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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT ASS'N, ET AL.,

Plaintiffs,

vs.

NATIONAL MARINE FISHERIES SERVICE, ET AL.,

Federal Defendants

and

STATE OF ALASKA,

Defendant-Intervenor.

Case No. 3:21-cv-00255-JMK
3:21-cv-00247-JMK
CONSOLIDATED

FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' REMEDY BRIEF

WES HUMBYRD; ROBERT WOLFE; and, DAN ANDERSON,

Plaintiffs,

vs.

GINA RAIMONDO, ET AL.,

Federal Defendants.

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INTRODUCTION

The National Marine Fisheries Service ("NMFS"); National Oceanic and Atmospheric Administration ("NOAA"); Gina Raimondo, in her official capacity as Secretary of the U.S. Department of Commerce ("DOC"); Janet Coit, in her official capacity as the Assistant Administrator of NOAA; and Jonathan M. Kurland, in his official capacity as NMFS Alaska Regional Administrator, (collectively "Federal Defendants") hereby respond to the United Cook Inlet Drift Association ("UCIDA") Plaintiffs' Remedy Brief. ECF 69.

On June 21, 2022, this Court granted UCIDA's motion for summary judgment after finding various statutory violations associated with regulations implementing Amendment 14 to the Fishery Management Plan ("FMP") for Salmon Fisheries off the Coast of Alaska. 86 Fed. Reg. 60,568 (Nov. 3, 2021) (hereinafter "Final Rule"). The Court also remanded and vacated the Final Rule, and ordered the parties to propose a schedule to brief the appropriateness of other relief requested in UCIDA's complaint. ECF 67. Following vacatur, the fishery was implemented in accordance with this Court's order returning management of Cook Inlet back to the State of Alaska ("State"), just as it has been managed for at least the last 70 years.

Despite vacatur of the Final Rule and relatively uncontested fishing this summer, Plaintiffs seek a number of different and additional remedies

including: (1) declaratory relief reaching beyond this Court's summary judgment order; (2) an order requiring NMFS to issue a new final rule by June 1, 2023; (3) contingent interim injunctive relief specifying how the Cook Inlet fishery should be managed in 2023; and (4) various other forms of relief designed to substantively insert Plaintiffs into NMFS's remand process. These additional remedies are not available under the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act" or "Act"), which states that, a court "shall only set aside" challenged regulations, like the Final Rule here. 16 U.S.C. § 1855(f)(1)(B).

Because this Court has already set aside the Final Rule, Plaintiffs' additional requests for relief run afoul of the Magnuson Act's plain language. Equally important, even if Plaintiffs' requests were available under the Magnuson Act, they are unwarranted. If implemented, these requests would truncate the Magnuson Act Council process, substantively insert the Court into the remand, and risk harm to various weaker stocks of salmon in Cook Inlet. *See* Declaration of Jonathan M. Kurland ("Kurland Decl.") ¶¶ 14-17. As such, Plaintiffs' additional requests for relief should be denied.

STANDARD OF REVIEW

By incorporating some, but not all, of the Administrative Procedure Act's ("APA") provisions, the Magnuson Act's judicial review provision, 16 U.S.C. § 1855(f), limits the permissible remedies the Court can grant.

Specifically, the Magnuson Act's allows a court only to "set aside any [ ] regulation or action [promulgated or taken by the Secretary] on a ground specified in section 706(2)(A), (B), (C), or (D)" of the APA. This unique provision restricts the available remedies in several ways.

First, Congress specified that only the regulations or actions promulgated or taken by the Secretary are subject to judicial review. 16 U.S.C. § 1855(f)(1). Council processes are thus excluded from this judicial review provision. *See, e.g.,* 16 U.S.C. §§ 1852, 1854; *J.H. Miles & Co.,* 910 F. Supp. 1138, 1159 (E.D. Va. 1995).

Second, although courts conducting review in accordance with the APA typically retain their equitable authority to fashion relief, courts do not retain such equitable authority where, as here, a "statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. That is, 5 U.S.C. § 702 curtails a court's equitable authority if another statute forbids that relief. *See Turtle Island Restoration Network v. Dep't of Commerce*, 438 F.3d 937, 944 (9th Cir. 2006) (analyzing § 1855(f)(1)(A) and holding that that interim injunctive relief when challenges involve the

Secretary's regulations) [1]; *see also Idaho Sporting Congress v. U.S. Forest Serv.,* 92 F.3d 922 (9th Cir. 1996).[2]

Third, although the Magnuson Act provides for review of the Secretary's regulations or actions, the Court "shall *only* set aside" the challenged regulations or actions on the grounds specified in 5 U.S.C. § 706(2)(A)-(D). 16 U.S.C.§ 1855(f)(1)(B) (emphasis added). This means that a court's review of the Secretary's regulation or action is limited to § 706(2)(A)-(D) (typically characterized as "arbitrary and capricious" review). Thus, a court cannot accept any extra-record evidence, as demonstrated by the exclusion of 5 U.S.C. § 706(2)(F). And if the regulation is inconsistent with §

[1] The Magnuson Act trades expedited review for limited remedies. 16 U.S.C.§ 1855(f)(4). Here, Plaintiffs sought, and obtained, expedited review from this Court, and in doing so correctly conceded that interim injunctive relief was not available. ECF 9 at 3, 7-8.

[2] In *Idaho Sporting Congress,* the Ninth Circuit analyzed a similar statute (termed the Rescissions Act) which, like the Magnuson Act, specifically excluded 5 U.S.C. § 705 from its judicial review provisions. *Id.* at 924 n.1, 925-26. In discussing the effect of the exclusion of § 705 from the Rescissions Act, the Ninth Circuit explained, "[c]onsidering the Rescissions Act as a whole, the reference to 5 U.S.C. § 705 merely serves to clarify and make explicit the comprehensiveness of the prohibition on restraining orders, preliminary injunctions, and relief pending review. By expressly excluding that provision in the Rescissions Act, *Congress intended to forestall any attempt to obtain such relief under the APA* based on the fact that that particular remedy is not available under the Rescissions Act." *Id.* at 925-26 (emphasis added).

706(2)(A)-(D), Congress specified the sole remedy -- it "shall only set aside" the challenged regulation.

Fourth, the Secretary cannot be compelled to act under 5 U.S.C. § 706(1), as judicial review is limited to 5 U.S.C. § 706(2)(A)-(D). *See* 5 U.S.C § 706(1) ("The reviewing court shall (1) compel agency action unlawfully withheld or unreasonably delayed . . .").

ARGUMENT

Without citing the relevant judicial review provision or case law from this Circuit, Plaintiffs contend that this Court may ignore the plain language in 16 U.S.C. § 1855(f)(1)(B) and provide remedies expressly foreclosed by the Magnuson Act because there is perceived "recalcitrance." This perception is not correct. Indeed, this Court already found that NMFS fully complied with the previous Judgment. *UCIDA*, 3:13-cv-00104-TMB, ECF 206.[3] But even if Plaintiffs' perception were correct (and it is not), there is no exception in the Magnuson Act for Plaintiffs' proposed remedies.

[3] The Court expressly found "that NMFS's promulgation of a Salmon FMP amendment satisfied the terms of the Judgment. NMFS issued . . . a final regulation promulgating a new amendment to the Salmon FMP . . . and NMFS met that deadline." UCIDA, 3:13-cv-00104-TMB, ECF 206 at 2. And there can be no argument that NMFS has not acted swiftly enough in this case since this Court just recently found that the Final Rule was arbitrary and capricious. ECF 67.

Congress spoke in the plainest of terms and specified the limits of any permissible remedy. The Court already provided that remedy to Plaintiffs by vacating the Final Rule and thus the additional requests for relief are unavailable.[4] To the extent the Court wishes to venture beyond the Magnuson Act's clear limitations, Plaintiffs' additional requests for relief are unwarranted and risk harm to the fishery and other protected species. Kurland Decl. ¶ 14.

I. UNDER THE MAGNUSON ACT THE COURT MAY ONLY SET ASIDE THE FINAL RULE AND INJUNCTIVE RELIEF IS NOT AVAILABLE.

The Magnuson Act's judicial review provision is uniquely narrow. By specifying which provisions of the APA apply during review of a Secretary's regulation, and the sole remedy available under 16 U.S.C. § 1855(F)(1)(B), Congress curtailed the Court's traditional equitable authority to issue injunctive relief under the APA. This limitation is found in the APA. 5 U.S.C. § 702 ("Nothing herein . . . confers authority to grant relief *if any other statute that grants suit expressly or impliedly forbids the relief which is sought*.") (emphasis added); *see also Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless a statute in so many words, or by a necessary and

[4] Federal Defendants acknowledge that they requested additional briefing on remedy, but that request was primarily directed at the constitutional claims in *Humbyrd* and whether or not the Court should vacate the Final Rule in the first instance.

inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."). The Magnuson Act, "in so many words," restricts this Court's equitable authority to issue the additional relief Plaintiffs seek. *Id.*

First, the Magnuson Act limits the standard of review under the APA making clear that the Court cannot compel the Secretary to act in a certain manner under 5 U.S.C. § 706(1). 16 U.S.C. § 1855(f)(1)(B) (excluding § 706(1)). Yet, Plaintiffs' request largely amounts to a mandatory injunction compelling the Secretary and State to provide Plaintiffs with a greater salmon allocation because of NMFS's perceived unreasonable delay. ECF 69 at 3 ("Despite years of litigation, Plaintiffs still have not obtained the remedy to which they are entitled . . ."). A remedy brief cannot be a backdoor 5 U.S.C. § 706(1) claim.

Second, because the Magnuson Act specifies the standard and scope of APA review, the Court must conduct its review based solely on the administrative record and cannot engage in fact finding like that contemplated under 5 U.S.C. § 706(2)(F). 16 U.S.C.§ 1855(f)(1)(B) (excluding 5 U.S.C. § 706(2)(F); *id.* (authorizing a court to set aside agency action found to be "unwarranted by the facts to the extent that facts are subject to trial de novo by the reviewing court."). Plaintiffs' proffered declaration, detailing why it seeks additional remedies beyond vacatur, ECF 70, begs for exactly this

kind of fact finding. While a court may look beyond the administrative record in limited instances, this provision of the Magnuson Act also indicates that Congress intended to limit review and the available remedy.

Finally, and most importantly, the Magnuson Act specifies the remedy for the Final Rule – that this Court "*shall only set aside any such regulation* . . . on a ground specified in section 706(2)(A), (B), (C), or (D) . . .." 16 U.S.C. § 1855(f)(1)(B) (emphasis added). Only means "nothing more or different." [5] And only modifies "set aside." [6] If Congress wanted to provide the Court with the authority to issue additional relief beyond vacatur, it certainly knew how to provide that authority. *See e.g., eBay Inc. v. MercExchange, L.L.C.,* 547

[5] *See* https://www.merriam-webster.com/dictionary/only

[6] Congress' insertion of "only" before "set aside" distinguishes the Magnuson Act from the other cases that involve general application of 5 U.S.C. § 706(2), which provides: "The reviewing court shall . . . hold unlawful and set aside . . .." *Id.* Nor can the language in § 1855(f)(1)(B) be read to merely limit the grounds on which a regulation can be invalidated. *See 17 Scallop Fishermen v. Gutierrez*, No. CIV.A 08-2264 (MLC), 2009 WL 387745, at *4 (D.N.J. Feb. 13, 2009) (finding that § 1855(f)(1)(B) did "not empower a reviewing court to issue preliminary injunctive relief."). If Congress intended this language to just apply to the standard of review, rather than remedy, it would have provided: "shall set aside any such regulation … *only* on a ground specified in section 706…" But that would re-write the Act. And even if § 1855(f)(1)(B) is read to limit the grounds upon which a regulation can be invalidated, it is inescapable that it still provides the sole remedy for that invalidation. Moreover, as noted above, many other provisions in the Magnuson Act evince Congress' intent, both impliedly and expressly, to strictly limit any remedy in Magnuson Act cases.

U.S. 388, 391–92 (2006) ("the Patent Act expressly provides that injunctions 'may' issue 'in accordance with the principles of equity.'"). But it clearly did not do so.

The Magnuson Act conveys Congress's clear intent that this Court's traditional equitable authority to issue injunctive relief is curtailed when providing a remedy. Multiple provisions imply this intent, but § 1855(f)(1)(B) makes this express. And this Circuit, as well as other district courts, have uniformly interpreted § 1855(f) very narrowly to limit permissible remedies. *Turtle Island Restoration Network*, 438 F.3d at 944; *Wild Fish Conservancy v. Thom*, No. C20-417-RAJ-MLP, 2020 WL 8675751, at *7 (W.D. Wash. June 9, 2020), report and recommendation adopted, No. C20-417-RAJ-MLP, 2021 WL 781074 (W.D. Wash. Mar. 1, 2021) ("[t]hough Plaintiff endeavors to characterize its action differently, Plaintiff's challenge necessarily entails the Magnuson-Stevens Act because an injunction in this matter would require the closure of a federal fishery."). Because the Court already vacated the Final Rule, there are no additional remedies available to Plaintiffs.

Even without this clear congressional intent, the Supreme Court also provided a limitation on injunctive relief in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010). In *Geertson Seed Farms*, the Supreme Court held "[i]f a less drastic remedy (such as partial or complete vacatur of [the agency's decision]) was sufficient to redress respondents' injury, *no recourse*

to the additional and extraordinary relief of an injunction was warranted." 561 U.S. at 165-66 (emphasis added). Whether viewed as reinforcing the Magnuson Act's limitation, or as a separate limitation in its own right, *Geertson Seed Farms*, makes clear that it would be error in this case to vacate and order injunctive relief as well. 561 U.S. at 165–66 (2010). This is particularly true where vacatur has the effect of maintaining the same management regime that has been in place for at least the last 70 years -- a management regime under which Plaintiffs built their businesses and have continuously operated, Kurland Decl. ¶ 18, and that was previously mandated by Congress. ECF 67 at 6 (discussing the North Pacific Fisheries Act of 1954).

Plaintiffs neglect to address these dispositive limitations and rely on cases that either involve other statutes, situations where the court remanded without vacatur, or both. For example, Plaintiffs rely heavily on *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 937 (9th Cir. 2008) ("*NWF v. NMFS*"). ECF 69 at 6, 9. That case involved claims under the Endangered Species Act ("ESA"), which does not have the same judicial review limitations as the Magnuson Act and expressly authorizes injunctive relief. 16 U.S.C. § 1540(g)(1)(A) ("any person may commence a civil suit . . . to enjoin any person . . ."). It also involved a far different situation where the district court (1) did not vacate the challenged agency action, and (2) put

constraints on the remand in light of conservation concerns. *NWF v. NMFS*, No. CV 01-640-RE, 2005 WL 2488447, at *3 (D. Or. Oct. 7, 2005).[7]

Alaska Ctr. for Env't v. Browner, 20 F.3d 981, 986 (9th Cir. 1994), which Plaintiffs also rely on, is similarly inapposite as it also involved a different statute, the Clean Water Act ("CWA"), which authorizes injunctive relief and involved a situation where there was repeated non-compliance. CWA § 505, 33 U.S.C. § 1365(a) ("district courts shall have jurisdiction . . .to order the Administrator to perform such act or duty . . ."); 20 F.3d at 983 ("To aid in enforcement of the Act, § 505(a) authorizes citizens to bring suit in federal court against the EPA for failing to perform a mandatory 'act or duty' set forth in the CWA."). And after a 13-year delay in compliance, the district court exercised this express authority, but merely ordered the agency to file status reports while being careful not to insert itself into remand deliberations. *Id.* at 986-87 ("While issuing these general directives to ensure ultimate compliance with the CWA, the court was careful to leave the

[7] In that case, the district court chose not to vacate the contested biological opinion on remand because of "the severe consequences that would follow." *Id.* It also had conservation concerns. *Id.* ("Without real action from the Action Agencies, the result will be the loss of the wild salmon."). When a court chooses not to vacate the challenged action, exercising equitable authority may be permissible as the contested agency action continues to legally exist. But that situation is not present here as the Court already vacated the Final Rule.

substance and manner of achieving that compliance entirely to the EPA."). That is a far cry from ordering harvest to occur up to "maximum sustained yield" and providing injunctive relief opening a fishery regardless of any run forecast. ECF 69 at 4.[8]

Plaintiffs' requests for relief here, based on cases involving statutes that authorize injunctive relief and that typically involve remand without vacatur, are nothing less than extraordinary. If granted, these remedies would insert this Court deeply into NMFS's remand deliberations, effectively order the State to run a fishery with the sole objective of ensuring that these Plaintiffs catch more sockeye (to the detriment of other fishery sectors) and runs the risk of harming weaker salmon stocks. Kurland Decl. ¶¶ 14-15. The Court does not have the authority to grant the additional relief Plaintiffs seek.

II. EVEN IF THE COURT HAD THE AUTHORITY, PLAINTIFFS' REQUESTS FOR RELIEF ARE UNWARRANTED.

A. Plaintiffs' Additional Request for Declaratory Relief Should be Denied.

[8] The only Magnuson Act case Plaintiffs cite is *N. Carolina Fisheries Ass'n, Inc. v. Gutierrez,* 550 F.3d 16, 19 (D.C. Cir. 2008), but there the district court did not vacate, and ultimately accepted NMFS's proposed remedy. *Id.* ("After insisting on a shortening of the proposed administrative calendar, the court deemed this proposal to be an appropriate remedy and remanded to the Service.").

This Court issued a detailed 54-page order on the parties' summary judgment motions addressing all of Plaintiffs' claims for relief. ECF 67. Nevertheless, Plaintiffs seek additional declaratory relief beyond that which was already provided and ask this Court to declare that: (1) NMFS "must produce an FMP amendment for Cook Inlet that covers the entire Cook Inlet salmon 'fishery,'" (2) "the FMP amendment must specify the MSY, optimum yield ("OY"), accountability measures, and any other applicable metrics for the fishery. . ." and (3) that the FMP "may not elevate the interests of the State of Alaska over the federal interests in the fishery or create a management plan that is subservient to State interests." ECF 69 at 8. These requests are, at best, redundant to the extent they would command the agency to do what the Magnuson Act already requires, and, at worst, misleading to the extent they ask this Court to interpret provisions of the Magnuson Act that were not at issue in this dispute.[9]

Plaintiffs have continually taken the position in multiple court proceedings and during Council processes that NMFS must regulate state waters. *See e.g.,* Fed. Defs.' Ex. 1 (ECF 30 at 42-52) (discussing UCIDA's argument). Plaintiffs believe the term "fishery" can be interpreted to extend

[9] Federal Defendants did not interpret the Court's request for briefing on remedy as an invitation to seek reconsideration of the summary judgment order. ECF 67 at 54. To the extent Plaintiffs seek reconsideration, they fail to meet the standards set forth in Rule 59.

NMFS's jurisdiction into state waters. *Id.* This request for specific declaratory relief appears designed to further that long-standing dispute without actually stating Plaintiffs' intent. *See e.g.,* ECF 69 at 15 (contesting the State's escapement goals).

Plaintiffs, however, chose not to directly raise this issue in this proceeding, and the Court already determined that it would not reach this issue. ECF 67 at 18 n.87 ("The Court does not address NMFS's authority, if any, to manage state waters because it is not pertinent to its decision. The Court cabins its analysis to the federal waters of the Cook Inlet."). There is no reason to revisit this issue now, especially without the benefit of briefing, as the Final Rule addressed only federal waters. *Id.*

To the extent Plaintiffs' request is designed to ensure that any FMP amendment will cover both the recreational and commercial fisheries, NMFS will include both in any final rule in order to comply with the Court's summary judgement order. Kurland Decl. ¶ 8 ("In accordance with this Court's order, the planned FMP amendment will address the management of both commercial and recreational salmon fishing in the EEZ.").

The remaining requests for declaratory relief also appear designed to insert Plaintiffs into NMFS's remand process. All of these declaratory relief requests track statutory provisions or the Court's summary judgment order. ECF 69 at 8 n.23. Providing additional declaratory relief would serve only to

create confusion during the remand. And if, after NMFS completes the remand, Plaintiffs believe that NMFS did not comply with the Court's remand order, they can bring suit challenging that determination, or file a motion contesting compliance with the judgment. *See e.g. UCIDA*, 3:13-cv-00104-TMB, ECF 206 (denying such motion).

B. The Court Should Not Impose a Remand Deadline or Order Contingent Interim Injunctive Relief.

Plaintiffs' request for completion of the remand and issuance of a new final rule by June 2023 is unreasonable. ECF 69 at 10. From the date of this filing (not issuance of any order), NMFS would have only eight months to issue a final rule. While NMFS has begun work on the remand, this timeframe, whether it involves a Council or Secretarial amendment, is entirely unrealistic.[10] Kurland Decl. ¶¶ 9-10 (explaining rulemaking timeframes). And a truncated schedule would substantively constrain what NMFS could reasonably do on remand. *San Luis & Delta-Mendota Water*

[10] Plaintiffs' suggestion that NMFS could simply issue a Secretarial Amendment is incorrect. As an initial matter, § 1854(c)(1)(C) is not available in these circumstances as that authority applies to plans for highly migratory species specifically authorized by section 304(g) of the Magnuson Act. 16 U.S.C. § 1854(c)(1)(C) ("authority to prepare such plan or amendment *under this section*"); *id.* § 1854(g). More importantly, a Secretarial Amendment includes many of the same rulemaking features as the Council process, and Plaintiffs' unrealistic deadline would impede NMFS's ability to rely on the best available science, in contravention of the Magnuson Act, 16 U.S.C. § 1851(a)(2). Kurland Decl. ¶ 10.

Auth. v. Jewell, 747 F.3d 581, 606 (9th Cir. 2014) (criticizing the district court's imposition of a one-year deadline and stating, "[d]eadlines become a substantive constraint on what an agency can reasonably do.").[11]

As set forth in the Regional Administrator's declaration, NMFS plans to issue a final rule by May 2024. Kurland Decl. ¶ 9. To the extent the Court is inclined to provide a remand deadline, NMFS's planned approach of May 2024 would allow for realistic rulemaking that would include ample opportunities for public input and afford the Council and NMFS time to consider and address the public's comments. *Id.*

1. The Court Should Not Provide Plaintiffs with Interim Injunctive Relief.

Plaintiffs implicitly recognize their proposed schedule is unrealistic by proposing a "contingency plan" for 2023. ECF 69 at 12. To that end, Plaintiffs propose enjoining NMFS and the State to open commercial fishing throughout the entirety of Cook Inlet "Mondays and Thursdays from 7:00 AM until 7:00 PM." ECF 69 at 13. That is, this Court would preemptively open the commercial fishing season in 2023 without regard to any run forecast or scientific basis. That is not sound fishery management. Kurland Decl. ¶ 14

[11] Instead of citing controlling authority on this point, Plaintiffs tellingly cite only an unpublished opinion from a Magistrate Judge that did not involve vacatur or the Magnuson Act. ECF 69 at 9 n.26.

("Mandating harvest periods without regard to salmon abundance may result in overfishing of weak stocks, and/or failures to meet escapement goals, as well as limit harvest opportunities in other Cook Inlet salmon fishery sectors."). Opening a fishing season without any run forecast or analysis risks harm to underperforming stocks. *Id.* ("The drift gillnet fleet can substantially interact with stocks that have been subject to overfishing in the recent past, including certain coho and sockeye salmon stocks."). Moreover, such an opening could adversely affect endangered beluga whales by increasing fishing over the status quo and reducing their prey base. *Id.*

Plaintiffs' second request, enjoining NMFS and the State to manage the fishery "in a good faith effort to meet MSY," is no less remarkable. ECF 69 at 15. Although convoluted, it appears Plaintiffs are seeking an injunction that forces NMFS and the State to issue fishing regulations that would ensure sockeye escapement goals are not exceeded, i.e., something Plaintiffs coin as overescapement. ECF 69 at 15-16. There are several problems with this request.

First, Plaintiffs confuse optimum yield and MSY. Kurland Decl. ¶ 15. Both are long-term averages, as opposed to annual harvest targets. *Id.* Optimum yield is based on MSY, but reduced to account for, among other things, ecological factors like co-occurring weaker stocks. 50 C.F.R. § 600.310(e)(3)(i)(A). Trying to achieve MSY for one stock in one season would

likely result in overfishing of co-occurring stocks. Kurland Decl. ¶ 15 ("An order to manage the fishery such that one stock of salmon in Cook Inlet meets MSY on an annual basis would almost certainly result in exceeding MSY for co-occurring stocks—that is, would result in overfishing for those stocks . . .").

Second, this request illuminates Plaintiffs' earlier request for declaratory relief on what it perceives to be the "fishery." *See supra* at II.A. Plaintiffs are effectively asking the Court to enjoin NMFS to issue an emergency rule that dictates escapement in state waters. *See* Huebsch Decl. ¶¶ 24-26, ECF 70 at 11-12 (making clear that UCIDA seeks regulation in state water zones). But NMFS does not have the authority to regulate salmon fishing in Cook Inlet state waters. 16 U.S.C. § 1811(a) ("exclusive fishery management authority over all fish . . . *within the exclusive economic zone*.") (emphasis added). NMFS cannot issue a rule requiring the State to achieve a certain escapement level, much less enforce such a rule in state waters. Fed. Defs.' Ex. 1 (ECF 30 at 42-52). Even Plaintiffs' briefing belies their request. ECF 69 at 16 ("the State can (and should) simply manage the fishery to meet the escapement goals the State has already established."). It would be truly unprecedented for this Court to issue an injunction ordering NMFS to regulate fishing in state waters, based on a Final Rule that only addresses federal waters, with a summary judgment order that already

concluded that state waters were beyond the scope of the proceedings, relying on a statute that does not authorize injunctive relief.

Third, issuing an interim or emergency rule in these circumstances is completely at odds with NMFS's regulatory practice. Emergency or interim authority may be exercised only if NMFS finds that an emergency exists or that interim measures are needed to reduce overfishing. 16 U.S.C. § 1855(c)(1); 62 Fed. Reg. 44,421 (Aug. 21, 1997) (setting forth emergency rule policy); Kurland Decl. ¶ 17 ("Emergency action should be used only to reduce the risk of overfishing, not to exacerbate that risk."). Moreover, a rule implemented under § 1855(c) must be based on the best scientific information available and prevent overfishing, consistent with the National Standards. 62 Fed. Reg. at 44,421 (requiring that record for emergency rule demonstrate compliance with the National Standards); 16 U.S.C. § 1851(a)(1)-(10) (National Standards).[12] Any interim fishing measures would also need to

[12] Plaintiffs' reliance on *N.C. Fisheries Ass'n, Inc. v. Daley*, 27 F. Supp. 2d 650, 667 (E.D. Va. 1998), is misplaced. ECF 69 at 18 n.57. That case involved, in part, a claim under the Regulatory Flexibility Act ("RFA") that provides the Court with authority for "corrective action." *Id.* at 666. As part of that corrective action, the Court sanctioned NMFS for not complying with previous Court orders, and "only set aside" part of the quota restriction that had been issued under the Magnuson Act. *Id.* There is no RFA claim in this case. Moreover, the Court's sanction was prompted by non-compliance of a previous order. But here, this Court already determined that NMFS fully complied with its Judgment. *UCIDA*, 3:13-cv-00104-TMB, ECF 206.

comply with the prohibitions and protections in the ESA as there are listed species (like endangered beluga whales) that may be affected by UCIDA's fishing efforts. Issuing an emergency or interim rule is not as simple as Plaintiffs make it out to be.[13] Kurland Decl. ¶¶ 17-18.

Finally, Plaintiffs' contingent requests, at bottom, seek a mandatory injunction requiring NMFS to issue an emergency or interim rule altering the status quo. But Plaintiffs have failed to meet their burden for a mandatory injunction, particularly a showing of imminent, irreparable harm and that this relief would serve the public interest. For purposes of injunctive relief, the status quo means "the last uncontested status which preceded the pending controversy." *Regents of Univ. of California v. Am. Broad. Companies*, 747 F.2d 511, 514 (9th Cir. 1984). Here, that means continued State management of Cook Inlet. Kurland Decl. ¶ 5; 16 U.S.C. § 1856(a)(3)(A). An injunction requiring NMFS to alter that continued management by increasing the allocation of commercial sockeye catch, can only be characterized as a mandatory injunction. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.,* 571 F.3d 873, 879 (9th Cir. 2009) (a

[13] Nor would the Court have the authority to mandate this result. *Cf. Anglers Conservation Network v. Pritzker,* 809 F.3d 664, 670 (D.C. Cir. 2016) (assuming that 5 U.S.C. § 706(1) applies to a Magnuson Act case, plaintiffs cannot compel NMFS to take an action that is discretionary, as opposed to mandatory, under the Act).

mandatory injunction "'goes well beyond simply maintaining the status quo,'" requires a heightened burden of proof, and is "'particularly disfavored.'") (quoting *Anderson v. U.S.*, 612 F.2d 1112, 1114 (9th Cir. 1980)). In general, mandatory injunctions "'are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages.'" *Id.* (quoting *Anderson*, 612 F.2d at 1115). Plaintiffs have not made this showing.

Plaintiffs' evidence demonstrates that their members will almost certainly be allowed to fish just as they always have for over the last 70 years. Indeed, Plaintiffs concede this point. Huebsch Decl. ¶ 35. Admittedly, Plaintiffs seek a greater allocation of sockeye at the expense of others fishing in Cook Inlet, but a *desire* for a greater allocation does not constitute irreparable harm. In fact, Plaintiffs' sole specific assertion of harm, that Mr. Huebsch's "income from salmon fishing is now less than 25% of what it has been historically," does not demonstrate that status quo management is causing harm, as the State has always managed this fishery during years of both high and low harvests. *Id.* ¶ 31. This is not "extreme or very serious damage" warranting a mandatory injunction. *Anderson*, 612 F.2d at 1115.

Nor would a mandatory injunction serve the public interest. The Magnuson Act recognizes various competing values. 16 U.S.C. § 1801(b) (purposes include conserving and managing fishery resources and

"promot[ing] domestic commercial and recreational fishing under sound conservation and management principles"). Among them, however, conservation is paramount. *E.g., Natural Resources Defense Council v. NMFS*, 421 F.3d 872, 879 (9th Cir. 2005) ("The purpose of the Act is clearly to give conservation of fisheries priority over short-term economic interests."). Blindly increasing harvest dose not promote conservation. Moreover, mandatory fishery openings could affect other users in Cook Inlet and would not be appropriate without a robust analysis of the potential impacts to all users and fishing communities. Plaintiffs are incorrect that increasing harvest opportunities for one particular group of stakeholders to the exclusion of others would serve the public interest. As such, Plaintiffs have failed to carry their burden for the extraordinary remedy of mandatorily enjoining NMFS to issue an emergency or interim rule.

C. Plaintiffs' Remaining Requests Are Designed to Interfere with the Remand Process.

The theme running through Plaintiffs' brief is that NMFS is "recalcitrant" and thus the Final Rule "was a farce." ECF 69 at 21. Based on that perception, Plaintiffs want this Court to retain jurisdiction after vacatur and order NMFS: (1) to collaborate with them during the remand (presumably at the exclusion of other interested public); and (2) file status

reports with an opportunity for Plaintiffs to object to the course of the remand. ECF 69 at 21-23.

Plaintiffs' perception is not accurate, nor are these additional remedies appropriate. NMFS diligently pursued the last remand in good faith. In fact, when Plaintiffs contested NMFS's previous efforts, this Court almost entirely denied UCIDA's motion to enforce the Judgment, the Ninth Circuit affirmed that denial, and subsequently this Court found that NMFS had complied with the Judgment. *UCIDA*, 3:13-cv-00104-TMB, ECF 168, 174, 206. Similarly, because the State would not accept delegated management, NMFS's options for the Final Rule were limited. Kurland Decl. ¶ 8. Choosing between two bad options, with the guiding principle of trying to achieve optimum yield, is not recalcitrance by any measure.

Plaintiffs' requests for continuing jurisdiction, status reports, and an opportunity to object are all designed so that they can influence a new final rule on remand. But this is not the Court's role. *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("the function of the reviewing court ends when an error of law is laid bare."). Providing an opportunity to run to the Court for every perceived slight would serve only to embroil the Court into the substance of the remand and effectively create an exclusive notice and comment procedure just for Plaintiffs. Long ago this intrusion was rejected. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435

U.S. 519, 548 (1978) ("this sort of unwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress.").

To be sure, NMFS is mindful of the Court's summary judgment order, and is committed to fully addressing the issues raised in that order. Moreover, NMFS intends to use the Council process, as well as notice and comment rulemaking, so that Plaintiffs, as well as other interested members of the public, have an opportunity to comment and participate during the remand. But creating an exclusive parallel, judicial process with the aim of shaping the substance of a new final rule is unwarranted.

CONCLUSION

The Court already vacated the Final Rule. No additional relief is available or warranted. Plaintiffs' additional requests should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that this brief contains 5,686 words in accordance with local rule 7.4(a) and electronically filed with the Clerk of the Court via CM/ECF system, which will send notification of such to the attorneys of record.

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