



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
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**Litigation Updates for the
December 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 29, 2024, Plaintiffs filed a motion in the United States District Court for the District of Alaska challenging Amendment 16 to the Salmon Fishery Management Plan and implementing regulations—issued May 1, 2024—as inconsistent with the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Administrative Procedure Act, and the National Environmental Policy Act. Federal Defendants filed their answer on July 22. Separately, on July 17 Plaintiffs filed a new complaint challenging the 2024 harvest specifications for the Cook Inlet commercial salmon fishery on many of the same grounds. On August 9, Plaintiffs filed a motion to consolidate the two cases and stay briefing deadlines until Federal Defendants filed their answer to the complaint challenging the harvest specifications. The Court granted Plaintiffs’ motion to consolidate on September 11, and Federal Defendants filed their answer to the harvest specifications complaint on September 16. On November 6, 2024, Plaintiffs filed their opening brief.

Status/Next Steps:

Federal Defendants will file their response brief in December.

Attached: Plaintiffs’ opening brief.

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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.

and

STATE OF ALASKA,

Intervenor-Defendant.

UNITED COOK INLET DRIFT
ASSOCIATION, et al.,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE, et al.,

Defendants.

OPENING BRIEF

Civil Action No.: 3:24-cv-00116-SLG
LEAD CASE

Case No. 3:24-cv-00154-SLG
CONSOLIDATED

United Cook Inlet Drift Association, et al. v. NMFS, et al.
Case No. 3:24-cv-00116-SLG

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I. INTRODUCTION

This case continues more than 15 years of litigation attempting to compel Defendant National Marine Fisheries Service (NMFS) to comply with its statutory duties under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). The MSA was passed in 1976 with a basic mandate to NMFS: produce a “fishery management plan” (FMP) “for each fishery under its authority that requires conservation and management,”¹ and ensure that the fishery is managed to meet the MSA’s National Standards.²

Despite this clear mandate, NMFS has never produced an FMP for the Cook Inlet salmon fishery that meets the National Standards. For the first 40-plus years after the passage of the MSA, NMFS ignored the Cook Inlet salmon fishery entirely and let the State of Alaska (State) manage the fishery however it saw fit. Unfortunately, the State’s management practices—beginning around 2000—took a turn for the worse, and salmon harvest in Cook Inlet began a precipitous and lasting decline that has now persisted for almost 25 years, to the detriment of fishing communities throughout Cook Inlet.

In 2008, to turn the tide on the State’s mismanagement, Plaintiffs turned to NMFS, the entity charged by Congress to manage the Nation’s salmon fisheries. Plaintiffs filed a petition with NMFS that pointed out the obvious: the Cook Inlet salmon fishery is under NMFS’s jurisdiction, and NMFS is required to manage it, just as NMFS does for other

¹ 16 U.S.C. § 1852(h)(1).

² *Id.* § 1851.

salmon fisheries in Alaska and along the West Coast. NMFS ignored the petition, resulting in a lawsuit,³ and then denied the petition, resulting in another lawsuit.⁴

Following settlement of the second lawsuit in 2010, NMFS begrudgingly recognized that it had to do *something* with the Cook Inlet salmon fishery. But instead of doing what Congress instructed and preparing an FMP that would manage the Cook Inlet salmon fishery, NMFS in 2012 issued an FMP amendment (Amendment 12) that codified its practice of deferring all fishery management decisions to the State.

After four years of litigation on Amendment 12, the Ninth Circuit in 2016 reversed in a unanimous and terse decision. The primary question was 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.”⁵ The Ninth Circuit said no, “[t]he [MSA] unambiguously requires [NMFS] to create an FMP for each fishery under its authority that requires conservation and management.”⁶ The Ninth Circuit further admonished that NMFS may not “shirk the statutory command that it ‘shall’ issue an FMP for each fishery within its jurisdiction requiring conservation and management” and cannot “wriggle out of this requirement by creating FMPs only for selected parts of those fisheries,

³ *United Cook Inlet Drift Association v. Wolfe*, 3:09-cv-00043-RRB.

⁴ *United Cook Inlet Drift Association v. Locke*, 3:09-cv-00241-TMB.

⁵ *United Cook Inlet Drift Ass’n v. Nat’l Marine Fisheries Serv. (UCIDA 1)*, 837 F.3d 1055, 1057 (9th Cir. 2016).

⁶ *Id.* at 1065.

excluding other areas that required conservation and management.”⁷ That should have resolved any dispute about the scope of NMFS’s obligation.

Unfortunately, old habits die hard. On remand, NMFS found a new way to shirk its duties. In 2022, NMFS issued a new amendment (Amendment 14). This time, NMFS deferred management to the State by closing all fishing in federal waters, resulting in yet another lawsuit.⁸ This Court had no trouble rejecting Amendment 14, explaining it was a “thinly veiled attempt” to avoid federal management and skirt the Ninth Circuit’s holding in *UCIDA 1*.⁹ This Court vacated Amendment 14 and ordered NMFS to prepare “a new FMP amendment that is consistent with this Court’s Summary Judgment Order and the previous orders in this litigation and complies with the Magnuson-Stevens Act, the APA, and all other applicable laws by no later than May 1, 2024.”¹⁰

On April 30, 2024, NMFS published the final rule implementing Amendment 16 to the FMP for Cook Inlet, which simply presents a new way for NMFS to shirk the statutory command. This time, NMFS defers management to the State by inconsistently (and unlawfully) parsing the statutory term “fishery” and institutionalizing the States’ mismanagement of Cook Inlet for the last two decades as the “optimum yield” for the

⁷ *Id.* at 1064.

⁸ *United Cook Inlet Drift Ass’n v. Nat’l Marine Fisheries Serv. (UCIDA 2)*, Nos. 3:21-cv-00255-JMK & 3:21-CV-00247-JMK, 2022 WL 2222879, at *6 (D. Alaska June 21, 2022). Below, Plaintiffs refer to specific docket entries in Case Nos. 3:21-cv-00255-JMK & 3:21-CV-00247-JMK by the 00247-case number, the docket number, and the date.

⁹ *See id.* at *8.

¹⁰ *UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 103, at 10 (D. Alaska May 15, 2023).

fishery moving forward. This is déjà vu all over again. The Ninth Circuit in *UCIDA 1* already explained that “fishery” is a “defined term,” that NMFS cannot produce “FMPs only for selected parts of those fisheries,” and that the entire fishery must be managed to meet “national interest, not managed by a state based on parochial concerns.”¹¹

Plaintiffs United Cook Inlet Drift Association and Cook Inlet Fishermen’s Fund (collectively “UCIDA”) filed this action because the statute’s (and Ninth Circuit’s) mandate remains unfulfilled. Amendment 16 and the resulting harvest specifications are unlawful for many of the same reasons that Amendment 14 was unlawful. Most fundamentally, NMFS still has failed to create a lawful FMP amendment for the Cook Inlet salmon fishery as the Ninth Circuit ordered NMFS to do eight years ago.

For the reasons explained below, UCIDA asks this Court to rule that Amendment 16 and its implementing regulations, including the harvest specifications, are arbitrary, capricious, and contrary to the MSA, 16 U.S.C. §§ 1801–1891d, and the APA, 5 U.S.C. §§ 551–59, 701–06. Plaintiffs respectfully request that this Court vacate the decisions approving Amendment 16 and the harvest specifications and order NMFS to comply with the MSA and develop a lawful FMP as the Ninth Circuit instructed.

II. RELEVANT FACTS

The relevant background facts are set out in detail in *UCIDA 1* and *UCIDA 2* and summarized above. Plaintiffs do not repeat those facts here other than to provide context to understand NMFS’s current decision.

¹¹ 837 F.3d at 1064, 1063–64.

A. After the Council failed to recommend an alternative, NMFS created Amendment 16 through the Secretarial amendment process.

In November 2022, this Court in *UCIDA 2* set a May 1, 2024 deadline for completion of remand and ordered periodic status reports by NMFS.¹² In March 2023, the North Pacific Fisheries Management Council (Council) reviewed a draft Environmental Assessment¹³ that analyzed four alternatives: 1) no action; 2) federal management in the EEZ with management delegated to the State; 3) federal management in the EEZ without delegation; and 4) federal management with the EEZ closed to commercial fishing.¹⁴ The Council’s Advisory Panel (AP) met in April 2023 and voted to recommend alternative 2.¹⁵ The motion’s rationale explained that “many AP members recognized that the choice of alternative 2 or 3 was like choosing the lesser of two evils.”¹⁶ It explained that alternative 2 “depends on the State’s willingness to accept partial delegated management.”¹⁷

At its April 2023 meeting, the Council “was scheduled to take final action to recommend an FMP amendment.”¹⁸ “Following the Advisory Panel motion, as was the case during the development of the previous FMP amendment, the State informed NMFS and the Council . . . 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

¹² *UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 77, at 10–11 (D. Alaska Nov. 8, 2022).

¹³ COUN00009.

¹⁴ COUN00014–15.

¹⁵ COUN00710.

¹⁶ *Id.*

¹⁷ COUN00711.

¹⁸ *UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 98-1 at 1 (D. Alaska Apr. 13, 2023).

with the MSA.”¹⁹ “[T]he Council acknowledged [that] delegating management to a State that has indicated it is unwilling to accept delegation is not viable under the MSA.”²⁰ Accordingly, “the Council was left with one viable management alternative[,]”²¹ adopting a federal management regime for the Cook Inlet EEZ.”²² A motion was put forward to adopt this as the preferred alternative, and the motion failed for lack of a second.²³ “With no other viable choice, [NMFS] informed the Council that [it] would immediately work on a Secretarial amendment that would likely resemble Alternative 3.”²⁴

On May 15, 2023, this Court issued an Amended Remedy Order,²⁵ explaining that “the actions taken by the Federal Defendants in the eleven months following the Court’s Order . . . are nearly identical to those taken to implement the now-vacated Amendment 14.”²⁶ It explained that “[g]iven the history of this litigation and the progress of the remand thus far, the Court concludes that stronger judicial intervention is necessary to ensure that the same processes do not yield the same result.”²⁷ The Court ordered the parties to attend collaboration meetings.²⁸

¹⁹ *Id.* at 2.

²⁰ *Id.*

²¹ Alternative 1 (no action) and Alternative 4 (closure of the EEZ) were not viable because of the Ninth Circuit’s and this Court’s orders.

²² *UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 98-1 at 2 (D. Alaska Apr. 13, 2023).

²³ COUN00719.

²⁴ *UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 98-1, at 2 (D. Alaska Apr. 13, 2023).

²⁵ *See UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 103 (D. Alaska May 15, 2023).

²⁶ *Id.* at 9.

²⁷ *Id.*

²⁸ *See id.*

The parties had two collaboration meetings in May 2023 and filed a joint status report regarding the meetings.²⁹ Plaintiffs explained in the status report that “[a]t this point, UCIDA believes that the parties are still very far apart on what constitutes a legal and effective FMP for the Cook Inlet salmon fishery.”³⁰

On April 30, NMFS published the final rule implementing Amendment 16.³¹ NMFS explained that “amendment 16 will create a new fishery in Cook Inlet, which will occur entirely within Federal waters.”³² Amendment 16 set maximum sustainable yield (MSY) as 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. NMFS determined that MSY applies to *all* fishing for stocks in state and federal waters.³³ NMFS then determined that optimum yield (OY) would be a range that includes all historical catches that the State has allowed in *federal waters only*, between 1999 and 2021, and that all other surplus fish are allocated to the State to manage.³⁴ This was a change from Amendment 14, where 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) . . .’”³⁵

²⁹ See *UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 104 (D. Alaska June 5, 2023).

³⁰ *Id.* at 7. Plaintiffs also submitted detailed comment letters at every available stage of this process. See, e.g., COUN00762–881; COUN01670; NMFS00662; NMFS00033; SPEC00244.

³¹ See FR00029.

³² FR00037.

³³ FR00030 (“MSY is specified for salmon stocks and stock complexes in Cook Inlet”); FR00039.

³⁴ See FR00030.

³⁵ *UCIDA 2*, 2022 WL 2222879, at *9 (ellipsis in original; citation omitted).

Under Amendment 16, fishing in federal waters opens for two periods a week from approximately June 19 until July 16, then one period a week from July 17 until July 31, and then two periods a week from August 1 until August 15.³⁶ Fishing in federal waters is closed on August 15 or when the TAC is reached, whichever is earlier.³⁷ The federal openers fall precisely on the same days and at the same times as state openers.³⁸ However, commercial fishermen are prohibited from fishing in state and federal waters on the same day.³⁹ Commercial fishermen fishing in federal waters are required to obtain new federal permits and to “comply with Federal recordkeeping, reporting, and monitoring requirements.”⁴⁰ Vessels participating in the fishery also must obtain and operate a Vessel Monitoring System (VMS)—costing approximately \$3,000 per device—which “transmits real-time GPS location of fishing vessels to NMFS.”⁴¹ Vessels are only allowed to deliver their federal waters catch to processors in state waters,⁴² and processors purchasing fish are required to obtain federal permits and report all fish purchased daily to NMFS.⁴³

³⁶ FR00031.

³⁷ *Id.*

³⁸ FR00010.

³⁹ FR00033.

⁴⁰ FR00032.

⁴¹ *Id.*; NMFS00682. This is a significant expense for UCIDA’s members. *See* 86 Fed. Reg. 60568, 60580 (Nov. 3, 2021) (“Restrictions 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.”).

⁴² FR00033.

⁴³ *Id.*

B. A separate Secretarial rulemaking process resulted in harvest specifications for the 2024 season.

On April 12, 2024, NMFS published proposed harvest specifications “for the salmon fishery of the Cook Inlet exclusive economic zone (EEZ) Area.”⁴⁴ NMFS explained that the “proposed harvest specifications include catch limits that NMFS could implement . . . assuming the Secretary of Commerce . . . approves amendment 16 to the Salmon FMP.”⁴⁵ NMFS explained that if Amendment 16 is approved, it would “specify the annual TAC amounts for commercial fishing for each salmon species after accounting for projected recreational fishing removals.”⁴⁶

The Council and the AP had already reviewed these proposed TAC amounts at their February 2024 meeting.⁴⁷ The AP recommended a TAC of 1,139,235 salmon.⁴⁸ NMFS reduced the AP’s TAC by 400,805 sockeye and proposed a total of 738,440 to the Council.⁴⁹ The motion failed, and NMFS proceeded with a second Secretarial amendment process to establish its proposed TAC.⁵⁰

In public comments on the proposed rule, Plaintiffs explained that a TAC is not an effective management tool for salmon in Cook Inlet.⁵¹ This notwithstanding, on June 18, 2024, NMFS published the final rule establishing its proposed TAC for salmon fishing in

⁴⁴ SPEC00112.

⁴⁵ SPEC00113.

⁴⁶ *Id.*

⁴⁷ *See* COUN01870; COUN02487.

⁴⁸ *See* COUN02546.

⁴⁹ *See* COUN02600.

⁵⁰ SPEC00114.

⁵¹ SPEC00269–76.

federal waters in 2024.⁵²

C. Plaintiffs moved to enforce, while also filing protective complaints.

On May 24, 2024, Plaintiffs moved to enforce this Court’s orders in *UCIDA 2*.⁵³ Plaintiffs’ motion was denied, and this Court explained that “reviewing the UCIDA Plaintiffs’ challenge to Amendment 16 in the separately filed consolidated cases will provide the Court with a more comprehensive view of the factual basis for Amendment 16 and the Final Rule as well as more thorough briefing on the merits by the parties.”⁵⁴

Meanwhile, Plaintiffs filed their complaint and petition for review regarding Amendment 16 on May 29, 2024,⁵⁵ and their complaint and petition for review regarding the resulting harvest specifications on July 16, 2024.⁵⁶ On September 11, 2024, this Court granted Plaintiffs’ motion to consolidate the two cases for all purposes.

III. LEGAL STANDARD

“Agency decisions under the Magnuson-Stevens Act . . . are reviewed pursuant to Section 706(2) of the APA[.]”⁵⁷ “Judicial review under the APA allows courts to ‘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.’”⁵⁸ “An

⁵² See SPEC00001.

⁵³ See *UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 133 (D. Alaska May 24, 2024).

⁵⁴ *UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 143, at 8–9 (D. Alaska Sept. 27, 2024).

⁵⁵ Case No. 3:24-cv-00116, Dkt 1.

⁵⁶ Case No. 3:24-cv-00154, Dkt. 1.

⁵⁷ *Flaherty v. Pritzker*, 195 F. Supp. 3d 136, 143 (D.D.C. 2016).

⁵⁸ *Pac. Dawn LLC v. Pritzker*, 831 F.3d 1166, 1173 (9th Cir. 2016) (ellipsis in original) (quoting 5 U.S.C. § 706(2)(A)).

agency’s decision may ‘be found to be arbitrary and capricious if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of the agency’s expertise.’”⁵⁹ If the Secretary “‘has considered the relevant factors and articulated a rational connection between the facts found and the choice made,’” then the decision is not arbitrary or capricious.⁶⁰ But if the “‘agency has failed to provide a reasoned explanation, or where the record belies the agency’s conclusion, [the court] must undo its action.’”⁶¹

IV. ARGUMENT

A. Amendment 16 is Unlawful Because It is Not an FMP for the “Fishery,” a Defined Term.

In *UCIDA I*, the Ninth Circuit said “[t]he [MSA] unambiguously requires [NMFS] to create an FMP for each *fishery* under its authority that requires conservation and management.”⁶² The word “fishery” sets the scope of this obligation. The MSA details the “Required Provisions” of an FMP, which expressly apply to a “fishery,” including, among many others, the obligation to provide “conservation and management measures” for “the fishery,”⁶³ to specify “the maximum sustainable yield and optimum yield from, the

⁵⁹ *Id.* (quoting *Yakutat, Inc. v. Gutierrez*, 407 F.3d 1054, 1066 (9th Cir. 2005)).

⁶⁰ *Id.* (citation omitted).

⁶¹ *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999) (citation omitted).

⁶² 837 F.3d at 1065 (emphasis added).

⁶³ 16 U.S.C. § 1853(a)(1).

fishery,”⁶⁴ to evaluate the impacts to and the “safety of participants in the fishery,”⁶⁵ specify criteria for when the “fishery” is overfished,⁶⁶ and to set an annual catch limit (ACL) to prevent overfishing “in the fishery.”⁶⁷

NMFS runs afoul of these requirements in Amendment 16 by narrowly, inconsistently, and unlawfully construing the term “fishery” to again shirk its duty under the MSA. NMFS concedes for purposes of setting MSY that the “fishery” includes all the salmon stocks born in the streams and rivers of Cook Inlet, and the harvest of those stocks in both state and federal waters.⁶⁸ This makes sense. Salmon, which are born in rivers and streams, migrate to the ocean, and then return to their natal rivers and streams to spawn, do not become different stocks of fish as they cross jurisdictional boundaries.

But when it comes to setting actual management measures such as OY, NMFS changes its tune, saying that the “fishery” only consists of the fishing on those stocks of fish that occurs in the EEZ. This, conveniently, allows NMFS to avoid including any conservation or management measures that apply to salmon once they leave the EEZ. NMFS’s contorted view of the “fishery” is arbitrary, capricious, contrary to the plain language of the MSA, leads to absurd results, and should be vacated.

1. The scope of an FMP must include “any fishing for such stocks.”

NMFS must prepare an FMP “for each fishery under its authority that requires

⁶⁴ *Id.* § 1853(a)(3).

⁶⁵ *Id.* § 1853(a)(9)(C).

⁶⁶ *Id.* § 1853(a)(10).

⁶⁷ *Id.* § 1853(a)(15).

⁶⁸ *See* FR00039.

conservation and management.”⁶⁹ “Fishery” is “a defined term,”⁷⁰ that 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.”⁷¹ “Fishing” includes all “catching, taking, or harvesting of fish.”⁷² And a “stock of fish” means “a species, subspecies, geographical grouping, or other category of fish capable of management as a unit.”⁷³ There is some discretion built into identifying the stock or stocks of fish that comprise a fishery under subsection (A).⁷⁴ However, once the stock or stocks of fish at issue have been identified based on the required characteristics, there is no discretion in subsection (B). A “fishery” must include “any fishing for such stocks.”⁷⁵

The definition of “fishery” is unchanged by the words “under its authority” in the MSA’s mandate that NMFS prepare an FMP “for each fishery *under its authority* that requires conservation and management.”⁷⁶ The statute does not say “for [the portion of] each fishery under its authority.” Instead, NMFS must prepare an FMP for “any fishing for such stocks” that comprise a “fishery under its authority” irrespective of whether such fishing occurs under the authority of a foreign nation or one or more states.

⁶⁹ 16 U.S.C. § 1852(h)(1).

⁷⁰ *UCIDA I*, 837 F.3d at 1064.

⁷¹ 16 U.S.C. § 1802(13).

⁷² *See id.* § 1802(16).

⁷³ *Id.* § 1802(42).

⁷⁴ *See id.* § 1802(13).

⁷⁵ *Id.* § 1802(13)(B).

⁷⁶ *Id.* § 1852(h)(1) (emphasis added).

The definition of “fishery” therefore dictates the scope of the FMP that NMFS must prepare because an FMP must cover “any fishing for such stocks.” *See UCIDA I*, 837 F.3d at 1064 (“The government argues that § 1852(h)(1) does not expressly require an FMP to cover an entire fishery, noting that ‘the provision says nothing about the geographic scope of plans at all.’ But, the statute requires an FMP for a fishery, a defined term.”). This makes particular sense in the context of managing anadromous fish, like salmon. As Senator Ted Stevens explained, “species such as salmon, go beyond the existing limits of one jurisdiction into another, and, as a matter of fact, may go beyond into the third area of international jurisdiction. As a practical matter, to the extent possible, we will have uniform and consistent management.”⁷⁷

His concerns are recognized directly in the first section of the statute. The MSA explains that “the fish off the coasts of the United States . . . and the anadromous species,” like salmon, “which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources.”⁷⁸ Congress envisioned a “national program for the conservation and management” of these “fishery resources” to ensure conservation and “to realize the full potential of the Nation’s fishery resources.”⁷⁹ That potential is realized through “the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain on a continuing basis, the

⁷⁷ 122 Cong. Rec. 119 (1976) (statement of Sen. Stevens); 16 U.S.C. § 1802(1) (defining “anadromous species”).

⁷⁸ 16 U.S.C. § 1801(a)(1).

⁷⁹ *Id.* § 1801(a)(6).

optimum yield from each fishery.”⁸⁰

Indeed, determination of the “fishery” is the lynchpin to a proper FMP. The FMP requirement applies to “each fishery.”⁸¹ Conservation and management measures must achieve “the optimum yield from each fishery.”⁸² The “Required Provisions” of an FMP expressly apply to a “fishery,” including, among many others, the obligation to provide “conservation and management measures” for “the fishery,”⁸³ the obligation to specify “the maximum sustainable yield and optimum yield from, the fishery,”⁸⁴ to evaluate the impacts to and the “safety of participants in the fishery,”⁸⁵ specify criteria for when the “fishery” is overfished,⁸⁶ and to set an ACL to prevent overfishing “in the fishery.”⁸⁷

2. The scope of Amendment 16 is unlawful because it does not include “any fishing for such stocks.”

Applied here, the definition of “fishery” makes it readily apparent that the FMP must govern the “stocks of fish” in Cook Inlet, and “any fishing for those stocks.” The “stocks of fish” are not a mystery here. There are five species of salmon that are born in streams and rivers around Cook Inlet, that migrate out to the Pacific Ocean for a number of years, and that pass through the EEZ in Cook Inlet in the summer on their return journey

⁸⁰ *Id.* § 1801(b)(4).

⁸¹ *Id.* 1852(h)(1).

⁸² *Id.* § 1851(a)(1).

⁸³ *Id.* § 1853(a)(1).

⁸⁴ *Id.* § 1853(a)(3).

⁸⁵ *Id.* § 1853(a)(9)(C).

⁸⁶ *Id.* § 1853(a)(10).

⁸⁷ *Id.* § 1853(a)(15).

to spawn in their natal streams and rivers.⁸⁸ NMFS readily acknowledges that there are multiple sectors in both state and federal waters that harvest the same stocks of fish that pass through the EEZ.⁸⁹

In fact, NMFS concedes this straightforward point when it defines MSY at the “stock or stock complex level,” explaining that “[b]ecause MSY must be defined in terms of the stocks or stock complexes, this definition of MSY does not subdivide between State and EEZ waters in Cook Inlet.”⁹⁰ This makes sense and is consistent with the statute. Salmon that are born in the Kenai River do not become different “stocks” of fish when their anadromous lifecycle migration takes them from the river, to the ocean, and then back to the river again. The stocks of salmon that are harvested in the EEZ as they return from years in the Pacific Ocean in route to their natal streams are the same stocks of fish that are harvested in state waters.

Despite NMFS’s concession, it artificially limited the scope of Amendment 16 to management measures governing the “harvest[] by the commercial and recreation fishing sectors *within the Cook Inlet EEZ Area.*”⁹¹ NMFS claims that “[d]efining the fishery as geographically constrained to the Cook Inlet EEZ is consistent with the Magnuson-Stevens Act” and nothing supports “that a Federal FMP must cover fishing that occurs in State

⁸⁸ See NMFS02137.

⁸⁹ See FR00037 (“while accounting for both State and Federal expected harvests.”); *id.* (“total harvest of Cook Inlet salmon stocks will continue to occur predominately within State waters”).

⁹⁰ FR00039 (emphasis added).

⁹¹ FR00036 (emphasis added).

waters if a harvested stock occurs in both State and Federal waters.”⁹² NMFS is flatly incorrect. Under the plain language of the MSA, the “fishery” consists of “*any* fishing for such stocks.”⁹³

Nor can NMFS’s misinterpretation of the “fishery” be reconciled with the statute. For example, the required provisions of an FMP provide that the FMP shall “assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield, from the fishery ...”⁹⁴ There is no plausible reading of the statute that allows NMFS to apply the “maximum sustainable yield” to the entire “stock” but restrict “optimum yield” to only that portion of the stock that is harvested in the EEZ. Rather, both MSY and OY must be set for the “fishery,” which, by definition, includes “any fishing” for the stock.⁹⁵

NMFS tries to justify its failure to issue an FMP amendment applicable to “any fishing for such stocks” by inventing an excuse that “given the geographical limits placed on NMFS’s authority to manage fisheries, it is necessary for the ‘fishery’ to be geographically constrained to the EEZ.”⁹⁶ Not so. Aside from the fact that this has no support in the plain language of the statute’s “fishery” definition, NMFS’s own guidelines make clear “[t]he geographic scope of the fishery, for planning purposes, should cover the

⁹² *Id.*

⁹³ 16 U.S.C. § 1802(13)(B) (emphasis added).

⁹⁴ *Id.* § 1853(a)(3).

⁹⁵ *UCIDA I*, 837 F.3d at 1064.

⁹⁶ FR00036.

entire range of the stocks(s) of fish, and not be overly constrained by political boundaries.”⁹⁷ The FMP “should include conservation and management measures for that part of a management unit *within U.S. waters*,^[98] although the Secretary can ordinarily implement them only within the EEZ.”⁹⁹ And “[w]here state action is necessary to implement measures within state waters to achieve FMP objectives, the FMP should identify what state action is necessary, discuss the consequences of state inaction or contrary action, and make appropriate recommendations.”¹⁰⁰

NMFS claims that “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.”¹⁰¹ But subsection (B) of the definition of “fishery” does not permit “any fishing for such stocks” to be divided based on “technical and economic characteristics.” The key is that the same stocks are being harvested in both jurisdictions, so the fishing (“any fishing”) in both jurisdictions is part of the same “fishery” under the MSA.

NMFS cannot create a new “fishery” that is contrary to Congress’s definition nor continue to shirk its duty to prepare an FMP “for each fishery under its authority” by

⁹⁷ 50 C.F.R. § 600.320(b) (emphases added).

⁹⁸ The term “U.S. waters” includes state waters. *See* 16 U.S.C. § 1802(45) (“The term ‘United States’ when used in a geographic context, means all the States thereof.”).

⁹⁹ 50 C.F.R. § 600.320(d)(2) (emphasis added).

¹⁰⁰ *Id.* § 600.320(e)(3).

¹⁰¹ FR00036 (emphases added).

manipulating the plain statutory definition to avoid issuing conservation and management measures for both federal and state waters. Amendment 16’s definition of “fishery” and the resulting scope of the FMP are arbitrary, capricious, contrary to law, and violate the Ninth Circuit and this Court’s orders.

Ultimately, this is just another “thinly veiled attempt” to defer to the State. Congress was clear that salmon stocks are an important national resource, and that these fishery resources must be managed “in accordance with national standards.”¹⁰² “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.”¹⁰³ By narrowly constraining the “fishery” to only fishing in federal waters, NMFS fails to include the statutorily required provisions in the FMP that Congress included to ensure that these important stocks of fish are managed in the national interest. Amendment 16 should be vacated.

B. NMFS failed to set Optimum Yield for the “fishery” and instead entirely deferred to the State of Alaska in violation of *UCIDA 1* and *UCIDA 2*.

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[.]”¹⁰⁴ The MSA provides further that:

The term “optimum,” with respect to the yield from a fishery, means the

¹⁰² 16 U.S.C. § 1801(b)(4).

¹⁰³ *UCIDA 1*, 837 F.3d at 1063.

¹⁰⁴ 16 U.S.C. § 1853(a)(3) (emphasis added).

amount of fish which—(A) 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; (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.^{105]}

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.”¹⁰⁶ NMFS acknowledges these statutory provisions.¹⁰⁷

In Amendment 16, NMFS establishes “the OY range for the Cook Inlet EEZ salmon fishery . . . 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.”¹⁰⁸ This definition of OY violates the MSA and the court orders for at least four reasons.

First, the FMP must set and specify the OY from the “fishery,” a defined term.¹⁰⁹ Amendment 16 only sets OY for NMFS’s artificially defined “Cook Inlet EEZ salmon fishery,” which only includes harvest in the EEZ Area.¹¹⁰ To justify this, NMFS explains that (1) “OY may be established at the stock, stock complex, or fishery level”; that (2) “the

¹⁰⁵ *Id.* § 1802(33).

¹⁰⁶ 16 U.S.C. § 1851(a)(1) (emphasis added).

¹⁰⁷ *See, e.g.*, NMFS02078.

¹⁰⁸ NMFS02089.

¹⁰⁹ 16 U.S.C. § 1853(a)(3).

¹¹⁰ NMFS02089; *see also* FR00039; NMFS02235–36.

fishery is properly defined as all harvest of co-occurring salmon stocks in the Cook Inlet EEZ”; and that (3) “[t]hus, OY is better defined for the Cook Inlet EEZ fishery rather than at the stock or stock complex level.”¹¹¹ But again, the “fishery” cannot be limited to only *some* of the fishing that occurs on a “stock,” as NMFS would have it. The “fishery” consists of “any fishing” on a stock. Thus, there is no “EEZ fishery” and OY cannot be “better defined” for that fantasy fishery. NMFS manipulates the definition of “fishery” to wriggle out of its obligation to set OY for *any* harvest on the Cook Inlet salmon stocks, whether such harvest is in state or federal waters.

Second, NMFS’s measure of OY is not based on MSY, as the MSA requires. OY must be prescribed “on the basis of the maximum sustainable yield from the fishery.”¹¹² In Amendment 16, “MSY is specified for salmon stocks and stock complexes in Cook Inlet,” but for OY, NMFS has arbitrarily cut up these salmon stocks and stock complexes based on a jurisdictional boundary.¹¹³ This violates the MSA.

Third, NMFS chose a measure of OY that ensures full-scale deferral to the State of Alaska, *again*. In Amendment 14, NMFS closed the Cook Inlet EEZ to commercial fishing so that the State could exclusively manage commercial salmon fishing in Cook Inlet’s state waters.¹¹⁴ The Court told NMFS it cannot just close the EEZ, so NMFS did the next closest thing. It created a “Cook Inlet EEZ salmon fishery” that is intentionally designed to

¹¹¹ FR00039.

¹¹² 16 U.S.C. § 1802(33).

¹¹³ *See supra* Section IV.A.2.

¹¹⁴ NMFS02112.

maintain the status quo—i.e., facilitate state management. In the final rule, NMFS 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.”¹¹⁵ 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 2021,¹¹⁶ NMFS has set an OY range that accounts for *nearly every possible harvest scenario that has occurred in the last two decades under state management.*¹¹⁷ This is deferral.

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 under federal management 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.”¹¹⁸ This directly violates this Court’s prior order, which cautioned that “[t]he plan for continuous federal management cannot consist of the agency abandoning its responsibilities in favor of deferral to the State.”¹¹⁹

¹¹⁵ FR00057–58.

¹¹⁶ See NMFS02235–36.

¹¹⁷ In *UCIDA 2*, the Court explained that under state management, “the commercial harvest of salmon from the Cook Inlet has decreased significantly over the past two decades.” 2022 WL 2222879 at *3. 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 NMFS02235–36.

¹¹⁸ *UCIDA 2*, 2022 WL 2222879 at *11.

¹¹⁹ *Id.* at *11–12 (emphasis in original).

Fourth, NMFS’s OY metric also violates National Standard 1, which 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.”¹²⁰ 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. Amendment 16 does not address the significant potential yield that is going un-harvested according to NMFS’s own data.¹²¹ This significant under-harvest persisted into 2024.¹²² And Amendment 16’s OY metric ensures that these dramatic over-escapements under state management will continue to persist.

In the final rule NMFS explains that

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*

¹²⁰ 16 U.S.C. § 1851(a)(1).

¹²¹ See SPEC00180 (demonstrating that in every year except one from 1999–2023, Kenai River Late Run Sockeye Salmon exceeded their escapement goal and produced a significant “Potential Yield EEZ,” which are wasted fish); SPEC00182 (same for Kasilof River Sockeye Salmon).

¹²²

<https://www.adfg.alaska.gov/sf/FishCounts/index.cfm?ADFG=main.displayResults&COUNTLOCATIONID=41&SpeciesID=420> (demonstrating that the Kasilof River exceeded the lower bound of its escapement goal in 2024 by 908,092 sockeye);

<https://www.adfg.alaska.gov/sf/FishCounts/index.cfm?ADFG=main.displayResults&COUNTLOCATIONID=40&SpeciesID=420> (demonstrating the Kenai River exceeded the lower bound of its escapement goal in 2024 by 1,176,350 sockeye); see also *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010) (explaining that it is appropriate to take judicial notice of information made publicly available by government entities on their websites).

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[.]^[123]

But NMFS’s own guidelines—which it is required to follow in developing an FMP amendment¹²⁴—command exactly the opposite.¹²⁵ NMFS cannot abdicate its responsibility to attempt to achieve OY for the “fishery” because part of harvest is managed by the State.

NMFS has not established OY for the “fishery,” and its chosen OY metric is entirely deferential to the State of Alaska. In these ways, Amendment 16 violates the *UCIDA 1*, *UCIDA 2*, and the MSA, which do not permit deferral to the State and which require OY for the “fishery,” a defined term.

¹²³ FR00040 (emphasis added).

¹²⁴ *Oceana, Inc. v. Raimondo*, 530 F. Supp. 3d 16, 20 (D.D.C. 2021), (“These guidelines do ‘not have the force and effect of law,’ but the various regional councils and NMFS personnel must use them ‘to assist in the development of fishery management plans.’” (quoting 16 U.S.C. § 1851(b))) *aff’d*, 35 F.4th 904 (D.C. Cir. 2022); *AP. Bell Fish Co. v. Raimondo*, No. CV 22-1260, 2023 WL 6159985, at *14 (D.D.C. Sept. 21, 2023) (explaining that although the guidelines do not have the force of law, “the APA requires an agency to comply with its own regulations” (quotation marks omitted)), *aff’d in part, rev’d in part and remanded on other grounds*, 94 F.4th 60 (D.C. Cir. 2024).

¹²⁵ *See* 50 C.F.R. § 600.320(d)(2) (“FMPs should include conservation and management measures for that part of the management unit within U.S. waters, although the Secretary can ordinarily implement them only within the EEZ.”); *id.* § 600.320(e)(3) (“Where state action is necessary to implement measures within state waters to achieve FMP objectives, the FMP should identify what state action is necessary, discuss the consequences of state inaction or contrary action, and make appropriate recommendations.”); *id.* § 600.310(f)(4)(iii) (“ACLs for State–Federal Fisheries. For stocks or stock complexes that have harvest in state or territorial waters, FMPs and FMP amendments should include an ACL for the overall stock that may be further divided.”).

C. Amendment 16 also violates National Standards 2, 3, and 10.

1. Amendment 16 is not based on the best available science.

National Standard 2 requires that “[c]onservation and management measures shall be based upon the best scientific information available.”¹²⁶ Courts have explained that “[a]bsent some indication that superior or contrary data was available and that the agency ignored such information, a challenge to the agency’s collection of and reliance on scientific information will fail.”¹²⁷

Multiple stock definitions that NMFS used in the final analysis for Amendment 16 were contrary to the recommendations of its own SAFE Team. For example, NMFS defined the Kenai Late Run sockeye salmon stock and the Kasilof sockeye salmon stock in the analysis as limited to those fish harvested in the Cook Inlet EEZ Area.¹²⁸ Yet the SAFE Team recommended definitions that tracked these stocks throughout their range.¹²⁹ The analysis does not explain why NMFS disregarded the recommendations of its own SAFE Team.¹³⁰ Contrary data was available to NMFS, and it ignored it. Accordingly, NMFS violated National Standard 2.

¹²⁶ 16 U.S.C. § 1851(a)(2).

¹²⁷ *Massachusetts v. Pritzker*, 10 F. Supp. 3d 208, 217 (D. Mass. 2014) (internal quotation marks and citation omitted).

¹²⁸ NMFS02223.

¹²⁹ See SPEC00145; SPEC00150 (“The NMFS SAFE Team recommends to the SSC that the Federal stock definition for Kasilof River sockeye salmon (KASOCK) would include Cook Inlet EEZ Area harvests, spawning escapements, and associated spawning escapement goals corresponding to the State definition for this stock.”).

¹³⁰ See NMFS02489.

2. NMFS fails to manage stocks as a unit throughout their range, in violation of National Standard 3.

National Standard 3 requires “[t]o the extent practicable, an individual stock of fish [to be] managed as a unit throughout its range, and interrelated stocks of fish [to be] managed as a unit or in close coordination.”¹³¹ NMFS explains that it 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” because it is “not practicable for NMFS to manage salmon stocks into State waters where NMFS has no management jurisdiction.”¹³² But the National Standard 3 guidelines explain that “FMPs should include conservation and management measures for that part of the management unit within U.S. waters, although the Secretary can ordinarily implement them only within the EEZ.”¹³³ And they clarify that “[w]here state action is necessary to implement measures within state waters to achieve FMP objectives, the FMP should identify what state action is necessary, discuss the consequences of state inaction or contrary action, and make appropriate recommendations.”¹³⁴

Here, NMFS artificially limited its conservation and management measures to only the EEZ. NMFS’s claims that it has “avoid[ed] relying on the State to achieve any Federal management targets,” but those same management targets effectively enshrine all possible

¹³¹ 16 U.S.C. § 1851(a)(3).

¹³² FR00054.

¹³³ 50 C.F.R. § 600.320(d)(2); *see* FR00054 (citing the National Standard 3 guidelines and describing how they “explain how to structure appropriate management units for stocks and stock complexes”).

¹³⁴ *Id.*, § 600.320(e)(3).

outcomes under state management into federal law.¹³⁵ It is certainly practicable for NMFS to set management measures for the “fishery” as the MSA requires and then, separately, explain what “state action is necessary to implement measures within state waters to achieve FMP objectives.”¹³⁶ The mere fact that NMFS cannot ordinarily force the State to take action is not an excuse for failing to identify the state action and explaining the consequences of state inaction or contrary action. This information is critically important to facilitate the management of a multi-jurisdictional fishery as the architects of the MSA envisioned.¹³⁷ Similarly, the fact that the State is blatantly obstructing MSA management in Cook Inlet¹³⁸ and refusing to cooperate¹³⁹ with NMFS is *more reason*—not less—why NMFS must articulate the consequences of state inaction or contrary action in its FMP.

¹³⁵ FR00040.

¹³⁶ 50 C.F.R. § 600.320(e)(3).

¹³⁷ S. Rep. No. 94-416, at 30 (1975) (“[U]nity of management, or at least close cooperation, is vital to prevent jurisdictional differences from adversely affecting conservation practices.”).

¹³⁸ See *UCIDA 2*, No. 3:21-CV-00247-SLG, Dkt. 98-1 at 2 (D. Alaska Apr. 13, 2023) (“[T]he 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.*” (emphasis added)).

¹³⁹ The record contains multiple examples of the State resisting cooperation, seeking to avoid management under the MSA or scrutiny of its actions by the Council or NMFS, and advocating for federal management that aligns with current non-MSA state management. See EM02629 (“Me too but not at the expense of overly intrusive Council review of state management as currently envisioned by your agency.”); EM04363 (requiring all inquiries for state input and data to be funneled through one point of contact); EM04382 (explaining how to mirror or approximate state management); EM04587 (inquiring whether the Council can set a TAC of zero); EM04878 (“it is our hope federal management will align with state management so that we can cooperate inseason”); EM05319, 5329, 5357 (explaining to NMFS that the State will not provide additional data).

3. Amendment 16 fails to promote safety of human life at sea.

National Standard 10 requires that “[c]onservation and management measures shall, to the extent practicable, promote the safety of human life at sea.”¹⁴⁰ NMFS did not sufficiently consider the negative impacts to the safety of the fleet created by its management measures. Specifically, before Amendment 16, fishermen could fish in federal waters—which are towards the middle of Cook Inlet¹⁴¹—and if the weather became dangerous, move to safer waters closer to shore and keep fishing. But now, if fishermen start fishing in federal waters, they are prohibited from moving to state waters to continue fishing if the weather picks up.¹⁴² Fishermen must choose between quitting fishing altogether, and missing out on needed income, or risking their crew and vessels by fishing in dangerous conditions.¹⁴³ NMFS’s justification for this Hobson’s choice is to “ensure accurate catch accounting for Federal managers.”¹⁴⁴ Lacking is any analysis of other alternatives that might similarly “ensure accurate catch accounting” but that do not jeopardize the safety of the fleet. The analysis does not meaningfully discuss this major safety concern and whether its costs are outweighed by the benefits of “accurate catch accounting.”¹⁴⁵ This issue was identified early in the process by the Council’s AP: “The daily registration requirement can undermine safety. A vessel registered to fish in the EEZ

¹⁴⁰ 16 U.S.C. § 1851(a)(10).

¹⁴¹ See NMFS02111.

¹⁴² See Declaration of David Martin (Martin Decl.), filed Nov. 6, 2024, ¶ 11.

¹⁴³ *Id.*

¹⁴⁴ FR00033.

¹⁴⁵ See NMFS02480–81; NMFS02490–91.

would not be able to move inshore in response to weather conditions. This restriction would force a participant to forgo fishing or face harsh weather in small vessels typically 42 ft or less.”¹⁴⁶ Amendment 16 does not promote the safety of human life at sea to the extent practicable.

D. The Court should vacate Amendment 16 and its implementing regulations, including the harvest specifications.

Although the courts must never forget that our constitutional system gives the Executive Branch a certain degree of breathing space in its implementation of the law, we cannot countenance maneuvering that merely maintains a facade of good faith compliance with the law while actually achieving a result forbidden by court order. . . . At some point, we must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough.^[147]

This resonates with particular force here. NMFS has again failed to comply with its unambiguous statutory mandate to manage the Cook Inlet salmon fishery as has been required by the MSA since it was enacted in 1976 and despite a Ninth Circuit order and an order from this Court that both affirm and clarify this obligation. At some point, enough is enough.

In light of the errors identified above, Plaintiffs request that the Court immediately issue an order vacating Amendment 16, its implementing regulations, and the harvest specifications, which were issued pursuant to an unlawful FMP amendment. Vacatur is the presumptive remedy for agency actions that are arbitrary, capricious, or contrary to law.¹⁴⁸

¹⁴⁶ COUN00711.

¹⁴⁷ *Pub. Citizen Health Rsch. Grp. v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987).

¹⁴⁸ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971).

Vacatur of the implementing regulations will reinstate the prior existing regulations, which while not ideal, are preferable to the status quo.¹⁴⁹ Vacatur will thus provide some immediate relief this coming summer to commercial fishermen who are harmed by Amendment 16.¹⁵⁰

NMFS's pattern of recalcitrance demonstrates that vacatur alone will not ensure prompt and necessary relief. NMFS has repeatedly failed to carry out its statutory obligations and has wasted many years in the process causing irreparable harm to the commercial fishermen and the whole commercial fishing industry. Despite years of litigation, Plaintiffs still have not obtained the remedy to which they are entitled—*lawful* management of the fishery. The Court has discretion to provide additional relief, particularly when, as here, the agency has failed repeatedly to carry out its statutory obligations. In addition to vacatur, Plaintiffs request the following relief:

(1) A declaratory judgment stating that the MSA requires NMFS to approve an FMP amendment that (a) governs the entire Cook Inlet salmon “fishery” as defined by the MSA; (b) specifies the MSA’s key requirements for the content of an FMP, such as specifying MSY and OY for the “fishery”; and (c) does not elevate state interests over federal interests.

(2) An order requiring NMFS to issue regulations implementing a new, lawful

¹⁴⁹ *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (“The effect of invalidating an agency rule is to reinstate the rule previously in force.”).

¹⁵⁰ See Declaration of Erik Huebsch, filed Nov. 6, 2024, ¶¶ 9–11; Martin Decl. ¶¶ 11, 14.

FMP amendment by no later than April 1, 2026.¹⁵¹ If NMFS does not do so, despite best efforts, the order should impose interim relief for the 2026 season to ensure (a) a fair and adequate salmon fishing opportunity in Cook Inlet in 2026 and (b) management of the fishery in compliance with the MSA.

(3) An order requiring NMFS to collaborate with Plaintiffs and other stakeholders in preparing a new, lawful FMP amendment.

(4) An order requiring NMFS to produce periodic status reports on its progress during the remand, with an opportunity for Plaintiffs to respond to those reports.

(5) The Court's retention of jurisdiction over this case to ensure full and timely compliance with all aspects of the remedy.

Plaintiffs also request that the Court's order include a requirement that the parties meet and confer and propose a briefing schedule or stipulation to this Court to address interim management measures for the 2025 season. To the extent it would assist the Court in determining whether to grant the additional relief detailed above, Plaintiffs welcome the opportunity to provide additional remedy briefing to this Court after the conclusion of the merits briefing.

¹⁵¹ Plaintiffs would prefer to have lawful regulations in place by April 2025 to govern the 2025 fishing season. But Plaintiffs also recognize that, as a practical matter, NMFS likely will not have time to promulgate new regulations after this Court's order and before the 2025 fishing season.

V. CONCLUSION

For the reasons explained below, UCIDA asks this Court to rule that Amendment 16 and its implementing regulations, including the harvest specifications, are arbitrary, capricious, and contrary to the MSA and the APA. Plaintiffs respectfully request that this Court vacate the decisions approving Amendment 16 and the harvest specifications and order NMFS to comply with the MSA and develop a lawful FMP as the Ninth Circuit instructed.

DATED this 6th day of November 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 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. Participants in this Case No. 3:24-cv-00116-SLG, who are registered CM/ECF users, will be served by the CM/ECF system.

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