



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box 21109
Juneau, Alaska 99802-1109

**Litigation Updates for the
June 2024 Meeting of the North Pacific Fishery Management Council**

Association of Village Council Presidents v. NMFS

Parties:

Plaintiffs: Association of Village Council Presidents and Tanana Chiefs Conference.

Plaintiff-Intervenor: City of Bethel, Alaska.

Federal Defendants: National Marine Fisheries Service (NMFS); United States Department of Commerce; Secretary of Commerce, Gina M. Raimondo; Deputy Assistant Administrator for Regulatory Programs, NMFS, Samuel D. Rauch, III.

Defendant-Intervenors: At-Sea Processors Association and United Catcher Boats.

Case Activity:

On April 7, 2023, Plaintiffs filed a complaint in the United States District Court for the District of Alaska challenging NMFS Alaska Region's implementation of the 2023 and 2024 final groundfish harvest specifications for the Bering Sea and Aleutian Islands management area (BSAI), arguing NMFS violated the National Environmental Policy Act (NEPA). Federal Defendants filed the answer on May 30, 2023. The complaint and answer were included in the NOAA General Counsel B3 Report for the June 2023 Council meeting.

In July 2023, the district court granted a motion by the At-Sea Processors Association and United Catcher Boats to intervene as Defendants. In September 2023, the district court granted a motion by the City of Bethel, Alaska, to intervene as a Plaintiff. Federal Defendants filed the administrative record on August 9, 2023, and filed a supplement to the administrative record on September 20, 2023.

On November 22, 2023, Ocean Conservancy, SalmonState, Native Peoples Action, Kuskokwim River Inter-Tribal Fish Commission, and Alaska Marine Conservation Council filed a motion to submit an amicus curiae brief in support of Plaintiffs, which the district court granted on December 11, 2023.

On April 10, 2024, Plaintiffs filed a motion to file a supplemental complaint to incorporate allegations that the 2024 and 2025 final BSAI groundfish harvest specifications also violate NEPA. On April 15, 2024, Plaintiff-Intervenor filed a motion to join Plaintiffs' request. The district court granted Plaintiffs' request, and Federal Defendants' filed their answers to Plaintiffs' and Plaintiff-Intervenor's complaints on May 30, 2024. The supplemental complaint of Plaintiffs Association of Village Council Presidents and Tanana Chiefs Conference and Federal Defendants' answer to that complaint are attached.



Status/Next Steps:

The parties are currently briefing the merits of the case. Since this case involves review of an agency action under the Administrative Procedure Act, the judge will decide the case based on the parties' briefs and oral argument, if requested by a party and scheduled by the district court. The briefing schedule is as follows:

- Plaintiffs' and Plaintiff-Intervenor's opening briefs were filed on October 9, 2023 (and included in the NOAA General Counsel B3 Report for the December 2023 Council Meeting). On May 1, 2024, Plaintiffs Association of Village Council Presidents and Tanana Chiefs Conference filed a supplemental brief to address the allegations raised in their supplemental complaint. Their brief is attached.
- Federal Defendants must file their administrative record in support of the 2024 and 2025 final BSAI groundfish harvest specifications by June 14, 2024.
- Federal Defendants' and Defendant-Intervenors' response briefs are due June 28, 2024.
- Plaintiffs' and Plaintiff-Intervenor's reply briefs are due July 26, 2024.

Attached: Plaintiffs' Supplemental Complaint
Federal Defendants' Answer
Plaintiffs' Supplemental Brief

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

ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS)
and TANANA CHIEFS CONFERENCE,)

Plaintiffs,)

Case No. 3:23-cv-00074-SLG

CITY OF BETHEL,)

Intervenor-Plaintiff,)

v.)

NATIONAL MARINE FISHERIES SERVICE; UNITED)
STATES DEPARTMENT OF COMMERCE; GINA M.)
RAIMONDO, in their official capacity as Secretary of)
Commerce; and SAMUEL D. RAUCH, III, in their)
official capacity as Deputy Assistant Administrator for)
Regulatory Programs, National Marine Fisheries Service,)

Defendants,)

AT-SEA PROCESSORS ASSOCIATION and)
UNITED CATCHER BOATS,)

Intervenor-Defendants.)

**SUPPLEMENTAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
(5 U.S.C. §§ 702, 706(1), 706(2)(A); 42 U.S.C. § 4332)**

INTRODUCTION

1. This supplemental complaint challenges the Defendants' decision adopting the final 2024 and 2025 harvest specifications for groundfish fisheries of the Bering Sea and Aleutian Islands (2024-2025 groundfish harvest specifications). The decision violates the National Environmental Policy Act (NEPA).

2. Plaintiffs filed a complaint on April 7, 2023, challenging the Defendants' adoption of the final 2023 and 2024 harvest specifications for the groundfish fisheries of the Bering Sea and Aleutian Islands (2023-2024 groundfish harvest specifications) without conducting an analysis of the environmental effects of that decision in the context of the current environment, in violation of NEPA. Doc. 1.

3. Plaintiffs submitted their principal brief on October 9, 2023. Doc. 32. Plaintiffs and Defendants have been pursuing settlement discussions since November 2023, and further briefing deadlines have been extended to accommodate those discussions. Docs. 39, 43, 45, 47.

4. Like the 2023-2024 groundfish harvest specifications, the 2024-2025 groundfish harvest specifications authorize fishing for billions of pounds of groundfish based on an analysis that is significantly outdated and fails to account for rapid and unprecedented changes in the Bering Sea and Aleutian Islands ecosystem over the last two decades.

5. This supplemental complaint does not replace Plaintiffs' original Complaint, which remains operative and is incorporated herein as appropriate by reference.

JURISDICTION AND VENUE

6. Plaintiffs restate and incorporate by reference paragraphs 7-8 of their Complaint.

PLAINTIFFS

7. Plaintiffs restate and incorporate by reference paragraphs 9-20 of their Complaint.

DEFENDANTS

8. Defendant National Marine Fisheries Service (Service) is a federal agency within the United States Department of Commerce responsible for the management, conservation, and protection of living marine resources within about 200 miles of the United States coast. The Service adopted the final 2023-2024 groundfish harvest specifications and the final 2024-2025 groundfish harvest specifications. It also issued the Alaska Groundfish Harvest Specifications Final Environmental Impact Statement (2007), Alaska Groundfish Harvest Specifications Supplementary Information Reports for the 2023-2024 and 2024-2025 groundfish harvest specifications (Feb. 2023 and Feb. 2024, respectively), Alaska Groundfish Fisheries Programmatic Supplemental Environmental Impact Statement (2004), and Alaska Groundfish Fisheries Programmatic Supplemental Environmental Impact Statement Supplemental Information Report (2015).

9. Plaintiffs restate and incorporate by reference paragraph 22 of their Complaint.

10. Plaintiffs restate and incorporate by reference paragraph 23 of their

Complaint.

11. Defendant Samuel D. Rauch, III, is sued in their official capacity as Deputy Assistant Administrator for Regulatory Programs for the Service. Defendant Rauch oversees the Service's regulatory actions and programs, including those to support the conservation and recovery of marine mammals and endangered species, ensure economically and biologically sustainable fisheries, and promote habitat stewardship through restoration and conservation. Defendant Rauch signed the 2023-2024 groundfish harvest specifications decision and the 2024-2025 groundfish harvest specifications decision.

SUPPLEMENTAL FACTS

12. Plaintiffs restate and incorporate by reference paragraphs 25-115 of their Complaint.

13. On March 11, 2024, the Service published in the Federal Register a final rule adopting the 2024-2025 groundfish harvest specifications.

14. The 2024-2025 groundfish harvest specifications adopt a total allowable catch of 1,300,000 metric tons for pollock and a total of 2,000,000 metric tons for all groundfish combined, the same limits adopted under the 2023-2024 groundfish harvest specifications.

15. Plaintiffs submitted comments, sent to the North Pacific Fisheries Management Council (Council) and the Service, during the Council's public process for the 2024-2025 groundfish harvest specifications raising the issues described in Plaintiffs'

Complaint and this supplemental complaint. These issues were also raised in comments during the public comment period after Defendants published the proposed 2024-2025 groundfish harvest specifications in the Federal Register.

16. In February 2024, the Service published a supplementary information report that considers the 2024-2025 groundfish harvest specifications. In that report, Defendants determined the 2024-2025 groundfish harvest specifications are not a substantial change in the action, and there are no significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

17. Although some of the unprecedented heat wave conditions observed in recent years in the Bering Sea have moderated, important biological metrics have lagged in response, showing continued indications of decreased productivity.

18. For example, abundance of chlorophyll-a, coccolithophores, and copepods—at the base of the food chain—continue to show negative indications of ecosystem productivity.

19. Western Alaska salmon populations remain in decline.

20. In the Aleutian Islands, persistent warm conditions continue, with lower productivity across the ecosystem.

21. In 2023, 14,616 Chinook salmon and 116,714 non-Chinook salmon were caught as bycatch in the groundfish fisheries for the Bering Sea and Aleutian Islands.

22. For the same year, the three-system index of in-river adult Chinook salmon

run sizes for the Unalakleet, Upper Yukon, and Kuskokwim rivers was among the lowest on record, with an estimate of 148,443 fish.

23. Subsistence fishing for Chinook and chum salmon remained severely restricted on western and interior Alaska rivers in 2023.

CLAIMS FOR RELIEF

Count I

(Failure to analyze environmental impacts of groundfish harvest specifications decisions as required under NEPA)

24. Plaintiffs incorporate by reference each of the allegations in the preceding paragraphs.

25. NEPA requires federal agencies to prepare environmental impact statements for “major [f]ederal actions significantly affecting the quality of the human environment” 42 U.S.C. § 4332(2)(C).

26. The decisions to adopt the 2023-2024 groundfish harvest specifications and the 2024-2025 groundfish harvest specifications are major federal actions.

27. These decisions determine the acceptable biological catch and overfishing limits for groundfish species, set the total allowable catch, apportion and allocate the total allowable catch, apply prohibited species catch limits, and make adjustments for biological and socioeconomic factors. The decisions have significant effects on the human environment.

28. In their 2023-2024 and 2024-2025 groundfish harvest specifications decisions, Defendants rely on the 2007 Alaska Groundfish Harvest Specifications Final

Environmental Impact Statement and supplementary information reports to conclude that additional NEPA documentation is not required for these groundfish harvest specifications decisions.

29. The 2007 Alaska Groundfish Harvest Specifications Final Environmental Impact Statement does not analyze the effects of the fisheries management decisions Defendants made in the 2023-2024 groundfish harvest specifications or the 2024-2025 groundfish harvest specifications in light of the current environment.

30. The Bering Sea and Aleutian Islands ecosystem has changed dramatically since the 2007 Alaska Groundfish Harvest Specifications Final Environmental Impact Statement was completed.

31. Declining salmon populations, restricted subsistence opportunities, warming ocean temperatures, changing ocean conditions, seabird die-offs, marine mammal mortality events, northern fur seal declines resulting from competition with fisheries, and shifts in abundance and distribution of species across all trophic levels are cumulatively significant new circumstances or information that must be analyzed in a supplemental environmental impact statement.

32. Fisheries management decisions, including the annual groundfish harvest specifications decisions, affect the marine ecosystem and may exacerbate climate-induced changes.

33. The 2007 Alaska Groundfish Harvest Specifications Environmental Impact Statement does not analyze the impacts of harvest specifications decisions in light of

these changes. The 2023 and 2024 supplementary information reports are not NEPA documents. They also do not analyze the effects of the 2023-2024 groundfish harvest specifications or the 2024-2025 groundfish harvest specifications decisions in light of these changes.

34. Therefore, Defendants have not complied with NEPA and their decisions to adopt the 2023-2024 groundfish harvest specifications and the 2024-2025 groundfish harvest specifications were arbitrary, capricious, and not in accordance with law. 5 U.S.C. § 706(1), (2)(A), (D); 42 U.S.C. § 4332(2)(C).

Count II

(Failure to complete a supplemental environmental impact statement analyzing the effects of the groundfish fishery management program as required under NEPA)

35. Plaintiffs incorporate by reference each of the allegations in the preceding paragraphs.

36. NEPA requires federal agencies to prepare environmental impact statements for “major [f]ederal actions significantly affecting the quality of the human environment” 42 U.S.C. § 4332(2)(C).

37. Federal agencies are required to prepare supplements to final environmental impact statements if “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(d)(1)(ii).

38. The 2023-2024 groundfish harvest specifications and the 2024-2025 groundfish harvest specifications implement both the harvest specifications strategy and

the Groundfish Fishery Management Plan for the Bering Sea and Aleutian Islands.

39. Defendants analyzed the harvest specifications strategy in the 2007 Alaska Groundfish Harvest Specifications Final Environmental Impact Statement. Defendants analyze annual decisions implementing this strategy through supplemental information reports.

40. In the 2023 supplementary information report for the 2023-2024 groundfish harvest specifications, Defendants conclude that additional NEPA documentation is not required for the 2023-2024 groundfish harvest specifications decision.

41. In the 2024 supplementary information report for the 2024-2025 groundfish harvest specifications, Defendants similarly conclude that additional NEPA documentation is not required for the 2024-2025 groundfish harvest specifications decision.

42. The 2023-2024 and 2024-2025 groundfish harvest specifications decisions, which implement the harvest specifications strategy, are themselves implementations of the Groundfish Fishery Management Plan.

43. Defendants analyzed the Groundfish Fishery Management Plan in the 2004 Alaska Groundfish Fisheries Programmatic Supplemental Environmental Impact Statement. Defendants made a decision not to update that analysis in the 2015 Alaska Groundfish Fisheries Programmatic Supplemental Environmental Impact Statement Supplemental Information Report.

44. The Bering Sea and Aleutian Islands ecosystem has experienced radical

change since the 2004 and 2007 environmental impact statements were completed.

45. Declining salmon populations, restricted subsistence opportunities, warming ocean temperatures, changing ocean conditions, sea bird die-offs, marine mammal mortality events, northern fur seal declines resulting from competition with fisheries, and shifts in abundance and distribution of species across all trophic levels are cumulatively significant new circumstances or information that must be analyzed in a supplemental environmental impact statement.

46. Fisheries management decisions, including the annual harvest specifications decisions, affect the marine ecosystem and may exacerbate climate-induced changes.

47. Neither the 2004 Alaska Groundfish Fisheries Programmatic Supplemental Environmental Impact Statement nor the 2007 Alaska Groundfish Harvest Specifications Final Environmental Impact Statement analyzes the effects of fisheries management in the context of the current, rapidly changing environment of the Bering Sea and Aleutian Islands ecosystem.

48. Defendants' conclusions in the 2023 supplementary information report for the 2023-2024 groundfish harvest specifications and the 2024 supplementary information report for the 2024-2025 groundfish harvest specifications that no supplemental environmental impact statement was required were arbitrary, capricious, and not in accordance with law. 5 U.S.C. § 706(1), (2)(A), (D); 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.9(d)(1)(ii).

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court:

1. Enter a declaratory judgment that:
 - a. Defendants' decisions to adopt the 2023-2024 groundfish harvest specifications and the 2024-2025 groundfish harvest specifications for the Bering Sea and Aleutian Islands were arbitrary, capricious, and not in accordance with NEPA; and
 - b. Defendants' reliance on the 2004 Alaska Groundfish Fisheries Programmatic Supplemental Environmental Impact Statement and the 2007 Alaska Groundfish Harvest Specifications Final Environmental Impact Statement is arbitrary, capricious, and not in accordance with NEPA.
2. Vacate the final 2023-2024 groundfish harvest specifications and the 2024-2025 groundfish harvest specifications for the Bering Sea and Aleutian Islands.
3. Enter injunctive relief as needed to ensure Defendants comply with NEPA and to prevent harm to Plaintiffs from the implementation of the Groundfish Fishery Management Plan without an updated NEPA analysis.
4. Award Plaintiffs their costs, fees, and other expenses of this action, including reasonable attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.
5. Grant such other relief as this Court deems just and proper.

Respectfully submitted this 10th day of April, 2024.

s/ Katharine S. Glover

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ANSWER

Defendants National Marine Fisheries Service (“NMFS”), United States Department of Commerce, Gina M. Raimondo, in her official capacity as Secretary of Commerce, and Samuel D. Rauch, III, in his official capacity as Deputy Assistant Administrator for Regulatory Programs (collectively referred to as “Federal Defendants”), through counsel, answer the Supplemental Complaint in this case dated April 15, 2024, ECF No. 52, as follows. The headings and numbered Paragraphs below correspond to the numbered Paragraphs in the Complaint.

Federal Defendants deny each and every allegation in the Complaint that is not specifically admitted in this Answer.

INTRODUCTION

1. The allegations in Paragraph 1 contain characterizations of Plaintiffs’ case, to which no response is required. To the extent that a response is required, Federal Defendants deny the allegations.

2. Federal Defendants admit that Plaintiffs filed a complaint on April 7, 2023 that formed the basis for this case. The remaining allegations in Paragraph 2 contain characterizations of Plaintiffs’ case, to which no response is required. To the extent that a response is required, Federal Defendants deny the allegations.

3. Federal Defendants admit the allegations in Paragraph 3.

4. Federal Defendants admit that the 2023-2024 and 2024-2025 groundfish harvest specifications establish harvest limits for groundfish in the Bering Sea and Aleutian Islands (“BSAI”) Management Area. Federal Defendants deny the remainder

of the allegations in Paragraph 4.

5. The allegations in Paragraph 5 contain characterizations of Plaintiffs' case, to which no response is required. To the extent that a response is required, Federal Defendants deny the allegations.

JURISDICTION AND VENUE

6. The allegations in Paragraph 6 are statements of Plaintiffs' case, to which no response is required. To the extent that a response is required, Federal Defendants incorporate by reference Paragraphs 7-8 of their Answer, ECF No. 8.

PLAINTIFFS

7. Federal Defendants incorporate by reference Paragraphs 9-20 of their Answer.

DEFENDANTS

8. Federal Defendants admit that NMFS is a federal agency within the United States Department of Commerce. Federal Defendants admit the allegations in the second and third sentences in Paragraph 8. To the extent these allegations characterize Federal Defendants' responsibilities under relevant legal authorities, those legal authorities speak for themselves and are the best evidence of their content. Federal Defendants deny any allegations contrary to the plain language, meaning, or context of those legal authorities.

9. Federal Defendants incorporate by reference Paragraph 22 of their Answer.

10. Federal Defendants incorporate by reference Paragraph 23 of their Answer.

11. Federal Defendants admit the allegations in Paragraph 11.

SUPPLEMENTAL FACTS

12. Federal Defendants incorporate by reference Paragraphs 25-115 of their Answer.

13. Federal Defendants admit the allegations in Paragraph 13.

14. The allegations in Paragraph 14 characterize the final 2023-2024 BSAI groundfish specifications and the final 2024-2025 BSAI groundfish harvest specifications, which speak for themselves and are the best evidence of their content. Federal Defendants deny any allegations contrary to the plain language, meaning, or context of those documents.

15. Federal Defendants admit that Plaintiffs Association of Village Council Presidents (AVCP) and Tanana Chiefs Conference (TCC) submitted joint written comments to the North Pacific Fishery Management Council (“Council”) regarding the proposed and recommended final BSAI Groundfish Specifications before the Council’s October 2023 and December 2023 meetings. To the extent the allegations in Paragraph 15 characterize the joint comments submitted by AVCP and TCC to the Council, those comments speak for themselves and are the best evidence of their content. Federal Defendants deny any allegations contrary to the plain language, meaning, or context of those comments. Federal Defendants deny that Plaintiffs submitted any comments to Federal Defendants during the public comment period for the proposed 2024-2025 groundfish harvest specifications. The Plaintiffs’ characterizations of the contents of the written comments in sentence 2 of Paragraph 15 are vague and ambiguous; Federal Defendants therefore lack knowledge or information sufficient to form a belief about the truth of the allegations and deny them on that basis.

16. The allegations in Paragraph 16 characterize the 2024 supplementary information report prepared by NMFS, which speaks for itself and is the best evidence of its content. Federal Defendants deny any allegations contrary to the plain language, meaning, or context in that document.

17. The Allegations in Paragraph 17 are vague and ambiguous; Federal Defendants therefore lack knowledge or information sufficient to form a belief about the truth of the allegations and deny them on that basis.

18. The Allegations in Paragraph 18 are vague and ambiguous; Federal Defendants therefore lack knowledge or information sufficient to form a belief about the truth of the allegations and deny them on that basis.

19. The allegations in Paragraph 19 are vague and ambiguous; Federal Defendants therefore lack knowledge or information sufficient to form a belief about the truth of the allegations and deny them on that basis.

20. The allegations in Paragraph 20 are vague and ambiguous; Federal Defendants therefore lack knowledge or information sufficient to form a belief about the truth of the allegations and deny them on that basis.

21. Federal Defendants admit the allegations in Paragraph 21.

22. The 2023 three-system index of in-river adult Chinook salmon run sizes from the Unalakleet, Upper Yukon, and Kuskokwim rivers was estimated to be 148,443 fish, based on a September 11, 2023, letter from the Alaska Department of Fish and Game to NMFS Alaska Region, which speaks for itself and is the best evidence of its content. Federal Defendants deny any allegations in Paragraph 22 beyond the estimated run sizes of 148,443 fish.

23. The allegations in Paragraph 23 are vague and ambiguous; Federal Defendants therefore lack knowledge or information sufficient to form a belief about the truth of the allegations and deny them on that basis.

CLAIMS FOR RELIEF

Count I

(Failure to analyze environmental impacts of groundfish harvest specifications decisions as required under NEPA)

24. Federal Defendants incorporate by reference all preceding Paragraphs of this Answer.

25. The allegations in Paragraph 25 characterize the National Environmental Policy Act (“NEPA”), which speaks for itself and is the best evidence of its content. Federal Defendants deny any allegations contrary to the plain language, meaning, and context of that act.

26. The allegations in Paragraph 26 are conclusions of law, to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

27. The allegations in the first sentence in Paragraph 27 characterize the final 2023-2024 and 2024-2025 BSAI groundfish harvest specifications, the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (“BSAI FMP”), and the federal regulations at 50 CFR part 679, which speak for themselves and are the best evidence of their content. Federal Defendants deny any allegations contrary to the plain language, meaning, or context of those documents. The allegations in the second sentence in Paragraph 27 are conclusions of law, to which no response is required. To the extent that a response is required, Federal Defendants deny the allegations.

28. The allegations in Paragraph 28 characterize the final 2023-2024 and 2024-2025 BSAI groundfish harvest specifications, the 2007 Final Environmental Impact Statement for the Alaska Groundfish Harvest Specifications (“2007 Groundfish Specifications EIS”), the 2023 supplementary information report for the Alaska Groundfish Harvest specifications (“2023 supplementary information report”), and 2024 supplemental information report for the Alaska Groundfish Harvest specifications (“2024 supplementary information report”), which speak for themselves and are the best evidence of their content. Federal Defendants deny any allegations contrary to the plain language, meaning, or context of those documents.

29. The allegations in Paragraph 29 characterize the final 2023-2024 and 2024-2025 BSAI groundfish harvest specifications, 2007 Groundfish Specifications EIS, 2023 supplementary information report, and 2024 supplemental information report, which speak for themselves and are the best evidence of their content. Federal Defendants deny any allegations contrary to the plain language, meaning, or context of those documents.

30. Federal Defendants admit that the ecosystems in the Bering Sea and Aleutian Islands have experienced change. The remaining allegations in Paragraph 30 are vague and ambiguous; Federal Defendants therefore lack knowledge or information sufficient to form a belief about the truth of the allegations and deny them on that basis.

31. The allegations in Paragraph 31 are conclusions of law, to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

32. Federal Defendants admit that some fishery management decisions may affect the marine ecosystem, but Federal Defendants deny the remaining allegations in Paragraph 32.

33. The allegations in Paragraph 33 characterize the final 2023-2024 and 2024-2025 BSAI groundfish specifications, 2007 Groundfish Specifications EIS, 2023 supplementary information report, and 2024 supplementary information report, which speak for themselves and are the best evidence of their content. Federal Defendants deny any allegations contrary to the plain language, meaning, or context of those documents.

34. The allegations in Paragraph 34 are conclusions of law, to which no response is required. To the extent that a response is required, Federal Defendants deny the allegations.

Count II
(Failure to complete a supplemental environmental impact statement analyzing the effects of the groundfish fishery management program as required under NEPA)

35. Federal Defendants incorporate by reference all preceding Paragraphs of this Answer.

36. The allegations in Paragraph 36 characterize and quote NEPA, which speaks for itself and is the best evidence of its content. Federal Defendants deny any allegations contrary to the plain language, meaning, and context of that act.

37. The allegations in Paragraph 37 characterize and quote NEPA's implementing regulations, which speak for themselves and are the best evidence of their content. Federal Defendants deny any allegations contrary to the plain language, meaning or

context of those regulations.

38. The allegations in Paragraph 38 characterize the final 2023-2024 and 2024-2025 BSAI groundfish harvest specifications, 2007 Groundfish Specifications EIS, and the BSAI FMP, which speak for themselves and are the best evidence of their content. Federal Defendants deny any allegations contrary to the plain language, meaning, or context of those documents.

39. The allegations in Paragraph 39 characterize the final 2023-2024 and 2024-2025 BSAI groundfish specifications, 2007 Groundfish Specifications EIS, 2023 supplementary information report, and 2024 supplementary information report, which speak for themselves and are the best evidence of their content. Federal Defendants deny any allegations contrary to the plain language, meaning, or context of those documents.

40. The allegations in Paragraph 40 characterize the 2023 supplementary information report, which speaks for itself and is the best evidence of its content. Federal Defendants deny any allegations contrary to the plain language, meaning, or context of that document.

41. The allegations in Paragraph 41 characterize the 2024 supplementary information report, which speaks for itself and is the best evidence of its content. Federal Defendants deny any allegations contrary to the plain language, meaning, or context of that document.

42. The allegations in Paragraph 42 characterize the final 2023-2024 and 2024-2025 BSAI groundfish harvest specifications, 2007 Groundfish Specifications EIS, and BSAI FMP, which speak for themselves and are the best evidence of their content.

Federal Defendants deny any allegations contrary to the plain language, meaning, or context of those documents.

43. The allegations in Paragraph 43 characterize the 2004 Programmatic Supplemental Environmental Impact Statement for the Alaska Groundfish Fisheries (“2004 Groundfish FMPs EIS”) and the 2015 supplemental information report for the 2004 Groundfish FMPs EIS, which speak for themselves and are the best evidence of their content. Federal Defendants deny any allegations contrary to the plain language, meaning, or context of those documents.

44. Federal Defendants admit that the ecosystems of the BSAI have experienced change. The remaining allegations in Paragraph 44 are vague and ambiguous; Federal Defendants therefore lack knowledge or information sufficient to form a belief about the truth of the allegations and deny them on that basis.

45. The allegations in Paragraph 45 are conclusions of law, to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

46. Federal Defendants admit that some fishery management decisions may affect the marine ecosystem, but Federal Defendants deny the remaining allegations in Paragraph 46.

47. The allegations in Paragraph 47 characterize the 2004 Groundfish FMPs EIS and the 2007 Groundfish Specifications EIS, which speak for themselves and are the best evidence of their content. Federal Defendants deny any allegations contrary to the plain language, meaning, or context of those documents.

48. The allegations in Paragraph 48 are conclusions of law, to which no response

is required. To the extent that a response is required, Federal Defendants deny that Plaintiffs are entitled to the relief requested or any relief whatsoever.

The remainder of Plaintiffs' Supplemental Complaint constitutes their requests for relief, to which no response is required. To the extent a further response is required, Federal Defendants deny that Plaintiffs are entitled to the relief requested or any relief whatsoever.

DEFENSES

1. Plaintiffs have failed to establish this Court's jurisdiction for some of their claims.
2. Plaintiffs have failed to state a claim upon which the relief sought can be granted.

WHEREFORE, Federal Defendants respectfully request that this Court deny Plaintiffs any relief, dismiss the Complaint and Supplemental Complaint with prejudice, grant judgment for Federal Defendants, and grant such other relief as the Court deems appropriate.

Respectfully submitted, this 30th day of May 2024.

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*Attorneys for Plaintiffs Association of Village Council Presidents and
Tanana Chiefs Conference*

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

ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS)
and TANANA CHIEFS CONFERENCE,)

Plaintiffs,)

Case No. 3:23-cv-00074-SLG

CITY OF BETHEL,)

Intervenor-Plaintiff,)

v.)

NATIONAL MARINE FISHERIES SERVICE *et al.*,)

Defendants,)

AT-SEA PROCESSORS ASSOCIATION and UNITED)
CATCHER BOATS,)

Intervenor-Defendants.)

PLAINTIFFS' SUPPLEMENTAL BRIEF

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INTRODUCTION

Pursuant to the Court's Order, Doc. 53, Plaintiffs AVCP and TCC submit this brief addressing the 2024-2025 groundfish harvest specifications challenged in their Supplemental Complaint, Doc. 52. Defendants' 2024-2025 decision violates NEPA for the same reasons the 2023-2024 groundfish harvest specifications violate NEPA. *See* Doc. 1 (Complaint); Doc. 32 at 25-26 (Opening Brief). In adopting the 2024-2025 groundfish harvest specifications, the Service followed the same process as it used for the 2023-2024 decision, relying on outdated environmental analyses that do not consider the effects of the harvest specifications in light of dramatic environmental changes, including significant declines in western Alaska salmon populations.

BACKGROUND

As explained in Plaintiffs' Opening Brief, Doc. 32 at 11-13, each year, the Service adopts harvest specifications to authorize the annual Bering Sea and Aleutian Islands groundfish fisheries. *See generally* Ex. 3.¹ In March, the Service adopted the 2024-2025 specifications. *Id.* at 1. The new decision, like the 2023-2024 decision, implements the fisheries management plan; authorizes fishing for two million metric tons of groundfish, including 1.3 million metric tons of pollock; and implements choices regulating bycatch. *Id.* at 1, 4; *see also* Doc. 32 at 12-14 (explaining harvest specifications).

¹ Federal Defendants agree that all exhibits cited in this brief are part of the supplemental record being prepared for the Supplemental Complaint, Doc. 52. For the convenience of the Court, Plaintiffs will file a corrected brief with updated citations once the supplemental record has been filed.

The Service adopted the 2024-2025 groundfish harvest specifications following the same harvest specifications strategy and process as the previous specifications and did not produce any NEPA analysis to support the decision. Instead, the Service reviewed stock assessment and fishery evaluation reports to assess the health of the groundfish stocks and completed a Supplementary Information Report (SIR). *See* Ex. 3 at 2, 32-33 (describing harvest specifications process and SIR). As with the 2023-2024 decision, the Service concluded in the SIR that there was no new information relevant to the decision not considered through either the harvest specifications process (including the stock assessment reports) or the 2007 EIS for the harvest specifications strategy. *Compare* NMFS00592, 00635 (2023 SIR) *with* Ex. 4 at 10, 74 (2024 SIR). These conclusions were arbitrary, in violation of NEPA.

ARGUMENT

The Service's 2024-2025 groundfish harvest specifications suffer from the same defect as the 2023-2024 groundfish harvest specifications: there is no NEPA analysis considering the effects of these decisions in the context of the current environment. Because the Service did not complete either an EIS analyzing the effects of the annual groundfish harvest specifications or a supplemental EIS analyzing the harvest specifications strategy in light of the radical changes that have occurred in the Bering Sea and Aleutian Islands in the 17 years since the 2007 harvest specifications EIS was completed, both of the Service's groundfish harvest specifications decisions are arbitrary, in violation of NEPA. *See* Doc. 32 at 25-48.

I. The annual harvest specifications decision is a major federal action and there is no EIS analyzing its effects in the current environmental context.

As explained in Plaintiffs' Opening Brief, the annual harvest specifications decision is a major federal action with potentially significant effects on target and non-target fish, habitat, marine mammals, and other components of the marine ecosystem.

Doc. 32 at 26-33. Just as the Service did not complete an EIS for the 2023-2024

groundfish harvest specifications, it did not complete an EIS for the 2024-2025

groundfish harvest specifications. *See id.* at 25-26. Instead, the Service completed

another SIR, in which it came to the same conclusions that it did in the 2023 SIR:

1) "there is no additional or new information that falls outside the scope of the Harvest Specifications EIS's process for the consideration of new information[,]" Ex. 4 at 10; and

2) "the information presented does not indicate that there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Id.* at 74; *see also* NMFS00592, 00635 (2023 SIR).

These conclusions were arbitrary with respect to the 2023-2024 groundfish harvest specifications decision and, for the same reasons, are arbitrary with respect to the 2024-2025 decision.

The changes that have occurred in the Bering Sea ecosystem over the last decade are relevant to the harvest specifications decision and are not within the scope of effects previously disclosed. Doc. 32 at 33-42. These trends have continued over the past year, with continued indications of reduced carrying capacity and uncertainty in the ecosystem.

See Ex. 1; Ex. 2. When new information is significant, an agency must prepare a

supplemental EIS; a non-NEPA document, such as an SIR, is not a substitute. *See Idaho Sporting Cong. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000); *see also* Doc. 32 at 42-44 (arguing an EIS is required).

This ecosystem still has not recovered from the last decade’s ecosystem-wide shifts, including catastrophic salmon declines. *See* Doc. 32 at 14-20. The 2023 summer cold pool in the southeastern Bering Sea remained “significantly below the large cold pool extents that were common prior to the recent warm stanza” despite moderation in sea surface temperatures in some areas. Ex. 6 at 10-11; *see also* Ex. 5 at 13-15 (Aleutian Islands returned to persistent marine heatwave conditions in late summer). “[B]iological metrics like zooplankton and fish dynamics have lagged in their expected response to cooler conditions[,]” with potential effects on the ecosystem’s carrying capacity and productivity. Ex. 6 at 10, 12; *see also* Ex. 5 at 14 (suggesting “lower productivity across the ecosystem, concomitant with increased bioenergetic needs for fish, faster growth rates for zooplankton and larvae, and shorter incubation periods for eggs due to the warm conditions”). For example, while primary productivity indicators were expected to increase with more moderate heatwave conditions, instead, they have continued to decline. Ex. 6 at 12. Other indications of the ongoing effects of changed ocean conditions include a 34 percent drop in pelagic forager biomass between 2022 and 2023, *id.* at 9, low large copepod abundance, an important nutrient source at the base of the food chain, *id.* at 8, 13, and below-average crab biomass, *id.* at 8.

Western and interior Alaska salmon stocks remain depressed, with multiple

Chinook runs projected to be below escapement goals. *See id.* at 16, 27. In 2023, the three-river index for Chinook salmon included “extremely low run size[s]” for the Unalakleet River and the Upper Yukon River, with limited subsistence fishing opportunities across all three river systems. Ex. 7 at 1-2. Abundance of juvenile Chinook and chum salmon in the northern Bering Sea remained well below average in 2023, correlating to expected below average adult returns to the Yukon in three to four years. Ex. 6 at 17-19.

As explained in Plaintiffs’ Opening Brief, these changes to the marine environment are significant and were not analyzed in the 2007 EIS for the harvest specifications strategy or the 2004 programmatic EIS, nor did the Service prepare an EIS for the 2023-2024 groundfish harvest specifications to analyze them. *See* Doc. 32 at 33-41. Nothing in the past year changes those conclusions; the agency has once again not prepared an EIS for the 2024-2025 groundfish harvest specifications, and the decision therefore violates NEPA for the reasons described in Plaintiffs’ Opening Brief. *Id.*

II. The Service violated NEPA by failing to supplement the 2007 harvest specifications strategy EIS to consider the effects of the strategy in the current environmental context.

Even if the Service was not required to complete a new EIS for the 2023-2024 or 2024-2025 groundfish harvest specifications decisions, the Service violated NEPA by failing to supplement the 2007 harvest specifications strategy EIS to consider the strategy’s effects in light of significant changes to the marine ecosystem. *See* Doc. 32 at 44-48. The 2007 EIS that the Service relies on—which in turn relies on the 2004

programmatic EIS—is severely outdated and the Service’s rationale for failing to supplement it is arbitrary for the reasons described in Plaintiffs’ Opening Brief. *Id.*

CONCLUSION

In addition to the relief requested in their Opening Brief, Doc. 32, AVCP and TCC ask the Court to determine the 2024-2025 groundfish harvest specifications decision violates NEPA, remand the decision to the Service, and consider supplemental briefing to address appropriate additional remedies. *See* Doc. 53 at 2; Doc. 47 (providing for separate remedies briefing).

Respectfully submitted this 1st day of May, 2024.

s/ Katharine S. Glover

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I certify that this document contains 1,391 words, excluding items exempted by Local Civil Rule 7.4(a)(4), and complies with the word limits set in the Court's Order, Doc. 53.

Respectfully submitted this 1st day of May, 2024.

s/ Katharine S. Glover
Katharine S. Glover

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2024, a copy of the foregoing PLAINTIFFS' SUPPLEMENTAL BRIEF, with attachments, was served electronically on all counsel of record through the Court's CM/ECF system.

s/ Katharine S. Glover
Katharine S. Glover

TABLE OF EXHIBITS

Exhibit No.	Description
1	Association of Village Council Presidents & Tanana Chiefs Conference, Comments Re: Agenda Item C3, BSAI/GOA Groundfish (Sept. 29, 2023)
2	Association of Village Council Presidents & Tanana Chiefs Conference, Comments Re: Agenda Item C3 BSAI Groundfish Specifications (Dec. 1, 2023)
3	National Marine Fisheries Service, Fisheries of the Exclusive Economic Zone Off Alaska, Bering Sea and Aleutian Islands, Final 2024 and 2025 Harvest Specifications for Groundfish, 89 Fed. Reg. 17,287 (Mar. 11, 2024)
4	National Marine Fisheries Service, Alaska Groundfish Harvest Specifications Supplementary Information Report (Feb. 2024)
5	North Pacific Fishery Management Council, Ecosystem Status Report 2023: Aleutian Islands (I. Ortiz & S. Zador eds., 2023) (excerpts)
6	North Pacific Fishery Management Council, Ecosystem Status Report 2023: Eastern Bering Sea (E. Siddon ed., 2023) (excerpts)
7	S. Rabung, Alaska Department of Fish & Game, Letter to J. Kurland, NOAA Fisheries, Alaska Region (Sept. 11, 2023)