Ryan P. Steen, AK Bar No. 0912084
Beth S. Ginsberg, Admitted *Pro Hac Vice*
Jason T. Morgan, Admitted *Pro Hac Vice*
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, Washington 98101
(206) 624-0900 (phone)
(206) 386-7500 (facsimile)

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 ET AL., Defendants.	Case. No. 3:13-cv-00104-TMB

REPLY IN SUPPORT OF SUMMARY JUDGMENT BY UNITED COOK INLET DRIFT ASSOCIATION AND COOK INLET FISHERMEN'S FUND

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I. INTRODUCTION

NMFS[1] and the state go to great lengths to make this case much more complicated than it needs to be. UCIDA has challenged NMFS's decision to remove the Cook Inlet EEZ fishery from the scope of the Salmon FMP, thereby (in its own words) "deferring" management to the state of Alaska. The fundamental problem with this decision to "defer" is that it uses a process created from whole cloth. The MSA never uses the word "defer" and the process created by NMFS not only has no textual basis in the statute, but is directly contrary to the express "delegation" procedure set forth in the MSA. The delegation process allows NMFS to delegate management to a state through a fishery management plan subject to ongoing federal oversight. NMFS's so-called "deferral" procedure is an impermissible end-run around both the delegation procedure and the express obligation in 16 U.S.C. § 1852(h)(1) (Section 302(h)(1)) requiring NMFS to produce a fishery management plan for each fishery under its jurisdiction that requires conservation and management. Not only is NMFS's self-created deferral process without statutory authority, it is also without agency precedent. NMFS has never before removed an entire fishery from a fishery management plan using this process.

NMFS's only statutory support for this "deferral" process is 16 U.S.C. § 1856(a)(3)(A) (Section 306(a)(3)(A)), which allows a state to "regulate a fishing vessel outside the boundaries of the State" if there is no fishery management plan in place and the "fishing vessel is registered under the law of that State."[2] This provision is silent on and in no way authorizes deferral of conservation and management obligations for an entire "fishery." Equally important, the authority to "regulate a fishing vessel" contemplated in 306(a)(3)(A) is a far cry from the authority over "management of the fishery" as provided elsewhere in the MSA.[3] That is especially so when, as here, the authority to "regulate a fishing vessel," does not even include every vessel that could operate within that area.[4] Section 306(a)(3)(A)'s grant of jurisdiction

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[1] This reply brief uses the same abbreviations and conventions as Plaintiffs' Memorandum in Support of Summary Judgment, as well as NMFS's convention of citing briefs and documents in this case by ECF number and page.

[2] 16 U.S.C. § 1856(a)(3)(A).

[3] *Compare id.* (emphasis added) *with id*. at § 1856(a)(3)(B) (emphasis added).

[4] *Id*. at § 1856(a)(3)(A) (applying only to vessels registered under the law of the state).

over certain vessels, as opposed to entire fisheries, does not support NMFS's cramped reading of the MSA.

Lacking statutory support for their "deferral" process, NMFS insists this invented process is reasonable because salmon management is complicated, the state is best poised to timely deal with those complications, and imposing a fishery management plan would create an unnecessarily burdensome regime. Even assuming these practical limitations existed, they do not authorize NMFS to circumvent the MSA. While the state may be better poised to administer the fishery on a day-to-day basis, it must do so consistent with the MSA and under the directives of an approved fishery management plan, not through an unsanctioned and unsupervised deferral. In any event, the MSA contemplates that these concerns can be addressed through cooperative efforts between the state and the Council, by incorporating appropriate, existing state measures into the plan, and delegating day-to-day administration of that plan to the state.[5]

NMFS's further attempts to justify its statutory departures on the basis of National Standards 3 and 7 (16 U.S.C. §§ 1851(a)(3) and (a)(7), Section 301(a)(3) and (a)(7)) similarly fail because the standards themselves in no way authorize abdication to the state. Moreover, as discussed in Sections II.A.4, even if those standards could justify a decision to eliminate a fishery management plan in some circumstances, those circumstances are not present here, given the significant fishery disaster that culminated in the 2012 collapse of Cook Inlet Chinook salmon stocks, and the unprecedented fishery closures that ensued. The express and separate acknowledgements of these serious fishery problems by NMFS, the Secretary of Commerce, and the U.S. Fish and Wildlife Service clearly demonstrate the need for the continued federal oversight contemplated by the MSA.

With respect to NEPA, NMFS's arguments are equally unavailing. As explained in Section II.B.1, NMFS's efforts to avoid NEPA altogether on standing grounds are neither supported by applicable case law nor the record. UCIDA's standing declarations make clear that UCIDA's interests are both grounded in environmental and natural resource concerns as well as economic considerations. Contrary to NMFS's allegations, UCIDA's motivations do not revolve around allocation issues; they are animated by concerns about the long-term health of the fishery

[5] *Id*. at §§ 1801(b)(5), 1852(h)(1), 1853(b)(5), 1856(a)(3)(B).

resource and the ecosystem on which that fishery depends, and by long-term declines in the fishery's productivity.[6] UCIDA filed this lawsuit because it believes, just as Congress stated in passing the MSA, that: (1)"the anadromous species which spawn in United States rivers or estuaries, constitute *valuable and renewable natural resources*;" (2) that a "national program for the conservation and management of the fishery resources of the United States is necessary . . . to insure conservation . . . and realize the full potential of the Nation's fishery resources;" and (3) therefore that NMFS must produce a fishery management plan for "each fishery" in the EEZ that requires "conservation and management."[7]

NMFS's arguments as to the adequacy of its NEPA analysis fail because it did not discuss, let alone take a hard look at, the impacts of the 2012 fishery disaster. As explained in Section II.B.2, because the record low returns of Chinook salmon in Cook Inlet occurred after the EA was completed, NMFS cannot credibly insist that the EA need not have been supplemented to address that disaster or its underlying causes. Nor can NMFS credibly continue to assert that its refusal to consider an alternative that retains federal oversight of the Cook Inlet Salmon fishery was reasonable, especially in light of its failure to look at the causes or the ecological ramifications of the 2012 disaster in the first place.

For all these reasons, and those discussed more fully below, the Court should vacate NMFS's decision and remand it with instruction to prepare and implement a fishery management plan for the Cook Inlet Salmon Fishery in conformity with the MSA, APA and NEPA.

II. ARGUMENT

A. Amendment 12 and Its Implementing Regulations Violate the MSA and the APA.

1. NMFS's Interpretation of the MSA Is Not Entitled to *Chevron* Deference.

The threshold legal issue presented in this case is whether MSA Section 302(h)(1), which expressly mandates the development of a fishery management plan by NMFS "for each

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[6] UCIDA could not have been more clear to both NMFS and the Council that its concerns were about the health of the stocks, not allocation issues: "This is not . . . an allocation issue for UCIDA. Other people have tried to put those words in our mouth. It's not. It is about abundance of the stocks." AR_RULEFMP_0000161 (statement of Dr. Maw to the Council, reproduced for NMFS).

[7] 16 U.S.C. § 1801(a)(1), (6) (emphasis added).

fishery under its authority that requires conservation and management," grants NMFS the discretion to decline to produce a plan for a fishery that requires conservation and management.[8] NMFS insists that its interpretation of the MSA, which is premised on a reading of the statute that *implicitly* allows NMFS to "defer" management to the state, is entitled to deference under *Chevron U.S.A., Inc. v. NRDC, Inc.*.[9] Yet, no deference is owed here. The Supreme Court has held that "pure question[s] of statutory construction" are "for the courts to decide" by "[e]mploying traditional tools of statutory construction."[10] Deference under *Chevron* applies only if "the agency interpretation claiming deference was promulgated in the exercise of" congressionally delegated authority "to make rules carrying the force of law."[11]

Because NMFS's final rule here does not offer any interpretation of MSA Section 302(h)(1) and does not use the term "defer," there is no interpretation of MSA Section 302(h)(1) that could possibly be subject to a *Chevron* analysis. Instead, NMFS has adopted its interpretation of MSA Section 302(h)(1) as a litigation position, and such interpretations are entitled to no deference under *Chevron*.[12]

2. Regardless of Whether *Chevron* Applies, NMFS's Deferral Process Is Contrary to the Language and Intent of the MSA.

UCIDA's opening brief demonstrated that the plain language of Section 302(h)(1) expressly requires NMFS to develop a fishery management plan "for each fishery under its authority that requires conservation and management."[13] UCIDA further demonstrated that the MSA expressly provides a mechanism to "delegate management of the fishery to a State" *through* a properly promulgated fishery management plan (just as NMFS has done in the East Area under the salmon FMP) subject to continued oversight, and even allows NMFS to "incorporate" a state's management measures (if consistent with the MSA) into the fishery management plan.[14]

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[8] 16 U.S.C. § 1852(h)(1).
[9] 467 U.S. 837 (1984).
[10] *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).
[11] *United States v. Mead Corp.*, 533 U.S. 218, 218, 227 (2001).
[12] *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 827 (9th Cir. 2012).
[13] 16 U.S.C. § 1852(h)(1).
[14] *Id.* at §§ 1853(b)(5), 1856(a)(3)(B).

NMFS and the state do not respond to UCIDA's position that under basic cannons of statutory construction, Congress's decision to provide an express mechanism to transfer conservation and management over a fishery forecloses "'any other mode'" of accomplishing that same result.[15] It would make little sense to suggest, as NMFS does here, that Congress both: (1) expressly provided a process to transfer conservation and management over a fishery to a state through a delegated plan (subject to continuing federal supervision to ensure compliance with the MSA); and (2) intended, *sub silentio*, to allow NMFS to avoid that delegation process by deferring to the state with no on-going oversight or assurances of compliance with the MSA.

Similarly, NMFS tries to ignore the fact that its wholesale creation of a "deferral" process requires the Court to impermissibly insert the word "federal" in front of "conservation and management" in Section 302(h)(1), in violation of basic cannons of construction.[16] NMFS does not dispute that Congress elsewhere in the MSA utilized "federal" as a qualifier on specific language, and that the MSA also uses the phrase "conservation and management measures" in other portions of the MSA in a manner that cannot be limited to federal actions. [17]

NMFS makes only two arguments in response to these clear statutory mandates: (1) Section 302(h) does not apply; and (2) UCIDA's interpretation of Section 302(h)(1) renders Section 306(a)(3)(A) superfluous. Neither argument has merit.

Regarding NMFS's obligation to comply with Section 302(h)(1), the district court in *Flaherty v. Bryson*[18] decisively held that NMFS must comply with that section. As the court explained, NMFS is required to review the Council's proposed fishery management plans, amendments, and implementing regulations to determine whether they are consistent with all provisions of the MSA; NMFS's "responsibilities therefore include ensuring compliance with

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[15] ECF 30 at 36 (quoting *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929)).

[16] ECF 30 at 34-35.

[17] The state incorrectly argues that NMFS has interpreted 16 U.S.C. § 1852(h)(1) by regulation to mean that the "conservation and management which may be required in EEZ fisheries is 'federal' conservation and management." ECF 44 at 11. But the "regulation" cited by the state is actually the National Standard 7 "advisory guidelines," which do not purport to interpret 16 U.S.C. § 1852(h)(1), and which Congress has explained do "not have the force and effect of law." 16 U.S.C. § 1851(b). NMFS's brief does not join this incorrect argument.

[18] 850 F. Supp. 2d 38 (D.D.C. 2012).

Section 1852(h)'s [302(h)] requirement that the council prepare an FMP or amendment for any stock of fish that 'requires conservation and management.'"[19] Thus, the *Flaherty* decision demonstrates that NMFS is required to ensure compliance with Section 302(h)(1) and its failure to do so violates the APA.[20]

As for NMFS's insistence that UCIDA's interpretation of Section 302(h)(1) conflicts with Section 306(a)(3)(A), *there is no such conflict*. Section 302(h)(1) requires NMFS to ensure the creation of a fishery management plan for each "fishery" that requires conservation and management in the EEZ, while allowing NMFS to "delegate[] management of the fishery to a State" in the plan itself.[21] Section 306(a)(3)(A), by contrast, grants limited authority to a state to regulate certain "vessels," not a "fishery."[22] Section 306(a)(3)(A) is thus not a general grant of authority for states to manage an EEZ "fishery" in the absence of an FMP, and indeed, all parties agree that a state cannot regulate out-of-state vessels in the absence of an FMP. As expressly defined in the MSA, a "vessel" is not a "fishery."[23]

Instead of providing a general grant of authority to manage EEZ fisheries, Section 306(a)(3) contemplates the scenario where NMFS has determined that no "conservation and management" are required for a "fishery" in the EEZ (per Section 302(h)(1)), but that the

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[19] *Id*. at 54-55 (quoting 16 U.S.C. § 1852(h)(1)). In addition, the MSA places the *exact same obligation on NMFS* to prepare its own fishery management plan for a fishery that "requires conservation and management" if the Council refuses to produce a proper plan. 16 U.S.C. § 1854(c)(1)(A).

[20] 850 F. Supp. 2d at 55. In a footnote, NMFS mistakenly argues that the *Flaherty* case undermines UCIDA's interpretation. The court in *Flaherty* explained that Section 302(h)(1) of the MSA required NMFS to make a determination as to whether a specific stock (river herring) required "conservation and management" and further held that NMFS had violated that provision by excluding river herring without any reasoned explanation as to why no conservation and management was necessary. *Id*. at 52. This is entirely consistent with UCIDA's position. The court did not address (and was not presented with) issues of state management or whether NMFS could defer those obligations to state management.

[21] 16 U.S.C. §§ 1852(h)(1), 1856(a)(3)(B).

[22] *Id*. at § 1856(a)(3)(A).

[23] *Id.* at § 1802(18)(A) ("'fishing vessel'" means "any vessel, boat, ship, or other craft which is used for . . . fishing"); *id.* at § 1802(13)(A) ("'fishery'" means "one or more stocks of fish which can be treated as a unit for purposes of conservation and management"); *compare* AS Chapter 5.25 (regulating boat safety and registration requirements) *with* AS Chapter 16.05 (governing regulation of fisheries).

adjoining state has found some need to regulate a "vessel" (per Section 306(a)(3)(A)). This situation could occur, for example, where some incidental level of fishing in federal waters could have a negative impact on a state fishery, because the state and NMFS disagree as to whether conservation and management are necessary, or because the Council has not yet had the opportunity to produce a fishery management plan for an emerging or developing fishery. Interpreting Section 302(h)(1) to obligate NMFS to develop a fishery management plan for "each" federal fishery that "requires conservation and management" (precisely as the statute reads) is entirely consistent with Section 306(a)(3).

The state also cites Section 306(a)(3)(C) to support its argument that the MSA contemplates state regulation of a fishery in the absence of an FMP.[24] But, like Section 306(a)(3)(A), this section is limited to the regulation of a "fishing vessel," and more importantly, the authority it provides terminates once NMFS approves a fishery management plan.[25] This provision was inserted into the MSA in 1996 to respond to the efforts by scallop fishermen to exploit a jurisdictional loophole that existed in Prince William Sound because the Council had not yet developed a fishery management plan.[26] That loophole allowed unregulated fishing in federal waters that adversely impacted the state scallop fishery.[27] Congress's grant of authority in Section 306(a)(3)(A) was accordingly limited to out-of-state vessels operating in an EEZ fishery "for which there was no fishery management plan in place on August 1, 1996," and evaporates once that plan was developed.[28] Tellingly, NMFS concedes that this provision does not apply here.[29]

Even assuming that there were any ambiguity in this plain language requirement found under Section 302(h)(1) (and there is not) NMFS's deferral process "so completely diverges from any realistic meaning of the [MSA] that it cannot survive scrutiny under *Chevron* Step

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[24] ECF 44 at 13.
[25] 16 U.S.C. § 1856(a)(3)(C).
[26] ECF 30 at 49 n.215 (discussing *Trawler Diane Marie, Inc. v. Brown*, 918 F. Supp. 921 (E.D.N.C. 1995)).
[27] *Id*.
[28] 16 U.S.C. § 1856(a)(3)(C).
[29] ECF 43 at 23 n.4.

Two."[30] Indeed, there is no textual basis for the so-called "deferral" procedure because NMFS created this procedure from whole cloth. And, as discussed above, NMFS's invention of this so-called "deferral" process creates an illogical end-run around the express delegation procedure provided in the MSA.

Moreover, the deferral process utilized by NMFS here effectively turns the MSA's management regime upside down. The MSA contemplates a "national program" for the benefit of the nation as a whole, and for managing fisheries in the EEZ through regionally adopted fishery plans subject to explicit "national standards."[31] As discussed above, the states have an important role in that process, through participation on the Council; the Council may, as appropriate, coordinate federal management with states through incorporation of state policies into national fishery management plans, and may even delegate management of that fishery to the states.

In direct contrast to these explicit mandates, NMFS, in this case, has taken an entire fishery that occurs in federal waters -- the Cook Inlet salmon fishery -- and removed it from the fishery management plan. NMFS's regulatory abdication[32] allows this fishery to be managed however the state deems fit. The Cook Inlet fishery need not be managed for the benefit of the nation or to meet the national standards, and there is no accountability to NMFS or the Council. Indeed, the state's counsel has instructed the Alaska Board of Fisheries that it need not comply with or even follow the MSA in regulating this fishery. "It is the State's position that the

[30] *NRDC, Inc. v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000).

[31] 16 U.S.C. §§ 1801(a)(1), 1801(a)(6), 1851(a).

[32] NMFS unfairly claims that UCIDA's brief (and apparently briefs filed in other cases) "exaggerates" the nature of the dispute by making it look like NMFS "simply abandoned management of salmon fishing off the coast of Alaska altogether," when, NFMS claims, it merely redrew a few lines on a map to exclude the Cook Inlet portion of the EEZ from the fishery management plan. ECF 43 at 10. But NMFS concedes that its line-drawing exercise "has the effect of deferring management to the State" for the *entirety* of this important fishery. ECF 43 at 10.[32] Its self-created deferral process provides no continuing federal oversight, check-in, or other mechanism to ensure continued compliance with the MSA. "Abandonment" or "abdication" is an apt adjective to describe NMFS's "deferral" under these circumstances.

Magnuson Stevens Act does not apply to this fishery."[33] Based on these facts, there is no credible way to read the MSA as sanctioning such deferral.

Nor does NMFS find any support for its deferral process in National Standards 1 and 7 (Section 301(a)(1) and (7)). NMFS argues that those standards require the Council to "necessarily consider whether existing management of a fishery provides that the national interest in a fishery [is] safeguarded," and allows the Council to "determine that existing management measures adequately protect those interests" such that "there may be no need for Federal involvement."[34]

NMFS's characterization of these provisions cannot be reconciled with the text of the statute for two reasons. First, Section 301 sets forth the national standards that govern the substance of all fishery management plans.[35] It does not instruct NMFS or the Council as to whether a fishery management plan is required in the first instance. The standards for determining whether a fishery management plan is required at all are provided in Section 302(h)(1).

Second, the text of National Standards 3 and 7 does not provide the kind of discretion that NMFS desires. National Standard 3 provides: "Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry."[36] National Standard 7 provides: "Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication."[37] These provisions speak only to the necessity and propriety of specific "conservation and management measures" -- things contained in a fishery management plan -- *not to the necessity or propriety of the plan itself*.

Similarly, NMFS's reliance on its "advisory guidelines" to National Standard 7 fares no better.[38] As the court in *Flaherty* explained, NMFS's national standard guidelines "cannot be

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[33] AR_RULEFMP_0000035.
[34] ECF 43 at 25.
[35] 16 U.S.C. § 1851.
[36] *Id.* at § 1851(a)(3).
[37] *Id.* at § 1851(a)(7).
[38] ECF 43 at 31-32 (citing 50 C.F.R. § 600.340).

understood to permit NMFS to ignore its duty to ensure compliance with the MSA."[39] That is especially true because Congress made clear that the national standard guidelines "shall not have the force and effect of law."[40] NMFS cannot use advisory guidelines -- especially guidelines that address different provisions of the MSA -- to expand or diminish its obligation to produce plans required by Section 302(h)(1).

Lastly, NMFS argues that its advisory guidelines implementing National Standard 7 should somehow be given more credence because they are longstanding and Congress has "had plenty of opportunities to correct it."[41] This argument ignores Congress's explicit admonishment that these advisory guidelines "shall not have the force and effect of law."[42] There is no reason for Congress to *correct* guidelines where it has already decreed those guidelines to have no legal effect. More importantly, NMFS points to *no other examples* where it has actually decided (as it has here) to approve the removal of an entire fishery from the fishery management plan, based on National Standard 7 guidelines or otherwise. The closest example NMFS produced was the *Flaherty* case, where NMFS's failure to include an entire fishery in the fishery management plan was found arbitrary and capricious.[43] This is hardly a call to action for Congress.

In short, there is no statutory basis whatsoever for NMFS's invented "deferral" procedure; the only appropriate mechanism to transfer management to the state is through the express statutory delegation process, which NMFS pointedly decided to avoid.

3. NMFS Failed to Address Its September 13, 2012 Fishery Disaster Declaration for Cook Inlet.

In addition to these failings, UCIDA's opening brief explained that NMFS acted arbitrarily and capriciously by failing to reconcile (or even address) its 2012 disaster declaration for Cook Inlet with its determination that these fisheries are "adequately managed" by the state in accordance with the MSA.[44] Indeed, as UCIDA explained, NMFS did not address the

[39] 850 F. Supp. 2d at 56.
[40] 16 U.S.C. § 1851(b).
[41] ECF 43 at 42.
[42] 16 U.S.C. § 1851(b).
[43] 850 F. Supp. 2d at 52.
[44] ECF 30 at 37-40.

disastrous 2012 fishing season at all. NMFS provides three justifications in response, none of which has any merit.

First, NMFS argues that UCIDA waived this argument because it did not tell NMFS about the 2012 fishery disaster during the public comment period.[45] The doctrine of waiver is not applicable here. The public comment period closed on May 29, 2012.[46] The events giving rise to the 2012 disaster occurred in June and July of 2012. The Governor of Alaska asked NMFS to declare a fishery disaster for Cook Inlet on August 16, 2012.[47] UCIDA sent in its supplemental comments *that very same day*.[48] UCIDA could not have commented to NMFS on May 29, 2012 regarding a disaster that had not yet happened. Nor was it required to. The only case cited by NMFS that deals with new information arising *after* the close of the comment period (*American Iron & Steel Institute v. EPA)* makes UCIDA's point, that "[a]n agency does, however, have an obligation to deal with newly acquired evidence in some reasonable fashion."[49]

Indeed, the Ninth Circuit has established that there is no obligation *at all* to raise comments on issues where the agency had "independent knowledge of the very issue that concerns Plaintiffs in this case[;] . . . 'there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.'"[50] NMFS, of course, had independent knowledge of its own Cook Inlet disaster declaration, and that the cause of that disaster was "unknown." Under these circumstances, there can hardly be a waiver.

Second, NMFS argues that it did, in fact, address the 2012 disaster because (a) it mentions the disaster in the final rule; and (b) it previously addressed underlying concerns regarding over-escapement or potential mismanagement.[51] Neither argument is credible. NMFS's only mention of the 2012 disaster is to explain that its removal of Cook Inlet from the

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[45] ECF 34-35.

[46] AR_RULEFMP_0000001.

[47] AR_RULEFMP_000190.

[48] AR_RULEFMP_0001872.

[49] *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1007 (D.C. Cir. 1997). NMFS's other cases are inapposite as they deal with parties that allegedly failed to raise arguments that could have been made during the public comment period. *See* ECF 43 at 34-35.

[50] *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1093 (9th Cir. 2006) (quoting *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 765 (2004)).

[51] ECF 43 at 35.

fishery management plan does not affect the availability of disaster funds. That inapposite explanation does not discuss the reasons behind the disaster, nor its impact on the fishery and the fishing community.[52] Similarly, NMFS's response to prior comments in no way addresses the concerns associated with the 2012 disaster including the "abrupt decline of Chinook salmon in the Kenai River and Northern District streams;" the "significant unanticipated decline of important fishery resources," and "undetermined" cause of those unprecedented declines.[53] Nor does the final rule anywhere address the "abrupt" and "unanticipated decline" of Chinook salmon in Cook Inlet in 2012 or the fact that the reason for the decline is unknown, and does not attempt to reconcile these events with NMFS's determination that the state is adequately managing Cook Inlet fisheries in a manner consistent with the MSA. Attempts by NMFS to shore up these record deficiencies are too little, too late, and must be regarding as *post hoc* rationalizations.[54]

Third, NMFS now argues that the disaster declaration only applied to a state fishery in state waters and that therefore "no fishery that occurs in Federal waters . . . was affected by the Secretary's determination."[55] Because this rationale does not appear in the record, it too, must be disregarded as a *post hoc* rationalization.[56] In any event, these rationales reflect a fundamental misunderstanding of fishery management in Cook Inlet and are belied by the record.[57] Driftnet fishermen operating in the Cook Inlet EEZ have permits that allow them to fish for all five species of anadromous fish in Cook Inlet, including Chinook salmon.[58] The same Chinook

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[52] AR_RULEFMP_0001049-50.

[53] AR_RULEFMP_0001903.

[54] *Arrington v. Daniels*, 516 F.3d 1106, 1112-13 (9th Cir. 2008) (explaining that courts "may look only to the administrative record to determine whether the agency has articulated a rational basis for its decision…. *Post hoc* explanations of agency action by appellate counsel cannot substitute for the agency's own articulation of the basis for its decision." (citations omitted)).

[55] ECF 43 at 36.

[56] *Arrington*, 516 F.3d at 1112-13.

[57] *See* AR_RULEFMP_0001902 (state press release explaining that low Chinook salmon numbers resulted in severe restrictions to "all fisheries"). By regulation, any closure of the setnet fishery automatically triggers state water closures on drift gillnetting, necessarily forcing more fishing effort into the EEZ. *See* 5 AAC 21.359 (b)(3)(B).

[58] AR_RULEFMP_0000030.

salmon stocks that experienced an "abrupt decline" in the summer 2012 passed through the EEZ fisheries, and were subject to potential harvest *en route* to the Kenai River and Northern District streams. These salmon do not know political boundaries. Indeed, NMFS's own oft-stated rationale for deferring management to the state is to enable the state to manage all salmon stocks as a unit in both the EEZ and state waters. Put otherwise, the 2012 and NMFS attempt to argue otherwise are unpersuasive and unsupported in the record.

4. NMFS's Reliance on National Standards 3 and 7 Is Arbitrary and Capricious.

UCIDA's opening brief demonstrated that even if NMFS had the discretion to remove a fishery that requires conservation and management from an FMP, NMFS's reliance on National Standards 3 and 7 to justify that decision was itself arbitrary and capricious.[59] NMFS responds that it did not *rely* on national standards, but instead ensured that Amendment 12 was *consistent* with National Standards 3 and 7.[60] The record shows otherwise.

Specifically, the final rule explains: National Standards 3 and 7 give the Council "the authority" to remove Cook Inlet from the Salmon FMP and that "the Council and NMFS's rationale for removing these areas from the FMP is explained in detail in EA Section 2.5 . . . ."[61] Section 2.5 of the EA in turn attempts to answer the question, "Is federal conservation and management required?" and then answers that question by discussing (only) National Standards 3 and 7.[62] The only other provision of the MSA that is discussed in Section 2.5 is MSA Section 306(a)(3)(C), which EA concedes does not apply.[63] If NMFS did not *rely* on these national standards, then they relied on nothing at all. Either way, NMFS's action is arbitrary and capricious.

As to the application of National Standard 3, UCIDA demonstrated that NMFS's decision to remove the Cook Inlet salmon fishery from the Salmon FMP was arbitrary and capricious because it did not result in management of the fishery as a unit through a properly developed fishery management plan (as contemplated by the MSA) and instead leaves a jurisdictional

[59] ECF 30 at 40-47.
[60] ECF 43 at 29.
[61] AR_RULEFMP_0001042, 0001048.
[62] AR_RULEFMP_0000704-05.
[63] AR_RULEFMP_0000712-13.

loophole for unregulated fishing.[64] NMFS can point to nothing in the language of National Standard 3 that dictates a different result. National Standard 3 instructs that an "individual stock of fish shall be managed as a unit throughout its range."[65] Proper delegation to a state through a fishery management plan can ensure management of the fishery in both state and federal waters as a unit. But, simply removing federal waters from the fishery management plan (as NMFS has done here) leaves the state able to regulate some vessels, but not others. This is not management "as a unit" and is consequently contrary to National Standard 3.

Additionally, NMFS attempts to marginalize the risk of unregulated fishing by claiming that NMFS and the Council carefully considered the possibility of that eventuality, and determined that engaging in such fishing was too risky for fishermen because the state would prosecute any vessel that entered state waters. The problem here is not whether the Council made such a determination (it clearly did), but whether NMFS had *any factual basis in the record to support such a conclusion*. Critically, NMFS's only citations to the record are to the conclusory statements in the EA.[66] But that document does not even identify the source of the state's legal authority to prosecute such fishermen, address questions raised by UCIDA as to how such authority could survive constitutional scrutiny, or address evidence presented by UCIDA that there were fishermen who were interested in exploiting that loophole despite the risks.[67] Accordingly, NMFS's reliance on National Standard 3 is arbitrary and capricious.

With respect to National Standard 7, UCIDA demonstrated that even if the National Standard 7 advisory guidelines could provide NMFS an exception to the statutory mandate in Section 302(h)(1) (and they cannot), NMFS's application of those guidelines was still arbitrary and capricious.[68] Specifically, UCIDA showed that NMFS misapplied the first factor in those guidelines -- "the importance of the fishery to the Nation and the regional economy" -- by asking whether a fishery management plan would "change" the importance of the fishery (a

[64] ECF 30 at 40-42.
[65] 16 U.S.C. § 1851(a)(3).
[66] ECF 43 at 40-41.
[67] AR_RULEFMP_0000037-39, 0000246, 00000272-73.
[68] ECF 30 at 42-47.

factor not found in the guideline). [69] NMFS responds by claiming that it looked at the economic benefits of this fishery in other portions of the EA and then "found that the fishery is important to the nation."[70] The problem with this argument is that the record citations offered by NMFS do not make any such finding; instead, they repeat the conclusion in the EA that the absence of a fishery management plan "will not change the importance of the salmon fishery."[71] While there is certainly no harm in NMFS inquiring as to whether a plan will result in change, such an inquiry is not a substitute for the fundamental determination necessitated by the guidelines: is this fishery a nationally or regionally important fishery? Describing the fishery and discussing potential changes does not answer that question. Put otherwise, NMFS has asked and answered the wrong question.

Similarly, UCIDA demonstrated that NMFS's unsupervised (and unsanctioned) deferral process was arbitrary because there are and remain serious concerns regarding the state's management of the fishery -- as demonstrated by acknowledgements from NMFS, the Secretary of Commerce, and other agencies.[72] UCIDA also demonstrated that the state has asserted that it is not obligated to comply with the MSA in managing this fishery.[73]

NMFS tries to marginalize these serious issues by pointing to what it argues was a successful harvest in 2012 of nearly 4 million salmon allowing "Plaintiffs [to] account[] for 93% of the total sockeye harvest in Cook Inlet" in 2012. NMFS's decision to describe the 2012 season as some sort of banner year for fishing in Cook Inlet once again demonstrates a fundamental lack of understanding of the fishery and intentionally ignores the critical fact that the fishery was entirely closed for the set-net fishers -- who are among the individuals represented by Plaintiffs in this case.[74] NMFS further ignores that this important part of the fishery was closed *due to the worst expected Chinook salmon runs in 30 years*.[75] This resulted in

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[69] ECF 30 at 45.
[70] ECF 43 at 42-43.
[71] AR_RULEFMP_0001039-40.
[72] ECF 30 at 45-46 (collecting sources); *see also* AR_RULEFMP_0000324 (statement of U.S. FWS explaining significant concerns with Chinook salmon escapement goals).
[73] AR_RULEFMP_0000035.
[74] ECF 33 at ¶¶ 5, 14.
[75] AR_RULEFMP_00001872-74; ECF 33 at ¶¶ 5, 12, 14.

"severe restrictions to all fisheries" including driftnet fishermen.[76] That Driftnet fishermen caught 93% of the sockeye is *only because the set net fishery was closed altogether*. Moreover, the state badly missed its escapement goals for the Kenai and Kasilof river stocks, which will, in turn, result in severely reduced runs in future years.[77] Far from a banner year, Cook Inlet fishing in 2012 was no triumph for anyone.

Moreover, UCIDA's concerns over diminishing salmon returns are grounded in hard facts in the record. The record remains unrebutted that several stocks in Cook Inlet have been extirpated during the state's management of the fishery.[78] As to harvests, Dr. Maw in cooperation with Jeff Fox (former state area biologist for the Cook Inlet salmon fisheries) produced a report graphing over 100 years of catch data for Cook Inlet. These tables show that the commercial harvest of four million salmon falls well below the historical average following passage of the MSA, and that the average harvest has declined by approximately 800,000 fish since the state passed its sustainable salmon policy in 2000.[79] So while the total catch in 2012 may have produced the "third highest value in the last 10 years," that is only because the fishery has been under-performing for more than a decade.

Lastly, UCIDA is not alone in raising such concerns. NMFS itself concluded in 2011 that harvest of northern bound stocks in Cook Inlet has crashed and that sockeye runs to the Kenai were down due to state "management decisions leading to over-escapement as a contributing factor."[80] Even more recently, in 2012, the Secretary of Commerce was forced to declare a disaster in Cook Inlet, leading the U.S. Fish and Wildlife Service -- the entity

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[76] *Supra* note 57; AR_RULEFMP_00001902.
[77] AR_RULEFMP_00001872-74.
[78] AR_RULEFMP_000060-61.
[79] AR_RULEFMP_0000071.
[80] 76 Fed. Reg. 20,180, 20,181 (Apr. 11, 2011). NMFS also tries to distance itself from its prior statement that "existing and future salmon fisheries create a situation demanding the Federal participation and oversight contemplated by the Magnuson Act." It does so by claiming that this statement referred only to the "East Area." Not so. The statement occurs in the introduction to the plan (governing both the East and West Area) and makes no distinction between these areas. AR_NPFMC_0972-73.

responsible for managing certain subsistence fisheries in Alaska -- to express "significant concerns" with the methodology used by the state to set Chinook salmon escapement goals.[81]

Under these circumstances, it was patently arbitrary for NMFS to invent an unsanctioned "deferral" process to default to state management, in a manner that ensures no ongoing compliance with the MSA.

B. NMFS's EA Violates NEPA.

1. UCIDA Has Standing to Challenge NMFS's Compliance with NEPA.

Federal defendants challenge Plaintiffs' prudential standing by claiming that Plaintiffs assert wholly economic injuries falling outside of NEPA's "zone of interest."[82] NMFS's arguments have no merit and ignore both controlling case law and undisputed evidence in the Plaintiffs' standing declarations.

Prudential standing requires that a plaintiff assert an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[83] Purely economic interests or interests promoting environmental harm fall outside of NEPA's zone of interest.[84] But contrary to the federal defendants' characterization, and as established in Supreme Court and Ninth Circuit precedence, a plaintiff's injuries *are* within NEPA's zone of interest if they have "an environmental as well as an economic component."[85] Indeed, a plaintiff can "have standing under NEPA even if his or her interest is primarily economic, as long as he or she also alleges an environmental interest or economic injuries that are 'causally related to an act

[81] AR_RULEFMP_0000324.
[82] ECF 43 at 45-49.
[83] *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).
[84] *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993).
[85] *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010) (finding that commercial alfalfa farmers with an interest in potentially significant environmental effects related to genetically modified crops fall within NEPA's zone of interest).

within NEPA's embrace.'"[86] In addition, socioeconomic injuries, like those asserted by Plaintiffs, are also protected under NEPA.[87]

Plaintiffs' NEPA-related injuries are inextricably economic, environmental, and socioeconomic in nature.[88] This three-pronged stake in the fishery itself, and animating this lawsuit, is demonstrated by the Declaration of Dr. Roland Maw, UCIDA's Executive Director, who explains that 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."[89] Dr. Maw explains that UCIDA and its members are "committed to the protection of the environment in Cook Inlet."[90] Similarly, the Vanek Declaration explains that CIFF works to "advocate on behalf of all fishermen of Cook Inlet and for the coast community more generally," and that CIFF members are "fueled by the desire to save the commercial fishing industry… and protect the habitat and ecosystems that those species depend on."[91] In furtherance of these organizational mandates, Plaintiffs have challenged NMFS's cursory NEPA review of Amendment 12 because NMFS's complete failure to meaningfully consider the implications of federal abdication of conservation and management duties in Cook Inlet has resulted, and will continue to result, in significant economic, socioeconomic, *and* ecological injuries to the fishermen and fishing communities that Plaintiffs represent.

For example, NMFS's failure to take a "hard look" at the 2012 fishing resource disaster and concurrent failure to evaluate impacts associated with unregulated fishing in Cook Inlet resulting from its decision to approve Amendment 12, contributes to, and exacerbates the

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[86] *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, 415 F.3d 1078, 1103 (9th Cir. 2005) (quoting *Port of Astoria, Or. v. Hodel*, 595 F.2d 467, 476 (9th Cir. 1979)).

[87] *Monsanto Co.*, 130 S. Ct. at 2756; *see also Lake Erie Alliance for Prot. of Coastal Corridor v. U.S. Army Corps of Eng'rs*, 486 F. Supp. 707 (W.D. Pa. 1980).

[88] *See, e.g.*, ECF 32 ("Maw Decl.") at ¶ 5.

[89] *Id*.

[90] *Id*.

[91] ECF 33 ("Vanek Decl.") at ¶ 6 (emphasis added). NFMS avers in a footnote that CIFF waived its right to bring NEPA claims by failing to comment on the salmon FMP EA. Dkt. 43 at 47 n.11. But CIFF was not required to raise comments already made by UCIDA. *See 'Ilio'ulaokalani Coal.*, 464 F.3d at 1092.

environmental and economic injuries related to over-escapement and the potential for salmon stock depletion experienced by UCIDA's members.[92] Plaintiffs are concerned not just with injuries that arise from their members, but also with the harm to the fishing communities that they represent and seek to preserve.[93] Without a robust and sustainably managed salmon fishery resource, these people and the communities they represent will be grievously injured.[94] In short, Plaintiffs' economic and socioeconomic injuries arise directly from the environmental impacts of NMFS's inadequate NEPA analysis and accordingly fall squarely within NEPA's zone of interest.

2. NMFS Failed to Take a Hard Look at the 2012 Fishery Management Disaster.

UCIDA's opening brief demonstrated that NMFS violated NEPA by failing to address the 2012 fishery disaster in Cook Inlet.[95] NMFS concedes that it did not address the 2012 fishery disaster and attempts to justify that abject failure by maintaining that the disaster declaration is a "distinct action" unrelated to its decision to approve the Salmon FMP.

In fact, according to NMFS, the "commercial fishery failure" occurred "only in state waters."[96] This anemic attempt to artificially divide the fishery into state and federal subparts (which NMFS otherwise maintains is an inseparable unit) rings hollow. While the economic hardship may have been felt more by fishermen in state waters, the underlying biological basis for the disaster (the worst Chinook returns in 30 years) is grounded in the overall health of the entire fishery. NMFS has an obligation to reconcile those unexplained low returns of Chinook salmon with its insistence that the state has been adequately managing the resource.

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[92] *See, e.g.*, Maw Decl. at ¶ 12 (over-escapement "seriously impacts the fishery resource" because "too many spawning salmon … can exhaust the available food supply"); *id.* at ¶ 23 (increasing opportunities for unregulated out-of-state vessels "destabilizes the fishery and puts the resource at risk, creating the potential for overfishing").

[93] Maw Decl. at ¶ 7 (stating that "[i]n addition to permit holders, UCIDA has approximately 65 associational members including fish processors, gear suppliers, crew members, and other interested members of the community"); Vanek Decl. at ¶ 5 (explaining that CIFF represents 446 members, seafood processors, and community members).

[94] *See* Vanek Decl. at ¶ 11 (state-facilitated over-escapement "created financial hardship for me, the fishing community, and moreover, it damages the health of the resource").

[95] ECF 30 at 47-48.

[96] ECF 43 at 49-50.

While on the one hand, NFMS concedes that it did not address the 2012 crash, it alternatively maintains that it did so under a different name and was not required to use talismanic wording. [97] But the record demonstrates that NMFS did not address the 2012 fishery disaster by some other name. Indeed, NMFS could not have done so because, as the Governor explained, the declines were "unanticipated" and *because NMFS concedes that it does not even know the cause of 2012 disaster or why Chinook salmon returned in record low numbers*. Precisely because the 2012 disaster was an unprecedented and unanticipated event in Cook Inlet, NMFS was required to pause and take a hard look at the causes of the fishery crash before moving forward with its decision to abdicate responsibility to the state.[98]

Finally, NMFS also maintains that a supplemental NEPA analysis was not required because issuance of regulations implementing the Salmon FMP is not a major federal action, and even if it was, the decision to approve the Salmon FMP already occurred. Yet the law is clear that a regulation implementing a fishery management plan are a major federal action.[99] Indeed, when reviewing regulations implementing a plan, NMFS is required to revisit the plan itself to ensure consistency with the MSA.[100] In any event, the record belies any argument that NMFS's decision was somehow complete on June 29, 2012. Although NMFS issued its EA on that date, it still had not figured out how to respond to comments raised by UCIDA, and did not do so until publication of the final rule in December.[101] Moreover, the record demonstrates that NMFS was still involved in high level briefings addressing UCIDA's comments and concerns with Amendment 12 and the legal risks associated with approving the regulation when the disaster declaration was issued.[102] Given this extended administrative process, NMFS had no excuse to not issue a supplemental EA addressing the unprecedented events in Cook Inlet in 2012.

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[97] ECF 43 at 50-51.

[98] *See Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1158 (9th Cir. 2010) ("NEPA's 'look before you leap' requirements dictate that agencies 'consider every significant aspect of the environmental impact of a proposed action' *before* that action is approved." (citation omitted)).

[99] 40 C.F.R. § 1508.18.

[100] *See Wash. Trollers Ass'n v. Kreps*, 466 F. Supp. 309, 312 (W.D. Wash. 1979).

[101] AR_Email_0008963.

[102] AR_RULEFMP_0001025 (internal memo dated September 4, 2012 discussing issues raised by prior UCIDA's comments)

3. NMFS Failed to Take a Hard Look at the Impacts of Unregulated Fishing in Cook Inlet.

UCIDA previously demonstrated that NMFS failed to take a hard look at the impact of unregulated fishing in the EEZ.[103] In response, NMFS largely regurgitates the conclusory analysis contained in the EA and fails to respond to UCIDA's concerns regarding the potential deployment of out-of-state floating processors and drum seiners (highly effective means of capturing a large portion of the run given the geography of Cook Inlet), or the intent of members of the fishing community to exploit this loophole.[104] NMFS simply assumed that no one would exploit this loophole without ever checking in with those with the means, motive, or expertise to do so. Because the EA fails to include "any material in support of or in opposition to its conclusions" that unregulated fishing is unlikely to occur, it fails to meet NEPA's hard look requirements.[105]

With respect to the state's authority to prosecute such vessels, NMFS can only point to evidence outside the EA, something that it is not allowed to do.[106] In any event, even if NMFS could rely on an explanation outside the EA itself, the cited discussion does not address or reconcile questions raised by UCIDA. More specifically, UCIDA questioned whether such supposed "authority to prosecute vessel operators for conducting legal activity in international waters would likely run afoul of constitutional limitations and further emphasized that this position "is entirely inconsistent with statements by NOAA's Office of General Counsel claiming that the State cannot regulate a fishing vessel in the EEZ unless that vessel 'chose' to get a State permit."[107] These questions go unanswered in the EA (and the record) and clearly demonstrate that NMFS failed to take a hard look at the impacts of its decision.

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[103] ECF 30 at 48-51. *See also Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998) (justification must be found in the EA itself).

[104] Dkt. 43 at 44.

[105] 161 F.3d at 1214.

[106] *Id*. at 1213. *See* ECF 43 at 44 (citing AR_AUDIO_0038-39 and AR_NPFMC_02587).

[107] AR_RULEFMP_0000037-38. The State provides discussion of AS 16.05.475 which it claims would allow it to prosecute any unregistered fishing vessel that entered state waters. But the regulations implementing that provisions belie any such reading. Alaska Admin. Code tit. 5, § 39.120 elaborates that "Vessel registration is required before fishing or transporting

4. NMFS's EA Failed to Consider a Reasonable Range of Alternatives.

In addition to the gross inadequacies demonstrated above, NMFS failed to consider a reasonable range of alternative because it used an "all or nothing approach" with regard to use of the delegation process. Instead of analyzing one alternative that either delegated management of all three historic net fisheries, or delegated none of them, NMFS instead should have considered the alternative of treating Cook Inlet separately from the other two historical net fishing areas. This third alternative presented by UCIDA was both reasonable and supported by specific factual distinctions between the fisheries. NMFS's failure to "'give full and meaningful consideration to *all* reasonable alternatives'"[108] violates NEPA's express command.

NMFS attempts to justify its all or nothing approach by deferring to the Council's determination that there is no difference between the Cook Inlet salmon fishery and any other salmon fishery.[109] But NMFS cannot satisfy its hard look obligations under NEPA by deferring to unverified and unsupported conclusions by the Council.[110] Instead NMFS was obligated to address the concerns presented by UCIDA as to why Cook Inlet is distinct and should be treated separately from the other net fishing areas. NFMS's failure to do so was arbitrary and capricious.

III. VACATUR IS THE APPROPRIATE REMEDY

Because Amendment 12 is contrary to law and arbitrary and capricious, the appropriate remedy in this case is twofold and includes: (1) vacatur of the portions of Amendment 12 that apply to the West Area and the regulations implementing those parts of the plan, and (2) temporary reinstatement of those portions of the prior plan and rule. This twofold remedy would return the fishery to the status quo that existed prior to approval of Amendment 12 and its

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unprocessed fish in any waters of Alaska" but is not required for those vessels merely transiting state waters en route to a fishing location.

[108] *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) (emphasis added) (quoting *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008)).

[109] ECF 30 at 52-54.

[110] *See Flaherty*, 850 F. Supp. 2d at 54 (NMFS may not "rubber stamp the Council's decisions").

implementing regulations and would prevent unregulated fishing in the EEZ, pending remand to NMFS to comply with the requirements of the MSA and NEPA.

In contrast, the Court should not implement the partial vacatur suggested by NMFS, which would vacate the regulations implementing Amendment 12, but not the relevant provisions of Amendment 12 itself. As NMFS concedes, that remedy would entirely close fishing in the EEZ portion of Cook Inlet, thereby depriving UCIDA of the fishery it seeks to protect through this lawsuit.

IV. CONCLUSION

For all of the reasons discussed above and those presented in UCIDA's opening brief, the Court should grant summary judgment in favor of UCIDA because Amendment 12 and its implementing regulations are arbitrary, capricious, and contrary to law.

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/s/ Jason T. Morgan
Ryan P. Steen, AK Bar No. 0912084
Beth S. Ginsberg, Admitted *Pro Hac Vice*
Jason T. Morgan, Admitted *Pro Hac Vice*
jtmorgan@stoel.com
Attorneys for United Cook Inlet Drift Assn. and Cook Inlet Fishermen's Fund

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2014, I filed a copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Alaska by using the CM/ECF system. Participants in this Case No. 3:13-cv-00104-TMB who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Jason T. Morgan
Jason T. Morgan