UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
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Litigation Updates for the
February 2026 Meeting of the North Pacific Fishery Management Council

UCIDA v. NMFS

Parties:

Plaintiffs/Appellants: United Cook Inlet Drift Association (UCIDA); Cook Inlet Fishermen's Fund.

Federal Defendants/Appellees: National Marine Fisheries Service (NMFS); National Oceanic & Atmospheric Administration (NOAA); Secretary of Commerce, Howard W. Lutnick; and Assistant Administrator for NOAA.

Defendant-Intervenor/Appellees: State of Alaska.

Case Activity:

On May 29, 2024, plaintiffs filed a motion in the United States District Court for the District of Alaska challenging Amendment 16 to the Salmon Fishery Management Plan and implementing regulations—issued May 1, 2024—as inconsistent with the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Administrative Procedure Act, and the National Environmental Policy Act. On July 1, 2025, the U.S. District Court for the District of Alaska granted summary judgment in NMFS's favor on all claims and dismissed plaintiffs' claims with prejudice. Plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit, and filed their opening brief on January 21, 2026.

Status/Next Steps:

The Federal Defendants are preparing a response brief. The U.S. Court of Appeals for the Ninth Circuit has not yet set a date for oral argument.

Attached: Appellants' Opening Brief (January 21, 2026)

Appeal No. 25-5523

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appellants,

v.

NATIONAL MARINE FISHERIES SERVICE et al.,

Appellees,

STATE OF ALASKA,

Intervenor Appellees.

On Appeal from the United States District Court
for the District of Alaska
Case Nos. 3:24-cv-00116-SLG and 3:24-cv-00154-SLG
Hon. Sharon L. Gleason

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This is a comeback case. In *United Cook Inlet Drift Association v. National Marine Fisheries Service*, 837 F.3d 1055 (9th Cir. 2016) ("*UCIDA 1*"), this Court rejected an amendment ("Amendment 12") to the Alaska Salmon Fishery Management Plan ("Salmon FMP"). The Magnuson-Stevens Fishery Conservation and Management Act (the "Magnuson-Stevens Act" or "Act"), 16 U.S.C. § 1801 *et seq.*, requires the National Marine Fisheries Service ("NMFS") to produce a fishery management plan ("FMP") for "each fishery under its authority that requires conservation and management." 16 U.S.C. § 1852(h)(1). In Amendment 12, NMFS removed the Cook Inlet salmon fishery from the Salmon FMP in order to defer its management obligations to the State of Alaska.

This Court invalidated Amendment 12, finding that NMFS improperly attempted to "shirk the statutory command that it 'shall' issue an FMP for each fishery within its jurisdiction requiring conservation and management." *UCIDA 1*, 837 F.3d at 1063. The Court explained that "[t]he Magnuson-Stevens Act unambiguously requires a Council to create an FMP for each fishery under its authority," that the word "fishery" was "defined" by the Act, that "[t]he Act makes plain that federal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns," and that NMFS, therefore, may not defer its management obligations to the State of Alaska. *Id.* at 1063–65.

During the 10 years since the decision in *UCIDA 1*, commercial fishermen in Cook Inlet have struggled in vain to get NMFS to comply with these "plain" and "unambiguous[]" statutory mandates. Following remand on *UCIDA 1*, NMFS issued Amendment 14, which punitively *closed all commercial fishing* in the Exclusive Economic Zone ("EEZ") and gave the state sole management authority for Cook Inlet salmon in state waters. The district court easily found Amendment 14 unlawful because it was "directly contrary to the Ninth Circuit's ruling in *UCIDA 1*." *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv.* (hereafter "*UCIDA 2*"), No. 3:21-CV-00255-JMK, 2022 WL 2222879, at *8 (D. Alaska June 21, 2022). This resulted in another remand.

Undeterred, NMFS promulgated Amendment 16 to the Salmon FMP (the rule at issue in this appeal), which finds a new way to shirk the same statutory commands based on an erroneous jurisdictional excuse. This time, NMFS allows a *small amount* of fishing in the EEZ, and NMFS calls this EEZ harvest the "fishery." According to NMFS, the "stocks of fish" that comprise this limited "fishery" are exactly and only those fish that are harvested in the EEZ each year. NMFS deems the fish that swim through the EEZ unharvested to belong to separate stocks and a separate fishery, even though all those fish are part of the same biological stocks of anadromous fish. And NMFS allows the State of Alaska to manage those supposedly separate stocks and separate "fishery" however it sees fit, without any

Magnuson-Stevens Act oversight. In short, Amendment 16 provides no management guidelines or conservation measures for how the *whole* Cook Inlet salmon fishery must be managed.

This violates the Magnuson-Stevens Act. The "statute requires an FMP for a fishery, a defined term." *UCIDA 1*, 837 F.3d at 1064. The term "fishery" means "one or more stocks of fish which can be treated as a unit for purposes of conservation and management . . ." and "*any fishing for such stocks*." 16 U.S.C. § 1802(13) (emphasis added). Salmon do not become a different "stock of fish" when they pass into (or out of) the EEZ, and NMFS's statutory obligation to provide conservation and management for the Nation's salmon stocks does not evaporate or rematerialize as salmon swim in and out of exclusive federal jurisdiction in the EEZ. To the contrary, the Act makes plain that the "fishery" NMFS must manage is composed of "stocks of fish" and "any fishing" for those stocks. *Id*.

None of this should be in dispute. NMFS's own regulatory guidelines for FMPs explain that "[t]he geographic scope of the fishery, for planning purposes, should cover the entire range of the stocks(s) of fish, and not be overly constrained by political boundaries." 50 C.F.R. § 600.320(b). The "fisheries" at issue in Amendments 12 and 14 both included the entire range of the stocks of fish. *See* Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Salmon, 77 Fed. Reg. 75572, 75579 (Dec. 21, 2012) (analyzing stocks throughout their range and all

harvest of salmon); *UCIDA 2*, 2022 WL 2222879, at *8 & n.94 ("[T]he Cook Inlet salmon fishery includes the stocks of salmon harvested by all sectors within State and federal waters of Cook Inlet." (quoting AKR0020364)).

NMFS's gerrymandered EEZ-only "stocks" and "fishery," which fall apart under bare minimum statutory and biological scrutiny, ultimately just reflect NMFS's continuing political desire to defer management decisions for salmon in Cook Inlet to the State of Alaska. But the overarching purpose of the Magnuson-Stevens Act is to ensure that the Nation's critical fishery resources, like the salmon stocks of Cook Inlet, are managed according to the robust national standards set forth by the Act. *UCIDA 1*, 837 F.3d at 1063. These protections are meaningless if NMFS can redefine "stocks" and a "fishery" to only include fish harvested in federal waters and disclaim responsibility for management or conservation of the stocks as a whole.

NMFS recalcitrance comes with substantial cost. While NMFS has spent years finding novel ways to avoid its statutory obligations, the fishery management failures and hardships described in *UCIDA 1* have snowballed. *Id*. at 1061; 2-ER-39–42; 2-ER-47–52. Cook Inlet was once "one of the nation's most productive salmon fisheries." *UCIDA 1*, 837 F.3d at 1057. The fishery is now plagued by repeated economic disaster declarations and fishery closures, not from lack of salmon, but due to mismanagement of the fishery that is causing irreparable harm to

the fishermen. 4-ER-914; 4-ER-925; 4-ER-933. This is precisely the result that the Magnuson-Stevens Act's national standards were intended to prevent.

This Court should vacate Amendment 16 and remand with instructions to NMFS to prepare a lawful FMP amendment for Cook Inlet and to the district court to consider such further relief as is just and proper, including a deadline, interim management measures, and collaboration, as appropriate.

II. JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The district court issued its order on summary judgment on July 1, 2025, and its judgment in favor of defendants (collectively "NMFS") that same day. Appellants (collectively "UCIDA") timely filed a notice of appeal on August 28, 2025. This Court has jurisdiction of that appeal under 28 U.S.C. § 1291.

III. ISSUES PRESENTED FOR REVIEW

1. Whether NMFS complied with the Magnuson-Stevens Act's mandate to prepare an FMP for the Cook Inlet salmon "fishery" when it limited the "stocks of fish" and the "fishery" to only those fish "harvested" in the EEZ.

2. Whether NMFS violated its obligation to establish "optimum yield" for the "fishery," as required by 16 U.S.C. § 1853(a)(3), (5) and National Standard 1, when it instead established optimum yield only for fish harvested in the EEZ.

3. Whether NMFS's salmon stock definitions are arbitrary, capricious, and contrary to National Standard 2's requirement to use the best scientific and

commercial data available when NMFS disregarded the salmon stock definitions recommended by NMFS's own scientific and statistical committee.

4. Whether NMFS complied with National Standard 3 when it failed to include conservation and management measures for stocks of salmon throughout their range.

IV. PERTINENT STATUTORY PROVISIONS

Appellants have reproduced pertinent statutory provisions as an addendum to this brief.

V. STATEMENT OF THE CASE

A. Statutory Framework

1. The Magnuson-Stevens Act

The Magnuson-Stevens Act is the primary domestic legislation governing management of federal fisheries. 16 U.S.C. §§ 1801–1891(d). The stated purpose of the Act is to "take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the *anadromous species* . . . of the United States." *Id.* § 1801(b)(1) (emphasis added).[1] The Magnuson-Stevens Act creates eight regional fishery management councils charged with the responsibility for preparing fishery management plans ("FMPs") and plan amendments for each federal fishery. *Id.* § 1852(a)(1).

[1] Salmon are anadromous species. 16 U.S.C. 1802(1) (defining "anadromous species" as "fish which spawn in fresh or estuarine waters of the United States and which migrate to ocean waters.").

The Magnuson-Stevens Act requires a fishery management plan for each "fishery" under the regional council's authority "that requires conservation and management." *Id.* § 1852(h)(1). A "fishery" is defined as

> (A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and (B) any fishing for such stocks.

Id. § 1802(13). In turn, "stock of fish" is defined as "a species, subspecies, geographical grouping, or other category of fish capable of management as a unit." *Id.* § 1802(42). The fishery management plan is the foundational document for management of each fishery and provides the framework for ensuring that fisheries are managed in a manner consistent with the requirements of the Act and its 10 national standards. *Id*. § 1851(a).

The Magnuson-Stevens Act's national standards guide all fishery management plans and the regulations implementing those plans. *Id*. As relevant to this litigation, National Standard 1 requires fishery management plans to prevent overfishing while achieving "the optimum yield from each fishery." *Id.* § 1851(a)(1). National Standard 2 requires all conservation measures to be based on the best scientific information available. *Id*. § 1851(a)(2). National Standard 3 provides that "[each] individual stock of fish" should be managed as a unit throughout their range, where practicable. *Id*. § 1851(a)(3).

In addition, all fishery management plans must contain certain required provisions. *See id.* § 1853. Relevant here, fishery management plans must

> assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specification.

Id. § 1853(a)(3). Thus "maximum sustainable yield" (or "MSY") and "optimum yield" (or "OY") are critical components for managing a fishery, consistent with the Act's purpose that the Nation's fishery resources are "finite but renewable" and that these "fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis." *Id.* § 1801(a)(5).

Fishery management councils submit proposed fishery management plans and amendments to NMFS for review and approval. *Id.* §§ 1853, 1854. All fishery management plans and regulations implementing those plans must be consistent with the requirements of the Act. *Id*. § 1851(a). If a fishery management council fails to develop and submit a plan, NMFS may prepare a plan itself pursuant to the Secretarial amendment process. *See id.* § 1854(c)(1)(A). The Magnuson-Stevens Act allows judicial review under the APA for challenges to NMFS's approval and implementation of plans and amendments. *Alaska Factory Trawler Ass'n v. Baldridge*, 831 F.2d 1456, 1464 (9th Cir. 1987); 16 U.S.C. § 1855(f).

B. Management of the Cook Inlet salmon fishery

"Cook Inlet is one of the nation's most productive salmon fisheries." *UCIDA*

1, 837 F.3d at 1057. "Its salmon are anadromous, beginning their lives in Alaskan freshwater, migrating to the ocean, and returning to freshwater to spawn." *Id.* "Cook Inlet is a large inlet that connects the Pacific Ocean to major Alaskan rivers, and contains both state and federal waters." *UCIDA 2*, 2022 WL 2222879, at *2. "The Cook Inlet salmon fishery contains five species of Pacific salmon: Chinook, Silver, Sockeye, Pink, and Chum." *Id.* "Each species is comprised of a number of 'stocks,' which generally are delineated by the areas in which the salmon spawn or the time of year that they spawn." *Id.*

In *UCIDA 1*, this Court set forth a detailed factual and legislative background regarding the management of the Cook Inlet salmon fishery, which UCIDA does not repeat here. *See* 837 F.3d at 1057–61.

1. In *UCIDA 1*, this Court ruled that the Magnuson-Stevens Act unambiguously requires NMFS to create an FMP for the Cook Inlet salmon fishery.

In 2013, UCIDA filed suit challenging Amendment 12 and its implementing regulations. *Id.* at 1061. After the district court granted summary judgment to defendants, UCIDA appealed. *Id.* The primary question in *UCIDA 1* was whether NMFS "can exempt a fishery under its authority that requires conservation and management from an FMP because the agency is content with State management." *Id.* at 1057. This Court said no, "[t]he Magnuson-Stevens Act unambiguously requires [NMFS] to create an FMP for each fishery under its authority that requires conservation and management." *Id.* at 1065. This Court further admonished that

NMFS may not "shirk the statutory command that it 'shall' issue an FMP for each fishery within its jurisdiction requiring conservation and management" and cannot "wriggle out of this requirement by creating FMPs only for selected parts of those fisheries, excluding other areas that required conservation and management." *Id.* at 1063–64.

2. After *UCIDA 1*, NMFS created Amendment 14, which was invalidated by the district court in *UCIDA 2* for the same reason this Court struck down Amendment 12.

The history of Amendment 14 is recounted in detail in *UCIDA 2*. *See UCIDA 2*, 2022 WL 2222879, at *4–5. In short, the North Pacific Fishery Management Council (the "Council") gave up on trying to develop an FMP amendment addressing the Cook Inlet salmon fishery and acquiesced to a last-minute motion by the State of Alaska to simply close all commercial fishing in the EEZ portion of the fishery, giving total control of the management of the fishery to the State of Alaska. *See id.* at *4. NMFS approved the amendment as compliant with the Magnuson-Stevens Act. *Id*.

The district court ruled that Amendment 14 was arbitrary and capricious because it continued to delegate conservation and management to the State of Alaska in violation of the Magnuson-Stevens Act and this Court's ruling in *UCIDA 1*. *See id.* at *8. In so holding, the court explained that Amendment 14 "was crafted as a thinly veiled attempt to ensure an absence of federal management, which conflicts with the Ninth Circuit's holding in *UCIDA 1*." *Id.* The district court vacated

Amendment 14 and ordered NMFS to prepare a new FMP amendment by May 2024. *Id.* at *20.

3. After the Council failed to recommend an alternative, NMFS created Amendment 16 through the Secretarial amendment process.

The administrative proceedings following the district court's second remand order in *UCIDA 2* continued to go sideways. The Council reviewed a draft environmental assessment and again considered alternative management schemes. 5-ER-1005–06. But "the State [of Alaska] informed NMFS and the Council . . . that it would not accept a delegation of management authority for the Cook Inlet EEZ salmon fishery under the conditions that would be necessary to comply with the [Magnuson-Stevens Act]." Third Status Report to the Development of a Salmon FMP Amendment to Address Cook Inlet, *UCIDA 2*, No. 3:21-CV-00255-SLG, Dkt. 98-1 at 2 (D. Alaska Apr. 13, 2023). "[T]he Council acknowledged [that] delegating management to a State that has indicated it is unwilling to accept delegation is not viable under the [Magnuson-Stevens Act]." *Id.* Accordingly, "the Council was left with one viable management alternative[,][2] adopting a federal management regime for the Cook Inlet EEZ." *Id.* A motion was put forward to adopt this as the preferred alternative, and the motion failed for lack of a second. 5-ER-985. With no Council

[2] Alternative 1 (no action) and Alternative 4 (closure of the EEZ) were not viable because of the Ninth Circuit's and the district court's rulings.

amendment, NMFS had "no other viable choice" and set to "immediately work on a Secretarial amendment" for the Salmon FMP. *See id.*

Given this failed process, commercial fishermen went back to the district court for help. On May 15, 2023, the district court issued an Amended Remedy Order, explaining that "the actions taken by the Federal Defendants in the eleven months following the Court's Order . . . are nearly identical to those taken to implement the now-vacated Amendment 14." *UCIDA 2*, No. 3:21-CV-00255-SLG, Dkt. 103, at 9 (D. Alaska May 15, 2023). It explained that

> [g]iven the history of this litigation and the progress of the remand thus far, the Court concludes that stronger judicial intervention is necessary to ensure that the same processes do not yield the same result.

See id. The Court ordered the parties to attend collaboration meetings. *See id.*

The parties had two collaboration meetings in May 2023 and filed a joint status report regarding the meetings. *See* Joint Status Report, *UCIDA 2*, No. 3:21-CV-00255-SLG, Dkt. 104 (D. Alaska June 5, 2023). Plaintiffs explained in the status report that "[a]t this point, UCIDA believes that the parties are still very far apart on what constitutes a legal and effective FMP for the Cook Inlet salmon fishery."[3] *Id.* at 7. On April 30, 2024, NMFS published the final rule implementing Amendment 16. *See* 2-ER-222.

[3] UCIDA also submitted detailed comment letters at every available stage of this process. *See, e.g.*, 5-ER-989; 5-ER-1010; 4-ER-913; 5-ER-972.

4. Amendment 16 creates a new "fishery" and designates new federal "stocks of fish."

In its final rule, NMFS explained that "amendment 16 will create a new fishery in Cook Inlet, which will occur entirely within Federal waters." 2-ER-230. NMFS defined that "fishery" as "*all harvest* of co-occurring salmon stocks in the Cook Inlet EEZ." *Id.* (emphasis added). NMFS explained:

> Defining the fishery as geographically constrained to the Cook Inlet EEZ is consistent with the Magnuson-Stevens Act. Section 3 of the Magnuson-Stevens Act broadly defines a "fishery" as one or more stocks of fish that can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and any fishing for such stocks.
>
> NMFS has determined that salmon stocks in the Cook Inlet EEZ can be treated as a unit for purposes of conservation and management because they all fall within the geographical management area under NMFS's jurisdiction, the best scientific information available supports NMFS's determination that the EEZ has unique ecological characteristics due to the mixed stock nature of fishing in the EEZ, and fishing for these stocks in the EEZ has distinct technical and economic characteristics that distinguish it from State water fisheries as discussed in the response to *Comment 55*.

2-ER-229. NMFS defined the relevant "stocks of fish" as only those portions of each stock "harvested in the Cook Inlet EEZ Area," i.e., fish caught in federal waters. 2-ER-320–21.

5. Amendment 16 sets MSY using the biological definition of "stocks," but sets optimum yield using NMFS's new federal-waters-only definition of "stocks."

Amendment 16 sets maximum sustainable yield as either (a) the number of surplus fish over the State of Alaska's escapement goals or (b) the historical harvest that has been allowed by the state. NMFS determined that MSY applies to *all* fishing for stocks in state and federal waters. 2-ER-223 ("MSY is specified for salmon stocks and stock complexes in Cook Inlet"); 2-ER-232. NMFS then determined that optimum yield would be a range that includes all historical catches that the state has allowed in *federal waters only*, between 1999 and 2021, and that all other surplus fish are allocated to the state to manage. *See* 2-ER-223. This was a change from Amendment 14, where NMFS claimed that "the OY for the Cook Inlet salmon fishery is set to 'the level of catch from all salmon fisheries occurring within Cook Inlet (State and Federal Water catch) . . ..'" *UCIDA 2*, 2022 WL 2222879, at *9 (ellipsis in original; citation omitted).

6. A separate Secretarial rulemaking process resulted in harvest specifications for the 2024 season.

On April 12, 2024, NMFS published proposed harvest specifications "for the salmon fishery of the Cook Inlet exclusive economic zone (EEZ) Area." 3-ER-340. NMFS explained that the "proposed harvest specifications include catch limits that NMFS could implement . . . assuming the Secretary of Commerce . . . approves amendment 16 to the Salmon FMP." 3-ER-341. NMFS explained that if Amendment 16 is approved, it would "specify the annual [total allowable catch

("TAC")] amounts for commercial fishing for each salmon species after accounting for projected recreational fishing removals." *Id.*

The Council and the Advisory Panel ("AP") had already reviewed these proposed TAC amounts at their February 2024 meeting. *See* 3-ER-352; 3-ER-350. The AP recommended a TAC of 1,139,235 salmon. *See* 3-ER-348. NMFS reduced the AP's TAC by 400,805 sockeye and proposed a total of 738,440 to the Council. *See* 3-ER-345. (By comparison, historical annual harvests in Cook Inlet have routinely ranged from four to nine million fish. 4-ER-914.) The motion failed, and NMFS proceeded with a second Secretarial amendment process to establish its proposed TAC. 3-ER-342. On June 18, 2024, NMFS published the final rule establishing its proposed TAC for salmon fishing in federal waters in 2024.

7. The district court upholds Amendment 16 and the harvest specifications.

UCIDA filed its complaint and petition for review regarding Amendment 16 on May 29, 2024, 2-ER-90, and its complaint and petition for review regarding the resulting harvest specifications on July 16, 2024, 2-ER-55. On September 11, 2024, the district court granted UCIDA's motion to consolidate the two cases for all purposes.

On July 1, 2025, the district court entered its Decision and Order upholding Amendment 16. 1-ER-3. The court rejected UCIDA's arguments that Amendment 16 failed to comport with the Magnuson-Stevens Act's definition of "fishery," failed

to set optimum yield as required by the Magnuson-Stevens Act, and violated National Standards 1, 2, 3, and 10. *See* 1-ER-17–34. On August 28, 2025, UCIDA filed this appeal. 5-ER-1014.

VI. SUMMARY OF THE ARGUMENT

1. The Magnuson-Stevens Act unambiguously requires NMFS to create an FMP for the "fishery," which, here, is properly composed of the "stocks of fish" that require conservation and management in Cook Inlet. The Act defines a "fishery" to include "stocks of fish" and "any fishing for such stocks." Until Amendment 16, there was no dispute that the stocks of fish in Cook Inlet that require conservation and management are the biological stocks of salmon throughout their range. But Amendment 16 creates unprecedented, new "stocks of fish" consisting only of those Cook Inlet salmon that are harvested in the EEZ. Amendment 16 then defines the "fishery" comprised of these "stocks" as limited to EEZ harvest. By employing these definitional acrobatics, NMFS again avoids its obligation to create conservation and management measures for "any fishing" for the biological salmon stocks in Cook Inlet as required by the Act. Amendment 16 arbitrarily divides Cook Inlet salmon stocks based on which side of a jurisdictional boundary fish are harvested. Any fish that are not harvested in the EEZ are left to the State of Alaska to conserve and manage. At bottom, Amendment 16 is not an FMP amendment for the "fishery," a defined term, and thus it violates *UCIDA 1* and the Magnuson-

Stevens Act, and is arbitrary, capricious, and contrary to law.

2. Optimum yield is a critical component for managing a "fishery." But NMFS failed to even set OY for the "fishery," instead establishing OY only for EEZ harvest. In addition, NMFS's OY metric is not based on maximum sustained yield as required, which NMFS established for the Cook Inlet salmon stocks as a whole. Because NMFS did not set OY for the "fishery," it cannot comply with National Standard 1's directive to achieve OY for the "fishery."

3. In Amendment 16, NMFS redefined the salmon stocks that require conservation and management as only that portion of each stock harvested in the EEZ. But these definitions are contrary to the stock definitions recommended by NMFS's own scientific and statistical committee, which NMFS stated were the best scientific information available. NMFS's unexplained refusal to use the best scientific information available violates National Standard 2.

4. National Standard 3 requires NMFS to manage stocks of fish as units throughout their range to the extent practicable. NMFS's excuse that it can avoid this requirement entirely because of the limits on its jurisdiction is not credible. NMFS must set management measures for the "fishery" as the Act requires and then, separately, explain what "state action is necessary to implement measures within state waters to achieve FMP objectives." 50 C.F.R. § 600.320(e)(3). The Magnuson-Stevens Act and NMFS's own guidelines require it to prevent

jurisdictional boundaries from becoming a detriment to the conservation and management of anadromous salmon.

VII. ARGUMENT

A. Standard of Review

The district court's decision on summary judgment is reviewed *de novo*. *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000). The Court reviews challenges to a federal agency's compliance with the Magnuson-Stevens Act under the APA's arbitrary and capricious standard. The APA directs a reviewing court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

The Court is to inquire "'whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice[s] made."'" *Pac. Coast Fed'n of Fishermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001) (citation omitted). In making this inquiry, the Court "must engage in a careful, searching review to ensure that the agency has made a rational analysis and decision on the record before it." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 927 (9th Cir. 2008). An agency action is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or

the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010).

B. Amendment 16's definitions of the "fishery" and the "stocks of fish" violate the Magnuson-Stevens Act because they are limited to only EEZ harvest.

In *UCIDA 1*, the Ninth Circuit said, "[t]he [Act] unambiguously requires [NMFS] to create an FMP for each ***fishery*** under its authority that requires conservation and management." 837 F.3d at 1065 (emphasis added). This is a broad obligation, the scope of which is dictated by the definition of the word "fishery." In Amendment 16, NMFS violated the Magnuson-Stevens Act by adopting an unlawfully narrow definition of "fishery," which it defined as "*all harvest* of co-occurring salmon stocks in the Cook Inlet EEZ." 2-ER-232 (emphasis added). Its "fishery" definition, in turn, was based on new "stock" definitions that cut biological stocks up based on which side of a jurisdictional boundary the fish are harvested. *See* 2-ER-320. These definitions defy the plain language and intent of the Act, and are arbitrary, capricious, and contrary to law.[4]

[4] In its Decision and Order, the district court did not accurately state the issue. It asserted that "Plaintiffs maintain that NMFS's FMP violates the [Act] because the FMP defines fishery to include only those salmon in the federal waters in Cook Inlet," *see* 1-ER-17, but this is not UCIDA's complaint. The issue is that NMFS defined the fishery as only fish *harvested* in the EEZ. *See* 2-ER-320. This distinction is important. Had NMFS defined the fishery "to include only those salmon in the federal waters in Cook Inlet," as the district court claimed, then NMFS's FMP would have been required to cover "any fishing for such stocks,"

1. "Fishery" is a defined term that establishes the scope of an FMP amendment.

The Magnuson-Stevens Act defines "fishery" as: "(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and (B) any fishing for such stocks." 16 U.S.C. § 1802(13). "Fishing" is all "catching, taking, or harvesting of fish," as well as "attempted catching, taking, or harvesting of fish," or "any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish." *See id.* § 1802(16). And a "stock of fish" is "a species, subspecies, geographical grouping, or other category of fish capable of management as a unit." *Id.* § 1802(42). Simply put, a "fishery" is a "stock[] of fish" *and* any "fishing" on that stock. *Id.* § 1802(13).

There is some judgment baked into identifying the stocks of fish that can be managed "as a unit," but once the "stocks" are identified, the Act plainly extends the scope of a "fishery" to "any fishing" (catching, taking, harvesting, or attempting to do so) on the stocks irrespective of where that fishing takes place. An FMP amendment for a "fishery" must, therefore, include conservation and management measures for "any fishing for such stocks" that comprise that fishery. *Id.*

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including fishing taking place in state waters. 16 U.S.C. § 1802(13)(B). By defining the "fishery" as only "all harvest" in the EEZ and the stocks as only the portions of each stock "harvested" in the EEZ, NMFS avoided this obligation.

§ 1802(13)(B).

Congress' definition of "fishery" is inherently logical in the context of the Act's purpose. The Act seeks "to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery." *Id.* § 1801(b)(4). NMFS guidelines explain that "[t]he geographic scope of the fishery, for planning purposes, should cover the *entire range of the stocks(s) of fish*, and not be overly constrained by political boundaries." 50 C.F.R. § 600.320(b) (emphasis added). And as particularly relevant here, an anadromous stock, like salmon, cannot be conserved and managed in accordance with national standards unless all harvest of that stock, regardless of where it occurs, is considered.

Indeed, special concerns for anadromous stocks are reflected throughout the text and history of the Act. As Senator Ted Stevens explained, "species, such as salmon, go beyond the existing limits of one jurisdiction into another, and, as a matter of fact, may go beyond into the third area of international jurisdiction. As a practical matter, to the extent possible, we will have uniform and consistent management." 122 Cong. Rec. 119 (1976) (statement of Sen. Stevens). The Act explains that "[t]he fish off the coasts of the United States . . . and the anadromous species," like salmon, "which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources." 16 U.S.C. § 1801(a)(1). Congress

envisioned a "national program for the conservation and management" of these "fishery resources" to ensure conservation and "to realize the full potential of the Nation's fishery resources." *Id.* § 1801(a)(6). That potential is realized through "the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery." *Id.* § 1801(b)(4).

This issue was so important that Congress even gave NMFS the exclusive *extra-territorial* jurisdiction over anadromous stocks "throughout the migratory range" of anadromous species, even beyond the EEZ into international waters. *Id.* § 1811(b). To that effect, Congress provided that when issuing a "fishery management plan" for a "fishery," that NMFS could even require permits for fishing "beyond" the EEZ, if necessary. *Id.* § 1853(b)(1).

Defining the "fishery" correctly is therefore the lynchpin to a proper FMP amendment. The "Required Provisions" of an FMP expressly apply to a "fishery," including, among many others, the obligation to provide "conservation and management measures" for "the fishery," *id*. § 1853(a)(1); the obligation to specify "the maximum sustainable yield and optimum yield from, the fishery," *id*. § 1853(a)(3); to evaluate the impacts to and the "safety of participants in the fishery," *id*. § 1853(a)(9)(C); specify criteria for when the "fishery" is overfished, *id*. § 1853(a)(10); and to set an annual catch limit ("ACL") to prevent overfishing "in

the fishery." *Id.* § 1853(a)(15).

2. The "stocks of fish" are the building blocks of a "fishery." In Amendment 16, NMFS adopted new and improper stock definitions for its "fishery."

To start, there can be no dispute that, biologically, Cook Inlet salmon stocks "are anadromous, beginning their lives in Alaskan freshwater, migrating to the ocean, and returning to freshwater to spawn." *UCIDA 1*, 837 F.3d at 1057. Years ago, NMFS determined that these biological stocks require "conservation and management," and that remains true today. *Id.* at 1062 ("The government concedes that Cook Inlet is a fishery under its authority that requires conservation and management."); *see* 5-ER-942 ("salmon are harvested in both State and Federal waters but originate from the same stocks").

For the first time ever in Amendment 16, NMFS defined the Cook Inlet salmon stocks as only that portion of each biological stock that is "harvested in the Cook Inlet EEZ Area." 2-ER-320; 3-ER-491. In briefing below, NMFS justified this new approach by claiming that Cook Inlet salmon in the EEZ are merely "biologically related to the stocks in the State-managed fishery." Federal Defendants' Response Brief, Case No. 3:24-cv-116-SLG, Dkt. 40 at 35 (Dec. 20, 2024). But there are no "biologically related" EEZ fish and state-waters fish. Cook Inlet salmon passing through the EEZ are the *same fish* that are born in and migrate back to state waters. But by cabining "stocks" to only those fish that are harvested in the EEZ, NMFS ensured that the Magnuson-Stevens Act's national standards

would *not* apply to those same fish before they are harvested or to fish from the same stock that swim through the EEZ and go unharvested. This defies the plain language and intent of the Magnuson-Stevens Act, particularly as applied to anadromous stocks, and is arbitrary, capricious, and contrary to law.

Moreover, prior to the final rule, there was no debate about what constitutes the stocks of salmon in Cook Inlet that require conservation and management. For example, "the 2021 Salmon FMP [] states that '[t]he Cook Inlet salmon fishery includes the stocks of salmon harvested by all sectors within State and federal waters of Cook Inlet.'" *UCIDA 2*, 2022 WL 2222879, at *8 (citation omitted). As recently as the proposed rule, NMFS acknowledged that "the jurisdictional issues in Cook Inlet are challenging because salmon are harvested in both State and Federal waters *but originate from the same stocks*[.]"[5] 5-ER-942 (emphasis added). It was only in the final rule that NMFS declared the existence of new Cook Inlet salmon "stocks"

[5] The proposed rule consistently refers to Cook Inlet salmon stocks as occurring in both federal and state waters. *See* 5-ER-943 ("Participants were universally concerned about the health of Cook Inlet salmon stocks."); 5-ER-945 ("harvest of all Cook Inlet stocks also occurs in State marine and fresh waters"); 5-ER-947 (describing how stocks mix together and move up Cook Inlet and "into State waters to reach their spawning streams"); 5-ER-948 (discussing fishing "for all Cook Inlet sockeye salmon and coho stocks"); 5-ER-953 ("Given the significant degree of interaction among salmon fisheries in Cook Inlet, management of salmon stocks as a unit or in close coordination throughout all Cook Inlet salmon fisheries is particularly important."). These are the stocks that require conservation and management.

consisting only of fish harvested in the EEZ. *Compare* 5-ER-968 (draft Environmental Assessment ("EA") Sept. 2023—paragraph under "*New draft FMP language for the Cook Inlet EEZ*") *with* 3-ER-491 (final EA Feb. 2024—bullets under "*New draft FMP language for Cook Inlet EEZ*"); *see* 2-ER-229; *see also* 2-ER-320–21.

NMFS changed its position on this critical issue without any acknowledgment or analysis. Such a change only "complies with the APA if the agency (1) displays 'awareness that it is changing position,' (2) shows that 'the new policy is permissible under the statute,' (3) 'believes' the new policy is better, and (4) provides 'good reasons' for the new policy, which, if the 'new policy rests upon factual findings that contradict those which underlay its prior policy,' must include 'a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy.'" *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009)). NMFS satisfied none of these requirements when it decided for the first time, in the final rule, that Cook Inlet salmon stocks that require conservation and management consist only of the portion of those stocks harvested in federal waters. This failure also warrants reversal.

In addition, NMFS's new stock definitions are contradicted by the stock definitions used in its own record, which are the biological stocks rather than only

the portion of those stocks harvested in the EEZ. *United States Sugar Corp. v. Env't Prot. Agency*, 830 F.3d 579, 650 (D.C. Cir. 2016) ("unexplained inconsistencies" render agency action arbitrary and capricious). The Final Environmental Assessment ("FEA") analyzed the full biological Cook Inlet salmon stocks and all harvest on those stocks. 3-ER-382 ("The EA provides the best available information on the status of the salmon stocks in Cook Inlet"); *id*. ("Assessment is done at the stock or stock complex level and takes into consideration total catch of salmon from all fisheries."); 3-ER-497 ("Because salmon are exploited in multiple fisheries, and because multiple salmon stocks may be exploited within the Federal waters of Cook Inlet, it is necessary to determine fishery specific contribution to the total exploitation rate to determine the actions necessary to end and prevent future overfishing."); 3-ER-554 ("However, even with conservative management, because harvests in the EEZ (and State waters) occur before spawning escapements are fully assessed, it is still possible that these harvests could result in the spawning escapement goals not being achieved for some stocks during some years[.]"). The FEA explains that a closure in the Cook Inlet EEZ salmon fishery may occur for a given fishing year if "[o]pening the Cook Inlet EEZ salmon fishery would likely result in overfishing for one or more stocks." 3-ER-498 (emphasis added). The underlined language plainly refers to the full stocks because it is logically impossible to determine that a stock is overfished if that stock is defined as fish *harvested* in the

EEZ (in which case 100% of the stock is harvested every year if EEZ fishing occurs). Even more absurdly, a closure of the Cook Inlet EEZ salmon fishery in a given year would mean that no fish were harvested in the EEZ, which, in turn, would mean that the stock (defined as only the fish *harvested* in the EEZ from a biological stock, *see* 2-ER-320–21) would never have existed for that year.

The FMP also analyzes Cook Inlet salmon stocks as a whole even though it claims that it is only looking at stocks composed of EEZ harvest. It explains that "NMFS and the Council will work with the State to coordinate management of State and Federal salmon fisheries harvesting *the same stocks* to the extent practicable to avoid overfishing and minimize disruption to all Cook Inlet salmon harvesters." 2-ER-318 (emphasis added). The FMP goes on to say that "[f]or salmon stocks harvested in the Cook Inlet EEZ Area, MSY is defined at the stock or stock complex level." 2-ER-319. "[T]his definition of MSY does not subdivide between State and EEZ waters in Cook Inlet." *Id*. There are even statements in the final rule that contradict NMFS's new definition.[6]

[6] *See, e.g.*, 2-ER-230 ("total harvest of Cook Inlet salmon stocks will continue to occur predominately within State waters"); 2-ER-232 (for "salmon stocks harvested in the Cook Inlet EEZ Area, MSY is defined at the stock or stock complex level"); 2-ER-239 ("Over time, NMFS will work to expand the scientific information available to manage Cook Inlet salmon stocks."); 2-ER-242 ("NMFS agrees that it is prudent for conservation of Cook Inlet salmon stocks to reduce the number of commercial fishery openings in the Cook Inlet EEZ Area."); 2-ER-254–55 ("NMFS

Finally, NMFS's new stock definitions also render key Magnuson-Stevens Act provisions irrelevant. If NMFS can define a "stock" as only fish *that have already been harvested* in a specific location (i.e., those Cook Inlet salmon harvested in the EEZ), then "any fishing for such stocks" has no meaning or purpose because there can be no fishing for fish that have already been caught. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (quoting *Duncan v. Walker*, 533 U.S. 167, 174, (2001)). Nor, under NMFS's definition, does the Act's definition of "migratory range" have any meaning as there is no "maximum area at a given time of the year within which fish of [the] anadromous species or stock . . . can be expected to be found." 16 U.S.C. § 1802(29). By NMFS's definition, fish only become part of the "stock" at the time they are netted and pulled out of the water and therefore have *no* migratory range.

Finally, NMFS's own guidelines condemn its jurisdictionally constrained stock definitions. 2-ER-229; *see also* 2-ER-293 (map of the EEZ area). Those guidelines explain that "[t]he geographic scope of the fishery, for planning purposes, should cover the entire range of the stocks(s) of fish, and not be overly constrained

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will manage salmon fishing in the Cook Inlet EEZ Area using the best available science to achieve OY and prevent overfishing on all Cook Inlet salmon stocks").

by political boundaries." 50 C.F.R. § 600.320(b). In other words, a *jurisdictional* grouping cannot substitute for a *geographic* grouping because those terms mean distinctly different things. *See Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1120–21 (9th Cir. 2006) (discussing the vital importance of preventing "jurisdictional differences" from adversely affecting conservation practices when "fish live in the waters of more than one jurisdiction" and explaining that geographic scope of FMP should include stocks throughout their range).

In sum, NMFS's last-minute change (from the proposed rule to the final rule) to the definitions of the Cook Inlet salmon stocks that need conservation and management is arbitrary and capricious, contrary to the record, and contrary to the Magnuson-Stevens Act.

3. The scope of an FMP Amendment for Cook Inlet must include "any fishing for such stocks," not just harvest in the EEZ.

The FMP amendment must address "any fishing" for the *full* Cook Inlet salmon stocks. NMFS abdicated this responsibility by redefining the Cook Inlet salmon stocks as only the portion of those stocks harvested in the EEZ, then it used those artificially narrow stock definitions to create a "fishery" that is limited to "*all harvest* of co-occurring salmon stocks in the Cook Inlet EEZ."[7] 2-ER-232 (emphasis

[7] If NMFS had appropriately defined the stocks biologically as they have always been defined, then NMFS's "fishery" would be required to include "any fishing for such stocks," which necessarily includes state-water fishing.

added). But NMFS did not even apply its stock or fishery definitions consistently. For example, NMFS defined MSY in the final rule at the "stock or stock complex level," explaining that "[b]ecause MSY must be defined in terms of the stocks or stock complexes, *this definition of MSY does not subdivide between State and EEZ waters in Cook Inlet*." 2-ER-232 (emphasis added). This makes sense and is consistent with the statute. Salmon that are born in the Kenai River do not become different "stocks" of fish when their anadromous lifecycle migration takes them from the river, to the ocean, and then back to the river again.

Despite NMFS's concession when setting MSY, it artificially limited the scope of Amendment 16's other conservation and management measures to "harvest[] by the commercial and recreation fishing sectors *within the Cook Inlet EEZ Area*." 2-ER-229 (emphasis added). In defense of this position, NMFS asserted that nothing supports "that a Federal FMP must cover fishing that occurs in State waters if a harvested stock occurs in both State and Federal waters." *Id.* But NMFS is flatly incorrect. Under the plain language of the Magnuson-Stevens Act, the "fishery" consists of "*any* fishing for such stocks." 16 U.S.C. § 1802(13)(B) (emphasis added). NMFS cannot invent new definitions for the "stocks" that require conservation and management and a new "fishery" definition to avoid its obligation to account for fishing occurring outside the EEZ.

Ultimately, this is just another "thinly veiled attempt" by NMFS to defer to

the state by defining away its responsibility for fishing in state waters. Congress was clear that salmon stocks are an important national resource, and that these fishery resources must be managed "in accordance with national standards." 16 U.S.C. § 1801(b)(4). "The Act makes plain that federal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns." *UCIDA 1*, 837 F.3d at 1063. By narrowly constraining the "stocks" and the "fishery" to only fish that have been harvested in federal waters, NMFS fails to include the statutorily required provisions in the FMP that Congress included to ensure that these important stocks of fish are managed in the national interest.

4. Nothing about the Act's obligation to produce an FMP for a "fishery" requires NMFS to exceed its jurisdictional authority and manage fishing on stocks in state waters.

NMFS argued below, and will likely argue on appeal, that considering Cook Inlet salmon stocks as a whole and giving the word "fishery" its plain statutory meaning to include "any fishing" for those stocks would infringe on the State of Alaska's rights to manage harvest in state waters. But what NMFS sees as lamentable, Congress said was essential: "federal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns." *UCIDA 1*, 837 F.3d at 1063.

Besides, NMFS's fears are overstated. Defining the "fishery" to include "all fishing" on Cook Inlet salmon stocks does not mean that NMFS must usurp state management. It means only that NMFS must set the standards necessary to ensure

conservation and management of the stocks, then work cooperatively with the state to find ways to achieve those standards. Nothing about NMFS's obligation to establish conservation and management measures for "any fishing" on stocks of fish covered by an FMP (including fishing occurring in state waters) requires NMFS to exceed its jurisdictional authority and automatically supersede state management in state waters. *See* 2-ER-229–30.

In fact, Congress expected that NMFS and the states would collaborate under FMPs that address federal and state waters, *see* H.R. Rep. No. 94-445, at 73 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 593, 641 ("The Committee is most hopeful that appropriate action will be taken by the States to cooperate with the Secretary so that Federal assertion of jurisdiction in such instances will not be necessary."), and that states have primary authority under the Magnuson-Stevens Act to manage fishing occurring within their territorial waters. 16 U.S.C. § 1856(a)(1) ("Except as provided in subsection (b), nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries."). This is the rule, but Congress also created an exception:

> **Exception [¶] (1)** If the Secretary finds, after notice and an opportunity for a hearing . . ., that--
>
> **(A)** the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the exclusive economic zone and beyond such zone; and
>
> **(B)** any State has taken any action, or omitted to take any

> action, the results of which will substantially and adversely affect the carrying out of such fishery management plan;
>
> the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

16 U.S.C. § 1856(b). This provision shows that Congress anticipated that some fishing in "a fishery, which is covered by [an FMP]" may occur outside federal waters and provided a process for addressing state actions that "substantially and adversely affect the carrying out of such [FMP]."

Indeed, numerous cases confirm the non-controversial fact that a state has authority to manage fishing in its territorial waters under normal circumstances, even in a manner contrary to an FMP—to a point. *Guindon v. Pritzker*, 31 F. Supp. 3d 169, 176 (D.D.C. 2014) ("It also bears noting that states manage their own waters, and do not always conform to federal rules . . . . State regulations thus may affect the federal management scheme."); *Fishing Rts. All., Inc. v. Pritzker*, 247 F. Supp. 3d 1268, 1273–74 (M.D. Fla. 2017) ("the federal season length reduction has been counteracted by non-conforming state regulations"); *Coastal Conservation Ass'n v. U.S. Dep't of Com.*, 846 F.3d 99, 104 (5th Cir. 2017) ("While the Gulf Council has shortened the fishing season in federal waters, the Gulf states have responded by loosening restrictions in state waters[.]"). This is precisely why NMFS itself created

guidelines requiring an FMP to describe the "[m]anagement activities and habitat programs of adjacent states and their effects on the FMP's objectives and management measures" and, "[w]here state action is necessary to implement measures within state waters to achieve FMP objectives," "identify what state action is necessary, discuss the consequences of state inaction or contrary action, and make appropriate recommendations." 50 C.F.R. § 600.320(e)(3).

The Pacific Fishery Management Council's Salmon FMP ("West Coast FMP") provides an apt example of how NMFS is supposed to address anadromous salmon fisheries under the Magnuson-Stevens Act.[8] There, NMFS defined the "fishery" to include anadromous stocks throughout their range. *See* West Coast FMP at Table 1-1, pp. 7–13 ("Stocks and Complexes in the Fishery"). The scope of that FMP covers "the coastwide aggregate of natural and hatchery salmon species that is contacted by salmon fisheries in the [EEZ] off the coasts of Washington, Oregon, and California." *Id.* at 5. NMFS established an OY for the whole "fishery,"

[8] NMFS points to this as an example of an FMP that "covers salmon stocks caught in the EEZ off the coasts of Washington, Oregon, and California." 2-ER-230. The West Coast FMP is available on the Pacific Fishery Management Council's website: Salmon fishery management plan and amendments, Fishery Management Plan (2024), https://www.pcouncil.org/fishery-management-plan-and-amendments-3/, or directly at this link: Pacific Coast Salmon Fishery Management Plan (Feb. 2024), https://www.pcouncil.org/documents/2022/12/pacific-coast-salmon-fmp.pdf/; *see also Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (explaining that it is appropriate to take judicial notice of information made publicly available by government entities on their websites).

defined as:

> The optimum yield to be achieved for species covered by this plan is the total salmon catch and mortality (expressed in numbers of fish) resulting from fisheries within the EEZ adjacent to the States of Washington, Oregon, and California, *and in the waters of those states (including internal waters), and Idaho*, that, to the greatest practical extent within pertinent legal constraints, fulfill the plan's conservation and harvest objectives.

See id. § 2.2, p. 13 (emphasis added). Moreover, the West Coast FMP establishes status determination criteria, conservation objectives, and other conservation and management measures for the stocks *throughout their range*, by appropriately accounting for "any fishing for such stocks." *See id.* at pp. 15–20 (status determination criteria that take into account all fishing on the stocks); Table 3-1, pp. 21–27 (conservation objectives for the "stocks in the fishery"); *id.* at pp. 28–41 (harvest controls for any fishing on such stocks). In sharp contrast, Amendment 16 cabins these definitions, criteria, and measures to EEZ harvest only. *See* 2-ER-320 (stocks defined as only EEZ harvest of each stock); 2-ER-322 (status determination criteria for stocks as defined); 2-ER-319–20 (OY for just EEZ harvest); 2-ER-238 ("OFL and ABC are specified for each stock or stock complex," defined at 2-ER-320 as only EEZ harvest).

Additionally, the West Coast FMP establishes harvest measures without distinction for EEZ and state territorial waters. *See* West Coast FMP at pp. 62–63. It explains that "[t]he Council assumes these ocean harvest controls also apply to

territorial seas or any other areas in state waters specifically designated in the annual regulations." *Id.* at 62. The West Coast FMP contemplates in-season adjustments to quotas for "[a]ny catch that take place in fisheries within territorial waters that are inconsistent with federal regulations in the EEZ." *See id.* at p. 66; *see also* 50 C.F.R. § 660.408(j) ("Quotas (by species, including fish caught 0–3 nm seaward of Washington, Oregon, and California)."). It also explains that "[c]losures will be coordinated with the states so that the effective time will be the same for EEZ and state waters." West Coast FMP at p. 79. In short, in the West Coast FMP, NMFS appropriately defined the "fishery," established conservation and management measures for the "fishery," and recognized that adjacent states maintain default authority over their territorial waters (subject to 16 U.S.C. § 1856(b)).

The Ninth Circuit approved of the West Coast FMP's treatment of stocks throughout their ranges in *Oregon Trollers* after it reiterated that the "'geographic scope of the fishery, for planning purposes, should cover the entire range of the stock[s] of fish, and not be overly constrained by political boundaries.'" 452 F.3d at 1121 (quoting 50 C.F.R. § 600.320(b)). "By defining the Klamath Management Zone to reach from Humbug Mountain, Oregon, to Horse Mountain, California, the [West Coast FMP] takes into account the migration pattern of the Klamath chinook from the Klamath River to the ocean, and their growth to maturity off the coasts of Oregon and California." *Id.* It further explained that "[s]almon fisheries throughout

this range, off the coasts of both states, are managed in the same manner to ensure that 35,000 natural spawning Klamath chinook escape." *Id.*

In sum, the Act requires an FMP for stocks occurring in both state and federal waters to set standards and metrics for "any fishing for such stocks." That is precisely what NMFS did for the salmon stocks covered by the West Coast FMP. NMFS's contrary jurisdictional justifications for its constrained stocks and fishery here are inapt and should be rejected.

C. NMFS failed to set OY for the "fishery," it did not base OY on MSY, and it deferred to the State of Alaska in violation of National Standard 1 and *UCIDA 1*.

The Magnuson-Stevens Act requires that "[a]ny [FMP] which is prepared by any Council, or by the Secretary, with respect to any fishery, shall . . . assess and specify the present and probable future condition of, and the maximum sustainable yield and ***optimum yield from, the fishery***, and include a summary of the information utilized in making such specification[.]" 16 U.S.C. § 1853(a)(3) (emphasis added). The Act directs that:

> The term "optimum", with respect to the yield from a fishery, means the amount of fish which—
>
> (A) 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;
>
> (B) is prescribed on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant social, economic, or ecological factor; and
>
> (C) in the case of an overfished fishery, provides for

> rebuilding to a level consistent with producing the maximum sustainable yield in such fishery.

Id. § 1802(33). Under National Standard 1, an FMP's "[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." *Id.* § 1851(a)(1) (emphasis added).

In Amendment 16, NMFS establishes "the OY range for the Cook Inlet EEZ salmon fishery . . . as the range between the average of the three lowest years of total estimated EEZ salmon harvest and the three highest years of total estimated EEZ salmon harvest from 1999 to 2021." 2-ER-320. This definition of OY violates the Magnuson-Stevens Act for at least three reasons.

First, the FMP must set and specify the OY from the "fishery," a defined term. 16 U.S.C. § 1853(a)(3). Amendment 16 only sets OY for NMFS's artificially defined "Cook Inlet EEZ salmon fishery," which only includes harvest in the EEZ area. 2-ER-320; *see also* 2-ER-232; 3-ER-503–504. The "fishery" cannot be limited to only *some* of the fishing that occurs on a biological "stock" that requires conservation and management, as NMFS would have it. The "fishery" consists of "any fishing" on the stock that requires conservation and management. Thus, there is no "EEZ fishery" and OY cannot be "better defined" for that fantasy fishery. *See* 2-ER-232. NMFS manipulated the definition of "fishery" to wriggle out of its obligation to set OY for *any* fishing on the biological Cook Inlet salmon stocks,

whether such fishing is in state or federal waters

NMFS tried to justify its narrow OY metric in the final rule by explaining that because "OY may be established at the stock, stock complex, or fishery level," and because "the fishery is properly defined as all harvest of co-occurring salmon stocks in the Cook Inlet EEZ," then "OY is *better defined* for the Cook Inlet EEZ fishery rather than at the stock or stock complex level." 2-ER-232 (emphasis added). But NMFS has it backwards. A "fishery" is not a subset of a "stock" or "stock complex." Instead, a stock or stock complex is the building block of a fishery, which is *broader*, not *narrower*.[9] This is plain from the definition of a "fishery," *see* 16 U.S.C. § 1802(13)(A) ("one or more stocks of fish which can be treated as a unit"), from NMFS's guidelines, *see* 50 C.F.R. § 600.305(c) (explaining how to group stocks together into a fishery); *id.* § 600.310(d)–(e)(3) (discussing the stocks or stock complexes that comprise a fishery and how OY may be set at the "stock, stock complex, or fishery level"); *id.* § 600.320(b) (explaining that the geographic scope of a fishery should cover the entire range of "stock[s] of fish"), and from the West Coast FMP, *see* West Coast FMP § 2.1, p. 13 (defining OY at the fishery level).

Second, NMFS's measure of OY is not based on MSY, as the Act requires. OY must be prescribed "on the basis of the maximum sustainable yield from the

[9] The district court erred when it failed to appreciate this important distinction. *See* 1-ER-25; *see also* 50 C.F.R. § 600.305(c)(5) (discussing grouping stocks together into complexes).

fishery." 16 U.S.C. § 1802(33). In Amendment 16, "MSY is specified for salmon stocks and stock complexes in Cook Inlet." 2-ER-223. OY must therefore be based on this same "fishery" that includes stocks and stock complexes in Cook Inlet. 16 U.S.C. § 1802(33) (OY must be "prescribed on the basis of the maximum sustainable yield from the fishery"). But for OY, NMFS arbitrarily cut up these salmon stocks and stock complexes based on a jurisdictional boundary. Since MSY was set at the stock or stock complex level, *see* 2-ER-319, NMFS could either define the yield that was optimum for each stock, or for each stock complex, or for the entire fishery. *See* 50 C.F.R. § 600.310(e)(3) ("OY may be established at the stock, stock complex, or fishery level."); *id.* § 600.310(e)(3)(ii) ("OY is a long-term average amount of desired yield from a stock, stock complex, or fishery."). Because NMFS chose to set OY for the "fishery," it needed to define the "long-term average amount of desired yield from" all the stocks in the fishery as a whole. *See* West Coast FMP § 2.1, p. 13 (example of defining OY at the fishery level).

Third, NMFS chose a measure of OY that ensures full-scale deferral to the State of Alaska—*again*. In Amendment 14, NMFS closed the Cook Inlet EEZ to commercial fishing so that the State could exclusively manage commercial salmon fishing in Cook Inlet's state waters. 3-ER-2112. The district court told NMFS it cannot just close the EEZ, so NMFS did the next closest thing. It created a "Cook Inlet EEZ salmon fishery" that is intentionally designed to maintain the status quo—

i.e., facilitate state management. In the final rule, NMFS explains that "[b]ecause EEZ fishing opportunity is expected to be similar to the status quo under this action, salmon harvests in the Cook Inlet EEZ Area and other areas of Cook Inlet are expected to remain at or near existing levels." 2-ER-250–51. Because NMFS's OY range includes the average of the three lowest years and the average of the three highest years of total estimated EEZ salmon harvest from 1999 to 2021, *see* 3-ER-503–04, NMFS has set an OY range that accounts for *nearly every possible harvest scenario that has occurred in the last two decades under state management*.[10] This is deferral.

NMFS has not established OY for the "fishery," and its chosen OY metric—which is not based on MSY—is entirely deferential to the State of Alaska. Amendment 16 violates *UCIDA 1* and the Magnuson-Stevens Act, which do not permit deferral to the state and which require OY for the "fishery," a defined term.

D. Amendment 16 also violates National Standards 2 and 3.

1. Amendment 16 is not based on the best available science.

National Standard 2 requires that "[c]onservation and management measures shall be based upon the best scientific information available." 16 U.S.C.

[10] In *UCIDA 2*, the Court explained that under state management, "the commercial harvest of salmon from the Cook Inlet has decreased significantly over the past two decades." 2022 WL 2222879 at *3. Yet, inexplicably, NMFS relied entirely on performance *from the past two decades of unlawful management* to define the level of yield that is "optimum" in the Cook Inlet EEZ. *See* 3-ER-503–04.

§ 1851(a)(2). Courts have explained that "[a]bsent some indication that superior or contrary data was available and that the agency ignored such information, a challenge to the agency's collection of and reliance on scientific information will fail." *Massachusetts v. Pritzker*, 10 F. Supp. 3d 208, 217 (D. Mass. 2014) (citation omitted).

Here, NMFS disregarded the scientific analysis conducted by its own scientific and statistical committee, the entity created by the Act to provide "scientific advice for fishery management decisions, including recommendations for acceptable biological catch, preventing overfishing, maximum sustainable yield, and achieving rebuilding targets, and reports on stock status and health …." 16 U.S.C. § 1852(g)(1)(B). The scientific and statistical committee developed a Stock Assessment and Fishery Evaluation report (the "SAFE report") to "summarize the best scientific information available concerning the past, present, and possible future condition of the salmon stocks and fisheries, along with ecosystem considerations/concerns." 3-ER-475. The SAFE report recommended that the FMP define the stocks for the Kenai River Late Run sockeye salmon stock and the Kasilof River sockeye salmon stock in a manner that tracked these stocks throughout their range. *See, e.g.*, 2-ER-153; 3-ER-374; SPEC00054. The SAFE report explains

> The definitions of salmon stocks considered in this SAFE *align with*, or are aggregations of, the stock definitions used by the State. . . . Assumptions of the analyses within this SAFE include: *that Federal stock definitions align*

> *with the State's definitions for Kenai River Late Run sockeye, Kasilof River sockeye, and Kenai River Late Run Large Chinook salmon* [and so on].

2-ER-133 (emphases added); 3-ER-359; SPEC00034.[11]

NMFS disregarded that recommendation and defined the Kenai Late Run sockeye salmon stock and the Kasilof sockeye salmon stock in the analysis as limited to those fish that have been harvested in the Cook Inlet EEZ Area. 3-ER-491. NMFS does not explain why it disregarded the recommendations of its own SAFE report, which it elsewhere said was the best available science. *Compare* 4-ER-758 *with* 3-ER-475. Contrary data was available to NMFS, and it ignored it. Accordingly, NMFS violated National Standard 2.

2. NMFS fails to manage stocks as a unit throughout their range, in violation of National Standard 3.

National Standard 3 requires "[t]o the extent practicable, an individual stock of fish [to] be managed as a unit throughout its range, and interrelated stocks of fish [to] be managed as a unit or in close coordination." 16 U.S.C. § 1851(a)(3). The Ninth Circuit has explained that "'[t]he purpose of [National Standard 3] is to induce a comprehensive approach to fishery management' that is not jeopardized when fish live in the waters of more than one jurisdiction." *Oregon Trollers*, 452 F.3d at 1120

[11] The district court noted that the version of the SAFE report cited by UCIDA was issued after the April 30, 2024 final rule, but the draft versions of the SAFE report (from January 2024 and March 2024) are both in the record and make identical recommendations regarding the stock definitions used. *See* 3-ER-352–75; COUN01894–1952; SPEC00026–111.

(quoting 50 C.F.R. § 600.320(b)). "To further this goal, '[t]he geographic scope of the fishery, for planning purposes, should cover the entire range of the stock[s] of fish, and not be overly constrained by political boundaries.'" *Id.* at 1121. It explained that "[w]hen a stock of fish is managed in the same manner throughout its geographical range, National Standard No. 3 is satisfied." *Id.*

For Amendment 16, NMFS explained that it "designed management measures that allow it to manage stocks of salmon as a unit throughout the portion of their range under NMFS's authority" because it is "not practicable for NMFS to manage salmon stocks into State waters where NMFS has no management jurisdiction." 2-ER-247 (emphasis added). In this way, NMFS artificially limited its conservation and management measures to only the EEZ. But it is certainly practicable for NMFS to set management measures for the "fishery" as the Act requires and then, separately, explain what "state action is necessary to implement measures within state waters to achieve FMP objectives." 50 C.F.R. § 600.320(e)(3). The mere fact that NMFS cannot ordinarily force the state to take action is not an excuse for failing to identify the state action and explaining the consequences of state inaction or contrary action. This information is critically important to facilitate the management of a multi-jurisdictional fishery as the architects of the Act envisioned. S. Rep. No. 94-416, at 30 (1975) ("[U]nity of management, or at least close cooperation, is vital to prevent jurisdictional differences from adversely affecting conservation

practices."). By stubbornly focusing on just the EEZ, NMFS has deprived the "fishery" of a "'national or regional perspective,'" *see Oregon Trollers*, 452 F.3d at 1121 (citation omitted), and effectively ensured that the stocks of salmon in Cook Inlet will not be managed as a unit throughout their range. *Nat. Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 749 (D.C. Cir. 2000) ("The [Magnuson-Stevens] Act was enacted to establish a federal-regional partnership to manage fishery resources."). Similarly, the fact that the state is blatantly obstructing Magnuson-Stevens Act management in Cook Inlet, *see* Third Status Report to the Development of a Salmon FMP Amendment to Address Cook Inlet, *UCIDA 2*, No. 3:21-CV-00255-SLG, Dkt. 98-1 at 2 (D. Alaska Apr. 13, 2023) ("[T]he State informed NMFS and the Council during the Council meeting that it would not accept a delegation of management authority for the Cook Inlet EEZ salmon fishery *under the conditions that would be necessary to comply with the [Act]*." (emphasis added)), is *more reason*—not less—why NMFS must articulate the consequences of state inaction or contrary action in its FMP.

E. Vacatur of Amendment 16 is the appropriate remedy.

Vacatur is the required, default remedy under the APA. *Se. Alaska Conservation Council v. U.S. Forest Serv.*, 443 F. Supp. 3d 995, 1022 (D. Alaska 2020). "The Ninth Circuit has explained that a court should 'order remand without vacatur only in "limited circumstances,"' and 'leave an invalid rule in place only

"when equity demands."'" *Id.* (quoting *Pollinator Stewardship Council v. U.S. E.P.A.*, 806 F.3d 520, 532 (9th Cir. 2015)). In light of the errors identified above, UCIDA requests that the Court immediately vacate Amendment 16 and its implementing regulations. Vacatur is the presumptive remedy for agency actions that are arbitrary, capricious, or contrary to law. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971) *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Vacatur of the regulations implementing Amendment 16 will reinstate the prior existing regulations, which while not ideal, are preferrable to the status quo. *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force."). The limited circumstances that justify remand without vacatur are not implicated here. *See Pollinator Stewardship Council*, 806 F.3d at 532. This is not a situation where equity demands leaving Amendment 16 in place during remand. *Compare Cal. Cmtys. Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 994 (9th Cir. 2012) (vacatur would lead to air pollution); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (vacatur would risk potential extinction of a species). And vacatur is especially appropriate here where the very core of NMFS's FMP is erroneous.

VIII. CONCLUSION

The determination of the "fishery" is the lynchpin to a proper FMP. *See Gulf*

Fishermens Ass'n v. Nat'l Marine Fisheries Serv., 968 F.3d 454, 457 (5th Cir. 2020), *as revised* (Aug. 4, 2020) ("The concept of a 'fishery' is central to the Act[.]"). Amendment 16 adopts flawed "stock" definitions and a legally erroneous definition of "fishery." *Oregon v. Ashcroft*, 368 F.3d 1118, 1129 (9th Cir. 2004) ("We 'must, of course, set aside [agency] decisions which rest on an erroneous legal foundation.'" (alteration in original; quoting *NLRB v. Brown*, 380 U.S. 278, 291–92 (1965)), *aff'd sub nom. Gonzales v. Oregon*, 546 U.S. 243 (2006)). For the reasons explained above, UCIDA respectfully requests that this Court vacate Amendment 16 and its implementing regulations and remand with instructions to NMFS to prepare a lawful FMP amendment for Cook Inlet and to the district court to consider such further relief as is just and proper, including a deadline, interim management measures, and collaboration, as appropriate.

IX. STATEMENT OF RELATED CASES

Appellants are not aware of any related cases pending before this Court.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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