their rivers. *Id.* In addition, prey availability is one of the limiting factors in the status of the critically endangered Cook Inlet beluga whales. *Id.* ¶14. NMFS was required to complete consultation under the Endangered Species Act (“ESA”) when developing Amendment 16 and during that consultation determined that the levels of salmon harvests expected under Amendment 16 are not likely to adversely affect critically endangered Cook Inlet beluga whales. *Id.* ¶ 14. Any substantial increase in harvest, however, would require additional ESA consultation to determine whether those increases would jeopardize the continued existence of Cook Inlet beluga whales. *Id.*

Finally, vacating Amendment 16 would remove all federal regulations from the Cook Inlet EEZ Area. There would be no structure in place for NMFS to manage the fishery: no permits, no catch accounting, no way to calculate overfishing limits, and no way to enforce any fishing limitations. These are the basic, necessary components of establishing a new management regime in the EEZ. 86 Fed. Reg. at 34,727. Without these critical structural components, federal management of the EEZ is impossible. Thus, with this motion UCIDA would obstruct federal management and return management of the Cook Inlet EEZ over to the State. That is not what this Court ordered and is contrary to the judgment issued by this Court. NMFS should be allowed the opportunity to implement its management framework and bring federal management to the Cook Inlet EEZ Area.

CONCLUSION

For the foregoing reasons, the motion should be denied.

Dated: June 4, 2024

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon counsel of record using the CM/ECF system on June 4, 2024.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

UNITED COOK INLET DRIFT)
ASSOCIATION, *et al.*,)
)
 Plaintiffs,)
)
v.)
)
NATIONAL MARINE FISHERIES)
SERVICE, *et al.*,)
)
 Defendants.)

Case No. 3:21-cv-00255-JMK
**STATE OF ALASKA'S
OPPOSITION TO PLAINTIFF'S
MOTION TO ENFORCE**

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INTRODUCTION

UCIDA complains that with the Amendment 16 and its enacting regulations “the trainwreck is here.”¹ This type of hyperbole is nothing new. But Amendment 16 is obviously no trainwreck. The reality is that Amendment 16 fits within the confines of the Magnuson-Stevens Fishery Conservation and Management Act (which should be probably abbreviated as “FCMA” but for reasons of tradition is the “MSA”). UCIDA’s past challenges have concerned whether NMFS must produce an FMP for a federal Cook Inlet EEZ fishery. That is what we have here now. Amendment 16 meets the MSA’s National Standards by establishing an Optimum Yield (“OY”) that prevents overfishing all based on the best scientific information available. Far from a wreck, the train has arrived at the station on time. UCIDA just doesn’t like where it ended up.

Unhappy with Amendment 16’s federal management, UCIDA now seeks federal takeover of a state-managed fishery, an agency power apparently unlocked by five words “any fishing for such stocks” in the definition of “fishery.” The problem is UCIDA knows the plain language of the MSA prohibits the grand relief they seek. This Court need not look any further than Section 306:

Except as provided in subsection (b), nothing in [the Magnuson-Stevens Fishery Conservation and Management Act] shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.²

This is not the only obstacle to the Motion to Enforce that UCIDA knows of.

¹ Dkt. 133 at 1.

² 16 U.S.C. § 1856(a)(1).

UCIDA knows that National Standard One gives NMFS authority to set an optimum yield conservatively when necessary to prevent overfishing.³ UCIDA knows that National Standard Two requires the Agency use the best scientific information available in setting the yield and conservation and management measures.⁴ UCIDA knows that the best scientific data NMFS considered here — estimated historical harvests from 1999 to 2021 from State of Alaska data — is not “deferral.”⁵ UCIDA knows all this but rather than accept the fact that UCIDA got exactly what it asked for — a federal fishery managed by a federal FMP — it is simply rehashing its failed arguments in an attempt to hijack NMFS’s agency expertise and tilt the FMP in its fishing favor.⁶ Worse yet, UCIDA tries to recast this Court’s previous order as requiring a federal FMP for state waters, which this Court *expressly* did not find.⁷ This Court cannot follow UCIDA any further and must reject the Motion to Enforce to avoid further hijacking of the administrative process.

BACKGROUND

This Court ordered NMFS to produce what is now Amendment 16: an FMP for Cook Inlet’s federal waters that complies with the MSA’s National Standards. Reading

³ 16 U.S.C. § 1851(a)(1).

⁴ 16 U.S.C. § 1851(a)(2).

⁵ *Id.* See also Ex. 5 at 9.

⁶ Arguments that failed in *Jensen v. Locke*, No. 3:08-CV-00286-TMB, 2009 WL 10674336 (D. Alaska Nov. 9, 2009), failed in the Amendment 12 litigation before both the district court (3:13-cv-00104-TMB), and failed before the Ninth Circuit (*UCIDA v. NMFS*, 807 F. App’x 690 (9th Cir. 2020)).

⁷ See Dkt. 67, at 18 n. 87

UCIDA’s “Motion to Enforce” is like having bad déjà vu. UCIDA has failed not once, but twice to plainly state in a complaint or motion for summary judgment that the federal FMP must cover State waters. Yet UCIDA seeks to vacate Amendment 16 on these unraised grounds.

In its previous lawsuit regarding Amendment 12, UCIDA challenged NMFS’s decision to “approve changes to the Salmon FMP to eliminate *federal waters* in Cook Inlet from that FMP.”⁸ UCIDA argued that removing *federal waters* in Cook Inlet from the FMP violated the MSA, NEPA, and the APA.⁹ The Ninth Circuit agreed, holding that Amendment 12 was contrary to the MSA to the extent it removed Cook Inlet from the FMP.¹⁰ Far from holding that NMFS may implement an FMP that manages salmon in Alaska waters, the Ninth Circuit stated that in order to *delegate authority over the federal fishery to Alaska* “NMFS must do so expressly in an FMP.”¹¹

When UCIDA moved “to enforce the judgment” in that case challenging Amendment 12, UCIDA argued for the first time that the federal FMP must cover State waters.¹² This, of course, was nonsense, was not what UCIDA sought in its complaint, and was not what UCIDA argued when it appealed the order on summary judgment to the

⁸ UCIDA Complaint in 3:13-cv-00104-TMB ¶ 2 (emphasis added).

⁹ *United Cook Inlet Drift Ass’n v. Nat’l Marine Fisheries Serv.*, (UCIDA) 837 F.3d 1055, 1061 (9th Cir. 2016).

¹⁰ *Id.* at 1062.

¹¹ *UCIDA*, 837 F.3d at 1063 (citing 16 U.S.C. § 1856(a)(3)(B)).

¹² “Motion to Enforce Judgment” in 3:13-cv-00104-TMB, pp 21-24.

Ninth Circuit.¹³

After that case was closed, UCIDA filed the instant suit challenging Amendment 14. You would think that having missed its opportunity to litigate the spurious assertion that that a federal FMP must cover State waters, despite the fact that the plain language of the MSA explicitly forbids it, UCIDA would argue that issue front and center in its new complaint. You would be wrong. Instead, UCIDA again tried to hide the ball and did not mention its current argument that the FMP must cover State waters in either the Complaint or in its summary judgment brief.¹⁴ When this Court granted summary judgment on UCIDA’s challenge, the Court explicitly rejected that its order concerned NMFS’s authority in state waters. The Court disagreed with NMFS’s argument that UCIDA in fact sought NMFS’s regulation of “commercial salmon fishing in State waters,” stating instead that:

Federal Defendants allege that “the animating premise of UCIDA [Plaintiffs’] arguments is that NMFS was required to regulate commercial salmon fishing in State waters.” The Court does not read UCIDA Plaintiffs’ briefing as arguing for this result. Although briefly stating that the fishery at issue in this case should include federal and state waters, UCIDA Plaintiffs appear to agree that, for purposes of this litigation, “the issue here is whether NMFS’s decision to close all commercial salmon fishing in *federal* waters to serve the State’s political agenda was arbitrary, capricious, and contrary to law.” The Court does not address NMFS’s authority, if any, to manage state waters because it is not pertinent to its decision. The Court cabins its

¹³ See e.g. *UCIDA*, 837 F.3d at 1057. (“The issue for decision is whether NMFS can exempt a fishery under its authority that requires conservation and management from an FMP because the agency is content with State management.”)

¹⁴ Which is why this Court expressly stated that it did not believe UCIDA was making this argument. See Dkt. 67 at 18. N. 87.

analysis to the federal waters of the Cook Inlet.¹⁵

Amazingly, UCIDA again waited until the remedy stage to mention that it thought the Court had accidentally ordered the federal FMP to *illegally* cover State waters.¹⁶ But the Court again refused to expand its “cabined” analysis and did not grant that relief.¹⁷ All the Court’s remand order required NMFS implement an FMP amendment consistent with this Summary Judgment Order and in compliance with the MSA, the Administrative Procedures Act, and all other applicable laws “no later than May 1, 2024.”¹⁸

This remedial language is UCIDA’s purported basis for its Motion to Enforce. But the reasons why UCIDA claims NMFS has violated the Court’s Order neither appear in the Court’s Summary Judgment Order nor the MSA. Instead, this so-called Motion to Enforce upends the MSA, disregards NMFS’s scientific expertise, and negates Alaska’s sovereign right to manage its state waters. The Court should reject the Motion.

ARGUMENT

The MSA contains an explicit provision preserving state authority over state waters.¹⁹ Just as the State has argued before, the Court need look no further than the

¹⁵ Dkt. 67 at 18 n. 87 (citations omitted).

¹⁶ See Dkt. 69, Remedy Brief by Plaintiffs UCIDA and CIFF, at 7 (“produce an FMP amendment for Cook Inlet that covers the entire Cook Inlet salmon ‘fishery’ as defined by the Act.”) The State is being generous here, because UCIDA did not actually say “the federal FMP must cover State waters” and explain how 16 U.S.C. § 1856(a)(1) does not apply, but UCIDA is close enough to making the argument given how it has argued the definition of “fishery” somehow obviates the plain text passed by Congress.

¹⁷ Dkt. 103 at 7.

¹⁸ Dkt. 103 at 10.

¹⁹ 16 U.S.C. § 1856.

express language of MSA Section 306 to see that Congress has directly spoken to the question of how and when state management is preempted. Congress unambiguously stated that except as provided in Section 306(b), “nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.”²⁰ Despite this plain and unambiguous language, UCIDA asks this Court to vacate Amendment 16, effectively seeking a court order that the federal FMP must cover State waters in total disregard of the MSA.

I. Neither the MSA nor this Court’s order can be interpreted to require an FMP that manages state fisheries in state waters.

Federal courts must interpret statutes based on their whole, “presuming congressional intent to create a coherent regulatory scheme.”²¹ Further, courts must recognize when interpreting complex statutory schemes (like the MSA) that “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”²² In the particular context of federal preemption “the Court must be assume that ‘that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”²³

Congress created the MSA in 1976 to assert federal authority over “200 miles

²⁰ *Id.*

²¹ *Padash v. I.N.S.*, 358 F.3d 1161, 1170 (9th Cir. 2004).

²² *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 468 (2001).

²³ *Jensen v. Locke*, 2009 WL 10674466, at *3 (quoting *Wyeth v. Levine*, 129 S.Ct. 1187, 1194-95 (2009)).

from the coastline, [] and regulated foreign fishing in that area.”²⁴ However, the MSA also delineated where the new federal jurisdiction ended and the states retained jurisdiction began: “[s]tates retained jurisdiction over the first three miles from the coast, *id.* § 306(a) (codified as amended at 16 U.S.C. § 1856), and the federal government had jurisdiction over the next 197 miles, originally called the fishery conservation zone (“FCZ”) and later named the exclusive economic zone.”²⁵ The MSA further defined the “exclusive economic zone” as “the zone established by Proclamation Numbered 5030, dated March 10, 1983. For purposes of applying this chapter, *the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States.*”²⁶

The MSA took pains to clarify that nothing in the law diminished State authority over State waters. Section 306 is titled “State Jurisdiction” and Section 306(a) reads in relevant part as follows:

State Jurisdiction

(a) In general

(1) Except as provided in subsection (b), nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.

(2) For the purposes of this chapter, except as provided in subsection (b), the jurisdiction and authority of a State shall extend--

(A) to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States pursuant to the Geneva Convention on the Territorial Sea and Contiguous Zone or any successor convention to which the United States is a party;...²⁷

²⁴ *UCIDA*, 837 F.3d at 1058. (internal citations omitted).

²⁵ *Id.* (some internal citations omitted).

²⁶ 16 U.S.C. § 1802(11) (emphasis added).

²⁷ 16 U.S.C. § 1856.

A. The MSA definition of “fishery” does not give NMFS authority to regulate a fishery within state waters under an FMP.

UCIDA would have this Court ignore plain language and order NMFS to usurp the State’s management of fisheries in state waters based on the theory that the five words “any fishing for such stocks” in the definition of “fishery.”²⁸ The definition of “fishery” hardly presents the kind of clear statement required to preempt state authority. The MSA clearly states the opposite: nothing in the MSA diminishes state jurisdiction over state waters, only allowing federal preemption in situations not present here.²⁹

UCIDA misconstrues the MSA and ignores the plain and replete references to the divisions of federal and state authority over fisheries in the MSA. This Court acknowledged as much in its Order on Summary Judgment, explaining *UCIDA I* to determine “the Cook Inlet is a fishery within NMFS’s jurisdiction . . . pursuant to the Act” and therefore required an FMP to be developed.³⁰ In other words, despite UCIDA’s insistence to the Contrary, both this Court and the Ninth Circuit already explained the plain language jurisdictional boundaries of the MSA.³¹

Herein lies UCIDA’s statutory interpretation error. UCIDA reads the definition of “fishery” — meaning “one or more stocks which can be treated as a unit for purposes of conservation and management” and “any fishing for such stocks”— as dispositive. This interpretation reads out the crucial context; the definition of fishery does not dictate

²⁸ See e.g. Dkt 133 at 13.

²⁹ See 16 U.S.C. § 1856.

³⁰ Dkt. 67 at 17-18.

³¹ *UCIDA* at 1061-62.

the scope of an FMP as to state waters that NMFS is required to prepare as UCIDA contends. That scope is determined by Section 306. Section 306 makes clear that fisheries that fall outside state waters fall outside NMFS's authority, except in the limited circumstances where preemption is appropriate.

Section 306(a) of the MSA recognizes that states retain management jurisdiction over fishing in state waters and makes clear that: "nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries." Again, section 306(b) refers to the "jurisdiction or authority of a State" when delineating where constitutes State waters under the MSA. It is UCIDA, not the federal agency, using semantics to challenge Amendment 16, aiming to upend the MSA regulatory scheme and the State of Alaska's sovereign right to manage fishing in State waters.

Given this statutory preemption scheme, no court has ever found that the NMFS may usurp State management of fisheries in State waters without engaging in the Section 306(b) process simply because the target fish traverses federal waters at one point in its life cycle. UCIDA does not, and cannot, point to a single shred of support for its theory that anytime fish traverse federal waters to enter a State waters fishery that NMFS may usurp State management. Conversely, courts have regularly found, consistent with the plain language of the MSA, that States retain jurisdiction from the coast to the three-mile seaward boundary.³²

³² See *e.g. Davrod Corp. v. Coates*, 971 F.2d 778, 786 (1st Cir. 1992) ("the

And no court would determine that the power to upend a core exercise of state police powers — to regulate natural resources in in state waters — based on the five words “any fishing for such stocks.” Doing so would disrupt the MSA’s explicit preemption scheme — the proverbial elephant in a mousehole that the U.S. Supreme Court has oft-cautioned against.³³

UCIDA argues against these interpretative headwinds and claims instead that Amendment 16’s compliance with the jurisdictional boundaries produces “bizarre results.”³⁴ Yet again, these arguments manufacture problems that do not exist under the MSA. UCIDA is correct that NMFS assigns Cook Inlet salmon stocks into three tiers of Status Determination Criteria (“SDC”) — a requirement of National Standard One³⁵ —

Magnuson Act as originally framed confirmed state jurisdiction over fisheries within a State's internal waters and, for coastal states, out to the three-mile limit.”); *Conservation Council for Hawaii v. Nat'l Marine Fisheries Serv.*, 154 F. Supp. 3d 1006, 1014 (D. Haw. 2015) (“Under the Magnuson-Stevens Act, the federal government exercises ‘sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone... which extends from the seaward boundary of each coastal state to 200 miles offshore”); *City of Charleston v. A Fisherman's Best, Inc.*, 310 F.3d 155, 160 (4th Cir.2002) (The Magnuson-Stevens Act expressly preserves the jurisdiction of the states over fishery management within their boundaries”); *Chinatown Neighborhood Ass'n v. Harris*, 33 F. Supp. 3d 1085, 1102–03 (N.D. Cal. 2014), *aff'd*, 794 F.3d 1136 (9th Cir. 2015) (“States generally have authority over fishing within the boundaries of the state, which for most states extends three miles seaward from the coastline.”); *Massachusetts by Div. of Marine Fisheries v. Daley*, 170 F.3d 23, 25 (1st Cir. 1999) (“[T]he Magnuson-Stevens Act does not govern fishing in state waters, save for statutory exceptions not invoked in this case.”).

³³ *E.g.*, *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001).

³⁴ Dkt. 133 at 17.

³⁵ 50 CFR § 600.310(b)(ii); (e)(2).

“based on the level of information available for each stock or stock complex.”³⁶ Specifically, the SDC tiers use escapement goal data to inform whether or not the EEZ stocks are at risk of overfishing.³⁷ The stocks themselves, however, have separate definitions based on the where the species are harvested.³⁸ NMFS determined that “salmon stocks in the Cook Inlet EEZ can be treated as a unit for purposes of conservation and management because they all fall within the geographical management area under NMFS’s jurisdiction” and the best scientific information available supports that the EEZ has unique ecological, technical, and economic characteristics that make it manageable as a unit.³⁹ In other words, the stock definitions are consistent with how the MSA generally defines stocks: a species, subspecies, geographical grouping, or other category of fish capable of management as a unit.”⁴⁰

What UCIDA calls a “bizarre result” is complying with the requirements of National Standards 1 and 2.⁴¹ NMFS uses the available escapement goal data as “the best information available” to determine the overfishing status of stocks in the EEZ.⁴² The

³⁶ Ex. 4 at 51-56.

³⁷ *Id.*

³⁸ Ex. 4 at 49-50; Ex. 1 at 8.

³⁹ Ex. 1 at 8.

⁴⁰ 16 U.S.C. § 1802.

⁴¹ *Id.* at § 1851(a)(1)-(2).

⁴² *See* Ex. 5 8-9 (calling the State of Alaska’s management data the best scientific information available).

nature of anadromous species that requires such data inputs.⁴³ What is bizarre is UCIDA’s argument that this typical management mechanism — defining a stock based on where the stock spawns and using data about that spawning to inform overfishing determinations — somehow violates the MSA or this Court’s order that NMFS develop an FMP consistent with the MSA. The Court should not let UCIDA muddy the waters and must reject its Motion to Enforce.

B. This District Court has previously rejected a nearly identical argument because Section 306 is the only way to preempt state authority over state waters.

In 2009 a commercial fisherman sued the Secretary of Commerce and the Commissioner of the Alaska Department of Fish and Game arguing that Alaska’s resident only subsistence fishery, Alaska’s subsistence use priority, and their combined impact on commercial fisheries violated four of the MSA national standards.⁴⁴ The plaintiff in that case argued that Congress, in enacting the MSA, “implicitly preempted state management of salmon in Alaska.”⁴⁵ The plaintiff claimed, just as UCIDA does here, that “Congress intended the [MSA] to apply to salmon management in both state waters and the exclusive economic zone.”⁴⁶

The court concluded that in enacting the MSA, “Congress intended the states to

⁴³ *Washington Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1448 (9th Cir.1990) (“The concern with escapement is paramount, because escapement is a measure of how many fish may return to the rivers to spawn and be harvested there, which is a major purpose of the Magnuson Act.”).

⁴⁴ *Jensen v. Locke*, 2009 WL 10674336, at *1.

⁴⁵ *Id.*

⁴⁶ *Id.*

retain exclusive authority to regulate fishing within territorial and inland waters, absent satisfaction of the statutory preemption procedures set out in Section 1856(b).”⁴⁷ The court further explained that the MSA “provides for federal preemption of state regulation of territorial or internal waters only in limited circumstances where, after ‘notice and an opportunity for a hearing,’ the Secretary of Commerce finds that state action will ‘substantially and adversely affect’ the carrying out of a fishery management plan for a fishery ‘engaged in predominately within the exclusive economic zone and beyond such zone.’”⁴⁸

Beyond the plain language of the MSA, the district court reviewed the legislative history and found that it too supported the conclusion that states retain jurisdiction over their waters. The court explained:

The House Report noted that “Under United States law, the biological resources within the territorial sea of the United States (i.e., out to 3 miles) are the management responsibility of the adjacent several States of the Union. Whatever regulation of both fishermen and fish harvest, that occurs in this area is as deemed necessary and appropriate by each concerned State.” The House version of the Act stated that jurisdiction “may [only] be diminished with respect to any anadromous species ... if the Secretary of Commerce finds that a fishery management plan under this legislation applies to such species and that such State has taken any action, or omitted to take any action, the result of which will substantially and adversely affect the carrying out of the management plan.”⁴⁹

The court determined that “contemporaneous legislative history of the Magnuson-

⁴⁷ *Id.* at 10.

⁴⁸ *Id.* at 9. (citing 16 U.S.C. § 1856(b)(1)).

⁴⁹ *Id.* (quoting H. Rep. No. 94-445 at 29).

Stevens Act suggests that Congress did not intend to preempt state authority to regulate territorial and internal waters.”⁵⁰ This Court should come to the same conclusion and unambiguously hold that NMFS does not have authority to manage salmon in Alaska’s water absent a new act of Congress or through the codified MSA preemption procedures.

C. The MSA explicitly contemplates preemption of state authority over state waters but only in limited circumstances not present here.

The MSA’s preemption framework denies NMFS the authority to manage fisheries in state waters unless the Secretary follows the preemption procedures in Section 306(b) of the MSA. But nothing of the sort has happened in this case.

Under certain circumstances and pursuant to certain procedures, the Secretary of Commerce may notify the State of “his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.”⁵¹ And when that happens the State has rights, such as the right “to petition the Secretary for reinstatement of its authority over such fishery” and the right to a hearing on the issue.⁵²

The plain language of the MSA makes two things clear: first, none of the circumstances under which the Secretary may assert management authority over Alaska waters are present here (and UCIDA still does not argue that such circumstances are present); and, second, the Secretary has not attempted to notify the State of any intention

⁵⁰ *Id.*

⁵¹ 16 U.S.C. § 1856(b).

⁵² *Id.*

to assert jurisdiction over the State’s sovereign waters. As such, no authority exists for this Court to vacate Amendment 16 and hijack NMFS’s administrative process to produce an FMP in violation of federal law.

II. Amendment 16’s Optimum Yield does not defer the State; it is based on the best scientific information available and complies with the MSA.

UCIDA also contends that basing the OY range for the Cook Inlet EEZ fishery on salmon harvests in the EEZ from 1999 to 2021 violates the Court’s Orders and MSA.⁵³ This argument is a sleight of hand that picks and chooses portions of this Court’s prior order on a separate and wholly distinct FMP Amendment. NMFS here established a conservative OY based on the best available scientific information that prevents overfishing of distressed stocks in the Cook Inlet EEZ while giving the agency time to review and revise the historical data used.⁵⁴

Amendment 16’s OY is not a deferral to the State; it is fisheries management based on the best scientific information available at this time, exactly what the MSA requires. In the Proposed Rule, NMFS explained why the historical data used to calculate the OY range is the “the best scientific information available”⁵⁵ because all “existing data on harvests in the EEZ are established because management and catch reporting have never differentiated between State and EEZ waters.”⁵⁶ Then in the Stock Assessment and Fishery Evaluation, agency scientists reiterated after “thorough review” that the State’s

⁵³ UCIDA Mot. to Enforce at 8.

⁵⁴ Ex. 3 at 6-7, 15.

⁵⁵ Ex. 3 at 6.

⁵⁶ Ex. 3 at 4.

data and stock definitions were “based upon the best scientific information available.”⁵⁷

The Final Rule concluded the same: “[t]he best scientific information available regarding the appropriate harvest levels in this mixed stock fishery are currently estimates of historic catch in years of high and low abundance across stocks from 1999-2021.”⁵⁸

Further, UCIDA acts as if the Amendment 16 OY is a “deferral” to state management despite NMFS’s explicit acknowledgment that federal management of the EEZ fishery may produce different OYs based on federally collected data over time.

NMFS explained it “expects initial management of the Cook Inlet EEZ to be conservative

⁵⁷ Ex. 5 at 9.

⁵⁸ The Rule goes on to explain why in great detail: “As explained in the Analysis, the 1999–2021 time period was chosen due to the advent of the current abundance-based approach to management of salmon in Upper Cook Inlet. In addition, this time series represents the recent range of salmon productivity conditions that are representative of reasonably foreseeable future conditions, reflects a range of time when management measures both increased and decreased fishing opportunity in EEZ waters, and captures a range of different social and economic conditions within fishing communities. Furthermore, this period also reflects the time for which high quality and comparable data for nearly all fisheries and fishing communities throughout Cook Inlet are available. The OY range considers but does not include the 1980s because there was a different ecological regime in place in the North Pacific (highly productive for salmon stocks), seafood markets for salmon were significantly different (strong Asian demand and less competition from farmed salmon), and the regional population was significantly smaller. These factors all influence NMFS’s consideration of the greatest net benefit to the Nation, including consideration of food production and recreational opportunities and taking into account the protection of marine ecosystems. The harvest levels from 1999–2021 have resulted in numerous viable fisheries while preventing stocks from becoming overfished. While it may be possible to develop better information in the future as NMFS collects more data specific to the EEZ—and section 302(h)(5) of the Magnuson-Steven Act requires the Council to review OY on a continuing basis—at present, historic catch is the best scientific information available. Therefore, ranges of catch in years of high and low salmon abundance is an appropriate method to determine OY.” Ex. 1 at 14.

to account for the significant uncertainty and minimize the risk of overfishing.”⁵⁹

And NMFS vowed to review and revise the OY as the MSA charges.⁶⁰ After implementing Amendment 16, NMFS can begin “collecting the data needed to address some of these uncertainties.”⁶¹ It is therefore neither inexplicable nor contrary to the MSA to rely on this historical data from the State to calculate OY at this time in the EEZ fishery.

UCIDA’s objection to Amendment 16’s OY asks this Court to rebalance the goals at play in National Standard One, which the Court should not do.⁶² NMFS’s decision to take a conservative approach based on the only existing data in the fishery for Amendment 16’s initial OY range does not violate the MSA. The agency has full discretion to choose which data on which to rely in producing an FMP.⁶³ National Standard One does not dispense unlimited fishing opportunity; it mandates that FMPs “shall prevent overfishing,” while also seeking to achieve an optimum yield.⁶⁴

Accordingly, NMFS is not required to demonstrate that it has chosen “the least restrictive

⁵⁹ *Id.*

⁶⁰ Ex. 4 at 49.

⁶¹ *Id.*

⁶² *Washington Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1447-48 (9th Cir.1990) (“[D]eference is particularly appropriate where the resource to be managed and the act, regulations, and case law are complicated, thus calling for agency expertise.” (citations omitted)).

⁶³ *Trawler Diane Marie, Inc. v. Brown*, 918 F. Supp. 921, 930 (E.D.N.C. 1995), *aff’d sub nom. Trawler Diane Marie, Inc. v. Kantor*, 91 F.3d 134 (4th Cir. 1996)

⁶⁴ *See e.g. Parravano v. Babbitt*, 837 F. Supp. 1034, 1044-45 (N.D. Cal. 1993).

alternative available for managing the resource”;⁶⁵ when NMFS concludes that “reducing the overall harvest” in a fishery is necessary to prevent overfishing, it has acted consistent with National Standard One.⁶⁶ UCIDA’s preferred result would “construe the Magnuson Act to tie the Secretary's hands and prevent [her] from conserving a given species of fish whenever its very nature prevents the collection of complete scientific information.”⁶⁷ That is antithetical to the MSA’s broader purpose to prevent overfishing with conservation and management measures.⁶⁸ This Court cannot invalidate Amendment 16 just because UCIDA wishes the Cook Inlet EEZ provided more economic opportunity. Indeed, nothing in the MSA “guarantees [a particular group] a directed ... fishery.”⁶⁹

UCIDA’s other challenges to Amendment 16’s OY further manipulate the Court’s prior order to create requirements contrary to the MSA. NMFS properly defined the OY range in Amendment 16 based on the maximum sustained yield and at the level of the Cook Inlet EEZ fishery. NMFS explained how “MSY must be defined at the stock or stock complex level without reference to management jurisdiction,” but OY is a “a long term average amount of desired yield from a particular stock or fishery and is generally set below MSY.”⁷⁰ Accordingly, “[u]nder Amendment 16, OY would be defined at the

⁶⁵ *Id.* (quoting *Alaska Factor Trawler Ass’n v. Baldrige*, 831 F.2d 1456, 1460 (9th Cir. 1987)).

⁶⁶ *Id.*

⁶⁷ *Nat’l Fisheries Inst., Inc. v. Mosbacher*, 732 F. Supp. 210, 220 (D.D.C. 1990).

⁶⁸ *Id.*

⁶⁹ *Pac. Coast Fed’n of Fishermen’s Ass’n v. Blank*, 693 F.3d 1084, 1093 (9th Cir. 2012) (quoting *Fishermen’s Finest, Inc. v. Locke*, 593 F.3d 886, 896 (9th Cir.2010)).

⁷⁰ Ex. 3 at 6.

EEZ fishery level to both account for the interactions between salmon stocks in the ecosystem and provide Federal managers with a target that is within their control to achieve.”⁷¹ This explanation and analysis demonstrates that NMFS did not rely on the State to “achieve any management targets” in compliance with the Court’s prior order.⁷²

Ultimately, NMFS balanced National Standard One’s ambition to produce an OY in the fishery with its prohibition against overfishing.⁷³ Amendment 16’s OY uses historical data of harvests from 1999-2021 to ensure that harvests in the EEZ stay “at these levels have prevented overfishing and maintained a viable EEZ fishery while account[ing] for harvest of Cook Inlet salmon stocks in all other fisheries, weak stock management considerations, and management uncertainty . . . [as well as] the varying relative abundance of salmon stocks each year.”⁷⁴ UCIDA cannot cast off the agency’s consideration and analysis of the best scientific information available; as this Court has already recognized the agency is best position to evaluate scientific information to

⁷¹ Ex. 3 at 6.

⁷² Dkt. 67 at 28.

⁷³ *Washington Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1448 (9th Cir.1990) (“The Magnuson Act was concerned, among other things, with overfishing and the inadequacy of fishery management and conservation measures.”).

⁷⁴ Ex. 4 at 49. *See also* Ex. 1 at 14 (“The harvest levels from 1999–2021 have resulted in numerous viable fisheries while preventing stocks from becoming overfished. While it may be possible to develop better information in the future as NMFS collects more data specific to the EEZ—and section 302(h)(5) of the Magnuson-Steven Act requires the Council to review OY on a continuing basis—at present, historic catch is the best scientific information available. Therefore, ranges of catch in years of high and low salmon abundance is an appropriate method to determine OY.”).

comply with the MSA.⁷⁵ The Motion to Enforce cannot invalidate the agency's determination based on its scientific expertise.

CONCLUSION

This Court must reject UCIDA's attempts to vacate a legally promulgated FMP that does exactly what it had previously ordered: In Amendment 16, NMFS produced a FMP that establishes a federal Cook Inlet EEZ Fishery that is compliant with the MSA, APA, the federal Constitution, and all other applicable laws.

DATED: June 4, 2024.

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⁷⁵ Dkt. 103, Amended Remedy Order at 2 (“The Court lacks the expertise and scientific information to evaluate whether UCIDA Plaintiffs' proposed interim measures further the goals of the Magnuson-Stevens Act. The Court also has no means with which to receive information and adjust its interim measures based on salmon run strength.”) *See also Trout Unlimited v. Lohn*, 559 F.3d 946, 959 (9th Cir. 2009) (“NMFS is entitled to decide between conflicting scientific evidence”); *Washington Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1447-48 (9th Cir.1990).

CERTIFICATE OF SERVICE

I certify that the foregoing **State of Alaska's Opposition to Plaintiff's Motion to Enforce** was served electronically on all parties using the CM/ECF system.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT
ASSOCIATION and COOK INLET
FISHERMEN'S FUND,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE; NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION;
GINA RAIMONDO, in her official capacity
as the United States Secretary of Commerce;
JANET COIT, in her official capacity as
Assistant Administrator, National Oceanic
and Atmospheric Administration; and JON
KURLAND, in his official capacity as NMFS
Alaska Region Administrator,

Defendants.

Civil Action No.: _____

**COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTIVE
RELIEF, AND PETITION FOR
REVIEW (42 U.S.C. § 4332; 16 U.S.C.
§§ 1801-1891d; 5 U.S.C. §§ 553, 701-
706)**

COMPLAINT AND PETITION FOR REVIEW

United Cook Inlet Drift Association, et al. v. NMFS, et al.

INTRODUCTION

1. Plaintiffs have a related action pending in *United Cook Inlet Drift Association, et al., v. National Marine Fisheries Service, et. al.*, No. 3:21-cv-00255-JMK.

Plaintiffs respectfully request that this Court consolidate this action, pursuant to Federal Rule of Civil Procedure 42, with Plaintiffs' pending case because the actions involve common questions of law and fact.

2. This case is the most recent chapter in a more-than-a-decade-long attempt by Plaintiffs to get Federal Defendants to stop shirking their duty to prepare a lawful Fishery Management Plan ("FMP") amendment for the Cook Inlet salmon fishery. Although Plaintiffs have repeatedly prevailed in this Court, Federal Defendants have continued to ignore their statutory duties in favor of deferring to the State of Alaska. At some point, enough is enough. This litigation has past that point.

3. As discussed more fully below, like its predecessors, Amendments 12 and 14, Amendment 16 to the FMP and its implementing regulations are arbitrary, capricious, and contrary to the Magnuson-Stevens Fishery Conservation and Management Act (the "MSA" or "Magnuson-Stevens Act"), 16 U.S.C. §§ 1801-1891d; the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*; and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, 701-706. In Amendment 16, the National Marine Fisheries Service ("NMFS") has, once again, found another way to try and continue to defer to Alaska's historic management practices, even as commercial harvests continue to dwindle. For the reasons discussed below, Plaintiffs respectfully request that

COMPLAINT AND PETITION FOR REVIEW

United Cook Inlet Drift Association, et al. v. NMFS, et al.

this Court vacate the decision approving Amendment 16 and its implementing regulations. Plaintiffs seek an order requiring NMFS to comply with the MSA and develop an appropriate FMP that covers the “fishery.” Plaintiffs request that the Court declare that Amendment 16 and its underlying implementing regulations and NMFS’s NEPA Finding of No Significant Impact (“FONSI”) are arbitrary, capricious, and an abuse of discretion; not in accordance with law; and in excess of statutory jurisdiction, authority, or limitations. Plaintiffs further seek an order vacating Amendment 16 and its underlying implementing regulations and the FONSI, and remanding to Defendants under the prescriptive supervision of this Court as set forth in the Request for Relief below.

PARTIES

Plaintiffs

4. Plaintiff United Cook Inlet Drift Association (“UCIDA”) is a corporation in good standing registered under the laws of the State of Alaska. UCIDA represents the economic, social, and political interests of drift gillnet fishermen and their families in Cook Inlet, Alaska. UCIDA currently has approximately 200 members who hold limited-access salmon driftnet fishing permits, issued by the State of Alaska, in Cook Inlet. UCIDA membership ranges across 27 different states and one foreign country.

5. UCIDA’s members make their living by commercial fishing. UCIDA’s members hold State of Alaska limited-entry permits (meaning additional permits can no longer be issued and are fully allocated), which authorize them to catch all five species of salmon: sockeye, coho, chinook, chum, and pink.

COMPLAINT AND PETITION FOR REVIEW

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6. Drift gillnet boats are small-scale fishing operations, typically crewed by one to three persons. Each fishing operation represents a substantial investment in the boat, gear, and the permit itself. Each boat is generally allowed to deploy a single 900-foot-long gillnet. The gillnet is suspended in the water column by floats (called “corks”) as the boat drifts with the current—hence the name “drift gillnet.” After the gillnet is allowed to “soak” in the water for a length of time (as the boat and net drift with the current), the gear is hauled in, and the fish are removed and placed on ice in the boat’s hold. Those fish are then transported to, and offloaded at, one of Cook Inlet’s local seafood processors in fishing communities such as Kenai, Kasilof, Ninilchik, or Homer. After processing, these salmon are delivered throughout the United States and around the world.

7. In addition to permit holders, UCIDA has approximately 30 associate members, including fish processors, gear suppliers, crew members, and other interested members of the community.

8. UCIDA’s mission is to promote public policy that facilitates the science-based and orderly harvest of Cook Inlet salmon in a manner that is economically and ecologically sustainable and that protects commercial salmon fishing in Cook Inlet as a viable way of life. UCIDA and its members are committed to the protection of the environment of Cook Inlet, and to ensuring that its marine resources are both managed and conserved to enhance the health and productivity of the ecosystem. To that end, UCIDA has advocated in state and federal forums for management of these salmon

stocks in a manner consistent with the goals and objectives of the MSA, including management consistent with the MSA's Maximum Sustainable Yield ("MSY") principles (MSY is defined at 50 C.F.R. § 600.310(e)(1)(i)(A) as the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological, environmental conditions). The relief UCIDA seeks in this lawsuit is germane to its organizational purpose.

9. Plaintiff Cook Inlet Fishermen's Fund ("CIFF") is a non-profit corporation registered under the laws of the State of Alaska. CIFF has 446 members, including commercial fishermen of all gear types, seafood processors, and community members. The majority of CIFF's members are from Alaska, but CIFF also has members from 21 other states.

10. CIFF's mission is to advocate on behalf of all commercial fishermen of Cook Inlet and for the coastal community more generally. CIFF's members and volunteers are fueled by the desire to save the commercial fishing industry in Cook Inlet as well as all of Alaska. The relief CIFF seeks in this case is germane to its organizational purpose.

11. UCIDA and CIFF (collectively, "Plaintiffs"), directly or through their members, fully participated, to the limited extent allowed by NMFS and the North Pacific Fishery Management Council, in the proceedings predating the decisions challenged in this lawsuit. Plaintiffs submitted detailed written comments and testimony on

Amendment 16 and its implementing regulations and the accompanying draft environmental assessment (“EA”).

12. Plaintiffs have standing to bring this action because their members are directly and adversely impacted by Amendment 16 and its implementing regulations, which improperly defer to the State of Alaska. Plaintiffs and their members are also adversely impacted by Defendants’ failure to comply with the procedural requirements of NEPA and the MSA. The challenged agency decisions are final and ripe for review by this Court.

Defendants

13. NMFS is an agency of the National Oceanographic and Atmospheric Administration (“NOAA”), U.S. Department of Commerce. NMFS is sometimes referred to as “NOAA Fisheries.” Among its duties, NMFS is responsible for managing commercial marine fisheries to ensure sustainable harvests that provide the greatest overall benefit to the nation pursuant to the MSA.

14. Defendant Gina Raimondo is the Secretary of the U.S. Department of Commerce and is sued in her official capacity. Secretary Raimondo directs all business of the Department of Commerce, including NOAA and its agency, NMFS. Through these agencies, Secretary Raimondo is ultimately responsible for the approval of Amendment 16 and its implementing regulations, and the EA and corresponding FONSI, and is further responsible for the Department of Commerce’s compliance with federal law, including NEPA, the MSA, and the APA.

15. Defendant Janet Coit is the Assistant Administrator for NOAA Fisheries and is sued in her official capacity. The U.S. Secretary of Commerce (“Secretary of Commerce” or “Secretary”) has delegated responsibility to the NOAA Administrator to ensure compliance with NEPA, the MSA, and the APA, and to promote effective management and stewardship of the nation’s fisheries resources and assets to ensure sustainable economic opportunities. The NOAA Administrator, in turn, has subdelegated this responsibility to NMFS.

16. Defendant Jon Kurland is the Administrator of the NMFS Alaska Region and is sued in his official capacity.

JURISDICTION AND VENUE

17. This Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 701-706 (APA), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory judgments), 28 U.S.C. § 2202 (injunctive relief), and 16 U.S.C. §§ 1855(f) and 1861(d) (MSA).

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

19. Plaintiffs have exhausted all administrative remedies.

20. Venue is properly vested in this Court under 28 U.S.C. § 1391 because Plaintiffs’ principal place of business is in this district, and a substantial part of the acts or omissions giving rise to this controversy occurred in this district.

STATUTORY FRAMEWORK

The Magnuson-Stevens Fishery Conservation and Management Act

21. The MSA is the primary domestic legislation governing management of federal fisheries. 16 U.S.C. §§ 1801-1891d.

22. The MSA created eight regional fishery management councils that are primarily charged with preparing FMPs and plan amendments for each managed federal fishery. *Id.* § 1852(a)(1).

23. The MSA requires an FMP for each fishery under the regional council's jurisdiction "that requires conservation and management." *Id.* § 1852(h)(1). The FMP is the foundational document for management of each fishery and provides the framework for ensuring that fisheries are managed in a manner consistent with the requirements of the MSA and its 10 National Standards.

24. The MSA's purpose is to put these national fishery resources under "sound management" and "to realize the full potential of the Nation's fishery resources." *Id.* § 1801(a)(5)-(6). This includes both conservation measures to prevent overfishing, as well as a "national program for the development of fisheries which are underutilized or not utilized by the United States fishing industry." *Id.* § 1801(a)(7).

25. The MSA gives special attention to anadromous species such as salmon. Indeed, the MSA's stated purpose is "to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the *anadromous species . . .* of the United States." *Id.* § 1801(b)(1) (emphasis added).

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26. The Council manages fisheries that fall under its authority. Prior FMPs developed by the Council govern the management of salmon fisheries, including but not limited to the salmon fisheries in which Plaintiffs' members participate.

27. The authority of a state to manage fisheries in the exclusive economic zone ("EEZ"), beyond the state's territorial waters (three miles for purposes of MSA), is constrained by the MSA. The state may regulate all fishing activities in the adjacent portions of the EEZ only to the extent that the applicable FMP delegates such authority. *Id.* § 1856(a)(3). Absent such delegation through an FMP, the state may only regulate vessels registered under the laws of that state in the EEZ.

28. Fishery management councils submit proposed FMPs and FMP amendments to the Secretary of Commerce for review and approval. *Id.* §§ 1853, 1854. All FMPs, and FMP amendments, must be consistent with the requirements of the MSA, including the 10 National Standards set forth in the MSA.

29. The MSA's National Standards guide all FMPs and MSA regulations. For example, National Standard 1 requires FMPs to prevent overfishing while achieving the OY from each fishery for the U.S. fishing industry. *Id.* § 1851(a)(1). National Standard 2 requires that all conservation measures be based on the best scientific information available. *Id.* § 1851(a)(2). National Standard 3 provides that fisheries should be managed as a unit throughout their range, where practicable. *Id.* § 1851(a)(3). National Standard 4 requires that any allocation of fishing rights be "fair and equitable" to fishermen and "shall not discriminate between residents of different States." *Id.*

§ 1851(a)(4). National Standard 7 requires conservation measures to, where practicable, minimize costs and unnecessary duplication. *Id.* § 1851(a)(7). National Standard 8 requires conservation measures to take into account the importance of the fishery resources to fishing communities, to provide for the sustained participation of, and to minimize impacts on, such communities. *Id.* § 1851(a)(8). National Standard 10 requires conservation measures to promote the safety of human life at sea. *Id.* § 1851(a)(10).

30. The Secretary of Commerce, acting through NMFS, must disapprove an FMP amendment to the extent it is inconsistent with provisions of the MSA or any other applicable law.

31. The Secretary of Commerce must also approve all regulations that implement an FMP. *Id.* § 1854(b). The Secretary must give notice of proposed rulemaking and provide an opportunity for public comment on proposed regulations. *Id.*

32. Any fishery management regulation implementing an FMP must be consistent with the MSA, including the 10 National Standards for fishery management and conservation. *Id.* §§ 1854(b), 1851(a).

The National Environmental Policy Act

33. Approvals of FMPs, FMP amendments, and implementing regulations are subject to NEPA requirements, 42 U.S.C. § 4321 *et seq.*; 16 U.S.C. § 1854(i).

34. Congress established NEPA as “our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a) (1978) (amended July 16, 2020). NEPA and its implementing regulations require that federal agencies, including NMFS, must prepare an

environmental impact statement (“EIS”) for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); *see* 40 C.F.R. § 1501.3–.6 (2020). The purpose of NEPA is to ensure that federal decision-making is fully and publicly informed through a reasonably thorough and thoughtful analysis of the probable environmental impacts resulting from a proposed federal action, and through identification and analysis of a reasonable range of alternative actions, including the no-action alternative. In enacting NEPA, Congress sought to ensure that federal agencies take a hard look at the environmental consequences of any proposed action and required agencies to comply with NEPA “to the fullest extent possible.” 42 U.S.C. § 4332.

35. NEPA requires that a federal agency proposing a major federal action with significant environmental effects prepare a detailed statement, which must include the environmental impacts of and alternatives to the proposed action. *Id.* § 4332(2)(C)(i)-(iii). This detailed written statement is an EIS. *See* 40 C.F.R. § 1508.1(j) (2020).

36. To determine whether an EIS is necessary, an agency may first prepare an EA. *See id.* §§ 1501.5(a)–(c), 1508.1(h) (2020). An EA is a “concise public document prepared by a Federal agency to aid an agency’s compliance with the Act and support its determination of whether to prepare an [EIS] or a [FONSI].” *Id.* § 1508.1(h) (2020). An EA must contain sufficient information and analysis to determine whether the proposed action is likely to have significant impacts, thus requiring preparation of an EIS. *See id.* §§ 1501.5(a)–(c), 1508.1(h) (2020). An EA must consider a reasonable range of

alternatives and must include a reasonably thorough discussion of the direct, indirect, and cumulative impacts of the proposed alternative. *See* § 1501.5(c)(2) (2020).

37. If an agency concludes, based on the EA, that an EIS is not required, it must prepare a FONSI, which explains the agency’s reasons for its decision. *Id.* §§ 1501.6(a)–(c), 1508.1(l) (2020).

38. The analysis of alternatives should present the environmental impacts of the proposed action and the alternatives based on the information and analysis presented. *Id.* § 1502.14 (2020). The analysis must evaluate reasonable alternatives to the proposed action, identify a “no action” alternative, discuss in detail each alternative considered, and discuss the reasons alternatives were eliminated from the detailed study. *Id.* § 1502.14(a)–(f) (2020). These alternative analysis requirements also apply to EAs. *See* 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1501.5(c)(2) (2020).

The Administrative Procedure Act

39. The APA provides for judicial review of final agency action by persons “aggrieved” by such action. 5 U.S.C. § 702. The actions reviewable under the APA include any “preliminary, procedural, or intermediate agency action or ruling . . . on the review of the final agency action.” *Id.* § 704.

40. The APA also provides standards applicable when a federal agency proposes and adopts final rules and regulations. *Id.* §§ 553, 551(4). Specifically, agencies must provide “[g]eneral notice” of any “proposed rule making” to the public through publication in the Federal Register. That notice must include: “(1) a statement of

the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” *Id.* § 553(b). An agency’s responsibility to consider public comments on a proposed rulemaking is required by 5 U.S.C. § 553(c).

41. Under the APA, a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A). A reviewing court shall also “hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law.” *Id.* § 706(2)(D).

STATEMENT OF FACTS

The Cook Inlet Salmon Fishery

42. Upper Cook Inlet is home to five species of anadromous salmon—chinook, sockeye, coho, pink, and chum—as well as steelhead trout. These are some of the largest natural, wild returns of salmon in the nation. And unlike many of our nation’s fisheries that are fully utilized (or even overutilized), Cook Inlet salmon stocks are largely underutilized. For example, in 2014, an estimated 20 million pink salmon returned to Cook Inlet, but state restrictions limited harvest to 642,754 fish, with *15 million pink salmon not utilized* and not needed for biological purposes. This happened again in 2020.

43. The Kenai River sockeye runs in Cook Inlet, in particular, are world-class, with the potential to produce millions of adult sockeye annually. These sockeye are also

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genetically unique, with an unusual variety in the age and large size of adult returning stocks.

44. The commercial fishery on these Cook Inlet anadromous stocks dates back to at least 1882, utilizing all manner of gear types, from fishwheels to driftnets. The federal government expressly recognized the national importance of maintaining this commercial fishery in 1952 when it negotiated by treaty to exclude Cook Inlet from an international treaty banning most net fishing activities outside of state waters.

45. Commercial fishing in Upper Cook Inlet is currently limited to two gear types (set and drift gillnets) and occurs on all five Cook Inlet anadromous salmon stocks. When they are permitted to fish, eastside set net operations deploy gillnets from fixed locations near shore, anchored to the bottom, and commonly extending in sections as far as one and a half miles offshore. Westside set net operations are commonly extended up to five miles off shore. Northern District set net operations commonly extend up to 10 miles off the northern inlet shores. Drift gillnets, by contrast, are deployed from small vessels.

46. The majority of commercial fishing harvest in Upper Cook Inlet is sockeye. The majority of the commercially caught Cook Inlet salmon find their way to grocery stores and restaurants in the United States. Cook Inlet salmon are an important and healthy part of the nation's food supply.

47. The Cook Inlet salmon fishery is highly competitive and requires conservation and management.

The 1990 Salmon FMP

48. The last major revision to the Salmon FMP was in 1990. The 1990 Salmon FMP has two management areas: the East Area and the West Area. The border between the two areas is the longitude of Cape Suckling.

49. The 1990 Salmon FMP addressed commercial salmon fishing in the East and West Areas differently. In the East Area (which consists primarily of coastal waters off southeast Alaska), the 1990 FMP set forth the Council's management goals and objectives. The 1990 FMP delegated management of East Area fisheries, consistent with the Council's management goals and objectives, to the State of Alaska.

50. In the West Area, by contrast, the 1990 Salmon FMP provided little guidance on how to manage salmon. Instead, the 1990 Salmon FMP closed the vast majority of the West Area to commercial fishing, consistent with prohibitions in the International Convention for the High Seas Fishery of the North Pacific Ocean ("High Seas Convention"). Also consistent with the High Seas Convention, the 1990 FMP exempted from this closure three historic net fisheries: Cook Inlet, Prince William Sound, and the Alaska Peninsula area. The EEZ portion of Cook Inlet open to fishing is a contiguous area of approximately 1,100 square miles. The 1990 Salmon FMP did not expressly delegate management to the State of Alaska or set clear management goals or objectives for the West Area.

51. The High Seas Convention was repealed and replaced in 1992 by the North Pacific Anadromous Stock Act of 1992, which contained no provisions for management of the three historic net fisheries areas. Despite the change in the law, the Council took no action for nearly 20 years to make changes to the FMP to clarify for the West Area how it was to be managed.

The State of Alaska’s Management of the Cook Inlet Salmon Fishery

52. The State of Alaska has managed the salmon fisheries in Alaska since 1960. As a condition of statehood, Alaska was allowed to manage the Cook Inlet salmon fishery provided that “the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad *national interest*.” Alaska Statehood Act, Pub. L. No. 85-508 § 6(e), 72 Stat. 339, 341 (1958) (emphasis added). The State of Alaska sets its fishery management policies through the Alaska State Board of Fish and implements those management policies through the Alaska Department of Fish and Game.

53. The State of Alaska manages salmon in Cook Inlet based on a series of state management plans without federal oversight. Generally speaking, these management plans set escapement goals for salmon. An escapement goal, in this context, is the number of salmon that the state has determined is necessary or desirable to “escape” past fishing sectors and, thereby, provides spawning stock for successive generations or meets other needs.

54. The state management plans also include allocation decisions. Allocation decisions are generally made by setting the number of fishing days, including time and area, allowed for a particular gear type during the season.

55. In season, the state manages these fisheries based on assessments of run strength, as measured against desired escapement goals. In theory, if the run strength is estimated to be larger than normal, then more fishing days are authorized to avoid exceeding maximum escapement targets. If run strengths are estimated to be smaller than normal, then fewer fishing days are authorized to avoid dropping below minimum escapement targets. These run strength assessments are based on preseason forecasts, test boat data, and other factors.

56. Setting science-based escapement goals for salmon is essential to a well-managed fishery. If an escapement goal is set too low, then the fishery gets overfished and run strengths diminish over time. If an escapement goal is set too high, then the harvestable surplus is lost. Where too many salmon escape and spawn, the fitness of that run may also be diminished in future years due to density-dependent effects and other biological and ecological factors. That is especially the case for sockeye, where rearing space and food supply in the lakes and rivers are a limiting factor. Over-escapement events can reduce run strengths for two or three successive years.

57. The state has two basic kinds of escapement goals: biological and sustainable. Biological escapement goals are intended to achieve the MSY (human consumption for that fishery as a food resource). Sustainable escapement goals, by

contrast, are based on historical data showing that a certain harvest level can be sustained. In Upper Cook Inlet, only one salmon stock has a biological escapement goal. This goal has not been peer reviewed or set for MSY as required by MSA and National Standard 1.

58. Beginning in 2000, the state imposed a “Sustainable Salmon Fisheries Policy” (“SSFP”) intended to ensure the long-term viability of salmon runs in Alaska.

59. The state has affirmatively stated that it is under no obligation to comply with the MSA in making its fishery management decisions, and it has said it “would not accept a delegation of management authority for the Cook Inlet EEZ salmon fishery under the conditions that would be necessary to comply with the MSA,” i.e., that it will not manage fishing in state waters consistent with the MSA. Indeed, the state’s record has shown that it has not managed fishing, especially the fishing in Cook Inlet, in a manner consistent with the MSA.

60. In 1990, when the last Salmon FMP was created, the state typically managed the salmon fishing sectors in accordance with the MSA. Beginning in 1996, the state began departing from MSA management. And, when the state subsequently adopted the SSFP, it no longer made any attempt to manage fishing in Cook Inlet under MSA standards.

61. The Cook Inlet salmon fishery was historically one of the nation’s most productive salmon fisheries. In the 1980s and 1990s, the sockeye salmon harvest alone ranged consistently from four to nine million sockeye per year. During the last two decades, the commercial harvest in Cook Inlet has steadily—and more recently,

precipitously—declined. The 10-year average annual commercial sockeye catch for 2014–2023—based on the preliminary data released by the State of Alaska, Department of Fish and Game for 2023—was just 1.65 million sockeye. A significant portion of this reduction in catch has been converted by the state’s management to over-escapement (surplus to optimum yield “OY”) into the Upper Cook Inlet river systems. For example, just in 2023, the total sockeye harvest (1.6 million sockeye) was approximately equal to or less than the over-escapement in just two rivers—the Kenai and Kasilof Rivers—which were overescaped by 1.65 million sockeye. If the commercial fleet had been permitted to catch this over-escapement, their total catch for the season would have been over 3 million sockeye, below the low end of the historical average but a significant improvement over the status quo. Instead, these fish were wasted due to the state’s failure to manage in accordance with the upper bound of its escapement goals, which resulted in lost yield in 2023 and jeopardized yield in future years.

62. Accompanying the last two decades of historically low salmon harvest is the state’s decision to gradually restrict the commercial fishery year after year, with most openings now being severely geographically limited to only a narrow band, preventing the fishery from targeting areas where salmon congregate. At the same time, the state has continued to increase “escapement” levels to record high (and likely unsustainable) levels in order to guarantee more than enough fish for the sport fishers to catch and to stock the

state resident-only personal use fishery with hundreds of thousands of fish.¹ Even with inflated escapement targets, the restrictions on commercial fishing are so significant that the state still regularly exceeds those escapement goals by a wide margin.

63. The state restrictions have resulted in severe financial hardship to the U.S. citizens participating in the Cook Inlet commercial salmon fishery, as well as the businesses that rely on the commercial harvest. Twenty years ago, Cook Inlet had 23 major salmon processors willing to purchase and prepare salmon for the wholesale and retail markets, including both international markets and local food stores throughout the U.S. Presently, there are only two major salmon processors left in Cook Inlet.

64. Importantly, these state restrictions are based not on science or sound principles of species conservation and fishery management, but rather on other “allocative purposes,” like “mak[ing] sport fisheries more enjoyable.” In fact, as a result of the state’s over-escapement approach, the increasing *sport* fishery (and the resident-only personal use fishery) has harmed Cook Inlet salmon by causing “serious in-river habitat degradation problems such as hydrocarbon pollution and turbidity levels that exceed clean water standards, and miles of trampled riverbanks.” Millions of salmon go unharvested every year while the commercial fleet is sidelined, to the detriment of Plaintiffs’ members, local fishing communities, and the national interest in this important food source as expressed by the Magnuson-Stevens Act.

¹ For example, the in-river escapement goal for sockeye in the 1980s and early 1990s (when the fishery was doing very well) was 400,000 to 700,000. By 2011, the state ratcheted that goal to 1.1 million to 1.35 million, with no underlying biological basis for the change.

65. As noted above, only one salmon stock in Cook Inlet is claimed to have a biologically based escapement goal. Many runs in Cook Inlet have no escapement goal of any kind. There are no escapement goals for pink salmon, only one tributary with escapement goals for chum, and two tributaries with escapement goals for coho. Of the 35 chinook tributaries, only seven have any escapement goals or monitoring data, and most of those seven are listed under the state designation of “stock of concern.”

66. State management in Cook Inlet has destabilized the fishery. As a result, many seafood processors have simply quit doing business in Cook Inlet, citing a hostile business environment created by state mismanagement as the reason. Harvests of some stocks have declined as much as 50% due to state management. Every year, millions of salmon (worth tens of millions of dollars to local and national communities and businesses), above and beyond those necessary to meet biological needs, go unharvested due to state mismanagement.

History of This Litigation

67. In 2010, Plaintiffs sought to turn the tide of state mismanagement of the fishery by appealing to NMFS and the Council, and asking for the development of an FMP to manage the Cook Inlet salmon fishery in a manner consistent with the National Standards of the MSA. NMFS and the Council flatly refused, claiming that they (as the entities entrusted by Congress to manage the nation’s fishery resources) lacked the expertise to manage salmon in Alaska (even though they, in fact, manage salmon in other areas of Alaska). Instead, in 2012, NMFS and the Council issued Amendment 12 to the

Fishery Management Plan for Salmon Fisheries in the EEZ off the Coast of Alaska (the “Salmon FMP”). *See* 77 Fed. Reg. 75,570 (Dec. 21, 2012). Amendment 12 cut the Cook Inlet salmon fishery out of the Salmon FMP altogether and deferred all management authority to the State of Alaska.

68. Plaintiffs initiated this litigation more than a decade ago against Federal Defendants (collectively “NMFS”) to challenge Amendment 12. The Ninth Circuit Court of Appeals agreed with Plaintiffs that NMFS’ decision to defer management to the State of Alaska in Amendment 12 was illegal. *United Cook Inlet Drift Ass’n v. Nat’l Marine Fisheries Serv. (UCIDA I)*, 837 F.3d 1055, 1063 (9th Cir. 2016). The Ninth Circuit instructed that NMFS could not “wriggle out of” its duties or “shirk” the statutory command to produce an FMP for the Cook Inlet salmon fishery. *Id.* at 1063, 1064. Moreover, the Ninth Circuit rejected NMFS’s argument that the Magnuson-Stevens Act “does not expressly require an FMP to cover an entire fishery.” *Id.* at 1064. Furthermore, the “Act makes plain that federal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns.” *Id.* at 1063.

69. The Ninth Circuit’s decision in September of 2016 initiated a five-year administrative process that NMFS, the Council, and the State of Alaska turned into a complete farce. At the last minute, the Council completely abandoned its efforts to create a federally delegated or a federally managed FMP program for the Cook Inlet salmon fishery. Instead, at the urging of the State of Alaska (and with help from NMFS), the

Council proposed an amendment (“Amendment 14”) to close commercial salmon fishing in federal waters altogether, and relinquish and defer all management decision for the Cook Inlet salmon fishery to the State of Alaska. This was precisely the opposite of what the Ninth Circuit instructed. NMFS issued final regulations implementing Amendment 14 on November 3, 2021. *See* 86 Fed. Reg. 60,568 (Nov. 3, 2021). Amendment 14 determined that “[t]he Cook Inlet salmon fishery includes the stocks of salmon harvested by *all* sectors within State and federal waters of Cook Inlet,” Dkt. 67 at 20 (quoting record), and that OY “for the Cook Inlet salmon fishery is set to the ‘level of catch from all salmon fisheries occurring within Cook Inlet (State and Federal water catch)’” *Id.* at 23 (quoting record). In other words, Amendment 14 set OY as whatever the state has allowed under state management.

70. UCIDA challenged Amendment 14, and on June 21, 2022, this Court granted UCIDA’s motion for summary judgment, vacating the final rule. *See* Dkt. 67. This Court explained that Amendment 14 effectuated another unlawful deferral to the state as it made “federal management standards in form rather than substance,” violating the instructions in *UCIDA I*. *See id.* at 22–23. The Court also explained that OY based on state harvest levels violated National Standard 1—the obligation to set the “optimum yield from each fishery” and to do so on “the basis of maximum sustainable yield [“MSY”] from the fishery.” *Id.* at 26–27 (quoting 16 U.S.C. § 1802(33)). As the Court explained, “[b]ootstrapping statutorily required management measures, such as MSY and OY, to the actual number of fish caught in the Cook Inlet, as determined by the State of

Alaska, summarily casts the decision of what constitutes ‘the amount of fish which . . . will provide the greatest overall benefit to the Nation’ to the Alaska Department of Fish and Game.’” Dkt. 67 at 29 (quoting 16 U.S.C. § 1851(a)(1)).

71. As a result of these (and many other) violations, the Court issued a remedy order on November 28, 2022, directing that NMFS “shall issue regulations implementing a new FMP amendment that is consistent with the Court’s [SMJ] Order and the previous orders in this litigation and complies with the [MSA], the APA, and all other applicable laws by no later than May 1, 2024.” Dkt. 103 at 10. The Court also required NMFS to file periodic status reports every 45 days, set a status conference in April 2023, and retained jurisdiction over the case. *See* Dkt. 77 at 10–11.

72. In its third status report filed on April 13, 2023, NMFS explained that the Council “was scheduled to take final action to recommend an FMP amendment at its April 2023 meeting.” Dkt. 98-1 at 1. “The Council had two viable alternatives to choose from: federal management of the fishery in the EEZ with specific management measures delegated to the State of Alaska (State) through the FMP (Alternative 2), or direct federal management of the fishery in the EEZ (Alternative 3).” Dkt. 98-1 at 1. NMFS explained that “the State informed NMFS and the Council during the Council meeting that it would not accept a delegation of management authority for the Cook Inlet EEZ salmon fishery under the conditions that would be necessary to comply with the MSA.” Dkt. 98-1 at 2. NMFS explained that this left the Council with one viable management alternative: adopting a federal management regime. Dkt. 98-1 at 2. “NMFS proffered a motion that

would have adopted Alternative 3, but no member of the Council would second that motion.” *Id.* NMFS explained that “[w]ith no other viable choice, [it] informed the Council that [it] would immediately begin work on a Secretarial amendment that would likely resemble Alternative 3.” *Id.* NMFS explained that “[b]ecause the analysis needed to support Secretarial action mirrors the analysis NMFS completed for the Council, it is largely complete.” Dkt. 98-1 at 3. NMFS stated that it “has not identified any legally viable management alternatives that were not presented to the Council, and NMFS is still on track to implement a final rule by May 2024.” Dkt. 98-1 at 3.

73. In its response to NMFS’ third status report, UCIDA explained its concerns with NMFS’ use of the Secretarial Amendment process to “forge ahead with its failed proposed Council amendment,” and UCIDA proposed several potential off ramps. *See* Dkt. 100 at 3–5.

74. On May 2023, the Court issued an amended remedy order explaining that “the actions taken by the Federal Defendants in the eleven months following the Court’s [SMJ Order] are nearly identical to those taken to implement the now-vacated Amendment 14.” Dkt. 103 at 9. “Given the history of this litigation and the progress of remand thus far, . . . stronger judicial intervention is necessary to ensure that the same processes do not yield the same result.” Dkt. 103 at 9. Accordingly, the Court ordered the parties to collaborate in order to avoid a perpetual cycle of litigation. *See* Dkt. 103 at 9.

75. The parties had two collaboration meetings in May 2023 (*see* Dkt. 102 at 2) and filed a joint status report regarding the meetings (*see* Dkt. 104). UCIDA explained its belief that “the parties are still very far apart on what constitutes a legal and effective FMP for the Cook Inlet salmon fishery.” Dkt. 104 at 7. This notwithstanding, NMFS continued the process of developing Alternative 3. *See* Dkts. 106–08, 110–12, and 118.

76. On December 20, 2023, the Court held a status conference. *See* Dkt. 119. UCIDA alerted the Court to its concern that the remand process was heading for a trainwreck in May 2024. *See* Dkt. 121-1 at 2. UCIDA explained that it expected to file a motion to enforce in May 2024 and that continued litigation and non-compliance with the Magnuson-Stevens Act by NMFS was an unacceptable outcome. *See* Dkt. 121-1 at 2.

77. On April 30, NMFS published the final rule implementing Amendment 16. 89 Fed. Reg. 34718, 34719. The next day, NMFS filed a Notice of Completion of Remand. *See* Dkt. 132 at 2.

78. In short, with Amendment 16, NMFS has once again found a new and clever way to try and continue to defer to the state’s historic management practices, even as commercial harvests continue to dwindle.

FIRST CLAIM FOR RELIEF

(Failure to Comply with Prior Court Orders)

79. Plaintiffs incorporate by reference all preceding paragraphs of this Complaint.

80. Plaintiffs have not yet received the relief they are entitled to under their original complaint, the holding of the Ninth Circuit in *UCIDA I*, and the holding of this Court in its order vacating Amendment 14.

81. MSA Section 304(a) and (b), 16 U.S.C. § 1854(a)-(b), requires Defendants to ensure FMPs and implementing regulations are consistent with the requirements of the MSA.

82. Amendment 16 continues to defer management to the State of Alaska without delegation through an FMP, including but not limited to by setting OY based on historic EEZ catch. This is directly contrary to the applicable court orders.

83. By continuing to refuse to comply with the MSA as held by the Ninth Circuit and this Court, NMFS has both prejudiced and injured Plaintiffs' rights and interests, and Plaintiffs have no other adequate remedy at law. For these reasons, Plaintiffs are entitled to the relief requested below.

SECOND CLAIM FOR RELIEF

(Violation of the MSA and the APA—Amendment 16)

84. Plaintiffs incorporate by reference all preceding paragraphs of this Complaint.

85. The MSA allows judicial review pursuant to the APA, 5 U.S.C. § 706(2)(A), (B), (C), or (D). 16 U.S.C. § 1855(f)(1)(B). Those provisions of the APA authorize reviewing courts to set aside federal agency action that is arbitrary, capricious,

and an abuse of discretion, in excess of statutory limitations, or without observance of the procedures required by law.

86. MSA Section 304(a) and (b), 16 U.S.C. § 1854(a)-(b), requires Defendants to ensure FMPs and implementing regulations are consistent with the requirements of the MSA.

87. In addition to and including all the reasons set forth above, Amendment 16 violates the MSA, and should be set aside under the APA for multiple reasons. A non-exhaustive list is included below:²

- a. Amendment 16 fails to comply with the MSA's statutory requirement to provide an FMP for each entire fishery under its jurisdiction that requires conservation and management. "Fishery" is a defined term that dictates the scope of an FMP. Amendment 16 improperly bifurcates the Cook Inlet salmon fishery into artificial state and federal components based on a purely jurisdictional justification and then fails to provide an FMP that covers fishing in state waters.
- b. Amendment 16 fails to set OY for the "fishery." Amendment 16 establishes OY based on historical catch in the EEZ under the State of Alaska's management. It effectively implements the state's mismanagement into federal law. This is unlawful deferral. Further, Amendment 16's OY measure is not based on MSY, as required by the MSA.

² Plaintiffs filed detailed comments on Amendment 16 detailing the legal flaws. Those comments are attached to this Complaint and incorporated herein.

- c. For stocks that do not have State of Alaska escapement goals, Amendment 16 uses historical catch to set MSY, again effectively implementing state mismanagement into federal law. This is deferral, and it violates the MSA.
- d. Amendment 16 also runs afoul of National Standard 1 and Required Provision 3. National Standard 1 requires that an FMP achieve OY, which is defined both in terms of the “greatest overall benefit to the Nation” as well as achieving MSY. Required Provision 3 requires an FMP to assess and specify MSY and OY for the fishery. Amendment 16 does not meet these requirements. Amendment 16 does not set OY for the fishery, take any steps to ensure that OY is met for the fishery, or even contemplate keeping track of whether OY is met for the fishery.
- e. Amendment 16 is not based on the best scientific information available as required by National Standard 2. NMFS openly concedes and even proclaims that its management approach is not the best approach, and it accordingly cannot be based on the best scientific information available.
- f. Amendment 16 violates National Standard 3. NMFS agrees that management of salmon stocks as a unit or in close coordination throughout all Cook Inlet is particularly important, but then NMFS fails to effectuate the management of Cook Inlet salmon stocks as a unit. Instead, NMFS arbitrarily cuts the fishery up for purposes of conservation and management measures required by an FMP. Management of salmon stocks as a unit or in close coordination

throughout all of Cook Inlet is particularly important, and it is well within NMFS' power to achieve. Amendment 16 violates National Standard 3.

g. Amendment 16 does not adequately consider or promote efficiency in the utilization of fishery resources, and it fails to minimize costs and avoid unnecessary duplication to the extent practicable in violation of National Standards 5 and 7. Rather than promote efficiency or minimize costs and avoid duplication, Amendment 16 appears to be specifically crafted to ensure the new “Cook Inlet EEZ fishery” is as inefficient and economically burdensome as possible. This includes the requirements that fishery participants obtain new federal permits; install expensive, unnecessary, and inappropriate VMS equipment; and provide intrusive GPS tracking in excess of statutory authority. *See Mexican Gulf Fishing Co. v. U.S. Dep't of Com.*, 60 F.4th 956 (5th Cir. 2023). Further, NMFS chose to open fishing in the EEZ on the same days and at the same times that state fishing is open but to prohibit participants from fishing in state and federal waters during the same trip. This limitation is extremely inefficient, impracticable for participants, and appears punitive.

h. In addition, Amendment 16's use of a TAC—when the fishery should be managed using escapement goals—is a separate violation of many of the national standards mentioned above. Both the State of Alaska and the stakeholders have repeatedly informed NMFS that TACs are not appropriate for salmon management.

i. Amendment 16 also violates National Standard 4 by allocating fishing privileges among Cook Inlet salmon fishermen but without doing so in a manner that is fair and equitable to all fishermen. By severely limiting federal waters harvest opportunity, NMFS allocates the privilege to harvest to state-waters fishing sectors. A prerequisite to an allocation of this type is a finding that it is fair and equitable. NMFS has made no such finding.

j. Amendment 16 violates National Standard 8 because it fails to account for the importance of fishery resources to the Cook Inlet fishing communities and does not utilize economic and social data to provide for the sustained participation of such communities and to minimize adverse economic impacts on such communities.

88. Amendment 16 is arbitrary, capricious, and contrary to the MSA, and NMFS's approval of Amendment 16 has prejudiced and injured Plaintiffs' rights and interests, and Plaintiffs have no other adequate remedy at law. For these reasons, Plaintiffs are entitled to the relief requested below.

THIRD CLAIM FOR RELIEF

(Violation of NEPA and the APA)

89. Plaintiffs incorporate by reference all preceding paragraphs of this Complaint.

90. NEPA requires that federal agencies prepare a "detailed statement" regarding all "major Federal actions significantly affecting the quality of the human

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environment.” 42 U.S.C. § 4332(2)(C). NEPA requires an agency to take a hard look at the environmental consequences of a proposed action, including by disclosing and analyzing the significance of all direct, indirect, and cumulative environmental impacts of each alternative. 40 C.F.R. §§ 1502.14, 1502.16 (2020). The agency’s analysis must include accurate scientific analysis, expert agency comments, and public scrutiny. *Id.* §§ 1502.23, 1501.5 (2020); 40 C.F.R. § 1500.1(b) (1978) (amended July 16, 2020).

91. If there exist substantial questions whether the action may have a significant effect on the environment, the agency must prepare an EIS.

92. If an agency decides not to prepare an EIS for a major federal action, it must supply a convincing statement of reasons to justify its conclusion that a project will not have significant impacts on the environment. *Id.* §§ 1508.1(1), 1501.6 (2020).

93. NMFS failed to produce a convincing statement of reasons demonstrating that Amendment 16 will not have significant impacts on the environment. NMFS has not taken a hard look at the environmental and conservation impacts that will occur to Cook Inlet salmon stocks as a result of managing via a TAC in the EEZ. Likewise, NMFS failed to take a hard look at the socioeconomic consequences of separately managing the EEZ portion of the fishery under a highly restrictive TAC. The state has a demonstrated pattern of commercial fishery disasters in Cook Inlet over the last decade, and Amendment 16 ensures a permanent disaster situation.

94. NEPA requires an agency to develop and assess appropriate alternatives in any proposal involving unresolved conflicts concerning uses of available resources. 42 U.S.C. § 4332(2)(E); 40 C.F.R. §§ 1507.2(d), 1501.5(c)(2) (2020).

95. The EA fails to consider a reasonable range of alternatives. Alternative 1 (no action) was foreclosed by the Ninth Circuit. Alternative 2 (delegation to the state) was foreclosed by the State of Alaska's refusal to accept delegation. Alternative 4 (closure of the EEZ) was foreclosed by this Court. Accordingly, the EIS only considered Alternative 3 (separate federal management), which NMFS repeatedly described as an ineffective method for managing fishing in the EEZ. These are not real alternatives. Rather than engage in the work needed to develop viable and effective alternatives, NMFS moved forward with an alternative that the Council refused to pursue. While there is no set number of alternatives that must be considered, it should be plain that an agency cannot structure its alternatives so there is only one available alternative. NMFS was required to, at the very least, consider a version of Alternative 3 that was feasible (as suggested by UCIDA and CIFF in public comments) and that would effectively manage the fishery.

96. The EIS also fails to meaningfully consider reasonable management alternatives to using a TAC, like escapement-based management, even though stakeholders are essentially unanimous that a TAC is not an effective management measure for a salmon fishery. NMFS is not so constrained that it is excused from its

failure to consider viable and effective alternatives, rather than settling on an alternative that it admits is ineffective.

97. NMFS's decision to approve Amendment 16 without considering appropriate alternatives and comparing the environmental impacts of those alternatives was arbitrary, capricious, and not in accordance with law and violated NEPA, 42 U.S.C. § 4332(2)(C), its implementing regulations, 40 C.F.R. §§ 1502.14(a), 1507.2(d), 1501.5(c)(2) (2020), and the APA, 5 U.S.C. §§ 702, 706.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

- A. Declare that the Defendants violated the MSA, APA, and NEPA;
- B. Declare that the Defendants' actions, as set forth above, were arbitrary and capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law;
- C. Declare that Amendment 16 is not consistent with the Ninth Circuit's or this Court's decisions in this matter;
- E. Vacate Amendment 16 and its implementing regulations, and remand with an order instructing the Defendants to develop an FMP for the *entire* Cook Inlet salmon fishery that complies with the requirements of the MSA, APA, and NEPA, and the Ninth Circuit's and this Court's holdings;
- F. Vacate the FONSI, and remand with an order instructing, as appropriate, the Defendants to prepare an EA or EIS that complies with NEPA and the APA;

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G. Appoint a special master to supervise the development of an FMP amendment for the entire Cook Inlet salmon fishery, to set deadlines for the development of that FMP, and to impose interim fishery management measures for the Cook Inlet salmon fishery until the FMP amendment is both issued and fully implemented;

H. Award Plaintiffs their reasonable attorney fees, costs, expenses, and disbursements, including attorney fees associated with this litigation pursuant to the Equal Access to Justice Act or other law; and

I. Award Plaintiffs other and further relief as this Court may deem just and equitable.

DATED this 29th day of May, 2024.

STOEL RIVES, LLP

/s/ Jason T. Morgan

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ATTACHMENT 1

COMMENT LETTERS



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December 18, 2023

VIA FEDERAL E-RULEMAKING PORTAL

Gretchen Harrington
Assistant Regional Administrator, Sustainable Fisheries Division
Alaska Region, NMFS
P.O. Box 21668
Juneau, Alaska 99802-1668

Re: Proposed Amendment 16 to the Salmon FMP

Dear Assistant Regional Administrator Harrington:

Please accept these comments on behalf of the United Cook Inlet Drift Association (UCIDA) related to the National Marine Fisheries Service's (NMFS) proposed Amendment 16 to the Fishery Management Plan for the Salmon Fisheries in the Exclusive Economic Zone (EEZ) Off Alaska (Salmon FMP). Because it violates the letter and spirit of multiple court rulings, the Magnuson-Stevens Fishery Conservation and Management Act (MSA), and other applicable law, UCIDA respectfully requests that NMFS and the Secretary disapprove of the proposed rule.

I. FACTUAL HISTORY

UCIDA is an organization that has represented the economic, social, and political interests of the 585 drift gillnet permit holders, their families, and fishing communities in Cook Inlet, Alaska for over 40 years. UCIDA's members make their living by commercial fishing. Their limited-entry permits authorize them to catch all five species of salmon in Cook Inlet using drift gillnet fishing gear. UCIDA also represents the interests of multiple associate members including fish processors, gear suppliers, crew members, and other interested members of the community.

Drift gillnet boats are small-scale business operations, typically crewed by one to three persons. Each fishing operation represents a substantial investment in the boat, gear,

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and the permit itself.¹ Each boat is generally allowed to deploy a single 900-foot-long gillnet. The gillnet is suspended in the water column by floats (i.e., corks) as the boat drifts with the current. After the gillnet is allowed to soak in the water for a length of time (as the boat and net drift with the current), the gear is hauled in, and the fish are removed and placed on ice in the boat's holds. The fish are then transported to and offloaded at one of Cook Inlet's seafood processors that buys fish in the region. After processing, salmon products are sold throughout the United States and around the world. Salmon benefit the Nation and the economy as a valuable food source.

The Cook Inlet salmon fishery was historically one of the nation's most productive salmon fisheries. In the 1980s and 1990s, the sockeye salmon harvest alone ranged consistently from four to nine million sockeye per year.² During the last two decades, the commercial harvest in Cook Inlet has steadily declined. The 10-year average annual commercial sockeye catch for 2014–2023—based on the preliminary data released by the State of Alaska, Department of Fish and Game (ADF&G) for 2023—was just 1.65 million sockeye. A significant portion of this reduction in catch has been converted by the State's management to overescapement (surplus to OY) into the Upper Cook Inlet river systems. For example, just in 2023, the total sockeye harvest (1.6 million sockeye) was approximately equal to or less than the overescapement in just two rivers—the Kenai and Kasilof Rivers—which were overescaped by 1.65 million sockeye.³ If the commercial fleet had been permitted to catch this overescapement, their total catch for the season would have been over 3 million sockeye, below the low end of the historical average but a significant improvement over the status quo. Instead, these fish were wasted due to the State's failure to manage in accordance with the upper bound of its escapement goals, which resulted in lost yield in 2023 and jeopardized yield in future years.⁴ This continuing pattern of overescapement, mismanagement, and wasted yield has economically starved UCIDA's members nearly to extinction.

¹ The value of Upper Cook Inlet drift permits fluctuates based primarily on the principles of supply and demand, and the value is largely reflective of the economic health of the fishery. Permit value declined and has remained very low during the last two decades. *See* CFEC Cook Inlet, Drift Gillnet Permit Values, attached as Ex. 1.

² *See* 1980–2011 Catch Records for Upper Cook Inlet, attached here as Ex. 2.

³ *See* Upper Cook Inlet Commercial Fishery Season Summary, attached here as Ex. 3,

⁴ *See* Draft Environmental Impact Statement (EIS) at 493.

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The history of the prior amendments to the Salmon FMP is described in the proposed rule.⁵ In 2012, NMFS revised the FMP through Amendment 12 “to facilitate State of Alaska salmon management in accordance with the [MSA].”⁶ Amendment 12 was struck down by the Ninth Circuit in 2016,⁷ and NMFS implemented Amendment 14 in 2021, which closed the Cook Inlet EEZ fishery to commercial fishing to again facilitate the State’s management of the fishery.⁸ Amendment 14 was struck down by the U.S. District Court for the District of Alaska (District Court) in June 2022, and NMFS was ordered to produce an MSA compliant FMP amendment by May 1, 2024.

II. SPECIFIC COMMENTS

A. Proposed Amendment 16 Violates the MSA.

1. Amendment 16 is not an FMP *for the fishery*.

UCIDA has reiterated this comment to NMFS for at least the last six years.⁹ Unfortunately, UCIDA must reiterate it again here against the backdrop of another wasted remand and another non-MSA compliant proposed FMP amendment.

The MSA definitions section provides that the terms listed have the definitions “[a]s used in th[e] chapter, unless the context otherwise requires.”¹⁰ As the Ninth Circuit noted

⁵ See Amendment 16 at 4–5. The draft proposed FMP amendment is cited as “Amendment 16” throughout this comment, whereas the proposed rule and analysis published by NMFS in the federal register is cited using the federal register citation.

⁶ Amendment 16 at 4.

⁷ See Draft EIS at 411.

⁸ Amendment 16 at 5.

⁹ See Draft EIS at 465 (“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” (quoting Nov. 21, 2017 letter to Hon. Timothy M. Burgess responding to Status Report filed by NMFS)).

¹⁰ 16 U.S.C. § 1802.

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more than seven years ago, “fishery” is “a defined term” in the MSA’s definitions section.¹¹ The section provides that “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.^[12]

Other relevant terms are also defined. For example, the term “stock of fish” means “a species, subspecies, geographical grouping, or other category of fish capable of management as a unit.”¹³ And “fishing” means

(a) the catching, taking, or harvesting of fish; (b) the attempted catching, taking, or harvesting of fish; (c) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or (d) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C).^[14]

In response to NMFS’s argument in 2016 that the MSA “does not expressly require an FMP to cover an entire fishery” because “the provision says nothing about the geographic scope of plan at all,” the Ninth Circuit confirmed that the MSA “requires an FMP for a fishery, a defined term.”¹⁵ The Ninth Circuit warned that “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.”¹⁶

In proposed Amendment 16, NMFS has artificially divided the Cook Inlet salmon fishery into a state-waters fishery and a federal-waters fishery. This is improper for

¹¹ See Draft EIS at 428.

¹² 16 U.S.C. § 1802(13).

¹³ 16 U.S.C. § 1802(42).

¹⁴ 16 U.S.C. § 1802(16).

¹⁵ Draft EIS at 428.

¹⁶ Draft EIS at 428.

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multiple reasons, including because it violates the letter and spirit of the MSA and the prior court rulings.

In the proposed rule, NMFS justifies its action by explaining that:

under the Magnuson-Stevens Act, there is only one narrow authority for NMFS to extend Federal jurisdiction into State waters. In order for a Federal FMP to govern fisheries occurring within State marine waters, both of the following conditions must be met under Magnuson-Stevens Act section 306(b) (1) the fishery must occur predominantly within the EEZ, and (2) State management must substantially and adversely affect the carrying out of the FMP. **As approximately 75 percent of the total annual upper Cook Inlet salmon harvest occurs within State waters, there is no authority for NMFS to assert management authority over the State water salmon fisheries in Cook Inlet.** In addition, even when the two conditions above are met, under no circumstance does NMFS or the Council have authority to manage fishing within State internal waters where salmon spawning takes place (i.e., landward of the coastline).^[17]

This justification illustrates how NMFS has arbitrarily chosen to define the word “fishery” differently throughout the proposed rule to avoid taking responsibility for the Upper Cook Inlet salmon fishery, rather than carefully and consistently applying the definition found in the MSA. According to NMFS’s justification quoted above, approximately 75% of the annual harvest in the “fishery” occurs within State waters. But how is this possible when NMFS has defined the “fishery” for purposes of the FMP amendment as the “Cook Inlet EEZ salmon fishery”? All harvest in that EEZ “fishery” by definition occurs in the EEZ. Either NMFS’s use of the term “fishery” in the proposed rule is incorrect or its justification for not being able to utilize the MSA section 306(b) exception is facially arbitrary.

Assuming NMFS’s distinction between the “Cook Inlet EEZ salmon fishery” and the state-waters fishery is a correct distinction to make—UCIDA believes it is not—then, for the purposes of assessing whether the exception in MSA section 306(b) applies, subsection (a) must be met because *all harvest* in “Cook Inlet EEZ salmon fishery,” the fishery covered by Amendment 16, occurs in the EEZ. Accordingly, if the “State has taken any action, or omitted to take any action, the results of which will substantially and

¹⁷ 80 Fed. Reg. 72318 (emphasis added).

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adversely affect the carrying out of such fishery management plan,” the Secretary would have authority to regulate “the applicable fishery within the boundaries of [the] State.”¹⁸ NMFS cannot escape its responsibilities under the MSA by artificially defining the fishery to include only the federal-waters portion of the Upper Cook Inlet salmon fishery. By defining the fishery in this manner, NMFS has ensured that it falls within the MSA section 306(b) exception, which permits it to regulate the State’s activities in state waters that adversely affect the carrying out of its FMP in federal waters.

UCIDA disagrees that NMFS can adopt a narrow—federal-waters only—definition of a fishery that clearly spans between state and federal waters. But importantly, if NMFS can make that arbitrary distinction, then the requirement that NMFS correctly set MSY and OY for the stocks of fish as a unit throughout their range and manage harvest to achieve MSY and OY in accordance with the MSA becomes *even more critical*. If NMFS’s “Cook Inlet EEZ salmon fishery” is completely deferential to the State’s management priorities (as currently drafted, it is) and does not properly set OY *for the fishery* or contemplate achieving OY *for the fishery* as the MSA requires, then NMFS’s FMP amendment will not contain the harvest metrics needed (a measure of OY for the entire *fishery* and an estimate of the proportional harvest from state-waters and federal-waters that will achieve OY) to ensure that the State’s action in the state-waters fishery does not interfere with NMFS’s obligation to follow the MSA in the federal-waters fishery—i.e., achieving OY *for the fishery*.

A fairly easy to understand example of how this failure to account *for the fishery* in proposed Amendment 16 will ensure that OY is not met is the pattern of overescapement that has occurred under State management.¹⁹ According to preliminary data for the 2023 season, the State’s management resulted in the Kenai River exceeding the upper bound of its “sustainable escapement goal” by 1,043,976 sockeye and the Kasilof River exceeding the upper bound of its “biological escapement goal” by 613,145 sockeye.²⁰ At the same time, the “total [Upper Cook Inlet] commercial harvest of 1.6 million sockeye salmon was

¹⁸ 16 U.S.C. § 1856(b).

¹⁹ For a detailed summary of the 2023 Upper Cook Inlet Fishery Management Actions, see attached Exhibit 4.

²⁰ See Upper Cook Inlet Commercial Fishery Season Summary, attached here as Ex. 3, at 10. The upper bound for the Kenai River was 1,300,000 sockeye and for the Kasilof River was 320,000.

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40% below the 2003–2022 average.”²¹ Accordingly, under the State’s management and based on the State’s preliminary numbers, the overescapement of sockeye in just two rivers in Upper Cook Inlet (1,043,976 + 613,145 = 1,657,121) exceeded the total commercial harvest of sockeye for the entirety of Upper Cook Inlet and likely exceeded the escapement necessary for all other rivers in Cook Inlet. (According to NMFS’s own scientific information included in its analysis, overescapement is problematic because it results in “foregone yield in the current” year and “may be expected to result in reduction in future recruitment,” i.e., reduction in long-term yield.²²) To further put these numbers in perspective, overescapement of sockeye in the Kenai and Kasilof in 2023 was more than NMFS’s OY range—approximately 291,631 to 1,551,464—for the entire “Cook Inlet EEZ salmon fishery” *for all species of salmon in Upper Cook Inlet*.²³ There should be no disagreement from NMFS that an FMP that allows this quantity of overescapement to occur in State waters—resulting in the waste of current yield and severely jeopardizing future yield—does not comply with National Standard 1’s directive that conservation and management measures achieve optimum yield for the fishery, whether fishery is defined correctly as the Upper Cook Inlet salmon fishery or narrowly as the Cook Inlet EEZ salmon fishery. Despite this overescapement elephant in the room, there is no discussion whatsoever in proposed Amendment 16 of how NMFS’s management measures for the Cook Inlet EEZ salmon fishery will address and prevent rampant overescapement by the State to ensure compliance with National Standard 1.

NMFS wants to pretend that its hands are tied and that it cannot interfere with the State’s pattern of drastically overescaping and underutilizing the Upper Cook Inlet salmon stocks. But NMFS cannot obfuscate what the MSA requires by taking an arbitrarily narrow view of the Upper Cook Inlet salmon fishery or the definitions of MSY and OY. If NMFS complied with the MSA and properly set OY *for the fishery*,²⁴ then it could institute management measures to prevent the overescapement either by allowing additional fishing

²¹ Upper Cook Inlet Commercial Fishery Season Summary, attached here as Ex. 3, at 2.

²² Draft EIS at 493.

²³ 80 Fed. Reg. 72320.

²⁴ 16 U.S.C. § 1802(13) (“(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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opportunity in the EEZ or by exercising the MSA section 306(b) exception if the State was acting in a manner that adversely affected NMFS's ability to ensure the fishery achieves OY. Whether or not NMFS defines the fishery correctly, it still must ensure that the entire fishery is regulated in accordance with MSY and OY.

NMFS's strawman argument that it is unprepared to manage the fishery, so it must manage it conservatively and defer to the State, is no excuse either. If NMFS acting alone is unprepared to adequately manage the "Cook Inlet EEZ salmon fishery" for the 2024 season in a manner that complies with the MSA, then it has the MSA section 306(b) exception available to it to ensure that the State's actions do not substantially or adversely affect the carrying out of the FMP and the achievement of OY for the fishery. NMFS has essentially predetermined that it is only capable of meeting a very-low management bar, and it has used this justification to set a very low bar for itself through proposed Amendment 16. This is not what the MSA or the courts have required.

In summary, proposed Amendment 16 is contrary to the MSA because it fails to create an FMP for the entire fishery. Even assuming NMFS was permitted to create a "Cook Inlet EEZ salmon fishery," it still must create an FMP amendment that complies with the MSA by setting MSY and OY *for the fishery* (state and federal waters). It then must put in place management measures to achieve MSY and OY *for the fishery*. After it has done so, if the State acts to substantially and adversely affect the carrying out of NMFS's MSA-compliant FMP amendment—by drastically overescaping rivers, for example—NMFS is permitted to regulate fishing within state waters under the MSA section 306(b) exception as necessary to ensure the fishery is managed in compliance with the MSA. Under no circumstances may NMFS avoid doing what the law requires.

2. Maximum Sustained Yield (MSY) and Optimum Yield (OY) must be set in compliance with the MSA.

a. MSY and OY must be established *for the fishery*.

The MSA requires that any FMP that is prepared by NMFS must "assess and specify the present and probable condition of, and the maximum sustained yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specification."²⁵ As noted above, "fishery" is a defined term that includes "one or more

²⁵ 16 U.S.C. § 1853(a)(3).

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stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics” and “any fishing for such stocks.”²⁶ NMFS must set MSY and OY for the entire Upper Cook Inlet salmon fishery, and it must do so in a manner that is scientifically sound, rather than in a manner that blindly defers to the State. In this way as well, Amendment 16 fails to comply with the law.

NMFS states that Amendment 16 “would amend the Salmon FMP to include definitions of MSY and OY,”²⁷ explaining that “[o]ne of the required foundational reference points is MSY, which is the largest long-term average catch that can be taken from a stock or stock complex under prevailing conditions.”²⁸ NMFS explains that “OY is prescribed on the basis of MSY, and MSY informs the status determination criteria that are used to determine whether a stock is overfished or subject to overfishing.”²⁹ NMFS claims that “MSY must be defined at the stock or stock complex level without reference to management jurisdictions,”³⁰ and that “OY is defined at the [Cook Inlet EEZ salmon fishery] level.”³¹

Without explanation, NMFS has changed its position on whether OY must be established *for the fishery*. In a March 29, 2018 legal memorandum NMFS included in the Draft EIS, NMFS’s Attorney-Advisory, Alaska Section, explained that:

[A]dding the commercial salmon fishery that occurs in [the] 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, [and] status determination criteria so that overfishing and overfished determinations can be made, and annual catch limits for the stocks of salmon

²⁶ 16 U.S.C. § 1802(13).

²⁷ 80 Fed. Reg. 72319.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*; *see also* Amendment 16 at 4.2.1 (“Because MSY cannot be defined at the fishery level, this definition of MSY does not subdivide between State and EEZ waters in Cook Inlet.”).

³¹ Amendment 16 at 4.2.2.

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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 State boundaries. Once established, these reference points will guide the Council and NMFS in their management (either direct or delegated) of the 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[.]”^[32]

At footnote 44 of her analysis, NMFS’s Attorney-Advisory explained further that, “section 2.7.2 of the October 2017 Discussion Paper presents a preliminary approach as to how optimum yield (OY) and maximum sustained yield (MSY) could be described for the commercial salmon fishery in the Cook Inlet EEZ Area[.]” It provides further that:

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

³² Draft EIS 439–40.

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ADF&G in determining when to open and close the salmon harvest by the salmon fishery.^[33]

NMFS's statement that OY can and should be set for just the Cook Inlet EEZ salmon fishery is also contradicted by other provisions of proposed Amendment 16. For example, the discussion of OY for the East Area troll fishery accounts for all factors affecting the yield *of the fishery*, not just the EEZ area:

For the troll fishery in the East Area, 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; provisions of the Pacific Salmon Treaty; decisions of the Pacific Salmon Commission; allocations by the Board; traditional times, methods, and areas of salmon fishing; and inseason indices of stock strength. Further, **because the commercial troll fishery and the sport fishery 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.**^[34]

NMFS has provided no justification with its recently invented position that OY should be set only for the federal-waters portion of Upper Cook Inlet.

The MSA and the National Standard 1 guidelines for establishing MSY and OY require that NMFS set MSY for "the stocks and stock complexes that require conservation and management."³⁵ Contrary to NMFS's claim in proposed Amendment 16 that "MSY cannot be defined at the fishery level," these same guidelines provide that "MSY may also be specified for the fishery as a whole."³⁶

³³ Draft EIS at 440 (emphasis added).

³⁴ Amendment 16 at 3.3.1. The OY for the East Area troll 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."

³⁵ 50 C.F.R. § 600.310(e)(1).

³⁶ 50 C.F.R. § 600.310(e)(1).

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For optimum yield, the National Standard 1 guidelines provide that “OY may be established at the stock, stock complex, or fishery level.”³⁷ Importantly, when proposed Amendment 16 provides that “OY is defined at the fishery level, and is specified for the Cook Inlet EEZ Area,” NMFS is again taking an inappropriately narrow view of the term “fishery” as used in the MSA. OY can be set individually for each of the lesser components that make up a “fishery”—i.e., for each stock or stock complex—but it must include OY for the whole fishery.³⁸ This is illustrated, for example, later in the guidelines: “[a]n OY established at a fishery level may not exceed the sum of the MSY values for each of the stocks or stocks complexes within the fishery.”³⁹ Congress intended NMFS to manage federal fisheries to achieve MSY and OY, and it gave NMFS the ability—through the MSA section 306(b) exception—to ensure that states could not take actions in state waters that substantially or adversely affect the carrying out of a federal FMP, so that NMFS’s efforts to reach MSY and OY were not thwarted by a state’s parochial concerns. In order to determine when the State’s parochial concerns are thwarting NMFS’s achievement of MSY and OY *for the fishery*, NMFS must actually set MSY and OY *for the fishery*. Because it fails to do so, proposed Amendment 16 violates the law.

b. MSY and OY cannot be based on historical catch.

The District Court explained that “[a]ccording to historical management data, the commercial harvest of salmon from the Cook Inlet has decreased significantly over the past two decades, despite its reputation as one of the best commercial fishing locations in Alaska.”⁴⁰ Yet, NMFS proposes to only rely on catch data from *the past two decades* to set OY.⁴¹ Moreover, NMFS proposes using “the range between the averages of the three lowest years of total estimated EEZ salmon harvest and the three highest years of total estimated EEZ salmon harvest from 1999 to 2021.”⁴² It is difficult to think of a more deferential measure of OY. By setting OY as the range between the average highest years

³⁷ 50 C.F.R. § 600.310(e)(3).

³⁸ 50 C.F.R. § 600.310(e)(3)(ii) (“OY is a long-term average amount of desired yield from a stock, stock complex, or fishery.”).

³⁹ 50 C.F.R. § 600.310(e)(3)(iv)(C).

⁴⁰ See District Court order, attached here as Ex. 5, at 7.

⁴¹ 80 Fed. Reg 72320.

⁴² 80 Fed. Reg 72320.

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and average lowest year,⁴³ NMFS ensures that OY is set at a range that includes *every possible outcome that has occurred in the EEZ under the State's mismanagement for the past two decades*. This means that the State can carry on managing the fishery as it has for the last two decades, and the probability is that harvest in the EEZ will fall within the range picked by NMFS. *This is deferral*. NMFS has given itself the greatest chances of continuing to do no work, except annually closing the EEZ portion of the fishery.

NMFS claims that “[u]nder any management alternative, NMFS’s mandate is to achieve OY and prevent overfishing.”⁴⁴ NMFS even acknowledges that “[b]ecause OY must be defined on the basis of MSY, the potential upper bound would be all yield above the lower bound of the escapement goal for each stock in the EEZ.”⁴⁵ Then NMFS explains that:

However, because it is not possible to harvest one stock at a time in this mixed stock fishery, because there are weak stocks intermingled with stocks that regularly exceed their escapement goal, and because harvest of all Cook Inlet stocks also occurs in State marine and fresh waters, OY must be reduced from MSY to account for these various ecological, economic, and social factors. For this reason, OY would be defined at the fishery level to account for mixed stock harvest and variabilities in run strength.^[46]

This would be a legitimate observation by NMFS if it then defined OY *for the fishery*, rather than “[d]efining OY for [just] the Cook Inlet EEZ salmon fishery.”⁴⁷ And NMFS makes no effort to tie the factors it lists in the quote above to its choice to base the EEZ

⁴³ Further, NMFS’s assessment of OY nowhere addresses that the “historical catch” years it chooses include multiple years when an economic disaster was declared (i.e., the disaster was not due to a lack of fish, but a lack of fishing opportunity) for the Upper Cook Inlet drift fishery. *See* Total Allowable Catch discussion attached as Ex. 6 (“The proposed OY range and the calculation of the TAC includes three years, 2018, 2020, and 2021 that were declared to be economic disasters by the Secretary of Commerce.”).

⁴⁴ 80 Fed. Reg. 72317.

⁴⁵ 80 Fed. Reg. 72320.

⁴⁶ 80 Fed. Reg. 72320.

⁴⁷ 80 Fed. Reg. 72320.

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OY measure on historical catch. It provides no explanation why setting OY at historical catch addresses the fact that “there are weak stocks intermingled with stocks that regularly exceed their escapement goals.” It does not explain why setting OY at historical catch in the EEZ accounts for the fact that “harvest of all Cook Inlet stocks also occurs in State marine and fresh waters.” These may be reasons why OY needs to be established *for the fishery*, but they are not reasons supporting NMFS setting OY for only the EEZ portion of the fishery or basing OY on historical catch.

NMFS also uses historical catch in assessing MSY for “Tier 3 stocks.” NMFS claims that “maximum catch over a recent range of years that are representative of current biological and environmental conditions is used as a proxy for MSY.”⁴⁸ This is patently improper when the State has not been managing Tier 3 stocks for MSY and has instead been dramatically underutilizing these stocks—including chum and pink salmon.⁴⁹ Catch under the State’s non-MSY management cannot be a proxy for MSY.

B. Proposed Amendment 16 is inconsistent with the National Standards.

The MSA requires that “[a]ny fishery management plan prepare, and any regulation promulgated to implement any such plan . . . shall be consistent with” the National Standards for fishery conservation and management. Proposed Amendment 16 fails to comply with many if not all of the National Standards, as addressed in more detail below.

1. Under Amendment 16, NMFS will not achieve the optimum yield for the fishery as required by Nation Standard 1.

Amendment 16 will not achieve optimum yield for multiple reasons. First, Amendment 16 does not set OY for the Upper Cook Inlet salmon fishery, take any steps to ensure that OY is met for the fishery, or even contemplate tracking whether OY is met for the fishery. NMFS improperly focuses solely on OY for the EEZ portion of the fishery, and this guarantees that NMFS will not ensure OY is met for the whole fishery.

In its discussion of National Standard 1 in the proposed rule, NMFS states that it “finds that *the proposed OY for the Cook Inlet salmon fishery* would be achieved on a

⁴⁸ Amendment 16 at 4.2.1.

⁴⁹ See Ex. 7 (historical harvests in Cook Inlet by species); see also Ex. 8 (spreadsheet documenting harvest tables in Cook Inlet).

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continuing basis under Amendment 16.”⁵⁰ This “finding” makes no sense, given that NMFS has only set OY for the EEZ portion of the “Cook Inlet salmon fishery.” This is another example of NMFS’s self-serving and shifting definition of “fishery” in the proposed rule.

Second, NMFS has set OY for the EEZ based on historical catch in the EEZ, rather than setting a metric that would dictate prospective expected harvest in the EEZ needed to achieve OY for the whole fishery. As explained above, focusing on historical catch in the EEZ is improper and does not achieve OY for the whole fishery or even for NMFS’s artificially defined “Cook Inlet EEZ salmon fishery.”

Third, Amendment 16 fails to account for or create a plan to disrupt the pattern of overescapement under State management. Amendment 16 focuses only on the concept of avoiding “overfishing,” without making any meaningful effort to simultaneously prevent drastic underfishing by optimizing yield. “Had Congress charged the Secretary with merely preventing overfishing, the Secretary likely would have responded with eliminating fishing altogether.”⁵¹ The District Court explained that “**NMFS’s own analysis** determined that ‘[o]verfishing is not occurring for any Cook Inlet salmon stocks, and none are in an overfished status.’ This does not track with the agency’s explanation that the reason for the closure is to ensure a ‘precautionary approach to minimizing the potential for overfishing.’”⁵² NMFS has a duty “to allow for harvesting at optimum yield in the present, while at the same time protecting fishery output for the future.”⁵³ The proposed rule fails to consider or address overescapement, which NMFS’s own scientific analysis indicates creates wasted yield and jeopardizes future yield.⁵⁴

⁵⁰ 80 Fed. Reg. 72328 (emphasis added).

⁵¹ *W. Sea Fishing Co. v. Locke*, 722 F. Supp. 2d 126, 140 (D. Mass. 2010).

⁵² District Court Order at 12 (emphasis added).

⁵³ *W. Sea Fishing Co. v. Locke*, 722 F. Supp. 2d 126, 140 (D. Mass. 2010).

⁵⁴ See Draft EIS at 493. This is also a reason why the proposed rule violates National Standard 2.; see also Biological and Fishery-Related Aspects of Overescapement in Alaskan Sockeye Salmon attached here as Exhibit 9.

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Amendment 16 also fails to acknowledge that NMFS has the flexibility to manage the Cook Inlet salmon fishery in a manner that complies with National Standard 1. The MSA specifically provides this flexibility:

Flexibility in application of NS1 guidelines. There are limited circumstances that may not fit the standard approaches to specification of reference points and management measures set forth in these guidelines. These include, among other things, . . . *stocks with unusual life history characteristics (e.g., Pacific salmon, where the spawning potential for a stock is spread over a multi-year period)*, and *stocks for which data are not available either to set reference points based on MSY or MSY proxies*, or to manage to reference points based on MSY or MSY proxies. In these circumstances, Councils may propose alternative approaches for satisfying requirements of the Magnuson–Stevens Act other than those set forth in these guidelines. Councils must document their rationale for any alternative approaches in an FMP or FMP amendment, which will be reviewed for consistency with the Magnuson–Stevens Act.^[55]

Despite NMFS’s assertions otherwise, the MSA allows NMFS the flexibility to respond proactively to the specific management concerns associated with salmon stocks. The MSA and National Standard 1 require NMFS to deploy that flexibility, which NMFS has failed to do in Amendment 16. NMFS also violated the National Environmental Policy Act (NEPA) by—among other reasons—failing to consider and evaluate reasonable alternatives such as using the flexibility built into National Standard 1 to manage using escapement goals rather than a TAC.

2. Amendment 16 is not based upon the best scientific information available as required by National Standard 2.

National Standard 2 requires conservation and management measures to be based on the best scientific information available. NMFS’s analysis of whether Amendment 16 complies with National Standard 2 focuses mainly on its determination that the State’s escapement goals are based on the best scientific information available.⁵⁶ NMFS even

⁵⁵ 50 C.F.R. § 600.310 (emphasis added).

⁵⁶ 80 Fed. Reg. 72328.

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suggests that it “may modify the escapement goals used in Federal management as scientific information related to Cook Inlet salmon stocks is improved.”⁵⁷ But it is difficult to understand why it would matter if NMFS adjusted the escapement goals, since its conservation and management measures in Amendment 16 do not attempt to ensure that the escapement goals are met. Be this as it may, NMFS has zoomed in on escapement goals and missed that it elsewhere admits repeatedly throughout its analysis that Amendment 16 is not based on the best available scientific information.

NMFS openly concedes and even proclaims that its management approach is not the best approach,⁵⁸ and it accordingly cannot be based on the best scientific information available.⁵⁹ In addition, NMFS explains that “[g]iven the significant degree of interaction among salmon fisheries in Cook Inlet, management of salmon stocks as a unit or in close coordination throughout all Cook Inlet salmon fisheries is particularly important.”⁶⁰ But NMFS fails to manage the Upper Cook Inlet salmon stocks as a unit throughout their range.⁶¹ This is not compliance with National Standard 2.

NMFS is well aware that the management measures Amendment 16 would implement—including its rigid use of a total allowable catch (TAC) for the EEZ that is

⁵⁷ 80 Fed. Reg. 72328.

⁵⁸ 88 Fed. Reg. 72317 (“Stakeholders and the Council noted with near unanimity that the State has significantly better tools, data, flexibility, and experience for inseason management of Cook Inlet salmon fisheries. NMFS agrees with this assessment. NMFS would have preferred delegated management under Alternative 2 so that State expertise and flexibility could be directly utilized for management of the Cook Inlet EEZ Area. The State has more than 60 years of experience managing salmon fisheries in Cook Inlet while NMFS has no prior experience managing these fisheries. However, because, pursuant to court order, the Cook Inlet EEZ must be managed under the FMP and the State declined to accept delegated management, the only remaining option was to create a new fishery in the Cook Inlet EEZ managed by the Council and NMFS.”).

⁵⁹ See 16 U.S.C. § 1851 (“Conservation *and management measures* shall be based upon the best scientific information available.” (emphasis added)).

⁶⁰ 80 Fed. Reg. 72328.

⁶¹ NMFS’s claim that it is “impossible” for it to do so is addressed under National Standard 3 below.

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determined pre-season, which it borrowed from regulations applicable to directed fishing for groundfish and halibut⁶²—are insufficient to manage a salmon fishery. It said as much more than 10 years ago in its final Environmental Assessment issued June 2012, “finding that ‘the State is the appropriate authority for managing Alaska salmon fisheries given the State’s existing infrastructure and expertise,’ and that ‘the State’s escapement based management system is a more effective management system for preventing overfishing than a system [like the federal one] that places rigid numeric limits on the number of fish that may be caught.’”⁶³ Despite acknowledging the ineffective nature of its management measures for salmon stocks, NMFS ignores the flexibility built into the MSA and opts instead for ineffective management. NMFS could implement management measures that account for and align with the best available science, but instead, NMFS blames the courts for requiring it to manage a fishery that it has predetermined it will do a poor job managing. NMFS blames the State for refusing to manage the fishery for it. NMFS blames the Council for failing to come up with better alternatives, and more than anyone else, NMFS blames stakeholders for repeatedly holding NMFS accountable as it continues to shirk its responsibility.

NMFS cannot shirk and blame its way out of establishing an FMP amendment that is based on the best available scientific information. UCIDA agrees with the views expressed by the tribes that the perceived limitations in the MSA in the context of salmon management do not “absolve the Federal responsibility to work to improve the health of the Cook Inlet salmon stocks.”⁶⁴

3. Amendment 16 violates National Standard 3.

There is agreement that in Upper Cook Inlet, “management of salmon stocks as a unit or in close coordination throughout all Cook Inlet salmon fisheries is particularly important.”⁶⁵ Yet, NMFS incorrectly claims that:

⁶² See 80 Fed. Reg. 72333 (amending in-season management regulations applicable to groundfish and halibut to include “fishing for Cook Inlet EEZ Area salmon”).

⁶³ *United Cook*, 837 F.3d at 1061 (quoting 77 Fed. Reg. 75,570).

⁶⁴ 80 Fed. Reg. 72318.

⁶⁵ 80 Fed. Reg. 72328.

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[B]ecause NMFS has no jurisdiction over State marine or fresh water salmon fisheries, it is impossible for NMFS to unilaterally manage Cook Inlet salmon as a unit throughout their range, and the State of Alaska declined to accept delegated management authority for the EEZ. Thus, two separate management jurisdictions are unavoidable in Cook Inlet.^[66]

Although there is an inevitable default distinction between jurisdiction over the state-water and federal-water harvest of the Cook Inlet salmon stocks, this does not justify NMFS arbitrarily cutting the fishery up for purposes of conservation and management measures required by an FMP amendment to encompass the entire fishery. As explained above, if NMFS is permitted to artificially define the fishery as the “Cook Inlet EEZ salmon fishery” for purposes of default jurisdiction over harvest, it must still set MSY and OY for the “fishery” as defined in the MSA and ensure the State’s management of harvest does not substantially or adversely affect the achievement of these metrics, including by utilizing the MSA section 306(b) exception as necessary.

OY cannot be defined for the Cook Inlet EEZ salmon fishery in a manner that permits the State to overescape the Kenai and Kasilof Rivers by more than the total catch for the entire commercial fishery on all species in state and federal waters. There is no plausible argument that OY has been achieved in the Cook Inlet salmon fishery or in the Cook Inlet EEZ salmon fishery if 1.6 million fish are wasted in state waters from just two rivers. OY must be set in a manner that provides the framework and reference points for management measures that will prevent this from occurring. Then, as explained above, (a) if the State acts in a manner that adversely affects the achievement of OY and (b) because the entirety of the harvest in the Cook Inlet EEZ salmon fishery occurs in federal waters, the Secretary must utilize the MSA section 306(b) exception to ensure the state waters fishery does not interfere with the FMP amendment. If the State would prefer that the Secretary is unable to exercise the MSA section 306(b) exception, then the State should accept delegated management of the EEZ waters and stop its pattern of overescapement.

Management of salmon stocks as a unit or in close coordination throughout all Cook Inlet salmon fisheries is particularly important, and it is well within NMFS’s power to achieve. As currently drafted, the proposed rule violates National Standard 3.

⁶⁶ 80 Fed. Reg. 72328.

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4. Amendment 16 does not adequately consider or promote efficiency in the utilization of fishery resources, and it fails to minimize costs and avoid unnecessary duplication to the extent practicable in violation of National Standards 5 and 7.

Rather than promote efficiency or minimize costs and avoid duplication, the proposed rule appears to be specifically crafted to ensure the new federal EEZ fishery is as inefficient and economically burdensome as possible. NMFS's analysis notes that Amendment 16 will "increase direct costs and burdens to S03H permit holders due to requirements including obtaining a [Salmon Federal Fisheries Permit (SFFP)], installing and operating a VMS, and maintaining a Federal logbook"⁶⁷ among other requirements. And NMFS chose to open fishing in the EEZ on the same days and at the same times that the state fishery is open but to prohibit participants from fishing in state and federal waters during the same trip.⁶⁸ This limitation makes no sense, is extremely inefficient, is impracticable for participants, and appears punitive.

If NMFS implemented escapement-based management, rather than a TAC,⁶⁹ then the NMFS's justification for prohibiting vessels from fishing in state and federal waters in the same trip would disappear. NMFS could still estimate the total catch in the EEZ (as it has evidently been estimated in the past two decades—i.e., the historical-EEZ-catch metric NMFS proposes setting OY from), but NMFS would not need to implement such severe restrictions on the drift fleets' ability to harvest fish in Cook Inlet. Likewise, if it opened the EEZ fishery on different days than the state fishery was open, NMFS could ensure that it would get an accurate record of the fish that were caught in just the EEZ opener, because there would be no fish caught in a state-waters opener, given that the state-waters opener would occur on a different day. Either of these alternatives would reduce duplication and promote the efficient utilization of the fishery resources.

⁶⁷ See 80 Fed. Reg. 72325.

⁶⁸ This prohibition on fishing in state waters is ironic given NMFS's feigned inability to manage what occurs in state waters.

⁶⁹ The myriad problems with using a TAC at all to manage the fishery, and the problems with the manner in which NMFS proposes to set the TAC for the Cook Inlet EEZ salmon fishery are discussed in more detail in attached Ex. 6.

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NMFS also fails to provide a legitimate justification for requiring vessels to obtain VMS monitoring systems to harvest in federal waters.⁷⁰ These devices cost approximately \$3,000 per device and require additional monthly fees to operate. This is a significant expense for UCIDA’s members. For example, “[r]estrictions on fishing in the EEZ in 2020, despite relatively high abundance of salmon returns, resulted in a fishery disaster with the average drift permit holder grossing only about \$4,400 for the entire season.”⁷¹ Accordingly, if UCIDA’s members had been forced to purchase a VMS monitoring system in 2020, its cost would have eaten up 68% of their gross earnings for the entire season. NMFS has not considered this cost on fishery participants. In addition to the financial cost, these devices impose a significant privacy cost, requiring vessel owners to transmit their exact location to NMFS every hour of every day, regardless of why they are using their vessel. NMFS has not shown that the searches implemented by these devices—especially in comparison to their costs—are necessary and appropriate for the conservation and management of the fishery. The proposed rule does not adequately discuss the costs created by the implementation of VMS in comparison to its perceived benefits, not to mention a complete failure by NMFS to discuss the privacy concerns implicated by NMFS’s VMS requirement.⁷²

Further, the Cook Inlet commercial salmon fleet does not have the electronic capability to conclusively determine where the boundary line is between state and federal water. (It is also worth noting that the EEZ boundary NMFS relies on is a line on a figure, not a chart for navigational purposes, and NMFS has not given any list of GPS coordinates or a definition for fisheries participants to use as the EEZ boundary.) The electronic equipment that shows the boundary line is considerably more expensive than the typical electronic equipment found on the average Cook Inlet gillnet vessel. The boundary line is

⁷⁰ Proposed Amendment 16 does not create a similar requirement for recreational fishing vessels in the EEZ or for vessels participating in the East Area salmon fisheries.

⁷¹ See 86 Fed. Reg. 60580 (<https://www.federalregister.gov/d/2021-23610/p-158>); see also Sep. 6, 2023 Final Spend Plan for funds appropriated to address 2018 and 2020 Cook Inlet disasters attached here as Exhibit 20.

⁷² See 80 Fed. Reg. 72325 (“A vessel with an SFFP would be required to keep their VMS active *within State waters* to ensure that *entire fishing trips are monitored* and to help verify that no fishing occurred within State waters during a fishing trip that included salmon harvest in the Cook Inlet EEZ.” (emphasis added)).

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not visible and highly irregular in shape.⁷³ With tidal currents in Cook Inlet that run as strong as 7 knots, it is virtually impossible for a fishing vessel with a net deployed to stay on one side or the other of the irregular shaped boundary. The proposed rule prohibits fishing in state and federal waters but fails to address the practicality of an EEZ-waters fishery participant conducting fishing operations in federal waters without crossing over into state waters. NMFS's discussion on this topic provides that:

Due to the mobile nature of drift gillnet gear and the strong tides in Cook Inlet, fishing can occur over multiple areas in a single set. At certain times fishery effort can be concentrated on or around the EEZ boundary. Historically, this has been addressed by the State's management of the fishery without reference to the EEZ as a fishery boundary or explicit reporting area. However, fishery participants have still had to fish within the bounds of specific open areas at any given time. These are typically defined with straight boundaries with coordinates in regulation. The EEZ boundary is irregular in shape which stakeholders have indicated could be problematic for compliance. To remain in compliance with Federal regulations, drift gillnet vessels operating in the Cook Inlet EEZ would need to maintain technology necessary to accurately determine vessel position relative to the boundaries of the EEZ and remain in the area while fishing.^[74]

What NMFS is requiring is not practicable, and this is reinforced by the fact that all of the State's drift gillnet fishing areas use straight lines between defined points to designate open and closed waters.⁷⁵ Amendment 16 violates National Standard 5 by failing to analyze whether it is even possible or practicable to participate in an EEZ-only fishery.

⁷³ See Draft EIS at 35. It is also unclear whether the EEZ boundary the proposed rule references has even been set in accordance with the law, and NMFS fails to address this or consider it.

⁷⁴ Draft EIS at 133.

⁷⁵ See Draft EIS at 226–27; *see also* 2023 Upper Cook Inlet Commercial Salmon Fishery Season Summary, attached here as Ex. 3 at 12–16; Upper Cook Inlet Management Area Districts, Subdistricts, and Sections attached here as Ex. 10.

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- 5. Amendment 16 violates National Standard 8 because it fails to take into account the importance of fishery resources to the Cook Inlet fishing communities and does not utilize economic and social data to provide for the sustained participation of such communities and to minimize adverse economic impacts on such communities.**

In its National Standard 8 analysis, NMFS claims—without any support—that “[i]f EEZ harvests are reduced, additional salmon would be available for harvest in State waters by the drift gillnet fishery sector.”⁷⁶ NMFS states that any such reductions are not anticipated to result in community level impacts. NMFS is mistaken.

The administrative record is filled with evidence of why a closure in the EEZ would destroy the viability of the Cook Inlet commercial salmon fishery for those who rely on it.⁷⁷ Amendment 16 fails to account for how the precautionary approach *it* suggests (due to the difficulties *it* anticipates in managing the fishery) will impact fishing communities. In addition, the best available scientific information does not support that a loss of harvest for the drift fleet in EEZ could be made up in state waters as the proposed rule suggests, especially when those state waters are already mostly closed. All harvest data and records—and the evidence in the administrative record—demonstrates otherwise. NMFS ignores this evidence, and instead proposes closing fishing in the EEZ annually on August 15—before some runs have finished and before many runs even start—to defer to the State.⁷⁸ Looking just at the Kenai River, for example, in 2023 the total escapement on August 14 was 1,867,436 sockeye.⁷⁹ By August 29, the total escapement had risen to 2,351,020 sockeye.⁸⁰ This means that 483,584 sockeye escaped in just the Kenai River in

⁷⁶ 80 Fed. Reg. 72329.

⁷⁷ See Decl. of Erik Huebsch in Support of Motion to Expedite Case and attachments, attached here as Ex. 11, at 7–85 (collecting public comments to the NPFMC regarding State’s effort to close federal waters to commercial fishing); see also amicus briefs District Court litigation attached to March 31, 2023 UCIDA comment on Agenda Item C1.

⁷⁸ See 80 Fed. Reg. 72324.

⁷⁹ See Daily Fish Counts, attached as Ex. 12, at 2–3.

⁸⁰ *Id.*

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the 15 days after NMFS's proposed closure date. This does not comply with the MSA or the courts' rulings.⁸¹

Amendment 16 also appears to propose allowing new participants into the commercial fishery and provides no explanation or justification for doing so. Commercial fishing for salmon in federal and state waters in Cook Inlet has been restricted to limited entry permit holders since 1974. NMFS proposes to do away with this restriction for salmon fishing in the EEZ by only requiring a federal permit before a person can participate in a fishery.⁸² NMFS proposal makes this sweeping reallocation of the commercial salmon resources without any explanation or science-based justification. In addition to violating National Standard 8, this reallocation violates National Standard 4 as it is not fair and equitable and there is no evidence that allowing new participants into a fishery that has been limited entry for decades will promote conservation, especially when NMFS is so concerned with overfishing. To the extent NMFS contends that it is not opening the fishery up to new participants, it must clarify the ambiguity in the proposed rule in response to this comment. NMFS's analysis cannot fail to consider whether it is letting new participants into the "Cook Inlet EEZ salmon fishery" and whether it is disrupting the fishery's historical status as a limited entry fishery.

C. Additional Comments and Exhibits

Attached herewith as exhibits and incorporated by reference are UCIDA's previous comments and materials provided relevant to the proposed FMP amendment. UCIDA hereby expressly incorporates all exhibits and attachments to this letter and all previously submitted materials as additional comments on proposed Amendment 16 that should be considered and responded to by NMFS. These materials constitute part of the administrative record. This includes the following documents and their attachments, among the others attached herewith and referenced above:

⁸¹ NMFS specifically requested comments on its proposed closure date of August 15. UCIDA urges NMFS not to adopt a pre-determined season closure date. Doing so would only defer to the State for the remainder of the fishing season. Instead, NMFS should close harvest in federal waters when and not until OY has been achieved for the fishery, which is unlikely to occur on the same date or a predictable date each year.

⁸² See 80 Fed. Reg. 72325.

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- Exhibit 13 – UCIDA’s May 18, 2020 letter to Mr. Kinneen et al.
- Exhibit 14 – UCIDA’s December 2, 2022 comment on Agenda Item C-3, addressed to Simon Kinneen, Chair of the NPFMC.
- Exhibit 15 – UCIDA’s March 31, 2023 comment on Agenda Item C-1 addressed to Simon Kinneen, Chair of the NPFMC.
- Exhibit 16 – UCIDA’s May 25, 2023 comment on NMFS’s public hearing and written comment period pertaining to salmon fisheries in Cook Inlet, addressed to Kelly Denit, Director, Office of Sustainable Fisheries.
- Exhibit 17 – UCIDA’s June 14, 2023 letter to Jon Kurland, Regional Administrator, NOAA Fisheries.
- Exhibit 18 – ADF&G’s Aug. 31, 2021 letter to Chris Oliver, Executive Director, NPFMC.
- Exhibit 19 – ADF&G’s UCI Annual Management Report for 2002.

III. CONCLUSION

There are numerous reasons why proposed Amendment 16 violates the MSA, the court rulings, and other applicable law. UCIDA urges NMFS to reject Amendment 16 and to instead produce an MSA-compliant FMP amendment, rather than wasting another remand and severely damaging UCIDA’s members and the communities in Cook Inlet along the way.

We sincerely appreciate your consideration of these comments and concerns.

Kind regards,



Connor R. Smith



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May 25, 2023

Kelly Denit, Director
Office of Sustainable Fisheries,
National Marine Fisheries Service

**Re: Fisheries of the Exclusive Economic Zone Off Alaska; Cook Inlet Salmon;
Public Hearing**

Dear Director Denit:

Please accept these comments on behalf of the United Cook Inlet Drift Association (UCIDA) regarding the National Marine Fisheries Service’s (NMFS) public hearing and written comment period pertaining to salmon fisheries in Cook Inlet, identified by Docket ID NOAA-NMFS-2023-0065. NMFS invited comments regarding a proposed amendment to the Fishery Management Plan (FMP) for the Salmon Fisheries in the Exclusive Economic Zone (EEZ) Off Alaska. According to its published notice, NMFS plans to institute an FMP amendment via the “Secretarial Amendment” process—pursuant to Section 304(c) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA)—that would establish Federal management for the salmon fisheries in the EEZ waters of upper Cook Inlet. NMFS seeks input from interested persons on its development of an amendment and implementing regulations.

NMFS explains that it “will choose from among the Federal management options [] under Alternative 3 in the analysis prepared for the Council.”¹ UCIDA has reviewed Alternative 3 as detailed at Section 2.5 of the March 2023 Action Memo and the Draft Environmental Assessment for Final Action (EA), posted to the Council’s website, and as detailed in NMFS’s April 7, 2023, motion regarding its preferred alternative that failed for lack of a second at the North Pacific Fishery Management Council (the “Council”) meeting on C1 Cook Inlet Salmon.² UCIDA is an organization that has represented the economic,

¹ 88 FR 25382, 25383.

² NMFS’s April 7, 2023, Failed Motion is attached hereto as Attachment 1 (hereafter “Failed Motion”).

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social, and political interests of the 585 drift gillnet permit holders, their families, and fishing communities in Cook Inlet, Alaska for over 40 years. UCIDA is an interested party and provides these comments as such.

In short, NMFS’s preferred alternative—Alternative 3—is unlawful as currently drafted. UCIDA urges NMFS to avoid using the Secretarial Amendment process to take final action on an unlawful alternative. Instead, UCIDA respectfully requests that NMFS revise Alternative 3—in collaboration with UCIDA and other stakeholders—to comply with the law and develop a management plan for salmon that is consistent with the MSA, the court orders, and other applicable law.

I. SPECIFIC COMMENTS

A. Alternative 3 Does Not Comply with the Law.

NMFS’s proposed implementation of Alternative 3 would result in an FMP amendment that again fails to comply with the MSA, the courts’ rulings, and other applicable law for many of the same reasons that Amendment 14 was struck down by the District Court.

1. Alternative 3 fails to establish an FMP for the entire “fishery.”

The District Court held that Amendment 14 was unlawful because it did not establish an FMP for the entire Cook Inlet “fishery.”³ It explained that “[a] ‘fishery’ is defined in the Act as ‘one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics’ and ‘any fishing for such stocks.’”⁴

Alternative 3 fails to establish an FMP for the entire Cook Inlet “fishery” and is unlawful for this basic and fundamental reason. Alternative 3 discusses the Cook Inlet EEZ salmon fishery and “landings from the Federal fishery occurring in the EEZ” as distinct

³ *United Cook Inlet Drift Ass’n v. Nat’l Marine Fisheries Serv.*, No. 3:21-CV-00247-JMK, 2022 WL 2222879, at *7 (D. Alaska June 21, 2022) (internal citations omitted) (hereafter “District Court Order”).

⁴ *Id.* (quoting 16 U.S.C. § 1802(13)(A)–(B)).

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“from landings originating from the directly adjacent State waters salmon fishery.”⁵ The EA states that “NMFS would be able to apply [management] measures only to the fishery that occurs in the EEZ,”⁶ and it discusses the “[c]hallenges associated with a separate salmon fishery in the EEZ.”⁷ This distinction fails to account for the entire Cook Inlet salmon “fishery” as defined by the MSA, and “any fishing for such stocks.”⁸ Ideally, federal management pursuant to Alternative 3 would result in NMFS cooperating with the State, including through a formalized management agreement, to ensure seamless management of the entire fishery. If cooperation is impossible, it is not an acceptable alternative to produce an FMP amendment that does not ensure the entire “fishery” and “any fishing on such stocks” is managed consistent with the MSA.

The EA acknowledges that “under the MSA, NMFS must manage the Federal fisheries under its jurisdiction to prevent overfishing, including accounting for all removals, even when the removals responsible for causing overfishing are outside of NMFS’s jurisdiction.”⁹ NMFS is correct that it must manage the fisheries under its jurisdiction, including by accounting for all removals in State waters. It cannot do so by just deferring to the State as Alternative 3 currently suggests: “if salmon removals increase in State waters, EEZ TACs would be reduced to prevent overfishing.”¹⁰ This is the same deferral mechanism that the Ninth Circuit and District Court have admonished. The EA’s statement that “the Cook Inlet EEZ drift gillnet fishery would be managed separately from the adjacent State waters salmon drift gillnet fishery” is unlawful given that courts have reiterated that an FMP amendment must cover the *entire fishery* as defined by the MSA.¹¹ NMFS cannot create a subservient fishery in the EEZ that defers to the State-waters fishery and fails to address the whole “fishery” as defined by the MSA.

2. Alternative 3 continues NMFS’s pattern of deferral to the State.

As currently drafted, Alternative 3 would continue NMFS’s unlawful practice of deferring to State management rather than taking ownership of the fishery in Cook Inlet

⁵ EA at 109.

⁶ *Id.*

⁷ *Id.* at 116.

⁸ 16 U.S.C. § 1802(13)(B)).

⁹ EA at 117 (emphasis added).

¹⁰ *Id.*

¹¹ *Id.* at 126.

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and managing it pursuant to federal rules and in the National Interest. The District Court explained that “the management standards set by NMFS are federal management standards in form rather than substance. These standards rely entirely on decisions made by the state of Alaska.”¹² Similarly, the Court explained that “NMFS cannot satisfy its obligation under the Magnuson-Stevens Act to develop a plan for the Cook Inlet salmon fishery simply by applying conservation and management measures (i.e., the closure) from an existing plan.”¹³ What Alternative 3 proposes is not viable in light of the courts’ rulings.

The District Court already ruled that deferral is not MSA compliant management:

[P]ragmatic *incorporation* should not be confused with wholesale *deferral*. . . . Inclusion of the ‘Cook Inlet EEZ Subarea’ to an existing list of closure measures, absent further explanation or analysis as to how the closure serves the conservation and management purposes of the Magnuson-Stevens Act as to the Cook Inlet salmon fishery, does not amount to management through the FMP. Definitional semantics cannot substitute for actual management, especially where the agency anchors its decision to effectuating delegation to the State without any measures for federal oversight.^[14]

The EA trumpets the difficulties and complexities NMFS will face in managing the fishery, including by suggesting that the risk of overfishing or foregone yield will increase under NMFS’s management.¹⁵ This is more of the same. Rather than take ownership and invest in managing the fishery for the benefit of the Nation, as it is required by law to do, NMFS instead predicts that it will do a poor job managing the fishery, which it hypothesizes will likely lead to a fishery closure.¹⁶ If NMFS is truly unable to effectively manage the fishery with the tools currently available to it, the result cannot be that the fishery is closed to the detriment of those who rely on the fishery and to the Nation. Instead, the result ordered by the courts is that NMFS stop shirking its statutory duty and manage the entire “fishery” in a manner that protects those who rely on it and furthers the National Interest. This is not an optional directive that can be avoided by claimed difficulty.

¹² District Court Order at *9.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See* EA at 116.

¹⁶ *See id.* at 115 (“One potential annual management outcome of Alternative 3 is that NMFS would close the Cook Inlet EEZ to commercial salmon fishing in a given year.”).

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3. Alternative 3 elevates a strawman of “preventing overfishing” above “achieving, on a continuing basis, optimum yield,” when the best scientific evidence demonstrates that underfishing is the current problem, not overfishing.

The District Court held that “NMFS [is] required to independently establish that closure [is] warranted in the Cook Inlet salmon fishery, rather than blindly importing existing conservation measures from an adjacent area.”¹⁷ The District Court explained that “**NMFS’s own analysis** determined that ‘[o]verfishing is not occurring for any Cook Inlet salmon stocks, and none are in an overfished status.’ This does not track with the agency’s explanation that the reason for the closure is to ensure a ‘precautionary approach to minimizing the potential for overfishing.’”¹⁸

Alternative 3 fails to acknowledge that overfishing is not occurring for any Cook Inlet salmon stocks or that the State’s management of the Cook Inlet salmon fishery has consistently resulted in *significant* over escapement and wasted salmon. Instead, Alternative 3 proposes the same precautionary approach as Amendment 14, foreshadowing that “[o]ne potential annual management outcome of Alternative 3 is that NMFS would close the Cook Inlet EEZ to commercial salmon fishing in a given year.”¹⁹

While, of course, NMFS must to strive to prevent overfishing, this must occur “*while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.*” “Had Congress charged the Secretary with merely preventing overfishing, the Secretary likely would have responded with eliminating fishing altogether.”²⁰ Preventing overfishing may be easier for NMFS than achieving optimum yield—because a closed fishery requires very effort to manage—but that is not what the MSA requires. “Congress requires that the Secretary perform a balancing act.”²¹ NMFS cannot shirk its duty to achieve optimum yield by inventing an erroneous danger of overfishing. Courts have explained that NMFS must balance preventing overfishing with achieving optimum yield and that when optimum yield is not being achieved, “preventing

¹⁷ District Court Order at *9 (internal footnote omitted).

¹⁸ *Id.* at *12 (internal citations omitted) (emphasis added).

¹⁹ EA at 115.

²⁰ *W. Sea Fishing Co. v. Locke*, 722 F. Supp. 2d 126, 140 (D. Mass. 2010).

²¹ *Id.*

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overfishing” is not a legitimate justification for refusing to take measures towards achieving optimum yield:

While the Secretary is correct to the extent that national standard 1 requires consideration of maintaining a health[y] fishery, any such analysis should be used in setting the appropriate optimum yield. Once optimal yield is set, the Secretary is charged with “achieving” the optimum yield. Here, the evidence demonstrates that the herring landings have been consistently below the optimum yield, and well below the optimum yield, since 1999. The justification for refusing to grant Cape Clam a license is not rationally related to achieving optimum yield when there is simply no evidence or contention of a current danger of overfishing.^[22]

As long-time Cook Inlet commercial fishermen and UCIDA Vice President, Erik Huebsch, explained in a declaration submitted to the District Court, “[w]ith salmon stocks, both overfishing and underfishing can have the same deleterious effect on future runs. Simply put, not enough spawners (due to overfishing) or too many spawners (due to underfishing) can both negatively affect future run sizes and future yields.”²³ He explained—using the State’s own data—how the State has set escapement and in-river goals that do not comply with MSY and result in over escapement, and he explained how the State is intentionally managing the Cook Inlet salmon stock to exceed its own escapement goals.²⁴ The State is succeeding in over escaping these rivers, which does not achieve optimum yield and potentially causes significant lasting harm to the resource.²⁵ As Mr. Huebsch explained and provided supporting data to verify, the State has exceeded the high-end of the range of its in-river escapement goal on the Kenai River at least nine out of the last ten years, and often by a wide margin, including over escaping and wasting over

²² *Id.*

²³ Decl. of Erik Huebsch and Exhibits 1–7, attached hereto as Attachment 2. (Huebsch Decl.), ¶ 7.

²⁴ *Id.* at ¶¶ 17–23.

²⁵ *United States v. State of Wash.*, 384 F. Supp. 312, 390 (W.D. Wash. 1974), *aff’d and remanded*, 520 F.2d 676 (9th Cir. 1975) (“Wastage of fish and potential harm to other species and to the spawning stock of the same species may occur as a result of overescapement of salmon at spawning grounds. The Department of Fisheries believes that it is not properly managing the salmon resource if fish in excess of the number needed for spawning escape to the spawning grounds.” (emphasis added)).

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1,000,000 Kenai River bound sockeye salmon in a single year.²⁶ Alternative 3 is silent on this pervasive and troubling issue that has prevented optimum yield from being achieved on an ongoing basis for over a decade.

4. Alternative 3 does not comply with the National Standards.

The discussion above explains one aspect of why Alternative 3 fails to comply with National Standard 1, but Alternative 3 falls short of what National Standard 1 and the other national standards require in other important respects as well.

a. Alternative 3 sets MSY and OY as derivatives of the State’s escapement goals and fails to establish MSY and OY for the Cook Inlet salmon “fishery” as defined by the MSA.

The District Court ruled that Amendment 14 failed to comply with the national standards when it failed to properly set maximum sustained yield (MSY) or optimum yield (OY) and instead tied federal management targets to the changing landscape of state decisions.²⁷ The court explained that this was an improper delegation of management authority to the State:

Bootstrapping statutorily required management measures, such as MSY and OY, to the actual number of fish caught in the Cook Inlet, as determined by the State of Alaska, summarily casts the decision of what constitutes ‘the amount of fish which . . . will provide the greatest overall benefit to the Nation’ to Alaska’s Department of Fish and Game. The Magnuson-Stevens Act surely does not intend for the State of Alaska to be the sole arbiter of conservation and management measures without any federal stewardship.

....

The plan for continuous federal management cannot consist of the agency abandoning its responsibilities in favor of deferral to the State. This approach would open the door for state management that is inconsistent with, and free

²⁶ Huebsch Decl., ¶ 21.

²⁷ District Court Order at *10.

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from, oversight by the federal agencies ultimately tasked with conservation and management of the fishery.^[28]

Like failed Amendment 14, Alternative 3 proposes bootstrapping MSY and OY to the State’s escapement goals.²⁹ The National Standards require NMFS to establish the “optimum yield from each fishery for the United States fishing industry.”³⁰ This cannot be accomplished by deferring to the State’s escapement goals, which are set based on the State’s parochial motivations. For it to rely on the State’s escapement goals, NMFS must play an active role in setting these goals or determining that they are set in a lawful manner based on federal priorities and in the National Interest. These goals cannot be determined merely by the State’s individual priorities or interests.

NMFS’s preferred Option 2 for setting MSY proposes defining MSY in terms of “‘constant escapement’ for salmon stocks in Cook Inlet.”³¹ In the EA, “constant escapement” is defined as the “lower bound of the escapement goal range.”³² NMFS then states without support that, “escapement goals account for MSY, biological productivity, and ecological factors, including the consumption of salmon by a variety of marine predators. The SSC and Salmon Plan Team or NMFS would identify the escapement goal target [currently the lower bound] used to establish MSY.”³³ NMFS’s entire proposed conceptualization of MSY appears to be based on the lower bounds (or some other targets set in the future) of the State’s escapement goals. This is deferral. NMFS must verify that the State’s escapement goals account for MSY (they do not) before NMFS wholesale relies on them to set MSY for the EEZ.

NMFS also improperly proposes to set OY based on just the fishing activity in the EEZ. NMFS explains that “OY is the long-term desired yield from a stock, stock complex, or fishery that will provide the greatest overall net benefit to the Nation.”³⁴ But NMFS then

²⁸ *Id.* at *11.

²⁹ *See* EA at 116–20. NMFS makes many calculations based on a data set from 1999–2021. But this reflects a time period where the State had already unnecessarily restricted harvest, thus skewing the data.

³⁰ 16 U.S.C. § 1851(a)(1).

³¹ Failed Motion at 1.

³² EA at 119.

³³ *Id.*

³⁴ *Id.* at 121.

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proposes to set OY for the Cook Inlet salmon “fishery,”³⁵ as a range between the high-low historical-catch averages from the EEZ.³⁶ This is not OY for the “fishery” as defined by the MSA. At best, this is an effort at setting OY for fishing effort in the EEZ, but that is not what the MSA requires NMFS to do.³⁷ It is also unclear what science supports setting OY based on the high-low average that NMFS puts forth. For example, NMFS’s proposed approximation is for “salmon of all species.”³⁸ But salmon of all species do not naturally return at the same rate every year. Pink salmon, for example, return in much higher numbers in Cook Inlet in even years.³⁹ It is unclear why OY in an odd year would be based on a range of a low-high average that includes even years or why even years would be based on a low-high average that includes odd years.

Alternative 3 also fails to comply with National Standard 3 because it does not manage any stock of fish as a unit throughout its range and specifically describes different management measures for the EEZ and state waters.

b. NMFS’s preferred management measures appear calculated to make fishing in Cook Inlet as difficult and economically unviable as possible.

Alternative 3 as a whole and, to an even greater degree, NMFS’s preferred management measures from the options provided by Alternative 3 create an unworkable fisheries management structure. It fails to comply with National Standard 5 because it proposes inefficient, duplicative, and non-cooperative management schemes that would

³⁵ 16 U.S.C. § 1802(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.”).

³⁶ Failed Motion at 2.

³⁷ Annual catch limits (“ACLs”) also must be established for the “fishery,” not just fishing in the EEZ. NMFS has discretion to use escapement goals as a proxy for ACLs as set forth in the letter to Chris Oliver from Eric Schwab, Assistant Administrator of Fisheries, dated March 15, 2011.

³⁸ EA at 121.

³⁹ See, e.g., *United States v. Washington*, 20 F. Supp. 3d 828, 892 (W.D. Wash. 2007) (“Numbers of fish harvested then fluctuated between approximately three and four million fish for the next several years, higher in the odd-numbered years when large numbers of pink salmon were harvested.”).

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increase management and operational costs for participants. NMFS acknowledges the difficulties Alternative 3 would create:

Due to the mobile nature of drift gillnet gear and the strong tides in Cook Inlet, fishing can occur over multiple areas in a single set. At certain times fishery effort can be concentrated on or around the EEZ boundary. Historically, this has been addressed by the State's management of the fishery without reference to the EEZ as a fishery boundary or explicit reporting area. . . . The EEZ boundary is irregular in shape which stakeholders have indicated could be problematic for compliance.^[40]

Yet NMFS's preferred management measures make it unlawful for any person to (a) fish in state waters and federal waters in the same day, (b) have salmon onboard that were caught in state waters while fishing in federal waters, (c) land salmon caught in state waters concurrently with salmon caught in federal waters, or (d) allow any portion of a net fishing in the federal waters to enter state waters.⁴¹

Similarly, NMFS acknowledges the difficulty in ensuring that "vessels only participating in the State waters fishery do not enter EEZ waters," explaining that "[t]his could be most simply addressed by opening the EEZ drift gillnet fishery off-cycle with the State salmon drift gillnet fishery,"⁴² but then NMFS's preferred management measure is to "[e]stablish Federal fishing periods concurrent with existing State of Alaska fishing periods."⁴³ This is unworkable. NMFS appears to have chosen preferred management measures that would make it the most difficult for commercial fishermen to participate in the fishery.

Alternative 3 also fails to account for management measures that would minimize the impacts on fishing communities.⁴⁴ The administrative record is filled with evidence of why a closure in the EEZ would destroy the viability of the Cook Inlet commercial salmon fishery for those who rely on it.⁴⁵ Alternative 3 fails to account for how the precautionary approach *it* suggests (due to the difficulties *it* anticipates in managing the fishery) will

⁴⁰ EA at 129.

⁴¹ Failed Motion at 3–4.

⁴² EA at 127–28.

⁴³ Failed Motion at 3.

⁴⁴ See 16 U.S.C. § 1851(a)(8).

⁴⁵ See *Amicus Curiae* briefs filed by local communities, attached hereto as Attachment 3.

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impact fishing communities. In addition, the best available scientific information does not support that a loss of harvest for the drift fleet in EEZ could be made up in state waters as Alternative 3 suggests, especially when those state waters are already mostly closed. All harvest data and records—and the evidence in the administrative record—demonstrates otherwise. NMFS ignores this evidence, and instead proposes closing fishing in the EEZ on July 15—before the peak of most runs, and before many runs even start—to defer to the State.⁴⁶ This does not comply with the MSA or the courts’ rulings.

Alternative 3 also proposes allowing new participants into the commercial fishery and provides no explanation or justification for doing so. Commercial fishing for salmon in federal and state waters in Cook Inlet has been restricted to limited entry permit holders since 1974. NMFS proposes to do away with this restriction for salmon fishing in the EEZ by only requiring a federal permit before a person can participate in a fishery.⁴⁷ NMFS calls this approach “Open Access” and states that this would allow “anyone to obtain a Federal Fisheries Permit and participate in the Cook Inlet EEZ drift gillnet fishery.”⁴⁸ NMFS proposal makes this sweeping reallocation of the commercial salmon resources without any explanation or science-based justification. Among other issues, this reallocation violates National Standard 4 as it is not fair and equitable and there is no evidence that allowing new participants into a fishery that has been limited entry for decades will promote conservation, especially when NMFS is so concerned with overfishing.

For the reasons explained above and explained by the Ninth Circuit and District Court in their rulings, Alternative 3 is not a viable option as currently drafted. At bottom, Alternative 3 is really just another thinly veiled attempt to close the fishery and ensure that management will occur only in State waters under the sole discretion of the State. UCIDA urges NMFS not to pursue Alternative 3 as described.

B. The Remand Process is Fundamentally Flawed.

NMFS must fundamentally change its approach to the process of creating an FMP amendment for the Cook Inlet salmon fishery. NMFS has spent nearly a decade trying to avoid managing the fishery and trying to defer its management responsibility to the State, all the while expressing that the State is better suited to manage the fishery than NMFS and

⁴⁶ Failed Motion at 3.

⁴⁷ *Id.* at 4.

⁴⁸ *Id.*

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that NMFS will be ineffective if required to manage the fishery. NMFS now appears committed to fulfilling its own prophecy of ineffective management, conveying to the commercial fishery participants that “you kept asking for this even though we told you we would do a bad job, and now we are committed to doing a bad job so that you will get what we told you was coming.” This approach is incredibly unfortunate. Moreover, it is illegal.

NMFS’s current proposal to manage harvest using a TAC set just for federal waters based solely on preseason forecast will virtually ensure that the fishery cannot achieve optimum yield on a continuing basis. NMFS previously agreed that management of the salmon fishery based on escapement goals was better and more efficient than management based on set harvest limits. NMFS must build into any plan the ability to make in season adjustments based on data collected in season to allow a meaningful opportunity to harvest the available surplus. The State of Alaska makes the data necessary to make those adjustments available on a daily basis, and the FMP can authorize NMFS to make adjustments on an in-season basis. Failure to provide for such adjustment in a plan would effectively mean that the FMP would not be making best available science determinations.

The language of proposed Alternative 3 shows a failure by NMFS to meaningfully grapple with important issues in fishery management. There are hundreds of salmon bearing streams, rivers, and tributaries in Cook Inlet.⁴⁹ Harvest exploitation rates on many stocks (e.g. coho, chum and pink) are very low, and these stocks are currently heavily underutilized by State management.⁵⁰ NMFS’s obligation is to ensure management of these stocks in a manner consistent with the National Standards. Alternative 3 does not purport to do so or even address this issue.

A status hearing was held before the District Court on May 4, 2023, during which Judge Kindred expressed his sincere disappointment regarding NMFS’s actions thus far since the court’s order ruling that Amendment 14 was unlawful. Judge Kindred issued an Amended Remedy Order shortly thereafter explaining that “the actions taken by the Federal Defendants in the eleven months following the Court’s Order on the parties’ Cross-Motions for Summary Judgment at Docket 67 are nearly identical to those taken to

⁴⁹ See Attachment 4.

⁵⁰ See Attachment 5.

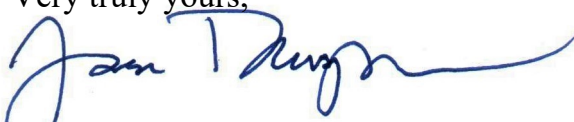
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implement the now-vacated Amendment 14.”⁵¹ The court ordered NMFS to collaborate with UCIDA “to avoid a perpetual cycle of litigation in this matter.”⁵² UCIDA urges NMFS to move forward in good faith and to work towards an FMP that is consistent with the MSA, the court orders, and other applicable law. Using the Secretarial Amendment process to push Alternative 3 as currently drafted to a final rule will do nothing but lead to wasted resources, harm to stakeholders, and avoidable litigation.

* * * * *

We sincerely appreciate your consideration of these comments and concerns.

Very truly yours,



Jason T. Morgan

⁵¹ *United Cook Inlet Drift Ass’n v. Nat’l Marine Fisheries Serv.*, No. 3:21-CV-00247-JMK, 2023 WL 3467496, at *3 (D. Alaska May 15, 2023) (hereafter “Amend Remedy Order”).

⁵² *Id.*

ATTACHMENT 2

FINAL RULE



34718

Federal Register / Vol. 89, No. 84 / Tuesday, April 30, 2024 / Rules and Regulations

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR 902

50 CFR Parts 600 and 679

[Docket No.: 240417-0111]

RIN 0648-BM42

Fisheries of the Exclusive Economic Zone off Alaska; Cook Inlet Salmon; Amendment 16

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement amendment 16 to the Fishery Management Plan (FMP) for the Salmon Fisheries in the Exclusive Economic Zone (EEZ) Off Alaska (Salmon FMP). Amendment 16 and this final rule establish Federal fishery management for all salmon fishing that occurs in the Cook Inlet EEZ, which includes commercial drift gillnet and recreational salmon fishery sectors. This action is necessary to comply with rulings from the U.S. Court of Appeals for the Ninth Circuit and the U.S. District Court for the District of Alaska, and to ensure the Salmon FMP is consistent with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). This final rule is intended to promote the goals and objectives of the Magnuson-Stevens Act, the Salmon FMP, and other applicable laws.

DATES: This rule is effective on May 30, 2024.

ADDRESSES: Electronic copies of amendment 16; the Environmental Assessment, the Regulatory Impact Review, and the Social Impact Analysis (contained in a single document and collectively referred to as the "Analysis"); the Finding of No Significant Impact; and the public comment announcement and tribal consultation and meeting summaries prepared for this action may be obtained from <http://www.regulations.gov> or from the NMFS Alaska Region website at <https://www.fisheries.noaa.gov/action/amendment-16-fmp-salmon-fisheries-alaska>.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to NMFS Alaska Region, P.O. Box 21668, Juneau, AK

99802-1668, Attn: Gretchen Harrington; in person at NMFS Alaska Region, 709 West 9th Street, Room 401, Juneau, AK; and to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments"; or by using the search function.

FOR FURTHER INFORMATION CONTACT: Doug Duncan, 907-586-7228 or doug.duncan@noaa.gov.

SUPPLEMENTARY INFORMATION: This final rule implements amendment 16 to the Salmon FMP. NMFS published the proposed rule and Notice of Availability (NOA) for amendment 16 in the **Federal Register** on October 19, 2023 (88 FR 72314), with public comments invited through December 18, 2023. Comments submitted on the NOA and the proposed rule for amendment 16 were considered jointly. The Secretary of Commerce approved amendment 16 on April 9, 2024, after considering public comment and determining that amendment 16 is consistent with the Salmon FMP, the Magnuson-Stevens Act, and other applicable laws.

NMFS manages U.S. salmon fisheries in the EEZ off of Alaska under the Salmon FMP. The North Pacific Fishery Management Council (Council) prepared, and the Secretary of Commerce (Secretary) approved, the Salmon FMP under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.* Regulations implementing the Salmon FMP are located at 50 CFR part 679. General regulations governing U.S. fisheries also appear at 50 CFR part 600. NMFS is authorized to prepare an FMP amendment necessary for the conservation and management of a fishery managed under the FMP if the Council fails to develop and submit such an amendment after a reasonable period of time (section 304(c)(1)(A); 16 U.S.C. 1854(c)(1)(A)). Because the Council failed to take action to recommend an FMP necessary for the conservation and management of the Cook Inlet EEZ salmon fishery, NMFS developed amendment 16 to the Salmon FMP and this final rule pursuant to section 304(c) of the Magnuson-Stevens Act in order to comply with rulings from the U.S. Court of Appeals for the Ninth Circuit and the U.S. District Court for the District of Alaska, and to ensure the Salmon FMP is consistent with the Magnuson-Stevens Act.

Amendment 16 Overview

Amendment 16 incorporates the Cook Inlet EEZ into the Salmon FMP as the Cook Inlet EEZ Area (defined as the EEZ waters of Cook Inlet north of a line at

59°46.15' N), thereby bringing the salmon fishery that occurs within it under Federal management by the Council and NMFS.

Two different sectors participate in the Cook Inlet EEZ Area salmon fishery: the commercial drift gillnet sector and the recreational sector. Historically, the commercial drift gillnet fleet has harvested over 99.99 percent of salmon in the Cook Inlet EEZ Area. Under this action, all salmon fishing in the Cook Inlet EEZ Area is managed by NMFS and the Council separately from adjacent State of Alaska (State) water salmon fisheries.

Amendment 16 revises the Salmon FMP, beginning with an updated history of the FMP and introduction in chapter 1, as well as a revised description of the fishery management unit in chapter 2 that includes the Cook Inlet EEZ Area as a separate and distinctly managed area. The management and policy objectives in chapter 2 are revised to include consideration of the Cook Inlet EEZ Area. Amendment 16 consolidates chapters describing management of the Salmon FMP's East Area and West Area into chapter 3. No substantive changes are made to Salmon FMP content related to the East Area and West Area.

A new chapter 4 comprehensively describes Federal management measures and the roles and responsibilities of NMFS and the Council in managing the Cook Inlet EEZ Area salmon fishery. In particular, chapter 4 defines all required conservation and management measures, including maximum sustainable yield (MSY), optimum yield (OY), and status determination criteria, and includes an outline of the harvest specifications process. Chapter 4 also describes required Federal permits; fishing gear restrictions; fishing time and area restrictions; NMFS inseason management provisions; and monitoring, recordkeeping, and reporting requirements.

Chapter 5 contains all content related to domestic annual harvesting and processing capacity, finding that all salmon fisheries off Alaska can be fully utilized by U.S. harvesters and processors. This finding is unchanged by this action.

Chapter 6 contains information on Essential Fish Habitat and Habitat Areas of Particular Concern and is not modified by this action. Amendment 16 removes the outdated Fishery Impact Statement in the Salmon FMP. The Analysis prepared for amendment 16 contains the Fishery Impact Statement for the Cook Inlet EEZ salmon fishery and this action.

Maximum Sustainable Yield and Optimum Yield

Under amendment 16, MSY and OY are specified consistent with the National Standard guidelines and are briefly described below. The definitions of MSY and OY are explained in greater detail in the preamble to the proposed rule and remain unchanged in this final rule.

MSY is specified for salmon stocks and stock complexes in Cook Inlet and defined as the maximum potential yield, which is calculated by subtracting the lower bound of the escapement goal (or another escapement value as recommended by the Council's Scientific and Statistical Committee (SSC) based on the best scientific information available) from the total run size for stocks where data are available. An escapement goal is the number of spawning salmon likely to result in sustainable yields over a broad range of expected conditions. Any fish in excess of that necessary to achieve the escapement goal for each stock or stock complex are theoretically available for harvest under this definition of MSY. For stocks where escapement is not known, historical catch is used as a proxy for MSY.

Amendment 16 defines the OY range for the Cook Inlet EEZ salmon fishery in the Salmon FMP as the range between the averages of the three lowest years of total estimated EEZ salmon harvest and the three highest years of total estimated EEZ salmon harvest from 1999 to 2021. This definition of OY tempers the influence of extreme events in defining OY (e.g., fishery disasters at the low end, or extremely large harvests at the high end), thereby resulting in a range of harvests that are likely to be sustainable and provide the greatest net benefit to the Nation into the future.

Status Determination Criteria and Annual Catch Limits

Amendment 16 specifies objective and measurable criteria for determining when a stock or stock complex is subject to overfishing or is overfished. These are referred to as status determination criteria and are established during the harvest specification process and evaluated each year after fishing is complete.

Amendment 16 establishes a tier system to assess salmon stocks based on the amount of available information for each stock. NMFS annually assigns each salmon stock to a tier based on the best available scientific information during the harvest specifications process as follows:

- Tier 1: salmon stocks with escapement goals and stock-specific estimates of harvests
- Tier 2: salmon stocks managed as a complex, with specific salmon stocks as indicator stocks
- Tier 3: salmon stocks or stock complexes with no reliable estimates of escapement

For stocks and stock complexes where escapement is known (Tier 1), or escapement of indicator stocks is thought to be a reliable index for the number of spawners in a stock complex (Tier 2), overfishing is defined as occurring when the fishing mortality rate in the Cook Inlet EEZ Area (F_{EEZ}) exceeds the maximum fishery mortality threshold (MFMT). The MFMT is defined as the maximum potential fishing mortality rate in the EEZ above which overfishing occurs for Tier 1 and 2 stocks, expressed as an exploitation rate that is assessed over one generation.

For Tier 1 and Tier 2 stocks, the Salmon FMP defines the overfishing limit (OFL) as the amount of salmon harvest in the EEZ for the coming year that corresponds with the spawning escapement target not being achieved, based on information available pre-season. Acceptable biological catch (ABC) is established based on the OFL. As an ABC control rule, ABC must be less than or equal to OFL, and the SSC may recommend reducing ABC from OFL to account for scientific uncertainty, including uncertainty associated with the assessment of spawning escapement goals, forecasts, harvests, and other sources. The annual catch limit (ACL) for each stock is set equal to ABC.

For Cook Inlet salmon, the minimum stock size threshold (MSST)—the level of biomass below which a stock would be considered overfished—is calculated for stocks in Tier 1 and 2 as follows: a stock or stock complex is overfished when summed escapements over a generation fall below one half of summed spawning escapement goals over that generation.

For Tier 3 stocks, which have no reliable estimates of escapement, overfishing is defined as occurring when harvest exceeds the OFL. The OFL for Tier 3 stocks is set as the maximum EEZ catch of the stock multiplied by the generation time (years). The result of this calculation is compared against the cumulative EEZ catch of the stock for the most recent generation. The SSC may recommend an alternative catch value for the OFL on the basis of the best scientific information available. As with Tier 1 and 2 stocks, ABC for these stocks must be set less than or equal to

the OFL, and may be reduced by a buffer to account for scientific uncertainty. For Tier 3 stocks or stock complexes with escapement goals for a suitable indicator stock, the MSST is calculated the same as for Tier 1 and 2 stocks. For Tier 3 stock complexes without any suitable indicator stocks with escapement goals, it is not possible to calculate MSST.

While OFL, ABC, and ACL are calculated based on the best scientific information available pre-season when harvest specifications must be established, realized harvest and escapement data are used post-season to determine whether ACLs were exceeded, whether overfishing occurred, and whether any stocks are overfished. Accountability measures are applied to prevent ACL overages and, if they occur, to prevent the recurrence of any ACL overages.

Harvest Specifications and Annual Processes

Amendment 16 establishes a harvest specification process for the Cook Inlet EEZ Area, along with specific definitions of required status determination criteria using the tier system described in the previous section.

A Stock Assessment and Fisheries Evaluation (SAFE) report provides the SSC and Council with a summary of the most recent biological condition of the salmon stocks, including all status determination criteria, and the social and economic condition of the fishing and processing industries. NMFS develops the SAFE report for the Cook Inlet EEZ Area, with public and scientific review through the Council process and public review through publication of the proposed salmon harvest specifications in the **Federal Register**.

The SAFE report summarizes the best available scientific information concerning the past, present, and possible future condition of Cook Inlet salmon stocks and fisheries, along with ecosystem considerations, taking into account any uncertainty. This includes recommendations of OFL, ABC, and MSST that are calculated following the tier system described above. The SAFE report will include a final post-season evaluation of the previous fishing year based on realized catches and escapement with all information needed to make "overfishing" and "overfished" determinations, as well as recommendations to develop harvest specifications for the upcoming fishing year. In providing this information, the SAFE report uses a time series of historical catch for each salmon stock,

including estimates of retained and discarded catch taken in the salmon fishery; bycatch taken in other fisheries; catch in State commercial, recreational, personal use, and subsistence fisheries; and catches taken during scientific research (e.g., test fisheries).

The SAFE report also provides information needed to document significant trends or changes in the stocks, marine ecosystem, and fisheries over time, as well as the impacts of management. The SAFE report will be developed to contain economic, social, community, essential fish habitat, and ecological information pertinent to the success of salmon management or the achievement of Salmon FMP objectives.

The SSC reviews the SAFE report each year and recommends the OFL, ABC, MFMT, and MSST for each stock or stock complex, which then constrain the maximum allowable harvest for each stock based on biology and scientific uncertainty identified in the assessments. This SSC review constitutes the official peer review of scientific information used to manage the Cook Inlet EEZ Area salmon fishery for purposes of National Standard 1 and for the purposes of the Information Quality Act. Upon review and acceptance by the SSC, the SAFE report, after incorporating any associated SSC comments, constitutes the best scientific information available for purposes of the Magnuson-Stevens Act.

Total allowable catches (TACs) are set for the Cook Inlet EEZ commercial salmon fishery. A TAC is a limit on the annual catch of a stock, stock complex, or species that is the management target of the fishery, and operates as an accountability measure that accounts for management uncertainty to ensure total catch remains at or below the ACL for each stock. In the Cook Inlet EEZ, TACs will initially be set at the species level because it is not currently possible to distinguish among individual stocks of the same species when monitoring harvests during the fishing season. TACs are set considering the estimated proportional contributions of each stock to total harvest of a species such that ACLs are not expected to be exceeded for any component stock if all TACs are fully achieved. Because of the uncertainty inherent to estimating the proportional contributions of each stock to total harvest pre-season, species-level TACs are reduced from the combined ACLs of component stocks by an appropriate buffer that accounts for the degree of management uncertainty.

NMFS will establish harvest specifications each year by publishing proposed and final salmon harvest specifications in the **Federal Register**.

NMFS will consider public comments on proposed harvest specification prior to making a final decision. If approved, final harvest specifications are issued with any applicable modifications and the agency responses to public comments.

Changes From Proposed to Final Amendment 16

After considering public comments, NMFS revised amendment 16 to specify the salmon stocks or stock complexes for which status determination criteria are being established, and, as recommended by the SSC at their February 2024 meeting, to better describe how the OFL would be set pre-season. For Tier 1 stocks, the pre-season OFL was updated in accordance with the SSC recommendation that it be based solely on the pre-season total run size for the coming fishing season (equation 6 within section 4.2.4 of the Salmon FMP) rather than on the generational (multi-year) formula that was defined in equations 8 and 9 of proposed amendment 16. For Tier 3 stocks, the language that describes how the pre-season OFL is set was updated in accordance with the SSC recommendation that rather than considering only maximum historical catch, the pre-season OFL could also be based on other values such as average or maximum catch for a particular period of time in the catch history. Finally, several technical corrections were also made to improve formatting consistency and to eliminate redundancy in the FMP.

Final Rule

This final rule modifies Federal regulations to implement amendment 16 by revising the definition of Salmon Management Area at 50 CFR 679.2 to redefine the Cook Inlet Area as the Cook Inlet EEZ Area and incorporate it into the Federal Salmon Management Area. This final rule creates figure 22 to 50 CFR part 679 to show the location of the Cook Inlet EEZ Area. Regulations at § 600.725 are modified to authorize the use of drift gillnet gear for the Cook Inlet EEZ Area commercial salmon fishery. Existing regulations related to salmon fisheries under the Salmon FMP throughout part 679 are moved to subpart J beginning at § 679.110. Management measures necessary for the Cook Inlet EEZ Area are added to subpart J. The following sections provide a summary of management measures implemented by this final rule.

Federal Commercial Fishing Season and Fishing Periods

Under this final rule, the Cook Inlet EEZ Area commercial drift gillnet fishing season begins each year on either the third Monday in June or June 19, whichever is later. For 2024, the third Monday in June is June 17, so the season will begin on June 19. However, because June 19 falls on a Wednesday—which as described below is not an open fishing period—the first day of fishing in the 2024 Cook Inlet EEZ Area commercial fishing season will be on Thursday, June 20.

On or after the season start date, NMFS will open the Cook Inlet EEZ Area for drift gillnet fishing for two, 12-hour periods each week, from 7 a.m. Monday until 7 p.m. Monday, and from 7 a.m. Thursday until 7 p.m. Thursday, a schedule that will continue until July 15 unless a harvest limit (TAC) is reached. From July 16 to July 31, drift gillnet fishing will be open for one 12-hour period per week from 7 a.m. until 7 p.m. on Thursdays, unless a TAC is reached before that time. From August 1 to August 15, the Cook Inlet EEZ Area will again be open for drift gillnet fishing for two, 12-hour periods each week, from 7 a.m. Monday until 7 p.m. Monday, and from 7 a.m. Thursday until 7 p.m. Thursday unless a TAC is reached before that time. The Cook Inlet EEZ Area will be closed to drift gillnet fishing when the TAC is reached, or on August 15, whichever comes first.

Inseason Management for Commercial Fishing

NMFS will actively monitor and manage the commercial salmon fishery in the Cook Inlet EEZ Area throughout the fishing season by exercising the inseason management authorities described in this rule. In regulations at § 679.118(c)(1)(i), this final rule provides NMFS the authority to prohibit commercial salmon fishing in the Cook Inlet EEZ Area. In regulations at § 679.25, this final rule provides NMFS inseason authority to adjust a TAC for any salmon species or stock and to close or open the Cook Inlet EEZ Area as necessary to prevent overfishing or prevent underharvest of a TAC for any species or stock (assuming there are no countervailing conservation concerns regarding co-occurring species or stocks).

Fishing will occur during the regularly scheduled fishing periods described above. Throughout the fishing season, NMFS will project the additional harvest expected from each additional opening of the fishery based on the number of participating vessels,

catch rates, and any other available information. NMFS will close the Cook Inlet EEZ Area to commercial fishing for salmon if projections indicate that an additional fishery opening is expected to exceed any specified TAC. NMFS will implement inseason management actions through publication in the **Federal Register**, consistent with the Administrative Procedure Act (APA).

NMFS will monitor all available sources of information during the fishery to evaluate whether the TAC remains appropriate. If the best scientific information available indicates that the number of salmon returning to Cook Inlet is significantly different than what was forecasted, NMFS may adjust management of the fishery using the adjustment authorities described above and specified in regulations at § 679.25. If significantly fewer fish return relative to the forecast, NMFS may close the fishery before a TAC is reached or before the season closure date to prevent overfishing. This may be determined based on fishery catches, test-fishery catches, escapement, or other scientific information.

NMFS may also consider an inseason adjustment to modify the TAC if scientific information indicates that salmon abundance is significantly higher than forecasted. To implement any inseason adjustment, NMFS publishes a temporary rule in the **Federal Register** and considers all public comments on the action. Any such action must not result in overfishing on any other co-occurring fish stocks and will also consider the potential impacts of such an action to all Cook Inlet salmon harvesters. NMFS could not adjust the TAC above any ABC or allowable de minimis amounts set forth in the harvest specifications established for the Cook Inlet EEZ Area in that fishing year without engaging in notice and comment rulemaking to amend the harvest specifications.

NMFS will use the authorities described above to achieve conservation and management goals. These tools may be used to either increase or decrease harvests in the Cook Inlet EEZ Area drift gillnet fishery as appropriate based on the specified TAC amounts, the amount already harvested, and other available information on inseason salmon abundance.

Federal Management Area

The management area is all Federal waters of upper Cook Inlet (EEZ waters of Cook Inlet north of a line at 59°46.15' N).

Retention of Bycatch

Drift gillnet vessels fishing in the Cook Inlet EEZ Area may retain and sell non-salmon bycatch including groundfish (e.g., Pacific cod, pollock, flounders, etc.) if they have a groundfish Federal fisheries permit (FFP). These are referred to as incidental catch species and this final rule allows retention of these species up to a specified maximum retainable amount (MRA). Drift gillnet vessels retaining non-salmon incidental catch species are also required to comply with all State requirements when landing these fish in Alaska. The MRA of an incidental catch species is calculated as a proportion (percentage) of the weight of salmon on board the vessel.

Table 10 to 50 CFR part 679 establishes MRA percentages in the Gulf of Alaska (GOA) and applies to the Cook Inlet EEZ Area. For commercial salmon fishing in the Cook Inlet EEZ Area, the basis species are salmon, which is classified as "Aggregated amount of non-groundfish species" in the table for the purposes of the calculation. To obtain the MRAs for each incidental catch species, multiply the retainable percentage for the incidental catch species from table 10 by the round weight of salmon (Basis Species: Aggregated amount of non-groundfish species) on board. For example, if there were 100 pounds (45.36 kg) of salmon aboard the vessel, then 20 pounds (9.07 kg) of pollock and 5 pounds (2.27 kg) of aggregated rockfish could be retained, because pollock has a retainable percentage of 20 and aggregated rockfish has a retainable percentage of 5 in table 10 when the basis species is the aggregated amount of non-groundfish species (i.e. salmon). Pacific halibut are not defined as a groundfish and may not be retained by drift gillnet vessels.

Cook Inlet EEZ Area Commercial Salmon Fishing Monitoring, Recordkeeping, and Reporting Requirements

This action manages the Cook Inlet EEZ Area salmon fishery separately from the adjacent State waters salmon fisheries. Recordkeeping and reporting requirements for commercial salmon fishing vessels operating in the Cook Inlet EEZ Area are specified at § 679.115. This final rule requires processors to report all landings of Cook Inlet salmon harvested in the EEZ through eLandings by noon of the day following completion of the delivery.

Commercial salmon fishing vessels, processors, and other entities receiving deliveries of Cook Inlet EEZ Area salmon (i.e., fish transporters, catcher

processors, and direct marketers) must obtain Federal permits and comply with Federal recordkeeping, reporting, and monitoring requirements consistent with regulations at § 679.114. While operating, all entities required to have any Federal salmon permit(s) for the Cook Inlet EEZ Area must have a legible copy of each valid permit in either paper or electronic format.

Requirements for Commercial Salmon Fishing Vessels

Harvesting vessel owners are required to obtain a Salmon Federal Fisheries Permit (SFFP). NMFS will issue SFFPs at no charge to the owner or authorized representative of a vessel. An SFFP will authorize a vessel of the United States to conduct commercial salmon fishing operations in the Cook Inlet EEZ Area, subject to all other Federal requirements. An SFFP applicant must be a citizen of the United States. NMFS will issue SFFPs after receipt, review, and approval of a complete SFFP application. SFFPs will have a 3-year application cycle. Once a vessel owner or authorized representative obtains an SFFP, it is valid until the expiration date shown on the permit, which is after 3 years if issued at the beginning of a permit cycle. Participants must maintain a physical or electronic copy of their valid SFFP aboard the named vessel. As with other Federal fisheries, if a vessel owner or authorized representative surrenders an SFFP, they could not obtain a new SFFP for that vessel until the start of the next 3-year permit cycle.

The SFFP is associated with a specific vessel and not transferable to another vessel. If the vessel is sold, the new owner will need to apply for an SFFP amendment from NMFS to reflect the new owner or authorized representative of the vessel. A vessel could not operate in the Cook Inlet EEZ Area fishery until the SFFP amendment was complete and the amended SFFP issued. The SFFP number is required to be displayed on the vessel's hull and buoys attached to the vessel's drift gillnet.

For a vessel being leased, the vessel operator is considered the authorized representative of the SFFP holder and no amendments to the permit are required. The vessel operator is subject to all SFFP requirements and limitations and liable for any violations.

This final rule requires commercial salmon fishing vessels to operate a Vessel Monitoring System (VMS) as specified at § 679.28(f)(6)(x). VMS transmits the real-time GPS location of fishing vessels to NMFS. A vessel with an SFFP is required to keep VMS active at all times when operating with drift

gillnet gear on board in the waters of Cook Inlet any day the Cook Inlet EEZ Area is open to commercial salmon fishing. This includes when operating within State waters to ensure that entire fishing trips are monitored and to help verify that no fishing occurred within State waters during a fishing trip that included salmon harvest in the Cook Inlet EEZ, or that a vessel with an SFPP does not fish in Federal waters during the same calendar day it fishes in State waters.

To collect catch and bycatch information, this final rule requires vessels to use a Federal fishing logbook as specified at § 679.115(a)(1). Commercial salmon fishing vessels will record the start and end time and GPS position of each set, as well as a count of the catch and bycatch. Logbook sheets are submitted electronically to NMFS by the vessel operator when the fish are delivered to a processor. The data provided by the logbooks will provide information to satisfy the Magnuson-Stevens Act Standardized Bycatch Reporting Methodology (SBRM) requirement (16 U.S.C. 1853(a)(11)).

State requirements, including possession of appropriate State Commercial Fisheries Entry Commission (CFEC) permit(s), continue to apply for drift gillnet vessels landing salmon or other species caught in the EEZ within the State or entering State waters.

This final rule prohibits commercial salmon fishing vessels from landing or otherwise transferring salmon caught in the Cook Inlet EEZ Area within the EEZ off Alaska. Commercial salmon fishing vessels delivering to tenders may deliver salmon caught in the Cook Inlet EEZ Area only to a tender vessel operating in State waters. This final rule prohibits processing (as defined by Federal regulations at § 679.2) salmon harvested in the Cook Inlet EEZ Area in the EEZ off Alaska in order to ensure historical participants and operation types are not displaced. Commercial salmon fishing vessels are allowed to gut, gill, and bleed salmon prior to landing but cannot freeze or further process salmon prior to landing their catch (freezing is considered processing per Federal regulations at § 679.2 and therefore is prohibited in Cook Inlet EEZ waters).

Requirements for Processors and Other Entities Receiving Deliveries of Commercially Caught Cook Inlet EEZ Salmon

This final rule requires processors that receive and process landings of salmon that are caught in the Cook Inlet EEZ Area by a vessel authorized by an

SFPP to obtain a Salmon Federal Processor Permit (SFPP). This includes any person, facility, vessel, or stationary floating processor that receives, purchases, or arranges to purchase and processes unprocessed salmon harvested in the Cook Inlet EEZ Area, except registered salmon receivers. Persons or businesses that receive landings (deliveries) of Cook Inlet EEZ salmon from harvesting vessels but do not immediately process it, or transport it to another location for processing, are required to obtain a Registered Salmon Receiver Permit (RSRP). If a tender vessel or vehicle receiving deliveries of salmon is operated by an SFPP holder, it may operate under the SFPP and does not need to obtain an RSRP. SFPP and RSRP holders may not receive deliveries or process salmon that were harvested in the Cook Inlet EEZ Area while in the Cook Inlet EEZ Area or any EEZ waters.

SFPP and RSRP holders are required to report all salmon landings through eLandings by noon of the day following completion of the delivery. Landings must be reported using existing Cook Inlet drift gillnet statistical areas, with the addition of an EEZ identifier and a requirement to identify the Federal permit associated with each landing.

NMFS issues SFPPs and RSRPs on a 1-year cycle. If the ownership of an entity holding a SFPP or RSRP changes, the new owner will need to submit an application for an amended permit. An amended permit is issued with a new permit number to reflect the change.

Because SFPPs are facility-specific, one SFPP is required for every processing facility, even if a facility is controlled by a company already holding an SFPP for another processing facility. An RSRP is required for each entity receiving but not processing landings of Cook Inlet EEZ salmon at the location of the delivery if they are not operated by an SFPP holder. If a single entity operates multiple vehicles or vessels receiving landings of Cook Inlet EEZ salmon, each one of those vehicles or vessels could use the RSRP held by the entity. This includes fish transporters or buying stations unaffiliated with an SFPP holder that receive deliveries directly from harvesting vessels.

For direct-marketing operations where the owner or operator of a commercial salmon fishing vessel catches and processes their catch, both an SFPP and an SFPP are required. For catcher-seller operations where the owner or operator of a harvesting vessel catches and sells unprocessed salmon (e.g., whole fish or headed and gutted) directly to someone other than an SFPP or RSRP holder, both an SFPP and an RSRP are required.

Other Commercial Fishing Management Measures and Prohibitions

This final rule defines the legal gear for the Cook Inlet EEZ Area drift gillnet fishery consistent with legal gear in the State waters drift gillnet fishery, to the extent practicable (see § 679.118(f)). Legal drift gillnet gear is no longer than 200 fathoms (365.76 m) in length, 45 meshes deep, and has a mesh size no greater than 6 inches (15.24 cm). Buoys at each end of the drift gillnet must be marked with the participant's SFPP number.

Gillnets will be measured, either wet or dry, by determining the maximum or minimum distance between the first and last hanging of the net when the net is fully extended with traction applied at one end only. It is illegal to stake or otherwise fix a drift gillnet to the seafloor. The float line and floats of drift gillnets must float on the surface of the water while the net is fishing, unless natural conditions cause the net to temporarily sink.

This final rule includes the following prohibitions specified at § 679.117 for drift gillnet fisheries in the Cook Inlet EEZ Area:

- Vessels are prohibited from fishing in both State and Federal waters on the same day, or otherwise having on board or delivering fish harvested in both EEZ and State waters, to ensure accurate catch accounting for Federal managers.
- Vessels cannot have salmon harvested in any other fishery on board.
- Vessels are prohibited from having gear in excess of the allowable configuration or deploying multiple nets.
- Vessels are prohibited from participating in other fisheries while operating drift gillnet gear for salmon in the Cook Inlet EEZ Area and are not allowed to have other fishing gear on board capable of catching salmon while commercial fishing for salmon in the Cook Inlet EEZ Area (i.e., operating drift gillnet gear).
- Because vessels legally participating in adjacent State water salmon fisheries may transit across the Cook Inlet EEZ Area, vessels can have other fishing gear on board while moving through the Cook Inlet EEZ Area, but are prohibited from commercial fishing for salmon within the Cook Inlet EEZ Area on any day they are participating in State water salmon fisheries.
- Manned or unmanned aircraft cannot be used to locate salmon or otherwise direct fishing.
- Vessels are prohibited from discarding any salmon caught while harvesting salmon using drift gillnet gear in the Cook Inlet EEZ Area.

- Vessels are prohibited from commercial or recreational fishing for salmon in the Cook Inlet EEZ Area contrary to notification of inseason action, closure, or adjustment issued under § 679.25 or § 679.118.

Cook Inlet EEZ Recreational Fishing Management Measures

This final rule includes management measures for recreational salmon fishing in the Cook Inlet EEZ Area as specified at § 679.119. NMFS establishes bag and possession limits in Federal regulations. For Chinook salmon, from April 1 to August 31, the bag limit is one Chinook salmon per day including a total limit of one in possession of any size. From September 1 to March 31, the bag limit is two Chinook salmon per day including a total limit of two in possession of any size. For coho (silver) salmon, sockeye salmon, pink salmon, and chum salmon there is a combined six fish bag limit per day, including a total limit of six in possession of any size. However, only three fish per day, including a total limit of three in possession, may be coho salmon.

In addition to Federal bag limits, recreational anglers are constrained by State bag and possession limits if landing fish in Alaska. Because of this, an angler cannot exceed State limits when landing fish in Alaska, or otherwise have both an EEZ limit and a State limit on board at the same time in either area.

Recreational fishing is open for the entire calendar year. In regulations at § 679.118(c)(1)(ii), this final rule provides that NMFS may prohibit, through an inseason management action, retention of individual salmon species while still allowing harvest of other salmon species if necessary. In addition to prohibiting retention, NMFS may also prohibit fishing for one or more salmon species if required for conservation. Inseason management actions for the recreational sector will be published in the **Federal Register** and subject to the same process and timing limitations outlined for the commercial sector in the Cook Inlet EEZ.

Recreational fishing for salmon in the Cook Inlet EEZ Area may only be done using hook and line gear with a single line per angler with a maximum of two hooks. Salmon harvested must not be filleted or otherwise mutilated in a way that could prevent determining how may fish had been retained prior to landing. Gills and guts may be removed from retained fish prior to landing. Any salmon that is not returned to the water with a minimum of injury counts toward an angler's bag limit.

Federal managers will review any available developing inseason information, including escapement data, and may prohibit retention of one or more salmon species if additional harvest could not be supported. This final rule does not establish a TAC specific to the recreational sector because the recreational harvest in the Cook Inlet EEZ has been small historically (less than 100 fish per year), but estimated removals in combination with commercial harvests are evaluated against the ACL to ensure they are not exceeded and to implement accountability measures, if required, for future seasons.

The State's existing Saltwater Charter Logbook, the Statewide Harvest Survey, and creel surveys provide the information needed to account for recreational harvest in the Cook Inlet EEZ Area, as well as satisfy the Magnuson-Stevens Act SBRM requirement.

Changes From Proposed to Final Rule

In response to public comment, this final rule modifies the number of commercial salmon fishing periods in the Cook Inlet EEZ Area.

The commercial fishing season was proposed to extend from approximately June 19 to August 15 each year, with two, 12-hour fishing periods each week. Overall, public comments highlighted a conservation and management concern associated with allowing two days of harvest per week between July 16 and July 31. Under the status quo of State management, this is the time period during which there has been a single drift gillnet opener per week in order to allow salmon bound for Northern Cook Inlet to pass through Federal waters (a management option many public commenters referred to as a "conservation corridor"). The State requested that NMFS close the EEZ to all commercial fishing after July 15 to avoid conservation concerns, including stocks not achieving spawning escapement goals. In addition, multiple Alaska Native tribes from the Cook Inlet region, communities in Northern Cook Inlet, and regional sportfishing organizations all expressed concern that two fishery openings per week from July 16–July 31—which would provide significantly more fishing opportunity to the drift gillnet fleet—was likely to result in conservation concerns when compared to the status quo of one opening per week during this time period (see Comment 34). In all, these comments emphasized that reducing drift gillnet openings to one per week from July 16–July 31 is a management measure important to stakeholders and

Alaska Native tribes in Northern Cook Inlet because it gives salmon stocks of lower abundance more opportunities to pass through the EEZ during the time period they are most likely to be present in Federal waters.

In light of the public comments identifying significant potential conservation concerns, NMFS reviewed information contained in the Analysis and 2024 SAFE report to further consider the potential impacts that could result from increased commercial fishing opportunity during this late-July migratory period. State management measures that limited drift gillnet fishing effort in the Cook Inlet EEZ began in 2015. As described in section 3.1.2 of the Analysis, under Federal reference points, overfishing likely occurred on "other sockeye salmon" in 2008, and on Cook Inlet coho salmon in 2013. Both of these stock complexes have substantial components that originate from the Northern District. Overfishing is not thought to have occurred on any stock since the State began restricting fishing in the EEZ in late July. Susitna (Yentna) River sockeye salmon were declared a State stock of concern in 2008 after repeated failures to meet escapement goals. After subsequent restrictions to fishing, including the reductions to EEZ fishing opportunities in late July, this stock met escapement goals to the point where it was delisted from being a stock of concern by the State of Alaska's Board of Fisheries (BOF) in 2020. Given the historical evidence suggesting an increased likelihood of conservation concerns for these stocks when there is additional EEZ fishing effort from July 16 until July 31, and because some salmon stocks have continued to miss spawning escapement goals during recent years when there was only a single drift gillnet opening per week from July 16–July 31, NMFS has determined that it would be unwise to increase the number of fishing periods in late July from the status quo. Therefore, this final rule reduces the proposed number of openings to one per week during this period. The final rule, however, does not adopt the State's request to close the EEZ July 15. As explained in this final rule, the fishery will be open for one opening per week July 16–July 31 and two openings per week August 1–August 15, unless a TAC is reached.

NMFS expects that one opening per week in late July will allow for the harvest of surplus yield to the extent practicable while still achieving spawning escapement goals in most years. If TACs allow for additional harvest in August, the fishery will

return to two openings per week from August 1 to August 15. This approach is expected to reduce the risk of higher than expected harvests in the EEZ that could result in overfishing or reduce or eliminate the harvestable surplus of one or more salmon stocks for all other salmon users in Cook Inlet.

Further, NMFS expects this change will better allow the drift gillnet fleet to target the stocks of highest abundance while reducing the risk of early closures because a TAC is reached for a stock of lower abundance. As explained above and in the preamble to the proposed rule, the Cook Inlet EEZ salmon fishery will be managed using TACs. Allowing salmon stocks of lower abundance bound for Northern Cook Inlet more opportunities to pass through the EEZ in July—particularly coho and Chinook salmon—means it is less likely the fishery will close early due to reaching the TAC for a stock of lower abundance before the drift gillnet fleet is able to harvest the TAC for abundant sockeye salmon. Additionally, spreading out the sockeye salmon harvest throughout the season by reducing fishing periods in late July will reduce pressure on Northern District sockeye salmon—which are Tier 3 stocks with less known conservation status—as more of the salmon in the EEZ in August are expected to be from the highly abundant Tier 1 Kenai and Kasilof stocks for which there is better information to inform inseason management decisions.

In this final rule, NMFS also clarified language at § 679.28(f)(6)(x) to clearly define when and where VMS is required to be used by vessels named or required to be named on a SFFP. An operational and transmitting VMS unit that complies with the requirements in § 679.28(f) must be carried by any such vessel operating in the waters of Cook Inlet with drift gillnet gear on board during a calendar day when commercial salmon fishing is authorized in the Cook Inlet EEZ Area. The corresponding prohibition at § 679.117(b)(1)(xiv) is similarly revised to prohibit operation contrary to requirements specified at § 679.28(f)(6)(x). This final rule also adds a definition of the “waters of Cook Inlet” at § 679.2. For purposes of §§ 679.28(f)(6)(x) and 679.117(b)(1)(xiv), the waters of Cook Inlet includes all waters north of a line from Cape Douglas (58°51.10' N) to Point Adam (59°15.27' N). In sum, these changes from proposed to final regulations clarify that the VMS requirement for SFFP holders applies: (1) on days when directed fishing for salmon using drift gillnet gear is open in the Cook Inlet EEZ Area; (2) if the vessel has drift gillnet gear on board the vessel or

deployed; and (3) if the vessel is operating in the waters of Cook Inlet.

This final rule also modifies regulations at § 679.118(c)(1)(ii) to provide NMFS the authority to prohibit fishing for one or more salmon species if required for conservation. While the recreational salmon fishery in the Cook Inlet EEZ Area is extremely small, this would give NMFS all management tools potentially required to conserve stocks at very low abundance. The most likely potential need for this authority is because declines in Chinook salmon abundance have, in some cases, entirely eliminated the harvestable surplus of Chinook (*i.e.*, escapement goals cannot be achieved even if no fish are harvested). In this instance, even the limited mortality resulting from catch and release fishing (*i.e.*, what would be allowed under a prohibition on retention) could potentially result in exceeding an ABC/ACL. NMFS would also maintain the authority to prohibit retention of one or more species if a closure to salmon fishing was not required to achieve conservation objectives or avoid exceeding an ABC/ACL.

Additionally, this final rule adds two new prohibitions to § 679.117 to clarify that it is unlawful for any person to: (1) engage in commercial fishing for salmon in the Cook Inlet EEZ Area contrary to notification of inseason action, closure, or adjustment issued under §§ 679.25 and 679.118 (see § 679.117(b)(1)(xvi)); or (2) engage in recreational fishing for salmon in the Cook Inlet EEZ Area contrary to notification of inseason action, closure, or adjustment issued under § 679.118 (see § 679.117(b)(2)(v)). The final rule also makes clarifying edits to § 679.117(b) as follows: (1) moves “of the Salmon Management Area, defined at § 679.2 and Figure 22 to this part,” from § 679.117(b)(1)(ii), to § 679.117(b)(1)(i), which is the first time the term “Cook Inlet EEZ Area” appears in § 679.117(b)(1); (2) replaces the word “set” in § 679.117(b)(1)(v), and replaces it with “deploy”; and (3) adds the term “Cook Inlet EEZ Area” to two prohibitions applicable to recreational fishing (see § 679.117(b)(2)(ii) and (iii)). Throughout the regulatory text, NMFS also made technical and grammar edits to correct regulatory cross references, use consistent terms, remove redundancy, and promote clarity.

One additional change from the proposed rule was removing a proposed requirement that any interactions or entanglements with marine mammals would be required to be recorded in the logbook. NMFS determined that this requirement would be duplicative with and may be confused with existing

reporting requirements under the Marine Mammal Authorization Program and has therefore removed the requirement from this final rule. Participants are, however, still required to report marine mammal interactions under the Marine Mammal Authorization Program.

Comments and Responses

NMFS received 87 comment submissions on amendment 16 and the proposed rule. NMFS has summarized and responded to 95 unique and relevant comments below. The comments were from individuals, environmental groups, local governments, the Alaska Department of Fish and Game (ADF&G), sportfishing organizations, fishing guides, tribes and tribal members, drift gillnet fishermen, and commercial fishing organizations. Several comment submissions were duplicates or addressed topics outside the scope of amendment 16 and the proposed rule. Overall, there was a mix of support and opposition, with those comments opposing the rule expressing concerns about expanding Federal management to salmon fisheries, impacts to adjacent state salmon fisheries, the cost and burden of monitoring requirements, adverse economic impacts, pre-season catch limits, the prohibition on fishing in both state and Federal waters on the same day, and underharvest (exceeding spawning escapement goals). The vast majority of commenters supported some version of Federal management (mostly drift gillnet fishers, commercial processors, and tribal groups), and a small minority opposed any type of Federal management. Comments are organized by topic into the following categories:

- Scope of the Fishery Management Plan
- National Standard 1
- Status Determination Criteria and Annual Catch Limits
- Inseason Management
- Cook Inlet EEZ Commercial Salmon Fishing Management Measures
- Federal Commercial Fishing Season and Fishing Periods
- Monitoring, Recordkeeping, and Reporting Requirements
- Other Commercial Salmon Fishing Management Measures and Prohibitions
- Recreational Fishing
- National Standard 2
- National Standard 3
- National Standard 4
- National Standards 5 and 7
- National Standard 8
- National Standard 10
- Economic Impacts

- General Support
- General Opposition
- Tribal Comments
- Marine Mammals
- Process Concerns
- Other

Scope of the Fishery Management Plan

Comment 1: NMFS's decision to limit the scope of Federal management to the Cook Inlet EEZ violates *UCIDA v. NMFS*, 837 F.3d 1055 (9th Cir. 2016), in which the Ninth Circuit Court of Appeals held that NMFS must manage the entire "fishery," including State waters.

Response: NMFS disagrees that the Ninth Circuit's decision requires this FMP to cover both State and Federal waters. Rather, limiting NMFS management solely to Federal waters (*i.e.*, the Cook Inlet EEZ) is consistent with the court's decision in *UCIDA v. NMFS*. In that case, UCIDA challenged amendment 12 to the Salmon FMP, which had excluded the Cook Inlet EEZ from the Salmon FMP. The Ninth Circuit considered only whether NMFS had the legal authority to exclude portions of the EEZ from the FMP. In ruling against NMFS, the Court held that NMFS must include the Cook Inlet EEZ in the Salmon FMP because it has an obligation to issue an FMP for each fishery under its authority that requires conservation and management. The phrase "under its authority" was critical to that Ninth Circuit decision, which considered whether a State could manage a fishery in Federal waters outside the context of an FMP. Nothing in *UCIDA v. NMFS* implied that a Federal FMP must cover fishing that occurs in State waters if a harvested stock occurs in both State and Federal waters. Not only was that question not before the Ninth Circuit, but requiring NMFS to manage in State waters through an FMP would violate the plain language of Magnuson-Stevens Act section 306(a), which provides that states retain management jurisdiction over fishing in state waters.

In fact, the Ninth Circuit explicitly recognized that the Cook Inlet EEZ constitutes a fishery, stating that "the statute requires an FMP for a fishery, a defined term," and adding "[n]o one disputes that the exempted area of Cook Inlet"—*i.e.* the Cook Inlet EEZ—"is a salmon fishery." 837 F.3d at 1064. The portion of Cook Inlet at issue in the litigation over amendment 12 was the Cook Inlet EEZ, not all of Cook Inlet. In this action, NMFS is complying with the Ninth Circuit's decision by incorporating the very "fishery" at issue in that case—the Cook Inlet EEZ salmon fishery—into the Salmon FMP.

Comment 2: NMFS's decision to limit the scope of Federal management to the Cook Inlet EEZ violates the plain language of the Magnuson-Stevens Act. The term "fishery," as defined within section 3 of the Magnuson-Stevens Act, requires that amendment 16 include a definition of "fishery" that extends throughout the range of salmon in Cook Inlet, including State waters.

Response: NMFS disagrees that its definition of the "fishery" violates the Magnuson-Stevens Act. As explained in the preamble to the proposed rule and the response to *Comment 1*, the "fishery" that is subject to Federal management under amendment 16 are the salmon stocks harvested by the commercial and recreational fishing sectors within the Cook Inlet EEZ Area. Defining the fishery as geographically constrained to the Cook Inlet EEZ is consistent with the Magnuson-Stevens Act. Section 3 of the Magnuson-Stevens Act broadly defines a "fishery" as one or more stocks of fish that can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and any fishing for such stocks.

NMFS has determined that salmon stocks in the Cook Inlet EEZ can be treated as a unit for purposes of conservation and management because they all fall within the geographical management area under NMFS's jurisdiction, the best scientific information available supports NMFS's determination that the EEZ has unique ecological characteristics due to the mixed stock nature of fishing in the EEZ, and fishing for these stocks in the EEZ has distinct technical and economic characteristics that distinguish it from State water fisheries, as discussed in the response to *Comment 55*.

The Magnuson-Stevens Act expressly limits the management authority of NMFS and the Council to the EEZ, with a narrow exception. Section 101(a) of the Magnuson-Stevens Act establishes the Nation's sovereign rights and exclusive fishery management authority over all fish and all Continental Shelf fishery resources within the EEZ. Section 3(11) of the Magnuson-Stevens Act defines the inner boundary of the EEZ as a line coterminous with the seaward boundary of each of the coastal States. Section 302(a)(1)(G) states that the Council has authority over the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska. Because Alaska's seaward boundary is 3 nautical miles (nmi) (5.56 kilometers) from its coast (3-nmi

boundary line), 43 U.S.C. 1301(b), the inner boundary of the EEZ, and therefore the Council's authority, starts 3 nmi (5.56 kilometers) from the Alaskan coast and extends to the outer boundary of the EEZ 200 nmi (370.4 kilometers) seaward of the coast of Alaska. In section 306, the Magnuson-Stevens Act expressly states that it shall not be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. Therefore, the Magnuson-Stevens Act does not contemplate the extension of Federal authority into State waters, except under the very limited circumstances described in section 306(b) (discussed further in the response to *Comment 4*). In sum, given the geographic limits placed on NMFS's authority to manage fisheries, it is necessary for the "fishery" to be geographically constrained to the EEZ.

Comment 3: NMFS's decision to define the fishery as geographically constrained to the Cook Inlet EEZ is arbitrary. There cannot be two adjacent management schemes for salmon; one in Federal waters and one in State waters, because one management scheme will always depend on the other. Salmon management depends on escapement goals. That means an FMP for just the EEZ will always depend on the State which sets the escapement goals.

Response: Defining the fishery as geographically constrained to the Cook Inlet EEZ is not arbitrary; it is required by the Magnuson-Stevens Act and is consistent with fisheries management throughout the EEZ off Alaska and throughout the U.S. Nearly all stocks harvested in the EEZ nationwide also occur in State waters, but as explained in the response to *Comment 2*, the Magnuson-Stevens Act explicitly left jurisdiction over state waters to the states.

Recognizing Federal and State jurisdictional boundaries is a foundational principle in the management of natural resources that straddle jurisdictions in the U.S. In mining, forestry, oil, gas, and fisheries, the location of the activity determines the applicable regulations, even if the relevant resource is also present in an adjacent jurisdiction. Furthermore, this is consistent with the management approach for other fisheries off Alaska. For example, in the GOA, the State manages fisheries for pollock and Pacific cod in State waters and NMFS manages pollock and Pacific cod fisheries in Federal waters. For these fisheries, the State determines when State waters will be open to fishing for pollock and Pacific cod, while the Council recommends and NMFS makes

those determinations for the EEZ, taking into account any anticipated harvest in State waters.

Similar to the Federal management of the Cook Inlet EEZ, the Pacific Fishery Management Council's Salmon FMP expressly limits Federal management to the fisheries in EEZ waters. That FMP covers salmon stocks caught in the EEZ off the coasts of Washington, Oregon, and California.

NMFS disagrees that a stock of anadromous fish cannot be successfully managed by different adjacent management regimes. NMFS and State management agencies regularly have separate fisheries that harvest the same stocks of fish. Management will be coordinated to the extent practicable. NMFS will establish catch limits for the Cook Inlet EEZ that are based on achieving escapement goals as defined in the Federal stock assessment, while accounting for both State and Federal expected harvests.

There are cooperative management arrangements where a single management agency can make decisions for both State and Federal waters. But these are dependent on a mutually accepted delegation of management authority or international treaties. For example, NMFS's management jurisdiction over the Bering Sea and Aleutian Islands king and Tanner crab fisheries is limited to the Bering Sea and Aleutian Islands Area EEZ, but because the Council recommended delegated management of the EEZ to the State through the Crab FMP—and NMFS determined State management was consistent with the FMP and the Magnuson-Stevens Act—the State executes delegated management actions for crab stocks in Federal waters while also managing these stocks within State waters. While there is often coordination between NMFS and the State to ensure that fishery management decisions achieve the common goal of sustainability, State and Federal authority remains constrained by jurisdictional limits.

Management of the Salmon FMP's East Area is different from the management of salmon in the Cook Inlet EEZ Area because of both the delegation of management authority to the State and the Pacific Salmon Treaty. Management of the salmon commercial troll and recreational fisheries in the East Area EEZ occurs across the State and EEZ boundary because the Council voted to delegate management of the salmon fisheries in the East Area EEZ to the State, the State was willing to accept such a delegation of authority, and NMFS determined State management was consistent with both the Salmon

FMP and the Magnuson-Stevens Act. The Council and NMFS considered delegating management of the Cook Inlet EEZ to the State, similar to the arrangement in the East Area. However, the State refused to accept delegated management on two occasions and NMFS has no authority to compel a state to accept such delegation. As a result, there is no alternative to having separately managed salmon fisheries in Cook Inlet, and the State and Federal fisheries are separated along the jurisdictional EEZ boundary.

Comment 4: Even if states generally retain jurisdiction over state waters pursuant to Magnuson-Stevens Act 306(a), here Magnuson-Stevens Act 306(b) requires NMFS to preempt State management and assert management authority over salmon fishing in the state waters of Cook Inlet.

Response: NMFS disagrees that Magnuson-Stevens Act section 306(b) requires NMFS to assert management jurisdiction over the State waters of Cook Inlet and/or implement management measures for State waters through this FMP amendment.

Magnuson-Stevens Act section 306(b) includes two criteria that must both be met before NMFS can assert management authority over fishing in State waters: (1) the fishery must occur predominantly in the EEZ and (2) after notice and opportunity for a hearing, the Secretary must determine that a State is "substantially and adversely" affecting the carrying out of an FMP. Even when these criteria are met, Magnuson-Stevens Act section 306(b) explicitly states that NMFS cannot assert management authority over internal (fresh) waters, meaning the scope of Magnuson-Stevens Act section 306(b) is narrower than claimed by the commenter even when it does apply.

Historically, the State has managed salmon fishing in Cook Inlet as a single fishery with no distinction between State and Federal waters. Under State management, approximately 75 percent of total upper Cook Inlet salmon harvests occurred in State waters. NMFS has previously determined that the State-managed fishery did not occur predominantly in the EEZ, and thus for that reason alone it had no basis for asserting management authority over State waters under Magnuson-Stevens Act section 306(b)(1)(A). In addition, NMFS has consistently found that State management is consistent with Magnuson-Stevens Act requirements and the goals and objectives of the FMP. Thus, both criteria for preemption under Magnuson-Stevens Act section 306(b) have not been satisfied. As a result of litigation brought by drift gillnet

fishermen, among others, status quo management as a single fishery by the State is no longer possible. NMFS acknowledges that amendment 16 will create a new fishery in Cook Inlet, which will occur entirely within Federal waters.

Even assuming the 306(b)(1)(A) criteria was met for the Cook Inlet EEZ salmon fishery after implementation of amendment 16—though total harvest of Cook Inlet salmon stocks will continue to occur predominantly within State waters—for NMFS to assert management jurisdiction over State waters it would also have to determine that State management "substantially and adversely" affects implementation of the Salmon FMP, after notice and opportunity for a hearing. The procedures and requirements for notice and the hearing at 50 CFR part 600, subpart G are prescriptive, none have occurred here, and NMFS has no basis to begin proceedings at this time. No fishing has yet occurred under amendment 16 to the Salmon FMP and this final rule, and NMFS has no information that suggests that State action or inaction will prevent the Council or NMFS from carrying out the management measures and management objectives specified in amendment 16. Thus, the criteria for preemption under Magnuson-Stevens Act section 306(b)(1)(B) has not been satisfied.

Comment 5: Every other FMP in Alaska sets management measures, including ACL and TAC, for the fishery in both State and EEZ waters. The King Crab closure around Kodiak Island does not allow the fishery in State waters to continue without direction, nor does the Pacific Cod TAC in the GOA apply for the EEZ waters only with the State waters fishery unregulated; the same is true for every other stock of fish except salmon. For the Salmon FMP, NMFS is trying to make us believe the rules governing this fishery are different, even after the Federal court decision that have determined they are not.

Response: NMFS disagrees. Federal ACLs and TACs are not established for State waters in other Federal FMPs. The BOF has established State managed fisheries in State waters, for example, the GOA Pacific cod fishery that the State manages by setting a guideline harvest level (GHL) outside the Federal harvest specifications process. For some fisheries, the BOF bases the GHL amount on a percentage of the Federal ABC. However, the GHL fishery is managed by the State. To comply with the Federal ACL regulations and National Standard 1 guidelines, NMFS manages Pacific cod in Federal waters to ensure the sum of all State waters and

Federal waters Pacific cod removals from the GOA do not exceed the Federal Pacific cod ABC (and therefore ACL) for the GOA. Accordingly, each year the Council recommends, and NMFS approves, a TAC in the GOA that is set at an amount to accommodate the State's GHL for the Pacific cod caught in State waters. This is consistent with the Magnuson-Stevens Act and National Standard guidelines that direct, as a fundamental component of sustainable fisheries management, that catch should not exceed the ACL and that all sources of mortality from fishing activities should be evaluated for stock status and specification of Federal harvest limits. If the State changed the applicable State waters GHL, there are no limits on the amount of Pacific cod that may be harvested in State waters, and NMFS would adjust the Federal TAC accordingly to ensure that total Pacific cod removals do not exceed the Federal Pacific cod ABC and ACL. In other words, as under amendment 16, the Federal TAC accounts for State water harvest but does not constrain or limit State water harvest.

The commenter also appears to reference the State Pacific cod parallel fishery. In this parallel fishery, some of the Federal TAC is harvested in State waters, under State regulations generally mirroring those used in Federal waters. NMFS does not establish a TAC for State waters or manage in State waters; rather, NMFS deducts catch in the parallel fishery from the Federal TAC per a longstanding arrangement that ensures this fishery does not create conservation concerns. The State originally developed and implemented parallel fisheries to provide fishing opportunities within State waters before the State had capacity and expertise to independently develop and manage State water groundfish fisheries (GHL fisheries). While the State has since developed State-managed groundfish fisheries, parallel fisheries have been maintained to address allocation issues with respect to vessel gear type, operation type, and size. The State opposes the Federal management approach for salmon in the Cook Inlet EEZ Area and has not expressed interest in either a delegation of management authority or taking State action to develop a parallel fishery for salmon. Therefore, NMFS must manage salmon fishing in the Cook Inlet EEZ in the same manner as it manages the vast majority of fish stocks off Alaska—by accounting for projected State water GHL harvest when establishing harvest limits for the EEZ, and debiting catch

that occurs in the parallel fisheries against the Federal TAC during the fishing season.

In regards to the crab fisheries in the GOA, there are no federally managed crab fisheries in the GOA, and there is no GOA crab FMP. The king crab closure around Kodiak is a State management measure.

Comment 6: The proposed FMP violates both the letter and the spirit of the District Court's ruling in 2022, the Ninth Circuit's order in 2016, and the Magnuson-Stevens Act. NMFS's repeated failure to provide the relief requested has caused severe economic harm to the drift gillnet fleet. Amendment 16 violates nearly all of the National Standards and imposes a harvest plan that is both burdensome and inefficient. Do not approve this action.

Response: NMFS disagrees. NMFS developed amendment 16 to comply with the decisions of the Ninth Circuit and the District Court, the Magnuson-Stevens Act, and other applicable Federal law. NMFS considered all Magnuson-Stevens Act requirements for FMPs and balanced the competing demands of the National Standards when developing amendment 16. NMFS finds this final rule to be consistent with all 10 National Standards, as detailed in section 5.1 of the Analysis and further addressed in responses to comments under the National Standard headings below. Economic impacts are further addressed in responses to comments below.

Because the State refused to accept delegated management authority, amendment 16 must necessarily establish an entirely separate management jurisdiction and, therefore, results in decreased management efficiency relative to the status quo (management of all salmon fishing in Upper Cook Inlet by the State). Separate Federal management infrastructure and regulations must be established while all existing State management measures remain in place. In order to manage the fishery in the Cook Inlet EEZ Area, NMFS must begin collecting the data essential to manage the fishery and required by the Magnuson-Stevens Act. In particular, NMFS must know who is participating in the fishery, how many vessels are active, and where catch is occurring, and must be able to debit catch against established limits during the season to prevent overfishing, even though collecting this information will involve new recordkeeping, reporting, and monitoring requirements for participants that are separate from those required in State waters.

Comment 7: NMFS is effectively deferring to State management by managing conservatively, claiming that it is unprepared and procedurally limited in its ability to manage the fishery.

Response: NMFS disagrees that it is implicitly deferring to State management by managing conservatively. This will be the first year since Alaska Statehood that there will be a federally-managed salmon fishery in the Cook Inlet EEZ, and currently all data collection and management infrastructure are run by the State. In light of these realities, "managing conservatively" is a responsible approach to fishery management, ensuring that NMFS does not harm salmon stocks as it builds infrastructure and expertise, and begins collecting the data needed to manage a new Federal fishery. It is unreasonable and imprudent to expect that NMFS could greatly increase total harvests from the status quo in the first year of a new fishery, with less management flexibility, less information, and less management experience in Cook Inlet. The best available science suggests status quo harvest levels in the EEZ could not be significantly increased without reducing or eliminating the harvestable surplus for other users and further increasing the risk that stocks of lower abundance will not achieve spawning escapement goals (which have not always been achieved in all years even under status quo EEZ harvests). While NMFS's approach is necessarily precautionary, the proposed 2024 Cook Inlet EEZ Area harvest specifications (89 FR 25857, April 12, 2024) would establish TACs for all species except coho salmon (due to elevated conservation risks and high uncertainty) that are higher than the recent 10-year average estimated Cook Inlet EEZ Area harvest.

As described in the preamble to the proposed rule, this action contains all of the management measures required for NMFS to administer and manage all salmon fishing in the Cook Inlet EEZ Area consistent with the Magnuson-Stevens Act. No management decisions are deferred to the State and NMFS will not rely on the State—implicitly or otherwise—to achieve OY or prevent overfishing (one of the flaws the District Court identified with amendment 14).

Using the best scientific information available, each year NMFS will prepare a SAFE report and develop harvest specifications based on the recommendations from the Council's SSC. As described in the response to *Comment 5*, although NMFS must necessarily account for projected

removals from State-managed fisheries in setting the harvest levels for the Cook Inlet EEZ Area, and other Federal fisheries off Alaska, that is part of making decisions based on best scientific information available and consistent with National Standard 2. Accounting for State action is not the same as deferring to State action. The processes by which Federal reference points are independently developed and annually reviewed is described in the preamble to the proposed rule and amendment 16.

Although NMFS has not historically managed salmon fishing in the Cook Inlet EEZ, it has the ability to do so successfully. Acknowledging that the State has decades of institutional expertise and management tools that make it currently more capable of efficient administration (as described in the Analysis) is not an indictment of NMFS's management. Further, while Federal notice requirements limited the suite of management alternatives and options when developing amendment 16 and preclude rapid fishery openings and closings as occurs under State management, no procedural limitations will prevent NMFS from implementing amendment 16, which has been designed to comply with all Magnuson-Stevens Act requirements. NMFS is confident it can effectively manage this fishery.

Comment 8: Regulations for Cook Inlet should allow fishing 110 miles (177.03 km) out from the mouth of the fish spawning grounds. For sport fishing, regulations should allow snagging one mile (1.61 km) from the mouth of any rivers in the inlet.

Response: This final rule would allow recreational salmon fishing in all waters of the Cook Inlet EEZ Area. EEZ waters of the West Area (3–200 nmi (5.56–370.4 km) off Alaska) outside of the Cook Inlet EEZ Area remain closed to commercial salmon fishing, as under the status quo, but recreational salmon fishing is authorized. Waters within 3 nmi (5.56 km) of shore are State waters and not subject to this action.

Comment 9: Several commenters suggested it would be best if all salmon fishing in Cook Inlet was managed by ADF&G. Some commenters expressed skepticism about the track record of Federal fisheries management (e.g., halibut fishery declines and salmon bycatch concerns) and other Federal resource management in Alaska. Other commenters noted that the State has more expertise and better flexibility to manage salmon, which is desirable given the complexity and challenge of salmon management in Cook Inlet. One commenter noted that Federal

management may prioritize non-Alaskan constituencies.

Response: NMFS acknowledges the complexity and challenges of salmon management in Cook Inlet. The challenges associated with Federal management are identified sections 2.4 and 2.5 of the Analysis. NMFS developed amendment 16 to address these challenges to the extent practicable.

NMFS is required to implement Federal management of salmon fishing in the Cook Inlet EEZ. The Ninth Circuit held that section 302(h)(1) of the Magnuson-Stevens Act requires a Council to prepare and submit FMPs for each fishery under its authority that requires conservation and management. *United Cook Inlet Drift Ass'n v. NMFS*, 837 F.3d 1055, 1065 (9th Cir. 2016). Because NMFS determined that the Cook Inlet EEZ salmon fishery requires conservation and management, the Ninth Circuit ruled that it must be included in the Salmon FMP. Because of this litigation and the State's subsequent decision not to accept a delegation of management authority for the Cook Inlet EEZ, management of all salmon fishing in Cook Inlet by the State is not possible at this time. Additional discussion of Federal jurisdiction is provided in the response to *Comment 3*.

Further, this rule will not prioritize any constituency. Consistent with National Standard 4, amendment 16 does not discriminate between residents of different states in allocating fishery resources and is fair and equitable to all fishermen. Consistency with National Standard 4 is discussed further below.

National Standard 1

Comment 10: The Magnuson-Stevens Act requires that NMFS set MSY and OY for fishing that occurs in both Federal and state waters. Only by doing so can NMFS ensure that the State's action in the State waters fishery does not interfere with NMFS's obligation to follow the Magnuson-Stevens Act in the Federal-waters fishery and achieve OY. NMFS should define OY for both State and Federal waters so as to prevent the overescapement caused by State management decisions.

Response: NMFS disagrees that it must set MSY and OY for fishing that occurs in both State and Federal waters. As discussed in the preamble to the proposed rule, MSY is a reference point, informed by the best available scientific information. The Magnuson-Stevens Act and National Standard 1 guidelines require that every FMP include an estimate of MSY for the stocks and stock complexes that require conservation and management (§ 600.310(e)(1)). MSY is

defined as the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological, environmental conditions and fishery technological characteristics (e.g., gear selectivity), and the distribution of catch among fleets (§ 600.310(e)(1)). Thus, under National Standard 1, NMFS acknowledges that MSY should be defined for a stock or stock complex, regardless of where fishing occurs, and thus it is not set for State waters or Federal waters. Because MSY is not a management target, it does not depend on any management actions. Rather, it describes the capacity of a stock to be harvested sustainably, regardless of who manages fishing or how harvest is authorized. Only by accounting for catch wherever it occurs can NMFS understand the largest long-term average catch or yield that can be taken from the entire stock or stock-complex. Amendment 16 provides that, for salmon stocks harvested in the Cook Inlet EEZ Area, MSY is defined at the stock or stock complex level (as described below), consistent with National Standard 1 guidelines for establishing MSY. Because MSY must be defined in terms of stocks or stock complexes, this definition of MSY does not subdivide between State and EEZ waters in Cook Inlet.

NMFS disagrees that OY should be established for fishing occurring in both State and Federal waters. In contrast to MSY, OY may be established at the stock, stock complex, or fishery level (§ 600.310(e)(3)). With respect to the yield from a fishery, the Magnuson-Stevens Act defines "optimum" as the amount of fish that will provide the greatest overall benefit to the Nation. Under amendment 16, the fishery is properly defined as all harvest of co-occurring salmon stocks in the Cook Inlet EEZ for the reasons stated in *Comments 1, 3, 4, and 29*. Because there is limited ability to target individual stocks of salmon in the Cook Inlet EEZ Area, stocks of varying abundance are inevitably all harvested in the same fishing trip. The amount of harvest that will provide the greatest overall benefit to the Nation in this highly mixed stock fishery where vessels operating in the EEZ cannot discriminate between stocks of varying abundance is very different from the amount of harvest that may be optimum for stocks or fisheries in State waters where vessels are better able to target individual stocks of fish near their natal streams. Thus, OY is better defined for the Cook Inlet EEZ fishery rather than at the stock or stock complex level, taking into account the

interactions among various stocks in the EEZ.

Furthermore, by defining OY at the level of the Cook Inlet EEZ fishery under Federal jurisdiction, NMFS ensures that OY is entirely within its purview and control to achieve on a continuing basis. In vacating amendment 14, the U.S. District Court for the District of Alaska found that NMFS had impermissibly deferred too much management authority to the State, stating “hinging federal management targets on the changing landscape of state decisions is an improper delegation of management authority to the State.” *United Cook Inlet Drift Ass’n v. Nat’l Marine Fisheries Serv.*, No. 3:21-cv-00255 at *28 (D. Alaska, June 21, 2022). In developing amendment 16, NMFS took a different approach. For the first time since Alaska Statehood, there will be two salmon fishery management jurisdictions in Cook Inlet. To avoid relying on the State to achieve any Federal management targets under amendment 16, NMFS has established OY for the Cook Inlet EEZ fishery and developed a harvest specifications process that will achieve that OY on a continuing basis while preventing overfishing of any of the salmon stocks of varying abundance that co-occur in the EEZ.

Comment 11: Amendment 16 addresses the complexities of a mixed stock fishery, with the added burden of separate adjacent jurisdictional authorities. The proposed rule addresses MSY and OY, the jurisdictional issues, and notes reliance on the State’s scientific knowledge and management authority but does not describe what triggers fishing in the Cook Inlet EEZ Area. Because the State did not accept delegated management and because NMFS lacks management expertise, amendment 16 implements Federal management that is not reliant on State input. However, because the State frequently develops the best scientific information available for Cook Inlet salmon stocks, amendment 16 should be modified to provide that NMFS authorize EEZ fishing only after receiving notice from the State that doing so will not negatively impact the State’s management goals and strategies.

Response: NMFS acknowledges the jurisdictional complexity related to this action, and the State’s expertise in salmon management. This action is intended to establish a Federal salmon management framework that is not dependent on the State and has the flexibility to adapt to changing conditions. The annual status determination criteria, harvest

specifications, and inseason management will be dependent on the best scientific information available and the circumstances present in each fishing year.

NMFS expects that it will develop management expertise and strengthen cooperative relationships with various Agency partners related to management of the Cook Inlet EEZ Area over time. NMFS acknowledges that the mixed stock nature of and status of weaker salmon stocks within the fishery can make it difficult to harvest all of the surplus yield for all component stocks and that the interaction between stocks must also factor into the definition of OY.

NMFS disagrees that the FMP should include language requiring approval from the State prior to opening salmon fishing in the Cook Inlet EEZ Area. Consistent with the direction of the District Court, NMFS has implemented management measures including a fishing season, fishing periods, and TACs to ensure that OY can be achieved without relying on the State.

Comment 12: Under the State’s management and based on the State’s preliminary numbers, the overescapement of sockeye in just two rivers in Upper Cook Inlet exceeded the total commercial harvest of sockeye for the entirety of Upper Cook Inlet and likely exceeded the escapement necessary for all other rivers in Cook Inlet. According to NMFS’s own scientific information included in its analysis, overescapement is problematic because it results in “foregone yield in the current” year and “may be expected to result in reduction in future recruitment.” (*i.e.*, reduction in long-term yield). To further put these numbers in perspective, overescapement of sockeye in the Kenai and Kasilof in 2023 was more than NMFS’s OY range—approximately 291,631 to 1,551,464—for the entire Cook Inlet EEZ salmon fishery for all species of salmon in Upper Cook Inlet. There is no discussion in proposed amendment 16 of how NMFS’s management measures for the Cook Inlet EEZ salmon fishery will address and prevent rampant overescapement by the State and the resulting unutilized waste to ensure compliance with National Standard 1. Amendment 16 focuses only on the concept of avoiding overfishing, without making any meaningful effort to simultaneously prevent drastic underfishing by optimizing yield.

Response: NMFS acknowledges that Kenai and Kasilof sockeye salmon stocks have exceeded escapement goals in recent years, resulting in foregone yield. As described in the preamble to

the proposed rule, salmon fishing in the Cook Inlet EEZ necessarily targets mixed stocks of salmon. Conservation measures to prevent overfishing on less abundant co-occurring salmon stocks are a primary driver of this foregone yield as they limit a complete harvest of the most abundant sockeye salmon stocks to prevent overfishing on less abundant salmon stocks. As referenced within the 2024 SAFE report, which was reviewed by the SSC, during recent years when Kenai and Kasilof river sockeye salmon escapement goals were exceeded, some sockeye, coho, and Chinook salmon escapement goals in Cook Inlet were not achieved at the status quo level of salmon harvest; thereby highlighting the difficulty of managing mixed stock fisheries to enable the harvest of potential yield while also achieving conservation objectives. Management measures that are required to prevent overfishing on all stocks are consistent with the Magnuson-Stevens Act.

As described in the response to *Comments 18, 25, and 55*, Cook Inlet is a mixed stock fishery within which there are weak stocks (*i.e.*, stocks of relatively low abundance). This situation requires management decisions that can result in overescapement of abundant stocks, such as Kenai and Kasilof sockeye salmon. Providing for greater harvest of the more abundant stocks in the EEZ would create a significant risk of not meeting escapement goals for less abundant stocks and reducing or eliminating the harvestable surplus of these stocks available to all other salmon users. As noted above, NMFS has evaluated historical EEZ harvest levels and found that harvest in the EEZ could not be increased to fully harvest surplus Kenai and Kasilof salmon without causing serious impacts to other salmon harvesters and major conservation problems for other stocks. Whether management in State waters could be modified to increase harvest of these stocks closer to their natal streams without increasing pressure on the stocks of lower abundance in the EEZ is outside the scope of this action, as NMFS has no jurisdiction over State waters (as described in the response to *Comment 10*). The potential for overescapement to reduce future yields is addressed in the response to *Comment 18*.

The Magnuson-Stevens Act has no prohibition against foregone harvest, and in fact suggests foregone harvest is necessary when additional harvest of an abundant stock would also result in bycatch of species for which there is a conservation concern. In contrast, the

Magnuson-Stevens Act explicitly mandates that NMFS prevent overfishing. Therefore, in defining OY for a mixed stock fishery, NMFS cannot look at the strongest stocks in isolation. Here, OY is appropriately limited to EEZ waters and defined so as to identify the amount of cumulative harvest of all co-occurring EEZ stocks that provides the greatest net benefit to the Nation while preventing overfishing. This is consistent with NMFS's approach to salmon management on the West Coast where "weak stock" management is required to avoid exceeding limits for the stocks with the most constraining limits. Each year when setting harvest specifications, NMFS will evaluate the maximum potential harvest available in the Cook Inlet EEZ Area and will work to provide harvest opportunities to the extent possible, subject to the constraints of scientific and management uncertainty. As the information available to NMFS to manage salmon fishing in the Cook Inlet EEZ Area improves through implementation of this new Federal fishery management regime, it is possible that harvest levels could increase.

The State's management decisions prior to NMFS implementing amendment 16 regarding allocations among fishery sectors under State jurisdiction are State decisions that are outside the scope of this action.

Comment 13: This definition of OY is inconsistent with a 2018 NMFS legal memorandum describing that OY should not be subdivided between State and Federal waters.

Response: NMFS disagrees that amendment 16's definition of OY is inconsistent with the 2018 NMFS legal memorandum filed in *UCIDA v. NMFS*. The relevant portion of the legal memorandum stated, "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." At that time, management of Cook Inlet had never been divided into separate State and Federal management regimes under the FMP. As such, it was assumed that continued State management over the drift gillnet fishery throughout both Federal and State waters would continue through delegation under Magnuson-Stevens Act section 306(a). Delegation of certain Federal management authorities to the State would have maintained a single fishery that could operate without specific regard for the EEZ boundary, but the State declined delegation. Therefore,

under amendment 16, which will create separate Federal and State fisheries, it is appropriate to define OY for the specific fishery under NMFS's jurisdiction—the Cook Inlet EEZ salmon fishery.

Comment 14: If NMFS could acknowledge that achieving OY/MSY escapement goals should be the driving factor in developing its FMP, then much of the complication built into amendment 16 would go away.

Response: NMFS acknowledges that an FMP must contain conservation and management measures, including ACLs and accountability measures, to achieve OY on a continuing basis and provisions for information collection that are designed to determine the degree to which OY is achieved. As stated above, here OY is defined for the fishery—which currently includes seven stocks or stock complexes of varying abundance—and accounts for the mixed stock nature of the salmon fishery in the EEZ and the needs of multiple user groups in identifying the harvest levels that will produce the greatest net benefit to the Nation across a variety of run sizes. The FMP's management measures are explicitly designed to achieve OY on a continuing basis while preventing overfishing, consistent with National Standard 1.

NMFS does not agree that achieving MSY or MSY escapement goals are its mandates. MSY is not a management target, as described above, and MSY identifies the maximum sustainable harvest level an individual stock could theoretically support if it was possible to target that stock in isolation and without uncertainty. OY is prescribed on the basis of MSY, as reduced by any relevant economic, social, or ecological factors. Here, for Tier 1 and 2 salmon stocks, MSY in the Cook Inlet EEZ represents all salmon in excess of the stock's escapement goal in a given year. For Tier 3 stocks, which have no reliable estimates of escapement, maximum catch over a recent range of years that are representative of current biological and environmental conditions is used as a proxy for MSY. But because it is not possible to target individual stocks of salmon in the EEZ, it is not possible to design conservation and management measures intended to fully harvest MSY for each stock, as such harvest levels would result in overfishing of the least abundant stocks. Instead, OY is defined for the fishery on the basis of MSY—in that it aims to achieve as much surplus yield for each stock as possible—but is reduced from MSY to account for interactions between stocks (ecological factors) and identify the harvest levels that will continue to support multiple active

fishery sectors without resulting in any one stock routinely missing its escapement goal (*i.e.*, likely overfishing) or any user group losing access to the resource (economic factors). Fully harvesting MSY for Kenai late run sockeye in the EEZ, for example, could decimate co-occurring populations of salmon bound for Northern Cook Inlet, completely eliminating fishing opportunities for other users. Such an outcome would benefit one user group to the exclusion of all others and thus would not produce the greatest *net* benefit to the Nation. Here, NMFS has defined OY by carefully considering net benefits, the competing demands of the numerous stakeholders and tribes who rely on Cook Inlet salmon stocks, and the fundamental characteristic of co-occurring, mixed stocks in the Cook Inlet EEZ. NMFS concludes the management measures in this final rule will achieve OY as defined in amendment 16 on a continuing basis.

Comment 15: Federal oversight of this fishery is a must to obtain maximum harvest and sustainable yield.

Response: The Magnuson-Stevens Act mandates that Federal fishery management measures shall prevent overfishing while achieving OY, which is different from achieving maximum harvest or MSY. To the degree that the commenter is suggesting that Federal management will result in harvests equal to MSY, NMFS disagrees. To the contrary, many stocks of fish in the EEZ are harvested at levels well below their MSY because of the complex interactions between stocks; achieving MSY for certain stocks would result in overfishing of other stocks, which would be inconsistent with the first mandate of National Standard 1. Instead, Federal fishery management measures must achieve OY on a continuing basis. OY is defined as the amount of fish that:

(1) Will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems;

(2) Is prescribed as such on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant economic, social, or ecological factor; and

(3) In the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery (16 U.S.C. 1802(33)).

Comment 16: Using historical catch data from 1999–2021 is incorrect as a proxy for MSY and OY. This period begins after the State increased

escapement levels, resulting in large overescapements of sockeye in the Kenai and Kasilof Rivers and under-harvest of coho, pink and chum salmon. Because the State has not been managing the fishery on the basis of MSY, this historical catch data has no relationship with MSY. This continues poor State management practices in Federal management. NMFS should include harvest data from the 1980s.

Response: NMFS disagrees. To start, historical catch is not used as a basis for establishing MSY in this action for any stocks or stock complexes with escapement goals or estimates of total run size (Tier 1 and Tier 2 stocks). Rather, MSY represents the maximum potential harvest of a run in excess of the spawning escapement goal. The annual SAFE reports will review the best scientific information available regarding escapement goals and estimated run sizes. For Tier 3 stocks with no data on run size or total escapement, maximum catch over a recent range of years that is representative of current conditions is used as a proxy for MSY because it represents the best scientific information available to estimate MSY. In prescribing OY on the basis of MSY, NMFS used the best scientific information available to identify the range of harvest levels in the EEZ that will provide the greatest net benefit to the Nation by ensuring all stocks harvested in the EEZ can meet their escapement goals and the greatest number and diversity of stakeholders and fishery sectors will retain access to the resource. In other words, NMFS defined OY as the harvest levels that are expected to capture as much yield in excess of escapement goals as possible in the EEZ without any individual stock routinely not achieving these escapement goals and risking overfishing, thereby maintaining a harvestable surplus for all other salmon users.

The best scientific information available regarding the appropriate harvest levels in this mixed stock fishery are currently estimates of historic catch in years of high and low abundance across stocks from 1999–2021. As explained in the Analysis, the 1999–2021 time period was chosen due to the advent of the current abundance-based approach to management of salmon in Upper Cook Inlet. In addition, this time series represents the recent range of salmon productivity conditions that are representative of reasonably foreseeable future conditions, reflects a range of time when management measures both increased and decreased fishing opportunity in EEZ waters, and

captures a range of different social and economic conditions within fishing communities. Furthermore, this period also reflects the time for which high quality and comparable data for nearly all fisheries and fishing communities throughout Cook Inlet are available. The OY range considers but does not include the 1980s because there was a different ecological regime in place in the North Pacific (highly productive for salmon stocks), seafood markets for salmon were significantly different (strong Asian demand and less competition from farmed salmon), and the regional population was significantly smaller. These factors all influence NMFS's consideration of the greatest net benefit to the Nation, including consideration of food production and recreational opportunities and taking into account the protection of marine ecosystems.

The harvest levels from 1999–2021 have resulted in numerous viable fisheries while preventing stocks from becoming overfished. While it may be possible to develop better information in the future as NMFS collects more data specific to the EEZ—and section 302(h)(5) of the Magnuson-Steven Act requires the Council to review OY on a continuing basis—at present, historic catch is the best scientific information available. Therefore, ranges of catch in years of high and low salmon abundance is an appropriate method to determine OY.

This action establishes a Federal management framework that accommodates varying levels of harvest over time as the information available to inform harvest specifications and both relative and absolute abundances of salmon change each year. NMFS reviewed fishery data dating back to 1966 when developing a definition for OY. Harvests by the drift gillnet fleet, and all other salmon users in Cook Inlet, have fluctuated dramatically over time based on both salmon abundance cycles and management decisions. Ultimately, as explained above, NMFS determined that the best scientific information available for prescribing OY is currently the estimates of historic catch in years of high and low abundance across stocks from 1999–2021.

Comment 17: The proposed calculation of MSY, OY, and TAC includes 3 years, 2018, 2020 and 2021, which were declared economic disasters by the Secretary of Commerce. This data should be omitted from all analyses of historic harvest.

Response: This action does not use historical catch data to define MSY or to set TACs, as explained above.

For the reasons explained in response to *Comment 16*, the best available

science for developing OY includes historic catch data. Of the 2018, 2020, and 2021 fishery disaster determinations referenced by the commenter, only the 2020 disaster determination applied to the drift gillnet fleet. The 2018 and 2021 determinations only applied to the East Side set net fishery sector. The East Side set net fishery does not operate in EEZ waters. Further, NMFS disagrees that disaster and low harvest years should be omitted from consideration in defining OY, as they represent part of the range of conditions experienced in the fishery. In defining the lower bound of OY for the Cook Inlet EEZ Area, the three lowest EEZ harvests are averaged together, and this number identifies what optimum harvest levels might be in years when low stock abundance reduces harvest opportunities.

It should be noted that OY is not an annual management target but is a long-term objective. Harvests may fall above or below the OY range in some years. Furthermore, OY may appropriately encompass very low harvests when that is what is required to prevent overfishing on all stocks. For example, in the GOA groundfish FMP, the lower bound of the OY range is defined by the year with the absolute lowest fishery harvest in the time series and in the BSAI King and Tanner Crab FMP, the lower bound of the OY range is zero.

Comment 18: Multiple commenters expressed concern about overescapement reducing future yields of Cook Inlet salmon stocks. Commenters stated that underfishing (too little harvest) can jeopardize the capacity of a salmon stock to produce MSY on a continuing basis by allowing too many salmon to enter the stream to spawn and exceeding the carrying capacity of the spawning and rearing habitat, thereby reducing future runs. ADF&G data indicates all the salmon stocks in Cook Inlet are underfished, and with such low exploitation rates, we cannot be overfishing. The commenters stated that most salmon stocks in Cook Inlet are underfished with returns that have exceeded escapement goals. For example, Kenai and Kasilof River sockeye salmon have consistently exceeded escapement goals, sometimes by over a million fish. This action will continue or increase overescapement and result in overcompensation. Management practices that jeopardize the long-term health of the salmon resource reduce opportunities for harvesters and processors and harm the economies of fishing communities.

Response: NMFS disagrees that all salmon stocks in Cook Inlet are

underfished, that overfishing cannot occur in Cook Inlet, and that amendment 16 will jeopardize the long-term health of the salmon resource if the stocks of highest abundance exceed their escapement goals when harvest restrictions are required to protect stocks of lower abundance. As discussed in the 2024 SAFE report, escapements for some stocks of sockeye, coho, and Chinook salmon have been below spawning escapement goals during recent years when Kenai and Kasilof sockeye salmon have exceeded the upper bound of their escapement goals.

As discussed in section 3.1 of the Analysis, the need to conserve weaker stocks by reducing fishing effort sometimes results in foregone yield from more productive stocks. For salmon, this can result in escapement goals being exceeded, which is sometimes referred to as overescapement. NMFS has evaluated the best available science on overescapement. Appendix 14 of the Analysis is an independent analysis of the potential for overcompensation (reduced yield as a result of overescapement) in Kenai and Kasilof river sockeye salmon stocks. The SSC reviewed this analysis, which found that ADF&G's escapement goals were established within the range expected to produce MSY for those stocks, that ADF&G's point estimates of MSY were accurate, and that there is limited evidence for overcompensation across the observed range of escapements for Kenai and Kasilof sockeye salmon. Thus, while instances of overescapement will result in foregone yield in the current year, existing spawner-recruitment information does not indicate that overescapement has resulted in substantial reductions in recruitment and yield for the primary stocks harvested by the drift gillnet fleet in Cook Inlet. In other words, though the Kenai and Kasilof sockeye salmon stocks have recently exceeded their escapement goals, this has not resulted in a conservation problem for those stocks and available data does not indicate that overescapement has resulted in a reduction in future yields. NMFS concludes that increased fishing effort in the EEZ to fully harvest the available yield for Kenai and Kasilof sockeye salmon would result in serious conservation concerns for stocks of lower abundance, which would fail to achieve their escapement goals.

For Cook Inlet salmon stocks without escapement goals, information is not available to analyze overescapement or its potential impacts on future yields. In the absence of specific stock

information, conservative management using suitable proxies while following the precautionary principle is consistent with the National Standard 1 guidelines for dealing with data-poor stocks (§ 600.310(e)(1)(v)(B) and (h)(2)). The guidelines provide flexibility in setting MSY and other reference points based on insufficient data and in consideration of stocks with unusual life history characteristics, including salmon. The risk of overfishing as a result of harvest rates that are too high is much greater than the uncertain and speculative risk of underharvest or overescapement. Therefore, precautionary management is appropriate for data-poor fish stocks.

From a practical perspective, it is not possible to manage the mixed stock salmon fishery in the Cook Inlet EEZ Area by harvesting surplus yield on all stocks because the composition, abundance, and productivity of stocks and species in the fishery vary substantially. Overescapement occurs in Cook Inlet, as noted in section 3.1 of the Analysis. Overescapement usually results from (1) a lack of fishing effort, (2) unexpectedly large salmon runs, or (3) management or economic constraints on the fishery. In this instance, management must constrain harvest of the largest, most productive salmon stocks to protect less abundant salmon stocks and species.

Comment 19: The Exxon Valdez litigation had documented damage to the Kenai River due to overescapement and the Exxon Valdez Oil Spill Trustees Council funded ADF&G research on damage from Kenai Sockeye overescapement and plaintiffs' compensation in part was for damage to future runs caused by overescapement. Now the State is managing the sockeye fishery in a manner that results in substantial overescapement, similar to what occurred after the oil spill.

Response: The response to *Comment 18* explains that the best scientific information available indicates that large escapements of sockeye salmon to the Kenai River have not resulted in reduced future yields and are not a conservation concern compared to the clear risks of overfishing and/or stocks failing to meet the lower bound of escapement goals. The claims and damages paid to plaintiffs in the decades of litigation arising from the Exxon Valdez oil spill are beyond the scope of this action.

Comment 20: The result of the overescapement on the Kenai and Kasilof rivers caused by commercial fishery restrictions wastes a food resource that belongs to the whole nation (see the Supreme Court's case of

Hughes v. Oklahoma which reversed *Greer v. Connecticut*). It is in the whole Nation's interest as to what happens to salmon in Alaska. When Alaska became a state, the State compact with Congress was for the State to manage its fish and wildlife in the national interest. The State created ADF&G to manage fish and game in the national interest. It is no longer doing that. This is the reason for the involvement of NMFS and the Department of Commerce.

Response: The U.S. Supreme Court in *Hughes v. Oklahoma*, 441 U.S. 322, 338 (1979), held that a State could not prohibit transporting fish out of state for sale once caught. *Hughes v. Oklahoma* is not relevant to this action.

NMFS has determined that this action would achieve OY for the Cook Inlet EEZ Area and, in doing so, will result in the greatest overall net benefit to the Nation. The National Standard 1 guidelines provide that OY means the amount of fish that will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems. This means NMFS must look at the impacts of its harvest management on all salmon stocks and stakeholders and cannot look at the interests of the drift gillnet fleet alone.

As noted in the preamble to the proposed rule, amendment 16 defines OY as the average range of target EEZ harvest across all species that maximizes fishing opportunities while preventing overfishing on any one stock. This OY range provides the greatest overall net benefits to the Nation because it ensures sustainable stock levels throughout the ecosystem, preserves multiple viable commercial fishery sectors for continued food production, and maintains a viable recreational fishing sector that attracts participants from throughout the Nation.

This OY range is expected to result in drift gillnet harvests near historic levels, protect less abundant salmon stocks transiting to Northern Cook Inlet, and ensure other commercial and non-commercial stakeholders in Cook Inlet continue to have access to salmon resources. Any management plan designed only to prevent overescapement in the Kenai and Kasilof rivers by increasing EEZ harvest would upset this balance, preempting other users, and likely causing stocks of lower abundance—particularly in Northern Cook Inlet—to more regularly miss their escapement goals, ultimately resulting in overfishing.

Comment 21: Use the flexibility within the National Standard 1 guidelines (§ 600.310(h)(2)) to adopt an escapement-based inseason management methodology similar to the State. If the State is allowing too much harvest in its jurisdiction, it will be reflected in too low escapement numbers, and Federal managers will know to restrict fishing. Likewise, if the State is not providing for enough harvest, daily escapement numbers will indicate a higher than acceptable final escapement, and Federal managers will know to allow more fishing time. One commenter noted that an alternative approach is needed for salmon because of the following: (1) unlike groundfish stocks, salmon reproduce only once; (2) the harvestable surplus is entirely new recruits and the catch comprises almost exclusively mature salmon; (3) productivity of a specific year class cannot be improved by limiting harvest in subsequent years; (4) foregone harvest cannot be recaptured in future years; and (5) abundance cannot be estimated effectively in advance. Therefore, inseason estimates of abundance using contemporaneous data, with appropriate management actions taken to assure escapement and optimum production in future years, is the most effective way to avoid the risk of overfishing.

Response: As set forth under section 301 of the Magnuson Stevens Act, National Standard 1 provides that conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry. Section 303(a)(15) of the Magnuson Stevens Act requires that each FMP establish mechanisms for specifying ACLs to prevent overfishing and include accountability measures to prevent ACLs from being exceeded and to correct overages of the ACL if they do occur. The National Standard 1 guidelines at § 600.310(h)(2) contemplate limited circumstances in which alternative approaches to establishing ACLs may be appropriate, and specifically cite Pacific salmon as an example of stocks that may require an alternative approach to ACLs. However, while § 600.310(h)(2) provides NMFS some flexibility to consider alternative means of establishing ACL mechanisms and accountability measures in FMPs, the National Standard 1 guidelines do not provide discretion to consider alternative means of establishing other reference points, like OFL or ABC. And any alternative approach to establishing ACLs must be

consistent with the Magnuson-Stevens Act.

The primary function of status determination criteria, ACLs, and related requirements is to ensure that a scientifically-based approach is used for controlling catch to maintain stock abundance at the level necessary to prevent overfishing, ensure no stocks become overfished, and achieve OY in the fishery. Therefore, an alternative approach that is consistent with the Magnuson-Stevens Act must document how the alternative management measures would limit catch and explain how such measures would rely on the best scientific information available.

When the Council was developing the alternatives for analysis, the Council and NMFS considered using the State's salmon escapement goal management as an alternative approach for satisfying the ACL requirements of the Magnuson-Stevens Act under delegated management to the State (Alternative 2). Under amendment 12, the Council recommended this alternative approach for ACLs in the East Area. Escapement goals are specified annually, in terms of numbers of fish. The biology of salmon is such that escapement is the point in the species life history best suited for routine assessment and long-term monitoring. Using spawning escapement goals is consistent with the long-standing practice of using spawning escapement to assess the status of salmon stocks.

Under this alternative approach (not adopted in amendment 16), the mechanisms for specifying ACLs salmon stocks would be the State's scientifically-based management measures used to determine stock status and control catch to achieve the number of spawners necessary to produce MSY. The State's salmon management program is based on scientifically defensible escapement goals and inseason management measures to prevent overfishing. Accountability measures would include the State's inseason management measures and the escapement goal setting process that incorporates the best scientific information available on stock abundance.

Using the State's inseason management approach as an alternative approach to establishing ACLs is not possible under Federal management of a new fishery in the EEZ that will be managed separately from fishing in State waters. NMFS currently has no infrastructure for collecting escapement information in Cook Inlet and there is no guarantee NMFS managers would have access to information collected by the State quickly enough to make real

time management decisions. Additionally, escapement information is not available from any source for many salmon stocks in Cook Inlet. The responses to *Comments 23* and *28* provide additional discussion of the procedural challenges of implementing escapement-based inseason management in this situation.

For management of the Cook Inlet EEZ Area as an entirely separate jurisdiction, using escapement-based inseason management as an alternative approach for ACLs may have additional limitations. Because there is a lag of multiple days (or longer for the Northern District salmon stocks currently with the greatest conservation risks) between encountering EEZ fisheries and being counted at escapement monitoring stations, that data may not be timely for the current management situation. This lag between receipt of data and action can have huge consequences in a fishery where a single opening can harvest well over 300,000 salmon per day. Further, just because one stock has reached an escapement goal and can sustain additional harvest that does not mean that all of the other stocks, which are highly mixed in EEZ waters, can support additional harvest. This issue is compounded by fishing in EEZ waters occurring before all other users. Basing management solely on escapement would make it more difficult to ensure there was at least some harvestable surplus available to all salmon users in Cook Inlet across all jurisdictions when cooperation is not guaranteed through established agreements.

During the development of this action—first at the Council, then as a Secretarial FMP amendment after the Council failed to recommend any management measures—no one identified any alternative means of specifying ACLs for the Cook Inlet EEZ Area that would be consistent with the Magnuson-Stevens Act, rely on the best scientific information available, and limit catch to ensure no overfishing occurred. Therefore, amendment 16 uses the default ACL approach described in the National Standard 1 guidelines—establishing pre-season harvest limits based on the best scientific information available at the time stock assessments are drafted and harvest specifications are recommended. This is similar to how ACLs are set for salmon along the US West Coast and how the 2019 Pacific Salmon Treaty Agreement establishes pre-season limits on Chinook harvest under the Treaty.

Comment 22: The State, several regional sportfishing organizations, and

stakeholders in the Northern District believe amendment 16 will disrupt conservation and management benefits realized by the State's management plans, which these commenters have found to successfully balance the complexity and challenges of managing multiple user groups in a highly populated area. They emphasize that the State's management plans were developed by the BOF to ensure long-term sustainability of both strong and weak salmon stocks, optimize yields and opportunities of the diverse fisheries, and allocate benefits among user groups. They feel this action will result in overfishing of weak salmon stocks, produce suboptimum yields, and confound the State's effective in-season management. This is not consistent with the Magnuson-Stevens Act or National Standard 1.

Response: NMFS recognizes the complex and challenging nature of Cook Inlet salmon fisheries. NMFS disagrees that amendment 16 will undermine the State's Central District Drift Gillnet Fishery Management Plan, result in overfishing, or produce suboptimal yields.

As described in the preamble to the proposed rule, NMFS recognizes that salmon harvest in the Cook Inlet EEZ occurs first and can impact the amount of salmon available to upstream users and to meet spawning escapement goals. In developing this final rule, NMFS considered the management measures implemented by the BOF and worked to balance competing interests and provide opportunity for all users of salmon throughout Cook Inlet.

NMFS acknowledges that, in some years, this action may allow for more days of drift gillnet fishing in the Cook Inlet EEZ Area relative to previous State management plans. NMFS will use TACs that account for uncertainty and harvest in other fisheries in order to prevent overfishing on any less abundant salmon stocks transiting through the Cook Inlet EEZ Area. As described in section 2.5.2.1 of the Analysis and the response to *Comment 25*, TACs will account for stocks of lower abundance and prevent overfishing on weak stocks. The TACs are expected to result in total harvests fairly consistent with the status quo. NMFS will have inseason management authority to adjust TACs and close or reopen the fishery as needed to account for inseason conditions. NMFS and the Council will use the best scientific information available and work to improve salmon monitoring and assessment where possible/practicable, and will coordinate with the State to the extent possible. Further, as discussed in

the section on changes from the proposed to final rule, NMFS is reducing the number of open fishing periods from two to one from July 16 to July 31 to directly respond to the comments from users in Northern Cook Inlet who said they depend on the conservation corridor established under State management.

NMFS expects that this final rule will continue to provide for a harvestable surplus for all Upper Cook Inlet salmon fishery sectors in both State and Federal waters. NMFS anticipates that under this final rule all Cook Inlet salmon fisheries will remain viable and produce economic benefits commensurate with the status quo.

Status Determination Criteria and Annual Catch Limits

Comment 23: Many commenters raised concerns about using TACs for salmon harvest in the EEZ, including the following perspectives.

Use of a TAC established on pre-season projections will result in inappropriate catch. While uncertainty may be accounted for when setting ABC and OFL, it lacks the benefit of inseason information on run strength, weak stocks, harvests, and other important factors. Cook Inlet salmon run sizes and timing are variable and unpredictable, especially in recent years. Establishing a TAC increases the likelihood of either overfishing or underfishing and reduces the likelihood of remaining within the escapement goal range for those stocks with goals. Further, if there are deviations from forecasted run size, procedural constraints on Federal management may exacerbate the resulting problems. These issues combined could jeopardize sustainability, especially for weak stocks, and could result in overfishing of weak stocks.

Commenters from the drift gillnet fleet emphasized that forecasts will be inaccurate, management objectives will not be met, harvest will be unnecessarily reduced, MSY and OY will not be achieved, and this action will cause adverse economic impacts.

Other commenters voiced concerns that a TAC would not be conservative enough given that this action sets TACs for a first-in-line fishery, which would require the State to reduce State water fisheries harvest if the pre-season forecasts are not realized. Commenters from other commercial and recreational salmon fishery sectors in Upper Cook Inlet, as well as associated communities, were significantly concerned that TACs would not be precautionary enough and EEZ harvests would reduce or eliminate the harvestable surplus available to

other users. Some commenters cited unpredictable escapement data that would require unexpected fishery closures.

Response: Under section 303(a)(15) of the Magnuson-Stevens Act, the FMP must include a mechanism for specifying ACLs at a level that overfishing does not occur in the fishery, including measures to ensure accountability. NMFS is therefore required to have ACLs and management measures to implement them, and amendment 16 includes these required elements. TACs (*i.e.*, pre-season catch limits) are established to ensure fishery harvests remain below ACLs. Because salmon of the same species originate from separate stocks but cannot be visually distinguished, in amendment 16, TACs are set at the species level based on the cumulative estimated contribution by stock, at least until inseason genetic information becomes available. There is uncertainty inherent to forecast-based catch limits. In establishing TACs, NMFS will take into account management uncertainty and public comment, just as NMFS and the SSC will consider scientific uncertainty in setting OFL and ABC (and therefore ACL since ACL equals ABC) each year. OFL and ABC are specified for each stock or stock complex. TACs are established for species rather than stocks or stock complexes because inseason it is not currently possible to differentiate among stocks of the same species. TACs for each species are set based on the aggregate ABC for each component stock and stock complex and account for the assumed contribution of each stock or stock complex to total catch to ensure ABC is not exceeded for any one component stock. NMFS will monitor the fishery daily and use inseason management measures and adjust the TAC, if practicable, to ensure that catch amounts are appropriate for the realized run strength. And NMFS expects that TACs set for the Cook Inlet EEZ will be suitably precautionary to avoid overfishing.

Establishing TACs is consistent with the NMFS's management approach for salmon stocks in ocean fisheries on the West Coast with an ACL requirement (*e.g.*, stocks that are not subject to a tribal/international treaty or ESA exception). The Pacific Salmon Treaty also establishes pre-season catch limits for Chinook salmon covered by the Treaty. NMFS considered alternative approaches to establishing ACLs as described in the response to *Comment 21*.

NMFS will consider all available information about Cook Inlet salmon

run strength and coordinate with the State to the extent practicable when making management decisions for the Cook Inlet EEZ Area. However, this action establishes Federal reference points and harvest specifications for the Federal fishery, as required by the Magnuson-Stevens Act, which are different from existing State management measures.

NMFS acknowledges that the ACL requirement and additional Federal notice requirements—mandated by the Magnuson-Stevens Act and the APA—are less flexible in adjusting fishing opportunity based on inseason information about run size when compared to managing by monitoring escapement goals and exercising emergency order authority pursuant to State law, as under State management. This is described in section 2.5.2.6 of the Analysis. NMFS also acknowledges that fishing in the Cook Inlet EEZ Area takes place before all other salmon fisheries in upper Cook Inlet and that it can impact salmon escapement for each stock as well as the harvestable surplus available to all other subsequent salmon users. NMFS acknowledges the uncertainty inherent to forecast-based catch limits. However, NMFS designed the harvest specification process and management framework implemented by this action to account for the inherent uncertainty in preseason estimates and the need for inseason management, as well as the mixed-stock, first-in-line nature of the Cook Inlet EEZ Area fishery, consistent with the Magnuson-Stevens Act and the APA.

Comment 24: Appropriate harvest rates are not considered when determining what should be harvested in the Cook Inlet EEZ Area. The 2002 ADF&G mark-recapture population estimate study (Regional Information Report 2A03–20, published 2003) on coho, pinks, and chums found that the commercial fishery harvest rates on coho were about 10 percent, pinks were around 2 percent, and chums were around 6 percent. These harvest rates were the results of State management policies that were in effect at that time. To further skew the harvest rates since 2002, when the study was done, the commercial fishery was even more restricted by State salmon management plans that continue to fail to meet the requirements of Magnuson-Stevens Act. All harvest rates should be based on 81 percent overfishing exploitation rate and a 65 percent MSY exploitation rate. MSY exploitation rates should be 63 percent for coho, 53 percent for pinks, and 56 percent for chums to achieve MSY on these stocks over the long term.

Response: Harvest rates (exploitation rates) could not be considered for the Federal management of stocks of pink, chum, and coho salmon in Upper Cook Inlet because there are not sufficient data available to estimate such harvest rates. The mark-recapture studies cited by the commenter are now more than 20 years old, and salmon populations are not stable over time. Rather, as cited in the Analysis and the SAFE report, a variety of publications, including State of Alaska escapement goal reports, annual management reports, and stock assessments, indicate that Alaska's salmon populations experience substantial year-to-year fluctuations in abundance over time. Population estimates from a given year are not indicative of the population abundance during other years. There are no contemporary estimates of total run size or overall spawning escapement for stocks of coho, pink, and chum salmon for all of Upper Cook Inlet, and historical estimates are highly uncertain. As such, exploitation rates have not been estimated during recent years and therefore, it is not possible to precisely estimate MSY for these stocks based on current assessment methods. Moreover, there are no estimates of population abundance for these stocks to inform preseason harvest specifications. NMFS will use the best available scientific information to inform harvest specifications and management decisions for the Cook Inlet EEZ Area.

Comment 25: Several commenters, including Alaska Native tribes in the region, emphasized the importance of precautionary salmon management and felt that amendment 16 was not suitably precautionary given large potential harvests by the drift gillnet fleet, which includes a mixture of strong and weak stocks.

One commenter noted that many Northern District salmon stocks lack estimates of annual escapement, escapement goals, and numeric data (historic or current). Cook Inlet salmon fisheries harvest mixed stocks and need to be managed to account for this. Precautionary management would help meet escapement goals. NMFS should fund genetic data collection and more escapement monitoring.

Another commenter suggested setting conservative TACs for the first 6 years. One commenter generally suggested that management measures in addition to TACs would be needed. Another commented stated that NMFS must develop a plan for pre-season commercial fishing closures as well as in-season commercial fishing closures based on in-season escapements.

Response: NMFS acknowledges the importance of precautionary fishery management and avoiding overfishing on all salmon stocks. Furthermore, NMFS acknowledges that some Cook Inlet salmon stocks are highly abundant and may support additional harvests while other salmon stocks are a major conservation concern and can support little or no harvest. Over time, NMFS will work to expand the scientific information available to manage Cook Inlet salmon stocks. Amendment 16 includes accountability measures, and NMFS can implement additional accountability measures if needed to avoid exceeding ACLs.

NMFS must establish harvest specifications before fishing begins. NMFS agrees that there is a need for precaution when there is significant scientific or management uncertainty associated with salmon management in Cook Inlet. Drift gillnet fishing in Cook Inlet harvests mixed stocks of salmon. The best scientific information available will be used to assess the status of each salmon stock in Cook Inlet and set harvest limits each year. The harvest limits set for each species will consider the proportional contribution of each salmon stock to total catch, when known. Species-level TACs may also be reduced from combined ACLs to protect weak stocks when there is uncertainty about catch composition (a key type of management uncertainty). Furthermore, NMFS will close commercial fishing for all salmon species in the Cook Inlet EEZ when catch limits for one or more stocks are met or exceeded, or if other information becomes available that indicates overfishing is likely. This will help ensure that overfishing does not occur on any one stock.

NMFS disagrees that the management framework established by this action is not sufficiently precautionary. As described in the preamble to the proposed rule, every year the Council's SSC will establish ABCs for each Cook Inlet salmon stock, accounting for scientific uncertainty by reducing ABC from OFL. TAC would then be set for each salmon species to account for management uncertainty to ensure that total catch does not exceed the ABC for any stock and may also include additional reductions to account for social, economic, and/or ecological factors. As noted in the changes from proposed to final rule section, this action reduces the number of fishing periods per week in the Cook Inlet EEZ Area to one opening per week from July 16–July 31 to allow salmon stocks of lower abundance to migrate northward. To further address mixed-stock conservation needs, drift gillnet fishing

in the Cook Inlet EEZ area will be closed after a TAC for a single species is reached or would be exceeded by another opening because drift gillnet gear catches all stocks present in the EEZ and the fleet could not focus harvest on only those species for which there is remaining TAC.

NMFS acknowledges that there is some uncertainty in estimated EEZ harvests but recognizes it as the best scientific information available. Forecasted salmon abundance and associated uncertainty will be considered each year to set harvest specifications that are appropriately precautionary. After implementation of this action, NMFS will collect high quality data to determine total EEZ harvests.

For further explanation of NMFS's approach to management of this mixed stock fishery, see the response to *Comment 55*.

Comment 26: The State cannot commit to adjusting the work schedule and timing of Cook Inlet salmon management and science products to accommodate the proposed Federal harvest specification process. Salmon scales take time to read and age, data takes time to analyze, and models take time to run and fact check. Expediting these processes could result in errors. We already anticipate that this action will increase the volume and complexity of information requests that ADF&G receives from fishery participants, increasing staff workload.

Response: Nothing in this action requires the State to change the timing of their reports, publications, or other work products. However, as described in sections 4.7.3.2 and 4.8 of the Analysis, NMFS acknowledges that this action will increase costs and burden to State and Federal fishery management agencies. NMFS acknowledges the timing, logistical challenges, and costs associated with fishery data collection, analyses, and the timing requirements of the Federal process for the SSC and Council to recommend harvest specifications and for NMFS to implement them by publishing proposed and final harvest specifications in the **Federal Register**.

NMFS and the Council will use the best scientific information available at the time that harvest specifications must be developed or other fishery management decisions made. This may include information from the State or other sources, and NMFS will work with the State to the extent practicable. NMFS, the Council, and the SSC will evaluate the level of uncertainty in available data and information and

adjust harvest specifications and other management measures accordingly.

Comment 27: To establish a reliable TAC based on the proportional contribution of each stock to this fishery, better data must first be established including in-season genetics and escapement information for Northern Cook Inlet salmon stocks. Test fisheries need to take place where northern-bound fish are most easily differentiated from Kenai-bound fish. Using averages of previous years to establish the TAC is no substitute for timely in-season management. NMFS may want to support the State's test fishery or establish another test fishery to monitor salmon numbers, species, and stocks entering upper Cook Inlet. Timely genetic analysis from test fisheries could provide better real-time abundance information for management.

Response: NMFS acknowledges that there are incomplete genetics and escapement data for Cook Inlet salmon stocks, as described in section 2.5.2.2 of the Analysis. However, NMFS will use the best scientific information that is available, including information from test fisheries and historical data on genetic stock composition to manage salmon fishing in the Cook Inlet EEZ Area. Any uncertainties in the available scientific information will be accounted for, and management measures will be adjusted based on the level of precaution warranted. As discussed in the response to *Comment 28*, NMFS will monitor the fishery and make management decisions on a daily basis depending on currently available information on realized salmon abundance.

NMFS will work to improve the level of information available to manage the fishery and may consider other management tools including Federal test fisheries and genetics sampling to address future management needs.

Inseason Management

Comment 28: Daily management of the fishery must take place like all other State salmon fisheries.

Response: NMFS will monitor catch from each Federal fishing day, catch in other fisheries, and any other information available about inseason salmon abundance to make management decisions for the Cook Inlet EEZ Area on a daily basis. NMFS may close the fishery, reopen it, or—potentially—adjust the TAC amounts to account for emerging inseason conditions. However, unlike the State and as described in the proposed rule, NMFS must comply with the APA when implementing any fishery management decision. The need to comply with the APA's notice

requirements for all inseason actions, and the Magnuson-Stevens Act requirement to establish ACLs, make it infeasible to implement an escapement-based salmon management approach like that used by the State.

Comment 29: Catch per unit effort (CPUE) should be used instead of a TAC to manage salmon fishing in the Cook Inlet EEZ Area.

Response: NMFS disagrees that CPUE should be used to manage salmon fishing in the Cook Inlet EEZ Area as CPUE data alone would be insufficient to meet Federal Magnuson-Stevens Act and National Standards requirements. CPUE data would provide managers with the information about catch rates of salmon in the fishery, but not about the specific stocks caught. Even with stock specific catch information, CPUE data for salmon harvests may not correspond to overall run size or numbers of fish necessary to meet spawning escapement goals. As described in section 2.4.4 of the Analysis, methods that use CPUE (e.g., catch per delivery) would likely not provide sufficient information to judge whether catches had exceeded a level thought to cause overfishing for a stock. NMFS does agree that CPUE can, under some circumstances, provide useful inseason information for fishery managers.

Comment 30: The proposed TAC does not discuss the criteria that will be used to close the fishery. The only criterion that is presented is a salmon harvest of 291,631. This single criterion of 291,631 salmon does not meet Magnuson-Stevens Act and the National Standards requirements.

Response: This final rule does not establish a TAC of 291,631 salmon. NMFS will establish TACs in a separate proposed and final harvest specifications process.

The preamble to the proposed rule for this action comprehensively describe how TACs for each salmon species would be established according to the process laid out in the Harvest Specifications and Annual Processes section, while the criteria for closure are described in the Inseason Management section. This action establishes the lower bound of the OY range at 291,631 salmon. The OY range is not used to establish harvest specifications or close salmon fishing. The OY range is a long-term average amount of desired yield from the fishery, not an annual management target, and thus 291,631 represents the lower bound of the desired long-term average yield from the fishery. As described in the response to *Comment 10*, the OY range specified by this action is consistent with the

Magnuson-Stevens Act and the National Standards.

Cook Inlet EEZ Commercial Salmon Fishing Management Measures

Comment 31: Several commenters objected to the prohibition on drift gillnet fishing in State and Federal waters on the same calendar day. They indicated this will be inefficient, have adverse economic impacts, decrease flexibility to harvest salmon as migration paths and run timing vary, and be inconsistent with National Standard 6. Another commenter noted that there is not a similar prohibition on recreational fishing in both State and Federal waters on the same day. Some commenters also suggested these requirements are intended to be punitive against members of the drift gillnet fleet.

Response: This final rule provides that it is unlawful for commercial fishery sector participants to:

- Set drift gillnet gear within, or allow any portion of drift gillnet gear to enter, State waters on the same calendar day that drift gillnet gear is also deployed in the Cook Inlet EEZ Area while commercial fishing for salmon in the Cook Inlet EEZ Area (§ 679.117(b)(1)(v));
- Use a vessel named, or required to be named, on an SFFP to fish for salmon in the Cook Inlet EEZ Area if that vessel fishes for salmon in Alaska State waters on the same calendar day (§ 679.117(b)(1)(vii));
- Possess salmon, harvested in Alaska State waters, on board a vessel commercial fishing for salmon in the Cook Inlet EEZ Area or to have salmon on board a vessel at the time a fishing trip commences in the Cook Inlet EEZ Area (§ 679.117(b)(1)(viii) and (ix)); and
- Land salmon harvested in Alaska State waters concurrently with salmon harvested commercially in the Cook Inlet EEZ Area” (§ 679.117(b)(1)(xii)).

As noted in the preamble to the proposed rule (Other Commercial Fishery Management Measures and Prohibitions section), NMFS has determined that there is a need to restrict vessels from fishing in both State and Federal waters during the same calendar day. The Cook Inlet EEZ Area is managed separately from adjacent waters managed by the State. NMFS must be able to accurately account for harvest in the Cook Inlet EEZ to avoid exceeding the Federal TAC, prevent overfishing, and accurately manage to the established Federal reference points, as required by the Magnuson-Stevens Act, which NMFS would be less able to do if catches from State and Federal waters

were mixed on a vessel during a single fishing trip.

If vessels could fish in both State and Federal waters on the same calendar day, landings could contain a mix of salmon harvested in both the State and Federal fisheries. Some method to attribute a proportional amount of catch to Federal waters would be needed. This would embed assumptions about the correct proportions and thus would substantially increase uncertainty for Federal managers and would likely require significantly more conservative management decisions for the Cook Inlet EEZ Area. This could also create an incentive for fishermen to over-report State waters catch to keep the Cook Inlet EEZ open to commercial salmon fishing longer, which would necessitate additional monitoring, recordkeeping, and reporting measures. In short, NMFS could not accurately monitor EEZ harvests and ensure the fishery complies with all Magnuson-Stevens Act requirements if vessels could move between State and Federal waters on the same day and land fish caught in both jurisdictions.

As described in the response to *Comment 37*, these prohibitions do allow vessels to choose whether to fish in State or Federal waters on each calendar day. This allows vessels to operate where catches are highest or efficiency is maximized depending on their port location or any other factor.

Also as described in the response to *Comment 37*, NMFS did consider management that would schedule the Federal drift gillnet fishery on separate days to alleviate the catch accounting concern but chose not to implement this approach due to significant uncertainty about the total number of drift gillnet fishing days in Cook Inlet that would result in highly unpredictable effort and catch.

NMFS acknowledges that there is not a prohibition on recreational (sport) salmon fishing in State and Federal waters on the same day. As described in section 4.5.2.2 of the Analysis, fewer than 70 salmon per year are estimated to be harvested by recreational salmon fishing in the Cook Inlet EEZ Area. Furthermore, recreational anglers are not allowed to harvest additional salmon by fishing in either or both areas—the same bag limit applies in State and Federal waters and anglers are prohibited from catching or possessing a bag limit for both State and Federal waters on the same day. Therefore, there is no identified management need to prohibit recreational fishing in State and Federal waters on the same calendar day. If recreational salmon harvests in the Cook Inlet EEZ Area increase in the

future, the Council may recommend and NMFS may choose to implement additional restrictions on recreational salmon fishing as needed.

Comment 32: If NMFS implemented escapement-based management rather than a TAC, then there would be no need to prohibit vessels from fishing in State and Federal waters in the same trip.

Response: Escapement-based management was considered during the development of this action under Alternative 2, which would have delegated management authority to the State. Delegated management under Alternative 2 would not have included a prohibition on fishing in both State and Federal waters on the same calendar day and provided for the State’s use of their escapement-based tools to achieve Federal reference points. However, the State refused to accept delegated management. The response to *Comment 21* describes why escapement-based management as currently conducted by the State could not be implemented by this action.

Comment 33: Opening the whole EEZ and drift gillnet Area 2 will spread out the small drift gillnet fleet (less than 300 boats in recent years), reducing pressure on returning non-sockeye stocks and allowing maximum harvest of abundant sockeye stocks.

Response: Under this final rule, the entire Cook Inlet EEZ Area will be open to drift gillnet salmon fishing during established fishing periods. Because this is similar to historical State management of the Area, as described in the response to *Comment 25*, NMFS remains concerned about mixed-stock harvests and impacts to less abundant stocks and will manage salmon fishing within the Cook Inlet EEZ to prevent overfishing on all stocks through the use of TACs and inseason information.

While there have been fewer participants in recent years, this trend could reverse and over 200 additional latent permits could reenter the fishery, which must be considered in this long-term management framework.

Drift gillnet Area 2 is entirely within State waters and will continue to be managed by the State and is outside the scope of this action.

Federal Commercial Fishing Season and Fishing Periods

Comment 34: Many commenters expressed concern about the amount of fishing that this action will allow between July 15 and August 15, when certain stocks are migrating north through the Cook Inlet EEZ. Fishing by the drift fleet in EEZ waters from July 16 through July 31 is highly impactful

due to large catches and mixed stocks. Commenters noted that currently the drift gillnet fishery can only fish once per week during this critical period for migrating stocks and additional openings from July 16 through July 31 are authorized only under certain conditions and in limited areas. Multiple regional tribes, Northern district communities, and regional sportfishing organizations recommended that NMFS allow only one EEZ opening per week between July 15 and July 31, or until the season closure date. The State and one other commenter proposed that NMFS close the Cook Inlet EEZ to fishing after July 15.

Response: Upon reviewing the significant public comment received regarding the number of fishing periods in the proposed rule for this action and the importance of Cook Inlet salmon resources to all salmon users throughout Cook Inlet, NMFS agrees that it is prudent for conservation of Cook Inlet salmon stocks to reduce the number of commercial fishery openings in the Cook Inlet EEZ Area to one per week in late July. The reason for this change is discussed in detail above in the section on changes from the proposed to final rule and briefly summarized here.

In addition to establishing TACs that are suitably precautionary in light of uncertainty, the other primary means by which NMFS prevents overfishing and ensures all stocks are able to meet their escapement goals is by managing the amount and timing of scheduled fishing periods. In this final rule, NMFS has decided to decrease the number of commercial fishing openings between July 16 and July 31 from two to one per week. This more closely aligns with the number of openings under the status quo and is responsive to the significant public comments received on the importance of this time period to Northern Cook Inlet salmon stocks that transit through the EEZ to spawning grounds. From June 19 until July 15, and from August 1 to August 15, there will still be two drift gillnet fishery openings per week, unless otherwise closed. NMFS expects that when there are high salmon abundances, and no constraining stocks, this management framework will allow for harvest of TACs in the Cook Inlet EEZ Area.

Decreasing the number of fishing periods in the second half of July may also have other important conservation and management benefits. First, it allows for more even utilization of the beginning, middle, and late returning components of each salmon stock. Second, it may decrease the risk of a smaller TAC for one salmon species

being reached and resulting in a closure of the fishery before the larger, high value sockeye salmon TAC can be fully achieved. For example, while Chinook salmon are not harvested in large quantities by the drift gillnet fleet in the Cook Inlet EEZ Area, declines in Chinook salmon abundance have, in some cases, entirely eliminated the harvestable surplus of Chinook (*i.e.*, escapement goals cannot be achieved even if no fish are harvested). As a result, the Chinook salmon TACs established for the Cook Inlet EEZ Area are likely to be relatively small. Although very few Chinook have historically been caught after August 1, significant numbers have been caught in the second half of July. Reducing fishing time in the second half of July makes it less likely that a Chinook TAC will be reached, triggering a closure before the sockeye salmon TAC has been harvested.

As described in the preamble to the proposed rule, NMFS considered but rejected other management measures that would provide fewer drift gillnet fishing periods per week in the Cook Inlet EEZ Area. NMFS determined that allowing only one 12-hour drift gillnet fishing period per week in the Cook Inlet EEZ Area throughout the entire season may not allow for adequate harvest opportunities in the Cook Inlet EEZ Area in years when salmon abundances are higher. Similarly, a fixed July 15 closure would be expected to unnecessarily limit harvest in the Cook Inlet EEZ Area to less than half of its historical amount.

Comment 35: The State objected to the drift gillnet fishing season ending on August 15, as it stated that allowing fishing in the Cook Inlet EEZ during the August 1 to August 15 time period conflicts with its 1 percent rule. Under that State regulation, from August 1 to August 15, if less than 1 percent of the season's total drift gillnet sockeye salmon harvest has been taken per fishing period for two consecutive fishing periods in the drift gillnet fishery, the fishery is restricted to the west side of Upper Cook Inlet where the fleet is less likely to catch salmon from weak stocks or those needed to provide a harvestable surplus to other users. These area restrictions are also implemented if the East Side Set Net fishery is closed. The State stated that the proposed closure date of August 15 rule is not based on conservation objectives and fails to coordinate with the existing Cook Inlet allocation processes.

Response: NMFS chose not to implement a regulation similar to the State's 1 percent rule for the Cook Inlet

EEZ Area. NMFS expects that the season closure date of August 15 combined with the TAC will be sufficient to address conservation and management of coho salmon stocks in Cook Inlet. In most Federal fisheries, a TAC-based closure occurs before a season closure date. NMFS does not anticipate that drift gillnet fishing in the Cook Inlet EEZ Area will be open through August 15 in all years. NMFS will close the fishery when necessary to prevent exceeding a TAC. However, in years when salmon abundance supports higher TACs, two fishery openings per week for all of the season besides July 16–July 31 is expected to provide sufficient opportunities to harvest the available TAC by August 15 without creating conservation concerns for stocks of lower abundance.

Comment 36: Consider opening drift gillnet fishing in the Cook Inlet EEZ and Area 2 for two or three 12-hour periods a week. When the Kenai River reaches the lower end of the sockeye escapement goal, the commercial fleet should get additional openers to maximize harvest to protect the river from overescapement.

Response: As described in the preamble to the proposed rule and above, NMFS carefully considered the number of weekly commercial drift gillnet fishing periods. As described in the response to *Comment 2*, management of the Cook Inlet EEZ Area must balance utilization of abundant salmon stocks with protecting less abundant stocks from overfishing and ensuring stocks important to users other than the drift gillnet fleet continue to meet their escapement goals. While two 12-hour openings per week was proposed by NMFS, public commenters identified significant potential conservation concerns associated with increasing Cook Inlet EEZ Area commercial fishing time from the status quo. Opening the Cook Inlet EEZ Area to commercial fishing for three 12-hour periods per week would represent a major increase in fishing time and could significantly exacerbate the conservation concerns identified in this final rule. Kenai sockeye salmon reaching their escapement goal does not provide information to managers that other salmon stocks (*e.g.*, other sockeye, coho, and Chinook salmon) can also support additional harvest at that time.

There are also potential procedural challenges associated with significant inseason changes or adjustments. Sections 2.5.2.6 and 2.5.13 of the Analysis detail the constraints of the harvest specifications (*i.e.*, the TAC amounts) that it must publish prior to the fishing season. If there are

unexpectedly large salmon returns, fishing may continue for the remaining days for the season until any TAC amount is reached. If a TAC amount is reached and the fishery closes, but the best scientific information available indicates there is still a harvestable surplus, NMFS may adjust the TAC and reopen the fishery until August 15, or the revised TAC amount(s) is reached, whichever comes first. In addition, the Federal reference points established by this action and required by the Magnuson-Stevens Act are not directly equivalent to State escapement goals.

Drift gillnet Area 2 is entirely within State waters and will continue to be managed by the State and is outside the scope of this action.

Comment 37: Do not conduct Federal openings on the exact same schedule as State openings. Combining the two on the same day will result in nothing more than lost opportunity and inefficiency of effort and cost.

Response: This final rule at § 679.118(e) provides that the Cook Inlet EEZ will be open to drift gillnet fishing for two, 12-hour periods each week, from 7 a.m. Monday until 7 p.m. Monday, and from 7 a.m. Thursday until 7 p.m. Thursday from the later of the third Monday in June or June 19 until July 15, and from August 1 to August 15, and one, 12-hour fishing period on Thursdays from July 16 to July 31, until either (1) the TAC is reached, or (2) August 15, whichever comes first.

As discussed in the proposed rule and sections 2.5.9 and 4.8 of the Analysis, NMFS considered whether to open the Cook Inlet EEZ Area to drift gillnet fishing on different days than when State waters are open. NMFS chose to open the Cook Inlet EEZ Area on the same days to avoid unpredictable impacts to Cook Inlet salmon stocks, as additional days of fishing in a week would put additional pressure on stocks of lower abundance, allowing those stocks less opportunity to pass through the EEZ with sufficient abundance to both meet escapement goals and provide a harvestable surplus to all other users. If the EEZ were open on days when adjacent State waters were closed, and the State maintained its existing management plan, it is likely there would be a significantly increased number of total drift gillnet fishing days in upper Cook Inlet. This would increase the likelihood of harvests that are too high (the drift gillnet fleet has the potential to harvest over 300,000 salmon per opening) and it may not be possible to mitigate the impacts of additional fishing days each week in Cook Inlet, even with severe restrictions

or closures of later occurring fishery sectors. Further, to achieve OY while preventing overfishing in salmon fisheries, an important consideration is balancing harvest and escapement over the period salmon are returning. Providing regular periods when fishing is closed allows early, middle, and late returning components of each salmon stock to move up Cook Inlet to their natal spawning streams. By largely maintaining the existing fishing schedule, these migratory periods where fishing is closed—and which have largely been successful in allowing Northern District stocks to meet their escapement goals—are maintained.

Fishery participants may select whether to fish in State or Federal waters each day to maximize their harvest opportunities as salmon stocks move up Cook Inlet. NMFS acknowledges that, within a single fishing day, this may decrease efficiency and increase costs during times when salmon abundance may be unpredictably concentrated on the State/EEZ boundary. Across years, there is a high level of variability in the spatial and temporal distributions of salmon stocks migrating through Cook Inlet waters, including the Cook Inlet EEZ Area, due to changes in wind, tide, water temperature, and other factors. Therefore, it is very difficult to predict with accuracy any change in efficiency that may result from this rule.

Comment 38: Several drift gillnet stakeholders requested that the commercial fishing season start several weeks early (June 1) and finish later (September 15) to increase harvests of all salmon species, including pink and chum salmon.

Response: As described in the preamble to the proposed rule, historically drift gillnet fishing in Cook Inlet has not occurred prior to the third week in June as sockeye, coho, chum, and pink salmon are not present in commercially significant quantities in the Cook Inlet EEZ. The start date is based on this history of commercial fishing in the EEZ area. Further, as discussed in the preamble to the proposed rule, NMFS has concerns about additional impacts from the drift gillnet fleet to Chinook salmon that are present in the Cook Inlet EEZ before June 19. Opening after mid-June helps avoid potential additional impacts to early-run Cook Inlet Chinook salmon stocks. These stocks migrate through upper Cook Inlet in May and early June. For these reasons, NMFS did not choose to open drift gillnet fishing within the Cook Inlet EEZ prior to the third week in June.

NMFS has concerns that additional fishing time after August 15 could result in disproportionate impacts to coho salmon stocks in Cook Inlet. Fishing in the Cook Inlet EEZ after August 15 would be expected to primarily increase harvests of this species. Based on recent indices of spawning escapements, additional harvests of coho salmon may result in a failure to achieve spawning escapement goals. The EEZ is relatively far from Northern District streams and associated weirs where escapements are monitored. As such, fishery openings targeting coho salmon (which have an elevated conservation concern) in the EEZ carry the largest risk in terms of potential harvest on Northern District stocks prior to information about the achievement of spawning escapement goals. In contrast, State waters are closer to natal streams and can be prosecuted more precisely on target stocks and during a time when escapement data is more likely to be available since there is significantly less travel time between the State fishery and weirs. This action does not modify management of State waters, and it is expected that the majority of coho salmon harvests, which occur in State waters after August 15, will be unaffected by this action.

NMFS disagrees that closing the fishery later than August 15 would increase pink and chum salmon harvests. Historically, by August 15, over 99 percent of the average Chinook, sockeye, pink, and chum salmon harvest has been completed in both State and EEZ waters as those salmon species have largely moved through Cook Inlet EEZ waters and up into Cook Inlet State marine and fresh waters by that time (section 4.5.1.2.1. of the Analysis). Therefore, additional Cook Inlet EEZ Area fishing time after August 15 would be expected to impact only coho salmon, for which there are conservation concerns.

Comment 39: With amendment 16, NMFS's inseason management authority to close the fishery should be based on best available science and salmon escapement goals. NMFS needs more access to funding and resources to carry out these goals.

Response: NMFS will use the best scientific information available when making any inseason management decisions. NMFS will consider all sources of information when determining what constitutes the best scientific information available. However, for the reasons explained in *Comment 23*, NMFS inseason management decisions are based on TACs. NMFS will consider the escapement goals and the best scientific information available regarding

projected run sizes for an upcoming fishing season during the stock assessment and harvest specifications process. The SSC and NMFS will account for scientific uncertainty in these projections when setting ABC, and the Council and NMFS will also consider management uncertainty in recommending and establishing TACs. Inseason closures before the end of the season are most likely to be based on information suggesting an additional opener would result in exceeding a TAC for any species or could result in overfishing of any stock. NMFS will consider available spawning abundance information inseason (*i.e.*, progress toward meeting escapement goals) to ensure the abundance assumptions underlying the TACs are appropriate and will identify any potentially needed management changes.

NMFS will strive to make timely and efficient inseason management decisions, consistent with the APA, Federal regulations, and other applicable law. NMFS will work to build capacity and resources for salmon management in the Cook Inlet EEZ Area over time, however NMFS has determined that it can successfully implement amendment 16 at this time.

Comment 40: Pacific salmon evolved into the species we know today. Today, various stocks of salmon are considered threatened or endangered under the Endangered Species Act (ESA). Originally, indigenous people developed a social custom that delayed the start of salmon fishing and allowed salmon to reach their spawning grounds and complete their lifecycle, and this has been continued by government regulators. Flexibility in the opening and closing dates is needed to account for variations in run timing and migration patterns, especially under climate change, to avoid adversely affecting sport and subsistence fishers. The proposed new date of the third (or possibly fourth) Monday in June allows more flexibility.

Response: NMFS recognizes the evolution of conservation and management measures for salmon stocks as jurisdictions have changed over time. No salmon stocks spawning in Alaska are listed under the ESA. As described in the response to *Comment 38*, NMFS established the fixed season start and end dates to maintain historical harvest patterns and avoid adverse impacts to non-target salmon stocks within the Cook Inlet EEZ Area. However, NMFS does agree that flexibility is important to account for variations and contingencies and expects that the TACs and associated inseason actions will ensure that harvest is adjusted to the specific

conditions experienced during each fishing season to provide harvest opportunity and prevent overfishing, within the established commercial fishery season dates (approximately June 19 to August 15). NMFS may close and reopen fishing during the season to account for run conditions.

Comment 41: The season ending date needs to reflect the size of the return, which is not known until the very end of a salmon run or shortly thereafter.

Response: NMFS acknowledges that the realized run size of a stock is not fully known until the end of the fishing season, but has selected a fixed season closure date that falls after nearly all EEZ harvest has historically taken place and avoids potential new impacts on coho stocks of lower abundance. However, NMFS will use its inseason management authorities specified at § 679.25 to adjust the closure of the fishery based on TAC or other scientific information each year—up to August 15—including available indices of abundance (*e.g.*, test fishery data and spawning escapements).

Monitoring, Recordkeeping, and Reporting Requirements

Comment 42: ADF&G supports the monitoring, recordkeeping, reporting, legal gear, and prohibitions proposed for the commercial salmon fishery in the Cook Inlet EEZ Area. These requirements are necessary to minimize conflicts between fisheries in State and Federal waters, ensure accurate catch accounting, and facilitate enforcement of Federal regulations. The proposed prohibitions on fishing in both State and EEZ waters on the same day and having on board or delivering fish harvested in both State and EEZ waters are particularly important to meeting these objectives and the State supports including them in the final rule. We also support the proposed prohibitions on landing or otherwise transferring salmon that is caught within the Cook Inlet EEZ Area in the EEZ to ensure that harvesting vessels delivering to a tender vessel do so within State waters.

Response: NMFS acknowledges the support for these fishery management measures. NMFS agrees that the measures in this final rule are necessary to minimize conflicts between fisheries in State and Federal waters, ensure accurate catch accounting, and facilitate enforcement of Federal regulations.

Comment 43: ADF&G supports the proposed monitoring requirements to enforce the prohibitions on drift gillnet fishing in State and Federal waters on the same day, including requirements for commercial salmon fishing vessels in the Cook Inlet EEZ Area to operate a

VMS and complete a Federal logbook. NMFS may wish to consider onboard monitoring requirements such as electronic monitoring or observers to ensure adequate total catch accounting.

Response: NMFS acknowledges the support for the VMS and Federal logbook management measures described in the proposed rule and required by this final rule. As discussed in sections 2.5.6 and 4.7.2.2 of the Analysis, NMFS considered but did not require electronic monitoring or observers due to high costs and limited additional management utility beyond the measures contained in this final rule.

Comment 44: NMFS received comments that a VMS requirement is not necessary. These comments indicated that the drift gillnet fishery has minimal or no bycatch of marine mammals, sea birds, or protected fish stocks; there are no closed economic zones nearby; and that there is no VMS requirement in salmon fisheries in the East and West Areas of the EEZ, where ADF&G reporting requirements are deemed sufficient. Commenters also asserted that NMFS did not provide a legitimate or sufficient justification for the VMS requirement. Several commenters also said that they felt NMFS was imposing it as a punishment. One commenter asked if other forms of electronic monitoring are required. Commenters also noted that the VMS devices cost 3,000 dollars, which can be a significant portion of their gross earnings in seasons when there is a declared fishery disaster, and require additional monthly fees to operate.

Response: The final rule at § 679.117(b)(1)(xiv) prohibits a vessel named, or required to be named, on an SFFP from operating in the waters of Cook Inlet with drift gillnet gear on board any day the Cook Inlet EEZ Area is open to commercial salmon fishing without a functioning VMS as described in § 679.28(f). Regulations at § 679.28(f)(6)(x) requires a vessel named, or required to be named, on an SFFP issued under § 679.114 to use VMS when operating in the waters of Cook Inlet with drift gillnet gear on board on any calendar day the Cook Inlet EEZ Area is open to commercial salmon fishing. NMFS has determined that use of a VMS is necessary to effectively and efficiently manage the fishery. A VMS requirement is not punitive, it is not based on assumed bycatch of protected species nor intended to reduce bycatch, and NMFS disagrees that there are no closed fishing areas adjacent to the Cook Inlet EEZ Area. NMFS relies on VMS for most Federal fisheries off Alaska, particularly

when fishing vessels must comply with area restrictions. Vessels drift gillnet fishing for salmon in the Cook Inlet EEZ Area are prohibited from fishing in the adjacent EEZ waters south of the Anchor Point line at all times and, on the same calendar day, in the State waters directly adjacent to the eastern, western, and northern boundaries of the Cook Inlet EEZ Area. As stated above, for the purposes of catch accounting and enforcement it is critical for NMFS to understand where a vessel has been fishing—in State or Federal waters. Drift gillnet vessels that are fishing for salmon in the Cook Inlet EEZ are therefore subject to closed areas, and VMS is a standard technology used to monitor compliance with these regulations.

NMFS acknowledges that VMS is not a requirement in the East Area commercial troll salmon fishery. However, management of the East Area is delegated to the State, which allows fishing to occur seamlessly across the EEZ boundary. The State has well-established monitoring and enforcement infrastructure as well as other regulations to manage the fishery without the use of VMS. Similarly, the delegated management approach proposed for the Cook Inlet EEZ Area under Alternative 2 (section 2.4.8.1 of the Analysis) was not expected to include a VMS requirement given the State's existing management tools and expertise. However, the State would not accept delegated management authority, and therefore under this final rule VMS is needed to enforce the prohibition against harvesting salmon in both State and Federal waters on the same calendar day.

As described in sections 2.5.6 and 4.7.2.2 of the Analysis, NMFS considered but chose not to require more costly onboard observers or electronic monitoring camera systems in this fishery. Therefore, VMS data and logbooks are necessary to ensure accuracy of reported fishing effort, catch accounting, and compliance with regulations. Critically, NMFS managers will depend on VMS to determine the effort and projected catch in order to inform management decisions. Furthermore, without VMS, NOAA Fisheries Office of Law Enforcement would have to rely exclusively on resource-intensive patrols by air and sea; methods that are not as consistent as VMS in verifying that no fishing is occurring in closed waters and confirming fleet-wide reported fishing effort information.

Vessel owners will be responsible for the cost of obtaining and operating a VMS. As discussed in section 4.7.2.2.7

of the Analysis, NMFS estimates the cost of purchasing a compliant VMS unit at 3,100 dollars. One-time installation and tax costs are estimated at 888 dollars. Annual service and maintenance is estimated at 206 dollars. NMFS acknowledges that these requirements place additional burden on fishermen. However, Federal funds may be available to qualified vessel owners or operators for complete reimbursement of the cost of purchasing type-approved VMS units, which could offset over 75 percent of the total purchase and installation cost for fishery participants.

To facilitate compliance with the VMS requirement, NMFS has provided information on obtaining VMS and opportunities for reimbursement within the small entity compliance guide published with this final rule. Beyond VMS, this final rule does not require other electronic monitoring for vessels commercially fishing for salmon in the Cook Inlet EEZ.

Comment 45: VMS devices impose a significant privacy cost, requiring vessel owners to transmit their exact location to NMFS every hour of every day, regardless of why they are using their vessel.

Response: NMFS disagrees. VMS use would be required when operating a vessel named, or required to be named, on an SFFP in the waters of Cook Inlet with drift gillnet gear on board, and only on days when the Cook Inlet EEZ Area is open to commercial salmon fishing. When a vessel is operated outside the waters of Cook Inlet, the Cook Inlet EEZ Area is closed, or no drift gillnet gear is onboard the vessel, the VMS unit would not be required to be activated and transmitting. VMS data are collected for many Federal fisheries. Section 402(a)(2) of the Magnuson-Stevens Act authorizes the collection of data necessary for the efficient management of fisheries but provides for restrictions on the release of that data beyond NMFS. VMS collects vessel location information in near real time that it uses to ensure efficient management and compliance with regulations. VMS data collected for law enforcement purposes is considered confidential under sections 311(b)(1)(a)(vi) and 402 of the Magnuson-Stevens Act. Federal regulations at § 679.28(f)(3)(v) provide that vessel owners participating in a fishery that requires a VMS must make the VMS transmitter available to "NMFS personnel, observers, or an authorized officer." Federal regulations at § 600.1509(b) limit the circumstances under which personally identifying information, including business

identifiable information, can be disclosed beyond authorized entities, such as NMFS. NMFS does not release confidential data to the public unless directed by a court order. If NMFS uses VMS data in publications, it is aggregated to prevent release of confidential information.

Comment 46: Will the drift gillnet fishery participants be required to maintain a digital logbook?

Response: This final rule does not require a digital logbook. Under regulations at § 679.115, this action requires vessel operators to complete and submit logbooks in paper or electronic format. NMFS will make logbook sheets available to participants at no cost.

Comment 47: The proposed rule appears to allow new participants into the commercial fishery by requiring only a Federal fisheries permit and provides no explanation or justification for doing so. Commercial fishing for salmon in Federal and State waters in Cook Inlet has been restricted to State CFEC limited entry permit holders since 1974. If the permitting requirements under this action allow new participants by no longer requiring a CFEC permit, that will significantly devalue the CFEC permits held by existing participants. If NMFS is not opening the fishery up to new participants, it must clarify the ambiguity in the proposed rule in response to this comment.

Response: This action does not modify the State requirements related to CFEC permits. As described in section 2.5.6 of the Analysis, NMFS issues Federal permits authorizing participation in Federal fisheries and allowing for implementation of Federal monitoring, recordkeeping, and reporting requirements in order to manage fisheries. This final rule at § 679.114(b)(1) requires vessel owners or operators to obtain a SFFP to commercially fish for salmon in the Cook Inlet EEZ. NMFS will issue SFFPs free of charge. A SFFP is not a Federal limited entry permit. As described in section 2.5.15 of the Analysis, a Federal limited entry program was considered but not selected.

Although the SFFP is not a limited entry permit, vessels that land salmon from the Cook Inlet EEZ in Alaska must also comply with all applicable State requirements, which include the requirement to have the appropriate State CFEC permit, which is a limited entry permit. Because landing or transferring fish in the EEZ is prohibited, and there are significant logistical constraints to landing salmon outside of Alaska, NMFS anticipates that all participating vessels will land

their fish within the State of Alaska where they would be required to have State CFEC S03H limited entry permits. This will help ensure that historical participants in the fishery are not displaced or disrupted by new entrants and avoid negative impacts to CFEC permit values.

As described in section 2.5.15 of the Analysis, in the future the Council may consider whether it is necessary to recommend an FMP amendment to limit entry in the Cook Inlet EEZ Area.

Comment 48: Can a vessel registered in a separate Alaska gillnet area (e.g., a vessel fishing in Bristol Bay state waters) participate in the Federal Cook Inlet fishery?

Response: No, as explained in response to *Comment 47*, in order to use drift gillnet gear in the Cook Inlet EEZ Area, participants are required to have a SFFP. State CFEC permit requirements fall under the purview of the State and are not modified by this final rule. NMFS anticipates that a CFEC S03H permit for Cook Inlet drift gillnet would continue to be required to land fish caught using drift gillnet gear in the Cook Inlet EEZ Area in Alaska. Participants should consult the applicable State of Alaska regulations for a definitive answer regarding landing requirements.

Comment 49: The State supports maintaining the requirement for drift gillnet vessels in the EEZ to have the appropriate CFEC permit(s) to land salmon or other species caught in the EEZ within the State or enter State waters.

Response: NMFS acknowledges this comment. This final rule does not modify any State requirements for landing salmon or other species caught in the EEZ within the State or transiting through State waters with drift gillnet gear on board.

Other Commercial Salmon Fishing Management Measures and Prohibitions

Comment 50: The State supports the proposed legal gear definition for drift gillnet fishing of a net no longer than 200 fathoms (365.76 m) in length, 45 meshes deep, and maximum mesh size of no greater than 6 inches (15.24 cm). The proposed definition is consistent with State regulations and would help maintain consistency with recent fishery operations in terms of effort and selectivity and enable managers to estimate projected catches in the fishery more effectively.

Response: NMFS acknowledges this comment.

Comment 51: Are the net length requirements the same as State waters or

can a single permit fish 200 fathoms (365.76 m) in Federal waters?

Response: This final rule at § 679.118(f)(1) limits the length of drift gillnet gear in the Cook Inlet EEZ Area to a maximum length of 200 fathoms (365.76 m) for all participants. Fishery participants should consult State of Alaska regulations when determining what amount of gear is allowable when transiting State waters and landing salmon in Alaska with the CFEC permit(s) they hold.

Comment 52: One commenter stated that no more than 150 fathoms (274.32 m) of gillnet gear per permit should be allowable. Another suggested that NMFS impose the same State of Alaska CFEC rules regarding permits (i.e., allow 150 fathoms (274.32 m) for 1 CFEC permit, and 200 fathoms (365.76 m) for 2 CFEC permits).

Response: NMFS disagrees with these recommendations. As described in section 4.5.1.2.1 of the Analysis, up to 200 fathoms (365.76 m) of drift gillnet gear may be used by participants who are drift gillnet fishing in the Cook Inlet EEZ Area. NMFS does not anticipate this final rule will increase the allowable length of gear and result in increased harvests in the Cook Inlet EEZ Area, as State restrictions on the amount of gear a vessel can have on board will still apply when transiting through State waters following a fishing trip in the Cook Inlet EEZ Area.

Fishery participants should consult State of Alaska regulations to determine the amount of fishing gear they are allowed to have on board while transiting through State waters and landing salmon in Alaska.

Recreational Fishing

Comment 53: The State supports the proposed management measures for recreational anglers in the EEZ, including requirements for allowable gear, processing harvested salmon and reporting harvest. The proposed rule would establish bag and possession limits in Federal regulations consistent with current State regulations; however, we note that State regulations could change in the future and result in different regulations for anglers harvesting salmon in State waters and the EEZ.

Response: NMFS acknowledges this comment.

National Standard 2

Comment 54: NMFS failed to use the best scientific information, as required by National Standard 2. One example of this is the data used to calculate a potential TAC, as it is unknown what percent of fish have been harvested in

the EEZ. “Best guess” data should not be used.

Similarly, NMFS relied on State catch records, but those may be skewed by 20 percent or more due to the history of overescapement and pulling the in-river fish counters prior to the end of the later runs. The one good historical reference is the Offshore Test Fishery, which should be used in the analysis and to set TACs. Previous years run data cannot be considered reliable because Cook Inlet has not been properly managed for many years which has resulted in overescapement and stock declines. Consider modifying the historical percent of drift gillnet harvests attributed to the Cook Inlet EEZ to 65 percent.

Response: NMFS disagrees that the management measures implemented by amendment 16 and this final rule rely on information that is inconsistent with National Standard 2. National Standard 2 provides that conservation and management measures shall be based upon the best scientific information available. NMFS considered and weighed all of the information available in making the decisions, including public testimony, to develop and approve amendment 16, respectively.

NMFS used the best scientific information to inform the Analysis, which includes comprehensive fish ticket data including locale codes. Previously, data regarding harvests, landings, and statistical areas in Upper Cook Inlet did not differentiate between State and Federal waters. Therefore, NMFS had to develop a methodology to estimate historic salmon harvest in the Cook Inlet EEZ. The methodology used to develop EEZ harvest estimates for the Cook Inlet EEZ Area is presented in section 4.5.1.2.3 of the Analysis, along with a description of the associated uncertainties. This method and the results were reviewed and approved by the SSC, which agreed that the Analysis and harvest specification process relies on the best scientific information available. NMFS received no comments providing additional data to estimate EEZ harvest and no suggested alternate methodologies and cannot arbitrarily increase the attribution of historical harvest to the EEZ in the absence of any supporting data. Therefore, NMFS determined that the estimates presented in the Analysis constitute the best scientific information available.

However, this action establishes a fishery management framework that is adaptive, and is expected to improve the scientific information available for management of Cook Inlet salmon stocks over time. Once amendment 16 is implemented, NMFS will collect the

landings information needed to directly and precisely determine EEZ harvests. NMFS will review the information available to manage Cook Inlet salmon stocks each year, including any data gaps and uncertainties. As actual data is collected on harvest in this new fishery, NMFS will include that information in the ongoing assessment of what constitutes best scientific information available at that time, reviewed by the SSC, to establish harvest specifications and manage the Cook Inlet EEZ Area.

NMFS agrees that the offshore test fishery may be a useful source of information for management of the Cook Inlet EEZ salmon fishery, but disagrees that it should have relied on it. The offshore test fishery provides standardized CPUE information. However, as described in the response to *Comment 29* and in section 2.4.4 of the Analysis, CPUE data could not provide sufficient information to evaluate salmon abundance and determine whether catches exceed a level that could cause overfishing.

National Standard 3

Comment 55: Defining fishing as limited to the Cook Inlet EEZ violates National Standard 3. NMFS's definition of the fishery fails to manage salmon stocks as a unit throughout their range. Splitting the fishery into a Federal and State fishery makes the Federal fishery subordinate to the State fishery because the State fishery will continue overescapement. If there are harvestable surpluses, waiting to find out via the State fishery will mean the EEZ fishery will be compromised by State management.

Response: As explained in greater detail in the proposed rule, NMFS has determined that amendment 16 is consistent with National Standard 3. As set forth under section 301 of the Magnuson Stevens Act, National Standard 3 provides that, to the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

The key term here is "practicable." It is not practicable for NMFS to manage salmon stocks into State waters where NMFS has no management jurisdiction, and, thus, NMFS has designed management measures that allow it to manage stocks of salmon as a unit throughout the portion of their range under NMFS's authority, grouping interrelated stocks of salmon together because vessels cannot target individual stocks in the EEZ. Amendment 16 will allow NMFS to manage to optimum levels of EEZ harvest while preventing

overfishing, but NMFS cannot rely on National Standard 3 as a basis to assert management authority over State waters.

Furthermore, the National Standard 3 guidelines explain how to structure appropriate management units for stocks and stock complexes (§ 600.320). These guidelines state that the purpose of National Standard 3 is to induce a comprehensive approach to fishery management (§ 600.320(b)). The guidelines define management unit as a fishery or that portion of a fishery identified in an FMP as relevant to the FMP's management objectives and state that the choice of a management unit depends on the focus of the FMP's objectives and may be organized around biological, geographic, economic, technical, social, or ecological perspectives (§ 600.320(d)). As discussed above, in defining the fishery, NMFS primarily focused on co-occurring salmon stocks harvested within the Cook Inlet EEZ Area, as that geographic area defines the routine limits of NMFS's management jurisdiction.

There are unique technical, ecological, and economic features of salmon fishing in the Cook Inlet EEZ Area that further support limiting the management unit to the Cook Inlet EEZ. As described in the preamble to the proposed rule, drift gillnet gear captures all salmon in an area, and an entangled salmon cannot be released without an extremely high mortality rate. Further, in EEZ waters, salmon stocks are highly mixed, and catch in the EEZ includes both the Kenai and Kaslof stocks of sockeye salmon that are currently highly abundant, as well as much less abundant Northern District salmon stocks. In contrast, in nearshore waters, individual salmon stocks can be targeted by fishing adjacent to the river a specific salmon stock is returning to. This is not possible in EEZ waters. In other words, the EEZ is ecologically unique compared to near-shore waters due to the highly mixed stock nature of the fishery, with varying abundances and compositions of the stocks caught. The stocks that are mixed in the EEZ may be more discretely targeted in State waters management districts. Therefore, salmon fishery management in the EEZ requires an approach that ensures the stocks of lowest abundance are not overharvested before they reach their natal streams. The Cook Inlet EEZ Area is also economically unique because the drift gillnet fleet has exclusive use of the area for commercial salmon fishing. Within State waters, there are multiple commercial and non-commercial fishery sectors operating to selectively target

specific individual stocks to the extent practicable, with management measures in place to limit catch and mortality on stocks at risk of overfishing.

Federal management of the Cook Inlet EEZ Area under amendment 16 achieves National Standard 3 objectives through coordination with the State to the extent practicable before, during, and after each fishing season, as described in the harvest specifications and annual processes section of this preamble. This includes reviewing the available scientific information for management of Cook Inlet salmon stocks held by the State, as well as other sources, and estimating what harvests are expected in State waters to inform harvest limits for the Cook Inlet EEZ Area that are designed to prevent overfishing on all Cook Inlet salmon stocks. NMFS and the Council will evaluate both where harvest of salmon stocks may be constrained by the presence of stocks of low abundance and where there may be opportunities to harvest additional salmon that would not otherwise be utilized. NMFS will provide data on early EEZ catches to the State to inform run strength forecasts for management of all other upper Cook Inlet salmon fisheries.

National Standard 4

Comment 56: This action discriminates against Cook Inlet commercial fishers. Amendment 16 violates National Standard 4 as it does not allocate fishing privileges in a way that is fair and equitable. It places a TAC on one group of harvesters (the drift gillnet fleet) in one area (the EEZ), without a similar requirement on any other group. This can severely affect the economic viability of the drift gillnet fleet if the TAC is set incorrectly, and the drift gillnet fleet is precluded from harvesting the excess salmon. In addition, requiring a VMS system to commercial fish in Federal waters is not equitable as there is no similar requirement for the recreational fishery sector, or any VMS requirement for vessels fishing salmon in the East Area.

Response: NMFS disagrees that amendment 16 is inconsistent with National Standard 4, or that it allocates harvest in a manner that is not fair and equitable to the drift gillnet fleet. As set forth under section 301 of the Magnuson Stevens Act, National Standard 4 provides that conservation and management measures shall not discriminate between residents of different states. This final rule does not in any way discriminate between residents of different states. National Standard 4 further provides that, if it becomes necessary to allocate or assign

fishing privileges among various United States fishermen, such allocation shall be (1) fair and equitable to all such fishermen; (2) reasonably calculated to promote conservation; and (3) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privilege.

To start, this action allocates all commercial fishing privileges in the Cook Inlet EEZ to the drift gillnet fleet—NMFS cannot conclude that an allocation made to a single sector is not fair and equitable for that sector. No other commercial sector is subject to a TAC because no other commercial sector is permitted to fish in the EEZ at all. The drift gillnet fleet has historically harvested over 99.99 percent of the salmon caught in the Cook Inlet EEZ. The recreational fishery sector in the Cook Inlet EEZ harvests the remaining amount, an estimated average of 66 fish per year. This action is expected to maintain the harvest range of both sectors in the EEZ and does not allocate any harvest away from the drift gillnet fleet.

Although allocations must be fair and equitable and reasonably calculated to promote conservation, not all management measures required by the Magnuson-Stevens Act are subject to the same analysis. Neither the use of TACs to manage fishery effort nor the requirement to install VMS are allocations. The Magnuson-Stevens Act requires ACLs for fisheries managed under the Magnuson-Stevens Act, and TACs are how NMFS implements ACLs. And because fishing will take place adjacent to multiple closed areas, VMS is needed to enforce and monitor time and area closures. But even if NMFS were required to show that TACs or VMS requirements were fair and equitable to the drift gillnet fleet when compared to regulations that apply to the only other authorized sector in the EEZ, the recreational sector, it easily meets that burden here. Because the recreational sector catches under 100 fish per year in the EEZ and because recreational anglers are prohibited from possessing or landing the bag limit for both State and Federal waters on the same day—and thus there is no way that sector could increase its harvest opportunities compared to the status quo—neither a TAC nor VMS is needed to control recreational harvest or enforce rules for recreational fishermen.

The rationale for requiring VMS for commercial salmon fishing vessels in the Cook Inlet EEZ Area but not the East Area is described in the response to *Comment 44*.

If harvests by the recreational fishery sector increase, then NMFS may implement monitoring, recordkeeping, or reporting measures. For the time being, on-the-water and dockside enforcement of the recreational fishery sector is sufficient because the same bag limits apply across State and Federal waters for a single calendar day.

The allocation decisions referenced in National Standard 4 do not apply to decisions made by other management authorities that govern fishing outside of the Cook Inlet EEZ.

Comment 57: The proposed TAC does not address priority use for Federal Subsistence.

Response: Although it is unclear from the comment what the commenter means by “Federal Subsistence,” NMFS acknowledges that, in Alaska, subsistence taking of fish and wildlife is regulated by Federal law under Title VIII of the Alaska National Interests Land Conservation Act (ANILCA), which accords a priority for taking of fish and wildlife for subsistence uses over recreational/sport and commercial users on Federal public lands in Alaska (16 U.S.C. 3102, 3114). However, here NMFS is managing the Cook Inlet EEZ Area (*i.e.*, Federal marine waters) pursuant to the Magnuson-Stevens Act, and therefore Title VIII of ANILCA does not apply to this action regulating Federal marine waters in the Cook Inlet EEZ. The Magnuson-Stevens Act does not have a subsistence priority for fisheries in the EEZ.

Comment 58: Multiple commenters, including municipalities, trade associations, and fishing guides located in the Matanuska-Susitna Valley indicated that stable and predictable salmon fishing opportunities for all commercial and non-commercial users have both provided food security and an economic base for the region (communities of Palmer, Wasilla, Knik, Houston, Willow, Skwentna, Talkeetna, and Trapper Creek). These commenters cited several economic studies, which concluded that a broad base of fishing activities and fishing activities with conservative regulations, limits, and harvest opportunities (*e.g.*, recreational and subsistence) generate considerable economic benefit for each fish harvested.

Response: NMFS acknowledges the importance of salmon to fishermen and communities in Northern Cook Inlet, and when there are declines in salmon abundance, it results in adverse economic impacts. For discussion of the potential economic impacts on communities from this action, see sections 4.7.1.3 to 4.7.1.4 of the Analysis.

Comment 59: Several commenters felt this action would increase Cook Inlet EEZ Area salmon harvests, which would require the State to implement more restrictive fishery management measures for the Northern District commercial and non-commercial fisheries and may cause overfishing of weak stocks, such as the Susitna sockeye stock and the coho stock. By increasing commercial harvest, this action will exacerbate the inequity between the drift gillnet fleet and Northern Cook Inlet fishing groups. Drift gillnet permit holders have historically been the only commercial fishermen allowed to harvest salmon in Federal waters and also have better harvest opportunities in State waters.

Response: As described in section 4.7.1.3 of the Analysis, this action is not expected to increase salmon harvests in the Cook Inlet EEZ. Therefore, historical harvests by all fishery sectors in both State and EEZ waters should be maintained. As described in the response to *Comment 25*, this action will account for weak stocks and uncertainty when setting TACs for the Cook Inlet EEZ. NMFS acknowledges that harvest in the Cook Inlet EEZ Area occurs before all other salmon users in upper Cook Inlet and before there is robust information on realized inseason salmon abundance, both generally and for specific stocks. The uncertainty associated with this and risks of reducing or eliminating the harvestable surplus for other salmon users will be accounted for in both the harvest specification process and inseason management decisions. NMFS also acknowledges that the drift gillnet fleet is one of the largest salmon harvesters in Cook Inlet and has fishing opportunities in both State and Federal waters.

Comment 60: The Magnuson-Stevens Act emphasizes fairness in allocation and the production of food. To that end, the drift gillnet fleet should have not only meaningful harvest opportunities for sockeye but also a fair chance to bring northbound coho to market.

Response: As described in section 4.5.1.2.2 of the Analysis, the drift gillnet fleet is generally the largest or second largest harvester of coho salmon in Cook Inlet. On average, they harvest over 30 percent of the coho salmon in Cook Inlet, with an increasing harvest trend from 1999 to 2021. This results in an approximately even split between the drift gillnet fleet, the commercial set gillnet sector, and all non-commercial fishery sectors (recreational, personal use, and subsistence). This action is not expected to significantly reduce drift gillnet harvests of coho salmon. NMFS

determined that this action balances food production and recreational opportunities across all users in Cook Inlet while also protecting salmon stocks and the marine ecosystem. If there are increased harvests by the drift gillnet fleet, it is expected that the harvest of other users would necessarily be reduced, which NMFS concludes would reduce the fairness of salmon resource allocations in Cook Inlet by preempting or even eliminating harvest opportunities for other users, many of which can only operate in State waters.

Comment 61: Where in amendment 16 are the management plans the State will follow? For example, amendment 16 does not address closures of the East Side set net fishery and the implications for Federal management. The East Side set net fishery is the second largest fishery in Cook Inlet but has been ignored. The failure to include the entire fishery has decimated the East Side set net fishery, which has been restricted and closed based on illegal and unscientific objectives.

Response: NMFS does not include management measures in this action for salmon fishing in State waters. The East Side set net fishery sector and other salmon fishery sectors operating in State waters are described in section 4.6 of the Analysis. The East Side set net fishery sector occurs entirely within State waters. NMFS has no jurisdiction to implement management measures within State waters in Cook Inlet. NMFS will consider the harvests of other fisheries, including the East Side set net fishery sector, in making management decisions for the Cook Inlet EEZ Area. Comments on State management of the East Side set net fishery are outside of the scope of this action.

National Standard 5 and 7

Comment 62: The restriction on fishing in State and Federal waters on the same calendar day violates National Standard 5 because it is impossible to fish near the boundary line between State and Federal waters, given large Cook Inlet tides and current speeds in excess of 7 knots (12.96 kph) and the difficulty of staying within the irregularly-shaped Federal boundary line. Drift gillnetters lack the technology to determine where the boundary line is located while fishing.

Response: NMFS disagrees that the prohibition on fishing in both State and Federal waters in a single calendar day is not practicable and disagrees that the prohibition violates National Standard 5, which provides that conservation and management measures shall consider efficiency in the utilization of fishery resources where practicable. Under

State management, participants have successfully remained within the boundaries open to drift gillnet fishing within either State or EEZ waters. This action does not modify legal fishing gear or other operational elements in a way that is expected to increase the difficulty of staying within an open area. Nothing in this rule prohibits participants who are concerned about their ability to remain within Federal waters during certain fishing conditions from setting and retrieving their gear farther away from the State/EEZ boundary. Vessels participating in the Cook Inlet EEZ Area drift gillnet fishery are expected to be aware of their fishing location and fish only in locations and at times open to that fishery. In other Federal fisheries off Alaska and elsewhere, federally permitted vessels fishing in EEZ waters are commonly prohibited from fishing in State waters and are able to successfully remain with the Federal waters open to fishing immediately adjacent to the EEZ boundary. Examples include the Pacific cod fisheries in the Kodiak, Chignik, and South Alaska Peninsula areas, and the Aleutian Islands and Dutch Harbor subdistricts of the Bering Sea-Aleutian Islands Area.

As for the availability of suitable technology to verify vessel locations, NMFS has provided charts depicting the boundary and will provide electronic charts compatible with smartphone applications and commonly used commercial navigation products available at the NMFS Alaska Region website at <https://www.fisheries.noaa.gov/region/alaska>. More information is provided in the small entity compliance guide published with this action.

Comment 63: Amendment 16 does not adequately consider or promote efficiency in the utilization of fishery resources, and it fails to minimize costs and avoid unnecessary duplication to the extent practicable in violation of National Standards 5 and 7.

NMFS's analysis notes that amendment 16 will increase direct costs and burdens to drift gillnet vessels harvesting salmon in the Cook Inlet EEZ Area due to requirements including obtaining a SFFP, installing and operating a VMS, and maintaining a Federal logbook. NMFS also chose to open fishing in the EEZ on the same days and at the same times that the State fishery is open and to prohibit participants from fishing in State and Federal waters during the same trip. This limitation makes no sense, is extremely inefficient, is impracticable for participants, and appears punitive.

Response: NMFS disagrees that any of the above-described requirements are punitive, impractical, or inconsistent with either National Standard 5 or 7. As set forth under section 301 of the Magnuson Stevens Act, National Standard 5 provides that conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources, except that no such measure shall have economic allocation as its sole purpose. National Standard 7 provides that conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

This action considers efficiency in the utilization of fishery resources and minimizes costs and avoids unnecessary duplication to the extent practicable. NMFS recognizes that a system in which a single authority manages both State and Federal waters could allow for a more efficient means of conducting the catch accounting necessary to avoid overfishing. This is not possible here. Because the State did not accept delegated management authority nor would it commit to providing the information required for management within the needed timeframe, NMFS must establish Federal monitoring, recordkeeping, and reporting requirements to supply this essential information to Federal fishery managers, consistent with the mandates of the Magnuson-Stevens Act. As discussed in the response to *Comment 31*, to account for fish caught solely in the Federal EEZ, it is necessary for NMFS to prohibit fishing in State and Federal waters on the same trip. As such, this requirement is consistent with National Standard 7.

As described thoroughly in the response to *Comment 44* and in section 4.7.2.2 of the Analysis, NMFS identified the minimum level of information required to effectively manage and enforce salmon fishing in the Cook Inlet EEZ Area. NMFS considered the additional costs and burden of these measures, including the costs of VMS equipment, on participants. NMFS managers will depend on VMS to determine the effort and projected catch in order to inform management decisions. Furthermore, without VMS, NOAA Fisheries Office of Law Enforcement would have to rely exclusively on resource-intensive patrols by air and sea; methods that are not as consistent as VMS in verifying that no fishing is occurring in closed waters and confirming fleet-wide reported fishing effort information. NMFS considered but did not choose to require management measures that would provide additional information

but impose disproportionate costs to participants such as fishery observers and electronic monitoring camera systems. Federal funds may be available to qualified vessel owners or operators for complete reimbursement of the cost of purchasing type-approved VMS units, which could offset over 75 percent of the total purchase and installation cost for fishery participants.

Logbooks are similarly necessary to ensure accuracy of reported fishing effort, catch accounting, and compliance with regulations. Logbook sheets will be available for participants to obtain from NOAA's website, free of charge.

National Standard 8

Comment 64: Amendment 16 violates National Standard 8 because it fails to take into account the importance of fishery resources to the Cook Inlet fishing communities and does not utilize economic and social data to provide for the sustained participation of such communities and to minimize adverse economic impacts on such communities.

Response: NMFS disagrees that amendment 16 violates National Standard 8. As set forth under section 301 of the Magnuson Stevens Act, National Standard 8 provides that conservation and management measures shall, consistent with the conservation requirements of the Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data (based on the best scientific information available), in order to (1) provide for the sustained participation of such communities, and (2) to the extent practicable, minimize adverse economic impacts on such communities.

Section 4 of the Analysis extensively documents the importance of salmon to Cook Inlet fishing communities throughout the Cook Inlet region as well as communities in Washington and Oregon. Many of these communities are jointly dependent on commercial salmon fishing (both drift gillnet and set gillnet), as well as non-commercial salmon fishing (recreational participants and guides, subsistence, ceremonial, and educational fishery sectors). NMFS carefully considered the costs and benefits of each management measure. As described in the Analysis and the preamble to the proposed rule, NMFS selected measures that balance the burden on participants with providing the information that is essential for NMFS to manage salmon fishing in the Cook Inlet EEZ Area. Further, NMFS expects that participants drift gillnet

fishing in the Cook Inlet EEZ Area will be able to maintain their existing range of harvests and may be able to increase harvests if conservation conditions allow for it. Overall, because harvest levels of all sectors are expected to remain more or less consistent with status quo conditions, no long term community level impacts are expected. And because this rule is expected to maintain more or less status quo fishing opportunities for all users in Cook Inlet—with some possibility of additional days for the drift gillnet fleet—it appropriately provides for the sustained participation of fishing communities throughout Cook Inlet, including communities with residents that participate in State water fisheries. Many public commenters from Northern Cook Inlet expressed concern with any management plan that would increase EEZ harvests and thereby decrease salmon returns to the Northern Cook Inlet, causing adverse economic impacts on those communities. Instead, NMFS selected a management strategy that will preserve the complicated balance among various groups throughout Cook Inlet that has provided for the sustained participation of all Cook Inlet fishing communities for decades.

National Standard 10

Comment 65: There is no meaningful discussion of National Standard 10 Safety for this action. In the recent 10 year period, many vessels have been lost or damaged during periods of bad weather. Amendment 16 needs to address what happens and how the fishery will still achieve OY when these regular bad weather events occur.

Response: NMFS disagrees; the impacts of amendment 16 on the safety of human life at sea are discussed in sections 4.5.1.7 and 4.7.4 of the Analysis and NMFS finds this rule is consistent with National Standard 10. National Standard 10 provides that conservation and management measures shall, to the extent practicable, promote the safety of human life at sea. Overall impacts to public health and safety from this action are not expected to be significant. The VMS requirement provides a valuable tool for search and rescue efforts to locate a vessel in distress by regularly providing position information. This action also closes fishing in the Cook Inlet EEZ Area prior to the advent of deteriorating late summer and fall weather conditions. NMFS acknowledges that an inseason closure of the Cook Inlet EEZ under this action could result in vessel congestion in the fishing areas that remain open. In addition, closures of traditional, local fishing areas may induce vessel

operators to take additional risks, such as fishing in weather and sea conditions that they would normally avoid, to remain economically viable. However, NMFS expects that the safety benefits resulting from VMS will more than offset any marginal, indirect adverse effects on safety that this action may have.

Economic Impacts

Comment 66: Multiple commenters cited studies and information highlighting the economic importance of salmon fisheries to participants and regional Alaskan communities. Several commenters support amendment 16 as a vehicle to conserve the salmon species on which these fisheries depend.

Response: NMFS acknowledges this comment. Economic information, community information, and an analysis of expected economic impacts are presented in section 4 of the Analysis.

Comment 67: Many commenters and their families are long-term Cook Inlet drift gillnet participants who feel State management has left drift gillnet fishery participants struggling, and worry this will continue under amendment 16. They allege this action does not correct the perceived errors in State management and will continue to reduce harvester and processor participation.

Response: NMFS acknowledges relatively low revenues to the Cook Inlet drift gillnet fleet and decreases in participation in recent years. Under this action, NMFS will be responsible for managing salmon fishing within the Cook Inlet EEZ Area. NMFS has no jurisdiction to modify salmon management within State waters.

As discussed in the response to *Comment 10*, NMFS recognizes that some of the management measures necessary to meet Federal managements in the EEZ will require additional costs and time commitments from participants. As described in the Final Regulatory Flexibility Analysis in the Classifications section of this preamble, NMFS designed the management measures related to collection of information for management purposes to minimize the financial impact on participants to the extent practicable. NMFS selected these measures after evaluating a range of options for information collection, as described in sections 2.5.6 and 4.7.2.2 of the Analysis. More information is provided in the response to comments related to Monitoring, Recordkeeping, and Reporting Requirements.

Because EEZ fishing opportunity is expected to be similar to the status quo under this action, salmon harvests in

the Cook Inlet EEZ Area and other areas of Cook Inlet are expected to remain at or near existing levels. As described in section 4.7.1.3, temporary shutdown or permanent closing of some processing businesses would only be expected to occur if there were substantial decreases in production. This is not expected to occur because harvest levels are expected to remain near existing levels. However, in the event NMFS closed the EEZ under this action, that likely means fishery conditions would also be expected to result in EEZ closure or severe restrictions under status quo management by the State. The most likely reason for closure is the low abundance of stocks that pass through the EEZ as they move into the Northern District of Cook Inlet. Thus, as compared to the status quo, no substantial reductions in EEZ harvest are anticipated when considered in the context of run strength in a given fishing season.

NMFS disagrees that State management has arbitrarily left the drift gillnet fleet struggling. The low abundance of specific salmon stocks in Cook Inlet has been challenging to all salmon fishery sectors in Cook Inlet. The State has taken necessary management action to protect these weak stocks, which has reduced harvest for all users. As described in section 4.5.1.2.2 of the Analysis, despite these conservation challenges, the drift gillnet fleet has, on average, harvested an increasing percentage of the available harvestable surplus for all salmon species over this same time period (1999–2021).

Further, the Analysis includes an examination of the social and economic impacts of the alternatives. Section 3 of the Analysis evaluates the impact of the proposed action on salmon stocks and other parts of the environment while section 4.7 of the Analysis discusses the impact on fishing communities in comparison to the status quo. Based on the Analysis, NMFS concluded that this final rule will not have a significant impact on the human environment.

Comment 68: A commenter stated support for NMFS's proposed action to manage the Cook Inlet EEZ because the local economy on the Kenai Peninsula is fragile, with people affected by economic disasters such as fishing closures and fires and faced with few employment opportunities.

Response: NMFS acknowledges this comment.

Comment 69: Several local government representatives and bodies requested that NMFS implement management for the Cook Inlet EEZ Area that provides for a healthy

commercial fishing industry including processors and support services, considers all user groups, and considers the impact that management of the Cook Inlet EEZ can have on all Alaska communities that rely on sportfishing for economic development and subsistence use of salmon.

Response: NMFS acknowledges this comment. One of NMFS's primary concerns in developing amendment 16 is ensuring that all Cook Inlet salmon users, processors, and fishing communities retain access to and benefits from Cook Inlet salmon resources.

Comment 70: NMFS has not adequately addressed the economic impacts on fishermen and communities where the harvest is landed, including consideration of landing taxes, employment on the vessels, and in the processing plants.

Response: NMFS disagrees. The economic impacts of salmon fishing under the alternatives in Cook Inlet were comprehensively described and analyzed throughout section 4 of the Analysis. This included consideration of revenues, taxes, employment, and dependency. As summarized in section 4.10 of the Analysis, this action is expected to maintain harvest levels and opportunities commensurate with status quo conditions to the extent possible while accounting for uncertainty and the expectation that Federal management should improve over time as management expertise is developed. In fact, as noted above, this action allows for the possibility of slight increases in fishing days and harvest for the drift gillnet fleet when possible without impacting stocks of lower abundance. Thus, because this action is expected to maintain status quo harvest opportunities or even increase harvest opportunities for participants willing to comply with regulations in Federal waters, the best scientific information available supports NMFS's conclusion that minimal adverse economic impacts are anticipated from this action. Landings, landings taxes, employment, and processing are not expected to be significantly affected by this final rule compared to status quo conditions.

Comment 71: Market conditions arising from competition with farm-raised salmon account for a large part of the economic losses in salmon fisheries around Alaska. Permitting increased harvest of salmon in the Cook Inlet EEZ is unlikely to correct this problem but will likely adversely affect other Upper Cook Inlet salmon users.

Response: NMFS acknowledges that market conditions can have significant impacts on fishery values and that

fisheries management decisions made in other jurisdictions do affect market conditions. Sections 4.5.1 and 4.7.1.3 of the Analysis describe market conditions. In the near-term, this action is not expected to result in the harvesting of significantly more or less salmon in the Cook Inlet EEZ. Therefore, it should not directly affect the market conditions for commercially harvested salmon.

NMFS also acknowledges that management of the Cook Inlet EEZ Area may impact the harvestable surplus available to all other salmon users in Upper Cook Inlet. Again, because NMFS does not anticipate a significant change in harvest in the Cook Inlet EEZ as a result of this action, NMFS disagrees that this action will adversely affect the fishing opportunity, and associated economic value, for other users in the Upper Cook Inlet area.

As described in sections 4.5.1.3.4.2 and 4.6 of the Analysis, commercial catches and fishery values in nearly all Cook Inlet salmon fishery sectors were above the long-term average from 2010 to 2014. The ability to realize high fishery values are dependent on the number and value of harvested species. Drift gillnet fishery catches during recent years have been constrained by mixed stock management considerations, including constraining fishing time and area in order to avoid overharvesting less abundant salmon stocks.

Section 4.6 of the Analysis included an examination of the potentially affected fisheries, including personal use, set net, freshwater, subsistence, and educational fisheries and determined that harvests near status quo levels are likely to be maintained by this action.

General Support

Comment 72: I support Federal management of fisheries in Alaska.

Response: NMFS acknowledges this comment.

Comment 73: Federal management will ensure optimum yield and sustainable fish populations.

Response: NMFS acknowledges this comment.

Comment 74: I support this action. Federally regulating fishing for all salmon in the Cook Inlet EEZ will help save the resources so that salmon fishing by all users can continue. However, I want more input from Alaskans.

Response: NMFS acknowledges this comment. The public had multiple opportunities to provide input, including at AP, SSC, and Council meetings in 2022 and 2023; during a public hearing hosted online by NMFS

on May 18, 2023; and during the public comment period on the proposed rule and notice of availability for Amendment 16. Public input on this action from all members of the public was considered and is summarized and responded to in this final rule.

General Opposition

Comment 75: NMFS does not need to recreate the wheel to create this FMP. It should adopt the FMP management plan put forward by Cook Inlet Fisherman's Fund, which is based on historic regulations and would manage the Cook Inlet fishery to comply with the court orders, Magnuson-Stevens Act, and other applicable laws.

The commenter's proposed FMP amendment can be viewed at <https://www.regulations.gov/comment/NOAA-NMFS-2023-0065-0071>.

The commenter's FMP includes the following primary provisions:

- Escapement based management.
- Management measures for all commercial salmon fishery sectors in both State and Federal waters.
- Management of Chinook stocks throughout upper Cook Inlet with the commercial fishery allowed whatever harvest necessary to achieve the MSY/OY objectives for sockeye, coho, pink, and chum stocks.
- Prioritize restrictions on non-resident sport fishing over resident sport-fishing when restrictions are needed to achieve OY.
- A commercial fishing season from May through December, with two or three 12 hour regular commercial fishing periods per week. The State or NMFS would retain authority to adjust this fishing schedule to manage for MSY escapement goals or exploitation rates as required.

Response: NMFS disagrees that this commenter's proposed FMP amendment should be adopted. As explained in the responses to *Comments 3* and *4*, NMFS cannot adopt Federal management measures that apply to the State waters of Cook Inlet. As explained in the response to *Comment 23*, NMFS cannot implement escapement based management through amendment 16. NMFS disagrees that commercial salmon fishing should be exempt from management restrictions required to conserve Chinook salmon or other salmon stocks. Even with severe restrictions to both recreational and commercial salmon fishing, Chinook salmon stocks in Cook Inlet are not meeting escapement goals under the status quo. Forgoing any restrictions on commercial fishing to harvest all available yield of sockeye, coho, pink, and chum salmon stocks would result in

overfishing, which is inconsistent with NMFS's National Standard 1 mandate. NMFS disagrees that achieving MSY, particularly for a single fishery sector, constitutes achieving OY or maximizing net benefits to the nation. As explained in the response to *Comment 39*, a dramatic increase the fishing season duration and number of commercial fishing periods in the Cook Inlet EEZ Area would result in overfishing and reduce or eliminate the harvestable surplus for other salmon users in Cook Inlet. And NMFS may not discriminate between residents of different states when adopting Federal management measures. Section 2.7 of the Analysis generally explains why other provisions in stakeholder-submitted FMP amendments are inconsistent with the Magnuson-Stevens Act.

Amendment 16 complies with the Ninth Circuit ruling by amending the Salmon FMP to include the Cook Inlet EEZ Area. It complies with the District Court's order by implementing a federally-managed fishery in the EEZ that includes all Magnuson-Stevens Act requirements—including ACLs—and does not rely on the State to achieve any of the FMP's management objectives. The Analysis provides a comprehensive description of the purpose and need for this action, the management alternatives considered, and an analysis of their respective impacts.

Comment 76: Despite having the flexibility and resources to do an excellent job, NMFS is making amendment 16 unnecessarily complicated and difficult.

Response: NMFS developed amendment 16, the proposed rule, and this final rule in compliance with the Magnuson-Stevens Act and all other applicable Federal law. Management of Cook Inlet salmon fisheries is complex and challenging. The fishery includes multiple stocks of varying abundance, no stocks can be targeted in isolation in EEZ waters, and Cook Inlet includes many stakeholders beyond the drift gillnet fleet with competing demands. There is no simple solution to fisheries management in the Cook Inlet EEZ Area if NMFS is to consider the perspectives of all stakeholders and tribes, as it must. The Analysis identifies the strengths and weaknesses of each management alternative under consideration, including procedural constraints and currently available expertise.

NMFS intends to do an effective job managing the Cook Inlet EEZ Area salmon fishery, and expertise in this new Federal fishery will increase over time.

Comment 77: This unprecedented action should not be implemented. It

will disrupt management of Cook Inlet waters and lead to further lawsuits. While not everyone will be happy with any rule, the action's legality and the resources are most important.

Response: NMFS acknowledges that this action implements a separate Federal salmon fishery management regime within Cook Inlet for the Cook Inlet EEZ Area and that salmon users have diverse preferences for management measures. As described in the response to *Comment 9*, NMFS must implement Federal management of the Cook Inlet EEZ to comply with applicable court orders, the Magnuson-Stevens Act, and all other applicable Federal law.

Tribal Comments

Comment 78: Regional tribes were not adequately consulted in the development of amendment 16, which may have adverse impacts to salmon stocks that tribes have traditionally depended on since time immemorial. Three federally recognized regional tribal groups requested government-to-government tribal consultation.

Response: NMFS acknowledges the importance of salmon to many tribal entities located throughout Cook Inlet and adjacent lands. NMFS's efforts to engage and consult with tribes on this action are described in detail in the Tribal Summary Impact Statement of this rule. In brief, NMFS participated in three tribal engagement meetings on this action before the Council failed to take action and NMFS began developing a Secretarial FMP amendment. NMFS offered to consult with tribes after the Council failed to take action, and NMFS subsequently held consultations with two tribes in May and June, 2023. NMFS held a public hearing on the action in May 2023, to which it invited all impacted tribes. After publishing the proposed rule in October 2023, NMFS directly solicited comments on the proposed rule from impacted tribes in the fall of 2023. In December 2023, NMFS held an engagement meeting with the tribal fishing group, and in January 2024, NMFS held two informational meetings with tribal entities throughout the Southcentral Alaska region.

Many of the tribes NMFS engaged with requested an indigenous subsistence fishery set-aside to be incorporated into amendment 16 and this final rule. However, given the impending court deadline of May 1, 2024 for publication of this action, there was not sufficient opportunity to work with interested tribes on developing a proposal that could be analyzed and incorporated into amendment 16 while

remaining on schedule to comply with the court order. NMFS received additional tribal consultation requests related to the possibility of an indigenous subsistence fishery in the Cook Inlet EEZ and will honor them.

Comment 79: Multiple tribes in the region noted that this action impacts sovereign federally recognized Tribes and their citizens and ask that NMFS, as part of its Federal trust responsibilities to tribes, co-develop with Alaska Native tribes a tribal subsistence fishery or set-aside (tribal fishery) and include it as part of this action. Many reasons were provided in support, including that Alaska Natives have used Cook Inlet salmon since ancestral times; they have stewarded salmon for thousands of years; tribal inherent fishing rights have long been ignored; a lack of equitable tribal representation in Federal fisheries management; obligations under international law, Executive orders, and ANILCA; and that a new subsistence set-aside fishery in the EEZ would be highly beneficial for tribal members unable to sufficiently meet their needs with other harvest opportunities. It was suggested that a tribal fishery be modeled after the subsistence halibut fishery.

Response: NMFS recognizes that Alaska tribes are seeking more equitable fisheries management and increased involvement in Federal fisheries management processes. Furthermore, NMFS acknowledges the long-standing and ancestral use of salmon fishery resources by Alaskan tribes.

NMFS evaluated the impacts of this action on tribes in the Analysis and the tribal impact summary statement. NMFS recognizes that salmon fishing in the Cook Inlet EEZ Area occurs before all other fishing in Cook Inlet and impacts the harvestable surplus available to all others who rely on the salmon resources in Cook Inlet, including tribal and subsistence users. As described in section 4.7.1.3 of the Analysis, because this action is expected to maintain salmon harvests near status quo levels, NMFS does not expect that amendment 16 will decrease the harvestable surplus for ongoing tribal and subsistence fisheries in Cook Inlet.

To create a new tribal fishery within the Cook Inlet EEZ would require an FMP amendment, including further analysis and consideration by NMFS and the Council. NMFS has committed to honor requests for tribal consultation regarding the potential establishment of a tribal fishery in the Cook Inlet EEZ. FMPs are adaptive and the Council may recommend and NMFS may amend the FMP in the future to incorporate

feedback from tribes received in upcoming consultations.

Comment 80: The proposed action and subsequent management directly impacts the sovereign federally recognized tribes of the Cook Inlet and their citizens, which directly ties to their vital cultural way of life that has sustained their people for millennia. NMFS must partner with the Cook Inlet Tribes, thereby fulfilling their Federal trust responsibilities and guaranteeing the utilization and sustainability of traditional resources. The requirement to engage directly, government-to-government, is found in international law, treaties, declarations, Presidential Executive Orders (E.O.), and Secretarial Orders (See U.S. Department of the Interior's Secretary Order No. 3335 affirming the Federal trust responsibility of the United States to Indian Tribes and their citizens). Furthermore, the White House signed E.O. 14096 on Environmental Justice in April 2023. The E.O. directly cites tribal sovereignty and self-governance, recognizing the requirement for tribal consultation and enhanced collaboration with tribes on Federal policies, stating, in part, that we must recognize, honor, and respect the different cultural practices—including subsistence practices, ways of living, Indigenous Knowledge, and traditions—in communities across America.

Response: As described in response to *Comment 78* and in the Tribal Summary Impact Statement section of this final rule, NMFS provided multiple informational meetings to tribes and conducted tribal consultations. Impacts to tribes, their members and all other salmon users in Cook Inlet will continue to be considered in management of the Cook Inlet EEZ Area. NMFS will continue to consult and work with interested tribes to develop potential future management actions for the Cook Inlet EEZ Area that may provide subsistence or tribal fishing opportunities.

Marine Mammals

Comment 81: I support including the Cook Inlet EEZ in the Salmon FMP. Consider the importance of available salmon to the Cook Inlet beluga whales, which are endangered under the ESA. Cook Inlet beluga whales rely on salmon as prey. Failure to protect against overfishing or otherwise could amount to an illegal "taking" under the ESA. Harassing or harming the beluga whale is another reason the Salmon FMP must include the Cook Inlet EEZ.

Response: NMFS acknowledges that salmon are important prey to Cook Inlet beluga whales and that the availability of salmon prey for Cook Inlet beluga

whales is a factor identified in the recovery plan. NMFS Sustainable Fisheries Division consulted with NMFS Protected Resources Division under ESA section 7 to evaluate the potential impacts of these management measures to all ESA-listed species, including Cook Inlet beluga whales, that may be affected by this action. As described in section 3.3.1 of the Analysis, the best scientific information available at this time suggests that status quo salmon prey availability is adequate for belugas. This final rule is not expected to appreciably alter salmon availability to belugas compared to the status quo. NMFS will continue to review and consider any new information on the importance and availability of salmon prey to Cook Inlet beluga whales.

Comment 82: Drift gillnet gear can be destructive and its continued use in Cook Inlet may have adverse impacts to endangered beluga whales.

Response: As described in section 3.3.1 of the Analysis, NMFS has no information indicating that the drift gillnet gear used in the Cook Inlet EEZ Area has resulted in entanglements of Cook Inlet beluga whales or habitat degradation. This action does not modify drift gillnet fishing in Cook Inlet in any way that is expected to increase the entanglement risk for Cook Inlet beluga whales.

Process Concerns

Comment 83: One commenter stated that the EEZ line being used was ruled illegal in *U.S. v. Alaska* in 1975. This commenter alleges NMFS continues to use an illegal EEZ boundary. If NMFS were to use a proper boundary line (50 to 60 miles (80.47 to 96.56 km) north), the majority of the fishery would occur in State waters, undermining its argument that it cannot regulate State waters under section 306(b) of the Magnuson-Stevens Act.

Another commenter suggested that the EEZ boundary was incorrect for fisheries jurisdiction and should only be used for oil and gas leasing purposes. Federal waters for fishing have not been designated and need to be decided by the Boundary Commission as in Southeast Alaska.

Response: NMFS disagrees that it is using an incorrect EEZ boundary. NMFS also disagrees that Federal waters boundaries for the purpose of fisheries jurisdiction have not been defined in Cook Inlet. Under the Magnuson-Stevens Act, the EEZ is defined as the zone established by Proclamation Numbered 5030, dated March 10, 1983. For purposes of applying this Act, the inner boundary of that zone is a line

coterminous with the seaward boundary of each of the coastal States. The baselines used to determine the EEZ boundary are reviewed and approved by an interagency committee called the U.S. Baseline Committee, which is chaired by the Department of State. In 2006, a new method was used to calculate the baseline and NOAA navigation charts published in 2006 depict changes in the 3 nmi (5.56 km) boundary in parts of Alaska. In 2011, the U.S. Baseline Committee reviewed some of the changes to the baseline in Cook Inlet based on feedback from the State and updated their recommendations. However, not all areas where the baseline changes occurred have been reviewed by the Baseline Committee. For this reason, NMFS manages and enforces Federal fisheries according to the decisions of the U.S. Baseline Committee for the areas they reviewed and approved after considering input from the State since 2006. NMFS recognizes the historical (pre-2006) 13-nmi (5.56 km) state-waters boundary line for all other areas. This information is documented in a letter from NMFS to Alaska Department of Fish and Game that is posted on NMFS Alaska Region website.

To the extent this comment is alleging the U.S. Baseline Committee erred in approving this EEZ boundary, the decisions of the Baseline Committee are outside the scope of this action. For NMFS's response to the contention that it has authority to regulate state waters under section 306(b) of the Magnuson-Stevens Act, see the response to *Comment 4*.

Comment 84: NMFS has repeatedly disregarded instruction from courts, and a special master should be appointed to oversee development of Federal management of Cook Inlet.

Response: NMFS disagrees that it disregarded instruction from any court. NMFS has worked to ensure that Federal management of salmon fishing in the Cook Inlet EEZ will be in place by May 1, 2024, consistent with the Ninth Circuit and District Court orders.

Comment 85: One commenter felt that NMFS has been disingenuous, duplicitous, insulting to stakeholders, and deliberately obstructive throughout this process and produced poor work product that suggests it does not understand the fishery. It was also suggested that this action fails to reflect consideration or incorporation of input that the stakeholders from the drift gillnet fleet have provided on multiple occasions over several years, including the Council's stakeholder committee, resulting in an unworkable product.

Response: NMFS disagrees. The proposed rule and Analysis prepared for this action contains all relevant information about salmon fisheries in Cook Inlet and perspectives provided by stakeholders during the development of this action. Amendment 16 and this final rule implement Federal management in the Cook Inlet EEZ Area in accordance with the Magnuson-Stevens Act and as appropriate in recognition of the multiple users of salmon throughout Cook Inlet.

Throughout the development of this action, some stakeholders advocated for many provisions to increase harvests by the drift gillnet fleet that NMFS is not implementing for reasons discussed in a number of responses to comments. This input, as well as recommendations from the stakeholder committee, is also summarized in section 2.7 of the Analysis, which provides a comprehensive discussion of why certain recommendations were not incorporated into the management alternatives under consideration. Many of the drift gillnet fleets requests can be distilled to two basic premises, neither of which are consistent with the Magnuson-Stevens Act: (1) NMFS must apply Federal management to both State and Federal waters in Cook Inlet; and (2) NMFS must manage to fully harvest MSY for Kenai and Kaslof sockeye salmon, as well as all other salmon stocks and prevent overescapement. As described in the response to *Comment 4*, NMFS does not have jurisdiction to assert management authority over the State waters of Cook Inlet. As explained throughout the Analysis, the preamble to the proposed rule, and in responses to comments in this final rule, fully harvesting the entire harvestable surplus for Kenai and Kaslof sockeye would require an amount of fishery effort in the EEZ that would result in overfishing of other salmon stocks and could completely eliminate fishery opportunities and access to fishery resources for other users in Cook Inlet. To achieve OY and ensure that the fishery results in the greatest net benefits to the Nation, NMFS cannot prioritize access for one user group over access for all others. And in mixed stock fisheries, harvest is always constrained by the stocks of lowest abundance, as the Magnuson-Stevens Act requires that fishery management measures prevent overfishing.

NMFS's decision not to implement specific measures advocated for by one group of fishery stakeholders—and which other stakeholders and tribes oppose as likely to decrease their access to salmon and the State opposes based on conservation concerns—does not

mean NMFS is being disingenuous, duplicitous, insulting, or deliberately obstructive.

Comment 86: Most Council members could see their special interests (trawlers) affected by further scrutiny over salmon management. These conflicts are the reason that the Magnuson-Stevens Act requires science to drive management. These conflicts and the lack of accountability are why councils nationwide should be appointed by the president and be held responsible for their decisions.

Alaska has a majority of seats on the Council, including the commissioner of ADF&G, and the Council will mostly rule in favor of the State's parochial interests. This prioritizes protecting State interests and revenues.

Response: Amendment 16 is a Secretarial FMP amendment developed by NMFS and was not recommended by the Council. When this action was previously under Council consideration, none of the Council members had financial interests that would have required recusal from voting had the Council decided to recommend action. Regardless, the statutorily prescribed system for appointing Council members is outside the scope of this action.

Comment 87: ADF&G has a financial conflict of interest in managing South Central Alaska Salmon stocks. They are funded, in part, by sport fishing licenses and associated Federal matched funds. Therefore, they have a financial incentive to favor the recreational and personal use fisheries.

Response: The State of Alaska's allocation decisions among various sectors within State waters are outside of the scope of this action. In the Cook Inlet EEZ, nearly all catch is by the commercial drift gillnet fleet. There is no Federal personal use fishery, and the recreational sector catches less than 70 fish per year on average in the Cook Inlet EEZ.

Comment 88: Multiple commenters suggested that ADF&G had prioritized political considerations, or specific user groups, over sustainability and has not managed salmon and other species properly, which has resulted in the declines of Chinook and sockeye fisheries in Cook Inlet and unnecessary litigation. One commenter felt that amendment 16 results in more political management.

Response: NMFS disagrees that amendment 16 is political management. As described throughout the preamble to the proposed rule, NMFS worked to balance competing interests and demands of the National Standards in the policy decisions inherent to this fishery management action. NMFS will

manage salmon fishing in the Cook Inlet EEZ Area using best available science to achieve OY and prevent overfishing on all Cook Inlet salmon stocks. The State will continue to manage salmon fishing within State waters.

NMFS found the State has prioritized protecting stocks with the lowest abundance in regulating salmon fishing in Cook Inlet. As described in sections 3.1, 4.5, and 4.6 of the Analysis, salmon abundance is cyclical, and the harvests of different user groups have both increased and decreased at different times. To the extent the comment is criticizing allocation decisions made by the BOF (*i.e.*, which user group(s) are allowed to harvest the available excess yield of salmon), that is outside the scope of this action.

Comment 89: Our fisheries statewide are in peril because of multi-jurisdictional authority and allocations to specific user groups based on political agendas. Trawling back and forth across the mouth to Cook Inlet occurred only weeks prior to our State-regulated 2023 commercial salmon season being shut down due to a prediction of a shortage of what turned out to be less than 1,500 Chinook salmon. This was under both jurisdictions. So who should manage the anadromous fishery? The owner of the resource.

Response: NMFS, with guidance from the Council, has jurisdiction over salmon fishing in the Cook Inlet EEZ Area. This action addresses directed fishing for salmon in the Cook Inlet EEZ Area. Comments regarding salmon bycatch in trawl fisheries are outside of the scope of this action.

Comment 90: The State should no longer manage the fishery as they have failed to do so in a way that supports Alaskan interests. Furthermore, there is no longer a fishery to manage in the EEZ, as the president has taken away the ability of Alaskans to utilize Alaska's natural resources, such as oil and gas.

Response: Under this rule, NMFS, not the State of Alaska, will manage all salmon fishing (commercial and recreational) in the Cook Inlet EEZ. Comments regarding executive actions that affect other natural resources in Alaska are outside the scope of this action.

Comment 91: Alaskans who are licensed business owners and fishing in the EEZ should be managing their resources. People in Washington DC or Washington State are the reason many of our wild resources are being depleted; they should not have a say in managing Alaska fisheries.

Response: The Magnuson-Stevens Act governs the management of the fisheries in the EEZ. Section 2 of the Magnuson-Stevens Act provides that the purpose of the Act is to exercise sovereign rights for the purpose of exploring, exploiting, conserving, and managing all fish within the exclusive economic zone. It further provides that, with respect to management within the EEZ adjacent to Alaska waters, the Council is responsible for developing and recommending fishery management plans and regulations that implement those plans for management. Comments from all stakeholders and members of the public were considered in the development of amendment 16 and will be considered every year in the annual management processes for establishing salmon harvest specifications for the Cook Inlet EEZ Area.

Comment 92: Alaska's permanent fund dividend is declining and is being used to build commercial vessel docks. This litigation, which favors one fishing group over others, is costing millions of dollars. Commercial fishing is not hurting anyone. Protecting recreational fishing is not needed.

Response: Comments on the Alaska permanent fund, State government revenues, and dock construction are outside of the scope of this action. Comments about the cost of litigation are outside the scope of this action. This action will implement conservation and management measures for commercial drift gillnet and recreational fishing solely within the Cook Inlet EEZ Area.

Other

Comment 93: The proposed rule is incomplete without a complete overview of how offshore wind turbines, which are responsible for the increase in deaths of whales, dolphins, and other cetaceans off the East Coast, will be handled off Alaska.

Response: This action does not include elements related to offshore wind energy. Therefore, this comment is outside of the scope of this action.

Comment 94: Protect the hooligan (eulachon); that fishery needs review.

Response: This comment is outside the scope of this action.

Comment 95: In the Cook Inlet area, salmon spawning and rearing occurs on Federal lands and waters under the Department of the Interior. The Department of the Interior should be consulted and included in the development of this action.

Response: The United States Fish and Wildlife Service (USFWS), an agency within the Department of the Interior, has a representative on the Council and is aware of the issue. The USFWS did

not provide comments to NMFS during the comment period on amendment 16 or the proposed rule. In this action, NMFS implements federal management over commercial and recreational fishing in the Cook Inlet EEZ Area consistent with NMFS's authorities under the Magnuson-Stevens Act. The authorities of other agencies, including the Department of the Interior and USFWS, over lands and waters outside of the EEZ are outside the scope of this action.

Classification

The NMFS Assistant Administrator (AA) has determined that this action is consistent with the Salmon FMP, the National Standards, other provisions of the Magnuson-Stevens Act, and other applicable law.

NMFS prepared an environmental assessment (EA) for amendment 16 and the AA concluded that there will be no significant impact on the human environment as a result of this rule. This action is expected to maintain Cook Inlet EEZ salmon harvests at or near existing levels. The same or similar vessels will continue to use the same or similar fishing gear. As a result, no significant environmental impacts are anticipated. Copies of the EA and Finding of No Significant Impact are available from the NMFS (see ADDRESSES).

This final rule has been determined to be not significant for the purposes of Executive Order 12866.

A Regulatory Impact Review was prepared to assess costs and benefits of available regulatory alternatives. A copy of this analysis is available from NMFS (see ADDRESSES). NMFS approved amendment 16 and these regulations based on those measures that maximize net benefits to the Nation when considering the viable management alternatives. Specific aspects of the economic analysis are discussed below in the Final Regulatory Flexibility Analysis (FRFA) section.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." Copies of the proposed rule, this final rule, and the small entity compliance guide are available on the Alaska Region's website at: <https://www.fisheries.noaa.gov/region/alaska>.

Final Regulatory Flexibility Analysis

NMFS prepared a FRFA that incorporates the Initial Regulatory Flexibility Analysis (IRFA) and a summary of the analyses completed to support this final rule.

Section 604 of the Regulatory Flexibility Act (RFA) requires that, when an agency promulgates a final rule under section 553 of title 5 of the U.S. Code (5 U.S.C. 553), after being required by that section or any other law to publish a general notice of final rulemaking, the agency shall prepare a FRFA (5 U.S.C. 604). Section 604 describes the required contents of a FRFA: (1) A statement of the need for and objectives of the rule; (2) a statement of the significant issues raised by the public comments in response to the IRFA, a statement of the assessment of the agency of such issues, and a statement of any changes made to the proposed rule as a result of such comments; (3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments; (4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available; (5) a description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and (6) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes including a statement of the factual, policy, and legal reasons for selecting the alternative adopted and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

A description of this final rule and the need for and objectives of this rule are contained in the preamble to the proposed rule and final rule and are not repeated here.

Public and Chief Counsel for Advocacy Comments on the IRFA

An IRFA was prepared in the Classification section of the preamble to the proposed rule. The Chief Counsel for Advocacy of the SBA did not file any comments on the proposed rule. NMFS

received no comments specifically on the IRFA. No comments provided information that refuted the conclusions presented in the IRFA.

Number and Description of Small Entities Regulated by This Final Action

This final rule will directly regulate commercial salmon fishing vessels that operate in the Cook Inlet EEZ Area, charter guides and charter businesses fishing for salmon in the Cook Inlet EEZ Area, and entities receiving deliveries of salmon harvested in the Cook Inlet EEZ Area.

For RFA purposes only, NMFS has established small business size standards for businesses, including their affiliates, whose primary industries are commercial fishing, charter fishing, seafood processing, and seafood buying (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of \$11 million for all its affiliated operations worldwide. For charter fishing vessels (NAICS code 713990), this threshold is combined annual receipts not in excess of \$9 million. For shoreside processors (NAICS code 311710), the small business size is defined in terms of number of employees, with the threshold set at not greater than 750 employees. For entities that purchase seafood but do not process it (NAICS code 424460), the small business threshold is not greater than 100 employees.

From 2019 to 2021, there was an average of 567 S03H permits in circulation, with an average of 361 active permit holders, all of which are considered small entities based on the 11 million dollar threshold. Because NMFS expects the State to maintain current requirements for a commercial salmon fishing vessels landing any salmon in upper Cook Inlet to hold a CFEC S03H permit, NMFS does not expect participation from non-S03H permit holders in the federally managed salmon fishery in the Cook Inlet EEZ Area. Therefore, the number of S03H permit holders represents the maximum number of directly regulated entities for the commercial salmon fishery in the Cook Inlet EEZ Area. From 2019 to 2021, there was an average of 11 shoreside processors and 6 direct marketers, all of which are considered small entities based on the 750 employee threshold. From 2019 to 2021, there was an average of 4 catcher-sellers, all of which are considered small

entities based on the 100 employee threshold. From 2019 to 2021, there was an average of 58 charter guides that fished for salmon at least once in the Cook Inlet EEZ Area, all of which are considered small entities based on the 9 million dollar threshold. Additional detail is included in sections 4.5 and 4.9 in the Analysis prepared for this action (see ADDRESSES).

Description of Significant Alternatives That Minimize Adverse Impacts on Small Entities

NMFS considered, but did not select three other alternatives. The alternatives, and their impacts to small entities, are described below.

Alternative 1 would take no action and would maintain existing management measures and conditions in the fishery within recently observed ranges, resulting in no change to impacts on small entities. This is not a viable alternative because it would be inconsistent with the Ninth Circuit's ruling that the Cook Inlet EEZ must be included within the Salmon FMP and managed according to the Magnuson-Stevens Act.

Alternative 2 would delegate management to the State. If fully implemented, Alternative 2 would maintain many existing conditions within the fishery. Fishery participants would have the added burdens of obtaining a SFFP, maintaining a Federal fishing logbook, and monitoring their fishing position with respect to EEZ and State waters as described in sections 2.4.8 and 4.7.2.2 of the Analysis. However, section 306(a)(3)(B) of the Magnuson-Stevens Act provides that NMFS cannot delegate management to the State without a three-quarter majority vote by the Council, which did not occur. Therefore, Alternative 2 cannot be implemented and is not a viable alternative.

Alternative 4 would close the Cook Inlet EEZ but not impose any additional direct regulatory costs on participants and would allow directly regulated entities to possibly recoup lost EEZ harvest inside State waters. However, the District Court ruled that Alternative 4 was contrary to law. Therefore, Alternative 4 is not a viable alternative.

This action (Alternative 3) will result in a Cook Inlet EEZ salmon fishery managed directly by NMFS and the Council. Within Alternative 3, there were numerous sub-options for management measures. As described below, NMFS worked to select specific management measures that minimized cost and burden on participants to the extent practicable. This action will increase direct costs and burdens to

commercial salmon fishing vessels that operate in the Cook Inlet EEZ Area by requiring an SFFP, associated requirements to install and operate a VMS, and maintaining a Federal logbook as described in sections 2.5.6 and 4.7.2.2 of the Analysis. This action also requires that TACs be set before each fishing season. The TAC will be set to account for management uncertainty and reduce the risk of overfishing without the benefit of inseason harvest data, but overall catch in the EEZ is likely to remain near existing levels with a possibility for slight increases from the status quo (particularly as Federal managers collect data specific to the EEZ and develop expertise managing the fishery). As is possible under the status quo, salmon harvest in the EEZ could be reduced or prohibited in years when salmon returns are not predicted to result in a harvestable surplus, with an appropriate buffer to account for scientific and management uncertainty.

Processors receiving deliveries of salmon commercially harvested in the Cook Inlet EEZ Area are required to obtain an SFPP. Entities receiving deliveries of salmon commercially harvested in the Cook Inlet EEZ but not processing the fish are required to obtain an RSRP. All of these permits are available at no cost from NMFS. However, entities with these permits are required to use eLandings and report landings with all associated information by noon of the day following the completion of each delivery, which increases direct costs and burden.

While these measures do increase costs to commercial fishery sector participants, all of these elements are necessary to manage the fishery and prevent overfishing. Specific consideration was given in their development to minimize the burden on participants to the extent practicable while also providing required information to Federal fishery managers in a timely manner. More costly means of monitoring catch—including observers and electronic monitoring—were considered but rejected by NMFS. All entities that may be directly regulated by this action could also choose to continue participating in only the State waters fisheries to avoid being subject to these Federal requirements.

Charter fishing vessels do not have any additional Federal recordkeeping, reporting, or monitoring requirements but are subject to Federal bag, possession, and gear regulations. These measures are the same as existing State requirements and do not add additional burden.

Based upon the best scientific information available, there are no significant alternatives to the action that have the potential to comply with applicable court rulings, accomplish the stated objectives of the Magnuson-Stevens Act and any other statutes, and minimize any significant adverse economic impact of the action on small entities while preventing overfishing. After a public process, NMFS concluded that of the viable management options, Alternative 3, amendment 16 and this final rule, best accomplish the stated objectives articulated in the preamble for this action and in applicable statutes, and minimizes, to the extent practicable, adverse economic impacts on directly regulated small entities.

Recordkeeping, Reporting, and Other Compliance Requirements

This action implements new recordkeeping, reporting, and compliance requirements. These requirements are necessary for the management and monitoring of the Cook Inlet EEZ Area salmon fishery.

All Cook Inlet EEZ Area salmon fishery participants using drift gillnet gear are required to provide additional information to NMFS for management purposes. As in other North Pacific fisheries, processors provide catch recording data to managers to monitor harvest. Processors are required to record deliveries and processing activities to aid in fishery administration.

To participate in the fishery, persons are required to complete application forms, reporting requirements, and monitoring requirements. These requirements impose costs on small entities in gathering the required information and completing the information collections.

NMFS has estimated the costs of complying with the requirements based on information such as the burden hours per response, number of responses per year, and wage rate estimates from industry or the Bureau of Labor Statistics. Persons are required to complete many of the requirements prior to fishing, such as obtaining permits. Persons are required to complete some requirements every year, such as the SFFP and RSRP applications. Other requirements are more periodic, such as the SFFP application, which must be submitted every 3 years. The impacts of these changes are described in more detail in sections 2.5.6 and 4.7.2 of the Analysis prepared for this action (see **ADDRESSES**).

Vessels commercially fishing for salmon in the Cook Inlet EEZ Area are

required to obtain an SFFP, complete a Federal fishing logbook, and install and maintain an operational VMS. NMFS issues SFFPs at no cost. Although VMS costs may be significant for some participants, there may be funds available from NMFS for reimbursement of the purchase costs. Information on the VMS reimbursement program is contained in the small entity compliance guide published with this Final Rule. The vessel will also be required to mark buoys at each end of their drift gillnet with their SFFP number. While commercially fishing for salmon in the Cook Inlet EEZ Area, participants must remain within Federal waters and cannot also fish in State waters on the same calendar day or conduct any other types of fishing while in Federal waters.

Processors and other entities receiving landings of commercially caught Cook Inlet salmon from the Cook Inlet EEZ Area are required to obtain an SFPP or an RSRP, and report landings through eLandings by noon of the day following completion of the delivery. NMFS issues SFPPs and RSRPs at no cost.

For recreational salmon fishing, no additional Federal recordkeeping and reporting requirements are established. The State's existing recordkeeping and reporting requirements are expected to provide the information needed to manage recreational fishing in the Cook Inlet EEZ Area and satisfy Magnuson-Stevens Act requirements given the small scale and very limited harvest by the recreational sector. Information collected by the State includes creel sampling, the ADF&G's Statewide Harvest Survey, harvest records for annual limits, and the Saltwater Guide Logbooks.

Paperwork Reduction Act

This final rule contains collection-of-information requirements subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). This final rule adds a new collection of information for the Cook Inlet EEZ salmon fishery under new OMB control number 0648-0818 and revises and extends for 3 years existing collection-of-information requirements for OMB Control Number 0648-0445 (NMFS Alaska Region VMS Program). The public reporting burden estimates provided below for these collections of information include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

OMB Control Number 0648–0818

A new collection of information is created for reporting, recordkeeping, and monitoring requirements implemented by this action that are necessary to federally manage the Cook Inlet EEZ Area salmon fishery. This new collection contains the applications and processes used by harvesters, processors, and other entities receiving deliveries of Cook Inlet EEZ Area salmon to apply for and manage their permits; provide catch, landings, and processing data; and mark drift gillnet buoys. The data are used to ensure that the fishery participants adhere to harvesting, processing, and other requirements for the Cook Inlet EEZ Area salmon fishery.

The public reporting burden per individual response is estimated to average 15 minutes for the SFPP application, 25 minutes for the SFPP application, 20 minutes for the RSRP application, 15 minutes to register for eLandings, 10 minutes for landing reports, 15 minutes for the daily fishing logbook, and 30 minutes to mark drift gillnet buoys.

OMB Control Number 0648–0445

NMFS proposes to revise and extend by 3 years the existing requirements for OMB Control Number 0648–0445. This collection contains the VMS requirements for the federally managed groundfish and crab fisheries off Alaska. This collection is revised because this action requires vessels commercially fishing for salmon in the Cook Inlet EEZ Area to install and maintain an operational VMS. The public reporting burden per individual response is estimated to average 6 hours for installation of a VMS unit, 4 hours for VMS maintenance, and 2 hours for VMS failure troubleshooting. VMS transmissions are not assigned a reporting burden because the transmissions are automatic.

Public Comments

We invite the general public and other Federal agencies to comment on proposed and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Written comments and recommendations for these information collections should be submitted on the following website: <https://www.reginfo.gov/public/do/PRAMain>. Find the particular information collection by using the search function and entering either the title of the collection or the OMB Control Number.

Notwithstanding any other provisions of the law, no person is required to respond nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

Tribal Summary Impact Statement

NMFS's responsibility to engage in tribal consultations on Federal policies with tribal implications is outlined in Executive Order (E.O.) 13175, Consultation and Coordination with Indian Tribal Governments (November 6, 2000), the Executive Memorandum (April 29, 1994), the American Indian and Alaska Native Policy of the U.S. Department of Commerce (March 30, 1995), the Department of Commerce Tribal Consultation and Coordination Policy (78 FR 33331, June 4, 2013), Presidential Memorandum (Tribal Consultation and Strengthening Nation-to-Nation Relationships) (86 FR 7491, January 29, 2021), and the updated NOAA Policy on Government-to-Government Consultations with Federally Recognized Indian Tribes and Alaska Native Corporations (July 27, 2023). Congress required federal agencies to consult with Alaska Native corporations on the same basis as federally recognized Indian tribes under E.O. 13175 (Pub. L. 108–199, 118 Stat. 452, as amended by Pub. L. 108–447, 118 Stat. 3267). NOAA interprets the term “Alaska Native corporations” in this requirement to mean “Native corporation[s]” as that term is defined under the Alaska Native Claims Settlement Act (ANCSA) of 1971 (43 U.S.C. 1602).

Section 5(b)(2)(B) of E.O. 13175 requires a “Tribal Summary Impact Statement” for any regulation that has tribal implications, imposes substantial direct compliance costs on Native Tribal governments, and is not required by statute. Although not required by section 5(b)(2)(B) of E.O. 13175, the following is a tribal summary impact statement for this final rule that is consistent with E.O. 13175 and summarizes and responds to issues raised during all tribal consultations on Amendment 16 and the proposed rule.

Under E.O. 13175 and agency policies, NMFS notified all potentially impacted federally recognized Tribal governments in Alaska and Alaska Native Corporations and provided the opportunity to comment and respond to the agency's invitation for tribal consultation on the action.

A Description of the Extent of NMFS's Prior Consultation With Tribal Officials

On February 17, 2023, NMFS emailed tribal consultation invitation letters to Alaska Native Tribes, Alaska Native Corporations, and Alaska Native Organizations (“Alaska Native representatives”). The letter notified Alaska Native representatives that the management of salmon fisheries in the Federal (EEZ) marine waters of upper Cook Inlet would be presented to the Council for review, with an invitation to participate in the process and contribute to fishery decisions at the April 2023 meeting. NMFS invited Alaska Native representatives to consult with and provide comments to the agency directly via meeting or by telephone.

NMFS received one response from the Chickaloon Village Traditional Council (CVTC) to consult on management of salmon fisheries in the Federal (EEZ) waters of Cook Inlet. The purpose was to complete consultation between CVTC and NMFS Alaska Region per the agency's government-to-government relationship regarding the management of salmon fisheries in the EEZ waters of Cook Inlet before scheduled final action at the April 2023 Council meeting to hear and better understand the CVTC's perspectives regarding tribal impacts. NMFS also shared information about the action and its potential implementation and answered questions during the consultation.

NMFS was invited by Alaska Native representatives to speak on this action at the Tikahtnu Forum Meeting on February 24, 2023, the Kenaitze/Salamatof Hunting Fishing and Gathering Commission Meeting on March 7, 2023, and the Cook Inlet Fishers Group on March 30, 2023, to listen to tribal perspectives, provide information and answer questions on the action.

On April 21, 2023, NMFS sent an announcement to Alaska Native representatives stating the agency was under a court order to implement an amendment to the Salmon FMP by May 1, 2024 to federally manage the salmon fisheries that occur in the Cook Inlet EEZ, consistent with Magnuson-Stevens Act requirements. NMFS provided a second invitation for tribal consultation and engagement opportunities on this issue. Two Alaska Native tribes responded to the invitation to consult on amendment 16. NMFS held tribal consultation on this action with the Salamatof Tribe on May 22, 2023, and with the Chickaloon Native Village (CNV) on June 20, 2023. NMFS shared information regarding Federal salmon management during the meeting but

primarily wanted to hear and better understand the Salamatof Tribe's and CNV's perspectives regarding tribal impacts. Also, on June 22, 2023, NMFS received a letter from the Ninilchik Traditional Council (NTC). NTC thanked NMFS for the invitation to consult and for engaging with tribes on the action but declined NMFS's invitation to consult based on lack of agency engagement in the past, lack of adequate time, and because of NTC's concern that the action did not incorporate tribal input in studies and impact statements related to traditional ecological knowledge.

On April 26, 2023, NMFS notified Alaska Native representatives that NMFS would hold a public hearing to receive input on an amendment to the Salmon FMP to establish Federal management for salmon fishing in the Federal waters of upper Cook Inlet. Alaska Native representatives were given another opportunity to provide verbal comments at the public hearing on May 18, 2023 or written comments by May 25, 2023 during the public comment process.

On October 18, 2023, NMFS solicited public comment—including comments from Alaska Native representatives—on the proposed rule that would implement Federal management of commercial and recreational salmon fishing in the Cook Inlet EEZ (88 FR 72314, October 19, 2023). NMFS invited comment from Alaska Native representatives on the action through December 18, 2023. Additionally, on October 20, 2023, NMFS provided a response letter to the NTC thanking them for their concerns and encouraging the NTC to reconsider engagement with NMFS on this action.

On November 16, 2023, NMFS received a response from the Cook Inlet Fishers Group asking for tribal engagement. On December 5, 2023, NMFS met with tribal representatives from the Cook Inlet Tribal Fishers Group, which included the Knik Tribal Council, CVTC, and NTC. The purpose of this meeting was to engage with interested Cook Inlet Tribes regarding Federal management of salmon fisheries in the Cook Inlet EEZ. NMFS shared information about the action and its potential implementation during the meeting but primarily wanted to hear and better understand the Cook Inlet Tribes' perspectives regarding tribal impacts. At the close of the meeting, participants agreed that a follow up tribal engagement meeting on this action would be pertinent in January 2024.

At the close of the amendment 16 public comment period on December 18, 2023, NMFS received written comments from NTC, Salamatof Tribe,

CVTC, and Kenaitze Tribe. The Salamatof Tribe requested separate government-to-government engagement while the remaining Cook Inlet tribes requested joint government-to-government consultation. On January 8, 2024, NMFS met with the Salamatof Tribe to share a status update on amendment 16 as well as hear and better understand their perspectives on the need for an indigenous subsistence fishery set-aside. On January 9, 2024, NMFS met with 11 Alaska Native representatives, including the NVC, CVTC, Seldovia Village Tribe, NTC, Knik Tribe, Native Village of Eklutna, Kenaitze Tribe, Chugach Regional Resource Commission, Ninilchik Native Association, Tyonek Native Corporation, and the Salamatof Tribe. NMFS listened to tribal concerns and perspectives regarding the new idea for an indigenous subsistence fishery set-aside and provided a status update on the amendment 16 process.

After the close of the amendment 16 public comment period, NMFS also received three written tribal comments from the Chugach Regional Resource Commission representing the Nanwalek Indian Reorganization Act Council and Port Graham Village Council, Tyonek Conservation District, and Native Village of Eklutna. The Chugach Regional Resource Commission requested tribal consultation with Nanwalek IRA Council and Port Graham Village Council. The Tyonek Conservation District expressed significant interest in participating in natural resource management decisions that could affect Cook Inlet. The Native Village of Eklutna requested to further develop traditional stewardship, through a degree of co-management with NMFS and the U.S. Fish and Wildlife Service (USFWS), of culturally important trust salmon stocks returning to traditional areas.

Many tribal members requested an indigenous subsistence fishery set-aside to be incorporated into amendment 16 and this final rule. Such a modification could not have been made to amendment 16 without publishing a new proposed rule, which was not possible given the impending court deadline for implementation of a final rule. Creating an indigenous subsistence fishery set-aside within the Cook Inlet EEZ would require further analysis and consideration by NMFS and the Council that are outside of the original scope and purpose of this action. As noted in response the *Comment 79*, FMPs are adaptive and the Council may recommend amending the Salmon FMP in the future to incorporate feedback

from tribes in upcoming consultations that NMFS has committed to honoring.

A Summary of the Nature of Tribal Concerns

Comments from Alaska Native representatives received prior to the close of the public comment period are summarized in the Comments and Responses section of this final rule. NMFS also received three written comments from Alaska Native representatives after the public comment period closed. Tribal comments received after the public comment period are included in the summary below.

Cook Inlet tribes expressed a significant interest in collaborating with NMFS on this action. The primary question received from Alaska Native representatives during tribal outreach and engagement on amendment 16 was how this action would impact tribal subsistence fishing. Based on the above tribal engagements, consultations, and public comments, the nature of tribal concerns fell into four main categories: (1) impacts to traditional lands/Federal trust responsibility; (2) indigenous subsistence fishery set-aside; (3) salmon status/fishery management; and (4) fish & habitat enhancement. The nature of tribal concerns are summarized for each of these categories below.

Impacts To Traditional Lands/Federal Trust Responsibility

All Cook Inlet tribes expressed that this action would affect their traditional ancestral territories, customary areas of use, and vital way of life and would impact environmental and cultural resources that are imperative to the health, safety, and welfare of tribal citizens. Cook Inlet tribes stated that NMFS must partner with them to fulfill the Federal trust responsibility and international obligations for tribal rights and food security, including access to traditional resources such as salmon. Cook Inlet tribes stated that Federal, territorial, and State regulations have dramatically reduced the fishing opportunities for Alaska Native tribal citizens while globally significant markets have been developed to sell Alaskan fish, which have eroded indigenous rights and have had a huge impact on Alaska Native peoples.

Indigenous Subsistence Fishery Set-Aside

Cook Inlet tribes expressed concerns that less weight was given to tribal comments relative to the commercial fishing industry and that they do not have a voice in the government process. Cook Inlet tribes asked NMFS to be

mindful of this power imbalance and that the action impacts tribal rights. Personal use, educational fishery permits, and a few (select) subsistence permits are how tribal citizens currently harvest fish in Cook Inlet. Cook Inlet tribes believe that Federal management of salmon in the Cook Inlet EEZ provides a long overdue opportunity for an indigenous subsistence fishery (e.g., tribal fishery set-aside) in the Cook Inlet EEZ, ahead of commercial and recreational needs, and would like to work with NMFS to develop an indigenous set-aside for salmon harvest that has priority over other uses.

Salmon Status/Fishery Management

One Cook Inlet tribe felt overescapement was unsustainable for the available habitat. Another tribe had significant concerns about the EEZ fishing and wanted to maintain the conservation corridor in Cook Inlet. Other tribes highlighted that there are numerous and increasing threats to Cook Inlet salmon populations that decrease salmon runs originating from Cook Inlet. Several Cook Inlet tribes support Federal management of salmon in the Cook Inlet EEZ. Tribes generally emphasized that NMFS must do more to achieve a precautionary fishery management approach based on threats to Cook Inlet salmon populations. Tribes also stated that by merely focusing on the commercial and recreational fishing that was the subject of the District Court's 2022 order, NMFS ignores subsistence needs, which are also included in the Magnuson-Stevens Act. With subsistence use representing only one tenth of one percent of Cook Inlet harvest, Cook Inlet tribes stated a subsistence fishery would not threaten commercial or recreational fisheries, have a very small effect on the salmon populations, and have a notably beneficial impact on tribal cultural perpetuation, citizen health, and wellbeing. Cook Inlet tribes requested that Federal fishery management be precautionary with TACs based on timely in-season escapements and not historical harvest averages and pre-season forecasts. Tribal recommendations included funding better escapement data collection and genetic analysis of EEZ-harvested salmon, development of a salmon database with in-season genetic data, development of test fisheries, a fishery period from July 16 to August 15, allowing only one 12-hour fishing period per week, and maintaining the current drift gillnet length of 150 fathoms (274.32 m). Lastly, tribes recommend creating a tribal fishing opportunity modeled after the Alaska

Subsistence Halibut Program and providing proxy fishing opportunities developed collectively with Tribal governments to ensure tribal elders and other tribal citizens who are physically unable to harvest fish in the Cook Inlet EEZ can access salmon.

Fish & Habitat Enhancement

All Cook Inlet tribes that commented want to work towards increasing salmon runs and have been taking actions (e.g., fish and habitat enhancement) over the past 50 years to address Alaska Native community concerns by reducing invasive species; replacing fish passage barriers in their district; restoring over 45 miles (72.42 km) of upstream salmon habitat; leading regional efforts for the prevention, early detection, and treatment of aquatic invasive plants; collecting baseline stream data; and surveying streams for inclusion in the State of Alaska Anadromous Waters Catalog for protection. Cook Inlet tribes have also performed research to advise habitat assessments and salmon restoration planning.

In summary, tribal concerns were focused on providing relief to Alaska Native salmon fishing families and communities as well as continued communication in the NMFS tribal engagement and consultation process as it relates to fishery resource access that sustains the tribal way of life. Detailed meeting summaries of the tribal concerns listed above are available on the NMFS Alaska Region website (see **ADDRESSES**).

NMFS's Position Supporting the Need To Issue the Regulation

This final rule is needed to implement Federal fisheries management of the Cook Inlet EEZ. NMFS's position is stated in the preamble to the proposed rule and this final rule, and in the comments and responses section.

Statement of the Extent to Which the Concerns of Tribal Officials Have Been Met

From the perspective of a number of Cook Inlet tribes, the primary concern was over how this fishery would impact Alaska Native subsistence fishing and, secondly, if the action would include a tribal subsistence set-aside. The Analysis prepared for this action provides information on the current subsistence fisheries in Cook Inlet and indicates that there has not been a subsistence fishery in the EEZ during the time period for which NMFS has data, though tribes have stated that they did historically fish in EEZ waters. Throughout litigation and for much of the development of amendment 16, a

tribal subsistence fishery did not come up as a management proposal. This final rule, developed in response to court decisions on a strict timeline, therefore authorizes only commercial drift gillnet and recreational fishing in the EEZ. To address tribal concerns that amendment 16 did not include an indigenous subsistence set-aside, NMFS has committed to honoring the Cook Inlet tribal consultation requests received in 2024 and welcomes further engagement and discussion.

NMFS and the Council have made significant efforts in conducting direct outreach and engagement, and for NMFS in conducting tribal consultations, with Alaska Native representatives, which include Alaska Native tribes, Alaska Native corporations, and Native organizations and communities over the last few years. NMFS made significant efforts to involve Alaska Native representatives in the development of this action. In conjunction with Council outreach, NMFS provided information to Alaska Native representatives that were interested in engaging at each step in the process and consulted with interested Alaska Native representatives, as described above.

NMFS considered all input from these consultations and engagements, consistent with E.O. 13175 and the agency's tribal consultation obligations before reaching a final decision on this action. In addition, NMFS committed to honoring the Cook Inlet tribal consultation and information requests to discuss the possibility of a tribal subsistence fishery in the Cook Inlet EEZ.

NMFS acknowledges the long-standing challenges that Alaska Native representatives have had communicating with the agency and appreciates the tribes' commitment to communicating needed improvements to the consultation process. NMFS has taken several actions over the last year, including building staff capacity and hosting listening sessions, and intends to continue to improve tribal consultation.

List of Subjects

15 CFR Part 902

Reporting and recordkeeping requirements.

50 CFR Part 600

Administrative practice and procedure, Confidential business information, Fish, Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations, Penalties,

Reporting and recordkeeping requirements, Statistics.

50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: April 18, 2024.

Samuel D. Rauch III,
Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS amends 15 CFR part 902 and 50 CFR parts 600 and 679 as follows:

TITLE 15—COMMERCE AND FOREIGN TRADE

PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB COLLECTION NUMBERS

■ 1. The authority citation for 15 CFR part 902 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

■ 2. Amend § 902.1, in the table in paragraph (b), by adding in numerical order entries for “679.114”, “679.115”, “679.117(b)(1)(xiv)”, and “679.118(f)(2)” to read as follows:

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

CFR part or section where the information collection requirement is located	Current OMB control No. (all numbers begin with 0648–)
50 CFR	
679.114	–0818
679.115	–0818
679.117(b)(1)(xiv)	–0445
679.118(f)(2)	–0818

CFR part or section where the information collection requirement is located

Current OMB control No. (all numbers begin with 0648–)

TITLE 50—WILDLIFE AND FISHERIES

PART 600—MAGNUSON-STEVENSON ACT PROVISIONS

■ 3. The authority citation for part 600 continues to read as follows:

Authority: 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

■ 4. Amend § 600.725, in the table in paragraph (v), under the heading “VII. North Pacific Fishery Management Council” by revising entry “8” to read as follows:

§ 600.725 General prohibitions.

(v) * * *

Fishery	Authorized gear types
VII. North Pacific Fishery Management Council	
8. Alaska Salmon Fishery (FMP):	
A. East Area	A. Hook and line.
B. Cook Inlet EEZ Area	B. Drift gillnet, handline, rod and reel, hook and line.

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 5. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*, 1801 *et seq.*, 3631 *et seq.*; Pub. L. 108–447; Pub. L. 111–281.

■ 6. Amend § 679.1 by revising paragraph (i)(1) to read as follows:

§ 679.1 Purpose and scope.

(i) * * *

(1) Regulations in this part govern commercial fishing for salmon by fishing vessels of the United States in the West Area and commercial and recreational fishing for salmon in the Cook Inlet EEZ Area of the Salmon Management Area.

■ 7. Amend § 679.2 by:
■ a. Adding, in alphabetical order, the definition for “Daily bag limit”;
■ b. Revising the definition of “Federally permitted vessel,”
■ c. Adding paragraph (7) to the definition of “Fishing trip”;
■ d. Adding, in alphabetical order, the definitions for “Possession limit” and “Registered Salmon Receiver”;
■ e. Revising the definition of “Salmon Management Area”; and
■ f. Adding, in alphabetical order, the definitions for “Salmon shoreside processor” and “Waters of Cook Inlet.”
The additions and revision read as follows:

§ 679.2 Definitions.

Daily bag limit means the maximum number of salmon a person may retain in any calendar day from recreational fishing in the Cook Inlet EEZ Area.

Federally permitted vessel means a vessel that is named on a Federal fisheries permit issued pursuant to § 679.4(b), a Salmon Federal Fisheries Permit issued pursuant to § 679.114(b), or a Federal crab vessel permit issued pursuant to § 680.4(k) of this chapter. Federally permitted vessels must conform to regulatory requirements for purposes of fishing restrictions in habitat conservation areas, habitat conservation zones, habitat protection areas, and the Modified Gear Trawl Zone; for purposes of anchoring prohibitions in habitat protection areas; for purposes of requirements for the BS and GOA nonpelagic trawl fishery pursuant to §§ 679.7(b)(9) and (c)(5), and 679.24(f); and for purposes of VMS requirements.

Fishing trip means:

(7) For purposes of subpart J of this part, the period beginning when a vessel

operator commences commercial fishing for any salmon species in the Cook Inlet EEZ Area and ending when the vessel operator offloads or transfers any unprocessed salmon species from that vessel.

* * * * *

Possession limit means the maximum number of unprocessed salmon a person may possess from recreational fishing in the Cook Inlet EEZ Area.

* * * * *

Registered Salmon Receiver means a person holding a Registered Salmon Receiver Permit issued by NMFS.

* * * * *

Salmon Management Area means those waters of the EEZ off Alaska (see figures 22 and 23 to part 679) under the authority of the Salmon FMP. The Salmon Management Area is divided into three areas: the East Area, the West Area, and the Cook Inlet EEZ Area:

(1) *The East Area* means the area of the EEZ in the Gulf of Alaska east of the longitude of Cape Suckling (143°53.6' W).

(2) *The West Area* means the area of the EEZ off Alaska in the Bering Sea, Chukchi Sea, Beaufort Sea, and the Gulf of Alaska west of the longitude of Cape Suckling (143°53.6' W), but excludes the Cook Inlet EEZ Area, Prince William Sound Area, and the Alaska Peninsula Area. The Prince William Sound Area and the Alaska Peninsula Area are shown in figure 23 to this part and described as:

(i) The Prince William Sound Area means the EEZ shoreward of a line that starts at 60°16.8' N and 146°15.24' W and extends southeast to 59°42.66' N and 144°36.20' W and a line that starts at 59°43.28' N and 144°31.50' W and extends northeast to 59°56.4' N and 143°53.6' W.

(ii) The Alaska Peninsula Area means the EEZ shoreward of a line at 54°22.5' N from 164°27.1' W to 163°1.2' W and a line at 162°24.05' W from 54°30.1' N to 54°27.75' N.

(3) *The Cook Inlet EEZ Area*, shown in figure 22 to this part, means the EEZ of Cook Inlet north of a line at 59°46.15' N.

* * * * *

Salmon shoreside processor means any person or vessel that receives, purchases, or arranges to purchase, and processes unprocessed salmon harvested in the Cook Inlet EEZ Area, except a Registered Salmon Receiver.

* * * * *

Waters of Cook Inlet means, for the purposes of §§ 679.28(f)(6)(x) and 679.117(b)(1)(xiv), all Federal waters and Alaska State waters north of a line

from Cape Douglas (58°51.10' N) to Point Adam (59°15.27' N).

* * * * *

■ 8. Amend § 679.3 by revising paragraph (f) to read as follows:

§ 679.3 Relation to other laws.

* * * * *

(f) *Domestic fishing for salmon.* Management of the salmon commercial troll fishery and recreational fishery in the East Area of the Salmon Management Area, defined at § 679.2, is delegated to the State of Alaska. Regulations governing the commercial drift gillnet salmon fishery and recreational salmon fishery in the Cook Inlet EEZ Area, defined at § 679.2, are set forth in subpart J of this part.

* * * * *

§ 679.7 [Amended]

■ 9. Amend § 679.7 by removing and reserving paragraph (h).

■ 10. Amend § 679.25 by:

■ a. Revising paragraph (a)(1) introductory text;

■ b. Adding paragraphs (a)(1)(vi) and (a)(2)(vi) through (viii); and

■ c. Revising paragraphs (b) introductory text and (b)(3) and (8).

The revisions and additions read as follows:

§ 679.25 Inseason adjustments.

(a) * * *

(1) *Types of adjustments.* Inseason adjustments for directed fishing for groundfish, fishing for IFQ or CDQ halibut, or fishing for Cook Inlet EEZ Area salmon issued by NMFS under this section include:

* * * * *

(vi) Adjustment of TAC for any salmon species or stock and closure or opening of a season in all or part of the Cook Inlet EEZ Area.

(2) * * *

(vi) Any inseason adjustment taken under paragraph (a)(1)(vi) of this section must be based on a determination that such adjustments are necessary to prevent:

(A) Overfishing of any species or stock of fish or shellfish;

(B) Harvest of a TAC for any salmon species or stock that, on the basis of the best available scientific information, is found by NMFS to be incorrectly specified; or

(C) Underharvest of a TAC for any salmon species or stock when catch information indicates that the TAC has not been reached, and there is not a conservation or management concern for any species or stock that would also be harvested with additional fishing effort.

(vii) The selection of the appropriate inseason management adjustments under paragraphs (a)(1)(vi) of this section must be from the following authorized management measures and must be based on a determination by the Regional Administrator that the management adjustment selected is the least restrictive necessary to achieve the purpose of the adjustment:

(A) Closure of a management area or portion thereof, or gear type, or season to all salmon fishing; or

(B) Reopening of a management area or season to achieve the TAC for any of the salmon species or stock without exceeding the TAC of any other salmon species or stock.

(viii) The adjustment of a TAC for any salmon species or stock under paragraph (a)(1)(vi) of this section must be based upon a determination by the Regional Administrator that the adjustment is based upon the best scientific information available concerning the biological stock status of the species or stock in question and that the currently specified TAC is incorrect. Any adjustment to a TAC must be reasonably related to the change in biological stock status.

(b) *Data.* Information relevant to one or more of the following factors may be considered in making the determinations required under paragraphs (a)(2)(i), (ii), (vi) and (vii) of this section:

* * * * *

(3) Relative distribution and abundance of stocks of groundfish species, salmon species or stocks, and prohibited species within all or part of a statistical area;

* * * * *

(8) Any other factor relevant to the conservation and management of groundfish species, salmon species or stocks, or any incidentally caught species that are designated as prohibited species or for which a PSC limit has been specified.

* * * * *

■ 11. Amend § 679.28 by adding paragraph (f)(6)(x) to read as follows:

§ 679.28 Equipment and operational requirements

* * * * *

(f) * * *

(6) * * *

(x) You operate a vessel named, or required to be named, on an SFFP issued under § 679.114 in the waters of Cook Inlet during a calendar day when directed fishing for salmon using drift gillnet gear is open in the Cook Inlet

EEZ Area and have drift gillnet gear on board or deployed.
* * * * *

■ 12. Add subpart J, consisting of §§ 679.110 through 679.119, to read as follows:

Subpart J—Salmon Fishery Management

- Sec.
- 679.110 Applicability.
- 679.111 through 679.113 [Reserved]
- 679.114 Permits.

- 679.115 Recordkeeping and reporting.
- 679.116 [Reserved]
- 679.117 Salmon fisheries prohibitions.
- 679.118 Management measures.
- 679.119 Recreational salmon fisheries.

Subpart J—Salmon Fishery Management

§ 679.110 Applicability.

This subpart contains regulations governing the commercial and recreational harvest of salmon in the Salmon Management Area (See § 679.2).

§ 679.111 through 679.113 [Reserved]

§ 679.114 Permits.

(a) *Requirements*—(1) *What permits are available?* The following table describes the permits available under this subpart that authorize the retention, processing, and receipt of salmon in the Cook Inlet EEZ Area, respectively, along with date of effectiveness for each permit and reference paragraphs for further information:

If permit type is:	Permit is in effect from issue date through the end of:	For more information, see . . .
(i) <i>Salmon Federal Fisheries Permit (SFFP)</i>	3 years or until expiration date shown on permit.	Paragraph (b) of this section.
(ii) <i>Salmon Federal Processor Permit (SFPP)</i> ...	Until expiration date shown on permit	Paragraph (c) of this section.
(iii) <i>Registered Salmon Receiver Permit (RSRP)</i>	1 year	Paragraph (d) of this section.

(2) *Permit and logbook required by participant and fishery.* For the various types of permits issued pursuant to this subpart, refer to § 679.115 for recordkeeping and reporting requirements.

(3) *Permit application.* (i) A person may obtain an application for a new permit, or for renewal or revision of an existing permit, from NMFS for any of the permits under this section and must submit forms to NMFS as instructed in application instructions. All permit applications may be completed online and printed from the NMFS Alaska Region website (See § 679.2);

(ii) Upon receipt of an incomplete or improperly completed permit application, NMFS will notify the applicant of the deficiency in the permit application. If the applicant fails to correct the deficiency, the permit will not be issued. NMFS will not approve a permit application that is untimely or incomplete;

(iii) The owner or authorized representative of a vessel, owner or authorized representative of a processor, and Registered Salmon Receiver must obtain a separate permit for each vessel, entity, operation, or facility, as appropriate to each Federal permit in this section;

(iv) All permits are issued free of charge;

(v) NMFS will consider objective written evidence in determining whether an application is timely. The responsibility remains with the sender to provide objective written evidence of when an application to obtain, amend, or to surrender a permit was received by NMFS (e.g., certified mail or other method that provides written evidence that NMFS Alaska Region received it); and

(vi) For applications delivered by hand delivery or carrier, the date the application was received by NMFS is the date NMFS staff signs for it upon receipt. If the application is submitted by fax or mail, the receiving date of the application is the date stamped received by NMFS.

(4) *Disclosure.* NMFS will maintain a list of permit holders that may be disclosed for public inspection.

(5) *Sanctions and denials.* Procedures governing permit sanctions and permit denials for enforcement purposes are found at subpart D of 15 CFR part 904. Such procedures are not required for any other purposes under this part.

(6) *Harvesting privilege.* Permits issued pursuant to this subpart are neither a right to the resource nor any interest that is subject to the “Takings Clause” provision of the Fifth Amendment to the U.S. Constitution. Rather, such permits represent only a harvesting privilege that may be revoked or amended subject to the requirements of the Magnuson-Stevens Act and other applicable law.

(7) *Permit surrender.* (i) NMFS will recognize the voluntary surrender of a permit issued under this subpart, if a permit is authorized to be surrendered and if an application is submitted by the permit holder or authorized representative and approved by NMFS; and

(ii) For surrender of an SFFP and SFPP, refer to paragraphs (b)(3)(ii) and (c)(3)(ii) of this section, respectively.

(b) *Salmon Federal Fisheries Permit (SFFP)*—(1) *Requirements.* (i) No vessel of the United States may be used to commercially fish for salmon in the Cook Inlet EEZ Area unless the owner or authorized representative first obtains an SFFP for the vessel issued under this

part. Only persons who are U.S. citizens are authorized to obtain an SFFP; and

(ii) Each vessel used to commercially fish for salmon within the Cook Inlet EEZ Area must have a legible copy of a valid SFFP on board at all times. The vessel operator must present the valid SFFP for inspection upon the request of any authorized officer.

(2) *Vessel operation.* An SFFP authorizes a vessel to conduct operations in the Cook Inlet EEZ Area.

(3) *Duration*—(i) *Length of permit effectiveness.* NMFS issues SFFPs on a 3-year cycle, and an SFFP is in effect from the effective date through the expiration date, as indicated on the SFFP, unless the SFFP is revoked, suspended, or modified under § 600.735 or § 600.740 of this chapter, or surrendered in accordance with paragraph (a)(7) of this section.

(ii) *Surrendered permit.* (A) An SFFP may be voluntarily surrendered in accordance with paragraph (a)(7) of this section. NMFS will not reissue a surrendered SFFP to the owner or authorized representative of a vessel named on an SFFP until after the expiration date of the surrendered SFFP as initially issued.

(B) An owner or authorized representative who applied for and received an SFFP must notify NMFS of the intention to surrender the SFFP by submitting an SFFP application found at the NMFS Alaska Region website and indicating on the application that surrender of the SFFP is requested. Upon receipt and approval of an SFFP surrender application, NMFS will withdraw the SFFP from active status.

(4) *Amended permit.* An owner or authorized representative who applied for and received an SFFP must notify NMFS of any change in the permit

information by submitting an SFPP application found at the NMFS Alaska Region website. The owner or authorized representative must submit the application form as instructed on the form. Except as provided under paragraph (b)(3)(ii)(B) of this section, upon receipt and approval of an application form for permit amendment, NMFS will issue an amended SFPP.

(5) *SFPP application.* To obtain, amend, renew, or surrender an SFPP, the vessel owner or authorized representative must complete an SFPP application form per the instructions from the NMFS Alaska Region website. The owner or authorized representative of the vessel must sign and date the application form, certifying that all information is true, correct, and complete to the best of their knowledge and belief. If the application form is completed by an authorized representative, proof of authorization must accompany the application form.

(6) *Issuance.* (i) Except as provided in subpart D of 15 CFR part 904, upon receipt and approval of a properly completed permit application, NMFS will issue an SFPP required by paragraph (b) of this section.

(ii) NMFS will send an SFPP with the appropriate logbooks to the owner or authorized representative, as provided under § 679.115.

(7) *Transfer.* An SFPP issued under paragraph (b) of this section is not transferable or assignable and is valid only for the vessel for which it is issued.

(c) *Salmon Federal Processor Permit (SFPP)—(1) Requirements.* No salmon shoreside processor, as defined at § 679.2, may process salmon harvested in the Cook Inlet EEZ Area, unless the owner or authorized representative first obtains an SFPP issued under this subpart. A salmon shoreside processor may not be operated in a category other than as specified on the SFPP. A legible copy of a valid SFPP must be on site at the salmon shoreside processor at all times and must be presented for inspection upon the request of any authorized officer.

(2) *SFPP application.* To obtain, amend, renew, or surrender an SFPP, the owner or authorized representative of the salmon shoreside processor must complete an SFPP application form per the instructions from the NMFS Alaska Region website. The owner or authorized representative of the salmon shoreside processor must sign and date the application form, certifying that all information is true, correct, and complete to the best of their knowledge and belief. If the application form is completed by an authorized

representative, proof of authorization must accompany the application form.

(3) *Issuance.* Except as provided in subpart D of 15 CFR part 904, upon receipt and approval of a properly completed permit application, NMFS will issue an SFPP required by paragraph (c) of this section.

(4) *Duration—(i) Length of effectiveness.* An SFPP is in effect from the effective date through the date of permit expiration, unless it is revoked, suspended, or modified under § 600.735 or § 600.740 of this chapter, or surrendered in accordance with paragraph (a)(7) of this section.

(ii) *Surrendered permit.* (A) An SFPP may be voluntarily surrendered in accordance with paragraph (a)(7) of this section. NMFS may reissue an SFPP to the person to whom the SFPP was initially issued in the same fishing year in which it was surrendered.

(B) An owner or authorized representative who applied for and received an SFPP must notify NMFS of the intention to surrender the SFPP by submitting an SFPP application found at the NMFS Alaska Region website and indicating on the application form that surrender of the SFPP is requested. Upon receipt and approval of an SFPP surrender application, NMFS will withdraw the SFPP from active status.

(5) *Amended permit.* An owner or authorized representative who applied for and received an SFPP must notify NMFS of any change in the permit information by submitting an SFPP application found at the NMFS Alaska Region website. The owner or authorized representative must submit the application form as instructed on the form. Upon receipt and approval of an SFPP amendment application, NMFS will issue an amended SFPP.

(6) *Transfer.* An SFPP issued under this paragraph (c) is not transferable or assignable and is valid only for the salmon shoreside processor for which it is issued.

(d) *Registered Salmon Receiver Permit (RSRP)—(1) Requirements.* An RSRP authorizes the person identified on the permit to receive a landing of salmon from an SFPP holder at any time during the fishing year for which it is issued until the RSRP expires, as indicated on the RSRP, or is revoked, suspended, or modified under § 600.735 or § 600.740 of this chapter, or surrendered in accordance with paragraph (a)(7) of this section. An RSRP is required for any person, other than an SFPP holder, to receive salmon commercially harvested in the Cook Inlet EEZ Area from the person(s) who harvested the fish. A legible copy of the RSRP must be present at the time and location of a

landing. The RSRP holder or their authorized representative must make the RSRP available for inspection upon the request of any authorized officer.

(2) *Application.* To obtain, amend, renew, or surrender an RSRP, the owner or authorized representative must complete an RSRP application form per the instructions from the NMFS Alaska Region website. The owner or authorized representative of a Registered Salmon Receiver must sign and date the application form, certifying that all information is true, correct, and complete to the best of their knowledge and belief. If the application form is completed by an authorized representative, proof of authorization must accompany the application form.

(3) *Issuance.* Except as provided in subpart D of 15 CFR part 904, upon receipt and approval of a properly completed permit application, NMFS will issue an RSRP required by paragraph (d) of this section.

(4) *Duration.* An RSRP is issued on an annual cycle defined as May through the end of April of the next calendar year, to persons who submit a Registered Salmon Receiver Permit application that NMFS approves.

(i) An RSRP is in effect from the first day of May in the year for which it is issued or from the date of issuance, whichever is later, through the end of the current annual cycle, unless it is revoked, suspended, or modified under § 600.735 or § 600.740 of this chapter, or surrendered in accordance with paragraph (a)(7) of this section.

(ii) An RSRP may be voluntarily surrendered in accordance with paragraph (a)(7) of this section. An RSRP may be reissued to the permit holder of record in the same fishing year in which it was surrendered.

(5) *Amended permit.* An owner or authorized representative who applied for and received an RSRP must notify NMFS of any change in the permit information by submitting an RSRP application found at the NMFS Alaska Region website. The owner or authorized representative must submit the application form as instructed on the form. Upon receipt and approval of an RSRP amendment application, NMFS will issue an amended RSRP.

§ 679.115 Recordkeeping and reporting.

(a) *General recordkeeping and reporting (R&R) requirement.* R&R requirements include, but are not limited to, paper and electronic documentation, logbooks, forms, reports, and receipts.

(1) *Salmon logbooks and forms.* (i) The Regional Administrator will prescribe and provide logbooks required

under this section. All forms required under this section are available from the NMFS Alaska Region website or may be requested by calling the Sustainable Fisheries Division at 907-586-7228. These forms may be completed online, or submitted according to the instructions shown on the form.

(ii) The operator must use the current edition of the logbooks and current format of the forms, unless they obtain prior written approval from NMFS to use logbooks from the previous year. Upon approval from NMFS, electronic versions of the forms may be used.

(iii) Commercial salmon harvest that occurred in the Cook Inlet EEZ Area must be recorded in eLandings by an SFPP or RSRP holder. See paragraph (b) of this section for more information.

(2) *Responsibility.* (i) The operator of a vessel, the manager of a salmon shoreside processor (hereafter referred to as the manager), and a Registered Salmon Receiver are responsible for complying with applicable R&R requirements in this section.

(ii) The owner of a vessel, the owner of a salmon shoreside processor, and the owner of a Registered Salmon Receiver are responsible for ensuring their employees and agents comply with applicable R&R requirements in this section.

(3) *Fish to be recorded and reported.* The operator of a vessel or manager must record and report the following information (see paragraphs (a)(3)(i) through (iv) of this section) for all salmon, groundfish (see table 2a to this part), halibut and crab, forage fish (see table 2c to this part), and sculpins (see table 2c to this part). The operator of a vessel or manager may record and report the following information (see paragraphs (a)(3)(i) through (iv) of this section) for other species (see table 2d to this part):

(i) Harvest information from vessels;

(ii) Receipt information from vessels, buying stations, and tender vessels, including fish received from vessels not required to have an SFPP or FFP, and fish received under contract for handling or processing for another processor;

(iii) Discard or disposition information, including fish reported but not delivered to the operator or manager (e.g., fish used on board a vessel, retained for personal use, discarded at sea), when receiving catch from a vessel, buying station, or tender vessel; and

(iv) Transfer information, including fish transferred off the vessel or out of the facility.

(4) *Inspection and retention of records—(i) Inspection of records.* The operator of a vessel, a manager, and a

Registered Salmon Receiver must make available for inspection R&R documentation they are required to retain under this section upon the request of an authorized officer; and

(ii) *Retention of records.* The operator of a vessel, a manager, and a Registered Salmon Receiver must retain the R&R documentation they are required to make under this section as follows:

(A) Retain these records on board a vessel, on site at the salmon shoreside processor or stationary floating processor (see § 679.2), or at the Registered Salmon Receiver's place of business, as applicable, until the end of the fishing year during which the records were made and for as long thereafter as fish or fish products recorded in the R&R documentation are retained on site.

(B) Retain these records for 3 years after the end of the fishing year during which the records were made.

(5) *Maintenance of records.* The operator of a vessel, a manager, and a Registered Salmon Receiver must maintain all records described in this section in English and in a legible, timely, and accurate manner, based on Alaska local time (A.l.t.); if handwritten, in indelible ink; if computer-generated, as a readable file or a legible printed paper copy.

(6) *Custom processing.* The manager or Registered Salmon Receiver must record products that result from custom processing for another person in eLandings consistently throughout a fishing year using one of the following two methods:

(i) For combined records, record landings, discards or dispositions, and products of custom-processed salmon routinely in eLandings using processor name, any applicable RSRP number or SFPP number, and ADF&G processor code; or

(ii) For separate records, record landings, discards or dispositions, and products of custom-processed salmon in eLandings identified by the name, SFPP number or RSRP number, and ADF&G processor code of the associated business entity.

(7) *Representative.* The operator of a vessel, manager, and RSRP holder may identify one contact person to complete the logbook and forms and to respond to inquiries from NMFS.

(b) *Interagency Electronic Reporting System (IERS) and eLandings—(1) Responsibility.* (i) An eLandings User must obtain at his or her own expense hardware, software, and internet connectivity to support internet submissions of commercial fishery landings for which participants report to NMFS: landing data, production data,

and discard or disposition data. The User must enter this information via the internet by logging on to the eLandings system at <https://elandings.alaska.gov> or other NMFS-approved software or by using the desktop client software.

(ii) If the User is unable to submit commercial fishery landings of Cook Inlet EEZ salmon due to hardware, software, or internet failure for a period longer than the required reporting time, the User must contact NMFS Sustainable Fisheries Division at 907-586-7228 for instructions. When the hardware, software, or internet is restored, the User must enter this same information into eLandings or other NMFS-approved software.

(2) *eLandings processor registration.*

(i) Before a User can use the eLandings system to report landings, production, discard, or disposition data, he or she must request authorization to use the system, reserve a unique UserID, and obtain a password by using the internet to complete the eLandings processor registration at <https://elandings.alaska.gov/elandings/Register>;

(ii) Upon registration acceptance, the User must print, sign, and mail or fax the User Agreement Form to NMFS at the address or fax number shown on the form. Confirmation is emailed to indicate that the User is registered, authorized to use eLandings, and that the UserID and User's account are enabled; and

(iii) The User's signature on the registration form means that the User agrees to the following terms:

(A) To use eLandings access privileges only for submitting legitimate fishery landing reports;

(B) To safeguard the UserID and password to prevent their use by unauthorized persons; and

(C) To ensure that the User is authorized to submit landing reports for the processor permit number(s) listed.

(3) *Information required for eLandings processor registration form.* The User must enter the following information (see paragraphs (b)(3)(i) through (ix) of this section) to obtain operation registration and UserID registration:

(i) Select the operation type from the dropdown list;

(ii) Enter a name that will refer to the specific operation. For example, if the plant is in Kodiak and the company is East Pacific Seafoods, the operation name might read "East Pacific Seafoods-Kodiak;"

(iii) Enter ADF&G processor code;

(iv) Enter all the Federal permits associated with the operation;

(A) If a processor for Cook Inlet EEZ salmon, enter the SFPP number; and

(B) If a Registered Salmon Receiver, enter the RSRP number;

(v) Enter the home port code (see tables 14a, 14b, and 14c to this part) for the operation;

(vi) If a tender operation, the operator must enter the ADF&G vessel identification number of the vessel;

(vii) If a buying station or Registered Salmon Receiver operation is a vehicle, enter vehicle license number and the state of license issuance;

(viii) If a buying station, tender vessel, or custom processor, enter the following information to identify the associated processor where the processing will take place: operation type, ADF&G processor code, and applicable SFPP number, and RSRP number; and

(ix) Each operation requires a primary User. Enter the following information for the primary User for the new operation: create and enter a UserID, initial password, company name, User name (name of the person who will use the UserID), city and state where the operation is located, business telephone number, business fax number, business email address, security question, and security answer.

(4) *Information entered automatically for eLandings landing report.* eLandings autofills the following fields from processor registration records (see paragraph (b)(2) of this section): UserID, processor company name, business telephone number, email address, port of landing, operation type (for catcher/processors, motherships, or stationary floating processors), ADF&G processor code, and Federal permit number. The User must review the autofilled cells to ensure that they are accurate for the landing that is taking place. eLandings assigns a unique landing report number and an ADF&G electronic fish ticket number upon completion of data entry.

(5) *Registered Salmon Receiver landing report.* The manager and a Registered Salmon Receiver that receives salmon from a vessel issued an SFPP under § 679.114 and that is required to have an SFPP or RSRP under § 679.114(c) or (d) must use eLandings or other NMFS-approved software to submit a daily landing report during the fishing year to report processor identification information and the following information under paragraphs (b)(5)(i)(A) through (C) of this section:

(i) Information entered for each salmon delivery to a salmon shoreside processor or Registered Salmon Receiver. The User for a shoreside

processor, stationary floating processor, or Registered Salmon Receiver must enter the information specified at (b)(5)(i)(A) through (C) of this section for each salmon delivery provided by the operator of a vessel, the operator or manager of an associated buying station or tender vessel, and from processors for reprocessing or rehandling product into eLandings or other NMFS-approved software:

(A) *Delivery information.* The User must:

(1) For crew size, enter the number of licensed crew aboard the vessel, including the operator;

(2) Enter the management program name in which harvest occurred (see paragraph (a)(1)(iii) of this section);

(3) Enter the ADF&G salmon statistical area of harvest;

(4) For date of landing, enter date (mm/dd/yyyy) that the delivery was completed;

(5) Indicate (YES or NO) whether delivery is from a buying station or tender vessel;

(6) If the delivery is received from a buying station, indicate the name of the buying station;

(7) If the delivery is received from a tender vessel, enter the ADF&G vessel registration number;

(8) If delivery is received from a vessel, indicate the ADF&G vessel registration number of the vessel; and

(9) Mark whether the vessel logsheet has been received.

(B) *Catch information.* The User must record the number and landed scale weight in pounds of salmon, including any applicable weight modifier such as delivery condition code, and disposition code of fish by species.

(C) *Discard or disposition information.* (1) The User must record discard or disposition of fish: that occurred on and was reported by a vessel; that occurred on and was reported by a salmon shoreside processor or Registered Salmon Receiver; and that occurred prior to, during, and/or after production at the salmon shoreside processor. (2) The User for a salmon shoreside processor or Registered Salmon Receiver must submit a landing report containing the information described in paragraph (b)(5)(i) of this section for each salmon delivery from a specific vessel by 1200 hours, A.l.t., of the day following completion of the delivery. If the landed scale weight required in paragraph (b)(5)(i)(B) of this section is not

available by this deadline, the User must transmit an estimated weight and count for each species by 1200 hours, A.l.t., of the day following completion of the delivery, and must submit a revised landing report with the landed scale weight for each species by 1200 hours, A.l.t., of the third day following completion of the delivery.

(3) By using eLandings, the User for a salmon shoreside processor or a Registered Salmon Receiver and the operator of the vessel providing information to the User for the salmon shoreside processor or Registered Salmon Receiver accept the responsibility of and acknowledge compliance with § 679.117(b)(5).

(ii) [Reserved]

(c) *Logbooks—(1) Requirements.* (i) All Cook Inlet EEZ Area logbook pages must be sequentially numbered.

(ii) Except as described in paragraph (c)(1)(iii) or (iv) of this section, no person may alter or change any entry or record in a logbook;

(iii) An inaccurate or incorrect entry or record in printed data must be corrected by lining out the original and inserting the correction, provided that the original entry or record remains legible. All corrections must be made in ink; and

(iv) If after an electronic logsheet is signed, an error is found in the data, the operator must make any necessary changes to the data, sign the new logsheet, and export the revised file to NMFS. The operator must retain both the original and revised logsheet reports.

(2) *Logsheet distribution and submittal.* The operator of a vessel must distribute and submit accurate copies of logsheets to the salmon shoreside processor or Registered Salmon Receiver and to NOAA Fisheries Office of Law Enforcement Alaska Region according to the logsheet instructions.

(3) *Salmon drift gillnet vessel daily fishing log.* The operator of a vessel that is required to have an SFPP under § 679.114(b), and that is using drift gillnet gear to harvest salmon in the Cook Inlet EEZ Area, must maintain a salmon drift gillnet vessel daily fishing log.

(4) *Reporting time limits.* The operator of a vessel using drift gillnet gear must record in the daily fishing log the information from the following table for each set within the specified time limit:

REPORTING TIME LIMITS, CATCHER VESSEL DRIFT GILLNET GEAR

Required information	Time limit for recording
(i) SFFP number, set number, date and time gear set, date and time gear hauled, beginning and end positions of set, length of net deployed, total number of salmon, and estimated hail weight of groundfish for each set.	Within 2 hours after completion of gear retrieval.
(ii) Discard and disposition information	Prior to landing.
(iii) Submit an accurate copy of the groundfish discards reported on the daily fishing log to shoreside processor or Registered Salmon Receiver receiving catch.	At the time of catch delivery.
(iv) All other required information	At the time of catch delivery.
(v) Operator sign the completed logsheets	At the time of catch delivery.

§ 679.116 [Reserved]

§ 679.117 Salmon fisheries prohibitions.

In addition to the general prohibitions specified in § 600.725 of this chapter and § 679.7, it is unlawful for any person to do any of the following:

(a) *The East Area and the West Area—*
(1) *East Area.* Engage in commercial fishing for salmon using any gear except troll gear, defined at § 679.2, in the East Area of the Salmon Management Area, defined at § 679.2 and figure 23 to this part.

(2) *West Area.* Engage in commercial fishing for salmon in the West Area of the Salmon Management Area, defined at § 679.2 and figure 23 to this part.

(b) *Cook Inlet EEZ Area—*(1) *Commercial fishery participants.* (i) Engage in commercial fishing for salmon in the Cook Inlet EEZ Area of the Salmon Management Area, defined at § 679.2 and figure 22 to this part, with a vessel of the United States that does not have on board a legible copy of a valid SFFP issued to the vessel under § 679.114;

(ii) Engage in commercial fishing for salmon using any gear except drift gillnet gear, described at § 679.118, in the Cook Inlet EEZ Area;

(iii) Have on board, retrieve, or deploy any gear, except a drift gillnet legally configured for the Cook Inlet EEZ Area commercial salmon fishery while commercial fishing for salmon in the Cook Inlet EEZ Area;

(iv) Deploy more than one drift gillnet while commercial fishing for salmon in the Cook Inlet EEZ Area;

(v) Deploy drift gillnet gear within, or allow any portion of drift gillnet gear to enter, Alaska State waters on the same calendar day that drift gillnet gear is also deployed in the Cook Inlet EEZ Area while commercial fishing for salmon in the Cook Inlet EEZ Area;

(vi) Deploy drift gillnet gear in excess of the allowable configuration for total length and mesh size specified at § 679.118(f) while commercial fishing for salmon in the Cook Inlet EEZ Area;

(vii) Use a vessel named, or required to be named, on an SFFP to fish for salmon in the Cook Inlet EEZ Area if

that vessel fishes for salmon in Alaska State waters on the same calendar day;

(viii) Possess salmon, harvested in Alaska State waters, on board a vessel commercial fishing for salmon in the Cook Inlet EEZ Area;

(ix) Have salmon on board a vessel at the time a fishing trip commences in the Cook Inlet EEZ Area;

(x) Conduct recreational fishing for salmon, or have recreational or subsistence salmon on board, while commercial fishing for salmon in the Cook Inlet EEZ Area;

(xi) Use or employ aircraft (manned or unmanned) to locate salmon or to direct commercial fishing while commercial fishing for salmon in the Cook Inlet EEZ Area 1 hour before, during, and 1 hour after a commercial salmon fishing period;

(xii) Land salmon harvested in Alaska State waters concurrently with salmon harvested commercially in the Cook Inlet EEZ Area;

(xiii) Land or transfer salmon harvested while commercial fishing for salmon in the Cook Inlet EEZ Area, within the EEZ off Alaska;

(xiv) Operate a vessel named, or required to be named, on an SFFP in the waters of Cook Inlet without an operable VMS as required in § 679.28(f).

(xv) Discard any salmon harvested while commercial fishing for salmon in the Cook Inlet EEZ Area.

(xvi) Engage in commercial fishing for salmon in the Cook Inlet EEZ Area contrary to notification of inseason action, closure, or adjustment issued under §§ 679.25 and 679.118.

(2) *Recreational fishery participants.*

(i) Engage in recreational fishing for salmon using any gear except for handline, rod and reel, or hook and line gear, defined at § 600.10, in the Cook Inlet EEZ Area of the Salmon Management Area, defined at § 679.2 and figure 22 to this part;

(ii) Use more than a single line, with more than two hooks attached, per angler in the Cook Inlet EEZ Area;

(iii) No person shall possess on board a vessel, including charter vessels and pleasure craft used for fishing, salmon

retained in the Cook Inlet EEZ Area that have been filleted, mutilated, or otherwise disfigured in any manner, except that each salmon may be cut into no more than two pieces with a patch of skin on each piece, naturally attached. One piece from one salmon on board may be consumed.

(iv) Exceed the daily bag limits and possession limits established under § 679.119.

(v) Engage in recreational fishing for salmon in the Cook Inlet EEZ Area contrary to notification of inseason action, closure, or adjustment issued under § 679.118.

(3) *Processors and Registered Salmon Receivers.* (i) Receive, purchase or arrange for purchase, discard, or process salmon harvested in the Cook Inlet EEZ Area without having on site a legible copy of a valid SFFP or valid RSRP issued under § 679.114;

(ii) Process or receive salmon harvested in the Cook Inlet EEZ Area without submitting a timely and complete landing report as required under § 679.115;

(iii) Process salmon harvested in the Cook Inlet EEZ Area in the EEZ off Alaska; and

(iv) Receive or transport salmon caught in the Cook Inlet EEZ Area without an SFFP or RSRP issued under § 679.114.

(4) *Recordkeeping and reporting.* (i) Fail to comply with or fail to ensure compliance with requirements in § 679.114 or § 679.115.

(ii) Alter or forge any permit or document issued under § 679.114 or § 679.115;

(iii) Fail to submit or submit inaccurate information on any report, application, or statement required under this part; and

(iv) Intentionally submit false information on any report, application, or statement required under this part.

(5) *General.* Fail to comply with any other requirement or restriction specified in this part or violate any provision under this part.

§ 679.118 Management measures.

This section applies to vessels engaged in commercial fishing and recreational fishing for salmon in the Cook Inlet EEZ Area.

(a) *Harvest limits*—(1) *TAC*. NMFS, after consultation with the Council, will specify the annual TAC amounts for commercial fishing for each salmon stock or species after accounting for projected recreational fishing removals.

(2) *Annual TAC determination*. The annual determinations of TAC for each salmon species or stock may be based on a review of the following:

(i) Resource assessment documents prepared regularly for the Council that provide information on historical catch trends; updated estimates of the MSY of the salmon stocks or stock complexes; assessments of the stock condition of each salmon stock or stock complex; SSC recommendations on reference points established for salmon stocks; management uncertainty; assessments of the multispecies and ecosystem impacts of harvesting the salmon stocks at current levels, given the assessed condition of stocks, including consideration of rebuilding depressed stocks; and alternative harvesting strategies and related effects on the salmon species;

(ii) Social and economic considerations that are consistent with Salmon FMP goals for the Cook Inlet EEZ Area, including the need to promote efficiency in the utilization of fishery resources, including minimizing costs; the desire to conserve, protect, and rebuild depleted salmon stocks; the importance of a salmon fishery to harvesters, processors, local communities, and other salmon users in Cook Inlet; and the need to promote utilization of certain species.

(b) *Annual specifications*—(1) *Proposed specifications*. (i) As soon as practicable after consultation with the Council, NMFS will publish proposed specifications for the salmon fishery in the Cook Inlet EEZ Area; and

(ii) NMFS will accept public comment on the proposed specifications established by this section for a period specified in the notice of proposed specifications published in the **Federal Register**.

(2) *Final specifications*. NMFS will consider comments received on the proposed specifications and will publish a notice of final specifications in the **Federal Register** unless NMFS determines that the final specifications would not be a logical outgrowth of the notice of proposed specifications. If the final specifications would not be a logical outgrowth of the notice of

proposed specifications, NMFS will either:

(i) Publish a revised notice of proposed specifications in the **Federal Register** for public comment, and after considering comments received on the revised proposed specifications, publish a notice of final specifications in the **Federal Register**; or

(ii) Publish a notice of final specifications in the **Federal Register** without an additional opportunity for public comment based on a finding that good cause pursuant to the Administrative Procedure Act justifies waiver of the requirement for a revised notice of proposed specifications and opportunity for public comment thereon.

(c) *Management authority*—(1) *Fishery closures*. (i) For commercial fishing, if NMFS determines that any salmon TAC for commercial fishing as specified under paragraph (b) of this section has been or may be reached for any salmon species or stock, NMFS will publish notification in the **Federal Register** prohibiting commercial fishing for salmon in the Cook Inlet EEZ Area.

(ii) For recreational fishing, if NMFS determines that any salmon ABC as specified under paragraph (b) of this section has been or may be reached, NMFS will publish notification in the **Federal Register** prohibiting retention of that salmon species when recreational fishing in the Cook Inlet EEZ Area and may also prohibit recreational fishing for one or more salmon species in the Cook Inlet EEZ Area. The Regional Administrator maintains the authority to open or close the Cook Inlet EEZ Area to recreational fishing for one or more salmon species if they deem it appropriate for conservation or other management purposes. Factors such as the ABC, anticipated harvest rates, expected mortality, and the number of participants will be considered in making any such determination.

(d) *Commercial Fishery maximum retainable amounts (MRA)*—(1) *Proportion of basis species*. The MRA of an incidental catch species is calculated as a proportion of the basis species retained on board the vessel using the retainable percentages in table 10 to this part for the GOA species categories.

(2) *Calculation*. (i) To calculate the MRA for a specific incidental catch species, an individual retainable amount must be calculated with respect to each basis species that is retained on board that vessel.

(ii) To obtain these individual retainable amounts, multiply the appropriate retainable percentage for the incidental catch species/basis species combination, set forth in table 10 to this

part for the GOA species categories, by the amount of the relevant basis species on board, in round-weight equivalents.

(iii) The MRA for that specific incidental catch species is the sum of the individual retainable amounts for each basis species.

(e) *Seasons*—(1) *Fishing season*. Directed fishing for salmon using drift gillnet gear in the Cook Inlet EEZ Area may be conducted from 0700 hours, A.l.t., from the third Monday in June or June 19, whichever is later, through 1900 hours, A.l.t., August 15.

(2) *Fishing periods*. Notwithstanding other provisions of this part, fishing for salmon with drift gillnet gear in the Cook Inlet EEZ Area is authorized during the fishing season only from 0700 hours, A.l.t., until 1900 hours, A.l.t., Mondays and from 0700 hours, A.l.t., until 1900 hours, A.l.t., Thursdays from the third Monday in June or June 19, whichever is later, until July 15, and from August 1 until August 15. From July 16 until July 31, fishing for salmon with drift gillnet gear in the Cook Inlet EEZ Area is authorized during the fishing season only from 0700 hours, A.l.t., until 1900 hours, A.l.t., Thursdays. Fishing for salmon using drift gillnet gear at times other than during the specified fishing periods is not authorized.

(f) *Legal gear*—(1) *Size*. Drift gillnet gear must be no longer than 200 fathoms (1.1 kilometer) in length, 45 meshes deep, and have a mesh size of no greater than 6 inches (15.24 cm).

(2) *Marking*. Drift gillnet gear must be marked at both ends with buoys that legibly display the vessel's SFFP number.

(3) *Floating*. The float line and floats of gillnets must be floating on the surface of the water while the net is fishing, unless natural conditions cause the net to temporarily sink. Staking or otherwise fixing a drift gillnet to the seafloor is not authorized.

(4) *Measurement*. For purposes of paragraph (f)(1) of this section, nets must be measured, either wet or dry, by determining the maximum or minimum distance between the first and last hanging of the net when the net is fully extended with traction applied at one end only.

§ 679.119 Recreational salmon fisheries.

(a) *Daily bag limits and possession limits*. For each person recreational fishing for salmon in the Cook Inlet EEZ Area, the following daily bag and possession limits apply:

(1) *Chinook salmon*. From April 1 to August 31, the daily bag limit is one Chinook salmon of any size and the possession limit is one daily bag limit

(one Chinook salmon). From September 1 to March 31, the daily bag limit is two Chinook salmon of any size and the possession limit is one daily bag limit (two Chinook salmon).

(2) *Coho salmon, sockeye salmon, pink salmon, and chum salmon.* For coho salmon, sockeye salmon, pink salmon, and chum salmon, the daily bag limit is a total of six fish combined, of any size, of which a maximum of three may be coho salmon. The possession limit for coho salmon, sockeye salmon, pink salmon, and chum salmon is one daily bag limit (six fish total).

(3) *Combination of bag/possession limits.* A person who fishes for or

possesses salmon in or from the Cook Inlet EEZ Area, specified in paragraph (a) of this section, may not combine such bag or possession limits with any bag or possession limit applicable to Alaska State waters.

(4) *Responsibility for bag/possession limits.* The operator of a vessel that fishes for or possesses salmon in or from the Cook Inlet EEZ Area is responsible for the cumulative bag or possession limit specified in paragraph (a) of this section that apply to that vessel, based on the number of persons aboard.

(5) *Transfer at sea.* A person who fishes for or possesses salmon in or from the Cook Inlet EEZ Area under a bag or

possession limit specified in paragraph (a) of this section may not transfer a salmon at sea from a fishing vessel to any other vessel, and no person may receive at sea such salmon.

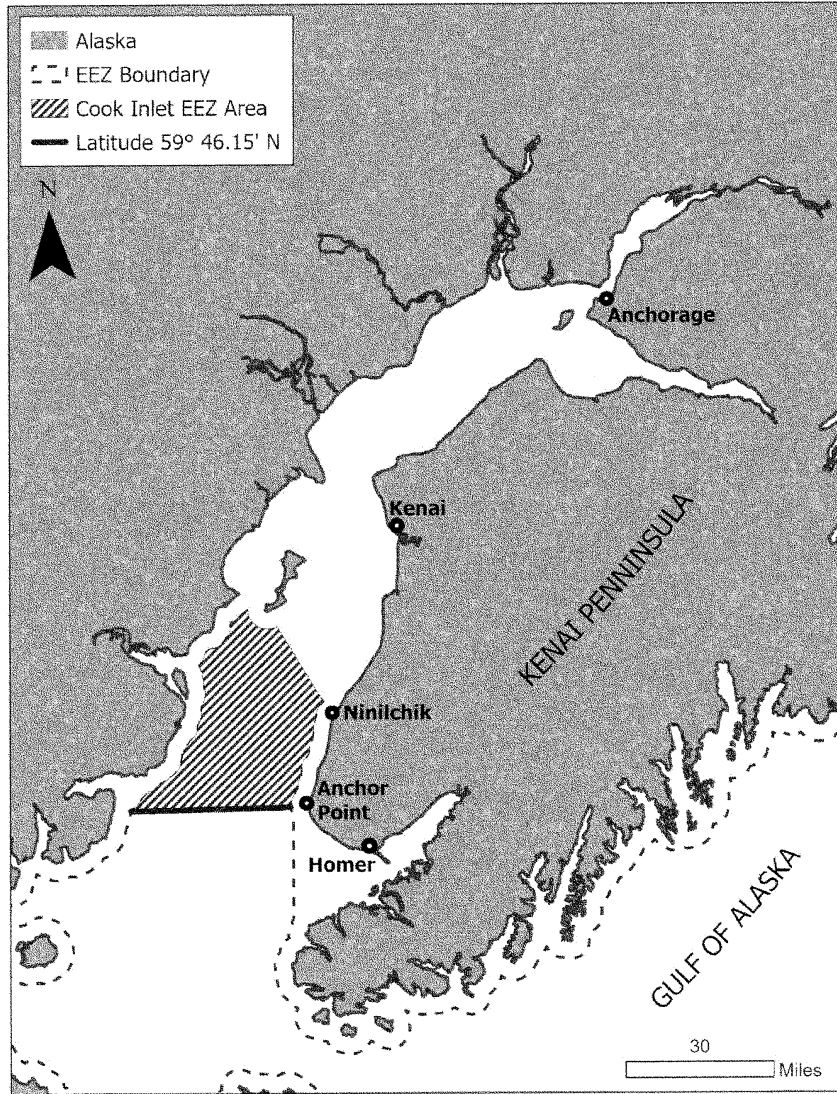
(b) *Careful release.* Any salmon brought aboard a vessel and not immediately returned to the sea with a minimum of injury will be included in the daily bag limit of the person catching the salmon.

■ 13. Add figure 22 to part 679 to read as follows:

Figure 22 to Part 679—Cook Inlet EEZ Area

BILLING CODE 3510-22-P

Cook Inlet EEZ Area



BILLING CODE 3510-22-C

- 14. Amend table 15 to part 679 by:
 - a. Adding in alphabetical order the entry "Gillnet, drift" under the heading

"NMFS AND ADF&G GEAR CODES";
and
■ b. Removing the entry "Gillnet, drift"
under the heading "ADF&G GEAR
CODES".

The addition reads as follows:
* * * * *

TABLE 15 TO PART 679—GEAR CODES, DESCRIPTIONS, AND USE

Name of gear	Use alphabetic code to complete the following:			Use numeric code to complete the following:		
	Alpha gear code	NMFS logbooks	Electronic check-in/check-out	Numeric gear code	IERS eLandings	ADF&G COAR
NMFS AND ADF&G GEAR CODES						
Gillnet, drift	*	*	*	03	X	X

[FR Doc. 2024-08664 Filed 4-29-24; 8:45 am]
BILLING CODE 3510-22-P