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December 2021 Council Meeting - Agenda B3 - NOAA General Counsel's Report

Two New Complaints Challenging the Final Rule Implementing Amendment 14 to the Fishery Management Plan for the Salmon Fisheries in the EEZ Off Alaska (Salmon FMP)

Two groups of plaintiffs filed separate complaints in the U.S. District Court for the District of Alaska challenging the final rule implementing Amendment 14 to Salmon FMP.

Humbyrd v. Raimondo, No. 3:21-cv-00247-JMK (D. Alaska).

On November 9, 2021, a group of plaintiffs represented by the Pacific Legal Foundation filed a lawsuit alleging that Amendment 14 violates the Appointments Clause, the Take Care Clause, and the Executive Vesting Clause of the U.S. Constitution. Plaintiffs allege the North Pacific Fishery Management Council (Council) wields significant executive powers and therefore the manner in which Council members are appointed under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) is unconstitutional. In the alternative, plaintiffs allege the NOAA Assistant Administrator for Fisheries has been delegated "wide, unreviewable discretion to exercise the Secretary's powers" and therefore must be appointed by the President and confirmed by the Senate in order to exercise valid rulemaking authority. Plaintiffs further allege that tenure protections for Council members impede the President's oversight authority and therefore violate the Take Care Clause and the Executive Vesting Clause. Plaintiffs seek declaratory relief and ask the court to vacate the rule implementing Amendment 14.

United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv., No. 3:21-cv-00255-JMK (D. Alaska)

On November 17, 2021, the same plaintiffs who successfully challenged Amendment 12 to the Salmon FMP filed a new complaint challenging the final rule implementing Amendment 14. In their complaint, the plaintiffs allege that Amendment 14 is inconsistent with the Magnuson-Stevens Act, the National Environmental Policy Act, and the Administrative Procedure Act. Their complaint includes allegations that the Council did not consider a reasonable range of alternatives and that the Salmon FMP must include management measures for the portion of the Cook Inlet salmon fishery that occurs in State waters. Plaintiffs are asking the Court to vacate Amendment 14 and appoint a special master to oversee the development of a new FMP amendment that would include management measures for both State and Federal waters in Cook Inlet.

The government's responsive pleadings and the administrative records for these cases are due by January 6, 2022.



Attachments:

1. The plaintiffs' Complaint in Humbyrd v. Raimondo, No. 3:21-cv-00247-JMK (D. Alaska).

2. The plaintiffs' Complaint in United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv., No. 3:21-cv-00255-JMK (D. Alaska).

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

WES HUMBYRD; ROBERT WOLFE; and
DAN ANDERSON,
Petitioners and Plaintiffs,

v.

GINA RAIMONDO, in her official capacity
as Secretary of the U.S. Department of
Commerce; JANET COIT, in her official
capacity as Assistant Administrator for the
National Marine Fisheries Service; and
NATIONAL MARINE FISHERIES
SERVICE,
Respondents and Defendants.

No. 3:21-cv-00247-JWS

PETITION FOR REVIEW & COMPLAINT
(16 U.S.C. § 1855; 5 U.S.C. § 706)

INTRODUCTION

1. “Since time immemorial Alaska has been blessed with a natural food resource in the form of annual migrations of salmon.” *Metlakatla Indian Cmty., Annette Island Rsrv. v. Egan*, 362 P.2d 901, 903 (Alaska 1961), *judgment aff’d in part sub nom., Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), and *vacated in part on other grounds*, 369 U.S. 45 (1962). This gift of nature “has always been one of the basic food resources of the people as well as the basis of their main industry,” forming “the principal source of income for a large portion of Alaska’s labor force.” *Id.*

2. Wes Humbyrd, Robert Wolfe, and Dan Anderson (“Petitioners” or “Plaintiffs”) are fishermen who make their livelihoods engaging in this integral part of Alaskan identity. For decades, Wes, Bob, and Dan have fished for salmon in Cook Inlet, investing their lives in a craft that feeds their communities, their families, and themselves.

3. In December, this time-honored way of life will be permanently wiped out from Cook Inlet.

4. The cause is a rule approved by Defendant National Marine Fisheries Service (“NMFS” or “Service”) through power delegated by Defendant Gina Raimondo, the Secretary of Commerce. *See Fisheries of the Exclusive Economic Zone Off Alaska; Cook Inlet Salmon; Amendment 14*, 86 Fed. Reg. 60,568 (Nov. 3, 2021) (“Rule”). In less than a month, the Rule will permanently close the commercial salmon fishery in Cook Inlet’s federal waters—not because the fishery is overfished or for any

other conservation or environmental reason, but simply because the government finds it too bothersome to coordinate with the State of Alaska in managing the fishery.

5. This casually destructive rule must be vacated, however, because it violates the Constitution's Appointments Clause and Take Care Clause. These "essential" structural provisions of the Constitution are accountability-preserving mechanisms. *Collins v. Yellen*, 141 S. Ct. 1761, 1783 (2021). Their basic function is to ensure presidential control over the agents who exercise executive power on his behalf.

6. The Appointments Clause reserves the exercise of significant federal power, including rulemaking and policymaking power, to "Officers of the United States." *Buckley v. Valeo*, 424 U.S. 1, 140–41 (1976) (per curiam). Such officers must be appointed by the President with the advice and consent of the Senate, except that Congress may by law vest the appointment of "inferior" officers in the President alone, the courts of law, or the heads of departments. U.S. Const. art. II, § 2, cl. 2. These limitations make the President responsible for the selection and oversight of executive officials with significant power; and the American people can then hold him responsible for poor appointments.

7. Though the Rule here was approved for publication by the National Marine Fisheries Service, the policy choice behind the Rule was made by the North Pacific Fishery Management Council ("Council"). The Council is an independent policymaking body created by the Magnuson-Stevens Fishery Conservation and Management Act ("Act" or "Fishery Act") to manage fisheries off the coast of Alaska.

Pursuant to the Act, the Council issues fishery management plans (“FMPs”), amendments to those plans, and implementing regulations. The Rule implements Amendment 14, an amendment to the Salmon FMP, which regulates salmon fishing in federal waters off the coast of Alaska. Under the Act, when the Council proposes a regulation, the Service must issue it as a final rule, provided only that the regulation is consistent with the Act and other applicable law. The Council thus decides the essential policy questions governing fishery management. Accordingly, Council members wield power reserved for officers.

8. Furthermore, the breadth of their policymaking power, combined with their statutorily granted discretion and independence, means that Council members must be appointed as non-inferior officers, sometimes called principal officers. Yet, none of the Council’s members who adopted the Rule was appointed by the President with the advice and consent of the Senate. Moreover, even if inferior officers could wield the Council’s power, the Council members were not properly appointed as inferior officers. Accordingly, the Constitution forbade them from proposing the Rule, and the Rule is void.

9. The Take Care Clause subjects federal officials exercising officer powers to another accountability mechanism. The Take Care Clause, with the Executive Vesting Clause, requires that officers be removable by the President, so that he is able to take care that the laws be faithfully executed. This powerful mechanism for oversight persists even if the President has other means of controlling an officer.

Given the breadth of the President’s supervisory powers and responsibilities, only limited removal protections are permissible.

10. First, only two types of officers may have tenure protection: “multimember bod[ies] of experts, balanced along partisan lines, that perform[] legislative and judicial functions and [are] said not to exercise any executive power,” and “inferior officers with limited duties and no policymaking or administrative authority.” *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2199–2200 (2020). For reasons explained herein, the Council is neither and may not receive tenure protection.

11. Second, any tenure protection must not be so stringent as to impede the President’s supervision. Yet, 10 of the 11 members of the Pacific Council enjoy such strong tenure protection that they cannot be effectively overseen. Seven members cannot be removed unless a Council supermajority consents or if the members violate certain financial conflict-of-interest provisions. Some members cannot be removed at all. These protections, by stymieing the President’s efforts to oversee the members’ duties, violate the Take Care Clause. And because the Rule was effected by Council members wielding officer power outside of presidential oversight, the Rule is void.

JURISDICTION AND VENUE

12. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); *id.* § 2201 (authorizing declaratory relief); *id.* § 2202 (authorizing injunctive relief); 16 U.S.C. § 1855(f) (providing for judicial review of Fishery Act regulations); *id.* § 1861 (providing district court jurisdiction over cases

arising under the Fishery Act); and 5 U.S.C. §§ 701–06 (judicial review provisions of the Administrative Procedure Act).

13. Venue in the District of Alaska is proper because the offices of the Defendants are located within the district, a substantial part of the acts or omissions giving rise to this action occurred within the district, and Plaintiffs reside in the district. 28 U.S.C. § 1391(e).

PARTIES

Plaintiffs

14. Wes Humbyrd, Bob Wolfe, and Dan Anderson are Alaska residents and active commercial salmon fishermen, possessing the necessary state permits.

15. Other than a 5-year break, Wes has been fishing for salmon in Cook Inlet for approximately 53 years. He typically earns between 70% and 80% of his income fishing for salmon in Cook Inlet, predominantly in federal waters.

16. Bob has worked in the Cook Inlet commercial salmon industry for 42 years, starting as a fish processor in 1980 and working his way up to owning his own boat and permit in 1987. Seven years ago, he started a retail business to sell his fish directly to consumers. On average, he earns 50% of his income fishing in Cook Inlet for salmon, predominantly in federal waters.

17. Dan first started participating in Cook Inlet's commercial salmon fishery in 1986 as a deckhand. In 1989, he struck out on his own with a newly purchased vessel and permit. Due to market uncertainties, Dan did not fish for salmon in 2020, but in most years, he fishes for salmon in Cook Inlet's federal and

state waters from June to August. Fishing Cook Inlet's federal waters is typically responsible for a significant portion of Dan's annual income.

18. Shutting down the federal waters to commercial salmon fishing will have a devastating impact on Wes, Bob, and Dan. With the waters in the middle of Cook Inlet closed, Plaintiffs will be forced to fish in nearshore state waters. Salmon in nearshore waters are not spread out evenly but rather congregate near the river mouths into which they migrate. Plaintiffs will therefore be required to drive their vessels an additional 8 to 10 hours per trip to arrive at a viable fishing site. If tides are unfavorable, Plaintiffs may be required to drive to state waters the day before they fish. This will injure Plaintiffs not just by increasing their operating costs, but also by imposing additional travel time, decreasing fishing opportunities, and significantly reducing their catch.

19. The Rule is also expected to impact the quality of Plaintiffs' catch. In Plaintiffs' experience, salmon in the open federal waters are fattier and of higher quality in texture, firmness, and color compared to nearshore salmon that have begun to migrate upriver. Their catch in state waters is therefore expected to be less competitive and sell at a lower price at market.

20. The volume of their catch will also be significantly curtailed. State waters extend only three nautical miles from shore, and much of that space is already taken up by other fishermen. For example, setnetters may place their nets up to 1.5 nautical miles from shore, depending on the precise location. Plaintiffs will thus be

left to fish in an extremely narrow band of water, significantly limiting the volume of possible catch compared with fishing in the open federal waters.

21. To catch salmon, Plaintiffs rely on drift gillnets, an efficient and economical method of fishing. But the difficulties and dangers of drift gillnet fishing in state waters will be greater than in open federal waters. Successful drift gillnet fishing requires significant space in which to spread out the gillnet. As a result, crowding the entire commercial salmon fishing fleet into the narrow band of state waters will require Plaintiffs to constantly maneuver their vessels and gear to avoid sand bars, rocks, and collisions and interference with other fishermen. These hazards of confining Plaintiffs to state waters—made worse by Cook Inlet’s large tidal fluctuations—will increase the chances that Plaintiffs suffer damage to their fishing gear and vessels.

22. Because of these factors, Wes, Bob, and Dan expect the fishery closure under the Rule to put them out of business, ending their decades-long careers fishing for salmon and significantly decreasing their incomes.

23. Even then, the Rule inflicts a further economic injury on each Plaintiff by reducing the value of his fishing assets, including his transferable fishing permits, vessels, and gear.

Defendants

24. Gina Raimondo is the Secretary of Commerce and the official charged by law with administering the Fishery Act. She is sued in her official capacity only.

25. Janet Coit is the Assistant Administrator for Fisheries. The Assistant Administrator approved the Rule as being consistent with applicable law. She is sued in her official capacity only.

26. The National Marine Fisheries Service is an agency within the Department of Commerce. The Secretary of Commerce has delegated to the National Oceanic and Atmospheric Administration (“NOAA”) the authority to administer the relevant portions of the Fishery Act; and NOAA has sub-delegated that authority to the Service.

LEGAL BACKGROUND

Federal Fisheries Management

27. In the United States, the state and federal governments divide authority to regulate oceanic fisheries. States govern nearshore waters, from the shoreline to three nautical miles offshore, while federal authority extends from three nautical miles to 200 nautical miles offshore. *United Cook Inlet Drift Ass’n v. NMFS*, 837 F.3d 1055, 1058 (9th Cir. 2016).

28. Federal fisheries are regulated through the process established by the Magnuson-Stevens Fisheries Conservation and Management Act. The express purpose of the Act is to manage fisheries to maximize their long-term benefits, including for commercial fishermen; the Act is not a one-sided environmentalist measure. 16 U.S.C. §§ 1801, 1851.

29. This purpose is given force through fishery management plans and amendments usually developed by eight regional fishery management councils and approved by the Secretary. *See id.* §§ 1852, 1854(a).

30. The fishery management plans and amendments are, in turn, implemented through regulations usually proposed by the regional councils and approved by the Secretary. *Id.* §§ 1853(c), 1854(b).

31. The Secretary has delegated her powers under the Fishery Act, including approval of fishery management plans, amendments, and regulations, to the Service.

32. The Secretary, and so the Service, may not reject councils' fishery management plans, amendments, and implementing regulations unless the same would violate "applicable law." *See id.* § 1854(a)(3), (b)(1). The Fishery Act does not authorize the Service or the Secretary to reject councils' fishery management plans, amendments, or implementing regulations for any other reason, such as a preference for a different policy approach. *See id.*

33. The Service is led by the Assistant Administrator for Fisheries. The Assistant Administrator for Fisheries is not nominated by the President and confirmed by the Senate.

The Regional Fishery Management Councils

34. Among the eight fishery management councils established by the Fishery Act is the North Pacific Fishery Management Council, which covers the states of Alaska, Washington, and Oregon. *Id.* § 1852(a)(1)(G).

35. The Council is an independent entity within the Executive Branch not contained within any other agency or Executive Department.

36. The Council has 11 voting members. *Id.*

37. A quorum is a majority of the Council, and the Council acts by majority vote of those present and voting. *Id.* § 1852(e)(1).

38. **The Regional Administrator:** One voting member of the Council is “[t]he regional director of the National Marine Fisheries Service for the geographic area concerned, or his designee.” *Id.* § 1852(b)(1)(B). The relevant official here is the NMFS Alaska Regional Administrator.

39. The Alaska Regional Administrator is appointed by the NMFS Deputy Assistant Administrator for Regulatory Programs.

40. The Alaska Regional Administrator is a career official in the Senior Executive Service. He is therefore removable only for cause. 5 U.S.C. §§ 7541–43.

41. **The state officials:** Three voting members consist of the “principal State official with marine fishery management responsibility and expertise in each constituent State, who is designated as such by the Governor of the State, so long as the official continues to hold such position, or the designee of such official.” 16 U.S.C. § 1852(b)(1)(A).

42. The relevant Alaska state official is the Commissioner of the Alaska Department of Fish and Game. The Commissioner is appointed to his state position by the governor of Alaska.

43. The relevant Washington state official is the Director of the Washington Department of Fish and Wildlife. The Director is appointed to his state position by the Washington Fish and Wildlife Commission.

44. The relevant Oregon state official is the Director of the Oregon Department of Fish and Wildlife. The Director is appointed to his state position by the Oregon Fish and Wildlife Commission.

45. The Act does not permit the President or the Secretary to remove the three state fishery officials from the Council.

46. **The governor-nominated members:** The remaining seven voting members are appointed by the Secretary, *id.* § 1852(a)(1)(G), but the Secretary's selection is limited to a list of nominees provided by the governors of Alaska and Washington, *id.* § 1852(b)(2)(C). The Alaskan governor provides nominations for five of the positions and the Washington governor for two positions. The governors need provide no more than three nominees for each vacancy.

47. The Secretary may reject a slate of nominees for a position only if the nominees fail to satisfy certain minimal statutory qualifications, in which case the governor may revise the list or resubmit the original list with additional explanations of the individuals' qualifications; the Secretary may not reject the list on the basis of the nominees' judgment, policy prescriptions, or character. *Id.*

48. The Secretary does not herself appoint these Council members. As with her other powers under the Fishery Act, the Secretary has delegated her appointment power to the NOAA Administrator. The NOAA Administrator has, in turn, delegated

this appointment power to the Assistant Administrator for Fisheries, who leads NMFS. The Assistant Administrator appoints these seven Council members.

49. The Act permits the Secretary to remove a governor-nominated member only if the Council first recommends removal by a two-thirds majority of voting members and states the basis for the recommendation, or the member violates § 1857(1)(O), a financial conflict-of-interest provision. *Id.* § 1852(b)(6).

The Appointments Clause

50. The Appointments Clause of the United States Constitution provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint” all “Officers of the United States.” U.S. Const. art. II, § 2, cl. 2. This requirement applies to both principal (also called superior) officers and inferior officers, except that “Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” *Id.*

51. “[A]ny appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by” the Appointments Clause. *Buckley*, 424 U.S. at 126.

52. The Appointments Clause is not limited to officials with authority to “enter a final decision” on behalf of the United States; it applies to any official who “exercise[s] significant discretion” in “carrying out . . . important functions.” *Freytag v. Comm’r*, 501 U.S. 868, 881–82 (1991).

53. Rulemaking is significant authority which may be exercised only by an officer. *Buckley*, 424 U.S. at 140–41.

54. A person exercising officer powers may be appointed as an inferior officer only if his “work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.” *Edmond v. United States*, 520 U.S. 651, 663 (1997). It is necessary but “not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude.” *Id.* at 662–63. The key question, rather, is “how much power an officer exercises free from control by a superior.” *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021).

55. Three factors that bear on whether an official wielding officer powers may be appointed as an inferior officer are: (1) whether the officer is subject to oversight in the conduct of his duties; (2) whether the officer is subject to removal without cause; and (3) whether the officer has “no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.” *Edmond*, 520 U.S. at 664–65. Supervision over inferior officers must extend to “matters of law as well as policy.” *Arthrex*, 141 S. Ct. at 1983; *see Collins v. Yellen*, 141 S. Ct. 1761, 1783 (2021). A head of department may not be appointed as an inferior officer. *Freytag v. Comm’r*, 501 U.S. 868, 884 (1991) (identifying heads of departments as “principal federal officers” who must be appointed with Senate confirmation).

56. The practical result of the Appointments Clause is that officers with more discretion must be appointed by nomination and confirmation, while closely supervised officers with less discretion may be appointed with less scrutiny (if allowed by Congress). Only nonofficers—those who lack any significant federal authority—may be selected by other means.

The Take Care Clause

57. The Take Care Clause, together with the Executive Vesting Clause, empowers the President to remove officers. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 484, 492 (2010); *Seila Law*, 140 S. Ct. at 2205. The removal power ensures that officers, once appointed, remain under the President’s control so that he may ensure and be accountable for the faithful execution of the laws. This power persists even if the President can control an officer through other means, such as the budget process and regulations. *Free Enter. Fund*, 561 U.S. at 504.

58. Congress may bestow tenure protection only on two small categories of officers: “multimember bod[ies] of experts, balanced along partisan lines, that perform legislative and judicial functions and [are] said not to exercise any executive power,” and “inferior officers with limited duties and no policymaking or administrative authority.” *Seila Law*, 140 S. Ct. at 2199–2200.

59. Even among officers who may enjoy tenure protection, the protection must be “[a]ppropriate for officers wielding the executive power of the United States.” *Free Enter. Fund*, 561 U.S. at 503. Thus, Congress “may not eliminate the President’s

removal power altogether” for any officer. *Seila Law*, 140 S. Ct. at 2205. And Congress may not create more than one level of tenure protection—that is, grant tenure protection to an officer who may be removed only by another officer with tenure protection. *Free Enter. Fund*, 561 U.S. at 493. No tenure protection may be so stringent as to “impede the President’s ability to perform his constitutional duty.” *Seila Law*, 140 S. Ct. at 2199 (alteration omitted) (quoting *Morrison v. Olson*, 487 U.S. 654, 691 (1988)).

FACTUAL ALLEGATIONS

The Cook Inlet Salmon Fishery

60. Plaintiffs make their living fishing for salmon in the federal waters of Alaska’s Cook Inlet. Cook Inlet is a large inlet connecting the Pacific Ocean to major Alaskan rivers. Because of its width, Cook Inlet has both state and federal waters.

61. Cook Inlet’s federal waters fall under the authority of the North Pacific Fishery Management Council but, until now, no fishery management plan governed those waters. Rather, the Council left management of these waters to Alaska.

62. In 2016, the Ninth Circuit held that this arrangement violated the Act and required the Council to manage Cook Inlet’s federal waters through an FMP. *United Cook Inlet Drift Ass’n*, 837 F.3d 1055.

63. In response to the Ninth Circuit’s decision, the Council proposed to amend a preexisting FMP bordering Cook Inlet. The amendment—Amendment 14—and the Rule, which implements Amendment 14, expand that preexisting FMP to include the Cook Inlet federal waters.

64. In addition, Amendment 14 and the Rule ban commercial salmon fishing in Cook Inlet's federal waters. Although the Council had considered keeping the fishery open and simply managing it in accordance with the Fishery Act, it ultimately opted to close the fishery instead.

65. NMFS determined that the Rule was consistent with applicable law and published it for comment. On November 3, 2021, NMFS published the Rule as a final rule.

DECLARATORY AND INJUNCTIVE RELIEF ALLEGATIONS

66. Each of the Plaintiffs has a significant interest in whether the Rule was lawfully promulgated. A substantial portion of each Plaintiff's income depends on commercial salmon fishing in Cook Inlet's federal waters. Further, Plaintiffs' fishing permits, vessels, and gear comprise a significant portion of Plaintiffs' assets. The closure of the Cook Inlet federal waters to commercial salmon fishing will visit significant economic hardship on Plaintiffs, in addition to reducing the value of their permits, vessels, and gear. A decision declaring the Rule to be inconsistent with the Appointments Clause or the Take Care Clause would remedy these injuries by preserving the value of Plaintiffs' assets and enabling Plaintiffs to continue to their fishing businesses.

67. Plaintiffs have no plain, speedy, and adequate remedy at law for their injuries. Money damages in this case are not available.

68. This case is currently justiciable because the Rule permanently closes the salmon fishery in Cook Inlet to commercial fishing, starting on December 3, 2021.

69. Therefore, declaratory and injunctive relief are appropriate to resolve this controversy.

FIRST CLAIM FOR RELIEF

Exercise of Powers Reserved to Officers of the United States by Persons Not Appointed Consistent with the Appointments Clause
(U.S. Const. art. II, § 2, cl. 2; 5 U.S.C. § 706(2)(B))

70. The preceding paragraphs are incorporated herein by reference.

71. Council members wield power reserved for officers of the United States because they exercise significant powers pursuant to the laws of the United States, including rulemaking powers.

72. Although Council members cannot promulgate regulations on their own, proposed Council regulations may be blocked only for inconsistency with law, not policy. *See* 16 U.S.C. § 1854(b). Thus, the Council and its members are endowed with significant power to make federal fishery policy.

Unlawful Principal Officers

73. Council members must be appointed as principal officers because they are not effectively supervised by anyone who is appointed by the President with the advice and consent of the Senate. Council members are not removable at will but rather enjoy extraordinarily strong protections against removal. *See id.* § 1852(b)(6). They have wide discretion over policy decisions. *See id.* § 1854(a)(3), (b). And they operate largely independent of external direction: they set their own priorities, establish and direct their own staff, and create their own operating procedures. *Id.* § 1852(e), (g)–(i).

74. Council members must also be appointed as principal officers for an independent reason. Because the Council is a freestanding entity within the Executive Branch, it constitutes an Executive department for constitutional purposes, and the Council members collectively constitute a head of a department. *Free Enter. Fund*, 561 U.S. at 511. Heads of departments, by definition, must be appointed as principal officers. *Freytag*, 501 U.S. at 884.

75. Despite the requirement that they be appointed as principal officers, Council members are not appointed through presidential nomination and Senate confirmation. They therefore exercise their powers unconstitutionally.

Unlawful Inferior Officers—Appointment by Constitutionally Ineligible Persons

76. Even if Council members need only be appointed as inferior officers, such appointment has not taken place, and they therefore exercise their powers unconstitutionally.

77. The default appointment procedure for inferior officers is presidential appointment with Senate confirmation. *Edmond*, 520 U.S. at 660.

78. The Constitution permits Congress to loosen this requirement within strict limits: Congress may only vest the appointment of inferior officers in the President, the courts of law, or the heads of departments; and Congress must do so “by law.” U.S. Const. art. II, § 2, cl. 2.

79. Here, one Council seat is taken by the Service’s Alaska Regional Administrator, *see* 16 U.S.C. § 1852(b)(1)(B), whose appointment Congress has not vested by law in the President, the courts of law, or a head of department, *see*

generally id. § 1851, *et seq.*, and is appointed by the Service’s Deputy Assistant Administrator for Regulatory Programs. This seat is therefore unconstitutionally filled.

80. Three seats on the Council are filled by state officials pursuant to three governors’ designations. But the appointment diffusion for these seats goes even further, because the governors are not solely responsible for these officials’ appointments to their *state* positions.

81. Each governor designates as a Council member the “principal State official with marine fishery management responsibility and expertise” in his respective state. *Id.* § 1852(b)(1)(A). They thus sit on the Council by virtue of their state positions. And the relevant state officials for Washington and Oregon—the Washington Director of Fish and Wildlife and the Oregon Director of Fish and Wildlife—are appointed to their state positions by the Washington Fish and Wildlife Commission and Oregon Fish and Wildlife Commission, respectively. These commissions are therefore directly responsible for the placement of two individuals onto the Council.

82. Even more egregiously, the state officials themselves do not sit on the Council. At the time the Council approved Amendment 14 and the Rule, each state official had appointed a designee to sit on the Council. *Cf. id.* § 1852(b)(1)(A) (allowing either the state official with principal fishery responsibilities “or the designee of such official” to sit on the Council).

83. The actual Council members were thus appointed by the principal state official in charge of fisheries. Those state officials were designated by the governor and appointed by state commissions (in Washington and Oregon) or the governor (in Alaska).

84. Needless to say, none of these three Council positions is filled by the President, the courts of law, or a head of department. *See id.* § 1852(b)(1)(A). They are therefore unconstitutionally filled.

Unlawful Inferior Officers—Unconstitutional

Restraint on Appointing Officer's Power

85. Statutorily, the remaining seven Council seats are filled by the Secretary from lists provided by the governors of Alaska and Washington. 16 U.S.C. § 1852(b)(1)(C), (b)(2)(C). The Secretary may reject a governor-prepared list only if it fails to meet objective statutory criteria, not for policy or character reasons. *See id.* § 1852(b)(2)(C). Because the governors may designate as few as three individuals per obligatory vacancy and 12 individuals per at-large vacancy, they can effectively force the Secretary to appoint individuals whose judgment and character she mistrusts and whose policy prescriptions she disagrees with.

86. This arrangement unconstitutionally constrains the appointment power. *See Myers v. United States*, 272 U.S. 52, 128 (1926) (holding that statutory limitations on an appointment power cannot “so limit selection and so trench upon executive choice as to be in effect legislative designation”); *United States v. Espy*, 145

F.3d 1369, 1372 (D.C. Cir. 1998) (quoting *Myers* and acknowledging that Congress faces “constitutional limits” in restricting executive appointments).

Unlawful Inferior Officers—Appointment by Assistant Administrator

87. Even if the division of the appointment power established by the Fishery Act were permissible, the seven seats reserved for Secretarial appointment would still be unconstitutionally filled because the Secretary has not actually made those appointments. Rather, the Assistant Administrator for Fisheries—who is not the President, a court of law, or a head of department—has been delegated the responsibility for these appointments from the Secretary and the NOAA Administrator. National Oceanic & Atmospheric Administration, U.S. Department of Commerce, NOAA Organizational Handbook: Transmittal No. 61, at PDF 2–3 (2015), <https://bit.ly/3k9XRlj>.

88. For this independent reason, the seven seats are unconstitutionally filled.

89. Because the Rule was proposed by the Council, and its members are unconstitutionally appointed, the Rule is contrary to constitutional right, power, privilege, or immunity. 5 U.S.C. § 706(2)(B).

In the Alternative—Unconstitutional Action by the Assistant Administrator

90. The Fishery Act unambiguously requires the Secretary to publish any regulation that is proposed by a Council and is consistent with law. 16 U.S.C. § 1854(b). The entire policymaking decision therefore lies with the Council. But even assuming that the Service possesses substantive policymaking discretion over such

regulations, the Rule was nevertheless issued in violation of the Appointments Clause.

91. The Assistant Administrator for Fisheries has been delegated wide, unreviewable discretion to exercise the Secretary's powers. She therefore must be appointed as a principal officer. Nevertheless, she is not nominated by the President and confirmed by the Senate. Any policymaking discretion on her part was therefore exercised in contravention of the Appointments Clause.

92. Even if the Assistant Administrator need only be appointed as an inferior officer, Congress has not provided "by law" that she may be appointed by the President alone, a court of law, or a head of department. She therefore must be appointed by the default procedures for inferior officers: presidential nomination and Senate confirmation. Because she was not so appointed, her actions, including any policymaking power she exercised with respect to the Rule, violate the Appointments Clause.

93. The Rule is thus contrary to constitutional right, power, privilege, or immunity. 5 U.S.C. § 706(2)(B).

SECOND CLAIM FOR RELIEF

Exercise of Powers Reserved to Officers of the United States by Persons Not Properly Removable Pursuant to the Take Care Clause and the Executive Vesting Clause
(U.S. Const. art. II, § 3, cl. 5; U.S. Const. art. II, § 1, cl. 1; 5 U.S.C. § 706(2)(B))

94. The preceding paragraphs are incorporated herein by reference.

95. For reasons discussed in the First Claim for Relief, Council members are officers of the United States.

96. The Take Care Clause, together with the Executive Vesting Clause, requires that officers be removable by the President, so that he may oversee and thereby take responsibility for their actions.

97. Only certain types of officers may enjoy tenure protection. But the Council is neither a “multimember body of experts, balanced along partisan lines, that perform legislative and judicial functions and is said not to exercise any executive power,” nor does it comprise “inferior officers with limited duties and no policymaking or administrative authority.” *Seila Law*, 140 S. Ct. at 2199–2200. Thus, no Council member may have any sort of tenure protection; each must be removable at will. Their tenure protections therefore violate the Take Care Clause.

98. Even if Council members were permitted to enjoy tenure protections, the tenure protections here are so stringent as to impede the President’s oversight and so violate the Take Care Clause and Executive Vesting Clause.

99. The three state officials are not removable at all by the President or another officer of the United States, which arrangement violates the Take Care Clause and Executive Vesting Clause.

100. The seven Council members nominated by the governors may be removed by the Secretary only if two-thirds of the Council agrees, or if these members violate certain financial conflict-of-interest provisions. 16 U.S.C. § 1852(b)(6)(A)–(B).

101. The former method creates more than one layer of tenure protection, because to remove a Council member, the Secretary must first gain the assent of other Council members, who are similarly protected. In fact, this removal method creates

interminable layers of tenure protection because the protection is recursive: to remove a Council member, the Secretary must gain the assent of other Council members, none of whom can be removed without the assent of other Council members, none of whom can be removed without the assent of other Council members, and so forth. The result is that just over one-third of the Council, if united, can frustrate all attempts of removal under this pathway. This level of protection prevents the President from holding the Council to account and therefore does not satisfy the Take Care Clause and Executive Vesting Clause.

102. The latter method is not a removal provision that permits the President to take care that the laws be faithfully executed, because it is not substantially related to the performance of Council members' duties. Removal provisions do not satisfy the Take Care Clause and Executive Vesting Clause simply by technically permitting removal in narrow circumstances. *See Free Enter. Fund*, 561 U.S. at 503 (noting that some removal standards may "be inappropriate for officers wielding the executive power of the United States").

The President must be able to remove . . . officers who disobey his commands [and] also those he finds negligent and inefficient, those who exercise their discretion in a way that is not intelligent or wise, those who have different views of policy, those who come from a competing political party who is dead set against the President's agenda, and those in whom he has simply lost confidence.

Collins, 141 S. Ct. at 1787 (cleaned up).

103. Yet, the second removal method would not permit removal even of a member who flagrantly abuses his power, engages in nepotism, or engages in criminal malfeasance while in office, so long as he scrupulously divulges his financial interests

and recuses himself from appropriate Council decisions. For example, so long as members avoid financial conflicts of interests, they may openly violate every regulation-created rule that purports to govern their conduct, *see* 50 C.F.R. § 600.225 (prohibiting abusing one's office to interfere with an election, restricting lobbying activities, forbidding adverse action against Council employees based on political affiliation or activity, and prohibiting criminal and dishonest conduct), yet successfully resist removal. The second pathway to removal therefore does not satisfy the Take Care Clause and Executive Vesting Clause.

104. For the foregoing reasons, 10 of the 11 Council members' removal protections violate the Take Care Clause and Executive Vesting Clause because the President is not capable of overseeing the Council's agenda or actions.

105. Therefore, the Rule is contrary to constitutional right, power, privilege, or immunity. 5 U.S.C. § 706(2)(B).

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for relief as follows:

1. As to the First Claim for Relief, a judgment declaring that the Rule violates the Appointments Clause;
2. As to the First Claim for Relief, a permanent prohibitory injunction setting aside the Rule and forbidding Defendants from enforcing it, because it violates the Appointments Clause;
3. As to the Second Claim for Relief, a judgment declaring that the Rule violates the Take Care Clause and Executive Vesting Clause;

4. As to the Second Claim for Relief, a permanent prohibitory injunction setting aside the Rule and forbidding Defendants from enforcing it, because it violates the Take Care Clause and Executive Vesting Clause;

5. As to both Claims for Relief, an award of reasonable attorney fees and costs, pursuant to 28 U.S.C. § 2412, or any other applicable authority; and

6. As to both Claims for Relief, any other relief that the Court deems just and proper.

DATED: November 9, 2021.

Respectfully submitted,

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*Attorneys for United Cook Inlet Drift Association and
Cook Inlet Fishermen’s Fund*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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

Plaintiffs,

v.

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

Defendants.

Civil Action No.: _____

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

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

SUMMARY OF ACTION

1. Plaintiffs have a related action pending in *United Cook Inlet Drift Association, et al., v. National Marine Fisheries Service, et. al.* 3:13-cv-00104-TMB. Plaintiffs have sought relief in that related action to include the allegations below pursuant to Federal Rule of Civil Procedure 15(a)(2) and 15(d). Plaintiffs hereby file this complaint protectively in response to arguments by Federal Defendants in the related action that relief under Civil Rule 15 is not proper or warranted, or otherwise insufficient to satisfy the applicable statute of limitations.

2. Commercial salmon fishing in Alaska is an important part of the state's cultural heritage and history. Salmon fishing has supported generations of Alaska fishers and their families and has been the life blood of many rural Alaskan communities and businesses since long before statehood.

3. The Cook Inlet salmon fishery has historically been one of the nation's most productive salmon fisheries. But during the last two decades, the commercial harvest in Cook Inlet has steadily—and more recently, precipitously—declined. In the 1980s and 1990s, the sockeye salmon harvest alone ranged consistently from four to nine million sockeye per year. The 10-year average annual commercial catch from 2008 to 2017 is now down to just 2.7 million sockeye. The commercial sockeye harvest was about 1.8 million in 2017 and 2019, and the commercial sockeye harvest in 2018 was only 814,516—the worst harvest in over 40 years. In 2020, the commercial salmon

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

harvest in Cook Inlet reached *a new low*, below 2018, with 669,751 sockeye harvested and 1.2 million total commercial harvest of all five salmon species. These precipitous declines have all occurred under the exclusive management, control and direction of the State of Alaska.

4. In 2010, Plaintiffs sought to turn the tide of state mismanagement of the fishery by appealing to the National Marine Fisheries Service (“NMFS”) and the North Pacific Fishery Management Council (the “Council”), and asking for the development of a fishery management plan (“FMP”) to manage the Cook Inlet salmon fishery in a manner consistent with the National Standards of the Magnuson-Stevens Fishery Conservation and Management Act (the “MSA” or Magnuson-Stevens Act”). NMFS and the Council flatly refused, cynically claiming that they (as the entities entrusted by Congress to manage this nation’s fishery resources) lacked the expertise to manage salmon in Alaska (even though they manage salmon in other areas of Alaska). Instead, in 2012, NMFS and the Council issued Amendment 12 to the *Fishery Management Plan for Salmon Fisheries in the EEZ off the Coast of Alaska* (the “Salmon FMP”). See 77 Fed. Reg. 75,570 (Dec. 21, 2012). Amendment 12 cut the Cook Inlet salmon fishery out of the Salmon FMP altogether and deferred all management authority to the State of Alaska.

5. Plaintiffs initiated this lawsuit eight years ago against Federal Defendants (collectively NMFS) to challenge Amendment 12. The Ninth Circuit Court of Appeals agreed with Plaintiffs that NMFS’s decision to defer management to the State of Alaska in Amendment 12 was illegal. *United Cook Inlet Drift Ass’n v. Nat’l Marine Fisheries*

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

Serv., 837 F.3d 1055, 1063 (9th Cir. 2016). The Ninth Circuit instructed that NMFS could not “wriggle out of” its duties or “shirk” the statutory command to produce an FMP for the Cook Inlet salmon fishery. *Id.* at 1063, 1064. Moreover, the Ninth Circuit rejected NMFS’s argument that the Magnuson-Stevens Act “does not expressly require an FMP to cover an entire fishery.” *Id.* at 1064. Furthermore, the “Act makes plain that federal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns.” *Id.* at 1063. As this Court explained, the Ninth Circuit “held that Magnuson-Stevens Act requires” the Council “to create an FMP for each entire fishery under its authority that requires conservation and management.” Dkt. 168 at 2-3.

6. The Ninth Circuit decision in September of 2016 initiated a five-year administrative process that NMFS, the Council, and the State of Alaska turned into a complete farce. At the last minute, the Council completely abandoned its efforts to create a federally delegated or a federally managed FMP program for the Cook Inlet salmon fishery. Instead, at the urging of the State of Alaska (and with help from NMFS), the Council proposed an amendment (“Amendment 14”) that closes commercial salmon fishing in federal waters altogether, relinquishes and defers all management decision for the Cook Inlet salmon fishery to the State of Alaska. This is precisely the opposite of what the Ninth Circuit instructed. NMFS proceeded to draft language for Amendment 14 for the Council, reviewed and approved Amendment 14, and issued final regulations

implementing Amendment 14 on November 3, 2021. *See* 86 Fed. Reg. 60,568 (Nov. 3, 2021).

7. The NMFS decision to close the commercial salmon fishing in federal waters will have immediate and disastrous consequences on commercial processors and fishers, their families, and the communities and business that depend on salmon fishing in Cook Inlet. The closed area in Cook Inlet has been an essential part of commercial fishing in Cook Inlet for over 100 years. As one Alaska legislator explained, Amendment 14 “will likely put an end to commercial fishing in Cook Inlet, and therefore, and Alaskan way of life.”

8. As discussed more fully below, Amendment 14 and its implementing regulations, like its predecessor Amendment 12, are arbitrary, capricious, and contrary to the Magnuson-Stevens Act, 16 U.S.C. §§ 1801-1891d; the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321, *et seq.*; and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-559, 701-706.

9. Even worse, the process associated with Amendment 14 demonstrates that the Council and NMFS were not acting in good faith during the remand of Amendment 12. Public records show that members of the Council were actively trying to avoid the application of federal standards to the Cook Inlet salmon fishery. The Commissioner for the Alaska Department of Fish and Game, Doug Vincent Lang, a member of the Council, expressed concern that the Council would “take actions to bring state management in federal waters in line with federal standards” under the Magnuson-Stevens Act. Behind

the scenes, and outside the public process, Commissioner Lang developed a political strategy based on the supposed “State Right to Manage” the fishery, and in opposition to “federal or outsider influence.” Without informing the public or stakeholders, Commissioner Lang determined that the state was “unwilling” to accept a delegated management authority in Cook Inlet (even though it accepts delegated management authority for other fisheries) and left stakeholders and Council staff to continue on a fool’s errand trying to develop a delegated program that the state had predetermined it was never going to accept. This fact was not disclosed by the state until after the close of public comment in December 2020, and immediately before the state called for a vote to close the fishery. NMFS is complicit in this scheme, as staff were aware of the state’s plan, and not only stayed silent on the issue, but actively advised State of Alaska representatives to omit the rationale related to the “State’s sovereign rights over management of the salmon fisheries” from the record before the Council, and replace it with a pretextual explanation ostensibly related to salmon conservation. This is not fair dealing.

10. For all these reasons, and those discussed below, Plaintiffs respectfully request this Court to vacate the decision approving Amendment 14 and its implementing regulations, and seek an order requiring NMFS to comply with the MSA and develop an appropriate FMP that covers Cook Inlet. Plaintiffs request the Court to declare that Amendment 14, its underlying implementing regulations, and NMFS’s NEPA Finding of No Significant Impact (“FONSI”) are arbitrary, capricious, and an abuse of discretion;

not in accordance with law; and in excess of statutory jurisdiction, authority, or limitations. Plaintiffs further seek an order vacating Amendment 14 and its underlying implementing regulations, and the FONSI, and remanding to Defendants under the prescriptive supervision of this Court as set forth in the Request for Relief below.

PARTIES

Plaintiffs

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

12. UCIDA’s members make their living by commercial fishing. UCIDA’s members hold State of Alaska limited-entry permits (meaning additional permits can no longer be issued and are fully allocated), which authorize them to catch all five species of salmon: sockeye, coho, chinook, chum, and pink. The majority of drift gillnet fishing by UCIDA’s members in Cook Inlet occurs within federal waters in the exclusive economic zone (“EEZ”).

13. Drift gillnet boats are small-scale fishing operations, typically crewed by one to three persons. Each fishing operation represents a substantial investment in the boat, gear, and the permit itself. Each boat is generally allowed to deploy a single 900-

foot-long gillnet. The gillnet is suspended in the water column by floats (called “corks”) as the boat drifts with the current—hence the name “drift gillnet.” After the gillnet is allowed to “soak” in the water for a length of time (as the boat and net drift with the current), the gear is hauled in, and the fish are removed and placed on ice in the boat’s hold. Those fish are then transported to, and offloaded at, one of Cook Inlet’s local seafood processors in fishing communities such as Kenai, Kasilof, Ninilchik, or Homer. After processing, these salmon are delivered throughout the United States and around the world.

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

15. UCIDA’s mission is to promote public policy that facilitates the science-based and orderly harvest of Cook Inlet salmon in a manner that is economically and ecologically sustainable and that protects commercial salmon fishing in Cook Inlet as a viable way of life. UCIDA and its members are committed to the protection of the environment of Cook Inlet, and to ensuring that its marine resources are both managed and conserved to enhance the health and productivity of the ecosystem. To that end, UCIDA has advocated in state and federal forums for management of these stocks in a manner consistent with the goals and objectives of the MSA, including management consistent with the MSA’s Maximum Sustainable Yield (“MSY”) principles (MSY is defined at 50 C.F.R. § 600.310(e)(1)(i)(A) as the largest long-term average catch or yield

that can be taken from a stock or stock complex under prevailing ecological, environmental conditions). The relief UCIDA seeks in this lawsuit is germane to its organizational purpose.

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

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

18. Plaintiffs, directly or through their members, fully participated, to the limited extent allowed by NMFS and the Council, in the proceedings predating the decisions challenged in this lawsuit. Plaintiffs submitted detailed written comments and testimony on Amendment 14 and its implementing regulations and the accompanying draft environmental assessment ("EA").

19. Plaintiffs have standing to bring this action because their members are directly and adversely impacted by Amendment 14 and its implementing regulations, which close fishing in federal waters in Cook Inlet and improperly defers and

relinquishes all management decisions for the Cook Inlet salmon fishery to the State of Alaska. Plaintiffs and their members are also adversely impacted by Defendants' failure to comply with the procedural requirements of NEPA and the MSA. The challenged agency decisions are final and ripe for review by this Court.

Defendants

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

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

22. Defendant Janet Coit is the Assistant Administrator for NMFS and is sued in her official capacity. The Secretary of Commerce has delegated responsibility to the NOAA Administrator to ensure compliance with NEPA, the MSA, and the APA, and to promote effective management and stewardship of the nation's fisheries resources and

assets to ensure sustainable economic opportunities. The NOAA Administrator, in turn, has subdelegated this responsibility to NMFS.

23. Defendant James Balsiger is the Administrator of the NMFS Alaska Region and is sued in his official capacity. Dr. Balsiger also is a voting member of the Council and participated in the remand process leading to the development of Amendment 14. Dr. Balsiger drafted Amendment 14, and then reviewed and approved Amendment 14 on behalf of NMFS.

JURISDICTION AND VENUE

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

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

26. Plaintiffs have exhausted all administrative remedies.

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

STATUTORY FRAMEWORK

The Magnuson-Stevens Fishery Conservation and Management Act

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

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

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

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

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

33. The Council manages fisheries in the EEZ off Alaska's coast. Prior FMPs developed by the Council govern the management of salmon fisheries, including but not limited to the salmon fisheries, in which Plaintiffs' members participate.

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

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

36. The MSA's National Standards guide all FMPs and MSA regulations. For example, National Standard 1 requires FMPs to prevent overfishing while achieving the optimum yield from each fishery for the U.S. fishing industry. *Id.* § 1851(a)(1). National Standard 2 requires that all conservation measures be based on the best scientific information available. *Id.* § 1851(a)(2). National Standard 3 provides that fisheries should be managed as a unit throughout their range, where practicable. *Id.* § 1851(a)(3). National Standard 4 requires that any allocation of fishing rights be "fair and equitable" to fishermen and "shall not discriminate between residents of different States." *Id.* § 1851(a)(4). National Standard 7 requires conservation measures to, where practicable, minimize costs and unnecessary duplication. *Id.* § 1851(a)(7). National Standard 8 requires conservation measures to take into account the importance of the fishery

resources to fishing communities, to provide for the sustained participation of, and to minimize impacts on, such communities. *Id.* § 1851(a)(8). National Standard 10 requires conservation measures to promote the safety of human life at sea. *Id.* § 1851(a)(10).

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

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

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

The National Environmental Policy Act

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

41. Congress established NEPA as “our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a) (1978) (amended July 16, 2020). NEPA and its implementing regulations require that federal agencies, including NMFS, must prepare an environmental impact statement (“EIS”) for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); *see* 40 C.F.R. § 1501.3–6 (2020). The purpose of NEPA is to ensure that federal decision-making is

fully and publicly informed through a reasonably thorough and thoughtful analysis of the probable environmental impacts resulting from a proposed federal action, and through identification and analysis of a reasonable range of alternative actions, including the no-action alternative. In enacting NEPA, Congress sought to ensure that federal agencies take a hard look at the environmental consequences of any proposed action and required agencies to comply with NEPA “to the fullest extent possible.” 42 U.S.C. § 4332.

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

43. To determine whether an EIS is necessary, an agency may first prepare an EA. *See id.* §§ 1501.5(a)–(c), 1508.1(h) (2020). An EA is a “concise public document prepared by a Federal agency to aid an agency’s compliance with the Act and support its determination of whether to prepare an [EIS] or a [FONSI].” *Id.* § 1508.1(h) (2020). An EA must contain sufficient information and analysis to determine whether the proposed action is likely to have significant impacts, thus requiring preparation of an EIS. *See id.* §§ 1501.5(a)–(c), 1508.1(h) (2020). An EA must consider a reasonable range of alternatives, and must include a reasonably thorough discussion of the direct, indirect, and cumulative impacts of the proposed alternative. *See* § 1501.5(c)(2) (2020).

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

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

The Administrative Procedure Act

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

47. The APA also provides standards applicable when a federal agency proposes and adopts final rules and regulations. *Id.* §§ 553, 551(4). Specifically, agencies must provide “[g]eneral notice” of any “proposed rule making” to the public through publication in the Federal Register. That notice must include: “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the

proposed rule or a description of the subjects and issues involved.” *Id.* § 553(b). An agency’s responsibility to consider public comments on a proposed rulemaking is required by 5 U.S.C. § 553(c).

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

STATEMENT OF FACTS

The Cook Inlet Salmon Fishery

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

50. The Kenai River sockeye runs in Cook Inlet, in particular, are world-class, with the potential to produce millions of adult sockeye returns annually. These sockeye are also genetically unique, with an unusual variety in the age and large size of adult returning stocks.

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

52. Commercial fishing in Upper Cook Inlet is currently limited to two gear types (set and drift gillnets) and occurs on all five Cook Inlet anadromous salmon stocks. East side set net operations deploy gillnets from fixed locations near shore, anchored to the bottom, and commonly extending in sections as far as one and half miles offshore. West side set net operations are commonly extended up to 5 miles off shore. Northern District set net operations commonly extend up to 10 miles off of the northern inlet shores. Drift gillnets, by contrast, are deployed from small vessels. Each drift gillnet is approximately 900 feet long.

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

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

The 1990 Salmon FMP

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

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

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

58. The High Seas Convention was repealed and replaced in 1992 by the North Pacific Anadromous Stock Act of 1992, which contained no provisions for management of the three historic net fisheries areas. Despite the change in the law, the Council took

no action to make changes to the FMP to clarify for the West Area how it was to be managed for nearly 20 years.

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

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

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

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

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

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

64. The state has two basic kinds of escapement goals: biological and sustainable. Biological escapement goals are intended to achieve the MSY (human consumption for that fishery as a food resource). Sustainable escapement goals, by contrast, are based on historical data showing that a certain harvest level can be sustained.

In Upper Cook Inlet, only one salmon stock has a biological escapement goal. This goal has not been peer reviewed or set for MSY as required by MSA and National Standard 1.

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

66. The state has affirmatively stated that it is under no obligation to comply with the MSA in making its fishery management decisions. Indeed, the state’s record has shown that it has not managed the fisheries, especially the fisheries in Cook Inlet, in a manner consistent with the MSA.

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

68. During the last two decades, the commercial harvest in Cook Inlet has steadily—and more recently, precipitously—declined. In the 1980s and 1990s, the *sockeye* salmon harvest alone ranged consistently from four to nine million sockeye per year. The Secretary declared a fishery disaster in Cook Inlet in 2012 due to the commercial salmon fishery failure. The commercial sockeye harvest was about 1.8 million in 2017 and 2019, and commercial sockeye harvest in 2018 was only 814,516—the worst harvest in over 40 years. The 2018 total commercial harvest of *all five* salmon species was approximately 1.3 million salmon: 61% less than the most

recent 10-year average (already reduced) annual harvest of 3.4 million fish. In 2020, the commercial salmon harvest in Cook Inlet reached a new low below 2018 with 669,751 sockeye harvested and 1.2 million total commercial harvest of all five salmon species. Petitions for disaster declarations for the 2018 and 2020 commercial seasons are currently pending with the Secretary.

69. The decline in harvest and disaster requests are a direct result of mismanagement by the State of Alaska because of unnecessary restrictions on the commercial fisheries, preventing the harvest of millions of surplus salmon annually. State management in 2021 provides an example. In 2021, the State of Alaska missed the high end of already overinflated escapement goals for sockeye on the Kenai and Kasilof Rivers and Fish Creek by allowing a *surplus* of 1,447,618 sockeye to escape. This wasted surplus *was larger than the entire commercial sockeye harvest* for Upper Cook Inlet in 2021 of 1,403,017 sockeye. The state wasted more sockeye than it allowed to be harvested.

70. Accompanying this period of historically low salmon harvest is the state's decision to gradually restrict the commercial fishery year after year, with most openings now being severely geographically limited to only a narrow band, preventing the fishery from targeting areas where salmon congregate. Commercial drift fishing historically occurred predominately in the EEZ, but state restrictions have progressively pushed fishing efforts out of this essential fishing area. At the same time, the state has continued to increase "escapement" levels to record high (and likely unsustainable) levels in order

to guarantee more than enough fish for the sport fishers to catch and to stock the state resident-only personal use fishery with hundreds of thousands of fish.¹ Even with inflated escapement targets, the restrictions on commercial fishing are so significant that the state still regularly exceeds those escapement goals by a wide margin (e.g., the Kenai in-river sockeye goal has been exceeded nine out of the last 10 years).

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

72. Importantly, these state restrictions are based not on science or sound principles of species conservation and fishery management, but rather on other “allocative purposes,” like “mak[ing] sport fisheries more enjoyable.” In fact, as a result of the state’s over-escapement approach, the increasing *sport* fishery (and the resident-only personal use fishery) has harmed Cook Inlet salmon by causing “serious in-river habitat degradation problems such as hydrocarbon pollution and turbidity levels that exceed clean water standards, and miles of trampled riverbanks.” Millions of salmon go

¹ For example, the in-river escapement goal for sockeye in the 1980s and early 1990s (when the fishery was doing very well) was 400,000 to 700,000. ER 384. By 2011, the state ratcheted that goal to 1.1 million to 1.35 million, with no underlying biological basis for the change. *Id.*

unharvested every year while the commercial fleet is sidelined, to the detriment of Plaintiffs' members, local fishing communities, and the national interest in this important food source as expressed by the Magnuson-Stevens Act.

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

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

Amendment 12 to the Salmon FMP

75. In 2007, Congress amended the MSA to require all fishery management councils to amend their FMPs to "establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual

specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.” 16 U.S.C. § 1853(a)(15). Congress gave the fishery management councils a deadline of “fishing year” 2011 to accomplish this goal for any fishery that was not being overfished. *Id.* § 1853 note.

76. In 2010, the Council began the process of amending the Salmon FMP to comply with this statutory deadline. Plaintiffs, and their members, fish processors, and community leaders from Cook Inlet enthusiastically participated in the Council’s process. Plaintiffs explained in public testimony and written comments that the salmon fisheries in Cook Inlet were experiencing significant management concerns that have resulted in reduced run strengths, wasted harvests, and reduced salmon quality. Plaintiffs further explained that the state was not managing this fishery in a manner consistent with the MSA, as conceded by the state who affirmatively represented that it was not obligated to do so. Accordingly, Plaintiffs asked the Council to update the FMP for the West Area, provide management goals and objectives for Cook Inlet and annual catch limits (or an appropriate proxy for annual catch limits) as required by the MSA, and then delegate management to the state consistent with these goals and objectives. This is precisely what the Council proposed to do (and did) for the federal salmon fisheries in the East Area, and Plaintiffs explained that similar measures were necessary to address ongoing management concerns in Cook Inlet.

77. Plaintiffs also offered to work with the Council, and with Defendants, to secure funding to carry out those tasks.

78. Instead of granting Plaintiffs' request or working with the commercial salmon fishing groups to address their concerns, Council members told Plaintiffs that their belief that the Council could provide them any help was "naive and misguided" or "ill-founded, at best." The Council emphasized that the "National Marine Fisheries Service does not have the expertise . . . to effectively manage salmon fisheries," and that it was naive to expect that the federal agencies could help the state achieve the optimum yield required by the MSA or help stabilize unpredictability in the management of the fishery.

79. Instead of complying with Congress's annual catch limit requirement, the Council, with the support of Defendants, adopted Amendment 12 to the FMP, which provided no annual catch limits for Cook Inlet. Instead of including annual catch limits in the Salmon FMP for Cook Inlet, the Council redrew the map of the West Area to withdraw Cook Inlet from inclusion in the West Area and the Salmon FMP altogether. In so doing, the Council effectively abdicated all federal responsibility for managing salmon in Cook Inlet, contrary to the MSA.

NMFS Approves Amendment 12 and Issues a FONSI

80. The Council submitted Amendment 12 and its implementing regulations to NMFS for approval in December 2011. On April 2, 2012, NMFS published a notice of Amendment 12 in the Federal Register and solicited public comment. 77 Fed. Reg. 19,605 (Apr. 2, 2012). On April 11, 2012, NMFS published a notice of the draft rules

implementing Amendment 12 and solicited public comment. 77 Fed. Reg. 21,716 (Apr. 11, 2012).

81. Plaintiffs submitted comprehensive comments on Amendment 12, the proposed implementing regulations, and the draft EA on May 29, 2012.

82. Plaintiffs explained that the Council's decision to remove Cook Inlet from the Salmon FMP was arbitrary, capricious, and contrary to law and asked the Defendants to reject Amendment 12 and its implementing regulations as inconsistent with the requirements of the MSA.

83. Plaintiffs also submitted detailed comments on the errors in the EA, the failure of the EA to comply with NEPA and its implementing regulations, and the need for a full EIS.

84. On June 25, 2012, NMFS issued its final EA and FONSI, concluding that Amendment 12 would have no significant impact on the environment.

85. The final EA and FONSI concluded that no EIS was necessary.

86. The final EA and FONSI did not consider the alternative of treating Cook Inlet differently from the other federal fisheries in the West Area.

87. On June 29, 2012, NMFS approved Amendment 12 to the FMP in a one-paragraph letter. The letter explained that regulations to implement Amendment 12 would follow at a later date. Under the MSA, such regulations must be issued within 30 days after the end of the public comment period. 16 U.S.C. § 1854(b)(3).

88. On December 21, 2012, nearly four months after the statutory deadline to issue final regulations expired, NMFS published its notice of approval of the regulations implementing Amendment 12. The decision relies primarily on National Standards 3 and 7 as its justification for removing Cook Inlet from the Salmon FMP.

Ninth Circuit Finds Amendment 12 Contrary to MSA

89. In 2013, UCIDA filed its initial complaint in this action with the district court, challenging NMFS's decision to remove the Cook Inlet salmon fishery from the Salmon FMP. UCIDA alleged that the decision violated NMFS's statutory obligation to prepare an FMP "for each fishery under its authority that requires conservation and management." *Id.* § 1852(h)(1). NMFS argued, *inter alia*, that the Magnuson-Stevens Act allows NMFS to "cede regulatory authority to a state over federal waters that require conservation and management simply by declining to issue an FMP" and "does not expressly require an FMP to cover an entire fishery." *United Cook*, 837 F.3d at 1062, 1064. In September 2016, the Ninth Circuit issued an opinion rejecting NMFS's argument and siding with UCIDA.

90. The Ninth Circuit disagreed with NMFS's argument that it could simply "defer" management to the state. The Ninth Circuit explained that "the federal government cannot delegate management of the fishery to a State without a plan, because a Council is required to develop FMPs for fisheries within its jurisdiction . . . and then to manage those fisheries 'through' those plans." *Id.* at 1063 (emphasis added). The court also made clear that a purpose of the FMP requirement was to ensure "that federal

fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns.” *Id.*

91. Next, the Ninth Circuit rejected NMFS’s argument that an FMP need not cover an entire fishery. The court explained that “fishery[] [is] a defined term” and that NMFS’s view, if accepted, would allow it to “fulfill its statutory obligation by issuing an FMP applying to only a single ounce of water in that fishery.” *Id.* at 1064. The court stated that Congress “did not suggest that [the] Council could wriggle out of this requirement by creating FMPs only for selected parts of those fisheries, excluding other areas that required conservation and management.” *Id.* In short, the Ninth Circuit instructed that (1) NMFS must prepare an FMP consistent with the federal standards set forth in the Magnuson-Stevens Act that reflect the national interest and (2) the FMP must address the entire Cook Inlet salmon fishery.

The Remand Process and Amendment 14

92. Amendment 14 is the Council and NMFS’s response to the Ninth Circuit’s mandate. Throughout the remand process, NMFS and the Council repeatedly attempted to find new ways to wriggle out of their statutory duty. Throughout most of the process, NMFS and the Council were considering three proposed alternatives on remand—*none* of which would comply with the Ninth Circuit’s holding or the MSA.

93. Alternative 1 is to produce no FMP amendment. This is not a viable alternative given the Ninth Circuit’s decision.

94. Alternative 2 would parse the fishery into separate “state” and “federal” components, and then manage the fish only when they are in federal waters. But the court already rejected the argument “that § 1851(h)(1) does not expressly require an FMP to cover an entire fishery,” explaining that “fishery” is a “defined term” and that NMFS could not provide “FMPs only for selected parts of those fisheries.” *Id.* Alternative 2 also proposed to defer to the state as to what management is needed in federal waters, allowing the state to decide how many fish are caught, who gets to fish, and where, when, and how fishing will occur. This violates both the Magnuson-Stevens Act, which requires these elements to be decided by NMFS, and the court’s instruction that NMFS and the Council must develop an FMP according to “federal rules in the national interest” so that the fishery is “not managed by a state based on parochial concerns.” *Id.* at 1063.

95. Alternative 3 would also parse the fishery into separate “state” and “federal” components, and manage the fish only when in federal waters. This alternative would set its own federal standards for fish while in federal waters but makes that federal management plan entirely subservient to the state segment of the fishery. Fishing would occur in federal waters *if, and only if*, the state allows it. If the state decides to “allocate” the entire harvestable surplus to state needs (like having more than enough fish for sport fishers or for state resident-only personal use fishers), then Alternative 3 simply could close the separate federal fishery. This subservient approach plainly elevates parochial concerns over national interests and defies this Court’s instruction that the FMP must cover the entire “fishery” as defined in the MSA.

96. NMFS and the Council never meaningfully engaged with their core obligations, as set forth by the Ninth Circuit. Instead, they repeatedly mischaracterized what commercial fishers were asking for as preemption. But commercial fishers simply want a management plan that covers salmon stocks throughout their range to ensure management of those stocks of fish consistent with the National Standards. This is not a request for “preemption” as NMFS erroneously states; it is precisely what NMFS’s own regulations require: “[t]he geographic scope of the fishery, for planning purposes, should cover the entire range of the stocks(s) of fish, and not be overly constrained by political boundaries.” 50 C.F.R. § 600.320(b).

97. Throughout the remand, the Council and NMFS disregarded the stakeholder process. The Council took an inordinate amount of time (nearly a year) just to create a stakeholder Salmon Committee. The members of the Salmon Committee worked diligently for many months to develop a functional and workable alternative (Alternative 2) that would create an FMP amendment to delegate management of the fishery to the State of Alaska under a federal plan. The Salmon Committee made one primary recommendation to the Council, that the Council consider an FMP amendment that covers the *entire* fishery as required by the Ninth Circuit’s decision. The Council refused to even analyze that alternative and instead dissolved that Committee altogether. As one Council member conceded, the commercial fishers “put their faith in the Council process, participated like professionals [in] the salmon FMP committee,” but “this process failed to serve them.”

98. The Council process failed because the State of Alaska and Commissioner Lang, sitting as the state's representative on the Council, had a different agenda. While stakeholders worked in good faith to find a way to make a delegated program under Alternative 2 work, the state had decided (without telling the public) that it was unwilling to accept a delegated program at all. The state did not disclose that it was unwilling to accept a delegated program until after the close of public comment at the Council hearing on December 7, 2020, four years into the remand process. Even worse, the state's failure to disclose its position on Alternative 2 distracted and diverted stakeholders from making efforts to develop Alternative 3, the only potentially viable option for the fishery in light of the state's (undisclosed) refusal to accept delegation.

99. Public records reveal that Commissioner Lang intended to use his role on the Council to avoid compliance with the Magnuson-Stevens Act and the results of the Ninth Circuit decision. In an internal email, Commissioner Lang notes that UCIDA had "convinced a federal court to order the Council to take action." But Commissioner Lang did not want the Ninth Circuit decision to open the state's management to "federal and outsider influence" that comes with an FMP. Instead, he developed a policy rationale based on the "State Right to Manage." He explained that "we cannot support the establishment of a process that requires annual federal and Council review and oversight of our fisheries and their management." He further explained that closure of the fishery in federal waters is "the only option" for "preserving state management" and preventing "federal incursion into this and other state-managed fisheries." Under any other option,

he explains, the Council would “take actions to bring state management in federal waters in line with federal standards.” In Commissioner Lang’s view, the “side effects” of compliance with federal fishery management standards “could kill us.”

100. In furtherance of the “State Right to Manage” agenda, Commissioner Lang (acting through Deputy Commissioner Rachel Baker), in October 2020, asked the Council to consider a new alternative (Alternative 4) that would result in closure of the Cook Inlet salmon fishery in federal waters. The motion to add Alternative 4 (made by Deputy Commissioner Baker) was made after the close of public comment and just two months before the Court-ordered deadline. Deputy Commissioner Baker proposed Alternative 4 as a potential policy choice that would help with a “transparent analysis” of the alternatives. But Deputy Commissioner Baker failed to disclose the state’s unwillingness to accept a delegated program or the underlying “State Right to Manage” rationale.

101. Meanwhile, between the October Council meeting and the December 7, 2020, Council meeting, NMFS helped the state carry out its anti-Magnuson-Stevens Act rationale for Alternative 4. NMFS was given advance drafts of the state’s motion to select Alternative 4, including express statements that Alternative 4 “maintains the States sovereign rights over management of the salmon fisheries.” NMFS staff suggested removing that language because “this statement could receive some pushback.” That offending language was scrubbed and replaced with conservation pretexts created at the last minute on the advice of NMFS. As Deputy Commissioner Baker explained in an

email to Commissioner Lang on December 3, 2020, written *four* days before the Council voted, “NOAA General Counsel provided some suggestions for building the record, the main outstanding issue is the need to identify conservation benefits that outweigh costs of closing the EEZ to commercial fishery participants.” Although aware of this issue, and the state’s plans to refuse to accept any federally delegated program, NMFS never informed the public of the state’s rationale. Neither did other Council members who were actively coordinating support for Alternative 4 outside the public process.

102. Alternative 4 was uniformly opposed by the public. NMFS received 225 written comments and 35 oral testimonies; all (except one) were in opposition to the new Alternative 4. The opposition included all commercial fishers as well as state legislators, local city governments, community development associations, economic development associations, and environmental protection groups. After the close of public comments at the December 7, 2020, Council meeting, the state announced to the public for the very first time that it refused to accept any delegated federal management for salmon in Cook Inlet. The state’s newly articulated objection to delegated management was not credible given that the state is currently subject to a delegated management program for salmon in the East Area under the Salmon FMP and has willingly accepted a delegated program for many other fisheries in Alaska (e.g., cod, scallop, and crab). With Alternative 1 (no action) precluded by the Ninth Circuit’s holding, Alternative 2 rendered infeasible by the state’s announcement, and Alternative 3 not fully developed, the Council voted for

Alternative 4. Notably, NMFS's representative to the Council, Dr. Balsiger, abstained, citing "litigation" concerns.

103. During the Council meeting in December 2020, the Council neither reviewed nor adopted an FMP amendment. Instead, the Council adopted Alternative 4 as "the preferred alternative."

104. It was not until sometime after the Court-ordered deadline of December 31, 2020 that NMFS even began drafting an FMP amendment to implement Alternative 4. In a letter dated March 2021, the NMFS Regional Director, Dr. Balsiger, provided the first draft FMP framework. Dkt. 180-1 at 1-2. The letter indicates that the Council had yet to make any decisions on what the FMP amendment would look like and had not yet made important decisions on the essential Magnuson-Stevens Act requirements of any FMP, including annual catch limits, maximum sustained yield, or optimum yield. *Id.* Without any public process, stakeholder input, or Council discussion, NMFS drafted Amendment 14 for the Council. *Id.*

105. NMFS then engaged in a sham "review" process of an Amendment that NMFS itself wrote. NMFS described the FMP Amendment 14 drafted by *NMFS* as the *Council's* amendment and misleadingly asserted that the Council "submitted" that amendment to NMFS for review on May 14. Dkt. 181-1 at 2. NMFS Regional Director Balsiger then reviewed and approved what he referred to as the "Council's" Amendment 14, with the Regional Director approving his own work on August 12, 2021.

106. NMFS proposed regulations implementing Amendment 14 on June 14, 2021. 86 Fed. Reg. 29,977 (June 4, 2021). The public comment period closed on July 6, 2021. By statute, NMFS was required to issue a final rule within 30 days, by August 5, 2021. 16 U.S.C. § 1854(b)(3). NMFS did not issue its final rule on Amendment 14 until November 3, 2021.

FIRST CLAIM FOR RELIEF

(Failure to Comply with Ninth Circuit’s Decision on Amendment 12)

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

108. Plaintiffs have not yet received the relief they are entitled to under their original complaint and the holding of the Ninth Circuit in *United Cook*.

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

110. Plaintiffs’ original complaint alleged that NMFS violated Section 304(a) and (b) because NMFS’s decision to remove the Cook Inlet salmon fisheries from the Salmon FMP is contrary to the express purpose of the MSA regarding anadromous stocks, and express requirements that an FMP is necessary “for each fishery under its authority that requires conservation and management,” because the Cook Inlet salmon fishery clearly requires conservation and management. *Id.* § 1852(h)(1). The Ninth Circuit agreed.

111. On remand, Defendants try to achieve the same result under a different guise. Amendment 14 closes the fishery in federal waters and relinquishes complete management control for the Cook Inlet salmon fishery to the State of Alaska. But this is just a different way to shirk the same duty.

112. Moreover, under Amendment 14, NMFS continues to defer management decision for sport fishing within federal waters in Cook Inlet to the State of Alaska without delegation through an FMP. This is directly contrary to the Ninth Circuit's instruction.

113. The Ninth Circuit instructed that the Magnuson-Stevens Act "makes plain that federal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns" and further explained the FMP must cover the entire fishery. *United Cook*, 837 F.3d 1063. Amendment 14 violates these basic instructions. It improperly segregates the fishery into multiple parts, provides no management for most of the fishery, and turns all harvest decision for the entire fishery over to the State of Alaska. This alone is reason to reject Amendment 14.

114. Furthermore, Defendants' remand process involved numerous procedural irregularities and failures to comply with the Council's Statement of Organization, Practices, and Procedures by failing to disclose key information such as the state's refusal to accept a delegated program in a manner that allowed for meaningful public comment and participation, failing to identify a preferred alternative or preliminary preferred alternative before taking final action, drafting Amendment 14 for the Council and

deciding key elements of Amendment 14 for the Council without going through the public process, and proceeding to engage in a sham review process by and approving Amendment 14 (written by NMFS) as if it were written by the Council.

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

SECOND CLAIM FOR RELIEF

(Violation of the MSA and the APA—Amendment 14)

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

117. The MSA allows judicial review pursuant to the APA, 5 U.S.C. § 706(2)(A), (B), (C), or (D). 16 U.S.C. § 1855(f)(1)(B). Those provisions of the APA authorize reviewing courts to set aside federal agency action that is arbitrary, capricious, and an abuse of discretion, in excess of statutory limitations, or without observance of the procedures required by law.

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

119. In addition to and including all of the reasons set forth above, Amendment 14 violates the MSA, and should be set aside under the APA for at least the following reasons:²

a. NMFS and the Council failed to follow the established procedures for developing Amendment 14. These include (1) violation of the Council's Statement of Organization, Practices, and Procedures by failing to disclose key information such as the state's refusal to accept a delegated program and failing to identify a preferred alternative or preliminary preferred alternative before taking final action; (2) the Council's failure to present Amendment 14 to the scientific and statistical committee, and the Council's failure to set required measures prior to final action; (3) NMFS's decision to write Amendment 14 for the Council and set the annual catch limits, maximum sustained yield, and optimum yield for the Council without going through the public Council process or without Council approval; and (4) Dr. Balsiger's review and approval of the Amendment that he wrote, as if he were reviewing the work of the Council.

b. Amendment 14 fails to comply with the MSA's statutory requirement to provide an FMP for each entire fishery under its jurisdiction that requires conservation and management. Amendment 14 improperly bifurcates the Cook Inlet salmon fishery into artificial state and federal components and then fails to

² Plaintiffs filed detailed comments on Amendment 14 detailing the legal flaws. Those comments are attached to this Complaint and incorporated herein.

provide management for the state component, or for all fishing activities in the federal component.

c. Amendment 14 is a capricious and punitive closure that was motivated and adopted for political reasons instead of for compliance with National Standards of the Magnuson-Stevens Act, and is the product of bad-faith decision-making by NMFS and the Council. Amendment 14 was proposed by the State of Alaska to support a hidden state's rights agenda and avoid "outsider influence" from NMFS, and NMFS was aware of and complicit in that anti-Magnuson-Stevens Act agenda.

d. Amendment 14 arbitrarily fails to account for the negative impact that the fishery closure will have on the state's ability to manage the fishery. It is well established that the State of Alaska cannot properly manage the commercial salmon fishery in Cook Inlet if the EEZ portion of the fishery is closed. In order to assess in-season run strength, the State of Alaska relies on test boat fishing (operated under a state-issued commercial license) in the Cook Inlet EEZ near the southern line of the commercial fishery management area, as well as early catch data from the drift fleet in the EEZ to calibrate the test boat data and assess the in-season run strength. Without these tools (both of which are foreclosed by Amendment 14), the state will have no way of assessing the in-season run strength. By the time fish reach state waters near natal streams, it is too late to assess the run and harvest the salmon that are excess to spawning needs. The test fishery harvest numbers in addition to the drift fishery harvest numbers are used to

calibrate run size so that over-fishing will not occur on early or small returns. Without the EEZ fishery, over-escapement of salmon will increase, the predictability of the salmon harvest will decrease, processors will not have a reliable source of product, and both the industry and the resource will suffer. The Council was presented with unanimous testimony from stakeholders, legislators, and cities confirming that closing the EEZ portion of the fishery will completely ruin the commercial fishery in Cook Inlet. It was arbitrary and capricious for NMFS to approve the closure under these circumstances.

e. Amendment 14 also fails to comply with the Magnuson-Stevens Act's statutory requirements for closing a fishery. Under 16 U.S.C. § 1853(b)(2)(C), an FMP may designate areas where fishing is closed, but the FMP must "ensure" that a closure "(i) is based on the best scientific information available; (ii) includes criteria to assess the conservation benefit of the closed area; (iii) establishes a timetable for review of the closed area's performance that is consistent with the purposes of the closed area; and (iv) is based on an assessment of the benefits and impacts of the closure, including its size, in relation to other management measures (either alone or in combination with such measures), including the benefits and impacts of limiting access to: users of the area, overall fishing activity, fishery science, and fishery and marine conservation." Amendment 14 does not meet any of these requirements. The best scientific information available shows that closure will have an enormous negative impact on the fishery and its

participants, and will have either no appreciable conservation benefits or actually harm conservation of the resource. Moreover, the Council's proposed Amendment to the FMP lacks "criteria to assess the conservation benefit of the closed area" and a timetable to review performance of the closed area.

f. Amendment 14 also runs afoul of National Standard 1. National Standard 1 requires that an FMP achieve optimum yield, which is defined both in terms of the "greatest overall benefit to the Nation" as well as achieving the MSY. Amendment 14 does not ensure either requirement is met. It turns complete control for all harvest levels over to the State of Alaska to do as it pleases with the fishery, while precluding the state from using essential management tools (harvest in the EEZ) to properly manage that fishery. The Council and NMFS never conducted a stock assessment for the nearly 1,300 stocks of salmon in Cook Inlet, and the FMP purports to conduct *no annual stock* assessments of the stocks moving forward. Simply put, the Council and NMFS do not know what the "maximum sustained yield" is for Cook Inlet salmon stocks and do not plan to find out.

g. NMFS decision to allow the state to set escapement goals also violates the Magnuson-Stevens Act's required use of the Scientific and Statistical Committee ("SSC"). 16 U.S.C. § 1852(g)(1)(B). Magnuson-Stevens Act establishes the SSC to "provide its Council ongoing scientific advice for fishery management decisions, including recommendations for

acceptable biological catch, preventing overfishing, maximum sustainable yield, . . . and reports on stock status and health, bycatch, habitat status, social and economic impacts of management measures, and sustainability of fishing practices.” Amendment 14 bypasses the SSC and puts those ongoing decisions in the hands of the State of Alaska. This is not what Congress intended in passing the Magnuson-Stevens Act.

h. Amendment 14 is also not supported by the “best scientific information” available as required by National Standard 2. This fishery closure is not based on science at all, but based on politics. Moreover, the draft EA/RIR abruptly cuts off its analysis of the fishery impacts in 2018, thereby omitting the dismal harvest in 2019 and the disastrous harvests in 2020. This information was available to NMFS and the Council but not used. This missing information was critical to the decision to close the fishery in the EEZ because much of the reduced harvest in 2019 and 2020 was the result of needless state closures of fishing opportunities in the EEZ. Restrictions on fishing in the EEZ in 2020, despite relatively high abundance of salmon returns, resulted in a fishery disaster with the average drift permit holder grossing only about \$4,400 for the entire season. Complete closure of the EEZ will be far worse. Likewise, NMFS and the Council failed to utilize the best available science in other respects in evaluating the efficacy of the State of Alaska’s escapement-based

management program (Appendix 13) by using a data set that ended in 2010, cutting off the last 10 years of available information on salmon returns.³

i. Amendment 14 also violates National Standard 3, which requires that “[t]o the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.” Closure of the EEZ fishery does not “coordinate” management of stocks or manage them as a unit. It simply abdicates all federal responsibility to the state to manage the fishery in state waters however it deems fit.

j. Amendment 14 also violates National Standard 4, which requires that all allocations “not discriminate between residents of different states.” Here Amendment 14 effectively allocates the entire fishery to the State of Alaska. The State of Alaska does, in fact, discriminate against out-of-state fishers, including by establishing an Alaska resident-only dipnet fishery that harvests hundreds of thousands of salmon per year to the detriment of other users of the resource.

k. Amendment 14 also violates National Standard 8, which requires that conservation measures “take into account the importance of fishery resources to fishing communities” using the best scientific data available, and to “(A) provide for the sustained participation of such communities,

³ Appendix 13 was also not peer reviewed.

and (B) to the extent practicable, minimize adverse economic impacts on such communities.” As noted above, NMFS and the Council have not relied on the best available information related to impacts of the fishery closure, including omission of data related to the last two years of harvest. The closure required by Amendment 14 will not provide for sustained participation of fishing communities; it will wreak economic hardship on those communities and have severe consequences on the viability of commercial salmon fishing in Cook Inlet as expressed in public comment (but ignored by the Council) by the City of Kenai, the City of Homer, State Senator Peter Micciche, State Representative Sarah Vance, the United Fisherman of Alaska, the Cook Inlet Aquaculture Association, Cook Inletkeeper, the Homer Marine Trades Association, the North Pacific Fisheries Association, the Kenai Peninsula Fishermen’s Association, Pacific Star Seafoods, Salmon State, and hundreds of commercial fishers.

l. Amendment 14 is also contrary to National Standard 10, requiring consideration of safety of life at sea, as it would concentrate more vessels and gear in smaller nearshore areas where there is a greater risk of collision and increased risk of vessels and gear hitting “erratic” boulders (large submerged boulders in the nearshore area).

m. The Council’s decision to adopt Amendment 14 is also contrary to the MSA because it was driven by a Council stated policy “to facilitate

State of Alaska salmon management in accordance with the Magnuson-Stevens Act, Pacific Salmon Treaty, and applicable Federal law.” There are two fatal problems with this policy. First, the facilitation of State of Alaska management is not a “policy” goal of the Magnuson-Stevens Act. The state’s role is to participate through the Council process, not as a substitute for the Council, and the Council’s policy is contrary to the intent of the Magnuson-Stevens Act by elevating state interests over national interests. The Ninth Circuit has already explained that this is improper. Second, the State of Alaska is assuredly not managing salmon in Alaska “in accordance with the Magnuson-Stevens Act.” UCIDA submitted detailed comments showing precisely why the state’s process for setting escapement goals does not comply with the Magnuson-Stevens Act. The Magnuson-Stevens Act requires the Council to set annual catch limits for each fishery based on peer-reviewed SSC recommendations. State of Alaska management plans that affect harvest levels or ACLs are based on flawed escapement goals set by politically appointed Alaska Board of Fisheries members.

120. Amendment 14 is arbitrary, capricious, and contrary to the MSA, and NMFS’s approval of Amendment 14 has both prejudiced and injured Plaintiffs’ rights and interests, and Plaintiffs have no other adequate remedy at law. For these reasons, Plaintiffs are entitled to the relief requested below.

THIRD CLAIM FOR RELIEF

(Violation of NEPA and the APA)

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

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

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

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

125. NMFS failed to produce a convincing statement of reasons demonstrating that Amendment 14 will not have significant impacts on the environment. NMFS has not taken a hard look at the environmental and conservation impacts that will occur to Cook Inlet salmon stocks as a result of closing the EEZ, including the resulting removal of the

ability of the State of Alaska to utilize the test boat fishery or early harvest returns in the EEZ, important management tools necessary to evaluate in-season run status and timing. The effects of such a closure are unknown, untested, and highly controversial, and raise serious questions as to whether the approval of Amendment 14 will significantly damage the long-term conservation of the fishery. NMFS and the Council rushed Alternative 4 from proposal to approval in less than two months, and never bothered to pause and look at the environmental consequences of that action. Likewise, NMFS failed to take a hard look at the socioeconomic consequences of closing the EEZ portion of the fishery. The state has a demonstrated pattern of commercial fishery disasters in Cook Inlet over the last decade, and Amendment 14 ensures a permanent disaster situation.

126. NMFS's failure to prepare an EIS in the face of substantial questions regarding significant environmental impacts was arbitrary, capricious, and not in accordance with law, in violation of NEPA, 42 U.S.C. § 4332(2)(C), and the APA, 5 U.S.C. § 706(2).

127. Alternatively, Defendants' decision to issue a FONSI without providing a convincing statement of reasons to justify its conclusion that the project's impacts to the fishery and fishing communities will be insignificant was arbitrary, capricious, and not in accordance with law, in violation of NEPA, 42 U.S.C. § 4332(2)(C), and the APA, 5 U.S.C. § 706(2).

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

129. The EA fails to consider a reasonable range of alternatives. Alternative 1 (no action) was foreclosed by the Ninth Circuit. Alternative 2 (delegation to the state) was secretly a sham, as the state would not accept delegation. Alternative 3 (separate federal management) was crafted by the Council in a manner designed to make it look impracticable and result in closure. These are not real alternatives, conveniently leaving only Alternative 4, the last-minute proposal by the state designed to prevent outsiders (e.g., NMFS) from interfering with the state's desire to manage the fishery. While there is no set number of alternatives that must be considered, it should be plain that an agency cannot structure its alternatives so there is only one available alternative, especially when as here that one alternative is the product of improper political motivation. NMFS was required to, at the very least, consider a version of Alternative 3 that was feasible (as suggested by UCIDA and CIFF in public comments).

130. NMFS's decision to approve Amendment 14 without considering appropriate alternatives and comparing the environmental impacts of those alternatives was arbitrary, capricious, and not in accordance with law and violated NEPA, 42 U.S.C. § 4332(2)(C), its implementing regulations, 40 C.F.R. §§ 1502.14(a), 1507.2(d), 1501.5(c)(2) (2020), and the APA, 5 U.S.C. §§ 702, 706.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

- A. Declare that the Defendants violated the MSA, APA, and NEPA;
- B. Declare that the Defendants' actions, as set forth above, were arbitrary and capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law;
- C. Declare that Amendment 14 is not consistent with the Ninth Circuit's decision in this matter;
- D. Declare that Defendants acted in bad faith in adopting and approving Amendment 14;
- E. Vacate Amendment 14 and its implementing regulations, and remand with an order instructing the Defendants to develop an FMP for the *entire* Cook Inlet salmon fishery that complies with the requirements of the MSA, APA, and NEPA and the Ninth Circuit's holding;
- F. Vacate the FONSI, and remand with an order instructing, as appropriate, the Defendants to prepare an EA or EIS that complies with NEPA and the APA;
- G. Appoint a special master to supervise the development of an FMP amendment for the entire Cook Inlet salmon fishery, to set deadlines for the development of that FMP, and to impose interim fishery management measures for the Cook Inlet salmon fishery until the FMP amendment is both issued and fully implemented;

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

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

DATED this 16th day of November, 2021.

STOEL RIVES, LLP

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