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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT ASSOCIATION, *et al.*, Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE, *et al.,* Defendants.	Case No. 3:21-cv-00255-JMK 3:21-cv-00247-JMK CONSOLIDATED **STATE OF ALASKA'S BRIEF IN OPPOSITION** (Local Rule 16.3)
WES HUMBYRD, *et al.,* Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE, *et al.,* Defendants.	

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INTRODUCTION

The United Cook Inlet Drift Association and the Cook Inlet Fisherman's Fund (collectively "UCIDA") are challenging Amendment 14 to the North Pacific Fishery Management Council's ("the Council" or "NPFMC") and the National Marine Fisheries Service's ("NMFS") Fishery Management Plan ("FMP") for Salmon Fisheries in the Exclusive Economic Zone ("EEZ") of Cook Inlet. UCIDA's claims fail on the merits and its requested relief, vacatur of Amendment 14, should be denied.

Commercial net fishing for salmon has been banned in the federal waters off Alaska known as the "West Area" since 1952.[1] Amendment 14 simply includes the Cook Inlet EEZ within the Salmon FMP's West Area, "thereby bringing the Cook Inlet EEZ Subarea and the commercial salmon fisheries that occur within it under Federal management by the [Council] and NMFS,"[2] which was precisely what UCIDA sought when they initiated the Amendment 12 litigation in 2012.

As a result of that litigation, the Council prepared, adopted, and promulgated the required FMP by a prior court ordered deadline of December 31, 2021. The FMP as amended by Amendment 14 fully complies with the MSA, the National Standards, and the Ninth Circuit order in *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv.*[3] And NMFS decision to include the Cook Inlet EEZ with the rest of the West Area EEZ falls squarely under NFMS' federal discretion.

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[1] AKR0013790.

[2] AKR0013822.

[3] *(United Cook I)*, 837 F.3d 1055, 1065 (9th Cir. 2016).

UCIDA alleges that Amendment 14 does not comply with the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), that it does not comply with the Ninth Circuit ruling in *United Cook I,*[4,5] and that it violates various national standards of the MSA.[6] Finally, UCIDA makes a halfhearted argument that Amendment 14 violates NEPA.[7] Each of these claims are wholly without merit and should be rejected by the court.

On alternate grounds, Wes Humbyrd, Robert Wolfe, and Dan Anderson (collectively "Humbyrd") ask the court to set aside Amendment 14 due to allegedly improper appointment of Council members in violation of the Constitution's Appointments Clause.[8] Like the claims advanced by UCIDA, Humbyrd's claims fail on the merits and the relief sought should be denied.

BACKGROUND AND PROCEDURAL HISTORY

In 1976, Congress passed the MSA, establishing a national program for the conservation of fishery resources, and providing the Secretary of Commerce with fishery management authority in the EEZ (between three and 200 miles from the coastline of the United States); the Secretary's authority under the MSA is in large part delegated to NMFS.[9] The MSA also established eight Regional Fishery Management Councils, each

[4] *United Cook I*, at 1065.

[5] EFC No. 38 ("UCIDA Brief"), at 22.

[6] *Id*.

[7] *Id*. at 46.

[8] U.S. Const. art. 2, § 2, cl. 2.

[9] *United Cook I*, at 1058 (citing 50 C.F.R. § 210.10 (repealed)).

charged with preparing an FMP "for each fishery under its authority that requires conservation and management."[10] The North Pacific Council is responsible for Alaska and the "Pacific Ocean seaward of Alaska."[11] After passage of the MSA, the State continued to manage three historical salmon net fisheries.[12]

In 1978, the Council adopted an FMP for salmon fisheries near Alaska; the FMP was approved and published by NMFS in 1979.[13] The FMP has been amended numerous times; the last major revision prior to 2012 was in 1990.[14]

The Alaska Salmon FMP divides the federal waters off Alaska into East and West Areas.[15] The West Area is west of Cape Suckling and includes the Cook Inlet, Prince William Sound, and Alaska Peninsula Areas.[16]

The 1990 FMP did not establish any management objectives in the West Area because the plan prohibited commercial salmon fishing there except in the three historical salmon net fisheries that were authorized by the North Pacific Fisheries Act:

> In the West Area, the only commercial salmon fishery is the incidental fishery allowed under 50 CFR 210 (see Appendix C). Federal regulations implementing the North Pacific Fisheries Act (16 U.S.C. 1021, et seq.), prohibit U.S. fishermen from fishing for or taking salmon with nets in the North Pacific outside Alaskan waters except for three historical fisheries

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[10] 16 U.S.C. § 1852(a), (h)(1).

[11] 16 U.S.C. § 1852(a)(1)(G).

[12] *United Cook I*, at 1059.

[13] *Id*. at 1058 (citing 44 Fed. Reg. 33250).

[14] *Id*. at 1059.

[15] *Id*.

[16] 50 C.F.R. § 210.10 (repealed)

> managed by the State; these are the (a) False Pass (South Peninsula), (b) Cook Inlet, and (c) Copper River net fisheries. These fisheries technically extend into the EEZ, but they are conducted and managed by the State of Alaska as nearshore fisheries. Thus, aside from those traditional fisheries, this plan prohibits commercial salmon fishing in the EEZ west of the longitude of Cape Suckling.[17]

In 2013, UCIDA filed a federal lawsuit challenging implementation of Amendment 12 to the FMP for Salmon Fisheries in the EEZ of Cook Inlet.[18] Amendment 12 eliminated from the FMP the EEZ waters in three areas of historically state-managed commercial salmon fishing beyond three miles off-shore (Prince William Sound Salmon Management Area; lower central Cook Inlet; and western end of Alaska Peninsula and Unimak Island).[19] The effect would have been to remove federal oversight of the MSA and confer fisheries management to the State of Alaska; UCIDA challenged removal of the Cook Inlet waters from the FMP.[20]

On appeal, the Ninth Circuit held in 2016 that the Council must "create an FMP for each fishery under its authority that requires conservation and management" and may only delegate management to the State through an FMP.[21]

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[17] NPFMC_0000975.

[18] *United Cook I*, at 1061.

[19] *See e.g.* AKR0013789.

[20] *United Cook I*, at 1061

[21] *Id.* at 1065.

On remand to the district court, all parties jointly decided to preserve Amendment 12 while NMFS developed a new amendment to the existing FMP to include the EEZ waters of Cook Inlet.[22]

In 2019, UCIDA filed a "motion to enforce judgment" seeking to challenge and force negotiations of the substance of the non-final FMP (arguing the FMP must include management of state waters), appoint a special master, and order a specific deadline for implementing the FMP amendment.[23] The district court denied UCIDA's requests for declaratory and injunctive relief, but did set a procedural deadline ordering the federal defendants to "prepare and adopt a Salmon FMP compliant with the Ninth Circuit's decision on or before December 31, 2020" and "final agency action and/or promulgation of a final rule [to] occur within one year thereafter."[24] UCIDA appealed.[25]

On appeal, the Ninth Circuit affirmed the District Court's decision, holding that the court did not abuse its discretion when it declined to intervene on UCIDA's substantive issues or when it imposed a court ordered deadline by which the Council must adopt a recommendation for referral to NMFS.[26]

After considering a variety of amendments to the FMP, the Alaska Department of Fish and Game ("ADF&G"), NMFS, and the Council prepared an Environmental

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[22] 3:13-cv-00104-TMB, ECF Nos. 101 and 102.

[23] 3:13-cv-00104-TMB, ECF No. 151.

[24] 3:13-cv-00104-TMB, ECF No. 168.

[25] *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv.*, 807 F. App'x 690, (9th Cir. 2020).

[26] *Id.*

Assessment and Regulatory Impact Review ("EA/RIR") for the FMP and shared it with the public for comment in November 2020.[27] In December 2020, the Council met to discuss the Assessment and Review, public comments, and proposed amendments.[28] After hearing discussion, the Council proposed and selected "Alternative Four," which would amend the salmon FMP to include the waters of the EEZ next to Cook Inlet as part of the FMP's West Area; subsequently, NMFS would manage the area by applying existing West Area prohibitions on commercial salmon fishing to the Cook Inlet EEZ.[29] In May of 2021, the Council submitted Amendment 14 to NMFS for review.[30]

UCIDA filed a Response to NMFS' 11th Status Report in which it foreshadowed the arguments made in this matter: that Alternative Four, once promulgated, will not comply with the Ninth Circuit's decision in *United Cook I* or with the MSA.[31] UCIDA also argued that NMFS failed to comply with the court ordered deadlines.[32] The district court denied UCIDA's sought relief and closed the case.[33] UCIDA promptly filed the complaint in the present litigation.

ARGUMENT

UCIDA's requests fail on substantive grounds for the reasons outlined below.

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[27] AKR0001950.

[28] *Id*.

[29] AKR0001950-1; AKR0013822.

[30] AKR0001952.

[31] 3:13-cv-00104-TMB, ECF No. 180, ¶¶ 1, 6.

[32] *Id*.

[33] 3:13-cv-00104-TMB, ECF No. 206.

First, Amendment 14 complies with the MSA. Under the MSA, the Council's main task is to prepare an FMP that "assess[es] and specif[ies] the present and probable future condition of, and the maximum sustainable yield" of a fishery.[34] Section 1811(b) gives NMFS "exclusive fishery management authority over … anadromous species throughout the migratory range of each such species beyond the exclusive economic zone" seaward.[35] Additionally, Sections 1853(b) and 1855(f)(2) of the MSA explicitly give the Council the discretion to close a federal fishery under its management; an FMP may "designate zones where … fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified . . . fishing gear."[36] Thus, expanding the FMP to include the waters of the Cook Inlet EEZ is unquestionably allowed under the MSA.

Second, Amendment 14 complies with the Ninth Circuit decision in *United Cook I*. The Ninth Circuit ruled that the Council "create an FMP for each fishery under its authority that requires conservation and management."[37] Amending the existing FMP to align the federal waters in Cook Inlet with the West Area absolutely falls within the purview of NMFS' federal management of the fishery. While UCIDA appears to have, at least for the moment, abandoned its assertion that the Ninth Circuit ruled the FMP must cover state waters, it continues to misinterpret the Ninth Circuit's ruling, which was

[34] 16 U.S.C. § 1853(a)(3).

[35] *Id*. § 1811(b).

[36] *Id*. § 1853(b).

[37] *United Cook I*, at 1065.

simply that federal oversight over the federal fishery is required.[38] Deciding to align the Cook Inlet Area with the rest of the West Area is a managerial decision that plainly complies with the Ninth Circuit's ruling.

NMFS took the required "hard look" at the impacts of Amendment 14, as demonstrated in the record, and fully complied with NEPA.

Humbyrd's arguments similarly fail. Council members are not principal officers as urged by Humbyrd, nor are they inferior officers as they lack the ability to take any affirmative action with regard to the fishery, serve temporary positions for the most part outside federal employment, do not perform executive branch functions, and can only propose actions to the Secretary. Furthermore, Congress has all necessary and proper authority to provide for the Council where it serves a primarily legislative function. The court should cleave to constitutional avoidance principals and reject Humbyrd's arguments.

NMFS fully complied with the MSA, the Ninth Circuit ruling, and NEPA. Amendment 14 was properly promulgated, and Humbyrd's claim that the Council structure is unconstitutional is unfounded. This Court should deny the relief sought by both UCIDA and Humbyrd.

I. Amendment 14 is Lawful.

UCIDA's primary allegation in its motion for summary judgment is that Amendment 14 is unlawful because it is not a "conservation measure" and it "defer[s]

[38] *Id.*

NMFS's responsibilities" to manage fisheries in the EEZ to Alaska.[39] UCIDA is incorrect on both counts.

UCIDA states that "[i]n limited circumstances, such as where a stock of fish is depleted or overfished, sound principles of conservation and management may require the closure of a fishery."[40] But UCIDA then goes on completely ignore NMFS primary rationale behind Amendment 14: that it "takes the most precautionary approach to minimizing the potential for overfishing."[41] Also ignored by UCIDA is the fact that, according to NMFS and supported by the evidence in the record, Amendment 14 "provides the greatest opportunity for maximum harvest from the Cook Inlet salmon fishery."[42] Rather than face the *actual* primary rationales behind Amendment 14, UCIDA ignores them and simply argues that "it is a political measure."[43]

UCIDA points out that "Alaska is not bound by the Magnuson-Stevens Act in its management of salmon in state waters."[44] This is true, because Alaska's fisheries management standards are much higher than simply "preventing overfishing." As the Ninth Circuit observed, NMFS final Environmental Assessment in 2012 found that "the State is the appropriate authority for managing Alaska salmon fisheries given the State's

[39] UCIDA Brief, at 29.

[40] *Id*. at 23.

[41] AKR0013823.

[42] *Id*.

[43] UCIDA Brief, at 23.

[44] *Id*. (citing 86 Fed. Reg. 60,568, 60,586 (Nov. 3, 2021) (AKR_13822–42).

existing infrastructure and expertise," and that "the State's escapement based management system is a more effective management system for preventing overfishing than a system [like the federal one] that places rigid numeric limits on the number of fish that may be caught."[45] It is notable that the Ninth Circuit decision in *United Cook I* did nothing to disturb that finding, and nothing has changed in the intervening decade that would alter the analysis.

NMFS simply extended the half-century old prohibition on commercial salmon fishing in the West Area to the Cook Inlet area *that UCIDA demanded be included within the FMP*. The entire fishery will now be prosecuted in State waters, where the salmon stocks can be fully utilized closer to their spawning rivers, allowing for greater precision in targeting healthy stocks and avoiding overharvest of weaker stocks.[46]

UCIDA continually complains that Cook Inlet salmon stocks Alaska are mismanaged and underutilized, but concedes that, under total State management, no Cook Inlet salmon stocks are currently in an overfished status.[47] That is unequivocally a positive thing. And it cannot be said that a fair amount of commercial salmon fishing does not occur in Alaska: in 2021 a total of 233.8 million fish were harvested, and sockeye account for approximately 56% of those fish.[48] The 2021 all-species commercial

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[45] *United Cook I*, at 1061.

[46] AKR0013826, AKR0013829.

[47] UCIDA Brief, at 25.

[48] https://www.adfg.alaska.gov/index.cfm?adfg=pressreleases.pr&release=2021_11_01, last visited March 23, 2022.

salmon harvest of 233.8 million fish and 858.5 million pounds is the third highest on record for both total fish harvested, and total pounds harvested.[49] Alaska fisheries, both in Alaska's waters and in the EEZ, thrive under Alaska's management.

a. The Council's decision to adopt Amendment 14 complies with the Ninth Circuit's directive in *United Cook I.*

UCIDA alleges that Amendment 14 "was intended to affect the same kind of improper delegation that was rejected by the Ninth Circuit."[50] This is incorrect in at least two important ways. First, Amendment 14 is not about delegation in any way. Second, the Ninth Circuit never held that delegation to the State would be improper—in fact, the Ninth Circuit specifically stated that NMFS may delegate management of the Cook Inlet EEZ to the State, it simply must do so in an FMP.[51]

Amendment 14, fundamentally, does not delegate management of the fishery to the State. Rather, it *expands* the area of federal management under the FMP. Amendment 14 brings the Cook Inlet EEZ area into the Salmon FMP's West Area, which is closed to commercial salmon fishing, thereby encompassing the Cook Inlet EEZ area and the commercial fisheries that occur within it under federal management.

UCIDA continues to hang its argument on the weak and false presumption that State managerial practices are inherently contradictory to the national economic and

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[49] *Id*.

[50] UCIDA Brief, at 25.

[51] *United Cook I*, at 1063. (citing 16 U.S.C. § 1856(a)(3)(B)).

social objectives set forth in the MSA.[52] This argument is weak because UCIDA has not offered an iota of evidence to suggest state concerns are being elevated over federal objectives, as UCIDA suggests.[53] And this argument is false because the MSA explicitly allows FMPs to "incorporate . . . the relevant fishery conservation and management measures of the coastal States nearest to the fishery."[54]

In *United Cook I*, the Ninth Circuit held that the MSA "requires a Council to create an FMP for each fishery under its authority that requires conservation and management" and that Amendment 12 was contrary to the MSA to the extent it excluded the Cook Inlet EEZ from the FMP.[55] Thus, the court ordered the federal defendants to include the federal waters of Cook Inlet within the FMP. Amendment 14, fully complies with the Ninth Circuit's ruling because it enumerates a plan for NMFS to manage the salmon fishery in Cook Inlet by including the waters of the Cook Inlet EEZ as part of the existing FMP's West Area—an option, as UCIDA itself has previously noted, that was fully "available under the Ninth Circuit's holding."[56] Additionally, Amendment 14

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[52] *Id*. at 36-37.

[53] *Id*. at 22.

[54] 16 U.S.C § 1853(b)(5). *See Ten Taxpayers Citizen Grp. v. Cape Wind Assocs., LLC*, 278 F. Supp. 2d 98, 101 (D. Mass. 2003), aff'd sub nom. *Ten Taxpayer Citizens Grp. v. Cape Wind Assocs., LLC*, 373 F.3d 183 (1st Cir. 2004) (holding NMFS' delegation of fisheries regulation in Nantucket Sound to Massachusetts was in accordance with the MSA and only limited in its jurisdiction over non-fishing activities).

[55] *UCIDA I*, 837 F.3d at 1065.

[56] 3:13-cv-00104-TMB, ECF No. 179, Exhibit A; ¶ 3; 3:13-cv-00104-TMB, ECF No. 180, ¶ 4.

complies with the MSA because § 1853 explicitly grants NMFS discretion to "designate zones where . . . fishing shall be limited, or shall not be permitted."[57]

It is important to note that the adopted Alternative Four was substantively contained within the proposed Alternative Three. Amendment 14, which came from Alternative Four, expands the Salmon FMP to include federal management of the Cook Inlet EEZ as part of the Salmon FMP's West Area; just as Alternative Three proposed.[58] Therefore, even though Alternative Four bears a different name, it was always an option under Alternative Three which was considered by the Council from the beginning of this process, and it would have had the same effect on the FMP by designating the federal waters fishery under federal management.

It is clear that the Council's decision to expand the area under federal management and apply fishing prohibitions in the revised FMP falls exactly in line with the Ninth Circuit's ruling that it must design a plan for NMFS to manage the Cook Inlet salmon fishery.

II. Amendment 14 complies with requirements under the MSA and the National Standards.

UCIDA continues to argue, as it has for several years, that Amendment 14 does not comply with the requirements or National Standards of the MSA. Before directly addressing the supposed conflicts with National Standards presented by UCIDA, it is important to address the jurisdictional limitations NMFS is navigating.

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[57] 16 U.S.C. § 1853(b)(2)(A).

[58] *See e.g.* AKR0000047.

First, the MSA only grants federal management of fisheries "throughout the migratory range of each such species beyond the exclusive economic zone."[59] Federal management in state waters requires the Secretary to undertake a special preemption process under the MSA.[60] And, even then, the Secretary may only preempt state authority between the coast and EEZ upon a finding that the fishery is "predominately within the exclusive economic zone and beyond" and that the State "substantially and adversely affect[ed] the carrying out" of the FMP.[61]

Second, the MSA designates clear boundaries between state jurisdictional authority (which is measured from the shore to three miles seaward) and federal authority (from the EEZ seaward).[62] Thus, just because there are possible mechanisms through which NMFS *may* manage State waters does not mean it is *required* to, and indeed, it *cannot* preempt State management in State waters in most circumstances.

Third, the MSA explicitly grants NMFS the authority to encompass areas of the EEZ under an FMP. Under Section 1801, the federal government exercises "sovereign rights for . . . managing all fish, within the exclusive economic zone" and "exclusive fishery management authority beyond the exclusive economic zone over such anadromous species and Continental Shelf fishery resources."[63] And, under Section

[59] 16 U.S.C. § 1811(b).

[60] 16 U.S.C. § 1856(b).

[61] *Id*. § 1856(b)(1), (c)(4)(B).

[62] *Id*. § 1811(b).

[63] 16 U.S.C. § 1801(b)(1)(A)–(B).

1853(b)(2)(A), FMPs may "designate zones where . . . fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels."[64] As the EEZ falls within NMFS' jurisdictional authority, NMFS has the discretion to encompass areas of the EEZ within an FMP.[65] But in order to manage fisheries in State waters, NMFS must undertake a statutorily prescribed preemption process, which it has not done in this matter. As such, NMFS has no authority to manage salmon fisheries in Alaska's sovereign waters.

a. Amendment 14 Complies with the National Standards.

Chief among the Magnuson-Stevens Act requirements that FMPs, amendments, and regulations must satisfy are the MSA's ten national standards for fishery conservation and management.[66]

In reviewing the Secretary's decisions on federal fishery closures, the court need only find a "rational connection between the evidence and the Secretary's exercise of discretion."[67]

NMFS' authority to designate areas under FMPs and make decisions on fishery closure is supported by case law. For example, in *Blue Ocean Inst. v. Gutierrez*,[68] the

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[64] *Id*. § 1853(b)(2)(A).

[65] *Id*. § 1811(b).

[66] *Oceana, Inc. v. Ross*, 483 F. Supp. 3d 764, 768 (N.D. Cal. 2020), appeal dismissed, No. 20-17154, 2021 WL 5313629 (9th Cir. July 12, 2021) (citing 16 U.S.C. § 1851(a)).

[67] *Trawler Diane Marie, Inc. v. Brown*, 918 F. Supp. 921, 928 (E.D.N.C. 1995), aff'd sub nom. *Trawler Diane Marie, Inc. v. Kantor*, 91 F.3d 134 (4th Cir. 1996) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420(1971)).

[68] 585 F. Supp. 2d 36 (D.D.C. 2008).

court found NMFS did not violate the MSA's mandate to prevent overfishing in its refusal to close a blue-fin tuna fishery given possible impacts on other species. In that case the court in that case observed "it is not enough for [plaintiff] to say that Western BFT populations are dropping and that the Department's efforts to prevent overfishing have been ineffective; [plaintiff] must show the Department's error . . . [plaintiff] has not."[69] Similarly, in *Roche v. Evans*, the court upheld closures of fishing areas ordered by the New England Fishery Management Council.[70] Most important to the current matter, the court noted that closure may be appropriate in some instances "even where [it] results in some discriminatory impacts" and "sacrifices the interests of some groups of fishermen, for the benefit as the Secretary sees it of the fishery as a whole."[71]

NMFS' discretionary authority extends to fishery closures in the EEZ. In *Southeastern Fisheries Ass'n, Inc. v. Mosbacher*, the red drum fishery encompassed the internal waters and seas of the Gulf States and the EEZ.[72] The Gulf Council and NMFS promulgated area closures in the EEZ until 20% escapement of juvenile fish was attained. Finding the Gulf Council had designed the FMP in accordance with "the best scientific evidence available," the court upheld the redfish closure in the EEZ, noting that

[69] *Id*. at 46.

[70] 249 F. Supp. 2d 47 (D. Mass. 2003).

[71] *Id*. at 55–56 (quoting *Alliance Against IFQs v. Brown*, 84 F.3d 343, 350 (9th Cir. 1996).

[72] 773 F. Supp. 435 (D.D.C. 1991).

an "action by the Secretary is presumed to be valid, and the Court must not substitute its own judgment for that of the Secretary."[73]

Here, Amendment 14 complies with the requirements of the MSA and its National Standards. As evidenced in *Blue Ocean*, the Council and NMFS have vast decision-making authority with regard to closing federal fisheries. And, like the plaintiffs in that case, UCIDA has similarly pointed to "disastrous fishing seasons," conjectural "devastating effects . . . on the fishing industry," and "farc[ical]" deliberations as evidence that the Council's management practices have been ineffective—echoing allegations that the *Blue Ocean* court found utterly inadequate to establish agency error. Additionally, even though some commercial fishermen may be disadvantaged by the inclusion of the Cook Inlet EEZ within the Salmon FMP, other commercial fishermen will *benefit* from the action. And regardless, *Roche* instructs that an industry group being potentially disadvantaged is insufficient to prevent area closure where FMP amendments consider the fishery as a whole, as Amendment 14 undoubtedly does.

Moreover, the Council and NMFS here need only show a rational basis for their decision to expand the FMP to include the Cook Inlet EEZ within the West Area, and its corresponding prohibition on commercial fishing. The facts here strongly resemble those in *Southeastern Fisheries Ass'n, Inc.* Just as the Secretary's decision to close the commercial redfish fishery in the Gulf EEZ was "presumed to be valid" and in

[73] *Id*. at 441-2. (quoting *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981).

compliance with MSA National Standards, the Secretary here need only show that expansion of the FMP promote the "conservation and management measures" outlined in Section 1851 of the MSA,[74] which they plainly do.

1. National Standard 1.

National Standard 1 requires that "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry."[75] The term "overfishing" means "a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis."[76] Congress, however, recognized that a certain amount of scientific uncertainty in predicting a stock's overfishing level is inevitable, and as a result, National Standard 1 guidelines "operate to ensure that there is no greater than a 50% probability that overfishing will occur."[77]

Amendment 14 unequivocally achieves the National Standard 1 requirement to prevent overfishing, as it aligns Cook Inlet with the rest of the West Area in prohibiting commercial fishing. It cannot be seriously argued that overfishing will occur in the EEZ as a result of Amendment 14, yet UCIDA attempts to make the argument, stating that "Amendment 14 fails to provide any means to ensure that the Cook Inlet salmon stocks

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[74] *Southeastern Fisheries Ass'n, Inc.*, 773 F. Supp at 441.

[75] 16 U.S.C. § 1851(a)(1).

[76] *Id*. § 1802(34).

[77] *Oceana, Inc v. Ross*, at 768. (quoting *Oceana, Inc. v. Locke*, 831 F. Supp. 2d 95, 128 (D.D.C. 2011) (citing 50 C.F.R. § 600.310(f)).

are not overfished or to ensure that the fishery is achieving optimum yield on a continuing basis."[78]

Addressing the separate arguments sequentially, the assertion that closing commercial fishing in the EEZ may still result in overfishing is flatly absurd. NMFS is required to consider State waters fisheries,[79] which in this case will be the only commercial salmon fisheries in Cook Inlet. This is common where a fishery occurs in both state and Federal waters, such as the Pacific cod fishery in the Gulf of Alaska; federal management of the federal fishery is responsive to state management of the state waters fishery.[80]

Alaska's successful management of complex multi-stock salmon fisheries relies in large part on the constitutionally mandated sustained yield principle.[81] As described in the State's Policy for the Management of Sustainable Salmon Fisheries, "wild salmon stocks and the salmon's habitats should be maintained at levels of resource productivity that assure sustained yields."[82] And despite the challenging nature of managing mixed-stock fisheries, the State's sustained yield management structure is why Alaska's wild salmon commercial fisheries are experiencing historic success.[83] This is, of course,

[78] UCIDA Brief, at 30.

[79] 50 CFR 600.310(e)(2)(ii)).

[80] AKR0013826.

[81] Alaska Const. art VIII, § 4; Alaska Statute 16.05.251(d).

[82] 5 AAC 39.222(c).

[83] *See supra* at 10-11.

directly contrary to UCIDA's claim that "the State is wasting millions of salmon every year."[84]

It is also important to note that the independent experts at NMFS and the NPFMC found that Alaska's management of commercial salmon fishing in Cook Inlet "is consistent with the policies and standards of the Magnuson-Stevens Act,"[85] and is "a more effective management system for preventing overfishing of Alaska salmon than a system that places rigid numeric limits on the number of fish that may be caught."[86] In other words, the State does a better job of managing the Cook Inlet commercial salmon fishery to prevent overfishing than would be possible under federal management.

The second part of UCIDA's argument regarding National Standard 1 is that "optimum yield" cannot be achieved solely in the state waters fishery.[87] UCIDA has no evidence to support this claim, so instead it presents recent "fishery disaster" determinations from 2012, 2018, and 2020. There have been approximately sixty fishery disaster determinations in the past decade.[88] The three upon which UCIDA relies were all caused by "natural causes,"[89] not mismanagement or overfishing. Moreover, Alaska

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[84] UCIDA Brief, at 31.

[85] 77 Fed. Reg. at 75570.

[86] *Id.* at 75571.

[87] UCIDA Brief, at 31.

[88] https://www.fisheries.noaa.gov/national/funding-and-financial-services/fishery-disaster-determinations, last visited March 18, 2022.

[89] *Id*.

accounts for 99 percent of the nation's total pacific salmon landings,[90] and had only three disaster determinations in Cook Inlet, compared with 23 West Coast salmon disaster determinations during that same time period.[91] UCIDA purposefully presents the three disaster determinations absent any context—because when fully explained they serve to show how extraordinarily successful Alaska's salmon management has been and continues to be.

"Optimum yield" is defined with respect to the yield from a fishery, "as the amount of fish that will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities and taking into account the protection of marine ecosystems." Of course, commercial salmon fishing is prohibited in the West Area; therefore, the directed harvest OY is zero.[92] The "West Area has been closed to commercial net fishing since 1952 and commercial troll fishing since 1973 and there has not been any yield from this area."[93] In approving and implementing Amendment 14, NMFS further recognized that the "OY recognizes that salmon are fully

[90] NOAA Fisheries of the United State Report, 2019, available at https://media.fisheries.noaa.gov/2021-05/FUS2019-FINAL-webready-2.3.pdf?null=, last visited March 18, 2022. ("U.S. commercial landings of salmon were 838.3 million pounds valued at $707.3 million—an increase of 262.3 million pounds (46%) and $109.3 million (18%) compared with 2018. Alaska accounted for 99 percent of total landings…")

[91] *See supra* note 63.

[92] AKR0000109.

[93] *Id*.

utilized by State fisheries and that the State manages fisheries based on the best available information using the State's escapement goal management system."[94]

UCIDA presents no data whatsoever to support its argument that State waters fisheries are incapable of achieving optimum yield. Instead, UCIDA observes that there have been federal fisheries disaster determinations in Cook Inlet in the past, so they will inevitably continue in the future.[95] But again, this ignores the reality that Alaska lands 99 percent of the nation's pacific salmon, and accounts for a small percentage of the salmon disaster determinations.[96] It ignores the fact that 858.5 million pounds Alaska salmon were harvested in 2021—the third highest annual catch on record for both total fish harvested and total pounds harvested.[97] UCIDA simply ignores the facts as they are and attempts to recast Alaska's management as a failure despite overwhelming statistical proof of the contrary.

History proves that NMFS is correct when it asserts that "salmon stocks can be fully utilized in State waters consistent with appropriate conservation and management, additional harvest in EEZ waters is not necessary to achieve OY, and introducing an additional, independent management jurisdiction in the EEZ could increase the risk of overfishing…"[98] Alaska has the scientific and technical expertise to produce record

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[94] *Id*.

[95] UCIDA Brief, at 31.

[96] *See supra* note 65.

[97] *See supra* note 35.

[98] AKR0013826.

salmon landings on a sustained yield basis, and Amendment 14 will ensure that it can continue doing so.

2. National Standard 2.

National Standard 2 requires that "[c]onservation and management measures shall be based upon the best scientific information available."[99] "best scientific information" "includes, but is not limited to, information of a biological, ecological, economic, or social nature."[100] Amendment 14 plainly achieves the National Standard 2 requirements. The process included review by the Council's Scientific and Statistical Committee to "provide scientific advice for the fishery management decision, evaluation of uncertainty in the development of salmon escapement goals, and a comprehensive description of social and economic conditions in the Cook Inlet salmon fishery, as well as consideration of alternative scientific points of view regarding the potential for overcompensation in Cook Inlet salmon stocks."[101] Further, the record proves that the "State has and is appropriately conserving and managing Cook Inlet salmon stocks."[102]

The Council also evaluated the social and economic impacts of their action using the best scientific information available.[103] As NMFS has explained, the "Cook Inlet drift gillnet fleet could maintain their existing levels of salmon removals in State waters,

[99] 16 U.S.C. § 1851(a)(2); *see also* 50 C.F.R. § 600.315(b)(1).

[100] 50 C.F.R. § 600.315(b)(1).

[101] AKR0000361 (internal parentheticals deleted).

[102] *Id.*

[103] *Id.*

which currently constitutes over 50 percent of their average annual catch," and "[v]essels could also relocate their previous EEZ fishing effort to State waters."[104]

Ignoring all of this, UCIDA argues that this is a "political decision," and wholly ignores the actual data related to the fisheries.[105] The Ninth Circuit addressed a similar argument from an aggrieved industry group in *Fishermen's Finest, Inc. v. Locke*.[106] In that case the plaintiff challenged an amendment to an FMP, which reduced the allocation of Pacific cod for plaintiff's fishing sector.[107] Specifically, the plaintiff argued that NPFMC allocated Pacific cod total allowable catch to the trawl Catcher/Processor sector as part of an "impermissible and arbitrary political compromise" in order to benefit one specific vessel.[108] The court held that the allocation had practical management objectives, thus "political concerns did not predominate."[109] The court used the occasion to draw a distinction between that situation, where some political considerations may have been present, and the "*pure* political compromise in which the agency did not engage in *any* scientific analysis"[110] present in other matters.[111]

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[104] AKR0013833.

[105] UCIDA Brief, at 33.

[106] 593 F.3d 886, 896 (9th Cir. 2010).

[107] *Id*. at 895-96.

[108] *Id*. at 893.

[109] *Id*.

[110] *Id*. at 899. (Emphasis in original).

[111] As was the case in *Midwater Trawlers Coop. v. Dep't of Com*., 282 F.3d 710, 720 (9th Cir. 2002), cited by UCIDA at note 156.

The current instance is much closer to *Fisherman's Finest*, as any arguable "political considerations" are heavily outweighed by the scientific rationale for Amendment 14. This Court should follow the Ninth Circuit's guidance and reject UCIDA's challenge on National Standard 2 grounds.

3. National Standard 4.

National Standard 4 requires that "[c]onservation and management measures shall not discriminate between residents of different States."[112] UCIDA ignores this critical condition precedent clause as though it does not exist, and instead focuses on what must happen *if* it "becomes necessary to allocate or assign fishing privileges among various United States fishermen."[113] But Amendment 14 does not discriminate between residents of different States in any way. Residents of any state may purchase a Cook Inlet drift permit. The State does not, indeed the state cannot, preclude residents of states other than Alaska from engaging in commercial salmon fishing in Alaska's sovereign waters.[114]

UCIDA appears to misunderstand the thrust of National Standard 4, arguing that an allocation from the drift gillnet fleet to other user groups *which also includes nonresidents of Alaska* (such as drift gillnet fishers who prefer state waters, set gillnet commercial fishers, sport fishers, and guided sport fishers) somehow offends National Standard 4. It plainly does not. Further, the State waters fisheries are irrelevant to the

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[112] 16 U.S.C. § 1851(a)(4); *see also* 50 C.F.R. § 600.325.

[113] *See* UCIDA Brief, at 34-35.

[114] *See e.g. Toomer v. Witsell*, 334 U.S. 385, 403, (1948); *Mullaney v. Anderson*, 342 U.S. 415, 417–18 (1952).

National Standard 4 analysis, as the West Area prohibition on commercial salmon fishing applies to all fishers, regardless of residency.[115] NMFS explained this in the EA/RIR: "Alternative 4 would apply equally to all participants in the commercial salmon fishery in the Cook Inlet EEZ. As detailed in the analysis, Alternative 4 is reasonably calculated to promote conservation by maintaining appropriate harvest levels for Cook Inlet salmon stocks. Alternative 4 achieves this by taking the most precautionary approach, a fishery closure, and avoids creating significant new management uncertainty by introducing another active salmon management jurisdiction in Cook Inlet."[116] Again, this reasoning makes ample sense when considering that the fishery is fully allocated in State waters.

4. National Standard 8.

National Standard 8 requires that "[c]onservation and management measures shall… take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2), in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities."[117]

Amendment 14 complies with National Standard 8 in several ways. First, by preventing overfishing in the EEZ the action helps ensure that an economically vibrant fishery occurs in State waters.[118] Second, other users will benefit from including the

[115] AKR0000361.

[116] AKR0000361-2.

[117] 16 U.S.C. § 1851(a)(8); *see also* 50 C.F.R. § 600.345.

[118] AKR0000363.

Cook Inlet EEZ within the West Area, primarily drift gillnet fishers who prefer State waters and set gillnet commercial fishers.[119] Any negative effects from removing EEZ harvest will likely be offset by increased harvest in State waters.

The amici cities of Soldotna, Homer, and Kenai essentially argue that Amendment 14 violated National Standard 8 because NMFS failed to examine every possible impact and connect a mitigation for each. Yet the EA exhaustively identifies and examines the status of current harvest,[120] harvesting vessels,[121] processors/buyers,[122] fishing communities (including those of amici),[123] target products and markets,[124] and then crucially, analyzes and describes the impacts of those interrelated factors on the local communities.[125]

NMFS noted the reality that communities would be affected differently based on their location relative to the EEZ and their association with the drift gillnet fishery.[126] Because State waters catch rates of the same commercial drift fleet may also rise to offset EEZ loss, along with the catch rates of other groups including commercial setnetters and the recreational fishery, impacts would ultimately "depend on adaptive responses of

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[119] *Id.*

[120] AKR0000187-201.

[121] AKR0000202-219.

[122] AKR0000220-223.

[123] AKR0000224-260.

[124] AKR0000261-260.

[125] AKR0000288-290.

[126] AKR0000289.

individual and entities engaged in the fishery[.]"[127] And while there may be economic impacts to some communities as a result of this action, its primary purpose is to "prevent overfishing and achieve the conservation and management goals of the FMP while recognizing that an economically viable fishery will still occur within State waters."[128] Amendment 14 achieves that goal, and it does so in compliance with National Standard 8.

III. NMFS complied with NEPA.

Recognizing the clear shortcomings in its MSA argument, UCIDA tags on a short NEPA claim. Like its MSA argument, the NEPA claim fails. Despite UCIDA's assertion to the contrary, NMFS took the required "hard look" at the impacts of Amendment 14.

a. Statutory framework.

NEPA declares a broad national commitment to protecting and promoting environmental quality and establishes important "action-forcing procedures" to meet this goal.[129]

However, NEPA "does not mandate particular results, but simply provides the necessary process to ensure that federal agencies take a 'hard look' at the environmental consequences of their actions."[130]

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[127] *Id.*, 290.

[128] AKR0000363.

[129] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989).

[130] *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1124 (9th Cir. 2012) (internal quotations and citations omitted); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004).

To further its goals, NEPA requires the preparation of an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment."[131] However, pursuant to NEPA's implementing regulations, federal agencies may first prepare an EA that provides sufficient evidence and analysis to determine whether to prepare an EIS or make a finding of no significant impact ("FONSI").[132] If the action will significantly affect the environment, an EIS must be prepared, while if the project will have only an insignificant effect, the agency issues a FONSI.[133]

Here, NMFS prepared an EA in which it found that "cumulative impacts of the proposed action and its alternative are determined to be not significant."[134] This is supported by the weight of the evidence, as explained below.

b. NMFS provided ample reasons to support its EA.

First, the EA/RIR is voluminous at over 300 pages[135] while UCIDA dedicates a mere two paragraph to its baseless claim that the NMFS failed to comply with NEPA. A cursory review of the EA reveals that NMFS did, in fact, explain why Amendment 14's impacts are insignificant. Rather than analyze the EA, however, UCIDA simply argues that the EEZ fishery has been open for a long time, so any change to it must result

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[131] 42 U.S.C. § 4332(C).

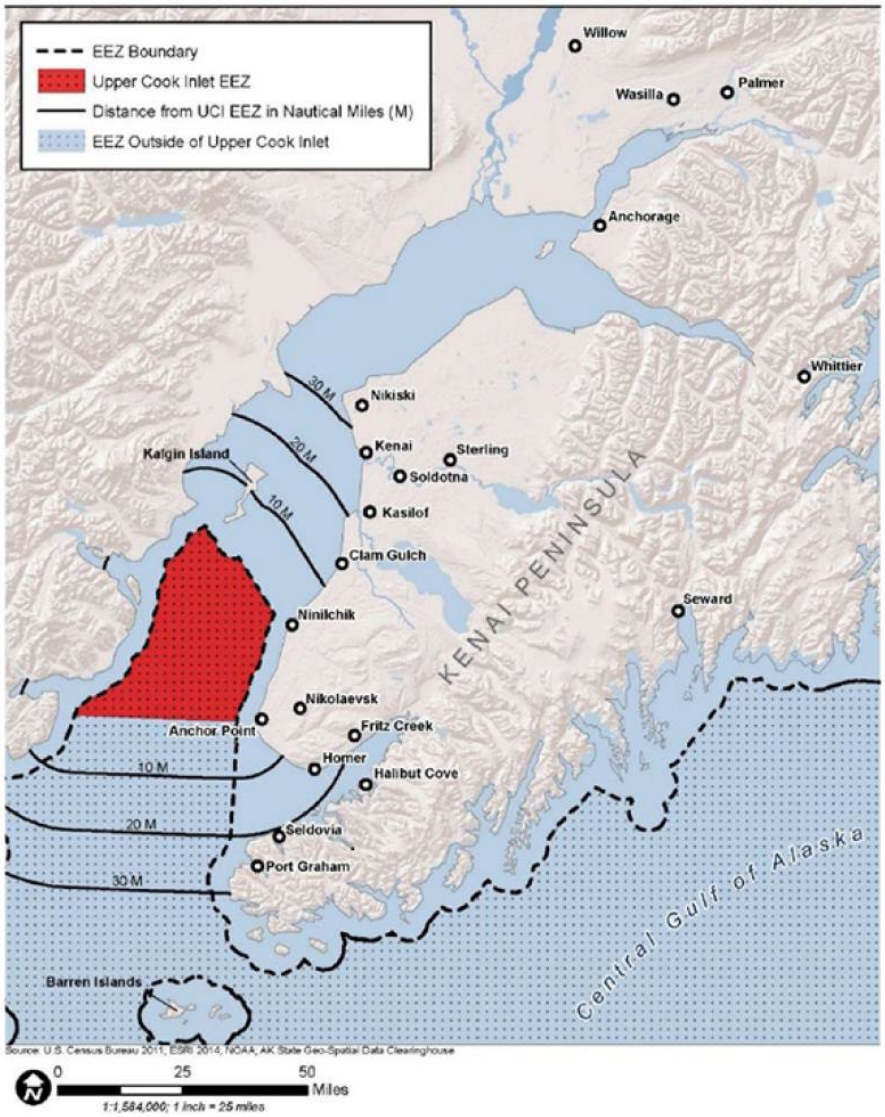
[132] 40 C.F.R. § 1508.1(h), (l).

[133] 40 C.F.R. §§ 1501.3, 1501.6; *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005).

[134] AKR0000045.

[135] *See generally* AKR0000040-388.

in significant impacts.[136] But this argument completely ignores the fact that the fishery will still occur in State waters, which make up the majority of Cook Inlet waters:



Source: Developed by Wislow Research based on NOAA boundary data and ADF&G fish ticket data compiled by AKFIN [137]

In fact, while the Inlet encompasses over 12,000 square miles, the Central District where the Upper Cook Inlet drift fleet operates is majority State waters with a total area of

[136] UCIDA Brief, at 40.

[137] https://www.fisheries.noaa.gov/feature-story/noaa-fisheries-implementing-amendment-14-alaskas-cook-inlet, last visited March 23, 2022.

approximately 2,267 square miles,[138] only about 1,000 of which is in the EEZ.[139] It is critical to recognize that the drift fishery will still be prosecuted in the ample State waters fishery.[140] Shifting fish caught in the EEZ to State waters is the primary result of Amendment 14, and viewing it through that lens makes it simple to understand how the action's impacts are insignificant as it relates to NEPA.

UCIDA also states that "NMFS and the Council spent a less than 30 days evaluating the impacts…."[141] This is false. The Council selected Alternative 4 at a December 2020 meeting and the Final EA/RIR on the action was published in August of 2021.[142]

Similarly misplaced is UCIDA's argument that NMFS failed to determine the "actual impacts" of closing the fishery, in support of which it cites an ADF&G document entitled "Responses to Questions from the Salmon FMP Analytical Team Regarding the Impacts of Alternative 4."[143] While the document does not support UCIDA's proposition, the first paragraph is instructive:

> The EEZ area within Cook Inlet is a relatively small area that engulfs a huge mixed stock fishery where thousands of distinct/discrete salmon stocks migrate through these federal waters on their final destination to their spawning grounds. Some of these stocks are robust while some are weak and others such as Chinook stocks are in a serious state of decline.

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[138] AKR0000223.

[139] AKR0013825.

[140] AKR0000363.

[141] UCIDA Brief, at 40.

[142] *See e.g.* AKR0000044.

[143] UCIDA Brief, at 41 (FN 196 citing AKR_7130-33.

> Timing of the fishery along with daily/weekly openers and amount of hours allotted, amount and length and make up of fishing gear, weather, and finally timing of migration, particularly of those weaker stocks through the EEZ waters all play a significant role in whether or not some of those weaker stocks will be over harvested or the more robust stocks will be under harvested. With that many different stocks migrating through relatively small area in such a short time frame, these waters that comprise the Cook Inlet EEZ are extremely difficult and complicated to manage to say the least without overharvesting some stocks or underutilizing others. That is why there are numerous complicated management plans that guide the harvest of CI salmon stocks and though these plans are continually a work in progress they have successfully been implemented to provide a sustainable harvest of Cook Inlet salmon over the past several decades for a variety of commercial, sport, personal use and subsistence users.[144]

The document also reflects the reality that when the EEZ is closed to commercial salmon fishing, all Cook Inlet drift gillnet fishing will occur in state waters.[145]

It is possible that UCIDA believes the following passage from the document supports its argument: "Drift gillnet fishery harvest may decrease in some years by variable amounts depending upon how the Cook Inlet drift gillnet fishery is managed in terms of weak stocks and allocation."[146] But that statement does not support the proposition that NMFS failed to determine the actual impacts of closing the fishery. Instead, that statement reflects the reality that it is impossible to perfectly predict future salmon run sizes (i.e. potential future weak stocks). That is an uncontroversial observation. What is plainly established, both in the record and as a matter of common sense, is that fish not caught in the EEZ will be targeted in the state waters drift

[144] AKR0001330.

[145] *Id.*

[146] AKR0001331.

fishery.[147] Of course, none of this suggests that NMFS failed to properly evaluate the closure. Indeed, this document, along with the rest of the administrative record exemplify that NMFS took exactly the hard look required by NEPA.

IV. Amendment 14 is Constitutional.

The Humbyrd plaintiffs mount an attack on Amendment 14 (and the overall structure of the MSA and legitimacy of the Council) by alleging Appointments Clause[148] or the Take Care[149] and Executive Vesting Clauses[150] violations. If successful, they would lay waste to the MSA.

In the MSA, Congress addressed the difficult biological realities of anadromous fishery management by balancing state and federal input through the carefully calibrated framework established in the fishery management councils, to ensure evidence based sustainable fisheries management. Despite Humbyrd's attempt to wrest any involvement in federal fisheries management of the Cook Inlet away from the states, the existing framework does not violate the Constitution. Council members are clearly not principal officers as urged by Plaintiffs, nor are they inferior officers as they lack the ability to take any affirmative action with regard to the fishery,[151] serve temporary positions for the

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[147] *See e.g.* AKR0007130. ("This may result in development of a "line fishery" where the bulk of the fleet is positioned near the EEZ boundary to harvest fish as they enter state waters."

[148] U.S. Const. art. 2, § 2, cl. 2.

[149] U.S. Const. art. 2, § 3.

[150] U.S. Const. art. 2, § 1, cl. 1.

[151] 16 U.S.C. § 1854.

most part outside federal employment,[152] do not perform executive branch functions, and can only propose actions to the Secretary.[153] Council members serve an important, but nonetheless *advisory* role.

Even if, *arguendo*, the Court were to determine that Council members are inferior officers, they are predominantly appointed by the Secretary in conformity with the Appointments Clause.[154] Although Congress established a selection process weighted to provide regional state input and ensure coordinated management with state-managed fisheries, such sideboards do not violate the separation of powers protections enshrined in the Constitution. Furthermore, Congress has all necessary and proper authority[155] to provide for the Council where it serves a primarily legislative function. The court should cleave to constitutional avoidance principals and reject Humbyrd's arguments.

Amendment 14 to the FMP was ultimately enacted by the Secretary, not the Council, and Humbyrd's argument is without merit. And because the matter can be fully resolved on statutory grounds, it is unnecessary to resolve the constitutional matters.

a. Council Members are not Officers.

Humbyrd goes to great lengths to argue that the Council members are officers, their appointments were improper, and therefore Amendment 14 should be set aside.[156]

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[152] 16 U.S.C. § 1852(b)(3).

[153] 16 U.S.C. § 1854.

[154] 16 U.S.C. § 1852(b)(2).

[155] U.S. Const. art. 1, § 8, cl. 18.

[156] ECF No. 37 ("Humbyrd Brief"), at 5.

Yet none of the cases cited for this proposition by Humbyrd match the composition or authorities of the Council. Furthermore, as indicated by the first paragraph of Humbyrd's brief, the Council operates within the legislative realm in which the *Humphreys Executor v. US.*[157] Court held Congress has authority to require such bodies "to act in discharge of their duties independently of executive control[.]" As acknowledged by Humbyrd, the Council is a quasi legislative body, and Congress was within its bounds to elect to share power through gubernatorial appointment given the intertwined nature of fisheries management and the recognition of state power reserved in the Constitution's Tenth Amendment. Such appointment scheme more closely safeguards the will of the people directly impacted, through their ability to express any displeasure to a Governor more likely to listen. If the court held to this view, members of the Council would not require appointment.

If it is necessary to continue to examine the Council's officer status, in *Buckley v. Valeo* the Court held that congressional members of the Federal Elections Commission performed executive functions including enforcement and that commissioners must be appointed in accordance with the Appointments Clause. [158] The Court noted in *Lucia v. SEC* that the *Buckley* significant authority test "is framed in general terms, tempting advocates to add whatever glosses best suit their arguments."[159] And Humbyrd certainly

[157] *Id*. at 25. (*citing Humphrey's Executor*, 295 U.S. 602, 629 (1935)).

[158] 96 S.Ct. 612 (1976).

[159] 138 S.Ct. 2044, 2051 (2018).

does that. But the Council at issue here does not have significant authority of its own, and can only act through the Secretary.

In *Lucia*, the Court looked to *Freytag v. Commissioner*[160] as settling the question of officer status for quasi-judicial positions,[161] which are not directly on point with regard to the Council. In *Lucia*, the Court examined whether a Securities and Exchange Commission administrative law judge (ALJ) was an ongoing, rather than temporary or episodic position as established in *United States v. Germaine*,[162] whether such position was set out in code, and whether they exercised significant authority.[163] The Court determined that because the ALJ served a career appointment, the position was created by statute, and an ALJ has "all the authority needed to insure fair and orderly adversarial hearings–indeed, nearly all the tools of federal trial judges[,]"that the ALJ was an officer subject to the requirements of the Appointments Clause. [164]

To the extent that a similar examination applies to the Council, which performs no real judicial or quasi-judicial function, members of the Council do not serve lengthy appointments, as their terms are set at three years, with a maximum of three consecutive appointments.[165] While Council positions are set out in statute, apart from the regional

[160] 501 U.S. 868 (1991).

[161] *Lucia,* at 2053.

[162] 99 U.S. 508, 510, 25 L.Ed. 482 (1879)

[163] *Lucia,* at 2053.

[164] *Id*. 2053.

[165] 16 U.S.C. § 1852(b)(3).

director of the NMFS, Council members are predominately not federal employees.[166] And fundamentally, the Council can take no affirmative action of its own, but may only recommend FMPs or proposed regulations and await Secretary review.

Supporting this conclusion, where other courts have examined the agency status of the fishery management councils, they determined that councils are advisory bodies designed merely to assist the Secretary with the highly technical understanding necessary for effective fisheries management.

In *J.H. Miles & Co., Inc. v. Brown,* the court took up the issue of whether the Mid-Atlantic Fishery Management Council was an "agency."[167] The court noted that council members are mostly not federal employees, and that the councils themselves are exempt from the provisions of the Federal Advisory Committee Act, 5 U.S.C. app. §1.[168] The court considered that the Secretary was unable to change quotas set by the council unless the recommendation violated a provision of the MSA, but determined that "the Councils appear to be designed to function as advisors, i.e. experts in the field who assist the Secretary in his role in managing the fishery. They cannot promulgate regulations, and they do not have any independent authority. Their role is to assist the Secretary."[169]

The court in *Flaherty v. Ross* reached the same conclusion, finding that "[a]t its core, the Council is an advisory body[,]" that "…the Council's plans and accompanying

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[166] 16 U.S.C. § 1852(b)(1)(B).

[167] 910 F.Supp. 1138, 1157 (E.D. Va., 1995).

[168] *Id*. at 1158.

[169] *Id.* at 1158-1159.

regulations still do not achieve the dignity of an agency's final decision until the Secretary reviews and adopts them[,] and that "…the Council does not by law have authority to take final and binding action affecting the rights and obligations of individuals."[170]

It is unclear how the members of a Council, which as a body is unable to act on its own, and is not an agency in its own right, can be officers as urged by Humbyrd. The Council members are not federal officers with regard to the Appointment Clause.

b. If Council Member are determined to be Officers, they are Inferior Officers Properly Appointed in Conformity with the Appointments Clause.

Although the State does not believe that Council members are officers, should the court determine to the contrary, Council members could only be inferior officers requiring Secretarial appointment, which most have been under the MSA.

1. Council members could only be inferior officers.

The Humbyrd plaintiffs correctly note the three part test separating primary and inferior officers set out by the Supreme Court in *Edmond v. United States*,[171] but then contorts the facts to argue that Council Members are *primary* officers, a proposition not supported by statute, case law, or the text of the Constitution. The *Edmond* test examines (i) whether the officer is subject to supervision and oversight by a principal officer; (ii)

[170] 373 F.Supp.3d 97, 106 (D.D.C. 2019) (internal quotes and brackets removed).

[171] 520 U.S. 651, 663 (1997).

whether the officer is subject to removal by a principal officer; and (iii) whether the officer has final decision making authority.[172]

Under the first prong of *Edmond*, statutorily the Council cannot propose any action without the oversight and review of the Secretary.[173] The Secretary can request reports from the Council,[174] can make revisions to proposed regulations,[175] issue an FMP where the Council fails to submit a compliant plan,[176] and make changes to an FMP under certain conditions for an overfished fishery,[177] amongst other oversight authorities.

Under the second prong of the *Edmond* test, the Secretary may remove a Council member either upon a recommendation of 2/3 of the Council, or if the Secretary finds that a Council member has committed an act prohibited by 16 U.S.C. 1857(1)(O).[178] Humbyrd points out that certain Governor-appointed members cannot be removed,[179] but even if those positions were found to be constitutionally infirm, the Councils could continue to operate with a quorum.[180] The Regional Administrator, reporting to the Secretary, would be subject to the same oversight as other employees under the

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[172] *Id*. at 664.

[173] 16 U.S.C. § 1854.

[174] 16 U.S.C. § 1852(h)(4).

[175] 16 U.S.C. § 1854(b)(3).

[176] 16 U.S.C. § 1854(c)(1)(B).

[177] 16 U.S.C. § 1854(e)(7).

[178] 16 U.S.C. § 1852(b)(6).

[179] 16 U.S.C. § 1852(b)(1)(a).

[180] 16 U.S.C. § 1852(e)(1).

Secretary's supervision. Humbyrd's Take Care and Executive Vesting Clause arguments fail for the same reasons.

Members of the Council cannot act independently, but only through Secretarial review and adoption (or rejection) of an FMP or regulation.[181] The Secretary must review any proposed FMP or regulation to determine its sufficiency with the MSA and any other applicable law, and may either approve, disapprove, or partially approve a plan or amendment. On this basis alone, members of the Council can only be inferior officers.

2. Council members are properly appointed.

If Council Members were determined to be inferior officers, the appointment of the majority of the current members are in accordance with the Appointments Clause. Although the Alaska Governor and the Washington Governor each provide a list with not less than 3 potential individuals for each applicable vacancy of 7 of the 11 seats, the Secretary must examine the candidates against objective set criteria and notify the Governor of any individual not qualified, and in such event the Governor must then submit an amended list or clarify the candidate credentials.[182]

Although the principal state officials with marine fishery management responsibility and expertise for the Alaska, Washington, and Oregon are appointed by their respective Governors, such alignment does not automatically offend constitutional separation of powers principles, but merely concedes the reality of anadromous fishery

[181] 16 U.S.C. § 1854.

[182] 16 U.S.C. § 1854(b)(2).

management of a fish stock which spend part of their life cycle in both federal and state waters, but are dependent on both for survival of the fishery. To the extent required, Council members are properly appointed and Amendment 14 should be upheld.

CONCLUSION

For the reasons articulated above, Amendment 14 was properly promulgated in accordance with the MSA, NEPA, and the Constitution of the United States. This Court should rejected the plaintiffs' arguments and uphold the Amendment.

DATED: March 23, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.4(a)(3), I hereby certify that this memorandum complies with the type-volume limitation of Local Civil Rule 7.4(a)(2), because this memorandum contains 8,205 words, excluding parts exempted by Local Civil Rule 7.4(a)(4). This memorandum has been prepared in proportionately spaced typeface, Times New Roman 13-point font, and I obtained the word count using Microsoft Word as installed on our computer system.

By: /s/ Aaron C. Peterson
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Senior Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2022, I caused copies of the foregoing, STATE OF ALASKA'S BRIEF IN OPPOSITION, to be served by electronic means on all counsel of record by using the Court's CM/ECF system.

/s/ Leilani J. Tufaga
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