No. 14-35928

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED COOK INLET DRIFT ASSOCIATION
AND COOK INLET FISHERMEN'S FUND,
Plaintiffs-Appellants,

v.

NATIONAL MARINE FISHERIES SERVICE, ET AL.,
Defendants-Appellees,

and

STATE OF ALASKA,
Intervenor-Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

RESPONSE BRIEF FOR THE FEDERAL APPELLEES

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GLOSSARY

APA	Administrative Procedure Act
Br.	Appellants' Opening Brief
EA	Environmental Assessment
EIS	Environmental Impact Statement
EEZ	Exclusive Economic Zone
ER	Excerpts of Record
FMP	Fishery Management Plan
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
SER	Supplemental Excerpts of Record
UCIDA	Plaintiffs-Appellants, United Cook Inlet Drift Association and Cook Inlet Fishermen's Fund

STATEMENT OF JURISDICTION

Plaintiffs-Appellants, United Cook Inlet Drift Association and Cook Inlet Fishermen's Fund (collectively referred to herein as "UCIDA"), invoked district court jurisdiction under 28 U.S.C. § 1331; 16 U.S.C. §§ 1855(f), 1861(d); and 5 U.S.C. §§ 701-706. Excerpts of Record ("ER") 77. The district court entered final judgment in favor of defendants on September 8, 2014. ER 1. UCIDA timely filed a notice of appeal on November 4, 2014. ER 44; Fed. R. App. P. 4(a)(1)(B). This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

UCIDA appeals from a district court judgment upholding the National Marine Fisheries Service's ("NMFS's") approval and promulgation of implementing regulations for Amendment 12 to the "*Fishery Management Plan for Salmon Fisheries in the EEZ Off Alaska*" ("Salmon FMP"). This amendment was developed and recommended by the North Pacific Fishery Management Council ("Council") and approved by NMFS under the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act"), 16 U.S.C. § 1801 *et seq.* UCIDA's appeal presents the following issues:

1. Was it permissible for NMFS to interpret the Magnuson Act as conferring discretion on the Council and NMFS to modify the Salmon FMP to remove an area

within Cook Inlet from Federal management under the Salmon FMP, thereby deferring management of this area to the State of Alaska?

2. Was NMFS's approval of Amendment 12 and its implementing regulations arbitrary and capricious?

3. Did NMFS violate the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.,* by failing to supplement the NEPA analysis or by failing to take a hard look at the potential for unregulated fishing in Cook Inlet under Amendment 12?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in pages 2 to 21 of the addendum to UCIDA's brief.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

UCIDA brought this action to challenge NMFS's approval of, and promulgation of implementing regulations for, Amendment 12 to the Salmon FMP. The Salmon FMP includes within its scope a vast area of the U.S. exclusive economic zone ("EEZ") off the coast of Alaska. The EEZ (sometimes referred to as "Federal waters") encompasses waters seaward of the boundary of U.S. coastal States (generally, from 3 to 200 nautical miles). 16 U.S.C. § 1802(11). Since the Salmon FMP was first developed in 1979, its management area has had two parts – the East Area and the West Area, with the boundary at Cape Suckling. For reasons not

directly relevant here, commercial fishing is managed differently in the East and West Areas. This case relates to the West Area. Amendment 12 to the Salmon FMP maintains a long-standing prohibition on all commercial fishing in the West Area. ER 237, 895. The Amendment excludes from the Salmon FMP's management area three discrete geographical areas of EEZ waters, located adjacent to Cook Inlet, False Pass, and Prince William Sound, where net salmon fishing historically occurred. ER 237-254, 863-64, 871-74; 50 C.F.R. § 679.2 (defining the "*Salmon Management Area*" under the authority of the Salmon FMP). Since statehood in 1959, Alaska has continuously managed salmon fishing within these three areas of EEZ waters and in the adjacent State waters (waters within three nautical miles of the coast). The practical effect of Amendment 12 is to maintain State management of these areas. As the Council and NMFS understood, under authority recognized in 16 U.S.C. § 1856(a)(3)(A), Amendment 12 has the effect of deferring management of fisheries in the three excluded areas to the State. ER 250, 342-43.

At issue here is one of the excluded areas: the Upper Cook Inlet, north of a specified latitude at Anchor Point (referred to herein as the "Cook Inlet EEZ Area"). Plaintiffs are two associations that represent interests of Cook Inlet commercial net fishermen and seafood processors. ER 70-71. UCIDA is dissatisfied with the State's management of salmon fisheries and apparently believes that commercial-fishing interests in Cook Inlet would be economically benefitted if the Cook Inlet EEZ Area were managed under the Federal Salmon FMP.

UCIDA filed a two-count complaint alleging that NMFS's approval of Amendment 12 and promulgation of implementing regulations violated the Magnuson Act and NEPA. ER94-98. The State of Alaska intervened in the case as a defendant. On cross-motions for summary judgment and based on its review of the administrative record, the district court entered judgment in favor of NMFS.

B. Statutory Background

1. Magnuson-Stevens Fishery Conservation and Management Act

Through the Magnuson Act, Congress delegated to the Secretary of Commerce, acting through NMFS, broad authority to manage and conserve fisheries in the EEZ. The Magnuson Act establishes eight regional fishery management councils, composed of fisheries experts selected by NMFS and State fishery officials designated by the governors of the member States. *See* 16 U.S.C. § 1852. The relevant council here is the North Pacific Fishery Management Council. *See* 16 U.S.C. § 1852(a)(1)(G). One of the Council's functions is to prepare and submit to NMFS for approval an FMP and amendments to such plan "for each fishery under its authority that requires conservation and management." 16 U.S.C. § 1852(h)(1).

The Act defines "'fishery'" as

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

(B) any fishing for such stocks.

16 U.S.C. § 1802(13). In addition, the Council proposes and submits to NMFS regulations that it deems "necessary or appropriate" to carry out such plans or plan amendments. *Id.*, § 1853(c).

NMFS reviews all Council-developed FMPs, plan amendments, and proposed regulations to determine if they are consistent with the Magnuson Act (including its National Standards), the relevant plan, and other applicable law. *See* 16 U.S.C. §§ 1853, 1854(a)-(b). The ten National Standards are listed in 16 U.S.C. § 1851(a). Congress directed NMFS to establish advisory guidelines (which do not have the force and effect of law) for the National Standards to assist in developing and reviewing FMPs. 16 U.S.C. § 1851(b). National Standard guidelines established by NMFS are set forth at 50 C.F.R. §§ 600.305-355.

NMFS may only approve, disapprove, or partially approve an FMP or plan amendment submitted by the Council. 16 U.S.C. § 1854(a)(3). Through notice-and-comment rulemaking, NMFS promulgates final regulations implementing approved plans. The Magnuson Act provides numerous opportunities for public comment and input during the Council's development of plans and amendments, and during NMFS's review of submitted plans and amendments and promulgation of implementing regulations. *See* 16 U.S.C. § 1854(a)-(b). The Act permits judicial review of regulations promulgated by the Secretary under the Act, to the extent authorized by, and in accordance with, the Administrative Procedure Act ("APA"), 5

U.S.C. § 706(2)(A)-(D). *See* 16 U.S.C. § 1855(f). The Act does not authorize judicial review of actions taken by the Council.

The Magnuson Act provides that it is not to "be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries." 16 U.S.C. § 1856(a)(1). An FMP does not ordinarily manage fisheries within State waters (generally, waters within three nautical miles of a State's coast). Only in limited circumstances, does the Magnuson Act allow NMFS to regulate fisheries in State waters. *See* 16 U.S.C. § 1856(b).

Under the Magnuson Act, the United States claims fishery management authority over fish, and all Continental Shelf resources, within the EEZ. *See* 16 U.S.C. § 1811(a). Coastal States may also regulate fishing within the EEZ in certain situations. For example, any State may regulate a vessel operating in a fishery in the EEZ if the fishing vessel is registered under the law of that State and there is no FMP for the fishery. 16 U.S.C. § 1856(a)(3)(A)(i). In this brief, this circumstance is referred to as "deferral." Another circumstance where a State may regulate vessels in the EEZ occurs when a Federal FMP for the fishery in which the vessel is operating "delegates management of the fishery to a State and the State's laws and regulations are consistent with such [Plan]." This circumstance is referred to in this brief as "delegation." 16 U.S.C. § 1856(a)(3)(B).

Although deferral and delegation are most relevant here, the Act also recognizes other circumstances where a State may regulate fishing vessels outside its

boundaries. Any State may regulate vessels registered under the law of that State when "the State's laws and regulations are consistent with the fishery management plan and applicable Federal fishing regulations for the fishery in which the vessel is operating." 16 U.S.C. § 1856(a)(3)(A)(ii). Under 16 U.S.C. § 1856(a)(3)(C), the State of Alaska may regulate both state-registered vessels and vessels not registered under Alaska law when the vessels are operating in a fishery in the EEZ for which there was no FMP in place on August 1, 1996, and the Secretary and Council find that the State has a legitimate interest in conserving and managing that fishery.

2. National Environmental Policy Act

NEPA requires Federal agencies to prepare an environmental impact statement ("EIS") for "major Federal actions significantly affecting" the environment. 42 U.S.C. § 4332(2)(C). An agency may prepare an environmental assessment ("EA"), a brief and concise document containing sufficient evidence and analysis for the agency to determine whether to prepare an EIS or to issue a Finding of No Significant Impact. 40 C.F.R. §§ 1501.4(b), 1508.9(a)(1), 1508.13. NEPA imposes only procedural requirements and does not require agencies to reach a particular outcome or to elevate environmental impacts over other concerns. *E.g., Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756-57 (2004); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989).

C. Factual Background

1. History of State Management of Salmon Fisheries off the Coast of Alaska

There is a lengthy history related to management of salmon fisheries off the coast of Alaska, including conventions and treaties that pre- and post-date Alaskan statehood. One constant, however, is that since statehood in 1959, Alaska has continuously managed the commercial fisheries that occur in both Federal and State waters of Cook Inlet.

In 1952, the United States, Canada, and Japan signed an International Convention for the High Seas Fisheries. Congress enacted the North Pacific Fisheries Act of 1954 to implement the Convention ("1954 Act"). *See* Pub. L. No. 579, 68 Stat. 698 (formerly codified at 16 U.S.C. §§ 1021-1035). Pursuant to the Convention, the 1954 Act, and implementing regulations promulgated by NMFS, commercial salmon fishing was prohibited in a western area off the coast of Alaska (west of Cape Suckling), with the exception of the three historic net-fishing areas to which Amendment 12 pertains. ER 168-69, 321-22; 44 Fed. Reg. 33250-51 (June 8, 1979). NMFS's regulations under the 1954 Act allowed net fishing in those areas under State management and in conformity with State regulations. *See* 35 Fed. Reg. 7070 (May 5, 1970); 50 C.F.R. § 210.1 (1971); ER 168-69, 321.

In 1976, Congress enacted the Fishery Conservation and Management Act (the precursor to the Magnuson Act). Pursuant to that Act, the Council developed, and in

1979 NMFS approved, a Salmon FMP that covered much of the EEZ off the coast of Alaska. *See* 44 Fed. Reg. at 33250; ER 229, 321, 328. In the West Area, management of the salmon fisheries tracked regulations under the 1954 Act: Commercial salmon fishing was prohibited with the exception of the three historic net-fishing areas which the State continued to manage. ER 123, 321; 77 Fed. Reg. 21716, 21717 (Apr. 11, 2012); 44 Fed. Reg. at 33250-51, 33267.

Over time, the 1979 Salmon FMP was modified through several amendments and in 1990, was comprehensively revised and reorganized. ER 114-73, 321-22. The 1990 FMP expanded the West Area's geographic scope to include EEZ waters west of 175 degrees east longitude (ER 121, 229), but otherwise made no material substantive changes to management in the West Area. The 1990 FMP retained the general prohibition on commercial salmon fishing in the West Area with the exception of EEZ waters within the three historic net-fishing areas, and the State continued to regulate commercial salmon fisheries in these areas consistent with the 1954 Act regulations.[1] ER 123.

[1] The 1979 and 1990 FMP focused primarily on troll fishing in the East Area. ER120. In the East Area – which is not at issue in this case – net fishing has been prohibited since 1952. The FMP authorizes commercial troll fishing in the East Area; the troll fishery operates in both State and Federal waters. ER 124, 321-22, 330. Since 1990, the Salmon FMP has delegated management of the commercial troll and sport fisheries in the East Area to the State to manage consistent with State and Federal laws. ER 322, 335-36. For the East Area, the Salmon FMP provides, *inter alia,* a nexus for implementing the Pacific Salmon Treaty, a bilateral treaty between the

Cont.

In 1992, Congress repealed the 1954 Act and enacted the North Pacific Anadromous Stocks Act of 1992 ("Stocks Act") to implement the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, which replaced the 1952 Convention. *See* Pub. L. No. 102-567, 106 Stat. 4309; Pub. L. No. 102-587, 106 Stat. 5098 (codified at 16 U.S.C. §§ 5001-5012). The new Convention and the Stocks Act included only the high seas, *i.e.*, waters beyond the 200-mile limit of the EEZ, and thus did not address Federal regulation within the EEZ. *See* 16 U.S.C. §§ 5002(5), 5009. In 1995, NMFS repealed the 1954 Act regulations (50 C.F.R. § 210.1) because they no longer had a statutory basis. *See* 60 Fed. Reg. 39772 (Aug. 2, 1995). The Salmon FMP was not revised to reflect this change. The State continued to manage the three historic net fisheries in Federal and State waters.

2. Process leading to approval of Amendment 12 and Final Rule

In 2010, the Council began a comprehensive review of the Salmon FMP to consider, among other things, changes in international law and Federal law affecting Alaska salmon that were not reflected in the 1990 FMP. ER 9, 176, 322. During deliberations on Amendment 12, the Council recognized that there was ambiguity with respect to management authority for the three historic net fisheries because of the withdrawal of the 1954 Act regulations. ER 178. One of the goals of

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United States and Canada, and for consultation under the Endangered Species Act. ER 339.

Amendment 12 was to clarify management authority in the three historic net fisheries.[2] *Id.* After extensive study and opportunities for public input, the Council voted unanimously in 2011 to recommend Amendment 12 to the Salmon FMP. ER 237.

NMFS evaluated Amendment 12 to determine its consistency with the Magnuson Act, including the ten National Standards, and other applicable law and to make a determination whether to disapprove, approve, or partially approve Amendment 12. In April 2012, NMFS published in the *Federal Register* notices soliciting comments on Amendment 12 and a proposed rule to implement Amendment 12. 77 Fed. Reg. 19605 (Apr. 2, 2012); 77 Fed. Reg. 21716 (Apr. 11, 2012); ER 846-55. NMFS advised the public that, in deciding to approve Amendment 12, it would consider comments submitted to the agency by the June 1, 2012, deadline. 77 Fed. Reg. at 19609; ER 855.

As part of the evaluation process, the Council and NMFS prepared an EA pursuant to NEPA. Although not required, a draft EA was circulated for public comment at the Council's October 2011 and December 2011 meetings, while the Council was still considering Amendment 12. A draft EA was again circulated for public comment during NMFS's review of the Amendment and proposed rule. *See* 77

[2] The Council's review of the FMP also considered the current Magnuson Act. Among other things, Congress's 2007 reauthorization of the Act had added a suite of new requirements for FMPs. *See* Pub. L. No. 109-479 § 104, 120 Stat. 3575 (2007).

Fed. Reg. at 19606; 77 Fed. Reg. at 21716; ER 846, 852. The situation in Cook Inlet and management concerns related to Cook Inlet fisheries were among the primary issues discussed and thoroughly considered by the Council during development of the Amendment and by NMFS during its review of the Amendment and its notice-and-comment rulemaking.[3] ER 179, 197, 239-53.

In June 2012, NMFS issued a final EA that examines and compares four alternatives and evaluates the impacts of each alternative. ER 306-549. Based on the information from the EA, NMFS made a finding on June 25, 2012, that the preferred alternative (Amendment 12 and the proposed rule) would not significantly impact the quality of the environment, and therefore no EIS needed to be prepared. ER301-304.

On June 29, 2012, NMFS's Regional Administrator approved Amendment 12 to the Salmon FMP. On December 21, 2012, NMFS published a Final Rule in the *Federal Register* that explained, *inter alia*, that the Amendment is consistent with the Magnuson Act and with the Act's National Standards and guidelines. The Final Rule implements Amendment 12 by excluding from the "*Salmon Management Area*" (*i.e.,* the EEZ waters off Alaska covered under the Salmon FMP), three specified geographic

[3] There was no opposition to removing EEZ waters adjacent to Prince William Sound or False Pass from the FMP and removal of those two areas is not directly at issue here. However, management of those areas might be affected if UCIDA's interpretation of the Magnuson Act were adopted by the Court. Amendment 12 also removes the sport (recreational) fishery in the redefined West Area from the FMP, thereby deferring to State management of this fishery for the entirety of EEZ waters west of Cape Suckling. ER 237. UCIDA has not challenged that removal.

areas, including the Cook Inlet EEZ Area that comprise the EEZ waters within the three historic net-fishing areas managed by the State since 1959. 50 C.F.R. § 679.2 (italics in original); ER 254.

3. Rationale for Amendment 12

Salmon are anadromous fish, meaning their life cycle involves a freshwater rearing period followed by migration to the ocean and, after a period of ocean feeding, adults migrate back to natal freshwater to spawn. The Council and NMFS determined that harvest of salmon in the West Area, including the Cook Inlet EEZ Area, is best managed by limiting harvest to areas near natal regions and using in-river escapement goals. ER 352. "Escapement is defined as the annual estimated size of the spawning salmon stock in a given river, stream, or watershed." ER 249. Escapement-based management takes into consideration the unique life history of Pacific salmon, and escapement goals maintain spawning levels that provide for maximum surplus production. ER 239. In contrast to Federal management of Cook Inlet salmon fisheries which would only apply to the portion of the fisheries conducted in the EEZ, "[t]he State manages for all sources of fishing mortality, from the commercial fisheries in the EEZ to the in-river subsistence fisheries. The State monitors actual run strength and escapement during the fishery, and utilizes in-season management measures, including fishery closures, to ensure that minimum escapement goals are achieved." ER 243. Salmon fisheries in Upper Cook Inlet are complex, mixed-stock fisheries with many divergent users. ER 248. Mixed stocks

separate into discrete stocks as they migrate toward their rivers of origin, and the State has discouraged the development or expansion of mixed-stock fisheries when the fish that comprise those stocks can be harvested after they have separated into more discrete stocks. *Id.* The Council and NMFS recognized that although it is difficult to manage salmon fisheries in circumstances where the composition, abundance, and productivity of the salmon stocks and species in those fisheries vary substantially, the State has attempted to ensure the conservation of the resources and allocate the harvest of the resources in a manner consistent with the goal of maximizing the benefits. *Id.* While there will always be over- and under-escapements due to the inherent variability of salmon runs and management for a mixture of stocks, with one managing entity throughout the managed area where directed fishing for salmon is allowed, the likelihood of achieving optimum yield is substantially increased. ER 239 ("directed fisheries for salmon are more appropriately managed as a unit in consideration of all fishery removals to meet in-river escapement goals"); ER 243 ("This approach recognizes that the biology of salmon is such that escapement is the point in the species' life history that is the most appropriate for assessing stock status, and that escapement happens in the river systems, not in the EEZ).

The Council and NMFS regarded the State's escapement-based management system with in-season monitoring as a more effective management system for preventing overfishing of Alaska salmon than a quota-based system under a Federal FMP that places rigid numeric limits on the number of fish that may be caught. ER

367-75. As explained above, the State has managed EEZ waters of the historic net-fishing areas since 1959 and has the infrastructure to do so. ER 239. The Council and NMFS determined that the State has adequately managed fisheries in these areas and concluded that prohibiting commercial fishing in the redefined West Area and removing the three historic net-fishing areas from the scope of the FMP best enables management of Alaska salmon stocks and directed fishing for those stocks throughout their range and is consistent with the Magnuson Act.[4] ER 243, 251.

For these and other reasons, the Council concluded, and NMFS agreed, that (1) the State of Alaska is the governmental entity best suited to manage these fisheries; (2) State salmon management of the stocks and fisheries occurring in the net-fishing areas is consistent with the policies and standards of the Magnuson Act; (3) Federal management of salmon fisheries should occur only in those areas and for those fisheries where Federal management is necessary and serves a useful purpose; and (4) Federal management of the Cook Inlet EEZ Area is not necessary, would not serve a useful purpose, and would provide no present or future conservation or management benefits that would justify the costs. ER 237, 239. NMFS explained that the Council and NMFS have discretion under the Magnuson Act to exclude this area of the EEZ from the FMP, with resultant deferral to State regulation. ER 245, 250.

[4] Amendment 12 reflects the Council's salmon management policy, which is to facilitate State salmon management in accordance with the Magnuson Act and applicable Federal law. ER 237.

D. The District Court's Opinion

In its order granting summary judgment in favor of NMFS, the district court upheld NMFS's approval of Amendment 12 and its Final Rule, concluding that NMFS's interpretation of the Magnuson Act was permissible and that the agency's actions were not arbitrary and capricious. ER 13-33. The district court first explained, that to the extent the Magnuson Act is ambiguous, NMFS's interpretation is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). ER 13-16. The court applied traditional tools of statutory construction to examine Magnuson Act §§ 1852(h)(1) and 1856, other sections identified by the parties, and the statute as a whole. ER 16-25. Based on this review, the court concluded that the Magnuson Act was ambiguous as to whether an FMP is required for every fishery that requires conservation and management and that the Act does not expressly forbid NMFS's interpretation that the Council and NMFS have discretion to exclude the Cook Inlet EEZ Area from the Salmon FMP. *Id.* The court further held that NMFS's interpretation did not exceed the permissible bounds of the statute. Accordingly, the court deferred to NMFS's interpretation. ER 25-33. The court also held that NMFS considered relevant factors and reasonably determined that the Amendment was consistent with National Standards. *Id.*

With regard to NEPA, the court held that NMFS took the requisite "hard look" at over-escapement and State management and deferred to NMFS's judgment that supplementing the EA to consider new information was not required. ER 37-39.

The court also found that NMFS, in compliance with NEPA, adequately considered the risks of unregulated fishing in the Cook Inlet EEZ Area and reasonably concluded those risks to be minimal. ER 41.

SUMMARY OF ARGUMENT

UCIDA represents commercial fishing industry interests who are dissatisfied with how the State has managed salmon fishing in Cook Inlet. UCIDA's interests are predominantly, if not exclusively, economic. Although the record indicates otherwise, UCIDA suggests that if fisheries operating in the Cook Inlet EEZ Area were managed under a Federal FMP, this would allow increased commercial fishing and exploitation of salmon.

Contrary to UCIDA's contention, the plain language of Magnuson Act § 1852(h)(1) does not determine the scope of management under an FMP and does not preclude Amendment 12. Nothing in the Magnuson Act forecloses the Council or NMFS from considering existing and complementary regulatory mechanisms under State law when determining the appropriate scope of an FMP or when determining whether under existing conditions, including State conservation and management efforts, a particular fishery or area in which a fishery operates needs Federal management under an FMP. In fact, the statute read as a whole and policies of the Act suggest that Federal management under an FMP is not necessary for all fisheries in the EEZ and that Congress contemplated that States could appropriately regulate fisheries in the EEZ that are not covered by an FMP. NMFS's long-standing

interpretation of the Act is permissible and, to the extent the statute is ambiguous on the issue at hand, NMFS's interpretation must be upheld under *Chevron*.

NMFS adequately considered and addressed concerns related to State management of fisheries. NMFS also provided an adequate and rational explanation, supported by the record, for its finding that Amendment 12 is consistent with National Standards 3 and 7.

UCIDA's NEPA arguments are without merit. Low runs of Chinook and fishing closures in 2012 were not significant new information requiring supplementation of the NEPA analysis. And NMFS took the requisite "hard look" at the possibility of unregulated fishing by vessels not registered with the State.

ARGUMENT

I. Standard of Review

This Court reviews *de novo* a district court's grant of summary judgment, as well as its legal interpretation of a statute. *See Northwest Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007). This Court reviews the agency action under the same standard of review applied by the district court. NMFS's promulgation of a regulation implementing an FMP is reviewed under the APA standard under which an agency action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2); 16 U.S.C. § 1855(f)(1); *Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1116

(9th Cir. 2006). A court's review under the arbitrary-and-capricious standard is narrow; the court cannot substitute its judgment for that of the agency. *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1217 (9th Cir. 2015). In reviewing regulations promulgated under the Magnuson Act, the Court's "only function" is to determine whether NMFS "has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Fishermen's Finest, Inc. v. Locke*, 593 F.3d 886, 894 (9th Cir. 2010) (internal quotation marks omitted); *see also Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir.2008) (*en banc*). The deference accorded to an agency is at its highest where a court is reviewing agency findings and conclusions involving scientific or technical expertise. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014); *Lands Council*, 537 F.3d at 993.

II. NMFS's Approval of Amendment 12 and Final Rule Is Permissible Under the Magnuson Act

UCIDA contends that the Magnuson Act that NMFS's interpretation of the Act as according discretion to the Council and NMFS to remove the Cook Inlet EEZ Area from the FMP, with the effect of deferring to State management, is contrary to law. Judicial review of NMFS's interpretation of the Magnuson Act is governed by *Chevron*. Under step one of the *Chevron* framework, if a statute speaks clearly "to the precise question at issue," a reviewing court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. However, if the statute "is silent or ambiguous with respect to the specific issue," under *Chevron* step two a court

must sustain the agency's interpretation of the statute if it is "based on a permissible construction" of the Act. *Id.*, at 843. Hence the questions here are (1) whether the Magnuson Act unambiguously forbids the NMFS's interpretation, and, if not, (2) whether the interpretation, for other reasons, is impermissible. *See Barnhart v. Walton*, 535 U.S. 212, 217-18 (2002); s*ee also United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). Here both questions must be answered in the negative.

As explained below, NMFS's interpretation of the Magnuson Act is in accord with the statute's language, structure, and purpose. NMFS's interpretation was developed through notice-and-comment rulemaking under authority delegated by Congress, and reflects a permissible interpretation of the Act when applying traditional canons of statutory construction. *See* 16 U.S.C. § 1854(a)-(b); 77 Fed. Reg. 75570, 75578 (Dec. 22, 2012); ER 245. Thus, to the extent there is ambiguity on the precise issue at hand, NMFS's interpretation must be given controlling weight under *Chevron*. *See Mead*, 533 U.S. at 227 (agency interpretation expressed in exercise of delegated rulemaking authority is binding in the courts unless procedurally defective, arbitrary and capricious in substance, or manifestly contrary to statute).

A. NMFS's Interpretation Is Not, as UCIDA Contends, Foreclosed by the Plain Language of § 1852(h)(1)

Contrary to UCIDA's contention, Magnuson Act § 1852(h)(1) does not unambiguously and by its plain language speak to the precise issue at hand, *i.e.*, whether the Council and NMFS have discretion to exclude the Cook Inlet EEZ Area

from the scope of the Salmon FMP and to thereby defer to State management of this area. *See* ER 245, 2550. Section 1852(h)(1) states:

> Each Council shall, in accordance with the provisions of this chapter –
>
> (1) for each fishery under its authority that requires conservation and management, prepare and submit to the Secretary (A) a fishery management plan, and (B) amendments to each such plan that are necessary from time to time (and promptly whenever changes in conservation and management measures in another fishery substantially affect the fishery for which such plan was developed);

16 U.S.C. § 1852(h)(1).

Here, the Council prepared an FMP for salmon fisheries in EEZ waters off the coast of Alaska that prohibits commercial fishing west of the longitude for Cape Suckling. Section 1852(h)(1) does not say, either expressly or by implication, that a Council FMP must cover the entire area of the EEZ where a fishery is found or contain management measures for the maximum feasible area of the EEZ in question. Indeed, the provision says nothing about the geographic scope of plans at all, or about whether a Council or NMFS may appropriately decide that some areas of the EEZ are better off administered by the adjoining State. NMFS's interpretation does not, as UCIDA contends, fail at *Chevron* step one.

Looking to other Magnuson Act provisions, it is clear that Congress contemplated that States could appropriately regulate fishing in the EEZ. For example, Congress provided that:

> A State may regulate a fishing vessel outside the boundaries of the State in the following circumstances: (A) The fishing vessel is registered under

> the law of that State, and (i) there is no fishery management plan or other applicable Federal fishing regulations for the fishery in which the vessel is operating * * *.

16 U.S.C. § 1856(a)(3)(A). Given that Congress expressly authorized States to regulate State-registered vessels in the EEZ in the absence of Federal regulation, the Magnuson Act cannot be read as plainly prohibiting deferral to State regulation in Amendment 12.

The Council and NMFS cited § 1856(a)(3)(A) when explaining that removal of the Cook Inlet EEZ Area from the Salmon FMP would preserve the State's authority to continue management of the salmon fisheries in this area. ER 250, 342-43. UCIDA indirectly attempts to sweep aside § 1856(a)(3)(A) by suggesting that the Act only contemplates or authorizes State management in the EEZ through a delegation of authority under an FMP. *See* Br. 39-40 (citing 16 U.S.C. § 1856(a)(3)(B)). UCIDA suggests (Br. 39 n.15) that deferral to State regulation is implicitly precluded under the *expressio unius est exclusio alterius* principle that "express mention of one thing impliedly excludes things not mentioned." However, that principle does not apply here because the statute expressly recognizes – indeed, in the same section – State authority to regulate fishing vessels in the EEZ *both in the absence of an FMP* or other applicable Federal fishing regulations *and* when an FMP delegates authority to the State.[5] 16

[5] In the lower court, UCIDA suggested that § 1856(a)(3)(A) grants authority only to regulate fishing vessels and not to manage fisheries. However, in the EEZ, salmon fishing is conducted from fishing vessels. The authority to regulate fishing vessels

Cont.

U.S.C. § 1856(a)(3)(A)-(B). UCIDA's interpretation of the Act is untenable because it ignores the former (*i.e.*, subsection (a)(3)(A)) and effectively renders it superfluous.

Furthermore, the *expressio unius* principle "is a product of logic and common sense, * * * and is properly applied only when the result to which its application leads is itself logical and sensible." *Alcaraz v. Block*, 746 F.2d 593, 607 (9th Cir. 1984) (internal quotation marks omitted). Common sense does not support requiring the Cook Inlet EEZ Area to be managed under an FMP where the Council and NMFS have determined that Federal conservation and management under an FMP is unnecessary and that State management adequately conserves and manages the fisheries consistent with Magnuson Act policies and standards. Indeed, for the purpose of conserving the relevant fisheries, the Council and NMFS determined that State regulation is actually preferable to Federal management under an FMP.[6] ER 239, 348-54; *supra* at 13-15.

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necessarily confers authority to regulate fishing activities in which the vessels are engaged. *See* 16 U.S.C. § 1802(13) (defining "fishery" in part as "any fishing for such stock"). Furthermore, the State's delegation authority is also described as a "circumstance[]" where a "State may regulate a fishing vessel outside the boundaries of the State." *Id.*, § 1856(a)(3)(B).

[6] UCIDA suggests (Br. 41) that NMFS's interpretation produces an absurd result at odds with the conservaton and management purposes of the Act because fishing in the Cook Inlet EEZ Area by vessels not registered in Alaska would go unregulated. However, the fact that Congress recognized State authority under § 1865(a)(3)(A) undercuts UCIDA's argument. Moreover, the question whether State management under deferral authority adequately conserves and manages a particular fishery is predominantly factual, not legal. *See* ER 244-45; *infra* at 41-43, 50-53.

UCIDA incorrectly asserts that the Council and NMFS may not, under § 1852(h)(1) consider whether *Federal* conservation and management is required. UCIDA notes that the term "'conservation and management,'" 16 U.S.C. § 1802(5), is not by definition limited to *Federal* conservation and management and that Congress did not insert the modifier "Federal" before "conservation and management" in § 1852(h)(1). Contrary to UCIDA's suggestion (Br. 38), use of the modifier "Federal" in a few other places in the Act does not signify that Congress intended, through the absence of the word "Federal" in § 1852(h)(1), to eliminate the Council's and the agency's discretion. While 16 U.S.C. § 1855(k)(1), which UCIDA cites (Br. 38), refers to "Federal" FMPs related to specific New England and Hawaii multispecies groundfish fisheries, numerous other sections (including § 1852(h)(1)), refer to FMPs without the "Federal" modifier and those references are reasonably understood to mean Federal FMPs. *E.g.*, 16 U.S.C. §§ 1801(b)(4), 1802(27), 1856(a)(3)(A)-(a)(3)(C). After all, through the Magnuson Act, Congress delegated authority to NMFS, *i.e.*, a Federal agency, with regard to fisheries in the EEZ, *i.e.*, Federal waters. So the absence of the modifier "Federal" in § 1852(h)(1) cannot demonstrate an unambiguous congressional intent on the precise issue here and cannot carry the weight of UCIDA's argument.

UCIDA contends that fisheries in the Cook Inlet EEZ Area require "conservation and management" under the Magnuson Act as evidenced by the fact that fisheries in this area are currently, and have been for many decades, managed by

the State under State rules and regulations designed to conserve and manage fisheries. Br. 35-36. Thus, the implication of UCIDA's reading of the Act is that an FMP must include an area of the EEZ within an FMP when, and simply because, a State is adequately conserving and managing fisheries in that area.[7] UCIDA's interpretation of § 1852(h)(1) admits of no exception. However, Section 1856(a)(3)(A) addresses the precise situation that UCIDA's rigid interpretation of the Act would not allow to occur – State management in Federal (EEZ) waters to conserve and manage fisheries that are not regulated under an FMP. Moreover, as a matter of common sense, UCIDA's interpretation has it backwards: The fact that the State has and continues to adequately manage salmon fisheries in the area is a sound reason to avoid adding a layer of Federal regulation, not a reason to require it.

[7] UCIDA suggests that the Council and NMFS also found that the portion of Cook Inlet fisheries extending into EEZ waters require *Federal* regulations for conservation and management, citing a sentence in an introductory section of the 1990 Salmon FMP which states that "'existing and future salmon fisheries create a situation demanding the Federal participation contemplated by the Magnuson Act.'" Br. 35 (quoting ER 121). But that statement pertained to fishing prohibitions in the FMP and the management of fisheries in the East Area, not to the three historic net-fishing areas in the West Area. The Plan described these net fisheries as "incidental fisher[ies]" and stated that although they "technically extend into the EEZ," they are "conducted and managed by the State of Alaska as nearshore fisheries." ER 123. More importantly, in 2011-2012, the Council and NMFS determined that fisheries conducted in the Cook Inlet EEZ Area do not require Federal regulation. ER 239-40. This is the relevant determination.

B. NMFS's Interpretation Is Reasonable and Consistent with the Act's Purposes and Policies

Under well-settled principles, an interpretation of a word or phrase depends on reading the whole of the statutory text, considering the purpose and context of the statute. *E.g.*, *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). As explained above, NMFS's interpretation of the Magnuson Act is consistent with § 1852(h)(1), as well as the State regulation provisions under § 1856(a).[8] In addition, NMFS's interpretation is consistent with other provisions that address FMPs and confer discretion on the Council and NMFS to determine whether Federal conservation and management is necessary. *E.g.* 16 U.S.C. § 1801(b)(5) (establishing Councils "to exercise sound judgment in the stewardship of fishery resources" taking into account State's social

[8] UCIDA asserts that NMFS must ensure that Councils prepare an FMP for every stock of fish that requires conservation and management. Br. 35 (citing *Flaherty v. Bryson*, 850 F. Supp.2d 38, 54-55 (D.D.C. 2012)). *Flaherty* is inapposite. Unlike this case, in which the Council and NMFS provided well-reasoned consideration of, and explanation for, Amendment 12, in *Flaherty* the relevant Council and NMFS had failed to articulate a reasonable explanation for why River Herring was not included as a stock within the managed fishery under an FMP. *Id.* at 55. The *Flaherty* court did *not* conclude that the Magnuson Act required inclusion of River Herring in the FMP simply because this stock was being managed by coastal States or that the Council lacked legal authority under the statute to exclude the stock. UCIDA also cites 16 U.S.C. § 1854(c)(1)(A), and asserts (Br. 35 n.12) that NMFS is required to prepare its own FMP for any fishery that requires conservation and management. However, § 1854(c)(1)(A) provides that NMFS "may" develop its own FMP in certain instances, but imposes no requirement to do so. *See Sea Hawk Seafoods, Inc. v. Locke*, 568 F.3d 757, 766 (9th Cir. 2009); *Anglers Conservation Network v. Pritzker*, 70 F.Supp.3d 427, 440 (D.D.C. 2014).

and economic needs); *id.* § 1851(a) (National Standards); *id.*, §1853 (FMPs are to contain measures "necessary and appropriate" for conservation and management). Reading these provisions together and considering their purposes and policies, it is plain that Congress tasked the Councils with making the specific determination as to whether a fishery, especially a fishery that is already managed by another entity, requires Federal conservation and management under an FMP. In determining the scope of an FMP or whether to exert Federal management authority over a fishery, a Council must necessarily consider whether national interests in a fishery are sufficiently safeguarded under existing conditions. *See* 16 U.S.C. § 1851(a)(1) (National Standards for national fishery management program). And, existing conditions can reasonably be understood to include existing management measures. If a Council determines that existing management measures adequately protect such interests, there may be no need for additional Federal measures.

NMFS's interpretation of the Act makes considerable sense in terms of the Act's basic objectives and policies and Congress's purposes and intentions with respect to FMPs as reflected in the National Standards and guidelines, particularly Standards 3 and 7. 16 U.S.C. § 1851(a); 50 C.F.R. §§ 600.305-355. National Standard 3 provides that "[t]o the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination." 16 U.S.C. § 1851(a)(3). As explained in the National Standards guidelines, the purpose of this standard "is to induce a

comprehensive approach to fishery management. The geographic scope of the fishery, for planning purposes, should cover the entire range of the stock(s) of fish, and not be overly constrained by political boundaries." 50 C.F.R. § 600.320(b). NMFS has defined "'management unit'" as a "fishery or portion of a fishery identified in an FMP as relevant to the FMP's management objectives," and the "choice of a management unit depends on the focus of the FMP's objectives and may be organized around biological, *geographic*, economic, technical, social, or ecological perspectives." *Id.* § 600.320(d) (emphasis added). NMFS has further provided guidance that a "less-than-comprehensive management unit may be justified if, for example, complementary management exists or is planned for a separate geographic area." *Id.* § 600.320(e)(2). As explained in the Final Rule for Amendment 12, the National Standard 3 guidelines recognize that Councils and NMFS have "discretion to determine the appropriate management unit for a stock or stock complex under an FMP" and thus clearly "contemplate that the selected management unit may not encompass all Federal waters if, such as here, complementary management exists for a separate geographic area." ER 243-44.

NMFS's interpretation is also reasonable in light of National Standard 7, which provides: "Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication." 16 U.S.C. § 1851(a)(7). NMFS guidelines state that "[t]he principle that not every fishery needs regulation is implicit in this standard. The [Magnuson Act] requires Councils to prepare FMPs only for

overfished fisheries and for other fisheries where regulation would serve some useful purpose and where the present or future benefits of regulation would justify the costs." 50 C.F.R. § 600.340(b). Further, the Council and NMFS should consider, among other things, "[t]he extent to which the fishery could be or is already adequately managed by states" and "[t]he costs associated with an FMP, balanced against the benefits." *Id.* § 600.340(b)(2)(iii), (vii).

UCIDA argues that National Standards 3 and 7 only provide guidance related to what measures to include within an FMP, and have no relevance to the statutory interpretation question whether the Council and NMFS can exclude a geographical area of the EEZ from an FMP. Br. 48, 52. To the contrary, the issue here came to NMFS in the form of a plan amendment, and in deciding whether to approve or disapprove the amendment, NMFS is required to consider whether the Amendment is consistent with the National Standards. 16 U.S.C. §§ 1801(b)(4), 1851(a), 1854(a)(1). Furthermore, here, delineating the FMP's geographic scope is no different from narrowly tailoring conservation and management measures to ensure non-duplicative management and minimization of cost. Indeed, the overriding objective of National Standard 7 is to ensure that Federal management serves a useful purpose, and the Act does not differentiate whether this purpose is fulfilled through tailored management measures or geographical definitions. When developing the National Standard guidelines, NMFS stressed that not every fishery needs Federal management and emphasized "responsibility to ensure that FMPs are developed only for those fisheries

where the need for Federal regulation can be clearly demonstrated." 47 Fed. Reg. 27228, 27234 (June 23, 1982).

UCIDA also asserts that the guidance on the National Standards cannot create a regulatory exception to an express statutory obligation. Br. 53. NMFS does not claim it can. However, the Standards and guidance, other Magnuson Act provisions, and a reading of the Act as a whole are all relevant to whether § 1852(h)(1) is properly construed as imposing the statutory obligation that UCIDA claims it does. When the Act is read in light of all these factors, it is apparent that NMFS reasonably exercised discretion conferred by the statute.

Finally, NMFS's interpretation is consistent with the overall conservation purpose of the Act and the unique nature of salmon management. The overriding conservation goal for any fishery is to ensure that enough adults reproduce so that their offspring maintain a future surplus of fish. ER 368-70. The Council and NMFS reasonably determined that the most beneficial conservation and management strategy involves allowing the State to manage the mixed-stock salmon fisheries with its escapement-based system and in-season monitoring to confirm actual run strength and the ability to adjust quickly to fishing pressure to ensure that escapement goals are met if pre-season forecasts of run strength prove inaccurate. *See* ER 351; *supra* at 13-15.

C. UCIDA's Reliance on 1976 Legislative History Is Misplaced

UCIDA suggests that a discussion on the Senate floor in 1976 bolsters its position by showing that Congress "carefully debated, and ultimately rejected, invitations to turn over the entirety of salmon fishery management in the [EEZ] to the State" of Alaska.[9] Br. 30. The 1976 legislative history on which UCIDA relies is irrelevant to analysis of the statutory provisions at issue here. Congress did not add the phrase "conservation and management." to § 1852(h)(1) until 1983.[10] Pub. L. No. 97-453, § 5(4), 96 Stat. 2481 (1983). The purpose of this amendment was "to clarify that the function of the Councils is not to prepare a Fishery Management Plan (FMP) for each and every fishery within their geographical areas of authority." H.R. Conf. Rep. No. 97-982, 97th Cong., 2d Sess., 18, *reprinted in* 1982 U.S.C.C.A.N. 4364, 4367. Moreover, Congress did not add 16 U.S.C. § 1856(a)(3) until 1996. Pub. L. No. 104-

[9] UCIDA relies on a discussion among several Senators and points to a proposed amendment from Senator Stevens that UCIDA asserts would have allowed the State of Alaska to manage all salmon fisheries in the EEZ. Br. 30. However, immediately upon the reading of the proposed amendment, Senator Stevens accepted a substitute amendment replacing it. *See* UCIDA's Addendum 31. That parliamentary maneuver means that the proposal on which UCIDA relies was not voted on by Congress. Furthermore, statements by individual legislators on the Senate floor are generally considered unreliable expressions of congressional intent. *See, e.g.*, *Garcia v. United States,* 469 U.S. 70, 76-78 (1984).

[10] The 1976 enactment stated that each Council shall prepare a fishery management plan "with respect to each fishery within its geographical area of authority." Pub. L. No. 94–265, § 302, 90 Stat 331 (1976). As amended in 1983, 16 U.S.C. § 1852(h)(1) provides that each Council shall prepare a fishery management plan "with respect to each fishery within its geographical area of authority that requires conservation and management." *Id.*

297, § 112, 110 Stat. 3595, 3596 (1996). As explained above, subsection (a)(3)(A) clarifies congressional intent that absent an FMP covering a fishery, a State has authority to regulate State-registered fishing vessels engaged in the fishery in the EEZ.

And, as a factual matter, the snippet of legislative history on which UCIDA relies is irrelevant. The Council did not propose, and NMFS did not approve, turning over the entirety of salmon fishery management in the EEZ to the State of Alaska. Rather, the Salmon FMP covers all EEZ waters off the coast of Alaska except for three discrete, relatively-nearshore areas.

D. Another Factor Supporting Deference Is that NMFS's Interpretation Is Long-standing

There are numerous examples where NMFS has approved withdrawing Federal management in the EEZ under an FMP with resultant deferral to State management. These provide further reason to defer to NMFS's interpretation. *See Barnhart v. Walton*, 535 U.S. 212, 219–20 (2002) (applying *Chevron* deference because statute does not unambiguously forbid the agency's regulation, the agency's construction is permissible, and particular deference is ordinarily accorded where agency interpretation is long-standing).

There are several examples of withdrawal in Alaska EEZ fisheries, including NMFS's withdrawal in 1987 of an FMP for Tanner crab, which included the Gulf of Alaska Tanner crab fishery. 52 Fed. Reg. 17577 (May 11, 1987). This withdrawal occurred primarily in light of difficulties coordinating timely management with the

State of Alaska. *Id.* NMFS explained that while there would no longer be Federal management, the State would fulfill the management role through "reversion to State management." *Id.* Ultimately the Council proposed, and NMFS approved, a new FMP that manages some crab fisheries in the Bering Sea and Aleutian Islands, but it did not include Gulf of Alaska Tanner crab in this FMP. 54 Fed. Reg. 29080 (July 11, 1989). Thereafter, NMFS removed 12 crab species from the Bering Sea and Aleutian Islands Crab FMP, explaining that Federal management of the species is not necessary and that the State would manage these stocks under "deferred management authority." 73 Fed. Reg. 14766 (Mar. 19, 2008). Likewise, in 2011, the Gulf of Mexico Fishery Management Council voted to repeal its stone crab FMP because this crab species was already managed predominantly by the State of Florida, and Federal management was considered unnecessary and duplicative. *See* 76 Fed. Reg. 43250 (July 20, 2011); 76 Fed. Reg. 59064 (Sept. 23, 2011).[11] While these examples have factual differences, the legal mechanism is the same – removal from Federal management under an FMP and deferral to management by the respective State.

[11] *See also* 63 Fed. Reg. 11167 (Mar. 6, 1998) (removal of black and blue rockfish);76 Fed. Reg. 65673, 65674 (Oct. 24, 2011); 76 Fed. Reg. 81851 (Dec. 29, 2011) (removal of Columbia River spring Chinook salmon); 76 Fed. Reg. 59102 (Sept. 23, 2011); 76 Fed. Reg. 75488 (Dec. 2, 2011) (removal of lobster species); 76 Fed. Reg. 74757 (Dec. 1, 2011; 77 Fed. Reg. 15916 (Mar. 16, 2012) (removal of snapper-group species FMP); 76 Fed. Reg. 68711 (Nov. 7, 2011); 76 Fed. Reg. 82414 (Dec. 30, 2011) (removal of conch species).

For all the reasons explained above, UCIDA is wrong in contending that NMFS's interpretation of the Magnuson Act is contrary to the statute's plain language and foreclosed under *Chevron* step one. To the extent the Act is silent or ambiguous on the relevant issue, NMFS's reasonable interpretation is entitled to controlling weight under *Chevron* step two.

III. NMFS's Approval of Amendment 12 and Final Rule Was Reasonable and Based on Consideration of Relevant Factors

UCIDA argues (Br. 42-56) that even if NMFS has discretion under the statute to remove the Cook Inlet EEZ Area from the Salmon FMP, NMFS's approval of Amendment 12 and its implementing regulations was arbitrary and capricious because NMFS allegedly failed to consider relevant factors and unreasonably relied on National Standards 3 and 7. UCIDA's contentions are meritless.

A. NMFS Addressed the Secretary's Determination of a 2012 Fishery Resource Disaster and the Underlying Concerns About State Management

UCIDA contends that NMFS failed to consider a September 2012 determination by the Secretary of Commerce (ER 65-66), pursuant to 16 U.S.C. § 1861a, of a commercial-fishery failure for the Cook Inlet fishery due to a fishery resource disaster. ER 65. The Secretary's determination provides a basis for Congress to appropriate disaster relief funding to assist affected communities and States. ER 65; 16 U.S.C. § 1861a(a)(2). The Secretary can make a disaster determination regardless of whether the affected fishery occurs in Federal or State

waters and regardless of whether the fishery is managed under a Federal FMP. *Id.* UCIDA's criticism of NMFS for not more specifically discussing the 2012 fishery resource disaster as it relates to State management is particularly unfounded given that UCIDA raised this issue over two months after the public-comment period had expired and after NMFS had approved Amendment 12. *See Lands Council*, 629 F.3d at 1076 (issues not raised in administrative proceeding are waived); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1059 (D.C. Dir. 2001) (agency not required to consider issues and evidence in comments untimely filed); ER 265-66. Regardless, UCIDA's argument is meritless.

By way of background, the returns of Chinook salmon in 2012 experienced steep declines. To pass Chinook salmon to the river and to provide sufficient spawning escapement, the State closed the Cook Inlet east side setnet fishery and restricted the Northern District setnet fishery during a time when much of the setnet harvest generally occurs. The setnet fishery occurs entirely in State waters (because the nets are attached to shore). The Cook Inlet drift gillnet fishery, a commercial net fishery that uses vessels and operates partly in EEZ waters, was unaffected by the State conservation measures and by the Secretary's fishery resource disaster determination. ER 294, 297.

UCIDA's argument is misleading in both its terminology and its substance and overstates the relevance and relationship of the 2012 fishery resource disaster determination to approval of Amendment 12. UCIDA asserts that NMFS "formally

declar[ed] a fishery *management disaster"* under the Magnuson Act. Br. 45 (emphasis added); *see also* Br. 55. However, the phrase "fishery management disaster" nowhere appears in the Magnuson Act or in the Secretary's determination. ER 64-65. The Magnuson Act provides that the Secretary of Commerce may determine there is a "commercial fishery failure due to a fishery *resource* disaster as a result of (A) natural causes; (B) man-made causes *beyond the control of fishery managers* * * *; or (C) undetermined causes." 16 U.S.C. §1861a(a)(1). Thus, under the Act's plain language, the Secretary could not lawfully have determined that there was a fishery resource disaster if the disaster resulted from a management failure. *Id.* And, in fact, the Secretary's September 2012 letter did not declare a "fishery management failure" (Br. 45), nor did it find that the 2012 fishery resource disaster was due to State mismanagement. The Secretary's determination states that "[e]xact causes for recent poor Chinook salmon returns are unknown, but may involve a variety of factors outside the control of fishery managers to mitigate, including unfavorable ocean conditions, freshwater environmental factors, disease, or other factors." ER 65. The Secretary did not find that there was a link between the State's management and one year of low Chinook abundance.

UCIDA stresses that the 2012 fishery resource disaster occurred "*while under the State's management.*" Br. 45 (emphasis in original). Contrary to UCIDA's implication, that truism does not demonstrate that poor runs of Chinook were caused by State mismanagement. Nor does this truism prove that the fishery resource disaster

affecting a fishery in State waters would have been averted if the EEZ waters of Cook Inlet were under Federal management in an FMP. ER 253, 266, 296-97, 409. The drift-gillnet fishery, the only commercial fishery that operates in EEZ waters, was also under the State's management and it was not affected by the Secretary's determination or by the State conservation measures. ER 289. In short, the relevance of the 2012 fishery resource disaster determination to Amendment 12 is not as "obvious" as UCIDA assumes (Br. 45-46).

In response to a timely comment as to whether Federal loan and grant funds would be available for investment in the Cook Inlet salmon industry, the Final Rule for Amendment 12 provides:

> The geographic scope of the FMP has no effect on the availability of Federal loans and grant funds for Cook Inlet salmon participants, habitat restoration, or assistance in case of a commercial fishery failure due to a natural resource disaster. Therefore, the Council did not need to consider the availability of funding in the areas identified by the commenter when it determined the appropriate scope of the FMP.
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> * * *
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> In the summer of 2012, Alaska State Governor Sean Parnell requested that the Secretary determine a commercial fishery failure due to a fishery resource disaster for the Chinook salmon fisheries on the Yukon and Kuskokwim rivers and in Cook Inlet. The Secretary's review of this request, and the supporting information provided by the State, and the Secretary's subsequent determination were irrespective of a Federal fishery management plan.

ER 253. UCIDA may disagree with NMFS's conclusion that the fishery resource disaster determination and approval of Amendment 12 are two distinct, unrelated

actions, but the fact remains that NMFS did not fail to consider or address the 2012 fishery resource disaster determination.

More importantly, NMFS thoroughly addressed the substantive concerns about over-escapement (*e.g.*, ER 240-41, 446-59) and State management (*e.g.*, ER 246-51, 390-93) that underlie UCIDA's contention that the 2012 fishery resource disaster is relevant to NMFS's approval of Amendment 12. UCIDA suggests that the poor returns of Chinook in 2012 and the related fishery resource disaster determination reflect poorly on State management and call into question the appropriateness of deferring management to the State. Br. 44-46, 47. NMFS addressed claims of adverse State management and concluded that "state salmon management does not cause low salmon returns." ER 251. NMFS explained that salmon returns are cyclical and salmon abundance fluctuates dramatically from year to year. ER 246, 251. The EA for Amendment 12 and the Secretarial determination of a fishery resource disaster are consistent in finding that likely factors causing low returns in some years include unfavorable ocean conditions, freshwater environmental factors, and disease, which are factors beyond the control of fish managers. ER 65, 251.

NMFS also thoroughly explained that the State's escapement-based management and escapement goals prevent overfishing and ensure sustained yield over the long term. ER 241-42, 367-75; *supra* at 13-15. NMFS found that the State's salmon management program is based on scientifically defensible escapement goals and in-season management measures to prevent overfishing. ER 249. In addition,

the EA provides detailed information on the status and trends of Cook Inlet salmon and a comprehensive discussion of how the State manages the Cook Inlet commercial and sport salmon fisheries that occur in the EEZ. ER 446-59. Ultimately NMFS concluded that "the State is adequately managing salmon stocks consistent with the policies and standards" of the Magnuson Act. ER 251. As these determinations pertain to scientific and technical issues within NMFS's expertise, they should be accorded the highest degree of deference. *E.g.*, *San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 994.

For all these reasons, UCIDA's argument that NMFS failed to consider a relevant issue is meritless.

B. NMFS's Explanation as to How Amendment 12 Is Consistent with National Standards 3 and 7 Is Reasonable and Supported by the Record

NMFS's application of National Standards 3 and 7 was reasonable and was not, as UCIDA contends, arbitrary and capricious. According to UCIDA (Br. 47), the Council and NMFS claimed that these National Standards give the Council "'the authority' to turn over management to the State." Br. 47 (citing ER 245, 251). However, what NMFS actually said is that "[u]nder the Magnuson Act and National Standards 3 and 7, the Council has the authority to develop an FMP that includes a geographic management unit for a fishery that is less than the entire EEZ if the Council can provide a reasonable explanation as to why that management unit is the

appropriate management unit." ER 245. NMFS addressed how Amendment 12 was consistent with National Standards 3 and 7, as it was required to do under § 1854(a) of the Act. NMFS's explanation also demonstrates how these standards strongly counsel in favor of the Amendment's exclusion of the three historic net-fishing areas from the FMP with resultant deferral to the State.

Much of UCIDA's critique of NMFS's explanation of the Amendment's consistency with National Standards 3 and 7 simply echoes UCIDA's statutory-interpretation arguments, which are addressed in Section II.A above and will not be repeated here. As explained below, UCIDA's contention that NMFS misapplied National Standards 3 and 7 and their guidelines is baseless.

1. National Standard 3

As discussed *supra* at 27-28, National Standard 3 provides in relevant part: To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range * * *. 16 U.S.C. § 1851(a)(3). Excluding the Cook Inlet EEZ Area is consistent with National Standard 3 because it facilitates managing fisheries as a comprehensive unit. ER 349. As NMFS explained: "The State manages for all sources of fishing mortality, from the commercial fisheries in the EEZ to the in-river subsistence fisheries. The State monitors actual run strength and escapement during the fishery, and utilizes in-season management measures, including fishery closures, to ensure that minimum escapement goals are achieved." ER 243. Deferring management to the State is also fully consistent with the guidelines because it provides

a comprehensive management approach that is not overly constrained by political boundaries. State management is precisely the type of "complementary management" that can be employed for a "separate geographic area." 50 C.F.R. § 600.320(e)(2).

NMFS's description of the Amendment 12 management approach as allowing management of salmon stocks and directed fishing as "seamlessly as practicable throughout their range" (*e.g.*, 237) does not, as UCIDA argues (Br. 50), mean that NMFS went outside of what National Standard 3 provides. The word "seamless" was used by NMFS simply as an adjective to describe a management unit that would allow for coordinated and smooth management – not fragmented by different, or duplicative regulatory regimes, consistent with National Standard 3. *See* ER 349; 16 U.S.C. § 1851(3). [12]

UCIDA also contends that management under Amendment 12 is not "seamless" because the State has no authority to regulate vessels not registered with the State and no authority to regulate beyond the 200-mile EEZ limit. Br. 50. The possibility of unregulated fishing in the EEZ waters of the net-fishing areas was thoroughly explored by the Council and NMFS (and is further discussed in Section

[12] UCIDA's assertion (Br. 49) that NMFS's understanding of, and guidance for, National Standard 3 "is flatly contradicted by the legislative history" is baseless. UCIDA relies on Senate Committee Report language encouraging collaboration, cooperation, and coordination between Federal and State governments. Br. 49-50. That is exactly what occurred here and the Council, NMFS, and the State of Alaska are united in agreement that Amendment 12 provides non-conflicting, optimal management.

IV.B below). ER 244-45, 354-55. Both the Council and NMFS found that is unlikely to occur and, if it were to occur, Amendment 12 does not foreclose the Council and NMFS from taking necessary action. ER 54-55. More specifically, to fish unregulated in these areas, a vessel would need to ensure that it never entered State waters, and could not hold any Alaskan permits. ER 356. If there was a mechanical failure, or the vessel needed fuel or supplies, it could not enter Alaskan waters without threat of prosecution or seizure. ER 354-55; *infra* at 51-52. Such complications make for an extremely risky business plan. That is why NMFS concluded that "[b]ased on the logistical complications and business risks * * * it is reasonable to expect that salmon fishing occurring in these areas will be by vessels registered with the State and that fishing will be regulated by the State." ER 355. In the Council's and NMFS's experience, the risk of unregulated fishing in these limited areas, thousands of miles from the nearest available non-Alaskan port, does not outweigh the costs of duplicative State and Federal management. *Id.*

UCIDA suggests (Br. 50-51) that the Council and NMFS overlooked an FMP option that delegated, rather than deferred, management authority to the State. This is inaccurate. The EA considered an alternative for dual Federal/State management that would include the Cook Inlet EEZ Area in the FMP and delegate the management of salmon fisheries there to the State. With respect to this alternative, NMFS concluded that dual Federal/State management "is not necessary, would serve no useful purpose, and would be costly and burdensome for managers and

participants." ER 240. Using two other fisheries as examples, NMFS explained that including the historic net-fishing areas within the FMP would not just require establishing dual management goals and objectives, but would also require delegating specific management measures to the State and establishing a process for delineating the roles and respective responsibilities between the two entities. *Id.* Other added burdens could include having to the implement Federal regulations applicable to salmon fishing in the area and addressing "[l]imited access programs, on-board observer coverage [and] mandatory vessel monitoring systems." *Id.* And fishery participants would be required to follow not only the Alaska Board of Fisheries processes, but also the Council process to stay informed on developments in, and changes to, management policies and decisions. *Id.* In short, there are additional administrative and regulatory burdens with delegation and very little, if any, benefit to the resource.

2. National Standard 7

As discussed *supra* at 28-29, National Standard 7 provides: "Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication." 16 U.S.C. § 1851(a)(7). NMFS's National Standard 7 guidelines provide seven general factors that should be considered, among others, in determining whether a fishery requires management through an FMP. 50 C.F.R. § 600.340(b)(2). In Section 2.5.1 of the EA, NMFS compared how each of the proposed alternatives affects these factors. ER 348; s*ee also* ER 242-43 (summarizing each of the seven

factors). Based on this analysis, NMFS concluded that Amendment 12 "minimizes the costs associated with creating Federal management and layering Federal management on top of existing State management and avoids unnecessary duplication with existing State management." ER 242; *see also* ER 353 ("[t]o date, neither the Council nor NMFS [has] identified any benefits of an additional layer of federal management on top of State salmon management for these fisheries"). NMFS also found that the salmon fisheries are adequately managed under the State's escapement-based management. ER 352.

UCIDA contends (Br. 53) that NMFS's application of the guidance for National Standard 7 is arbitrary because NMFS found that deferring management to the State would not change "'*the importance of the fishery to the Nation and regional economy*'". Br. 53-54 (quoting 50 C.F.R. § 600.340 (b)(2)(i) (emphasis added by UCIDA)). To the contrary, NMFS closely examined the economic benefits from this fishery, ER 432, and found it is important to the Nation. ER 242-43. It also found that deferring management to the State (which would allow this fishery to remain open, unlike the remaining West Area) would not change the importance of the fishery to the Nation. ER 243. Nothing in the guidelines precludes NMFS from making this comparison. In fact, it would be difficult to evaluate the "minimization of costs and duplication" without some point of comparison. 16 U.S.C. § 1851(a)(7).

UCIDA also suggests there is an inconsistency between NMFS's conclusion in 2012 that Federal involvement in the Cook Inlet EEZ Area is unnecessary given

adequate State management and a statement in the 1990 FMP. Br. 54. As explained *supra* at 25 n.7, the language that UCIDA cites from the 1990 FMP (ER 121) refers to fishing prohibitions and management of fisheries in the East Area, and has nothing to do with management of the three historic net-fishing areas. As NMFS explained, with respect to the net-fishing areas, the 1990 FMP relied on the 1954 Act and the intervening 1992 Stocks Act raised serious questions as to whether the FMP actually asserted Federal jurisdiction over the net fishing areas. *See supra* at 8-11. Amendment 12 is intended, among other things, to resolve these questions. *Id.* Thus, there is no inconsistency. In any event, management has always been retained by the State (since 1959). Clarifying the scope of the West Area, and, in particular, management of the historic net-fisheries, is not, as UCIDA suggests (Br. 54), an "about face." *See Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1051 n.4 (9th Cir. 2010) ("NMFS's factual findings are at most potentially inconsistent, not directly contradictory. NMFS's action therefore cannot be faulted on plaintiffs' theory that the agency has 'swerved from prior precedent' without explanation.").

Finally, UCIDA lists five items of "evidence" that NMFS supposedly "overlooked" when applying the National Standard 7 guidelines. Br. 55. This laundry-list approach fails to carry UCIDA's burden of demonstrating that NMFS's

action is arbitrary and capricious.[13] The reviewing court's proper role is not to fly-speck an agency decision or to require that an agency provide explanation addressing every detail in the record. *See, e.g.*, *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 605, 621, 630 (9th Cir. 2014). As summarized here, NMFS adequately addressed the issues corresponding to UCIDA's list. (1) The 2012 fishery resource disaster is discussed *supra* at III.A; *infra* at IV.A. (2) In its comments on Amendment 12, UCIDA raised the issue of over-escapement and quoted a *Federal Register* notice in which NMFS designated critical habitat for Cook Inlet beluga whales (ER 570, quoting 76 Fed. Reg. 20180 (Apr. 11, 2011)). NMFS responded to this comment in the Final Rule (ER 247, 251) and thoroughly addressed the issue of over-escapement. ER 240-41, 446-459. (3) Contrary to UCIDA's suggestion, a statement by a State of Alaska attorney that, as a legal matter, the State need not comply with the Magnuson Act is hardly "key" relevant evidence. Most relevant is the Council's and NMFS's finding – based on a thorough examination of the State's salmon management policies, practices, and fishery data and information (*see* ER 390-441) – that salmon fisheries are in fact managed by the State in a manner that is consistent with the policies and standards of the Magnuson Act. ER237. (4) In direct contravention of UCIDA's statement that harvest declines were overlooked, the record demonstrates

[13] In a footnote (Br. 55 n.19), UCIDA cursorily asserts that NMFS committed "additional errors in application of the other advisory guidelines," listing three National Standard 7 guideline factors. NMFS thoroughly considered and addressed each of these factors. ER 240-41, 243, 245-46.

that the Council and NMFS analyzed decades worth of salmon fishery harvest data. *See, e.g.*, ER 409-413, 539-49; Supplemental Excerpts of Record ("SER") 1-51 (stocks of concern). In the Final Rule, NMFS responded to comments asserting harvest declines, noting, for example, that in 2011, commercial harvest of salmon ranked as the fourth largest harvest in 20 years and the ex-vessel value was the fifth highest since 1960, and the highest since 1992. ER 246, 248, 251. (5) UCIDA's concern about declines in certain stocks relies in part on a comment regarding the adverse effects of the introduction of northern pike (ER 587-590). The EA examines northern pike control and eradication efforts, ER 492-95, and the Final Rule addresses effects of the northern pike, ER 253. And, through analysis of data and stocks of concern, the Council and NMFS took into consideration declines in certain stocks. *E.g.*, ER 409-13, 445-46, 539-49; SER 1-52.

In sum, NMFS appropriately took into account relevant issues and applied the National Standards. NMFS's approval of Amendment 12 and its implementing regulations was not, as UCIDA claims, arbitrary and capricious.

IV. NMFS Complied with NEPA

UCIDA's NEPA arguments largely reiterate the meritless contentions addressed above that NMFS violated the Magnuson Act by failing to consider adequately the 2012 fishery resource disaster and potential for unregulated fishing. UCIDA's arguments fare no better when repackaged as an alleged NEPA violation.

A. Supplementation of the NEPA Analysis Was Not Required

In June 2012, NMFS issued the final EA and Finding of No Significant Impact and approved Amendment 12. Over two months later, UCIDA submitted a letter to NMFS suggesting that subsequent events, such as the low Chinook returns in 2012 and resultant closures (discussed *supra* at III.A), should be addressed under NEPA. ER 265-67. UCIDA contends (Br. 57) that NMFS violated NEPA by failing to perform supplemental NEPA analysis addressing this new information. Supplementation is not required every time new information comes to light after the NEPA analysis is finalized because "[t]o require otherwise would render agency decisionmaking intractable, always awaiting updated information." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373 (1989). To trigger a duty to supplement, new information must demonstrate that the "remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Marsh*, 490 U.S. at 374; *see also* 40 C.F.R. § 1502.9(c). In other words, the information must present a "'*seriously* different picture of the environmental impact'" from what was considered in the finalized NEPA analysis. *Island Range Chapter of Mont. Wilderness Ass'n v. United States Forest Serv.*, 117 F.3d 1425 (Table), 1997 WL 362161, at * 2 (9th Cir. 1997) (quoting *Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir.1987)) (emphasis in original); *Oregon Natural Resources Council v. Devlin*, 776 F. Supp. 1440, 1449 (D. Or. 1991).

UCIDA fails to demonstrate that the information and concerns outlined in its August 2012 letter – sent after completion of NMFS's Finding of No Significant Impact and approval of Amendment 12 – constituted significant new information in the context of NMFS's decision to approve Amendment 12. As previously explained, NMFS had already taken a hard look at and addressed UCIDA's substantive concerns respecting State management and over-escapement in its NEPA analysis. Indeed, there are entire sections in the EA dedicated to over-escapement analyses and charts, as well as an entire section on State management. ER 446-459. Furthermore, the EA recognized that salmon returns are highly variable and took into account that in some years returns will be low, leading to fishing closures. ER 371. The EA also recognized that the State restricts salmon fisheries to manage for a stock of concern, such as Chinook salmon. ER 445. Given this consideration and discussion, a year of low returns for Chinook salmon in 2012 and the Secretary's related determination of a fishery resource disaster do not present a seriously different picture of environmental consequences from that analyzed in the EA. Supplemental NEPA analysis was not required.[14]

[14] UCIDA criticizes (Br. 58) the district court for deferring to NMFS's judgment that supplementary NEPA analysis was not required (ER 36-37). However, it is well established that a decision not to supplement is essentially a factual dispute and that an agency's decision not to supplement is reviewed under the deferential arbitrary-and-capricious standard. *E.g.*, *Marsh*, 490 U.S. at 376. Furthermore, the district court correctly held that NMFS's consideration and discussion of substantive concerns

Cont.

B. NMFS Took a Hard Look at the Possibility of Unregulated Fishing

The EA for Amendment 12 took the requisite "hard look" at potential impacts from unregulated fishing in the Cook Inlet EEZ Area. Not only did NMFS analyze the risk of unregulated fishing in Cook Inlet under the selected alternative (Alternative Three), it also addressed the issue by examining and comparing alternatives in the EA. For example, Alternative 4 called for removing the entire West Area from the FMP, thereby deferring management of this vast area to the State. ER 346-47. Alternative 4 was not considered a viable option in part because NMFS recognized that the "State's ability to manage the salmon stocks as a unit could be compromised if U.S vessels, that are not registered under the laws of the State, harvest salmon in the West Area."[15] ER 350. The development and examination of Alternative 4, and its comparison with other alternatives, aided examination of the issue of unregulated fishing, among other issues. *See* ER 347 (a key question in the early stages of this project, and in looking at what could happen if the FMP, and its prohibition on commercial fishing in the West Area, were removed from the West Area reaffirmed

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pertaining to State management effectively addressed the underlying concerns related to the fishery resource disaster. ER 32-33.

[15] This was not the only reason that Alternative 4 was not selected. Fishing in the open ocean, where stocks from different regions mix, could impact returns of non-Alaska salmon stocks and would not promote management of salmon stocks as a unit. ER 350. Prohibiting directed commercial salmon fishing in most of the Federal waters in the West Area prevents overfishing, reduces catch of non-Alaska salmon, and allows for harvest to occur near the rivers of origin. ER 245.

why an FMP is necessary and the function of the FMP, to prohibit commercial fishing, is vital for optimal management of the salmon fisheries."); *id.* (primary factors in deciding between alternatives included "understanding the risks of removing areas or fisheries from the FMP").

As explained in the EA and Final Rule, the selected alternative, Alternative 3, presented considerably less risk as compared to Alternative 4: unregulated fishing under Alternative 3 is "unlikely due to the risk and limitations associated with a business plan dependent on fishing relatively small pockets of salmon fishing grounds separated by substantial distance, avoiding entry into state waters under any circumstance, and shedding all state permits and licenses." ER 354. Furthermore, if a vessel not registered in the State of Alaska were to fish for salmon in the Cook Inlet EEZ Area, it could not enter State waters without violating State law and potentially facing aggressive enforcement action and even seizure of the vessel and gear. The State explained that under Alaska Statutes (AS) § 16.05.475, a "person may not employ a fishing vessel in the waters of this state unless it is registered under the laws of the state." AS § 16.04.475(a). The State statute broadly defines "Fishing vessel" and "employ" to bring within the law's ambit any vessel engaged in fishing or aiding or assisting another vessel at sea in performing any activity relating to fishing and proscribes criminal penalties, fines, and forfeiture of vessel and gear. AS §§ 16.05.475(b), 16.05.723, 16.05.195; *see also* Doc. Entry 44 at 20. UCIDA suggests (Br. 60) that the State cannot or will not regulate vessels not registered with the State to

the extent the State says it can. However, the State specified both the legal basis for its enforcement authority under State law and the practical reasons that give the State the ability to effectively preclude vessels not registered with the State from fishing in the Cook Inlet EEZ Area. Admin. Rec. Audio 038-039. Counsel for the State advised the Council that the State had successfully enforced criminal penalties against an unregistered fishing vessel that fished only in the EEZ in violation of State law, but before fishing had come into State waters for fuel and provisions. *Id.*[16]

Moreover, NMFS did not simply rely on the State's assurances of successful enforcement. Rather, NMFS concluded that, because of practical constraints facing a vessel not registered with the State, there was only a "negligible" risk that unregistered vessels would engage in directed salmon fishing in the Cook Inlet EEZ Area. ER 244-45, 355; *supra* at 41-43.[17]

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[16] Citing a 2010 email, UCIDA asserts that the State's fish and wildlife managers "identified unregulated fishing as a 'potentially significant concern,'" Br. 61 (quoting ER 927). But this concern pertained only to "the risk associated with no salmon FMP 3-200 in the west" (*i.e.*, Alternative 4). ER 927. The staff was "comfortable with the risk associated with lifting the FMP only in those areas where the traditional net fisheries occur." *Id.* UCIDA wrongly suggests that the State provided no explanation for this view. Br. 61. A State representative provided ample explanation in testimony before the Council in 2011. Admin Record Audio at 0036-0039.

[17] UCIDA asserts (Br. 59-60) that the EA here is inadequate for the same reason that an EA was held inadequate on a sedimentation issue in *Blue Mountains Biodiversity v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998). However, the actions, issues, and administrative records in the cases are too dissimilar to compare. In *Blue Mountains Biodiversity*, the Court found an EA for a post-fire, timber-salvage project due, *inter alia*, to a "cursory and inconsistent treatment of sedimentation issues." *Id.* at 1213-14.

Cont.

In the unlikely event that fishing for salmon in the EEZ by vessels not regulated by the State occurs, the Council and NMFS could take action. ER 245, 355. As stated in the EA, "[w]hile it is premature to specify the precise action the Council would take in this situation, when faced with a similar situation in the past the Council has immediately closed EEZ waters to fishing, while it works to develop a long-term management solution." ER 355. The EA recognizes that closing the EEZ to stop unregulated fishing could cause disruption and impose costs on all persons utilizing these salmon fishing areas, including the participants in the net fisheries, and removing an emergency closure could take time and prove costly to the historic net fisheries. ER 355. Thus, contrary to UCIDA's assertion (Br. 60), the EA did, in fact, disclose and analyze adverse impacts from closure, as did the Final Rule. ER 244, 355.

NMFS complied with NEPA by taking a hard look at substantive concerns respecting State management, including the potential for fishing by vessels not registered with the State. Because NMFS considered all relevant factors in arriving at its well-reasoned and supported decision to approve Amendment 12, NMFS has met its NEPA obligations.

The Forest Plan at issue acknowledged high risk of sedimentation from road building, yet the EA only revealed that sedimentation from the salvage project was expected to be small compared to that caused by the fire. The Court stated that this was an irrelevant comparison and noted that the EA did not estimate sedimentation from the project's road building and logging. For all those reasons, the EA was deemed inadequate. By contrast, the EA here provided specific, relevant rationales for concluding that there is low risk of unregulated fishing under Amendment 12.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **13,671 words**, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/
ELLEN J. DURKEE

STATEMENT OF RELATED CASES

Counsel is unaware of any related cases in this Court under Ninth Circuit Rule 29-2.6.

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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ELLEN J. DURKEE