



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
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**Litigation Updates for the
April 2025 Meeting of the North Pacific Fishery Management Council**

Oceana v. NMFS et al.

Parties:

Plaintiffs: Oceana

Federal Defendants: National Marine Fisheries Service (NMFS); United States Department of Commerce; Secretary of Commerce, Howard W. Lutnick; and Deputy Assistant Administrator for Regulatory Programs, NMFS, Samuel D. Rauch, III.

Case Activity:

On August 16, 2024, Oceana filed suit against the National Marine Fisheries Service (NMFS), the Department of Commerce, the Secretary of Commerce, and Samuel D. Rauch, III (collectively, Federal Defendants). Plaintiff challenges NMFS's approval of the revisions to essential fish habitat (EFH) for five fishery management plans (FMPs) in the North Pacific. Specifically, Plaintiff alleges NMFS disregarded obligations under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the National Environmental Policy Act (NEPA) by failing to consider more protective alternatives and underrepresenting adverse impacts from fisheries on habitat. Plaintiff also asserts NMFS's environmental assessment violated NEPA, arguing NMFS should have instead prepared a supplemental environmental impact statement. Federal Defendants filed the Administrative Record with the District Court of Alaska on November 15, 2024. Oceana also filed an amended Complaint, to which Federal Defendants filed an amended Answer.

Status/Next Steps:

Plaintiff filed an opening brief on February 26, 2025. Federal Defendant's brief is due June 20, 2025.

Attached: Plaintiff's Opening Brief and Motion for Summary Judgment.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

OCEANA, INC.,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Case No. 3:24-cv-00180-SLG
)	
NATIONAL MARINE FISHERIES SERVICE <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	
)	

PLAINTIFF’S PRINCIPAL BRIEF UNDER LOCAL RULE 16.3(c)(1)

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GLOSSARY

Core area or CEA	Core Essential Area
CIE	Center for Independent Experts
EFH	Essential fish habitat
FMP	Fishery management plan
MSA	Magnuson-Stevens Fishery Conservation and Management Act
MSST	Minimum stock size threshold
SSC	Science and Statistical Committee

INTRODUCTION

This case challenges the National Marine Fisheries Service’s (“Service”) failure to protect vulnerable seafloor habitats essential to the health of Alaska fisheries and communities from the devastating effects of trawl fishing. Recognizing that fish, crabs, and other species cannot survive—much less support a sustainable fishery—without places to breed, feed, and grow, the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”) requires the Service to take practicable action to minimize adverse fishing effects on essential fish habitat (“EFH”) and further identify measures to conserve and enhance this habitat. In the action challenged here, the Service failed to analyze, as the law requires, how trawl fishing affects all EFH and refused to consider any measures to minimize fishing impacts or otherwise conserve or enhance this habitat.

The North Pacific marine ecosystem is among the most productive on earth, supporting numerous fish, crustaceans, marine mammals, seabirds, corals, sponges, and other organisms. At the foundation of this ecosystem is a fragile seafloor composed of a variety of benthic organisms, which create complex habitat structures used by crab and fish species of all ages, and their prey. Although the Service has designated large areas of this habitat as EFH, it has failed to uphold its fundamental duties to protect and enhance those areas in light of harm caused by trawl fisheries, which often bulldoze the seafloor.

Instead of evaluating adverse effects of fishing on all designated EFH, as the MSA requires, the Service assessed only some impacts to a subset of designated EFH. It

further violated the MSA and the Administrative Procedure Act (“APA”) by arbitrarily ignoring available evidence about shallow-water benthic habitat features and habitat critical to fish of all life stages. The Service also violated the National Environmental Policy Act (“NEPA”) by refusing to consider any alternatives that would meet its obligation to minimize adverse fishing effects and conserve and enhance EFH. As a result of these violations, the majority of the western and central Gulf of Alaska remains the last and largest area on the west coast and in Alaska waters without necessary protections in place to limit the damaging effects of trawling.

STATUTORY AND REGULATORY FRAMEWORK

I. The MSA

The MSA provides the legal and procedural framework governing federal fisheries. It established eight regional fishery management councils, and requires them to prepare fishery management plans (“FMP”) and provide recommendations for conservation and management of fisheries. 16 U.S.C. § 1852(a)(1), (h). The North Pacific Fishery Management Council (“Council”) is the regional council for federal fisheries in Alaska waters. *Id.* § 1852(a)(1)(G). While the Council provides advisory recommendations, the Secretary of Commerce (“Secretary”) is responsible for ensuring every FMP and FMP amendment is consistent with all applicable law.

Id. §§ 1854(a)(1)(A), 1852(h)(1); *see Flaherty v. Bryson*, 850 F.Supp.2d 38, 54 (D.D.C. 2012) (MSA gives the Service final responsibility for ensuring any FMP is consistent with “the overall objectives” of the act) (citing *N.C. Fisheries Ass’n, Inc. v. Gutierrez*,

518 F.Supp.2d 62, 71-72 (D.D.C. 2007)). The Secretary's approval of an FMP or FMP amendment is subject to judicial review under the APA. 16 U.S.C. § 1855(d), (f); *Am. Oceans Campaign v. Daley*, 183 F.Supp.2d 1, 11 (D.D.C. 2000) (Secretary's approval of EFH amendments constitute "rules" under the APA and is a reviewable action); *Gutierrez*, 550 F.3d at 17 (Service's actions to implement FMPs are subject to judicial review).

The designation, conservation, and enhancement of EFH for marine species is a fundamental requirement of the MSA. When the original legislation was passed in 1976, the statute's conservation requirements focused mainly on overfishing as the driver of declining fish populations. *See* Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified at 16 U.S.C. §§ 1801(a)(2)-(6) (1976)). By 1996, Congress recognized that the degradation of fish habitat by fishing and other factors was a crucial concern and amended the MSA to establish separate, strong requirements to protect that habitat. *See* Sustainable Fisheries Act, Pub. L. No. 104-297, § 101, 110 Stat. 3359, 3360-61 (1996); *see also Oceana, Inc. v. Evans*, 384 F.Supp.2d 203, 237 (D.D.C. 2005), *order clarified*, 389 F.Supp.2d 4 (D.D.C. 2005) (the Sustainable Fisheries Act "amended the MSA to make protection of EFH a priority"). Congress found that "[o]ne of the greatest long-term threats to the viability of commercial and recreational fisheries is the continuing loss of marine, estuarine, and other aquatic habitats" and directed that "[h]abitat considerations should receive increased attention for the conservation and management of fishery resources of the United States." 16 U.S.C.

§ 1801(a)(9) (1996). As one of the bill sponsors summarized: “if you destroy the habitat, you destroy the nurseries and you destroy the ecosystem on which those nurseries are dependent, which then diminishes the ability to have a sustainable fishery.” 142 Cong. Rec. S10794-02 (daily ed. Sept. 18, 1996) (statement of Sen. Kerry).

Notably, both the House and the Senate recognized the central importance of conserving fish habitat in their respective bills to amend the MSA. *See* H.R. 39, 104th Cong. (1995) & S. 39, 104th Cong. (1996) (enacted); *see also* 142 Cong. Rec. H11418-02 (daily ed. Sept. 27, 1996) (statement of Rep. Gilchrest) (“If we did not include [the habitat provisions] into the legislation, even if we had all the best regulations concerning the coastal fisheries possible, we could still lose, without protecting the habitat where the fish spawn.”).

When the final EFH amendments were passed, Congress made clear that the Service was obligated to describe and identify EFH, and take actions to encourage the conservation and enhancement of EFH, including practicable measures to minimize adverse fishing effects. 16 U.S.C. § 1853(a)(7). The MSA defines EFH as “those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity.” *Id.* § 1802(10). The term “fish” expansively means “finfish, mollusks, crustaceans, and all other forms of marine animal and plant life other than marine mammals and birds.” *Id.* § 1802(12). Ultimately, the habitat provisions in the MSA were deemed necessary “to facilitate long-term protection of [EFHs].” *Id.* § 1801(a)(6).

The MSA also recognizes that excessive fishing pressure, or overfishing, threatens

the sustainability of fisheries and thus separately requires the Service to prevent overfishing. *Id.* §§ 1801(a)(2), 1851(a)(1). It defines “overfishing” as “a rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis.” *Id.* § 1802(34). One of the criteria used to assess whether a fish population is overfished is the minimum stock size threshold (“MSST”), defined as “the level of biomass below which the capacity of the stock or stock complex to produce [maximum sustainable yield] on a continuing basis has been jeopardized.” 50 C.F.R. § 600.310(e)(2)(i)(F).

II. EFH regulations

The Service’s EFH regulations require that each FMP contain ten components related to EFH, including identifying and describing EFH, identifying fishing and other activities that adversely affect EFH, and providing conservation and enhancement recommendations, and all EFH components must be reviewed every five years. 50 C.F.R. § 600.815; NMFS00713. When undertaking the five-year EFH review, the Council and Service should evaluate published scientific literature, unpublished scientific reports, solicit information from interested parties, and search for previously unavailable or inaccessible data. 50 C.F.R. § 600.815(a)(10).

The MSA does not define “adverse effects.” In its regulations, the Service defines “adverse effect” as:

any impact that reduces quality and/or quantity of EFH.
Adverse effects may include direct or indirect physical, chemical, or biological alterations of the waters or substrate

and loss of, or injury to, benthic organisms, prey species and their habitat, and other ecosystem components, if such modifications *reduce the quality and/or quantity of EFH*....

Id. § 600.810(a) (emphases added).

Consistent with this broad definition, the regulations also direct the Service to “prevent, mitigate, or minimize any adverse effects from fishing, to the extent practicable, if there is evidence that a fishing activity adversely affects EFH in a manner that is more than minimal and not temporary in nature....” *Id.* § 600.815(a)(2)(ii).

III. NEPA

NEPA requires agencies to study, develop, and describe a “reasonable range” of alternatives. 42 U.S.C. § 4332(2)(C)(iii), (F); *Env’t Def. Ctr. v. BOEM*, 36 F.4th 850, 876-77 (9th Cir. 2022); *see also Kleppe v. Sierra Club*, 427 U.S. 390, 401-02 (1976) (explaining 42 U.S.C. § 4332 requires consideration of alternatives). Even in the context of an environmental assessment (“EA”), the agency must provide “full and meaningful consideration to all reasonable alternatives.” *BOEM*, 36 F.4th at 876 (citing *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013)); *see also* 42 U.S.C. § 4332(2)(H) (requiring analysis of alternatives for “any proposal which involves unresolved conflicts concerning alternative uses of available resources”); *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1225, 1228-29 (9th Cir. 1988) (interpreting 42 U.S.C. § 4332 to require consideration of alternatives even if no environmental impact statement (“EIS”) is required). Reasonable alternatives to the proposed action include those that will “avoid or minimize” adverse effects of the proposed actions to the human

environment. 40 C.F.R. § 1500.2(e).¹ The “touchstone” of a NEPA alternatives assessment is whether the analysis fostered informed decision-making and public participation. *California v. Block*, 690 F.2d 753, 766-67 (9th Cir. 1982). That is, agencies must explain the environmental impact of a proposed action and its alternatives to enable comparison by the decisionmaker and the public. *Mont. Wilderness Ass’n v. Connell*, 725 F.3d 988, 1004 (9th Cir. 2013). “‘The existence of a viable but unexamined alternative renders an [EA] inadequate.’” *Id.* (citation omitted); *W. Watersheds Project*, 719 F.3d at 1049-50.

STATEMENT OF FACTS

I. Benthic habitat features in Alaska waters and the threats to them

The seafloor habitats at issue in this case provide critical areas for breeding, spawning, feeding, and growth for numerous fish and crustaceans, and endure significant, lasting harm from trawl fishing. The seafloor, or benthic zone, comprises many structure-forming invertebrates such as sponges, corals, sea pens, and sea whips. NMFS04058; COUN06237-52. Generally, sponges and corals attach themselves to rocks and other hard substrata, while sea pens and sea whips anchor into soft sediments like

¹ Although the Council on Environmental Quality (“CEQ”) has proposed to repeal its NEPA regulations, the Service’s decision is governed by the regulations that were in effect when the decision was made, which includes the regulations cited in this brief. *See* 90 Fed. Reg. 10,610, 10,611, 10,613-14 (Feb. 25, 2025) (rescinding CEQ’s NEPA regulations and directing agencies to rely on the version of the NEPA regulations in effect at the time of the decision); *BOEM*, 36 F.4th at 879 & n.5. In any event, the requirement to consider alternatives, whether in an EA or an EIS, comes from the explicit language of the statute. *See* 42 U.S.C. § 4332(2)(C), (F), (H).

sand or mud. NMFS04058. One hundred and forty-one different coral species have been documented in Alaska waters. SUPP00382. These habitat-forming animals live at a wide range of ocean depths. SUPP00361-66. For example, pennatulaceans (sea pens and sea whips) were found as shallow as three meters, SUPP00386, and sea fans, red tree corals, soft corals, and cup corals were found as shallow as ten meters. NMFS01070-71; *see also* SUPP00388 tbl.2.2 (six different coral groups in Alaska waters found at depths as shallow as 24, 11, 10, 6, and 3 meters).

Most corals grow very slowly and may require over 100 years to reach maximum size. NMFS01070-71; SUPP00384 (medium-sized coral aged at 112 years in the Gulf of Alaska). The Service has acknowledged that corals in Alaska waters, such as gorgonian corals, are “very long lived, easily damaged by fishing gear, and slow to recover from damage.” NMFS00951; *see also* NMFS08558 (slow growth rates of coral make them especially vulnerable to trawling).

A. Role of benthic habitat features

Corals, sponges, and other structure-forming invertebrates provide immense ecological value and vital support to crustaceans and numerous fish species. Fish and crabs at various life stages rely on benthic habitat for protection from predators and for feeding and spawning. NMFS08602; NMFS01070-74 (hard corals especially important habitat based on large size and long life spans); SUPP00394 (juvenile fish and crabs use coral habitat as refuge and for feeding; rockfish use coral habitat as spawning and breeding sites); NMFS01073 (sea whips provide food and shelter to Pacific ocean perch);

NMFS01074 (sea onions and other invertebrates provide habitat to small juvenile red king crab). Sea whips, corals, sea anemones, and sponges provide habitat to organisms and fishes that live near the seafloor, including rockfishes. NMFS08238; SUPP00394 (seven Alaskan species of rockfish highly associated with corals, including up to 97 percent of juvenile rockfish). The Service has acknowledged that areas that were unfished or lightly fished “provide important nursery habitat for crab and flatfish species, as well as for major prey species such as herring and capelin.” NMFS00994.

The presence of habitat-forming invertebrates also helps predict where some fish species are distributed. For example, in the Gulf of Alaska, juvenile Pacific ocean perch are strongly associated with rocky habitats and corals and sponges, at 85 to 245 meters deep. NMFS08475. Adult Atka mackerel are associated with hard corals throughout the Gulf of Alaska at shallow depths less than 300 meters. COUN21280-83 (habitat associations tables); *see also id.* (various species of rockfishes associated with soft and hard corals and sponges at depths less than 300 meters; adult and sub-adult Pacific cod associated with anemones, soft and hard corals, sea onions, and tunicates at depths less than 300 meters). Juvenile blue king crabs have been observed around the Pribilof Islands at depths of 10 to 60 meters among sponge, shell hash, hydroids, and other benthic habitat features. COUN20506.

B. Commercial fishing impacts on benthic habitat features

Commercial fishing heavily influences the structure and function of North Pacific ecosystems. COUN20731. Of all federal fisheries, the groundfish trawl fishery causes

the most harm to seafloor habitat. NMFS00953. Fishing operations “change the abundance or availability of certain habitat features (*e.g.*, prey availability or the presence of living or non-living habitat structure) used by managed fish species to accomplish spawning, breeding, feeding, and growth to maturity.” COUN14254. The bottom, or non-pelagic, trawl fisheries drag gear along the seafloor, scraping up and damaging fragile corals, sponges, and other epifauna. *See, e.g.*, EML06888. Trawl gear damages marine flora and fauna by crushing, burying, exposing, or completely removing it, which degrades the structure and diversity of the seafloor. SUPP00468; NMFS08602-03. In addition to destroying and pulling up epifauna, trawl gear smooths the seafloor, flattening the landscape. SUPP00468. Fishing gear can be two to three times as wide as a football field. *See* NMFS05653-54 (Gulf of Alaska trawl gear 193 meters wide); NMFS05656 (Bering Sea trawl gear 259 meters wide). Gear research studies have shown that the first pass of a bottom trawl has the most harmful impact on benthic habitat. NMFS00994; COUN13994 (about 27 percent of original hard coral volume was removed by a single trawl tow).

Bottom trawls are not the only fishing gear that damages the seafloor. Although pelagic trawls are often described as gear that is fished “midwater,” SUPP00398, 40 to 100 percent of the width of pelagic trawl gear can be in contact with the seafloor for the full duration of a trawl tow, NMFS11145, 11157; NMFS05653 (contact adjustments for

pelagic trawls or “PTR” in the Gulf of Alaska ranging up to 100 percent)²; SUPP00538 (“during some midwater trawling, the footrope will make contact with the seabed”); NMFS00944 n.2 (“pelagic trawls are sometimes fished on the bottom”). Pelagic pollock trawls in the Bering Sea “contact the seafloor to varying degrees, largely depending on the distribution of pollock relative to the seafloor.” COUN19028. Further, pelagic pollock trawls have a strong incentive to fish near or on the bottom, and gear is more likely to contact the seafloor when fishing in shallow waters. NMFS01174; COUN19028.

The Service has long acknowledged that fishing causes impacts to EFH. In 2005, the Service found fishing caused “persistent disturbance to certain habitats.” NMFS00850. Every review since that time has “not indicated findings different from those [analyzed in 2005] with respect to fishing effects on habitat.” NMFS00648.

C. Current EFH in the Gulf of Alaska

Nearly the entire Gulf of Alaska has been designated as EFH, comprising essential habitat for 46 species or species complexes managed under the Gulf of Alaska FMP. NMFS00655; COUN21378-477 (EFH maps); *see also* NMFS00659 (“almost all waters are identified as EFH for at least one species”). Despite its importance, however, only about nine percent of the central and western Gulf of Alaska is protected year-round from

² Contact adjustment “represents the proportion of the fished area in which the gear interacted with the seabed,” and proportions are translated to percentages. NMFS05559. For example, 1.0 means “assumed bottom contact” and .27 means 27 percent of the nominal area swept contacted seafloor. *Id.*

bottom trawls. COUN05160; NMFS00796 (map of habitat restrictions off Alaska); NMFS00845-46 (describing bottom trawl closures but not for pelagic trawls that contact the seafloor); EML01161 (map showing most of the western and central Gulf of Alaska open to bottom trawling).

II. EFH five-year reviews

A. 2005 EFH review

The Council's first attempt to carry out the MSA's EFH mandates was not successful. COUN00016. As a result of a legal challenge, the Service and the Council were required to complete an EA or EIS to properly examine "how fishing practices and gear may damage corals, disrupt fish habitat, and destroy benthic life that helps support healthy fish populations." *See Am. Oceans Campaign*, 183 F.Supp.2d at 20-21; COUN00016.

In its resulting 2005 EFH EIS, the Service analyzed fishing effects on EFH through a model known as the long-term effect index model. NMFS01228. Instead of directly evaluating fishing impacts on habitat, the Service's "primary consideration" was to evaluate whether a fish stock was able to maintain itself above its MSST. NMFS01230.

The Service contracted with the Center for Independent Experts ("CIE") to assess whether the model and analysis in the draft EIS provided a reasonable approach for identifying whether any Council-managed fishing activities adversely affect EFH. NMFS08548; SUPP00578. With respect to the use of MSST, most reviewers found the

application of MSST, a population proxy, NMFS01230, was wholly inappropriate in analyzing habitat impacts. Reviewers concluded that the use of MSST was “not justified scientifically”, SUPP00583, “completely inappropriate”, SUPP00640, and “problematic to apply...to EFH” because “there could be no sign of a decline in biomass until a precipitous collapse occurs.” SUPP00689. Reviewers also opined the use of MSST does not account for sensitive habitat features such as corals and sponges which may require “centuries to recover.” SUPP00633; *see also* EML04044 (corals and sponges have long recovery times and recovery times of sponges likely underestimate recovery rates). Additionally, the use of MSST resulted in conclusions that were “surprising in their outcome uniformity,” even when MSST trends looked “worrisome.” SUPP00689-90. Though the Service agreed MSST had its limitations, it nevertheless decided to use an approach where MSST was the “primary consideration” when it evaluated the effects of each alternative in the EIS. *See* NMFS01230, 01628, 01943-44.

The 2005 EFH EIS “concluded that fisheries do have long term effects on” EFH, but with minimal impacts not detrimental to fish populations or their habitats. NMFS08561. However, the Council acknowledged that “scientific uncertainty remains regarding the consequences of habitat alteration for the sustained productivity of managed species.” *Id.* It cautioned that “[e]ven though the available information does not identify adverse effects of fishing that are more than minimal and temporary in nature, that finding does not necessarily mean that no such effects exist.” NMFS00851. In light of the uncertainty, the Council adopted closure areas in the Aleutian Islands

region “to conserve EFH[,]” “minimize the effects of fishing on EFH[,]” and “address concerns about the impacts of bottom trawling on benthic habitat[,]” particularly corals. NMFS08510. This resulted in a prohibition on bottom trawling throughout most of the region around the Aleutian Islands. *Id.*; COUN14257; EML01161-62 (map showing protected areas around Aleutian Islands). By contrast, for the Gulf of Alaska, the Service prohibited bottom trawling in just ten small areas and required vessel monitoring systems for bottom trawl fishing vessels. NMFS00845-46; EML01161-62 (map showing small protected areas in Gulf of Alaska). Notably, for the Bering Sea in 2008, the Service largely froze the bottom trawling footprint. 73 Fed. Reg. 43,362, 43,362 (July 25, 2008) (closing areas not previously fished); *id.* at 43,368 (rejecting “no action” alternative as allowing trawling to expand into new areas).

B. 2010 and 2017 EFH reviews

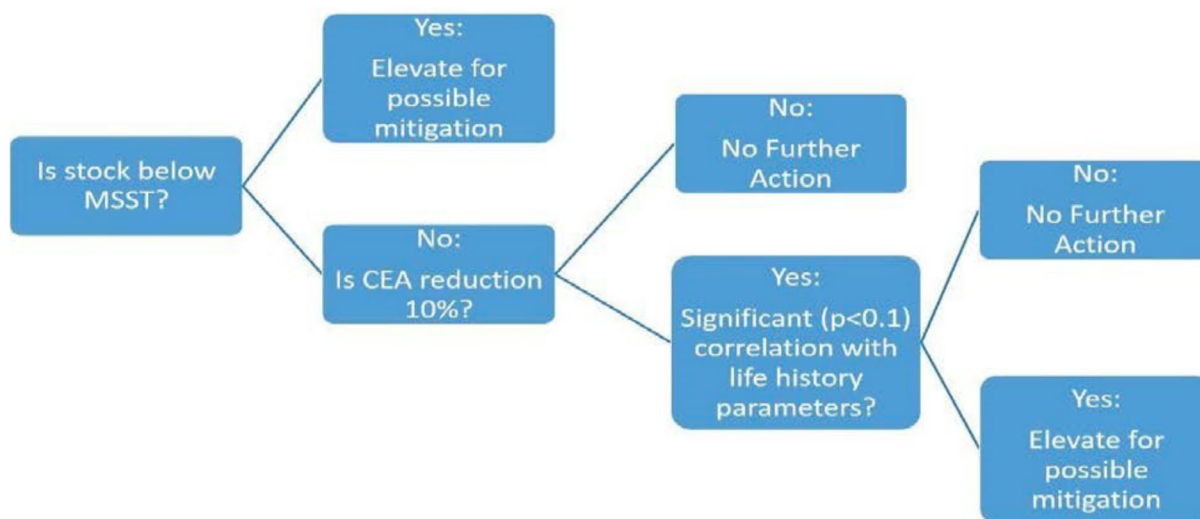
Subsequent EFH reviews were initiated in 2010 and 2017. NMFS00651, 00659-60; FR00002. The 2010 EFH review applied the same model and approach as the 2005 EFH EIS. COUN14257-58. The 2017 EFH review applied a new fishing effects model. NMFS05553. The Service claimed the new model addressed most comments from the CIE review, “with the exception of issues related to long-lived species such as corals, and localized impacts.” NMFS08549. The model still relied on MSST, but the Service added an assessment of habitat disturbances to a subset of designated EFH, or the “Core Essential Area” (“core area” or “CEA”), to determine whether impacts in this narrower area exceeded ten percent. COUN19219-20. Both five-year reviews “concluded that

fisheries do have long term effects on habitat[,]” but claimed those impacts are “minimal and not detrimental to fish populations or their habitats.” COUN14320.

C. 2023 review

1. Fishing effects assessment process

The Service employs a three-tiered approach to evaluate whether fishing causes adverse effects on EFH. NMFS05664-65, 05540; NMFS00686.

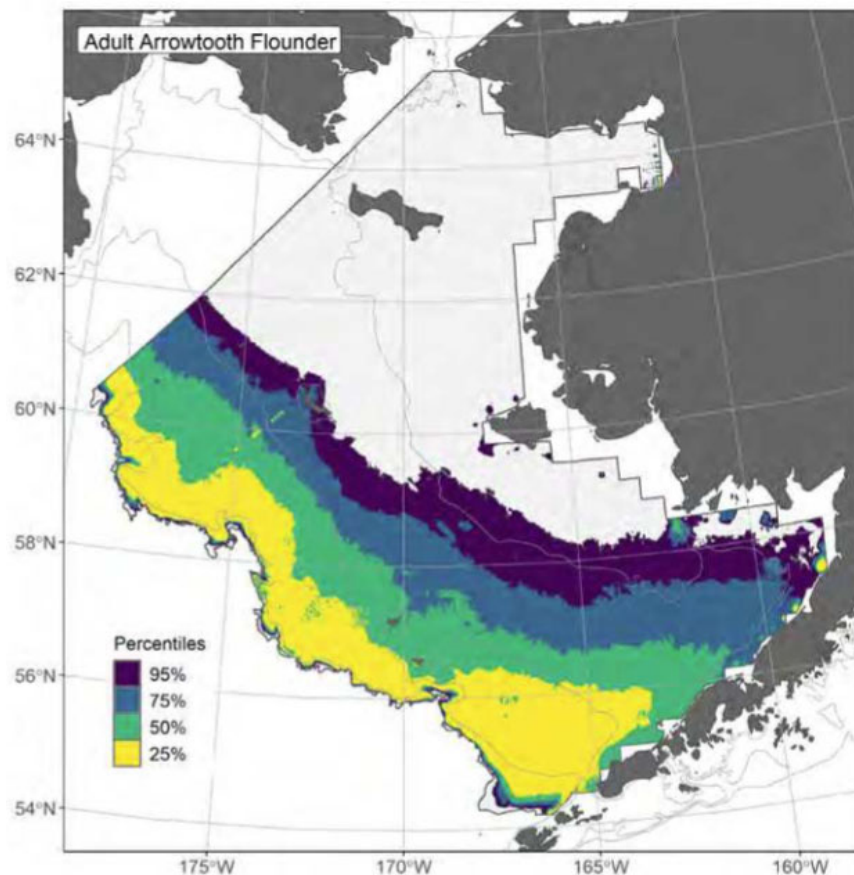


COUN14267.

The Service delegates the fishing effects assessment to stock assessment authors (“stock authors”), who are tasked with assessing habitat impacts caused by fishing for each federally managed fish stock. COUN14279. Stock authors first consider whether the stock they are evaluating is above or below the MSST. NMFS05665. If the population is below the MSST, stock authors look at other population indices to determine whether to recommend habitat protections. NMFS05641.

Stock authors then review the results of the fishing effects model for their

respective stocks. NMFS00687. The model estimates benthic habitat disturbance from commercial fishing activities on only a subset of the EFH designated for that species. NMFS05664. EFH is defined as the area inhabited by 95 percent of a species' population, but the fishing effects model is run using the upper 50th percentile of the core area. *Id.* For example, in the map below, all four colors depict the EFH for 95 percent of adult arrowtooth flounders, however, habitat impacts were only assessed in the green and yellow core area; impacts to overall EFH in the blue and purple areas were not considered.



COUN01746.

The fishing effects model tracks habitat disturbances on the core area “by calculating the impacts to habitat from fishing activities each month and simultaneously accounting for habitat recovery from past impacts.” COUN14264. Inputs into the model include “fishing intensity, habitat categorization, susceptibility and recovery of features, and the treatment of structure-forming invertebrates [like] corals and sponges.” COUN14261. The “primary output” of the fishing effects model is an estimated percentage of habitat disturbed for a specific time series. NMFS05554. Though stock authors have discretion to consider other information, if habitat disturbance within the core area does not exceed ten percent, no further action is required. NMFS05669.

Here, stock authors assessed fishing impacts to the core area of 103 species. NMFS05570. Of those 103, 87 did not exceed the ten percent habitat disturbance threshold, and 101 were above their MSST. NMFS05571, 05574-79, 05585. Thus, the significant majority of the species assessed required no additional analysis once they passed the tests measuring MSST and the ten percent impact threshold, and none were elevated for possible mitigation. Even of the 16 stocks that exceeded the ten percent impact threshold and the two that fell below their MSST, no stock author elevated their stock for mitigation. NMFS05571.

2. Oceana’s input

Beginning in 2021, Oceana presented the Council with evidence that fragile habitat features exist in shallow waters less than 300 meters and that impacts to these features were not being disclosed. EML00978-79; EML03913-15; SUPP00217-18;

SUPP00307-09; SUPP00207-09; SUPP00057-66; SUPP00166-69; NMFS11139-43.

However, the Service suggested that further minimization of fishing effects was not necessary. FR00002 (stating that based on its core EFH methodology, stock authors did not recommend further mitigation); *id.* (stating that its fishing effects model sufficiently accounted for pelagic trawl gear and effects were “minimal or temporary”). Instead, the Service maintained the same narrow habitat classification it established in 2016 for long-lived species that reside at depths greater than 300 meters and capped recovery at 50 years. NMFS07509-10; NMFS05561, 05662 tbl.A3.4.

Beginning in 2022, Oceana raised concerns that impacts to EFH for juvenile and sub-adult species were being ignored. SUPP00307-08; SUPP00206-07; SUPP00056; SUPP00165-66; NMFS11138-39. In response, the Service stated that “[t]he [Scientific and Statistical Committee’s (“SSC”)] guidance focuses the EFH [fishing effects] evaluation on the adult life stages of groundfish” but added that the fishing effects “model and evaluation process is an ongoing research priority for future EFH reviews.” FR00002-03.

In June 2023, Oceana proposed a measure to freeze the bottom trawl footprint in the Gulf of Alaska. COUN05158. The proposal would protect 90 percent of the Gulf of Alaska, while having a less than five percent impact on areas recently trawled. *Id.* It specified 16 areas as open to bottom trawling and required that pelagic and semi-pelagic trawlers keep their gear above the seafloor in the existing and proposed habitat conservation areas in the Gulf. COUN05160. Among other things, Oceana’s proposal

would more than double the amount of observed corals and sponges protected from fishing. COUN05173-76. It would also more than double protective areas on both the continental shelf and the upper slope. COUN05170. The proposal would also protect important habitat features like rocky reefs, seamounts, and submarine canyons. COUN05171-72, 05177-78. This would increase protections for EFH, benefiting managed species who depend on benthic habitat features, like rockfishes, crabs, and Pacific ocean perch. COUN05173-78.

3. The Service's action

The Council took a narrow approach during the 2023 review and ultimately focused on two alternatives that “differ[ed] very little”: the status quo and adopting a suite of FMP amendments (“EFH amendments”) that largely focused on updating habitat descriptions and maps. NMFS00655-56 (description of alternatives), 00662.

The EA for the 2023 EFH amendments only considered conservation measures relating to non-fishing impacts. NMFS00653; *see also* NMFS07999-8000. It considered no measures to minimize adverse fishing effects on EFH nor conservation and enhancement measures related to fishing effects on EFH. NMFS00653, 00687-88.

In response to comments that it failed to address habitat or conservation measures or to address a reasonable range of alternatives, the Service responded that it followed the Council's direction and roadmap. FR00003-04. In the Service's view, this comprised revising the conservation recommendations for non-fishing effects and reviewing new information about fishing effects to “understand” the effect of fishing on EFH. FR00003.

This also included developing alternatives that met the Council's and agency's goals to update information. FR00004.

In July 2024, the Service approved amendments to revise five FMPs to update the description and identification of EFH, and other updates, but did not establish any measures to minimize adverse fishing effects or conservation or enhancement measures focusing on fishing impacts. FR00001-02.

STANDARD OF REVIEW

Judicial review of agency decisions under the MSA and NEPA is governed by the APA's standard of review. 16 U.S.C. § 1855(f)(1); *Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1116 (9th Cir. 2006) (MSA); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891-92 (9th Cir. 2002) (NEPA). An agency's actions are set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 638 (9th Cir. 2004). An agency's action is arbitrary and capricious if the agency, among other reasons, "entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency." *BOEM*, 36 F.4th at 871. An agency's interpretation of a statute is a question of law reviewed de novo. *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1208 (9th Cir. 2021). Courts must "exercise their independent judgment in deciding whether an agency has acted within its statutory authority.... [C]ourts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Groundfish Forum, Inc.*

v. NMFS, No. 3:23-CV-00283-SLG, 2024 WL 4723744, at *6 (D. Alaska Nov. 8, 2024) (quoting *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412-13 (2024)).

ARGUMENT

I. Oceana has standing.

Oceana, Inc. (“Oceana”) has standing to bring this case because its members have standing in their own right, their interests are germane to Oceana’s organizational purpose, and the lawsuit does not require the participation of their individual members. *See Friends of the Earth, Inc. v. Laidlaw Env’t Servs., Inc.*, 528 U.S. 167, 181 (2000). Oceana’s mission is to protect and restore ocean habitat, including through the conservation of EFH. Ex. 1, ¶¶4, 8-9. Its members include “conservationists, fishermen, subsistence harvesters, scientists, and other ocean enthusiasts” who rely on Oceana to advocate for their interests. *Id.*, ¶5.

The Service’s actions and inactions have harmed Oceana’s members’ “aesthetic, environmental, and recreational interests[.]” *See Am. Oceans Campaign*, 183 F.Supp.2d at 10.

To prove standing, Plaintiffs must show: (1) they have suffered a concrete, personal, and particularized injury in fact to a legally protected interest; (2) a causal connection between the injury and the action of the defendant, fairly traceable to the challenged action; and (3) a likelihood, as opposed to mere speculation, that the injury will be redressed by a favorable decision.

Id. at 9 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Oceana’s members and supporters live near and rely on areas of the North Pacific

that are designated as EFH under the fisheries management plans at issue in this litigation. They boat, fish, scuba dive, conduct research, and enjoy observing coral gardens and watching marine mammals and seabirds in areas of the North Pacific ranging from southeast Alaska to Dutch Harbor. *See* Ex. 1, ¶¶18-26, 29; Ex. 2, ¶¶1, 3-7, 8, 9-10; Ex. 3, ¶¶1, 4-5, 7. The fish and marine resources Oceana’s members harvest, including sablefish, crab, salmon, rockfish, and halibut, use a variety of habitats throughout their lives, including seamounts, coral, and nearshore and offshore waters. *See, e.g.*, COUN21192-93; COUN21188-89; COUN20500; COUN21594; NMFS01019; NMFS01049.

The Service’s failure to adequately analyze the effects of fishing on these areas or to consider any measures to conserve and enhance these habitats harms Oceana’s members and supporters. *See Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961, 971 (9th Cir. 2003) (recognizing injury in the form of “added risk to the environment” when decisionmakers make decisions based on inadequate analysis (quoting *West v. Sec’y of Dep’t of Transp.*, 206 F.3d 920, 930 n.14 (9th Cir. 2000))). Continued trawling in EFH harms their interests in viewing healthy coral gardens, marine mammals and other ocean life, and in harvesting fish and other species to feed their families. *See, e.g.*, Ex. 1, ¶30, 35-36; Ex. 2, ¶¶8, 11, 13, 14-17; Ex. 3, ¶¶5-6, 8, 10.

These harms constitute concrete injury in fact, are fairly traceable to the actions taken by the Service and challenged in this litigation, and are likely to be redressed by the relief sought. *Lujan*, 504 U.S. at 560-61; *see also Renee v. Duncan*, 686 F.3d 1002, 1013

(9th Cir. 2012) (“Plaintiffs need not demonstrate that there is a guarantee that their injuries will be redressed by a favorable decision.”) (internal quotation marks and citation omitted); *Am. Oceans Campaign*, 183 F.Supp.2d at 9-10 (finding harm to members’ “aesthetic, environmental, and recreational interests” because of the Service’s failure to protect EFH).

II. The Service violated the MSA and APA when it concluded it need not consider actions to minimize any adverse effects on EFH.

The MSA charges the Service with taking action to conserve and enhance EFH, including the obligation to minimize, to the extent practicable, adverse fishing effects on EFH. 16 U.S.C. § 1853(a)(7). The obligation to minimize the adverse effects of fishing applies to all identified EFH, not a portion of it, and to all adverse impacts, not just the most significant. The Service is avoiding its obligation to minimize adverse effects by applying its regulatory definition in a way that erects an unlawfully high bar, to the point that the Service always concludes the adverse effects to EFH caused by fishing are minimal impacts. This has led the Service to never consider minimization measures in its EFH decision-making process.

The two primary thresholds the Service applies to its fishing effects assessment are unlawful: (1) MSST and (2) a ten percent impact disturbance threshold to a subset of the designated EFH. Neither test is consistent with the MSA’s obligation to minimize adverse effects, and for the significant majority of species, the Service, under its approach, need not consider any other factors to conclude no minimization steps are

required. As a result, the Service refused to consider any measures to minimize adverse effects. If the Service had lawfully considered whether fishing causes adverse effects to EFH, it would have found them—the record reflects the Council’s and Service’s recognition of impacts to EFH from fishing—and it would have been obligated to consider minimization measures like Oceana’s proposal. Even if the Service could justify its decision not to impose minimization measures, it failed to uphold its broader, proactive obligation to identify actions to conserve and enhance EFH, including Oceana’s proposal to freeze the bottom trawl footprint in the Gulf of Alaska.

The Service further violated the MSA by disregarding evidence showing adverse fishing impacts to long-lived corals and other benthic habitat features. It disregarded available evidence proving the existence of fragile and ecologically important habitat features shallower than 300 meters, focusing instead on deeper habitat, and failed to assess impacts to all EFH that supports all life stages of managed species, instead winnowing its analysis down to only the core area that supports adult species. The Service’s unlawful disregard for available evidence makes its conclusion—that fishing impacts on EFH were minimal and temporary and therefore not adverse enough to require minimization—arbitrary.

A. The MSA requires the Service to minimize all adverse effects to all EFH.

The MSA requires the Service to “minimize to the extent practicable adverse effects on [EFH] caused by fishing, and identify other actions to encourage the

conservation and enhancement of [EFH].” 16 U.S.C. § 1853(a)(7). “In statutory interpretation, the ‘plain meaning of a statute controls where that meaning is unambiguous.’” *Meyers v. Birdsong*, 83 F.4th 1157, 1160 (9th Cir. 2023) (quoting *Khatib v. Cnty. of Orange*, 639 F.3d 898, 902 (9th Cir. 2011) (en banc)). Congress did not include any qualifiers before “adverse effects” to limit the scope or degree of adverse effects to be considered. Nor did it indicate the obligation to protect EFH was linked to a finding that a fish stock is overfished. To the contrary, the structure and the legislative history of the MSA demonstrates that Congress understood the importance of the separate habitat obligation to protect sustainable fishing and the ecosystem at large. *Supra* pp. 3-4. Congress was also clear that once EFH is identified, the obligation to minimize applies to all EFH and not just a subset.

Despite its actions at issue here, the Service has long understood its EFH obligations are broad. When it promulgated the final EFH regulations in 2002, it adopted a strong definition of adverse effects consistent with the statutory obligation to respond to any adverse effects. It specified that the term included “any impact that reduces the quality and/or quantity of EFH.” 67 Fed. Reg. 2343, 2347 (Jan. 17, 2002). It rejected suggestions that would have narrowed or qualified the definition: “The [Service] disagrees that only statistically significant adverse effects should be considered because the [MSA] contains no such limitations. A much more inclusive definition of ‘adverse effect’ is necessary in the regulations to clarify what kinds of potential effects should be addressed in FMPs....” *Id.*

The final regulation requires the Council to “prevent, mitigate, or minimize any adverse effects from fishing, to the extent practicable, if there is evidence that a fishing activity adversely affects EFH in a manner that is more than minimal and not temporary in nature[.]” 50 C.F.R. § 600.815(a)(2)(ii). The initially proposed iteration of this provision limited the agency’s minimization obligation to only “substantial” adverse effects, 67 Fed. Reg. at 2354. In an interim final rule, the Service recognized the modifier could imply a constraint not in the statute, and rejected the “substantial” modifier. 62 Fed. Reg. 66,531, 66,538 (Dec. 19, 1997). The Service also considered “identifiable” but in the end adopted a final rule with no modifier at all. 67 Fed. Reg. at 2354. Relevant here, the Service also refused to include a requirement of a link between habitat impacts to decreased fish populations, explaining, “[i]t is not appropriate to require definitive proof of a link between fishing impacts to EFH and reduced stock productivity before Councils can take action to minimize adverse fishing impacts to EFH” because “[s]uch a requirement would raise the threshold for action above that set by the [MSA].” *Id.* The final rule includes explanatory language that effects must be “more than minimal and not temporary,” but that language was intended merely to make clear that “inconsequential changes” did not require minimization efforts, *see id.*, and cannot be interpreted as seeking to raise the threshold for the obligation to minimize adverse fishing effects beyond that established in the adverse effects definition—“any impact that reduces the quality and/or quantity of EFH.” *Id.* at 2347. Any other interpretation of the regulation—one that imposes an additional threshold before

minimization of adverse effects is required—would be flatly inconsistent with the statute. Thus, for almost 25 years, the Service has recognized that the MSA commands it to take practicable steps to minimize fishing effects for “any impact that reduces the quality and/or quantity of EFH.” *Id.*

Yet, as the next section describes, the Service has applied its regulation in a way that abandons this plain reading of the law and instead has instituted substantial, unlawful barriers to finding adverse effects in a way that wholly avoids its statutory obligations to minimize impacts under the MSA.

B. The two primary thresholds in the Service’s fishing effects assessment are inconsistent with the MSA.

The fishing effects assessment focuses on two key factors: a stock’s productivity relative to MSST and whether harmful impacts from fishing exceed ten percent disturbance to the portion of EFH the Service has decided is the “core” or most important habit for that species. *Supra* pp. 15-17. For the majority of species assessed, if these two thresholds are met, this ends the required analysis and the Service concludes no adverse effects exist that require it to consider any minimization measures. *Supra* p. 17. Despite evidence in the record that trawling harms habitats, *supra* pp. 9-11, including habitats that serve especially important ecological functions for many species, *supra* pp. 8-9, the Service consistently concludes these effects are not enough to merit a change in fisheries management. The Service has never found, in 20 years of assessing this metric, that any fishery in Alaska causes adverse effects requiring minimization measures. NMFS00686-

87. Consequently, the Service has improperly concluded that there is no need for it to carry out its main obligation, to consider measures to minimize the known impacts of trawl fishing on EFH.

1. The Service’s MSST proxy is unlawful as applied because it does not assess impacts on habitat.

The way the agency relies on MSST as a primary factor to evaluate adverse fishing impacts to habitat improperly conflates two distinct statutory requirements in the MSA—one which obliges the Service to prevent overfishing and, the other, to conserve EFH. *See* 16 U.S.C. § 1801(a)(6) (overfishing and protecting EFH stated as separate clauses). It is clear Congress prescribed these as separate duties by addressing their importance in other sections of the MSA. *Compare id.* § 1801(a)(5) (discussing overfishing and maintaining optimum yield), and § 1801(b)(4) (discussing purpose of FMP to maintain the optimum yield), *with* § 1801(a)(2)(C) (identifying direct and indirect habitat losses as a distinct threat to fish stocks), *and* § 1801(a)(9) (discussing the importance of prioritizing habitat considerations to protect the viability of all fisheries). MSST is not a habitat indicator—it is used to identify when a fish population is overfished, which triggers measures to prevent or end overfishing in compliance with National Standard 1. *Id.* §§ 1851(a)(1), 1853(a)(10); *see also Oceana, Inc. v. Bryson*, 940 F.Supp.2d 1029, 1037 (N.D. Cal. 2013) (describing MSST as a threshold below which a stock is considered overfished).

As described above, Congress enacted the EFH requirements because it recognized that habitat degradation is a related but distinct threat to fish populations and requires separate conservation and management measures. *Supra* pp. 3-4. Substituting consideration of whether a fish population is overfished for consideration of whether a stock's EFH is harmed by fishing, impermissibly renders the EFH requirement surplusage and nullifies the provision's effectiveness. *See, e.g., Pulsifer v. United States*, 601 U.S. 124, 143 (2024) (the canon against surplusage applies when a proposed statutory construction "render[s] an entire subparagraph meaningless" (quoting *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 128 (2018))); *see also Corly v. United States*, 556 U.S. 303, 314 (2009) (discussing "one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant'" (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004))).

Instead of proactively protecting EFH to support healthy fish populations, as the MSA requires, the Service uses MSST—stock collapse—as a primary test in deciding whether to minimize adverse fishing effects on EFH. Using MSST as a proxy for habitat loss means, by definition, the need to take action to minimize effects under this test is not triggered until the loss is significant enough to cause a stock to fail. By the time the fish stock has reached this unsustainable point, it may be too late to recover either the fish population or any habitat that has been adversely impacted by fishing. *Supra* pp. 4-5, 12-13. It certainly fails to meet the proactive habitat protection requirement of the MSA. It

also effectively negates the importance of already designated EFH by allowing severe degradation to occur, simply because a fish stock is not yet overfished, despite the agency's determination that the habitat is "necessary to fish for spawning, breeding, feeding, or growth to maturity." 16 U.S.C. § 1802(10). The method is as "inappropriate" and "problematic" as it was 20 years ago, SUPP00640; SUPP00689; *supra* pp. 12-13, and not consistent with what the MSA requires.

2. The Service's application of a ten percent impact threshold to a subset of EFH is inappropriate and contrary to law.

Once a stock's MSST status has been determined, stock authors assess the degree of habitat disturbance caused by fishing. But the Service's process fails to account for all adverse effects to all identified EFH, contrary to the MSA requirements. *See supra* pp. 23-27. The Service only analyzed fishing impacts to the half of the identified EFH that they assumed fish use the most, which the Service deems the core area. *Supra* pp. 15-16. And even then, habitat disturbance estimates within that subset of EFH must exceed ten percent before stock authors are required to do any further analysis in the fishing effects assessment process. NMFS05669. Here, the Service found that of the 103 species where fishing impacts to the core area were assessed, 87 did not exceed the ten percent habitat disturbance threshold. NMFS05574-79, 05585. Thus, for the significant majority of assessments, after passing the MSST threshold and this ten percent analysis of a subset of EFH, no further review is required, and the Service concluded no adverse effects requiring minimization exist.

There are two fundamental flaws with this analysis. First, only a portion of identified EFH is protected from adverse effects. Second, some level of harmful impacts to EFH will be allowed to occur without even considering measures to minimize those effects because up to ten percent of the core area can be affected without triggering the obligation to consider minimization. Neither is consistent with the MSA's obligation because the statute requires minimization of impacts to all of EFH, not some identified subset, *see supra* p. 4, and the obligation to minimize adverse effects is triggered when there are *any* adverse effects, not when there are substantial or large-scale effects. *Supra* p. 4; *see also* 16 U.S.C. § 1853(a)(7). Applying its regulatory definition of adverse effects in this unlawful way means the Service is ignoring documented harmful effects and thereby avoiding its obligation to consider practicable measures to minimize fishing effects. Consequently, their decision was arbitrary and contrary to law. *Blackwell*, 390 F.3d at 638.

III. The Service failed to address its broader obligation to conserve and enhance EFH.

Apart from whether the Service's adverse effects determination is lawful, it still has a separate and ongoing obligation to identify other actions to conserve and enhance EFH. 16 U.S.C. § 1853(a)(7). The conservation and enhancement measures are not dependent on the adverse effects determination. Rather, the minimization requirement is part of the broader, mandatory obligation to conserve and enhance EFH: FMPs "*must* identify actions to encourage the conservation and enhancement of EFH, *including*

recommended options to avoid, minimize, or compensate for the adverse effects” of fishing and non-fishing activities. 50 C.F.R. § 600.815(a)(6) (emphases added); *see also* 16 U.S.C. § 1853(a)(7). In fact, the Service and the Council appeared to recognize that minimization measures are a subset of the broader obligation to conserve and enhance in their summary report for the five-year EFH review: “FMPs must identify actions to encourage the conservation and enhancement of EFH, including recommended options to avoid, minimize, or compensate for adverse impacts” from fishing and non-fishing activities. NMFS00793. And this obligation applies not only to the adoption of the FMP, but to each subsequent amendment of the FMP. 50 C.F.R. § 600.815(b); *see also id.* § 600.815(a)(2)(ii) (amendments must “continue[] to minimize” adverse effects); *id.* § 600.815(a)(10) (requiring a “*complete* review of *all* EFH information” every five years (emphases added)). Therefore, even absent a finding of adverse effects to EFH, the Service was obligated to identify other measures to conserve and enhance EFH, but it did not do so.

The only conservation measures it considered were non-binding recommendations related to *non-fishing* effects on EFH, such as avoiding dredging activities during vulnerable periods and avoiding burying aquatic vegetation during road construction. NMFS00688-90; NMFS08042, 08070. When it came to fishing effects, the Council did not adopt any conservation and enhancement measures, and declined to consider any, despite its advisory panel’s recommendation that it do so. *See* COUN03497 (advisory panel recommendation to consider conservation and enhancement proposals and

acknowledging they “should not only be reserved for when the Adverse Impact threshold is reached”). It did not consider the proposal Oceana submitted that would provide significant conservation and enhancement benefits for sensitive habitat features in the Gulf of Alaska. *See supra* pp. 18-19. This failure violates the MSA.

IV. The Service violated the MSA and APA when it failed to consider available evidence in its fishing effects assessment.

Apart from the unlawful process that the Service used to make its determinations about adverse effects, its approval of the EFH amendments was arbitrary and capricious because the Service failed to consider important aspects of the issue—evidence of long-lived benthic habitat features like corals and sponges in shallow waters less than 300 meters deep and impacts to EFH important to all species’ life stages. *See BOEM*, 36 F.4th at 871.

A. Disregarded evidence related to long-lived habitat features.

The Service ignored evidence that important structure forming benthic habitat features reside at depths less than 300 meters and take more than 50 years to recover, rendering its fishing effects assessment insufficient and arbitrary.

Oceana submitted evidence showing that there are many long-lived habitat features, particularly corals, sponges, and sea pens at depths less than 300 meters, and that are subject to damage from trawling, *see, e.g.*, EML00979-80; EML03913-15; EML06885; SUPP00208-09; SUPP00057-59; NMFS11139-43, and that these long-lived habitat features are slow to recover. *See, e.g.*, EML00978-79; EML03916; SUPP00207-

08; SUPP00057-59; NMFS11139-43. The Service itself acknowledged these habitat features are vulnerable to damage from trawling and slow to recover. *Supra* pp. 9-11, 13-14. The record also reflects habitat features at shallow depths. *Supra* p. 8. And the Service has acknowledged that such habitat is associated with various species that rely on these features for breeding, feeding, and growth to maturity, and exist at depths less than 300 meters. *Supra* pp. 8-9.

Contrary to the record evidence, the fishing effects analysis narrowly classified these long-lived habitat features to cobble or boulder habitats deeper than 300 meters. NMFS05561. This narrow classification underestimates the known distributions of structure-forming habitat features and excludes habitat accounting for greater than 90 percent of coral records and 96 percent of sponge records. EML03913-15; SUPP00057-61; SUPP00198-201; SUPP00207-214. This underrepresentation of the spatial extent of structure-forming habitat features like corals, sponges, and sea pens in turn led the Service to underrepresent harmful impacts from fishing activities. NMFS05661-62 (fishing effects analysis limits habitat disturbance estimates to features deeper than 300 meters and caps recovery at 50 years). Given the Service's acknowledgement that long-lived features like corals and sponges are vulnerable to damage and slow to recover, *supra* p. 8, their underrepresentation from the fishing effects analysis means the Service failed to fully assess fishing impacts.

The Service has plainly disregarded available evidence that more accurately reflects adverse effects on EFH caused by fishing activities. Failing to consider evidence

demonstrating the existence of long-lived corals, sponges, and other structure-forming organisms at depths shallower than 300 meters and that take longer than 50 years to recover rendered its fishing effects assessment arbitrary and capricious. *See BOEM*, 36 F.4th at 871.

B. Disregarded evidence demonstrating fish of all life stages rely on structure-forming benthic habitat features.

The obligation to examine adverse effects to EFH includes habitat necessary to support all life stages of fish, including spawning, breeding, feeding, and growth to maturity. 16 U.S.C. § 1802(10). Contrary to that requirement, the Service failed to consider available information about habitat essential for vulnerable sub-adults and juvenile fish. The Service recognized its obligation to describe and identify EFH for all life stages when it updated the descriptions and maps for species in the Gulf of Alaska and elsewhere. NMFS00658; NMFS04037, 04044. However, the Service then failed to analyze fishing effects on the EFH it identified. The SSC itself has “discussed the apparent mismatch between the multiple life stages for which EFH has been defined and the evaluation of fishing effects on only adult life stages.” COUN03445. The Service acknowledged that “[t]he SSC’s guidance focuses the EFH evaluation on the adult life stages of groundfish,” FR00003, but sought to justify this failure by asserting “[t]he [fishing effects] model and evaluation process is an ongoing research priority for future EFH reviews.” *Id.* However, future promises of compliance with the law cannot satisfy the Service’s current legal obligation. *See Anglers Conservation Network v. Pritzker*,

139 F.Supp.3d 102, 111-12 (D.D.C. 2015).

The Service cannot rationally conclude that fishing effects on EFH are not adverse without considering the effects of fishing on EFH for sub-adult and juvenile fish populations. *See* 16 U.S.C. § 1802(10) (EFH means “those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity”); *see also* 50 C.F.R. § 600.815(a)(2)(i) (requiring fishing effects analysis to look at effects on “each type of habitat found within EFH”). The Service’s decision to disregard important, and readily available, life history stage information in the fishing effects analysis was arbitrary. *See BOEM*, 36 F.4th at 871.

V. The Service violated NEPA and APA because it failed to consider a reasonable range of alternatives.

The EA does not consider a reasonable range of alternatives or address Oceana’s conservation proposal to freeze the bottom trawl footprint in the Gulf of Alaska. NMFS00644-705. The Service failed to examine alternatives beyond the two proposed by the Council, and did not consider any alternatives that would meet its statutory requirement to minimize adverse fishing impacts and its broader obligation to identify conservation and enhancement measures. 16 U.S.C. § 1853(a)(7). Its failure to do so violates NEPA. *See supra* pp. 6-7.

The Service considered only two very similar alternatives in the EA: maintaining the status quo or updating EFH information and refining parameters in the fishing effects model. NMFS00657; COUN14269. Both alternatives considered the same level of

fishing effort, leaving open the same areas for fishing, and applying the same fishing gear restrictions. *See, e.g.*, NMFS00655-57. Ultimately, the Service determined the actions in the amendment package differed “very little” from the actions that were analyzed in 2005. *E.g.*, NMFS00662 (viewing updated EFH descriptions in amendment package as “largely technical or housekeeping changes”). Considering only two alternatives with nearly identical consequences is not a reasonable range. *See W. Watersheds Project*, 719 F.3d at 1051-53 (range of alternatives in EA inadequate where alternatives all allowed same level of grazing).

In particular, the Service declined to consider an obvious, practical alternative that would better meet the purpose of the action. Notably, Oceana advanced the only proposal that would confer substantial additional protections to EFH from fishing while having a minimal effect on current fishing. COUN05158-204; *see also supra* pp. 18-19 (summarizing Oceana proposal). Moreover, the Council has previously adopted similar prospective area closures in the Aleutian Islands and the Bering Sea, preventing bottom trawling expansion in both areas. *Supra* pp. 13-14. Oceana’s proposal is therefore reasonable. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813-14 (9th Cir. 1999) (alternatives that are viable, *i.e.*, not remote or speculative and meet agency’s policy objectives, must be considered); *Wild Fish Conservancy v. Nat’l Park Serv.*, 8 F.Supp.3d 1289, 1300-01 (W.D. Wash. 2014), *aff’d*, 687 F.App’x 554 (9th Cir. 2017) (agency failed to show there were no “meaningfully different,” or “viable,” alternatives between those considered).

Further, Oceana’s proposal fits squarely within the stated purpose and need by affirmatively addressing key elements of the EFH final rule. The action’s stated purpose is to comply with the EFH final rule, NMFS00652, which requires that each FMP must “identify actions to encourage the conservation and enhancement of EFH,” including practicable measures to minimize adverse fishing effects. 50 C.F.R. § 600.815(a)(6); *see also supra* pp. 5-6. By preventing bottom trawling from expanding into untrawled areas and requiring “pelagic” trawls to stay off the seafloor where bottom trawls are excluded, Oceana’s proposal addresses these important components of the EFH rule. The alternative therefore meets the purpose and need for the project and the requirements of the MSA.

The Service nonetheless declined to consider the alternative Oceana proposed—or any similar alternative—and its justification for failing to do so is arbitrary. In its response to comments, the Service declined to consider Oceana’s proposed alternative because it believed it was bound by the Council’s choice of alternatives: it simply followed the Council’s roadmap to update EFH descriptions. FR00003-04. This response fails for at least three reasons. First, the MSA regulations establish that the Service is responsible for providing written recommendations to the Council for conservation and enhancement measures, not the other way around, and, regardless, the ultimate responsibility to ensure compliance rests with the Service. 50 C.F.R. § 600.815(b) (Service’s obligation to recommend actions for both initial promulgation and subsequent amendment of EFH provisions); *accord Pritzker*, 139 F.Supp.3d at 111

(“ultimate responsibility for the details of any amendment...rests with NMFS”). Second, the Service incorrectly suggests that the purpose of the action is restricted to updating the description and identification of EFH. FR00004. But, as explained above, the stated purpose of the EA is to comply with the much broader provisions of the EFH final rule. NMFS00652; *supra* p. 38. The Service’s decision to narrow its focus to only two alternatives that address limited aspects of the EFH final rule conflict with this purpose. Third, as earlier discussed, the Service must “review [] *all* EFH information,” not just relating to non-fishing effects or to describing and identifying EFH. *See, e.g., supra* pp. 31-32. The Service’s rationale for refusing to consider Oceana’s proposed alternative is arbitrary and contrary to law. *See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 409 F.Supp.3d 738, 764-65 (D. Ariz. 2019), *aff’d*, 33 F.4th 1202 (9th Cir. 2022) (finding range of alternatives inadequate where agency improperly applied its regulations contrary to its statutory duties); *Ilio ’ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1100 (9th Cir. 2006) (finding range of alternatives inadequate where alternatives did not meet purpose and need and justification for refusing to consider others was not supported by record).

Further, to the extent the Service is relying on the Council’s decision to exclude conservation and enhancement measures because the Council concluded fishing effects did not require further minimization, the justification is logically and factually incorrect. As described earlier, the Service’s finding of minimal adverse effects is arbitrary and capricious and excludes key EFH from its consideration. *Supra* pp. 33-36. Furthermore,

the Service's obligation to consider conservation and enhancement measures is not limited to situations where the Service finds an adverse effect from fishing. Rather, the Service's obligation to consider conservation and enhancement measures is broader than its obligation to minimize the effects of fishing. *See supra* pp. 24-25, 31-32 (explaining the Service's obligation to consider conservation and enhancement measures). The Service's refusal to consider Oceana's proposal, or any similar alternative, was arbitrary. *See Ctr. for Biological Diversity*, 409 F.Supp.3d at 764-65. Far from bringing into relief the choices before decisionmakers and the public, the Service's actions "shrouded" critical policy choices from the view of the public. *Block*, 690 F.2d at 768.

VI. The Court should remand the environmental decision and associated authorizations for the EFH amendments back to the Service.

The Service's misapplication of the MSA, disregard for evidence, and inadequate environmental analysis violates NEPA, the APA, and the MSA. Therefore, Oceana is entitled to relief in the form of a remand to the agency with directions to act promptly to correct the identified violations. *See, e.g., Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 938 (9th Cir. 2010) (remand ordered "for the agency to prepare a new or supplemental [EA]"); *Pac. Marine Conservation Council, Inc. v. Evans*, 200 F.Supp.2d 1194, 1207 (N.D. Cal. 2002) (remand of FMP amendment for violations of MSA, NEPA and APA); *Evans*, 384 F.Supp.2d at 256 (remand of FMP amendment for violation of MSA; other parts of FMP vacated). Oceana requests that the Court apply its discretionary authority and impose a deadline of 18 months for the Service to conclude its

response to the remand order. *See Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 937 (9th Cir. 2008) (noting that “NMFS [did not] challenge the court’s discretionary authority to impose a deadline for the remand proceedings”).

CONCLUSION

The Service’s decision to approve the EFH amendments violates the MSA, APA and NEPA, therefore Oceana asks the Court to remand the decision adopting the EFH amendments and the EA supporting the EFH amendments to the Service for completion of new EFH amendments and an accompanying EA or EIS that comply with the law.

Respectfully submitted this 26th day of February, 2025.

s/ Charisse Arce

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I certify that this document contains 9,992 words, excluding items exempted by Local Civil Rule 7.4(a)(4), and complies with the word limits of Local Civil Rule 7.4(a)(1).

Dated: February 26, 2025.

s/ Charisse Arce
Charisse Arce

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2025, a copy of the foregoing PLAINTIFF'S PRINCIPAL BRIEF UNDER LOCAL RULE 16.3(c)(1), with attachments, was served electronically on all counsel of record through the Court's CM/ECF system.

s/ Charisse Arce

Charisse Arce

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

OCEANA, INC.,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Case No. 3:24-cv-00180-SLG
)	
NATIONAL MARINE FISHERIES SERVICE <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	
)	

DECLARATION OF JAMES KARNIK

I, James Karnik, hereby declare as follows:

1. I live in Juneau, Alaska. I first moved to Juneau in 2002 and lived there until 2010 before returning in 2012, and I have lived in Juneau ever since. Prior to living in Juneau, I spent two summers working in Denali National Park in Alaska during the years 2000 and 2002.

2. I was employed by Oceana, Inc. (“Oceana”) for the years 2007 to 2010 as a Pacific Communications Manager and then again from 2018 to the present. I am a member of Oceana and have been a member since October of 2016.

3. In my capacity as Pacific Communications Manager, I work with a team of scientists, attorneys, policy experts, fellow communications specialists, and administrators to achieve in-the-water protections for fisheries, marine life, and ocean ecosystems off the coasts of Alaska, Washington, Oregon, and California. Together, we work to protect Alaska’s ocean fisheries, wildlife, and ecosystems from overfishing, bycatch, habitat destruction, offshore oil and gas development, plastics, pollution, and

other impacts. As part of my job, I create reports, fact sheets, press releases, op-eds, videos, websites, social media content, and other materials in support of Oceana's ongoing campaign work. I am familiar with all aspects of Oceana's activities and organizational interests related to the Gulf of Alaska, Bering Sea, Aleutian Islands, and Arctic Ocean, as well as our work off the coasts of Washington, Oregon, and California.

4. Oceana is a non-profit international advocacy organization dedicated to protecting and restoring the world's oceans through policy, advocacy, science, law, and public education. It is headquartered in Washington, D.C., with several regional offices, including one in Juneau, Alaska. Oceana strives to rebuild abundant and biodiverse oceans by securing science-based policies in countries around the world, including the United States. Oceana's fishing campaigns focus on habitat protection, bycatch reduction, and sustainable catch limits that support the role of fish and other species in ocean ecosystems and food webs. Ensuring the conservation and sound management of seafloor habitat, including essential fish habitat ("EFH"), is a central focus of Oceana's work.

5. Oceana has over 1.5 million supporters worldwide, including over 5,000 supporters who live in Alaska, over 300 of which are active members. Our members in Alaska include conservationists, fishermen, subsistence harvesters, scientists, and other ocean enthusiasts. Oceana's members and staff, including me, rely on Oceana to represent their interests in the conservation and management of marine resources and ecosystems, including those in the North Pacific.

6. Oceana devotes considerable time and resources to studying and communicating the ecological and economic importance of sound management of fisheries in the North Pacific. In the last two decades Oceana has extensively communicated with fisheries managers, the media, and the public on the importance of EFH and the need for science-based policies to protect EFH in the Arctic Ocean, Bering Sea, Aleutian Islands, and Gulf of Alaska. This includes press releases, op-eds, reports, videos, social media posts, and email alerts to members.

7. Oceana monitors the North Pacific Fishery Management Council (“Council”) and National Marine Fisheries Service (“Service”) to ensure compliance with the Magnuson Stevens Fishery Management Act, National Environmental Policy Act, Marine Mammal Protection Act, and other laws relevant to the North Pacific ecosystem. It advocates for sustainable fisheries and conservation of the habitat, food web, and other elements of healthy North Pacific Ocean ecosystems. Oceana cannot meet these goals without a robust public process that relies on sound science and the opportunity for the public to participate in fisheries management decisions as required by law.

8. Oceana has worked to protect ocean resources off the coast of Alaska since the opening of its Alaska office in 2002. In that time, Oceana has helped to protect sensitive cold-water corals, sponges, and other EFH from bottom trawling, advance ecosystem-based management in the North Pacific, reduce bycatch of salmon, crab, halibut, and other non-targeted species in trawl fisheries, increase observer funding for trawl vessels in the Gulf of Alaska, support protections for marine mammals and

seabirds, reduce marine pollution, prevent new offshore oil drilling in the Chukchi and Beaufort seas, increase shipping safety, and promote more sustainable fishing practices in the North Pacific. On these issues and others, Oceana has been actively engaged in the Council process.

9. For the past two decades Oceana has been a leading voice for habitat conservation in Alaska, including campaigns to protect large areas of seafloor habitat in the Aleutian Islands, Bering Sea, Beaufort Sea, Chukchi Sea, and Gulf of Alaska. Bottom trawling is the primary threat to seafloor habitat in Alaska, as identified by the National Research Council in 2002. Our habitat campaign efforts focus on limiting the expansion of bottom trawling into new areas, protecting important habitat areas that are exposed and vulnerable to trawling, and protecting habitat conservation areas from pelagic trawls that are fished on the seafloor. With regard to pelagic trawling, Oceana submitted a proposal to the Council requiring that any pelagic and semi-pelagic groundfish trawls in the Gulf of Alaska Fishery Management Plan area are to be fished entirely above the seafloor with no bottom contact when operating in any existing or proposed conservation area closed to bottom trawls. Oceana also submitted a letter to the Council in October of 2024 calling for similar management measures to help ensure that any pelagic trawling does not damage or destroy seafloor habitat.

10. Since 2004, Oceana staff have regularly participated in Council meetings, including advisory bodies, management teams, and other subgroups. During this time, we have engaged in multiple rounds of the EFH process by submitting written comments

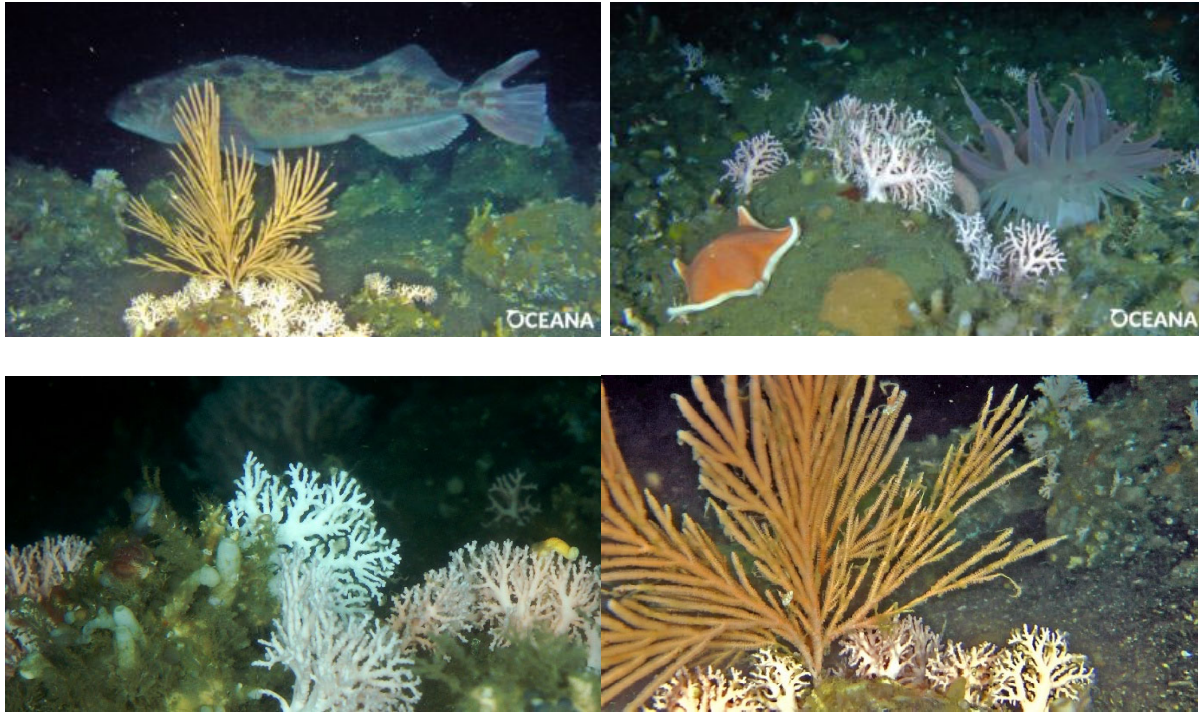
and offering testimony. The EFH process occurs every five years to review EFH designations and management to determine where and how critical ocean habitat areas should be protected as required under the Magnuson Stevens Act. As a result of our efforts and the efforts of others, the Council has acted to protect 64% of federal waters offshore of Alaska from groundfish bottom trawling.

11. Our current efforts focus on the central and western Gulf of Alaska, the last ocean region off Alaska's coast largely still open to bottom trawling. Our advocacy to protect the Gulf of Alaska has included comment letters and oral testimony to the Council at multiple meetings. For the most recent five-year review, since April 2021, Oceana has submitted over 10 comment letters and testified numerous times before the Council or its committees regarding EFH. The comment letters included a petition signed by over 600 supporters requesting that the Council initiate a public process to protect EFH, particularly in the Gulf of Alaska. Oceana also created a number of tools to assist those efforts, including a report entitled *Net Loss: The Cost of Bottom Trawling in Alaska* (https://usa.oceana.org/wp-content/uploads/sites/4/Net-Loss_The-Cost-of-Bottom-Trawling-in-the-Gulf-of-Alaska_small-size.pdf), a fact sheet showing the gap in protections for important seafloor habitat in the Gulf of Alaska (<https://usa.oceana.org/wp-content/uploads/sites/4/2023/09/Gulf-of-AK-habitat-protection-factsheet-Oceana.pdf>), and an interactive storymap about protecting seafloor habitats in the Gulf of Alaska (<https://storymaps.arcgis.com/stories/141e2e4d8a9043bfa5ba61149b6bef86>). Oceana

also worked with an Alaskan artist to commission a graphic of what bottom trawling looks like and its effects on the seafloor (<https://usa.oceana.org/wp-content/uploads/sites/4/Bottom-Trawl-graphic-scaled.jpg>).

12. Oceana invests substantial time, money, and resources to ongoing research that enhances the scientific knowledge and understanding of ocean habitat and ecosystems in the places where we work. Part of this investment involves sending researchers out on the water for multi-day expeditions in areas where we work. These expeditions explore new areas to document living seafloor habitats like corals and sponges, to add to the scientific record, and capture images and videos of those habitats to share with policymakers, the media, and the public. In 2022, along with other Oceana staff, I embarked on an eight-day expedition to circumnavigate Kodiak Island and explore 23 different sites in search of corals and other seafloor habitat areas. The goal of the expedition was to expand our knowledge of the Gulf of Alaska seafloor to support Oceana's efforts to protect sensitive and essential seafloor habitats from destructive bottom trawling. During the expedition we recorded numerous images and videos of corals, sponges, sea whips, and other seafloor living habitat areas. Oceana filmmakers then created a short video showing highlights from the expedition:

<https://vimeo.com/751777873>. Some examples of images taken during our expedition, 50 miles offshore Kodiak Island at 80 meters depth, are included here:



13. In 2023, I contributed to Oceana’s *Gulf of Alaska Seafloor Habitat Protection Proposal*, which was intended to advance the goal of protecting seafloor habitats and biodiversity, reducing coral and sponge bycatch, and maintaining substantial areas open to the trawl fleet to be able to fish safely, efficiently, and profitably inside identified open trawling areas. It was a practical approach to protecting seafloor habitat while maintaining sustainable Gulf of Alaska fishing opportunities by designating 16 groundfish bottom trawl “open areas” in the central and western Gulf of Alaska and requiring that pelagic groundfish trawls in the Gulf of Alaska Fishery Management Plan area are fished entirely above the seafloor with no bottom contact when operating in any existing or proposed conservation area closed to bottom trawls. The proposal had five main objectives: 1) protect areas containing known deep-sea coral and sponge communities from bottom trawl impacts; 2) protect areas that may support deep-sea coral

and sponge communities where bottom trawling has not been used recently, as a precautionary measure; 3) protect essential fish habitats for managed groundfish species, and habitat for non-groundfish species including Gulf of Alaska crab, halibut, and lingcod; 4) protect habitat conservation areas from pelagic trawls that contact the seafloor; and 5) maintain a productive groundfish fishery and minimize bottom trawl displacement. The proposal was submitted to the Council, who subsequently failed to consider many of the points raised in that proposal in their determination not to take any conservation action on EFH later that year, despite extensive testimony from Oceana scientists, other non-profit organizations, the fishing community, and others.

14. Oceana and its members' interests are directly threatened by the Council's and Service's inaction to protect EFH in the Gulf of Alaska. Oceana members rely on healthy Gulf of Alaska ecosystems that provide opportunities for fishing, foraging, wildlife viewing, birding, scientific research, recreation, photography, and other activities central to the lives of Gulf of Alaska residents and those members with personal connections to the region. Failure to establish protections for EFH places North Pacific Ocean ecosystems at risk, especially when considered within the larger global ocean issues of climate change, plastics pollution, and other large-scale ocean threats. The potential for thousands of square miles of seafloor habitats to be destroyed by bottom trawling, including fragile deep-sea coral and sponge ecosystems, adds an unacceptable risk to an already stressed ocean environment, and threatens the use and enjoyment of the fish, mammals, birds, and other marine life supported by those ecosystems for myself,

other Oceana members, and future generations in Alaska.

15. Oceana and its members also have an interest in the rule of law, including an expectation that federal agencies like the Service comply with the substantive and procedural mandates of the Magnuson Stevens Act, National Environmental Policy Act, and Administrative Procedure Act. Action or inaction that ignores or undermines those laws harms the interests of Oceana and its members, including me.

16. In sum, Oceana has a strong organizational interest in protecting the marine species, habitats, and ecosystems of the North Pacific, both as an organization and as an institution relied upon by its members to represent their interests with regards to healthy oceans and sustainable fisheries. The Service's decisions related to EFH in this case represent a direct threat to those interests and the failure of the Council and Service to adopt a science-based approach to conserving EFH in the Gulf of Alaska directly and irreparably harms Oceana and its members, including me, in Alaska and beyond.

17. Along with many years as an Oceana employee and member, I have also spent the majority of my adult life in Alaska. One of the primary reasons I live and work in Alaska is the opportunity to be near the ocean and enjoy a number of activities that rely on healthy ocean ecosystems.

18. Over the past 25 years, I have visited the Gulf of Alaska region many times and engaged in a number of ocean-related activities.

19. The first humpback whale I ever saw was on a boat tour of Kenai Fjords National Park off the coast of Seward, Alaska, in the year 2000. This was during my first

summer in Alaska, when I worked in Denali National Park. On a weekend off, I drove six hours to visit the Kenai Peninsula to experience the ocean off Alaska's coast, of which I had seen photos and videos for years before moving to the state. The idea of experiencing those same ocean waters personally was a thrill, and I can still remember what it felt like to hear the sound of a whale's breath, for the very first time in my life, as it surfaced for air. I remember crying and being overwhelmed with emotions as I saw the clouds of mist rising from the surface as the whale took each breath, and the thrill of seeing the whale's tail as it dove. I was mesmerized. For someone who grew up in Minnesota and went to college in Chicago it was unlike anything I had ever seen before. It had a profound effect on me and my understanding of the ocean. Seeing that whale is one of the main reasons I eventually decided to move permanently to Alaska.

20. Since moving to Alaska, I have visited the central Gulf of Alaska coastal communities of Kodiak, Sitka, Homer, and Seward multiple times. During these trips I enjoyed kayaking, birding, wildlife viewing, beachcombing, and taking photographs. In Kodiak I remember watching gray whales dive for clams close to shore, and marveling at the agility of these huge animals to maneuver in very shallow water. I feel a special connection to gray whales, having visited the lagoons off the Baja California peninsula in Mexico where gray whales mate and give birth. In those lagoons I saw hundreds of gray whales and had the profound experience of seeing a newborn calf swim up to our skiff and raise its head out of the water, allowing me to touch its snout and the side of its face while its mother kept a wary eye a few yards off the boat. Being on a 20-foot skiff

watching a 35-foot whale clearly visible under the water was a powerful experience, and bonding with her calf was indescribably joyful. I can still remember the feeling of that calf's skin on my hand, and how my hand was sore for days afterwards after the calf dove and smacked my hand against the boat with its tail. That whale encounter is among the best wildlife viewing experiences of my life, and it is one I will never forget. I have never seen gray whales in Juneau, as they are exceedingly rare in the more inner waters of the Inside Passage, so the few chances I have had the privilege of seeing gray whales in Alaska have been in Kodiak and Sitka, communities more connected with the open ocean waters of the Gulf of Alaska where gray whales transit between breeding grounds in Mexico and feeding areas off Alaska.

21. I have also attended the Kodiak Crab Festival twice, and while it was enjoyable to see the local arts and crafts on display, and enjoy chowder and Dungeness crab, each time I was struck by the old photos of mountains of king crab that used to be the centerpiece of the festival before the collapse of that fishery. It gave the festival a melancholy air as I couldn't help but think of what it must have been like to experience the height of that abundance of king crab. In addition, on a trip to Kodiak my former wife and I went on a kayak tour where we saw not only whales but also puffins, a bird that has always meant very much to me. Puffins were the image we had used for our wedding invitations in 2006, and every chance we had to see puffins (which are not native to the waters off Juneau) always brought us tremendous joy. These memories are among my favorites from all my trips around Alaska, and I am planning to return to

Kodiak again in the spring or summer of 2025 to see what else I can experience there.

22. I have also visited Sitka on the eastern edge of the Gulf of Alaska a dozen times. While there, I went whale watching, birding, kayaking, and also fished for salmon, or whatever else I might be lucky enough to catch from the shore. While I have never caught a fish while visiting Sitka, the experience of fishing has always been a calming and peaceful one for me, and I appreciate the chance to fish in waters different from my usual locations in Juneau whenever I have a chance. I have attended the Sitka Whale Fest twice to hear talks from marine biologists on cutting edge marine science and the latest data on whale populations in Alaska, and had the chance to go on whale watching trips with those same experts. I remember driving around Sitka and tuning the car radio to “Whale Radio,” a broadcast of a hydrophone placed in the ocean near town. It was exciting to hear the call of a whale on the radio and then race to the area where we could try to spot that whale from shore. I also visited Saint Lawrence Island near Sitka, at the edge of Sitka Sound and the open Gulf of Alaska. This is a world-class birding spot, where people travel from all over the world for the chance to spot rarer species like the rhinoceros auklet, which are difficult to spot aside from a few spots near open ocean. I still remember the tears in the eyes of a birder I met on that boat trip as she saw one, and told me she had been trying to see a rhinoceros auklet for more than 25 years.

23. Near Sitka I also took multiple extended beach camping trips at Shelikof Cabin, a cabin managed by the United States Forest Service on Kruzof Island on the outer coast of Southeast Alaska. On each trip we saw whales and brown bears dependent on

marine fish and invertebrates. Two of my closest friends, who are among the first friends I ever made in Alaska, have lived in Sitka for almost 20 years and I enjoy visiting them every chance I get and experiencing the beauty of Sitka Sound, the fresh fish available to eat, and the feeling of being so close to the open Gulf of Alaska.

24. I have visited Seward and Homer multiple times as well. Seward was the first coastal community I ever visited in Alaska, and it was the port where we departed for the whale watching tour mentioned above where I saw my first whale. I also have visited the Alaska Sea Life Center in Seward multiple times, with particularly fond memories of watching puffins dive for food and the first time seeing a Steller sea lion. I have also visited Homer on multiple occasions and another of my oldest friends in Alaska currently lives in Homer. My former wife and I stayed in a hotel at the end of the Homer Spit and had one of our best vacations sitting on the porch of our room spotting whales, sea lions, and seabirds and enjoying the sunsets over Kachemak Bay. I deeply value my experiences on the ocean in every Gulf of Alaska community I have been fortunate enough to visit, and I intend to return to these communities again in April or May of 2025 for those same experiences.

25. In 2017, I transited the Gulf of Alaska from Dutch Harbor to Homer on board the M/V Tustemena, one of the ferries that make up the Alaska Marine Highway System. Over the course of this three-day trip I saw whales, sea lions, and many species of seabirds, witnessed the eruption of a volcano from afar at two in the morning, gazing through binoculars at the red plume and feeling humbled by the power of the Earth. I

also experienced the feeling of open seas far from shore for the first time on that ferry trip, which was the farthest I had ever been from land. The sheer size and scale of the Gulf of Alaska was a powerful feeling as we floated on a ferry that would feel large when in port or traversing the narrow channels of the Inside Passage near where I live in Juneau yet started to feel small in the big open waters of the Gulf. On that trip I spotted an enormous plume of mist far on the horizon, a telltale sign of a whale surfacing and exhaling. While looking at the large size of the cloud of mist rising from the water my friends and I excitedly discussed whether it may have been a blue whale, an animal I have always wanted to see and is known to sometimes traverse the Gulf of Alaska. While we never saw the whale's blow again, and do not know what species it was, it is still thrilling to think it might have been a blue whale. Staring at the horizon that day to see if we could spot that gigantic plume of mist again is a prime example of why I enjoy the feeling of discovery that comes with wildlife viewing on the ocean. I am planning a second ferry trip across the Gulf of Alaska with friends intended for the summer of either 2025 or 2026. Knowing now that the ferry route passes over known deep sea coral and sponge gardens will only enrich that experience for me, as will the chance to share that knowledge with friends who accompany me.

26. I feel incredibly lucky to have firsthand knowledge of those corals and sponges deep beneath the Gulf of Alaska, as I was able to join Oceana's 2022 expedition around Kodiak Island. On that trip I was amazed at the vibrant large corals, majestic sea whip groves, fragile sponges, and diverse seafloor areas where sea stars, corals, and

anemones often shared the same rock or reef. While I had known intellectually that the dark waters beneath the Gulf held an abundance of corals, it was an entirely different experience to see live footage of those corals from our Remotely Operated Vehicle (“ROV”). Each time we deployed the ROV I would film the process of researchers lowering the vessel into the ocean, then join scientists as they monitored the video feed as the ROV plunged deeper and deeper into the cold, dark waters. It felt like an elaborate game of hide and seek or detective work as we reviewed the existing science to determine where to send the ROV and then waited with bated breath to see what we discovered. Each dive of the ROV felt like it held untold possibility, and even the ones where we did not find an abundance of corals remained exciting and filled with anticipation. I remember gasping out loud the first time a coral came into view and how it felt to be standing on a boat seeing live footage of the extraordinary corals hundreds of feet below our hull. I remember excitedly pointing and talking with the expedition team as we chose which way to explore and never knowing what we might find. On one dive the ROV appeared to fly through a grove of sea whips, a type of coral, arcing and turning as graceful long tendrils reached up from the ocean floor. On another dive we found vibrant coral gardens, and the entire expedition team raucously celebrated, dancing and cheering. On that dive we recorded footage of a lingcod swimming up against a coral and it almost felt like it was posing for us as it paused briefly in the frame of our camera. I have used that photo time and again in our advocacy work as well as shown it to dozens of friends and others who ask me about our expedition. I also keep an assembly of some of our best

video footage on my phone and have shared it with dozens of people personally and professionally in the years since the expedition (link here: [Oceana AK expedition-best undersea footage.mp4](#)). Each time I smile as I watch someone's face light up seeing the imagery and their amazement that such vibrant life exists hundreds of feet below the cold, dark waters of the Gulf of Alaska.

27. In my professional past, in 2006, I developed a project through Americorps with the Alaska Department of Fish and Game entitled the Alaska Coastal Wildlife Viewing Trail to create a series of wildlife viewing guides for nine communities in Southeast Alaska, including whale watching and other ocean-related wildlife viewing opportunities. For this project I took photographs and wrote descriptions of wildlife viewing in each community to boost independent tourism to small coastal locations. Some of the whales, seabirds, and other marine animals featured in these guides transit or feed in the Gulf of Alaska ecosystems.

28. I have served on the Board of Directors of Discovery Southeast since 2014 and am currently Board President. Discovery Southeast is a Juneau-based non-profit organization focused on nature education for Juneau's youth that for more than 35 years has introduced children and families to the outdoors, providing the foundation for lifelong interests, skills, and exploration. Part of our organization's work involves taking students beachcombing, tidepooling, looking at fish in streams, and ocean wildlife viewing to educate Juneau's youth on ocean life and the connections between the ocean, the land, and the people. Some of the marine life viewed and enjoyed by our students

spend part of the year in the Gulf of Alaska to feed or transit. I strongly believe that outdoor education and a connection with nature is critical to human well-being and to conservation. The first step for any person to want to protect an animal, habitat, or ecosystem is for them to build a personal connection with the natural world. At Discovery Southeast we work to reach every student in Juneau and bring them outside, regardless of the weather, to help them feel comfortable and curious in nature. I believe that reaching children at a young age and connecting them with nature is absolutely essential to any future conservation actions and to more healthy children in a world populated with screens and social media. I have always agreed with the statement that we do not inherit the Earth from our ancestors, we borrow it from our children. One of the strongest motivators for me to work in conservation is that inheritance we will leave to future generations, and to do all we can to make sure children born today in Alaska will be able to experience the same ocean life and fishing opportunities 50 years from now when they reach the age I am now. I worry that without protections for habitat, bottom trawling could well destroy long-lived corals and other seafloor areas that are the cornerstone of those healthy ocean ecosystems. I firmly believe that we all share that responsibility to future generations, whether as individuals, as Discovery Southeast, or as policymakers like the Service and Council.

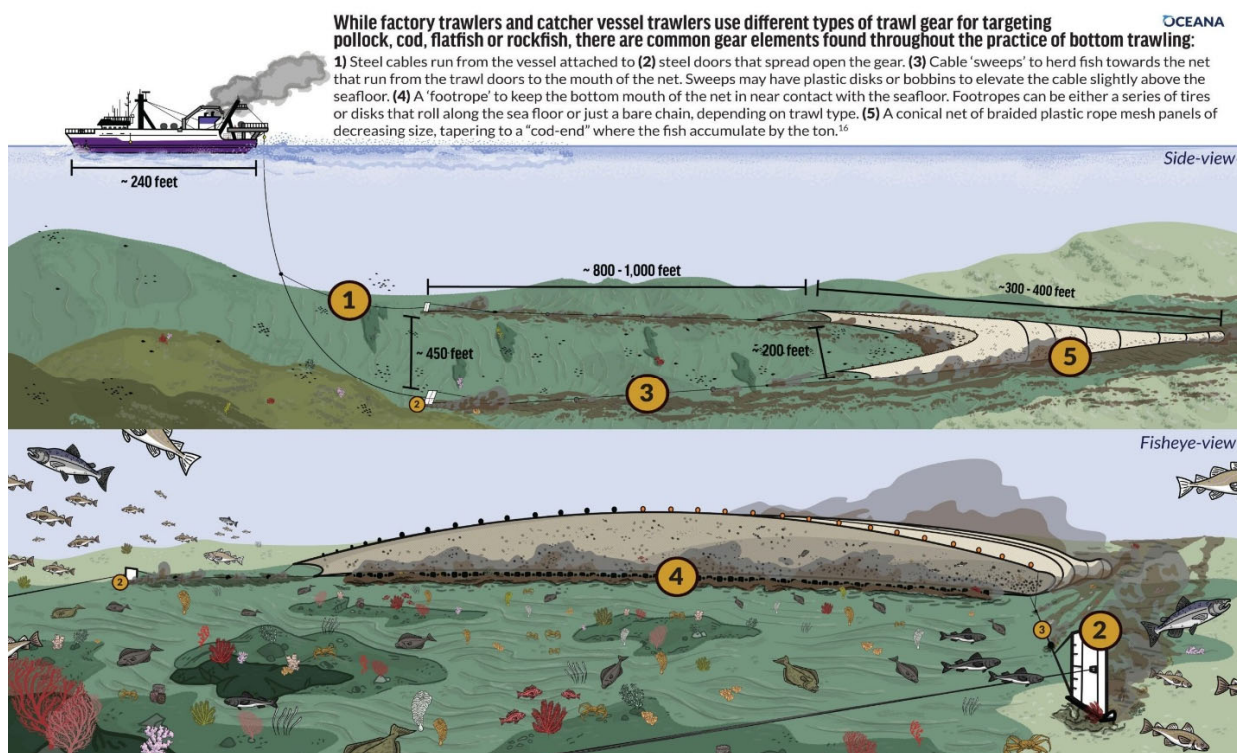
29. I have also fished for salmon, halibut, and crab in the Juneau area, and some of these species rely on healthy ocean ecosystems across Alaska, including the eastern Gulf of Alaska. Every late summer and fall I spend hours casting a fishing line

into the ocean in hopes of catching a salmon, and the feeling of catching my own food and eating it mere hours after it was in the ocean will never get old. I have seen salmon in Alaska during every stage of their lifecycle. I still feel a sense of wonder at seeing tiny salmon fry wriggling around in a stream and amazement at the idea that those small creatures will eventually swim out to sea and grow into the full-sized fish I catch from shore. I truly believe that the lifecycle and journey of a salmon is one of nature's great wonders, and since moving to Alaska I have come to appreciate and understand how important they are to the ecosystem and other animals. I have been to Pack Creek and Anan Creek bear viewing areas in Southeast Alaska multiple times and enjoyed watching black and brown bears catch salmon as they return to spawn. On the ocean I have seen sea lions eating salmon, tossing the fish in the air as they try to chomp the fish into smaller pieces for eating, and watched a pack of killer whales chasing salmon near the shoreline with awe-inspiring grace and precision. As a child in the Midwest I never especially enjoyed eating fish, even salmon, as it often was frozen or suffered during transit from the ocean to Minnesota. Since moving to Alaska, however, I eat fish and especially salmon as much if not more than any other protein. Fresh, wild-caught salmon is one of my favorites, and gathering around a grill in someone's yard or standing at a beach fire to eat fresh salmon is part of the fabric of my summer in Juneau each year. I have also enjoyed multiple week-long trips to fish for halibut in Idaho Inlet near the edge of the Southeast Alaska Inside Passage, and plan to once again return to that area in the summer of 2025 or 2026. I have also gone crabbing for Dungeness crab many times near

Juneau, and some of my earliest memories of Juneau involve feasts of crab with newly made friends, which felt like a true welcome to a different sort of life than I had experienced before. Fishing, and eating fresh fish or crab, is one of my favorite parts of living in Juneau and I intend to continue fishing for salmon, halibut, crab, and other marine species as long as I am able to do so.

30. I am profoundly worried that the decisions made by the Council and Service to not protect EFH in the Gulf of Alaska leaves the ecosystem, fish, marine mammals, and other species of the Gulf under threat. In my years of working for Oceana I have come to understand the devastating impacts that a single pass of a bottom trawl net can have on ocean habitat, some of which are corals or sponges that may be hundreds of years old yet be destroyed in an instant. Over the years I have been heartbroken by photos of corals that were hauled out of the sea by a trawl net, and that feeling only became stronger after the opportunity to join Oceana's expedition and see those same sorts of corals living and thriving on the seafloor. I believe, and have come to learn over many years, that all marine life in the Gulf of Alaska, and elsewhere in Alaska, relies on healthy ocean ecosystems and vibrant habitat areas. The primary threat to that habitat is bottom trawling, a type of industrial fishing where large, heavy nets are dragged for miles along the seafloor to catch species like flounder or cod. Along the way these nets also destroy corals and other important habitats essential for fish and ocean life for nurseries, feeding areas, spawning areas, and as places to hide from predators. Like bottom trawls, pelagic trawls used to catch pollock are also known to drag on the seafloor. The

difference is that with pelagic trawls, the doors used to hold the net open are suspended in the water column, yet up to 100 percent of the width of the net's footrope is in contact with the seafloor throughout the duration of the trawl tow. In my years working at Oceana I have spent countless hours writing about the impacts of bottom trawling and sharing that with the media and the public. In 2021, I worked with an artist friend to develop the graphic pictured below as a way to show the scale and impacts of trawling, and the image still bothers me every time I look at it:



31. I have read the National Research Councils' report that states that bottom trawling is the most destructive form of industrial fishing on sensitive seafloor habitats. I worry this habitat destruction has cascading impacts on fish and other sea life, ultimately threatening ocean ecosystems and my interests in them. While some discrete areas are

protected, hundreds of thousands of square miles in the Gulf of Alaska remain open to bottom trawling. Most of the seafloor in the Gulf remains unexplored. I am fearful that without adequate habitat protection the vibrant Gulf ecosystems and the whales, sea lions, fish, birds, and other animals I have been privileged enough to see and experience will decline, and that in the future there may be no whales to see or fish to catch if that decision is not changed.

32. I have come to understand the interconnectedness of habitat with healthy fish and invertebrate populations, many of which are in turn essential for larger animals like salmon, halibut, crab, whales, sea lions, and seabirds that I have enjoyed either harvesting or viewing throughout my time in Alaska. I have also come to understand the EFH process and the critical need to apply the best available science and a precautionary approach, especially considering that any opportunities for habitat protection are by design only considered once every five years. Over my years at Oceana, and as an Alaskan when not working at Oceana, I have followed every cycle of the EFH process and have been alarmed by the apparent decline of consideration of science.

33. I have personally witnessed fishery managers use a precautionary approach in the past, for example when they established habitat protections in the Bering Sea and Aleutian Islands, and also with the Arctic Fishery Management Plan that in 2009 closed vulnerable areas from industrial fishing before it could begin in the region. I am disturbed that this precautionary approach appears to be more and more a thing of the past. While fisheries management has always had disagreements between scientists,

advocates, industry representatives, and policymakers, in the past I witnessed attempts at compromise, a general recognition by all parties of the importance of habitat to healthy fisheries and ecosystems, and a spirit of finding a solution that would protect fragile habitat areas while still allowing for very successful trawl fisheries. It is disturbing to me to see what now seems a rushed and flawed process that fails to follow the Council's legal obligation to consider conservation alternatives to protect habitat, especially at a time when large scale impacts from climate change are already stressing the animals, fish, and ecosystems that rely on that same habitat. If current trends continue and bottom trawling expands into areas where fragile living habitat areas can be destroyed, I worry the effects will cascade through the ecosystem and diminish the health and abundance of many of the species I have experienced in the Gulf of Alaska, and I may not have the chance to do so again in the future.

34. I have been deeply disturbed and horrified to see firsthand how climate change is already profoundly affecting our state, including our ocean. Tidewater glaciers I have seen in Tracy Arm, Glacier Bay National Park, and Kenai Fjords National Park have all shrunk dramatically in the last two decades, along with terrestrial glaciers like Mendenhall Glacier in Juneau and Matanuska Glacier in the interior. I have visited all of these glaciers multiple times, and every time I return, I am struck by how diminished they are. While ocean impacts may not be as visibly dramatic, they are still noticeable. I have become deeply concerned about the shifts in species movements, apparent dramatic die-offs of some species, changes in ocean temperatures and acidity levels, loss of sea ice in

the Arctic, and other climate change impacts on our oceans. In my years with Oceana, I have gained a deeper understanding of climate change and also of how much we are still “catching up” in terms of our understanding of its impacts, and of potential impacts to come. The extraordinary stresses from climate change are another reason why responsible management, and common sense, should dictate a precautionary approach to protect habitat in the Gulf of Alaska and elsewhere.

35. I worry that, given the impacts of climate change, as well as the expansion of other human activities on our oceans, the Service is not using the most up-to-date information to make decisions about EFH protection in Alaska. Since 2005, the date of the Service’s last EIS, I have personally witnessed many changes in fisheries and ocean animals in my own region near Juneau. When I first fished in Alaska, I was able to catch king crab and king salmon near Juneau, yet aside from very rare and localized openings neither fishery has been available to me for many years. While I am not a regular fisher for halibut, when I have fished in recent years, it has been striking to witness that it is often more difficult to find halibut and that they are smaller in size. Salmon fishing for non-Chinook species has become more difficult as well in my own personal experience, and generally I have found myself catching less salmon in recent years than in years past. As a former whale watching guide, I have seen how the frequency and abundance of humpback whales visiting the Juneau area has also declined, whether due to climate change or other factors driving them or their food to other areas. It seems urgent to update any assessment upon which conservation and management decisions would be

based. Seeing fewer whales and catching fewer fish is harmful to me because both are among my favorite activities and it is heartbreaking to think the decline of both may continue. With less fish, I and others lose an important food source and the ability to build community. With less whales, others may not be able to experience the sense of wonder I felt when I saw my first whale. The idea of those opportunities not existing for myself and others is profoundly disturbing to me.

36. I have worked with colleagues at Oceana for many years to raise concerns about a number of fishery management issues in Alaska. In many cases I witnessed tough negotiations between the fishing industry, local communities, and conservationists, yet also often saw those end with management measures developed by the Council and the Service that found a way to have strong conservation measures and economically productive fisheries. This was most true when it came to habitat protection, and vibrant coral gardens, sponge beds, rocky reefs, and other critical habitat areas are now protected from the Beaufort Sea in Arctic Alaska to Southern California, and many of those processes I participated in by creating reports, press releases, op-eds, videos and other tools to promote habitat protection. The last place still largely unprotected from bottom trawling is the Gulf of Alaska, and it is of great concern to me that not only are there areas of fragile corals and sponges that are under threat, but that fishery managers now appear to be ignoring best available science and their legal obligations to protect and enhance the habitat that ocean species rely on. Considering the enormous global impacts facing our oceans, and the rapid changes happening in Alaska, it is critical to me that all

best science be brought to bear to ensure EFH areas, including long-lived deep-sea corals and sponges, are protected to support resilient ocean ecosystems. These ecosystems support the whales, other marine mammals, seabirds, fish, and other species that I deeply care about. They form a core part of why I moved to Alaska , why I am here today, and why I plan to remain here for the rest of my life.

I declare under penalty of perjury that the foregoing declaration is true and correct.

Executed on: February 20, 2025

By: 
James Karnik

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

OCEANA, INC.,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Case No. 3:24-cv-00180-SLG
)	
NATIONAL MARINE FISHERIES SERVICE <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	
)	

DECLARATION OF SEAN BOILY

I, Sean Boily, hereby declare as follows:

1. I currently live in Juneau, Alaska, where I established my home and professional practice as an architect in 2003. From 1994 through 2003 I lived in Anchorage, Alaska. From 1987 through 1993 I was a college student, out of state in the winters and living/commercial fishing in Homer, Alaska, in the summers. I was in a fishery directly impacted by Exxon’s 1989 oil spill in Prince William Sound, which was a turning point for me – the fishery was clearly declining after that, so I choose another career path. I maintained my Alaska residency through this time. From 1978 through 1987 I lived with my parents and attended school in Homer, Alaska. Prior to 1978 I lived with my parents in other Alaskan cities including Talkeetna, Chugach, and Eagle River.
2. I am a current member of Oceana and became a member in 2019. I rely on Oceana to represent my interests in protection of the North Pacific Ocean / the marine environment.
3. My personal and professional background and connection to the Gulf of

Alaska, Bering Sea, Aleutian Islands, and the North Pacific Ocean is from a lifetime of commercial and subsistence fishing, sportfishing, working, recreating, and raising a family on these waters and in places directly influenced by these waters.

4. I grew up along the Gulf of Alaska, on Kachemak Bay, where my parents and I lived and participated heavily in both commercial fisheries and subsistence harvest of salmon, bottom fish, crab, shrimp, and clams. Our livelihood was tied directly to fisheries and subsistence in Kachemak Bay, lower Cook Inlet, the Aleutians, and the Gulf of Alaska, and indirectly to the fisheries that built our Alaskan coastal community economies. My father was a part time commercial fisherman and part time General Contractor, my mother worked in local fish processors when she was younger and retired as a nonprofit healthcare administrator, and I commercial fished in the summers through high school and college and thereby paid for my education as an architect. I no longer commercial fish but I have friends, family, and clients who fish commercially and I support the sustainable harvest of these resources.

5. I did not take from fisheries and leave maritime Alaska: From a childhood spent exploring the beaches of Kachemak Bay I had developed a keen interest in marine life and our human relationship to it, which has enriched my work in Alaska as an architect. Since I returned to Alaska to apply my education and licensure, I established my practice in Juneau and have worked almost exclusively on projects in maritime communities and in their economies and culture. I have been part of the development of marine research facilities in Kodiak, restoration of historic cultural structures in the

Aleutian and Pribilof Islands, and most recently my firm designed and oversaw the construction of the new University of Alaska terrestrial sciences laboratory in Auke Bay, Alaska.

6. My family recreation is sailing/boating. This gets us out on the water throughout much of the Alexander Archipelago for weeks at a time in the summer months. During these trips we also conduct subsistence fish harvesting and enjoy watching marine wildlife, including humpback whales, Steller sea lions, seals, and various seabirds. As a family we subsistence fish for salmon, halibut, cod, rockfish, crab, and shrimp, and enjoy the ability to fill our freezer with these healthy foods every year. We use rod and reel, crab and shrimp pots, and cast nets in inner coastal waters.

7. I have been a recreational scuba diver in Alaska for over 30 years and appreciate the stunning beauty and life-rich cold-water submarine environment in a way most people never experience. When I was younger, I would dive for scallops and Shinkle oysters in bays and coves around the mouth of Cook Inlet, with dives for boat repairs and maintenance also. On dives I would occasionally interact face to face with marine mammals such as sea lions and harbor seals curious about what I was doing in their waters – a breathtaking experience. In recent years I have been diving in the more protected waters of Southeast Alaska for king crab, and most recently snorkeling with my teenage son on the outer coast for abalone near Sitka.

8. I believe the success of our subsistence and sport fishing efforts is notably influenced by what is going on out in the Gulf of Alaska in terms of species availability

and health. While I am not a fisheries scientist, diminishing salmon returns and scarcity of halibut, rockfish, shrimp, crab, and other bottom dwellers has been increasingly noted by me in the past 20 years. Why is this? We don't have more people here in Southeast Alaska putting pressure on fisheries – our population has been static or declining. There are just fewer fish and crustaceans to be found. I intuitively attribute this to the combination of changing environmental conditions due to ocean warming (we know this is well documented) and the increased pressure of offshore fisheries on fish stocks that are thereby made vulnerable. There must be a correlation. I do not compartmentalize Southeast Alaska or other regions of the Gulf of Alaska as isolated areas – they are all one and interrelated. The baby king crab we find in the bellies of halibut in Cook Inlet are part of the king crab life cycle in other parts of the Gulf of Alaska and the Bering Sea for example. Salmon is another example: they spend part of their lifecycle out in the Gulf of Alaska where they are caught as bycatch in ocean fisheries and affected by both climate and fishery-induced changes to their habitat. This affects how many are able to return to their natal streams, including those that drain into Southeast Alaska inside waters, to spawn.

9. To give examples of our current maritime activities: In the summer of 2024 my family and I utilized our boat to travel from Juneau south to the maritime communities of Petersburg, Wrangell, Ketchikan, then back north to Thorne Bay, Myers Chuck, Kasaan, Coffman Cove, Rocky Bay, Kake, Baranof Warm Springs, Tenakee Springs, and back to Juneau. In 2023 our travels took us from Juneau west to Hoonah,

Gustavus, Elfin Cove, Pelican, Tenakee Springs, and then out to Sitka. In 2022 we traveled to Craig, Edna Bay, Port Protection, Rocky Pass, and north to Angoon. In our travels we subsistence harvested rockfish, halibut, black cod (sablefish), Pacific skate, Dungeness crab, Coho and Pink salmon. On the outer coast near Sitka, we had the opportunity to snorkel for pink abalone and rock scallops and gather a variety of edible seaweeds. We have purchased oysters directly out of the rearing pens from remote farmers in Rocky Bay off Clarence Strait, and up in Bridget Cove north of Juneau. And on back in time, year by year, to the time I was active in the commercial fishing in the 1990's – in every season a portion of our lives is on the Pacific. Each community we have visited and all places between are dependent on the health and stability of the greater Gulf of Alaska environment.

10. This summer, 2025, we plan to once again travel out to Sitka and to further explore the outer coast up around Salisbury Sound, Cross Sound, and back into Icy Strait. In recent years we have paired this adventure with our current work: I am an architect and planner who serves projects in these communities. My wife is a University Professor who through the Cooperative Extension Service brings education programming to each community in the form of classes focused on food preservation and entrepreneurship, health, and community sustainability. Our high school-age son and college-age daughter join us for parts of these trips, expanding their own knowledge of the world and the maritime environment.

11. As a youth in Homer in the 70s and 80s I was able to see devastation

caused by poorly managed commercial fisheries. I saw a correlation between the activities of a single large shrimp trawler operating in the area and the sharp decline of local fisheries across the board – one consequence appeared to be the elimination of the king and tanner crab fishery in Kachemak Bay over the period of about 10 years. The trawling was done with bottom trawls that dug into the seabed and wreaked havoc on a broad spectrum of sea life. I know this because on the sorting tables at the local processing plant my mother worked at in that timeframe. I saw not just the retained target shrimp but all kinds of marine life, “trash fish” as they called it. Sorters were pulling rocks, large barnacles, and coral clusters out of the catch, and sometimes even prehistoric archaeological artifacts like stone spear points. And that was just what was brought back to town and not discarded at sea. The rest of the bycatch was dumped off the dock at the end of the day, by the ton.

12. It is important for me to share our rich marine environment and participate in subsistence harvests with my wife and children. These food harvests are both a health and economic benefit we have in living and embracing a maritime lifestyle here in Alaska. It also gives a real sense of food security to us given we live in a place where our commercial food chain can so easily be disrupted by economics, politics, or natural disasters. Being able to harvest our own food from the sea here in Alaska is essential to me and my family. It builds our self-sufficiency, expands our knowledge of our environment, builds our self-awareness, and affirms our place and purpose in the world. For me it imbues the spirit of being an Alaskan, and a living being on our planet.

13. I have every intention of remaining in Alaska, living in a coastal community, and being a part of building our local economies. As do my children. A healthy Gulf of Alaska/Bering Sea/Aleutian Islands/North Pacific Ocean ecosystem is a fundamental part of that life choice. The salmon, halibut, rockfish, skate, black cod (sablefish), crab, shrimp, scallops, and abalone that my family and I use are all dependent on healthy benthic habitats, as are the marine mammals and birds that we enjoy seeing. My interests in these marine species are adversely affected by decisions that fail to protect their habitat and allow indiscriminate trawling, including in sensitive benthic habitats.

14. My primary concerns with trawling, both bottom and midwater, are that it is a largely indiscriminate method of fishing that causes physical damage to the benthic environment, threatens overfishing of both target and bycatch species, and results in massive amounts of wasted biomass. I worry that trawling, especially in areas that provide essential habitat for a variety of fish species, or that are sensitive to damage because they are home to fragile benthic species like corals, is not controlled or monitored well offshore, including in the Gulf of Alaska, in the current global and national fisheries environment, as there is so much pressure on the ocean to give people a cheap source of protein, and to hide our errors and waste. Authorizing trawling in Alaska's federal waters without first knowing the extent of damage to the fisheries and the habitats and the extent to which all areas of the North Pacific are affected is irresponsible. We live in a world where we collectively know better, know to approach

fishery management with more care and precaution. I expect fishery managers to not ignore their legal obligations to manage our fisheries, including essential fish habitats, sustainably. They should not ignore past cause and effect findings that have shown the often-permanent negative effects of trawling on sensitive benthic habitats. The National Marine Fisheries Service's decision to allow indiscriminate trawling in the Gulf of Alaska and elsewhere undermines my interests in the long-term health of the ocean, including species that my family and I depend on.

15. The destruction of lower Cook Inlet by overfishing is something I witnessed as a youth, which in part shaped my path in life, away from that specific area and away from commercial fisheries. To this day subsistence fishing is more difficult and thereby more expensive there – many of the fisheries are closed because the stocks are either protected, depleted, or have completely disappeared. The cost of accessing areas that are still open for fishing – using bigger boats that can go further out for longer times – is beyond what many younger and aging locals can afford or do. This is adversely changing the local cultures and ethos of the place. I know my own children will likely never see the rich abundance of sea life, both along the shoreline and in the deeper ocean, that I did as a youth in Alaska, just 40 years ago. This is very concerning to me that they will not have the opportunities I had, but also that our world is a lesser place because of our inability to restrain ourselves as a species. Without protections now we are leaving our future generations a wasteland, which I fear will ultimately not be survivable.

16. I am concerned that the negative impact of indiscriminate fishing like trawling is compounded by the documented and projected effects of global/ocean warming on all marine species. As a society, we do not know what these effects fully mean yet. I have read about ocean acidification and how it is impacting both natural stocks of shellfish and mariculture enterprises. I have also learned that rising temperatures are directly affecting salmon runs – quantity of some species diminished such as King salmon, the size and health of species diminished in Coho, Sockeye, King, and Pink salmon. I fear gigantic Kenai River Reds and record-breaking King salmon are things of the past. In some Alaska river systems there are virtually no salmon returns any more. My firm is involved with developing hatchery water “chillers” for facilities on river systems in Oregon, Idaho, and Washington because the inland water temperatures there are too high for successful salmon egg germination and fry survival in early development at the hatchery sites. While immediately successful, that is just not a long-term sustainable strategy for ensuring a sustainable salmon future in the Pacific Northwest. The same applies in my mind to protecting essential fish habitats in Alaska. While we strive to understand the effects of global warming, I believe it is critical to take precautionary management measures to preserve the benthic habitat so many marine species depend on by leaving that habitat alone. I worry we may have just one shot at preserving fragile ocean habitats like coral gardens and sponge beds and the species that depend on them. Once these habitats are damaged, they may not recover, and their ability to support species—including species I depend on—and this critical marine

ecosystem will be adversely affected. I saw this happen in Kachemak Bay where the crab and shrimp stocks have not recovered to this day. We cannot afford to make mistakes like these because we did not put the effort into learning about them or put appropriate protective measures in place.

17. What has caught my attention is the correlation between what happened with trawling where I grew up on Cook Inlet and what looks like is happening out in the Gulf of Alaska. Trawling up the bottom indiscriminately and dumping bycatch is destructive and not sustainable. The Gulf of Alaska is a fragile and finite resource upon which all adjacent ecosystems depend, as does the future of fisheries in Alaska. I am concerned that, if we do not protect essential fish habitat by limiting trawling in fragile benthic habitats, the same things will happen in the Gulf of Alaska that happened in Cook Inlet. Populations of fish species and crabs that my family and I depend on will collapse and subsistence fishing will become more difficult. For me, that change would impact much more than what it means to me and my family members to be Alaskans: it will have a disastrous effect on all communities dependent on Gulf of Alaska and our ability to have thriving economies based in part on sustainably harvested marine resources. Without that what else do we have?

I declare under penalty of perjury that the foregoing declaration is true and correct.

Executed on: FEB. 18, 2025

By: _____


Sean Boily

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

OCEANA, INC.,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Case No. 3:24-cv-00180-SLG
)	
NATIONAL MARINE FISHERIES SERVICE <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	
)	

DECLARATION OF MAX LEE MITCHELL

I, Max Lee Mitchell, hereby declare as follows:

1. I have been a resident of Homer, Alaska, for the last 46 years.
2. I am an active member of Oceana and have been for the last 3 years. I rely on Oceana to keep me apprised of the health of the oceans and global efforts to help preserve and keep our oceans healthy.
3. I am a volunteer with the Prince William Sound Regional Citizen's Advisory Council and work on the Port Operations and Vessel Traffic System Committee.
4. I have spent most of my life working on the water, having worked as a commercial fisherman for over 21 years and then 19 years working on tugs in Prince William Sound where we did tanker escorts and dockings and also managed oil spill barges stationed across the Sound. My work in the fisheries has encompassed working coastal waters from SE Alaska up to the Northern Gulf of Alaska, Prince William Sound,

Cook Inlet, the Bering Sea and the Aleutian Islands. Over the years, I have fished herring, salmon, halibut, black cod (also called sablefish), king crab, tanner crab and opilio crab. I have also conducted charters doing seismic research in the Chukchi Sea, bottom research around Kodiak Island and birding and bear charters in the Aleutians and along the Katmai Coast. The last few years, I have been working with Oregon State University on a 5-year study of LeConte Glacier in SE Alaska.

5. My fishing now is limited to sport and subsistence fishing in Kachemak Bay during the summer months. I fish for salmon and Pacific cod. But as I look back through the years and see how all of the fish stocks have diminished, it causes me great concern for the future. I have seen reduction in fishing quotas and smaller stocks in some salmon fishing areas. The average size of halibut has diminished considerably. Herring stocks are much smaller and some areas no longer even have a herring fishery.

6. I have a deep and abiding love for the ocean and can't conceive of living away from it. I always enjoy being out on the water. For me, it's a meditation of sorts and I find great solace out there. I also enjoy viewing all of the marine mammals, especially whales. I was deeply saddened to learn that 15 Orcas were killed by draggers last year. I've also seen pictures of whales, mostly humpbacks, who have been injured and killed by vessel strikes in Alaska waters.

7. As long as I am able, I plan to continue to spend as much time as possible on the water in the coastal waters around Cook Inlet and Kodiak. I will continue to do salmon subsistence fishing for the dinner table and may also continue to do scientific

charters whenever possible, mainly in Southeast Alaska and the Alaska Peninsula.

8. As I have spent more and more time on the waters and have learned about the habitat of many aquatic species, I have grown to appreciate how incredibly diverse and special the oceans are. I have also seen how fragile they are. I have seen a sea bottom littered with lost fishing gear in the Gulf and I have encountered untold miles of lost longlines in the Aleutians and the Bering Sea. Virtually every Aleutian Island is littered with plastics of all types, but the trawl nets are the most prolific. Their presence on the beaches is a very depressing experience. When conducting sea bottom surveys around Kodiak in 2022, comparing trawled areas to non-trawled areas, it was easy for me to see the difference: the trawled areas appeared devoid of any marine growth such as sponges or corals. Those areas also lacked any appreciable growth of kelp or sea floor vegetation. It was easy to tell where the draggers had operated when compared to areas off limits to draggers. Knowing that there is such damage caused to sea life and the ocean bottom by these trawl nets makes me think that there must be something done to reduce their impact. If we don't proactively protect the benthic habitats from trawling in the Gulf of Alaska, I fear we will not only lose long-lived species like corals and sponges, but also the habitats they provide for fish and crustaceans, thus destroying or undermining the health of the entire marine ecosystem. If the federal fisheries managers do not take such steps, I would be deeply saddened to know that areas of the Gulf would not be able to sustain the habitat for sablefish, crab, Pacific cod and other species that I enjoy catching.

9. Bottom trawling is such a destructive process. It leaves a desolate bottom

and is killing everything in its path. It's the worst of all fisheries. I understand even the pelagic trawls can touch the bottom and result in damage.

10. As the oceans warm and the food chains within them change, I have learned that many marine species are experiencing massive die-offs and the whole ecology of the North Pacific Ocean is in danger and changing rapidly. While working in Prince William Sound, I saw firsthand the massive die-offs of murrelets in 2014-2016 due to the warmer waters pushing their food source too deep. I worry that the fisheries managers are not taking these changes into account when making decisions about whether to protect essential fish habitats or authorize trawling in those habitats. I worry that their decisions will accelerate worsening ocean conditions, including in the Gulf of Alaska. Unless the fisheries managers focus more on protecting the ecology and less on the financial interests, we, including I, will lose even more.

I declare under penalty of perjury under the laws of the United States of America that the foregoing declaration is true and correct.

Executed on: Feb 19, 2025

By: Max Mitchell
Max Mitchell