

Salmon Fishery Management Plan Workshop - Report
Revisions and updates to the Fishery Management Plan (FMP) for Alaska Salmon Fisheries
Environmental Assessment and FMP working draft
- Initial Review draft -

Wednesday, September 14, 2011, from 9:00 am – 3:00 pm
Clarion Suites Downtown hotel, Heritage room
1110 West 8th Avenue, Anchorage, AK 99501

Council members and staff present:

Dan Hull, Duncan Fields, and Ed Dersham; Chris Oliver, David Witherell, and Sarah Melton

National Marine Fisheries Service (NMFS) staff present:

Gretchen Harrington and Lauren Smoker (NOAA GC)

State of Alaska (ADF&G) staff present:

Jeff Regnart, Stefanie Moreland, Ruth Christiansen, Bob Clark, and Lance Nelson (Alaska AG)

Other attendees (not all inclusive): Ernie Weiss (Aleutians East Borough), Becca Robbins Gisclair (Yukon River Drainage Fishermen Association), Chip Treinen (self and United Fishermen of Alaska), Verner Wilson (World Wildlife Fund), Jerry McCune (Cordova Fishermen United), Jim Butler (Kenai Salmon Co.), Paul A. Shadura, Dale Kelley (Alaska Trollers Association), Andy Jensen (Alaska Journal of Commerce), and David Martin, Ian Pitzman, Erik Huebsch, and Roland Maw (all of United Cook Inlet Drift Association)

Presenters: Gretchen Harrington (NMFS) and Sarah Melton (NPFMC)

Agenda

- I. Introductions**
 - Review workshop agenda
 - Staff introductions – NPFMC and NMFS staff
- II. Update from Council staff**
 - Review of April 2011 Council motion on Initial Review of the Salmon FMP; preferred Council alternative and options
 - Background on the Salmon FMP issue; letters to and from the Council, NMFS, and ADF&G
 - Update on the Dutch Harbor meeting agenda and comment deadlines
- III. Salmon FMP presentation from NMFS staff**
 - Review of the Initial Review analysis
 - Review of the working draft Salmon FMP
- IV. LUNCH** – on your own, noon until 1:30 pm
- V. General question-and-answer discussion on the implications of the revised Salmon FMP to stakeholders and the public**
- VI. Comment timing & next Council meeting (wrap-up)**
 - Deadlines for comments for the next Council meeting (reprise)

Update from Council staff

Sarah Melton (NPFMC) gave a presentation placing the Initial Review Draft Environmental (EA) on the Salmon FMP and the working draft of the FMP, within the context of the Council. Sarah stated the purpose and objective of the Workshop, which is to provide background for

discussion and to assist with the formulation of informed written comments for the Council and public testimony. Written comments were due in the Council office by close of business (c.o.b.) Monday, September 19, either by mail, fax, or hand delivery.

Sarah presented a short history of the issues with revising and updating the Salmon FMP in the Council process. In October 2010, the Joint Protocol Committee received a presentation and briefing paper on issues surrounding the Salmon FMP. That briefing paper was expanded into a discussion paper and presented to the Council at its December 2010 meeting. In April 2011, the Council received a preliminary analysis that included the 1990 Salmon FMP with all subsequent amendments (the "clunker" FMP). The Council passed a motion selecting Alternative 3 as its Preferred Preliminary Alternative (PPA), which guided the next step of analysis. On September 6, staff released an Initial Review analysis and working draft FMP, and will present these to the Council in Dutch Harbor: *Amendment 12: Revisions to the Fishery Management Plan for the Salmon Fisheries in the EEZ off the Coast of Alaska*.

In addition, Sarah briefly discussed correspondence from early 2011 between the Council and NMFS on clarification of the National Standard (NS) guideline requirements and their applicability to Alaska Salmon. The Initial Review analysis and draft FMP incorporates the State of Alaska's (State) salmon management program. Final Council Action is tentatively scheduled for the December 2011 Council meeting in Anchorage.

I. Salmon FMP presentation from NMFS staff

Gretchen Harrington (NMFS) gave a presentation on the substantive updates and revisions proposed for the FMP and on its accompanying EA, walking through the working draft FMP and EA. Staff began looking at the 1990 FMP in light of new Magnuson-Stevens Fishery Conservation and Management Act (MSA) requirements and questions regarding the FMP's jurisdiction in the West Area. Gretchen discussed the current scope of the FMP, the East and West Areas, deferred management of salmon to the State, and the 1990 FMP's focus on the troll salmon fishery in Southeast Alaska (SEAK). (EA chapter 1)

The 1990 FMP prohibits commercial salmon fishing in the West Area, with the exception of three historical fisheries in Cook Inlet, Prince William Sound, and the Alaska Peninsula (i.e., the Southern Peninsula, or Area M) (herein, "three fisheries") where commercial net salmon fishing is allowed. However, as Gretchen pointed out, the 1990 FMP is vague on its specific function in the three fisheries. The FMP only states that State management is authorized under "other Federal law" that has since been repealed.

Gretchen discussed the four alternatives for the scope of the FMP that the Council recommended in April 2011, and the advantages and concerns with each as applied to salmon management. (EA Chapter 2) Gretchen discussed the risk of unregulated fishing by vessels not registered with the State in the three fisheries if no longer included within the scope of coverage under the revised and updated FMP.

Gretchen discussed the direction the Council provided staff in April 2011 for the substantive 1990 FMP must undergo to comply with the MSA and NS guidelines. (EA Chapter 3) The FMP address the new requirement that an FMP establish a mechanism for Annual Catch Limits (ACL) Accountability Measures (AM). The MSA exempts stocks from ACL/AM requirements that are pursuant to an international agreement, such as SEAK stocks under the Pacific Salmon Treaty. Also, under the NS1 guidelines, the Council may propose an alternative approach for Alaska because setting ACL using the methods prescribed in the NS1 guidelines is not be appropriate. showed how the working draft FMP incorporates this alternative approach and generally explained the State's salmon management program and the PST satisfy the MSA requirements. Gretchen discussed the addition of a Fishery Impact Statement to the FMP, measures to address bycatch in

salmon fisheries, and analysis of the impacts of the alternatives on Endangered Species Act (ESA) Pacific salmon stocks, marine mammals, seabirds, Essential Fish Habitat, and the cumulative environmental impacts.

Summary of the question-and-answer discussion

Regarding the scope of the FMP, questions were asked about possible implications of a new 3-mile line established on NOAA nautical charts (which has no impact on State and federal fisheries management in 2011). Gretchen commented that for purposes of the three fisheries in the West Area, the FMP would only set the boundaries that separate the EEZ into FMP and non-FMP waters, which is not affected by changes in the 3-mile line.

Questions were asked about existing international agreements and how any changes to the FMP will affect the commercial EEZ fisheries. Gretchen answered that the FMP is the nexus for implementation of the PST. (FMP Chapter 4) There was a comment that Steelhead fish are covered under the Anadromous Stocks Convention but are not included in the FMP.

There was discussion on the maps of the three fisheries in the West Area, particularly with regards to the delineation from Anchor Point in the Cook Inlet and the Copper River line in Prince William Sound. Gretchen agreed to examine the maps to ensure they are accurate. (FMP Chapter 2) Comment was also made that there could indeed be a few federal limited entry permits still being prosecuted. Gretchen asked of the stakeholders if that sort of information could be shared with NMFS.

Questions were asked about the definition and analysis of overfishing, particularly in regards to coho stocks in the SEAK. (FMP Chapter 5) Gretchen answered that Amendment 6 to the FMP implemented the overfishing formula using a default of a 4-year life cycle, and that the State performs the analysis of the status of the salmon stock relative to the FMP's overfishing definitions (EA Chapter 5).

Stakeholders asked that the Council consider the negative effects of under-harvest (which results in over escapement), which they postulated could be a factor in the Cook Inlet salmon fishery. Also discussed were any differences between State and Federal status determination criteria for the three fisheries. It was proposed that the MSA uses "MSY" to indicate the maximum sustained yield, but the State' management program looks at *de minimis* fishing, which perhaps is managing for less than MSY. Gretchen answered that how the State manages salmon is discussed in section 3.1.5 of the EA.

Regarding the risk of unregistered fishing in the three fisheries by vessels not registered with the State, it was asked that, if an unregistered vessel came into port, would the vessel's status change? Also, how could the State legitimately exercise jurisdiction over federally-registered vessels? Lance Nelson (Alaska AG) answered that the State defines "fishing activity" as any activity in support of fishing. If an unregistered vessel engages in unregulated fishing and stops at a State port for almost any reason, the State will seize that vessel.

With regards to the sport fishery, the Council's April motion called for its removal from the FMP in the West Area EEZ, which would then be managed exclusively by the State. The State, Gretchen pointed out, would still manage salmon as a unit, as called for by NS 3, and that Federal management of a sport fishery is unusual in an FMP.

Regarding the ESA, questions were asked about any possible differences between the East and Areas' coverage for consultation. Gretchen replied that the ESA would still apply to the three but, with their removal from the FMP, NMFS would not be the action agency for ESA. Stakeholders raised the concern that the State would not monitor—and would not be required to

monitor—whether the fish caught are from the Northwest or are PST fish. Gretchen replied that consultation will be conducted on the revised FMP and that the first step is to put the available ESA information into the analysis and that NMFS has been working with the Northwest region to concerns of encountering ESA-listed salmon in these three fisheries. (EA Chapter 5)

Regarding the community impacts of commercial salmon fishing, stakeholders asked that the discussion of economics be expanded to consider more information that just ex-vessel value (including permit values, and boat values, crew shares, tax revenue, and processing infrastructure) to accurately reflect the depth of salmon-related economic activity in these communities. Also, it was commented that the value of lost yield due to overly cautious escapement limits should be calculated. Gretchen thanked the stakeholders for their suggestions and told them the drafters are working with economists to improve the analysis of community impacts. (EA Chapter 4)

It was asked whether there has previously been a removal of fisheries of this magnitude before from an FMP. Lauren Smoker (NOAA GC) answered that the Gulf Tanner Crab FMP was removed because of the decision that federal conservations and management was not necessary. Certain rockfish species and crab species have also been removed from an FMP. Gretchen elaborated that the situation with the Salmon FMP is unique because it was one of the first FMPs (1979) and the Council's policy to delegate salmon management to the State has remained essentially the same.

Stakeholders raised the concern that the State would no longer have any Federal oversight and could close the three fisheries without oversight or accountability. Gretchen answered that if the three fisheries were removed from the FMP, there would be no Federal oversight of the State's management decisions. In addition, the FMP's review and appeals process would not apply to those areas. Lauren Smoker (NOAA GC) elaborated that the review and appeal process would remain for fisheries that are delegated to the state, but that removal of the three fisheries means that those areas are not under the FMP. In effect, the review and appeal process would be in place for the East Area only.

A question for the Council was proposed by the stakeholders – has the Council sufficiently evaluated whether there is a need for Federal conservation and management, and thus, the continued need for an FMP in the three fisheries? Lauren Smoker (NOAA GC) answered that is not possible to have an FMP that only obligates Federal oversight because any FMP must comply with MSA requirements.

Stakeholders also asked about the possibility of analysis and discussion of having an East Area FMP and three West Area FMPs particular to each commercial fishery, to allow independent Federal treatment of each fishery and to avoid any presumption of similarities between the three fisheries and the SEAK fishery. Due to stakeholder concerns over the lack of Federal oversight if the three fisheries are removed from the FMP, the stakeholders asked whether the Council can craft an FMP that includes these areas and manages them under the ten NS. Dan Hull (Council) described the caveat of having two management structures, Federal and State, with Federal requirements in addition to State requirements. The Council would defer to the State and its expertise, in effect rendering State management redundant under two systems and with unclear effects.

Wrap-up – comment timing & next Council meeting

Sarah repeated the deadline for comments for inclusion in the Council notebooks (in the Council office by c.o.b. September 19) and that the next Council meeting would be held in Dutch Harbor. Stakeholders raised the concern that there was insufficient time between the release of the Initial Review analysis, the Workshop, and the deadline for comments. Gretchen explained the Council process for analytical documents supporting a Council Action.



United Cook Inlet Drift Association

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• info@ucida.org •

Date: September 16, 2011

Addressee: Eric Olson
North Pacific Fisheries Management Council
605 West 4th, Suite 306
Anchorage, Alaska 99501-2252

RE: Comments Regarding the NPFMC's Initial Review Draft for Amending
the Salmon FMP in the West Area, Agenda Item C-1

Dear Mr. Olson,

Thanks to you and the Council for arranging the Salmon FMP Workshop held in Anchorage on September 14, 2011. We appreciated the opportunity to explore and discuss a few issues we have concerning the Salmon FMP Draft and Environmental Assessment. These documents were available to us for less than two weeks. During our review we have noted over 100 issues with these documents. These issues generally fall in five categories: technical errors, minor reference errors, major presentation errors, unsupportable statements and numerous errors of omission. We explored a few of these errors at the workshop.

We have started our analysis of the seven guidelines that are involved in National Standard 7 that need to have a positive finding in order to move forward with the proposed Salmon FMP. We just need more time in order for us to conduct our analysis of these 7 guidelines. Having less than two weeks to read, analyze and provide written comments is unreasonable.

During the workshop a discussion occurred that involved the possibility of separating this FMP into four (4) sections: the East Area and the West Areas of Copper River, Cook Inlet and the Alaskan Peninsula. A separate Salmon FMP for each area or a single Salmon FMP with four plans is something we would like to consider. This alternative is something that has not been considered or discussed. None of the current proposed alternatives contain an option for individual treatment of these four EEZ Salmon fisheries.

We understand the NMFS requirement to implement annual catch limits (ACL's) and measures to ensure accountability (AM's) in the salmon fishery. We have provided written and public testimony that Alternative Two (2) was our preferred alternative. We have asked for a salmon committee comprised of stakeholders from each of these four historic net fisheries.

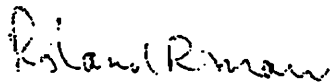
The NPFMC has chosen to adopt a problem statement, formulate alternatives and adopt a preferred alternative without a salmon stakeholder committee.

It is readily apparent that the State of Alaska proposed alternatives for ACL's and AM's that are factually incorrect, contain errors of omission and are legally deficient. It is some of these issues we would have raised earlier had there been a salmon stakeholder committee. Several of these current issues could have been identified, debated, discussed and hopefully resolved. Instead, the Council chose to consume a year or more of valuable time pursuing different paths that, in all likelihood, will not meet the statutory deadlines for ACL's and AM's as part of a revised Salmon FMP.

We note that NOAA and NMFS have taken steps to initiate a Secretarial Amendment to implement ACL's and AM's in the small-mesh multispecies fishery in New England. They are also initiating the Secretarial Amendment because the New England Fishery Management Council is not able to develop and submit Amendment 19 to establish ACL's and AM's for the small-mesh multispecies fishery as required by the Magnuson-Stevens Fishery Conservation and Management Act until well past the statutory deadline of 2011.

Due to logistical and financial constraints, no UCIDA or Cook Inlet EEZ salmon representatives will be able to attend the Dutch Harbor meeting. We again ask for the Salmon FMP process to be altered in order for the 570 Cook Inlet Salmon EEZ fishermen to actively participate.

Sincerely,



Roland Maw, PhD
UCIDA Executive Director

ams

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The Federal Register

The Daily Journal of the United States Government

Proposed Rule

Fisheries of the Northeastern United States; Northeast Multispecies Fisheries, Small-Mesh Multispecies Secretarial Amendment

A Proposed Rule by the National Oceanic and Atmospheric Administration on 09/19/2011

This article has a comment period that ends in 30 days (10/19/2011) [Submit a formal comment](#)

Summary

NMFS is requesting public comments on its initiation of a Secretarial Amendment to implement annual catch limits (ACLs) and measures to ensure accountability (AMs) in the small-mesh multispecies fishery. NMFS is initiating the Secretarial Amendment because the New England Fishery Management Council (Council) is not able to develop and submit Amendment 19 to establish ACLs and AMs for the small-mesh multispecies fishery as required by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), until well past the statutory deadline of 2011. As required by the Magnuson-Stevens Act, NMFS is announcing four public meetings to allow interested parties the opportunity to provide input on the action.

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DATES:

Written comments regarding the issues in this advance notice of proposed rulemaking (ANPR) must be received by 5 p.m. local time, on October 19, 2011. Meetings to obtain additional comments on the items discussed in this ANPR will be held on:

- Monday, October 3, 2011 from 4 p.m. to 7 p.m.
- Tuesday, October 4, 2011 from 4 p.m. to 7 p.m.
- Tuesday, October 11, 2011 from 4 p.m. to 7 p.m.
- Wednesday, October 12, 2011 from 4 p.m. to 7 p.m.

ADDRESSES:

The meetings will be held in:

- East Setauket, NY.
- Toms River, NJ.
- Gloucester, MA.
- Narragansett, RI.

For specific locations, see SUPPLEMENTARY INFORMATION. You may also submit comments on this document, identified by NOAA-NMFS-2011-0206, by any of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal <http://www.regulations.gov>. To submit comments via the e-Rulemaking Portal, first click the "Submit a Comment" icon, then enter NOAA-NMFS-2011-0206 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the "Submit a Comment" icon on the right of that line.
- **Mail:** Submit written comments to Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, "Comments on Whiting Secretarial."

- Fax: 978-281-9135; Attn: Moira Kelly.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on <http://www.regulations.gov> without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT:

Moira Kelly, Fishery Policy Analyst, (978) 281-9218, moira.kelly@noaa.gov.

SUPPLEMENTARY INFORMATION:

Under the Magnuson-Stevens Act at § 304(c)(1)(A), the Secretary of Commerce may develop an amendment for a council-managed fishery, if the responsible council "fails to develop and submit to the Secretary, after a reasonable period of time, a [* * *] necessary amendment * * *". The Magnuson-Stevens Act requires all managed fisheries to have ACLs and AMs by 2011. The Council is developing, but has not yet completed, Amendment 19 to the Northeast Multispecies Fishery Management Plan, which would establish ACLs and AMs for the small-mesh multispecies fishery, and does not anticipate Amendment 19 to be submitted to NMFS until May 2012, which means it will not be effective until October 2012. The small-mesh multispecies fishery consists of silver hake, red hake, and offshore hake, often collectively known as "whiting." There are two stocks each of silver and red hake (northern and southern) and one stock of offshore hake.

The Council has not completed Amendment 19 for a number of reasons, including postponing work on the amendment until after the November 2010 stock assessment review for the three small-mesh species. However, the Council is expected to set the acceptable biological catch (ABC) limits based on recommendations from its Scientific and Statistical Committee (SSC), at its September 2011 meeting. The SSC has recommended separate ABCs by stock or stock group: Northern red hake, southern red hake, northern silver hake, and a combined southern "whiting" ABC for the southern stock of silver hake and offshore hake. The Whiting Advisory Panel (AP) and the Oversight Committee will be recommending management alternatives at the Council's September meeting as well. NMFS intends to use the Council's ABC and a subset of the Advisory Panel and Committee's recommendations in the Secretarial Amendment.

After the public hearings are completed, NMFS will make a decision regarding the management measures to include in the Secretarial Amendment and will publish a proposed rule and a notice of availability for the amendment. After the 60-day proposed rule/notice of availability comment period, NMFS will publish a final rule. The final rule will remain in effect until the Council's Amendment 19, if approved, is implemented.

Public Comments

To help determine the scope of issues to be addressed and to identify significant issues related to this action, NMFS is soliciting written comments on this ANPR and will hold public meetings in four locations. All of the public meetings will take place from 4 p.m. to 7 p.m., at the locations listed below. The public is encouraged to submit comments related to the specific ideas mentioned in this ANPR. All written comments received by the due date will be considered in drafting the proposed rule.

- Monday, October 3, 2011, from 4 p.m. to 7 p.m., at the New York Department of Environmental Conservation Marine Resources Headquarters, 205 Belle Mead Road, Suite 1, East Setauket, NY.
- Tuesday, October 4, 2011, from 4 p.m. to 7 p.m., at the Ocean County Administration Building, Room 119, 101 Hooper Avenue, Toms River, NJ.
- Tuesday, October 11, 2011, from 4 p.m. to 7 p.m., at the Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA.
- Wednesday, October 12, 2011, from 4 p.m. to 7 p.m., at Narragansett Town Hall, 25 Fifth Avenue, Narragansett, RI.

Issues Under Consideration

Based on information from prior Whiting Advisory Panel and Oversight Committee meetings, NMFS is considering several options for the Secretarial Amendment. NMFS will seek public comment on the scope of this ANPR and requests public input on the following options. For each option, NMFS will propose setting an ACL for the same four stocks or stock groups as the SSC's recommendations. Annual catch targets (ACTs) would be used to account for management uncertainty, and would be set at a proportion of the ACL (75 percent, for example). Discards would be deducted from the ACT to establish the total allowable landings (TAL). The differences among the options would be the allocation of the TALs.

1. ACLs, ACTs, TALs by stock: This option would establish ACLs, ACTs, and TALs for each of the four stocks or stock grouping for which the Council's SSC set an ABC. The Whiting AP recently recommended this approach for the southern TALs (southern red hake and the southern combined whiting TAL), but not for the northern TALs (northern red hake and northern silver hake).

2. Northern TALs subdivided by area according to historic landings proportion: The Whiting AP suggested this approach at a recent meeting. The ACLs, ACTs, and TALs would be set as in Option 1, but the northern area TALs would be further subdivided into three TALs: Cultivator Shoal Exemption Area TAL, Other Exemption Areas TAL, and an incidental TAL. The "Other Exemption Areas" would consist of the Gulf of Maine Grate Raised Footrope Trawl Area, Small Mesh Areas I and II, and the Raised Footrope Trawl Areas near Cape Cod. The allocation would be made by historic landing proportion so that each area is given the opportunity to land proportionally the same amount of the overall catch limit as it has in recent years. The AP recommended using fishing years 2004-2010 to determine the appropriate proportions.

3. TALs subdivided equally by exemption area: The ACLs, ACTs, and TALs would be set as in Option 2, but the northern area TALs would be further subdivided by equally across the three areas.

4. AMs: NMFS is considering a combination of "proactive" and "reactive" accountability measures. The proactive AMs would be the use of ACTs and in-season closure authority when a TAL is projected to be reached. The reactive AM would be ACL and TAL specific pound-for-pound pay back of any overage above the catch limit or target.

5. NMFS is suggesting that no other management measures be introduced or modified through the Secretarial Amendment, in order to keep the measures as simple as possible while meeting the action's objectives.

Special Accommodations

The public meeting will be accessible to people with physical disabilities. Request for sign language interpretation or other auxiliary aids should be directed to Debra Lambert (301-713-2341), at least 7 days prior to the meeting.

Authority:

16 U.S.C. 1801 et seq.

Dated: September 13, 2011.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2011-24013 Filed 9-16-11; 8:45 am]

Site Feedback



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September 19, 2011

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Re: Comments Regarding the North Pacific Fishery Management Council's Initial Review Draft for Amending the Salmon FMP in the West Area, Agenda Item C-1

Dear Chairman Olson:

Attached to this letter for your review are the comments of the United Cook Inlet Drift Association ("UCIDA") regarding agenda item C-1 for the Council's upcoming meeting in Dutch Harbor. These comments are preliminary in nature because there was insufficient time between the release of the draft documents and the comment deadline to fully analyze those documents.

As noted in previous correspondence, UCIDA members will not be able to travel to Dutch Harbor in person for the meeting. If you have any questions or concerns regarding UCIDA's comments, please do not hesitate to contact me or UCIDA's Executive Director, Dr. Roland Maw, at (907) 260-9436. Thank you in advance for your consideration of these comments.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Jason T. Morgan', written over a white background.

Jason T. Morgan
Attorney for UCIDA

JTM:sdl

**Comments on the North Pacific Fishery Management Council's Initial Review
Draft for Amending the Salmon FMP in the West Area, Agenda Item C-1**

by

**United Cook Inlet Drift Association
43961 K-Beach Road
Suite E
Soldotna, Alaska 99669**

(907) 260-9436

September 16, 2011

I. INTRODUCTION

The North Pacific Fishery Management Council (the "Council") is currently in the process of determining how to update the *Fishery Management Plan for the Salmon Fisheries in the United States Exclusive Economic Zone ("EEZ") off the Coast of Alaska* ("Salmon FMP"). This update is necessary, in part, to comply with a statutory deadline in the Magnuson-Stevens Fishery Conservation Act ("MSA") to amend all fishery management plans so that they include annual catch limits ("ACLs") and accountability measures ("AMs") by fishing year 2011. In addition to these statutory deadlines, updates to the Salmon FMP are necessary because (1) the Salmon FMP is out of date with respect to portions related to the East Area; and (2) for reasons that are not entirely clear, the Salmon FMP fails to provide any of the statutorily required elements for a fishery management plan with respect to the West Area.

On March 21, 2011 Council staff produced a "Preliminary Review" of the Salmon FMP that evaluated four alternatives to updating the Salmon FMP: (1) take no action; (2) update the Salmon FMP; (3) update the Salmon FMP but remove the three active fisheries in the West Area from the scope of the Salmon FMP; and (4) update the Salmon FMP but remove the entire West Area from the Salmon FMP.

On March 31, 2011 the United Cook Inlet Drift Association ("UCIDA"), its members, and other interested parties presented oral and written testimony to the Council regarding these alternatives. UCIDA explained that only option 2 had the potential to reasonably comply with the MSA's ACL and AM requirements. More importantly, UCIDA explained that selecting alternatives 3 or 4 would have serious ramifications on fishery management in Cook Inlet.

Specifically, UCIDA's members explained that the commercial sockeye fishery in Cook Inlet occurs predominately in the EEZ portion of upper Cook Inlet. Although the current Salmon FMP delegates management of that fishery to the state of Alaska, the state is required to (but largely does not) manage that fishery in a manner consistent with the MSA. Under the current Salmon FMP, the Secretary of Commerce (the "Secretary") has an obligation to ensure that the state is managing in a manner consistent with the MSA, and the Salmon FMP itself provides a mechanism whereby aggrieved fishermen can petition the Secretary to take action if the state fails to meet its obligations.

Alternatives 3 and 4 would end that oversight in the EEZ portion of Cook Inlet. These options would allow the state to regulate fishing in the EEZ (for

vessels registered under the state) without consideration of the MSA's 10 national standards, and without any redress to the Secretary. In addition, alternatives 3 and 4 would allow unregulated and unrestricted fishing in the EEZ for any vessel not registered in the state. Such vessels could fish on any salmon stock, at any time, using any gear they see fit. In short, alternatives 3 and 4 represent federal abdication of MSA management authority over this important EEZ fishery in favor of a bifurcated system of state regulation for in-state vessels and no regulation for out-of-state vessels.

In response, several Council members seemed genuinely surprised that UCIDA would want any kind of federal oversight over the EEZ fisheries in Cook Inlet, and appeared to marginalize UCIDA's concerns over the management of the fisheries as merely an allocation dispute. The Council then unanimously selected alternative 3 as the preliminary preferred alternative. This alternative was preferred in part because it would provide for so-called "seamless" state management of the fishery.

The Council has now released its "Initial Review Draft" containing its draft revised Salmon FMP and its draft environmental assessment ("draft EA") under the National Environmental Policy Act ("NEPA"). This paper provides comments on that document.

UCIDA's comments fall into two broad categories. The first category centers around the Council's selection of alternative 3 as the preferred alternative. As explained below in detail, alternatives 3 and 4 represent federal abdication of responsibility under the MSA. Such abdication, if followed through on, is arbitrary, capricious, and contrary to the letter and spirit of the MSA. The Cook Inlet EEZ fishery is a regionally and nationally important resource. Moreover, the state of Alaska is not managing this fishery in a manner that is consistent with the MSA's scientific management mandate. Equally important, the state of Alaska has no capacity to control unregulated fishing in the EEZ by non-registered vessels. If the Council selects alternative 3, it is creating a very attractive loophole for opportunistic fishermen. Accordingly, the Council should not abandon this fishery and has a responsibility to ensure that it is managed in a manner consistent with the MSA.

The second category of comments centers around deficiencies in the draft EA. The draft EA is rooted in the fundamentally false premise that the National Marine Fisheries Service ("NMFS") need only review the previously issued "Final Programmatic Environmental Impact Statement for the Pacific Salmon Fisheries Management off the Coasts of Southeast Alaska, Washington, Oregon, and

California and in the Columbia River Basin" ("PEIS"), and then decide whether it should be supplemented. But that PEIS never discussed the salmon fisheries in the West Area or Cook Inlet. Indeed, it is not clear that NMFS has ever addressed its decision to defer management to the state in Cook Inlet. In addition, the draft EA overlooks current problems with state management of these fisheries and underestimates the potential harm that could result from unregulated fishing in the EEZ. For these reasons, and those discussed below, a full environmental impact statement should be prepared.

II. DISCUSSION

A. The Cook Inlet Salmon Fishery Is a Nationally Important Fishery.

Upper Cook Inlet is home to five species of anadromous salmon – chinook, sockeye, coho, pink, and chum – as well as steelhead.¹ The commercial fishery on the Cook Inlet anadromous stocks dates back to at least 1892, utilizing all manner of gear types, from fishwheels to driftnets.² The federal government expressly recognized the national importance of maintaining this commercial fishery in 1953 when it negotiated by treaty to exclude Cook Inlet from an international treaty banning net fishing outside U.S. territorial waters.³

Commercial fishing is currently limited to two gear types in Upper Cook Inlet, set and drift gillnets, and occurs on all five Cook Inlet anadromous stocks.⁴ The majority of commercial fishing in Upper Cook Inlet is on sockeye. From 1966 through 2010 (excluding 1989),⁵ the commercial catch of sockeye in Upper Cook Inlet ranged from 487,185 fish to 9.4 million fish.⁶ In 2010 the commercial catch

¹ See Pat Shields, Fishery Mgmt. Report No. 10-54, *Upper Cook Inlet Commercial Fisheries Annual Mgmt. Report*, Alaska Dep't of Fish & Game (Dec. 2010) (the "2010 Management Report") at 1.

² *Id.*

³ See *Int'l Convention for the High Seas Fisheries of the N. Pac. Ocean* (1953).

⁴ 2010 Management Report at 1.

⁵ No commercial fishing occurred in 1989 due to the Exxon Valdez oil spill.

⁶ Management Report at 140-41.

was 2.8 million sockeye.⁷ Approximately 56% of those fish (1.59 million) were caught by the drift fleet. The remaining 44% were caught by set nets.

In 2011, the commercial catch of sockeye in the Central District was over 5 million fish. At an average price of \$1.50 per pound, the ex-vessel value of the sockeye catch alone was over \$50 million this year. Equally important, unlike the catches of some fisheries in Alaska, the vast majority of the commercially caught Cook Inlet salmon find their way to grocery stores and restaurants in the United States.

B. The State Is Not Managing Cook Inlet Fisheries in a Manner Consistent with the MSA.

The Council's Preliminary Discussion Paper ("Paper") explains that "ADF&G expressly states that its salmon management system has been and is a successful and appropriate system for meeting the requirements of the MSA and NSI Guidelines to prevent overfishing while achieving on a continuing basis the OY from each salmon fishery for the fishing industry." Paper at 18. That is not correct. Although the state's management regulations have terms that sound like MSA terms – such as maximum sustainable yield ("MSY"), sustainable escapement goals, and optimum escapement goals – the state in practice is not managing in a manner consistent with the MSA, National Standard 1, or any of the national standards. Quite the contrary, as explained below, the state has a pattern and practice of disregarding the requirements of the MSA, and even its own regulations, in governing the salmon fisheries.

1. The State Has No Intention of Managing Salmon in Cook Inlet in a Manner Consistent with the MSA.

The state's representation to the Council that it is managing in a manner consistent with the MSA is flatly contradicted by their own instructions to the Alaska Board of Fish and Game (the "Board"). Last winter, the Board met to make changes to the management of commercial fisheries in Cook Inlet. During the Board's deliberations on how and when to close commercial fishing in the Inlet, Lance Nelson from the Department of Law explained:

Mr. Chairman, if I might? One point I wanted to make, there has been some references to the Magnuson Stevens

⁷ *Id.*

Act. It is the State's position that the Magnuson Stevens Act does not apply to this fishery. The Fishery Management Plan doesn't purport to manage these fisheries on its face, and so there are plenty of other things you can think about when it comes to what kind of sustained yield you want.^[8]

Given this clear representation to the Board – the entity responsible for setting management objectives in Alaska – it is dubious at best for the state to represent to the Council that it manages in a manner consistent with the MSA.

2. The March 2011 Board Meeting for Upper Cook Inlet Clearly Demonstrates That the State Does Not, in Fact, Regulate in a Manner Consistent with the MSA.

Even putting this concession aside, the state's practices during the last rulemaking cycle of the Board demonstrate that the state does not in fact regulate fishing in a manner consistent with the MSA. The following examples demonstrate some of the state's shortcomings.

Example 1: The State Lacks Escapement Goals on Many Fish Runs in Alaska.

The Paper states that the state is managing in a manner consistent with MSY because "in general escapement goal ranges are specified to produce 90% to 100% of MSY." Paper at 18. But many stocks in Cook Inlet have no escapement goals at all. For example, there are no escapement goals set on pink or chum salmon in Cook Inlet. Given that there are no escapement goals on these stocks, there is no way for the state to contend that it is managing these stocks to produce 90% to 100% of MSY.

Example 2: The Kasilof OEG Lacks Any Factual Basis.

The draft EA suggests that the Board's escapement goals, including the Optimum Escapement Goals ("OEG"), go through a rigorous deliberative process that includes careful consideration of "biological factors" and an "estimate of

⁸ Board Audio Logs, Mar. 5, 2011 at 2:57 p.m.

expected differences in yield of any salmon stock, relative to MSY, resulting from implementation of an OEG.”⁹ This simply does not happen in practice.

The Board’s decision to change the OEG for the Kasilof River shows an unprincipled practice of setting OEGs. Alaska Department of Fish and Game (“ADF&G”) staff proposed changes to the Kasilof sustainable escapement goal (“SEG”) based on changing the sonar counting method from Bendix to Didson. Based on that conversion, staff recommended setting the SEG at 160,000 to 340,000 sockeye. This number was calculated to achieve 90% to 100% of MSY. The staff also, *as a placeholder for further Board discussion*, included a change to the OEG, setting it at 390,000. Without ever having that discussion on the OEG, and without discussion of the risks of departing from the SEG, the Board adopted the OEG placeholder and passed it into regulation.

UCIDA pointed out this obvious error to the state once it saw that the final rules had indeed changed the Kasilof OEG without discussion of the impacts to the fishery. The state responded that it was entirely proper to change the OEG without discussing the risks. The reason given was that the old OEG was 50,000 fish higher than the old SEG, so it made sense for the new OEG to be 50,000 fish higher than the new SEG. When questioned, the state admitted that they did not know why the old OEG was 50,000 fish higher than the old SEG, nor what the impact was to MSY management of setting the OEG at 390,000 fish. This is not science-based management and is flatly inconsistent with the MSA and National Standards 1 and 2.

Example 3: Political Decisions Characterized as Conservation Goals.

The draft EA discusses stock of concern designations with respect to the Susitna River, specifically noting that the Board’s action plan places restrictions on the Northern District set gillnet fishery.¹⁰ But the draft EA leaves out the other serious and arbitrary restriction the Board placed on the Central District drift fleet during the 2011 meeting (and afterward) for the supposed purpose of protecting these stocks.

At the 2011 Board meeting, the Board was instructed by ADF&G staff that sockeye returns to the same lakes were down due to two factors: (1) invasive pike

⁹ Draft EA at 32-33.

¹⁰ *Id.* at 99-100.

minnow predation; and (2) chronic over-escapement. But rather than addressing those habitat and management concerns, the Board instead engaged in an effort to “terminalize” the Central District drift fleet around the Kenai River by forcing fishing into narrow corridors near shore. This plan to terminalize the fishery (and push the fishery out of the EEZ) was never presented in advance to the public for discussion, scientific debate, or scrutiny, but was announced and implemented at deliberation portion of the public hearing. The Board took these actions under the guise of conservation for stocks bound for the Susitna, although they had zero evidence that such measures would be of any benefit. This decision is not only contrary to science, but is clearly driven by a political agenda of the sportfishing industry to limit commercial fishing in Cook Inlet. The MSA prohibits such political dealings.

Even worse, after the public meeting was over, in an effort to install even more such punitive restrictions, the Board tried to pass emergency regulations. These efforts were stopped only by a lawsuit filed by fishermen and processors to halt this arbitrary action.

Example 4: Allocation Without Explanation.

The Board also makes many decisions that are clearly allocative in nature, without properly considering the impact of those decisions as required by National Standard 4 (fair and equitable) and National Standard 8 (consider impact to fishing communities). For example, the Board decided to increase the “inriver” allocation by 50,000 fish (from 150,000 to 200,000) on the Kenai River. UCIDA complained that the Board did so without discussing the impact on fishing to the drift fleet (as would be required under National Standards 4 and 8). The state responded that the decision to increase allocation to inriver uses was not an allocation decision, and therefore the state had no obligation to discuss the impact of that allocation. This kind of action is entirely inconsistent National Standards 4 and 8.

3. The State’s Process Lacks the Procedural Protections of the MSA.

The MSA is not only a substantive statute, but a procedural one. Congress contemplated a carefully crafted process for making fishery management decisions – involving the Council, scientific and statistical committees, advisory committees, public input, and oversight by the Secretary of Commerce – giving these groups the ability to approve or reject fishery management plans and regulations and, where appropriate, to veto or override Council decisions that are contrary to the MSA. This process is essential to achieving the difficult task of managing fisheries for the benefit of the nation. Moreover, the Council and the Secretary

must further analyze the impact of an action under NEPA and the Endangered Species Act ("ESA") (as appropriate).

The state's process by contrast is largely ad hoc. Changes to regulations are driven by a three-year cycle of largely public proposals. Often, the Board generates its own proposals in the middle of the rulemaking process and proceeds to adopt those changes – without any meaningful opportunity for the public to comment or participate. None of these proposals (whether Board-generated or otherwise) are analyzed for their impacts. No impact statement is produced. There is no scientific and statistical committee that reviews these proposals. There is no obligation on the part of ADF&G to review these proposals for consistency with state laws and policy (or the MSA), and no authority for ADF&G to veto or reject Board decisions that are inconsistent with state laws or policies.

For example, at the last Board meeting, the Board adopted seven Board-generated proposals. These proposals, among other things, (a) changed the Kenai River Late-Run Sockeye Management Plan by creating a new fishing corridor and then closing fishing in the EEZ in favor of fishing in that corridor; (b) adopted new inriver and optimum escapement goals for the Kenai and Kasilof River; and (c) placed harsh new closure restrictions that end the fishing season in August. These adopted proposals were presented to the public for the first time during the very meeting where the Board adopted the changes into law. This ad hoc decision-making process simply lacks the careful deliberative process contemplated by the MSA to ensure proper management of the fishery in a manner consistent with the MSA and its national standards.

Even worse, the Board has effectively delegated portions of its rulemaking responsibility to ADF&G so that ADF&G must interpret the "intent" of the Board in passing motions and writing regulations. Critically, there is no follow-up process whereby the ADF&G submits proposed draft regulations (based on their interpretation of Board intent) to the Board for its review. The result is that ADF&G has to effectively guess what the Board intended.

For example, the Board voted to approve a proposal that "changed 150,000 fish to 200,000 fish" for an inriver goal. ADF&G interpreted that approval to mean the Board intended to change another inriver goal from 200,000 fish to 250,000 fish, and yet a third inriver goal from 250,000 fish to 300,000 fish. When UCIDA pointed out that the Board never made the latter two changes, the state justified the change because "it stood to reason" that the Board would change all three inriver goals. This kind of post-decisional interpretation is a far cry from the Council's carefully crafted process, and, indeed, courts have explained that such a

process is flatly inconsistent with the requirements of the MSA. *See, e.g., Fishing Co. of Alaska, Inc. v. Gutierrez*, 510 F.3d 328, 333 (D.C. Cir. 2007) (Secretary cannot make changes to Council regulations that were not deliberated and approved by Council).

4. The State Refuses to Make Contingencies for Weather or Consider Safety of Life at Sea.

The MSA instructs the Council to consider safety of life at sea when making regulatory decisions (National Standard 10). UCIDA members have repeatedly asked the Board to make allowances for bad weather so that fishermen are not forced out to sea in dangerous conditions on the few days when fishing is open. The state has refused to do so. The result has been events like "Black Thursday" in 2010 where the Coast Guard was called to rescue four boats in serious distress in conditions too severe for fishing.

5. The State Has Limited EEZ Fisheries in Recent Years in Favor of Personal Use Fisheries That Are Discriminatory, Are Destructive of Essential Fish Habitat, and Permit Harassment of Beluga Whales.

The state is also managing its recreational fisheries in a manner that is inconsistent with the MSA. A prime example is the unrestrained growth of the personal use ("PU") fishery. This was at one time a small fishery that has steadily grown to the point where the Kenai River has an average of 25,000 "dipnetter days per year" with a harvest of over 500,000 sockeye.¹¹ There is currently no limit on the number of participants who can take advantage of this fishery, and its growth is therefore unrestrained.

Although the PU fishery does not itself occur in the EEZ, the state's authorization of the PU fishery is done at the expense of the EEZ fishery. That is so because the commercial fishery suffers time and area restrictions when escapement goals are not met as measured by sonar counters. But the dipnet fishery operates below the sonar counter, intercepting fish that would otherwise escape, and is not subject to time and area restrictions due to escapement concerns. The effect of such regulation is to displace commercial fishing operations.

¹¹ A "dipnetter day" is one person fishing for any part of a day.

The decision to allocate fish away from the EEZ fishery to the PU fishery is inconsistent with the MSA for the following reasons:

- o First, the PU fishery is for state residents only, and is therefore discriminatory. The decision to allocate fish away from the EEZ to that discriminatory fishery therefore is inconsistent with National Standard 4 (may not discriminate between residents of different states).
- o Second, the decision to allocate fish away from the EEZ to the PU fishery is damaging to salmon essential fish habitat ("EFH"). The Kenai fishery alone puts tens of thousands of recreational fishermen into sensitive riparian areas, damaging essential fish habitat. The state does not account for these EFH impacts or try to minimize those impacts as required by MSA section 303(a)(7), and therefore does not operate consistent with the MSA.
- o Third, the decision to allocate fish away from the EEZ into the PU fishery increases the impact to the beluga whale and its critical habitat. The EEZ fishery occurs outside beluga whale critical habitat, and a study by NMFS documented zero interactions between EEZ fishermen and the beluga whale. By contrast, the PU fisheries occur directly in beluga whale critical habitat, and place tens of thousands of fishermen and boats and countless tons of garbage and fish waste directly into beluga whale critical habitat. This not only creates significant detriment to the beluga, but exposes the state to potential civil liability under the ESA.

For all these reasons, the state is not managing the Cook Inlet fisheries in a manner consistent with the MSA.

C. The Council Has an Obligation to Update the Salmon FMP for the West Area and Cannot Abdicate That Responsibility to the State.

The MSA requires the Council to develop a fishery management plan for every fishery under its jurisdiction "that requires conservation and management" and to update those plans as necessary.¹² As explained below, federal conservation

¹² 16 U.S.C. § 1852(h)(1).

and management is clearly necessary in this case, and therefore a fishery management plan ("FMP") is required. Moreover, the MSA's implementing regulations for National Standard 7 explain that an FMP may not be required in every circumstance and provide a number of factors that the Council must consider in deciding whether or not to develop an FMP. Critically, none of the draft documents to date have attempted to apply those factors, and with good reason: those factors uniformly demonstrate that an FMP is required for Cook Inlet. Finally, the only reason put forward by the draft documents for selecting alternative 3 – the need for seamless management – is also not appropriate because (1) the management will not be seamless in any event; (2) National Standard 3 encourages cooperation, not abdication; and (3) the state's "seamless" management would be contrary to the MSA.

1. Federal "Conservation and Management" Is Necessary in Cook Inlet.

There are four reasons federal conservation and management are necessary in Cook Inlet.

First, as discussed above, the state is not managing the EEZ fisheries in Cook Inlet in a manner consistent with the MSA and has denied that it has any obligation to do so. Federal involvement is therefore necessary to ensure these fisheries are managed in a manner consistent with the MSA.

Second, NMFS has already decided that salmon in Cook Inlet require not only federal management but "special management." On April 11, 2011, NMFS completed the critical habitat designation for the beluga whale in Cook Inlet. 76 Fed. Reg. 20,180 (Apr. 11, 2011). As part of that designation, NMFS determined that Pacific salmon were primary constituent elements for the beluga whale's critical habitat and expressly determined that these salmon needed not only federal management but "special management." In so doing, NMFS rejected the argument that the state was properly managing the fishery:

Comment 2: Cook Inlet anadromous fish runs are healthy and appropriately protected under existing regulatory mechanisms.

Response: We recognize and acknowledge that the current management structure of the salmon fisheries has generally provided for the sustained harvest and productivity of salmon in Cook Inlet. However, it should also be noted that there are problems inherent with any

management system. The size of several king (Chinook) salmon returns in 2009 and 2010 was substantially below average, resulting in closures of sport and commercial fisheries in the Inlet. The Deshka River king salmon runs were extremely low in 2008 and 2009, resulting in closures. The Susitna River sockeye salmon runs failed to meet minimum escapement goals for 5 of 7 years between 2001 and 2007. Sockeye commercial harvests for the Northern District of Cook Inlet fell from an average of 180,000 fish in the 1980s to an average of 26,000 since 2002. The Alaska Department of Fish and Game forecasts Kenai River sockeye runs to be below average for 2010, citing management decisions leading to overescapement as a contributing factor.

76 Fed. Reg. 20,180.

Given that NMFS has determined that there are problems with the state's management of these fisheries and that these fisheries may require special management by the federal government, it would be arbitrary for the government to now reach the opposite conclusion.¹³

Third, withdrawal of the Salmon FMP in the Cook Inlet will create a jurisdictional loophole for vessels not registered in the state. To date, none of the Council's draft documents have explained why this loophole will not be exploited. UCIDA's members have had conversations with fishermen (who are not Cook Inlet gillnet permit holders) who have expressed intense interest in exploiting this loophole.¹⁴ Any such efforts will come at the expense of existing permit holders,

¹³ In addition, as explained above, federal management is necessary because of the state's increasing trend toward closing fishing in the EEZ (where impacts to beluga whale are nonexistent), in favor of PU fishing within beluga whale critical habitat. These PU fisheries can significantly impair beluga whale critical habitat by damaging water quality. Moreover, the sheer number of PU fishermen operating in beluga whale critical habitat has a high potential to interrupt beluga feeding behavior.

¹⁴ Indeed, the last time such a loophole was discovered, it was heavily exploited by an opportunistic fisherman. *See Trawler Diane Marie v. Brown*, 918 F. Supp. 921 (E.D.N.C. 1995) (scallop fishing vessel exploited the absence of an

(continued . . .)

as the state will have to curtail fishing by permit holders in response to unregulated fishing activities. Local communities will suffer when fish landed and processed in Cook Inlet towns such as Homer and Kenai are instead shipped off to foreign countries or the lower 48.

Moreover, the draft documents appear to overstate the state's ability to curtail such activities. The state may have the authority to prohibit fish caught in such a loophole from being landed in Alaska, but it is not so clear that it has the legal authority to prohibit a vessel carrying such fish (or a vessel that participated in such a fishery) from entering state waters. That is so because fishing in the EEZ by an out-of-state vessel would not be illegal. To the contrary, the Council would be intentionally making that action legal under federal law. Any state law that attempted to prosecute an individual for engaging in fishing activities made legal by federal law would almost certainly run into preemption and commerce clause limitations.

Similarly, the suggested federal check in/check out requirements are not a solution to this problem. This "solution" proves that there is a need for federal management, thereby requiring an FMP. In any event, such a procedure would be burdensome on legitimate fishing vessels that may cross into and out of the EEZ dozens of times in a fishing day. Moreover, this solution would likely be ineffective, as it would only detect unregulated fishing, not prevent it.

(... continued)

FMP by denouncing Alaska registration and catching more scallops than was allocated for the entire scallop fishing fleet in Prince William Sound area). When other fishermen started to line up to exploit the same loophole, the Secretary temporarily halted this exploitation by emergency order. But that alternative will not be available in this case (at least not until the point that overfishing is occurring – in which case the harm will have already been done). That is so because (a) the "Mister Big" scenario was only halted, long-term, by enacting an FMP; and (b) the use of the emergency order authority is limited to unforeseen emergencies, not anticipated management problems. Here, UCIDA has made it abundantly clear that this management problem will happen.

2. National Standard 7 Requires Development of an FMP for Cook Inlet.

National Standard 7 provides seven factors that the Council should consider in deciding whether an FMP is necessary. 50 C.F.R. § 300.640. Each factor weighs heavily in favor of developing an FMP for Cook Inlet.

The first factor is: “*(i) The importance of the fishery to the Nation and to the regional economy.*” As explained above, these fisheries are highly important to both the regional and the national economy. The ex-vessel value of Cook Inlet salmon fishing exceeded \$50 million this year. These fish largely end up in grocery stores and supermarkets in the United States, making Cook Inlet both an important food source as well as an economic driver. Thus, this factor supports development of an FMP.

The second factor is: “*(ii) The condition of the stock or stocks of fish and whether an FMP can improve or maintain that condition.*” As explained above, a number of the Cook Inlet stocks are experiencing management concerns and require, as NMFS has decided, “special management.” Having an FMP with clear management objectives for the fishery and installing science-based management can help ensure these runs continue to create jobs and provide quality salmon to the market. Thus, this factor supports development of an FMP.

The third factor is: “*(iii) The extent to which the fishery could be or is already adequately managed by states, by state/Federal programs, by Federal regulations pursuant to FMPs or international commissions, or by industry self-regulation, consistent with the policies and standards of the Magnuson-Stevens Act.*” The state had disavowed any obligation to regulate Cook Inlet salmon fisheries in a manner consistent with the MSA. Moreover, UCIDA has detailed above the many reasons the state is not managing in a manner consistent with the MSA. Thus, this factor weighs heavily in favor of an FMP.

The fourth factor is: “*(iv) The need to resolve competing interests and conflicts among user groups and whether an FMP can further that resolution.*” The conflict between commercial, sport, and PU fisheries has been intense in Cook Inlet for decades. This conflict is fostered, in large part, by the methods and procedures by which the Board manages the fishery. Having an FMP with clearly defined management objectives, operating in a transparent process, would seriously lessen those issues. The existence of an FMP would also provide Secretarial oversight of the Board – in a manner similar to the way the Secretary provides oversight of the Council. ADF&G either cannot or does not provide that

essential oversight. As such this factor too weighs heavily in favor of producing an FMP.

The fifth factor is: “(v) *The economic condition of a fishery and whether an FMP can produce more efficient utilization.*” Erratic Board management decisions have made Cook Inlet a difficult commercial environment. Often fishing is compressed into too few days so that processors are either idle or overwhelmed. Neither condition is good. When the processors get overloaded, fish quality goes down, significantly impacting the quality of fish that goes to market. Many processors that once operated in Cook Inlet have pulled out. Federal oversight with a stable FMP and management objectives could return a sense of order and predictability to the fishery.

The sixth factor is: “(vi) *The needs of a developing fishery, and whether an FMP can foster orderly growth.*” Currently, there is a hugely under-utilized chum and pink fishery in Cook Inlet. The state has been largely unwilling to allow harvest of these fish. An FMP could help develop these fisheries in a manner consistent with the National Standards.

The seventh factor is: “(vii) *The costs associated with an FMP, balanced against the benefits(see paragraph (d) of this section as a guide).*” For all the reasons stated above, an FMP would be highly beneficial. Without an FMP, commercial fishing in Cook Inlet has a dim future. The state’s continued mismanagement and transparent efforts to restrict and limit commercial fishing in favor of recreational and PU fisheries will turn commercial fishing into little more than a hobby. A properly developed FMP can halt this trend and restore science-based management to the fishery. At the same time, the cost to the federal government is small. There is an initial cost associated with developing a proper FMP for the West Area. But once that is done, the bulk of the implementation of that plan would be deferred to the state. The federal government will still have to provide some oversight, but these costs are modest when weighed against the value of the fishery and the potential for an FMP to seriously improve the management of that fishery.

In sum, all seven factors in National Standard 7 demonstrate that an FMP is necessary and appropriate for Cook Inlet.

3. Abdication Is Not Supported by National Standard 3.

The Council’s draft documents suggest that removing the historical net fishing areas from the FMP might be consistent with National Standard 3 because

it “would allow the State to manage salmon stocks seamlessly throughout their range, rather than imposing dual management.” This statement is factually incorrect because the state simply lacks the legal authority to manage salmon “throughout their range.” Specifically, the federal government would still have management responsibility and authority over subsistence uses in federal lands and waters within the state. See 50 C.F.R. part 100. Similarly, the federal government would still have responsibility for managing fish in international waters governed by international agreements. The Coast Guard, not the state, will be the entity responsible for prosecuting and enforcing fishing regulations in international waters, and the U.S. Department of State, not the state of Alaska, will have the responsibility for negotiating and enforcing treaties governing salmon returning to Cook Inlet. Thus “dual management” would occur under any scenario.

In any event, achieving seamless management by *abdication* of federal involvement is directly contrary to National Standard 3. National Standard 3 explains that when, as here, a fishery exists in both state and federal waters, the MSA encourages “unity of management” and close coordination *under an FMP* – not *without* an FMP. 50 C.F.R. § 600.320(b). Nothing in National Standard 3 suggests that a proper way to achieve this coordination is for the federal government to walk away from management.

Moreover, any such “dual management” arguments with respect to the West Area are arbitrary in light of the fact that the Council is proposing to impose dual management in the East Area. Similar dual management can be found in the Council’s Salmon FMP as well. In the East and West Areas, the state and federal governments work in close coordination and are able to manage the fishery in a manner consistent with National Standard 3. There is no reason the same cannot be done here.

Finally, “seamless” state management here is not a good thing because, as explained above, the state would be “seamlessly managing” the Cook Inlet fisheries in a *manner contrary to the MSA*. National Standard 3 does not support and is contrary to any decision to abdicate federal management.

D. The Draft EA Fails to Properly Address the Impacts of Abdicating Federal Management to the State.

As explained at the outset, the draft EA is based on the false premise that the prior PEIS considered the delegation of fishery management to the state; it did not. To our knowledge, no such NEPA document has ever comprehensively looked at the environmental or social/political impacts of federal abdication. Certainly, no

document has done so in recent years, because until this FMP process started, the Council was operating under the incorrect assumption that these fisheries were deferred to the state under other federal law.

What is missing from the draft EA is any kind of comprehensive analysis of the health of the Cook Inlet fisheries, and a discussion of whether the Cook Inlet fisheries are being managed in a manner consistent with the MSA. The draft EA fails to take a "hard look" at the state's management of the fisheries in Cook Inlet. For example, the draft EA omits entirely the discussion of the management problems occurring in the Susitna drainage. A significant number of the lakes in that system are suffering from the invasion of pike minnows. At least five lakes have suffered total extirpation of sockeye, including Trapper, Red Shirt, Neal, Sucker, and Caswell lakes. Shell Lake now seems poised to suffer the same fate. In 2009, 4,961 adult sockeye salmon returned to Shell Lake and presumably spawned. In 2011, when progeny from the 2009 spawning escapement were expected to migrate from Shell Lake, only 25 sockeye smolt were counted leaving Shell Lake. All of this is occurring under state management. Yet none of this was discussed in the draft EA.

Similarly, the draft EA fails to discuss the impacts of unrestricted growth of PU fishing in beluga whale critical habitat in the Kenai River. Although NMFS has strong evidence to support the fact that drift gillnet fishing has no impact on the beluga whale, it has no evidence at all regarding the impact of putting tens of thousands of fishermen directly into beluga whale critical habitat or of putting tons of fish waste from cleaning hundreds of thousands of fish on the beach and depositing the carcasses directly in beluga whale habitat. Anecdotal evidence suggests that the beluga whale no longer feeds in these critical habitat areas due to the PU fishery. Although these impacts are not occurring directly in the EEZ, the unrestrained growth of the PU fishery is an indirect effect of deferring management to the state, and the unrestricted expansion of the PU fishery comes at the expense of restrictions on fishing in the EEZ. Accordingly, NEPA requires a detailed investigation of the environmental impacts of the PU fishery.

The draft EA is also deficient for failing to properly analyze the impact of unregulated fishing for vessels not registered in the state. As mentioned above, UCIDA believes that it is highly likely that this loophole will be exploited. The opportunity to fish in the best fishing areas in Cook Inlet, with no gear restrictions or time restrictions, would be like opening up a new gold rush. The Council has an obligation to investigate this problem. At the FMP workshop, Lance Nelson suggested that the state would aggressively prosecute anyone participating in such a fishery. With all due respect to the state's bravado, NEPA at the very least

requires a detailed analysis of (1) whether the state has the legal authority under state law to prosecute an out-of-state vessel engaged in *legal* fishing *outside* the state of Alaska merely because that vessel enters the state in the course of trade or commerce; (2) whether any state law that authorized such prosecution would be preempted by the MSA or the commerce clause; and (3) whether such threats (if supported) would actually deter those who would take advantage of a legal and potentially highly lucrative fishing opportunity. But the Council cannot satisfy its obligation to take a "hard look" under NEPA by merely taking the state's word for it.

Finally, the draft EA does not consider a reasonable range of alternatives. The draft EA has not considered (1) any alternative that does not delegate all sportfishing to the state; or (2) any alternative that would treat Cook Inlet differently from other areas in the West Area.

III. CONCLUSION

The Cook Inlet salmon fishery is an important national resource. The Council has an obligation to ensure that it is managed in a manner consistent with the MSA. The preferred alternative of turning over management to the state is nothing short of abdication of that responsibility. UCIDA respectfully requests that the Council reconsider that position and develop an FMP for Cook Inlet.