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
District Court No. 3:13-cv-00104-TMB
Hon. Timothy M. Burgess, District Judge

ANSWERING BRIEF OF THE STATE OF ALASKA

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INTRODUCTION

This appeal concerns whether a federal agency properly allowed the State of Alaska to continue to manage a salmon fishery that Alaska has managed for more than fifty years. Plaintiffs seek to force the National Marine Fisheries Service (NMFS) to manage the portion of the Cook Inlet commercial salmon fishery that extends into the exclusive economic zone. The State has managed the entire Cook Inlet salmon fishery since Alaska statehood.

Specifically, plaintiffs challenge NMFS's approval of Amendment 12 to the Fishery Management Plan for the Salmon Fisheries in the EEZ Off Alaska. Amendment 12 allows the State to continue managing the entire Cook Inlet commercial salmon fishery by removing it (and a few other salmon fisheries) from the plan. Under the Magnuson-Stevens Fishery Conservation and Management Act, absent a plan for a fishery, a State may regulate in-state vessels in the fishery.

The North Pacific Fishery Management Council, which prepared and adopted Amendment 12, and NMFS, which approved it, both concluded that the State of Alaska was best positioned to manage the entire Cook Inlet commercial salmon fishery. Those agencies also determined that the State's management of the fishery was consistent with the Magnuson-Stevens Act.

All of plaintiffs' arguments challenging NMFS's approval of Amendment 12 are meritless.

STATEMENT OF THE ISSUES

1. Whether the Magnuson-Stevens Act allowed NMFS to approve Amendment 12 to the fishery management plan, which removed and deferred to State management of certain Alaska salmon fisheries.

2. Whether NMFS complied with the Administrative Procedure Act when it approved Amendment 12, removed the Cook Inlet commercial salmon fishery from the fishery management plan, and thereby allowed the State of Alaska to continue to manage the entire fishery, as the State has done since Alaska became a state in 1959.

3. Whether, in connection with NMFS's approval of Amendment 12, NMFS complied with NEPA by taking a hard look at (a) NMFS's 2012 fishery resource disaster declaration for Chinook salmon in Cook Inlet state waters; and (b) the potential for unregulated salmon fishing in Cook Inlet by out-of-state vessels.[1]

Relevant authorities cited in this brief are reproduced in the Addendum.

STATEMENT OF JURISDICTION

The State of Alaska agrees with the jurisdictional statement in plaintiffs' opening brief.

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[1] The State of Alaska will address the first two issues in this brief, and join in and rely on the brief of the Federal defendants concerning the NEPA issues pursuant to Fed. R. App. P. 28(i).

STATEMENT OF THE FACTS

A. Background.

Since Alaska statehood, the State of Alaska has managed the entire Cook Inlet commercial salmon fishery. Plaintiffs filed this case to force NMFS to regulate for the first time the part of the Cook Inlet commercial salmon fishery that extends into the exclusive economic zone. ER 70-73.

The Cook Inlet commercial salmon fishery is one of three historical commercial salmon net fisheries in Alaska that extend into the exclusive economic zone, but are managed by the State. The origin of these fisheries dates to 1952 when the United States, Canada, and Japan created the International Convention for the High Seas Fisheries of the North Pacific Ocean, which generally banned commercial salmon net fishing in the federal waters[2] adjacent to Alaska, but exempted from the ban these three traditional net fisheries. ER 876.

The convention was implemented domestically by the North Pacific Fisheries Act of 1954 (the "1954 Act"). ER 876. Under the 1954 Act, the Federal government issued regulations prohibiting commercial salmon net fishing in the exclusive economic zone adjacent to Alaska except as permitted under state regulations. ER 876.[3] At the time and continuing until the present, the State

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[2] Also called the "exclusive economic zone."

[3] *See also* 35 Fed. Reg. 7070 (May 5, 1970).

permitted and managed three such fisheries: in (1) Cook Inlet, (2) Prince William Sound, and (3) the Alaska Peninsula Area (also known as the False Pass Area).[4]

In 1976, Congress passed the Magnuson–Stevens Act,[5] establishing a national program for the conservation of fishery resources, and providing the Secretary of Commerce with fishery management authority in the exclusive economic zone of the United States.[6] In practice, the Secretary delegates much of her authority under the Act to NMFS (this brief will refer to the Secretary and NMFS interchangeably).[7] Yet, even after passage of the Act, NMFS continued to defer to State management of these three fisheries. ER 876.

B. Overview of the Magnuson-Stevens Act.

In the Magnuson-Stevens Act, Congress established eight regional fishery management councils, comprised of state and federal officials and fisheries experts nominated by state governors and appointed by the Secretary.[8] The principal task of each council is to prepare and submit to the Secretary for approval fishery management plans "for each fishery under its authority that requires conservation

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4 44 Fed. Reg. 33250, 33267 (June 8, 1979).

5 16 U.S.C. §§ 1801–1884.

6 *Yakutat, Inc. v. Gutierrez*, 407 F.3d 1054, 1058 (9th Cir. 2005).

7 *Fishermen's Finest, Inc. v. Locke*, 593 F.3d 886, 889 (9th Cir. 2010).

8 16 U.S.C. § 1852(b).

and management," amendments to plans, and regulations to implement the plans.[9] Relevant to this case, the Act establishes the North Pacific Fishery Management Council with authority over fisheries in the exclusive economic zone of the Arctic Ocean, Bering Sea, and Pacific Ocean.[10] The exclusive economic zone begins three geographical miles from the coast and extends out 200 nautical miles.[11]

The Magnuson-Stevens Act identifies ten National Standards for fishery conservation and management, and requires that plans be consistent with the Standards.[12] Two standards relevant to this case are:

- National Standard 3: "To 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";[13] and
- National Standard 7: "Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication."[14]

The Secretary reviews all council-developed fishery management plans, amendments, and proposed regulations to determine if they are consistent with the National Standards, other provisions of the Act, and other applicable law.[15] For

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9 16 U.S.C. §§ 1801(b)(4), 1852(h)(l), 1853(c).

10 16 U.S.C. § 1852(a)(l)(G).

11 16 U.S.C. § 1802(11); 43 U.S.C. § 1312; Proclamation No. 5030, 48 Fed. Reg. 10,105 (Mar. 10, 1983).

12 16 U.S.C. § 1851(a).

13 16 U.S.C. § 1851(a)(3).

14 16 U.S.C. § 1851(a)(7).

15 16 U.S.C. § 1854(a).

fishery management plans or amendments, the Secretary may only approve, disapprove, or partially approve a council's action.[16] The Secretary may also adopt her own fishery management plans, amendments, and implementing regulations under certain circumstances, including if a council fails after a reasonable period of time to submit to the Secretary a plan for a fishery that requires conservation and management.[17] The Secretary's final regulations implementing plans are subject to judicial review under the APA.[18]

Under the Magnuson-Stevens Act, the United States claims exclusive management authority over all fish in the exclusive economic zone, [19] yet in a section entitled "State jurisdiction," the Act allows States to manage fisheries in the exclusive economic zone in three general situations, if:

> (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; or (ii) 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.
>
> (B) The fishery management plan for the fishery in which the fishing vessel is operating delegates management of the fishery to a State and the State's laws and regulations are consistent with such fishery management plan. …

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16 16 U.S.C. § 1854(a)(3).

17 16 U.S.C. §§ 1854(c) & 1855(d).

18 16 U.S.C. § 1855(f).

19 16 U.S.C. § 1811(a).

> (C) The fishing vessel is not registered under the law of the State of Alaska and is operating in a fishery in the exclusive economic zone off Alaska for which there was no fishery management plan in place on August 1, 1996. . . .[20]

NMFS calls it a "deferral" of management authority when a State manages a fishery in the exclusive economic zone in the absence of a fishery management plan, such as under subsections (A) or (C), and a "delegation" of authority when a plan formally delegates authority to a State under subsection (B). ER 19. That NMFS and a council can decline to include a fishery within a plan, and thereby defer to State management of the fishery, represents NMFS's longstanding interpretation of the Act.[21]

The provisions specifying the management authority of States in the exclusive economic zone were enacted in 1996.[22] As originally enacted, the Act allowed States to regulate all fishing vessels in the exclusive economic zone that were registered in that State.[23]

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[20] 16 U.S.C. §§ 1856(a)(3)(A)-(C). The Act also provides that the jurisdiction and authority of States shall extend to specific areas, including to certain waters adjacent to southeastern Alaska. *Id.* § 1856(a)(2)(C).

[21] *See, e.g.*, 50 C.F.R. §§ 600.320(e)(2) & 600.340(b).

[22] Pub. L. No. 104–297, § 112, 110 Stat. 3559, 3595-96 (1996).

[23] Pub. L. No. 94-265, § 306(a), 90 Stat. 331, 355 (1976).

C. Background of the fishery management plan.

In 1979, after passage of the Magnuson-Stevens Act, the North Pacific Council developed, and NMFS approved, a Fishery Management Plan for the Alaska Salmon Fishery[24] providing for federal regulation of salmon fisheries in the exclusive economic zone off the coast of Alaska.[25] The plan established in the exclusive economic zone a "Salmon Management Area" divided at Cape Suckling into two parts: the East Area and the West Area. ER 869.[26] In the East Area, the plan provided for federal commercial power troll salmon permits in the exclusive economic zone, and adopted other management measures for the sport and commercial troll salmon fisheries that were complementary with existing state regulations for salmon fisheries in state waters. ER 869.

In the West Area, the plan prohibited all commercial salmon fishing except for the three historical commercial salmon net fisheries, as was the case under the 1954 Act regulations. ER 876. The plan noted that those historical "fisheries are technically in the [exclusive economic zone], but are conducted and managed by the State of Alaska as inside fisheries."[27] The plan also recognized that salmon

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[24] Later renamed the "Fishery Management Plan for the Salmon Fisheries in the EEZ Off Alaska." ER 862.

[25] 44 Fed. Reg. 33250.

[26] *See also* 44 Fed. Reg. at 33267.

[27] 44 Fed. Reg. at 33267.

stocks in the West Area are fully utilized by the inshore salmon fisheries. ER 869. Thus, the plan declined to discuss salmon fisheries in the West Area.[28]

In 1990, the North Pacific Council proposed, and NMFS approved, Amendment 3 to the plan. ER 114-73. The amended plan allowed commercial salmon fishing in the East Area, and sport salmon fishing in the entirety of the exclusive economic zone, but delegated regulatory authority over these fisheries to the Alaska Department of Fish & Game and Alaska Board of Fisheries. ER 123, 147.[29] NMFS retained authority to issue federal regulations for these fisheries as necessary to, for example, ensure that federal obligations under the Pacific Salmon Treaty are met. ER 147. The Pacific Salmon Treaty was agreed to in 1985 by the United States and Canada primarily to govern Pacific salmon stocks that originate in the waters of the United States and Canada and which are subject to interception by the other party. ER 149. The treaty governs most of the salmon stocks covered by the plan in the East Area. ER 149.

In the West Area, the amended plan continued to prohibit commercial salmon fishing except for State managed fishing in the three historical commercial salmon net fisheries. ER 123. The plan deemed these historical fisheries as being "provided by other Federal law." ER 123. Specifically, the plan referenced federal

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[28] 44 Fed. Reg. at 33267.

[29] As a general matter, the Department of Fish & Game implements the management policies and directives adopted by the Board of Fisheries. ER 147.

regulations promulgated under the 1954 Act that allowed fishing in these areas to the extent allowed under State regulations. ER 168.

In 1992, Congress repealed the 1954 Act and passed the North Pacific Anadromous Stocks Act of 1992[30] to implement the recently agreed-to Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean. ER 178. As the Convention included only waters of the North Pacific Ocean and its adjacent seas beyond the exclusive economic zone, and given repeal of the 1954 Act, NMFS repealed the 1954 Act regulations.[31] However, the Council and NMFS did not revise the plan to reflect this change in law, and the State continued to manage those three fisheries as it had done since Alaska statehood. ER 178.

In 2010, the Council initiated action to review the plan and propose amendments. ER 176. The Council recognized that the plan was vague on the function of the plan in the three historical commercial salmon net fisheries. ER 178. The plan did not prohibit salmon fishing in those areas, but also did not contain any management goals or objectives for those fisheries or explicitly defer management of those fisheries to the State. ER 178. Instead, the plan simply noted that fishing in those areas was "authorized by other federal law," a statement the Council recognized might no longer be "fully effective" in light of the repeal of the

30 16 U.S.C. §§ 5001-5012.

31 60 Fed. Reg. 39272 (Aug. 2, 1995).

1954 Act. ER 178. One of the goals of the Council's review was to clarify management authority in the West Area. ER 182-84.

D. Amendment 12 to the fishery management plan.

In December 2011, after holding five public meetings and considering public testimony and written and oral public comments at each meeting, and conducting a special open workshop for stakeholders, the Council voted unanimously to adopt Amendment 12 to the plan. ER 237, 240. The first comprehensive revision of the plan since 1990, Amendment 12 reflected the Council's existing salmon management policy: to facilitate the State's salmon management in accordance with the Magnuson-Stevens Act, the Pacific Salmon Treaty, and other applicable federal law. ER 237.

Under this policy, the Council identified six management objectives: (1) prevent overfishing and achieve optimum yield, (2) manage salmon as a unit throughout their range, (3) minimize bycatch and bycatch mortality, (4) maximize economic and social benefits to the Nation over time, (5) protect wild stocks and fully utilize hatchery production, and (6) promote safety. ER 237.

To reflect the Council's policy and objectives, Amendment 12 redefined the Salmon Management Area to remove the Cook Inlet, Prince William Sound, and Alaska Peninsula historical commercial salmon net fisheries. ER 237. By removing these fisheries, Amendment 12 allows the State to continue to manage these

fisheries as has been the case since Alaska statehood. Amendment 12 also removed the sport salmon fishery in the West Area from the plan. ER 237. The amended plan continues to apply to the vast majority of the exclusive economic zone west of Cape Suckling, and maintains the prohibition on commercial salmon fishing in the redefined West Area. ER 237. Amendment 12 also reaffirmed that management of the commercial and sport salmon fisheries in the East Area is delegated to the State. ER 237.

As required by the Magnuson-Stevens Act, NMFS evaluated Amendment 12 to ensure its consistency with the Act, including the ten National Standards, and other applicable law.[32] Among other documents, NMFS published a Final Environmental Assessment/Regulatory Impact Review in June 2012 (ER 306-549), and a Final Rule in December 2012 (ER 237-54). In those documents, NMFS explained why it concluded that Amendment 12 was consistent with the National Standards, the other parts of the Act, and other applicable law.

E. Management of the Cook Inlet salmon fishery by the State of Alaska.

Although plaintiffs repeatedly criticize State management of the Cook Inlet salmon fishery, plaintiffs submitted evidence to NMFS that under State management Cook Inlet sockeye salmon harvests[33] have generally met or exceeded

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[32] 16 U.S.C. § 1854(a)(3).

[33] Sockeye salmon are the largest commercially harvested stock of the five kinds of salmon harvested in Cook Inlet. ER 553.

average harvests from before State management. ER 603. In recent decades, these sockeye salmon harvests have greatly exceeded historical averages. ER 603.[34]

The Alaska Constitution requires the State to manage natural resources for the maximum benefit and use for all Alaskans.[35] Fish are reserved to the people for common use,[36] and must be "utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses."[37] The Alaska legislature has delegated authority over fisheries management to the Alaska Board of Fisheries,[38] with the Commissioner of the Alaska Department of Fish & Game having administrative authority.[39]

Subject to a subsistence priority,[40] the Board of Fisheries is authorized under state law to allocate fishery resources among commercial, personal use, sport, and guided sport fisheries.[41] Pursuant to that authority, the Board of Fisheries has

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[34] Plaintiffs curiously argued to NMFS that the above-average Cook Inlet sockeye salmon harvests in recent decades are related to passage of the Magnuson-Stevens Act (ER 603), even though the State continued to manage the Cook Inlet commercial salmon fishery even after passage of the Act.

[35] Alaska Const. art. VIII, §§ 1-2.

[36] Alaska Const. art. VIII, § 3.

[37] Alaska Const. art. VIII, § 4.

[38] *See, e.g.*, AS 16.05.221; AS 16.05.241; AS 16.05.251.

[39] *See, e.g.*, AS 16.05.010; AS 16.05.020; AS 16.05.050; AS 16.05.060; AS 16.05.241.

[40] AS 16.05.258.

[41] AS 16.05.251(e); 5 AAC 39.205.

adopted comprehensive fishery regulations for the Cook Inlet salmon fisheries, including detailed management plans for particular fisheries.[42] State regulations comprehensively conserve and manage each of these salmon fisheries as a unit using escapement goals.[43]

On top of that, the Board of Fisheries has adopted into regulation a comprehensive policy for salmon management called the Policy for the Management of Sustainable Salmon Fisheries, also known as the Sustainable Salmon Fisheries Policy,[44] a Policy for the Management of Mixed Stock Salmon Fisheries,[45] and a Policy for Statewide Salmon Escapement Goals.[46] These policies address every aspect of salmon management, and require the board and the department to work together to ensure, insofar as possible, the health and productivity of salmon stocks all over Alaska, including in Cook Inlet.

In the Final Rule and Environmental Assessment, NMFS thoroughly reviewed the State's management of salmon fisheries, and found that the State's method of salmon fishery management, using in-river escapement goals, is

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[42] *See, e.g.*, 5 AAC 21.310-21.380 (commercial salmon fishing regulations for the Cook Inlet Area).

[43] *See, e.g.*, 5 AAC 21.360 (setting escapement goals and providing direction to the Department of Fish & Game for management of the Kenai River late-run sockeye salmon stocks).

[44] 5 AAC 39.222.

[45] 5 AAC 39.220.

[46] 5 AAC 39.223.

superior to the catch limit method mandated by the Magnuson-Stevens Act. *E.g.*, ER 369-70. "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 352. By contrast, management of these fisheries under the Act would require setting harvest limits "in advance through notice and comment rule making, which would result [in] harvests being restricted in years when returns were above forecast and harvests too high in years when returns were below forecast." ER 349. NMFS found that removing these fisheries from the plan allows the stocks to be "managed by the State as a unit in consideration of all fishery removals to meet in-river escapement." ER 349.

SUMMARY OF THE ARGUMENT

Plaintiffs argue that the Magnuson-Stevens Act requires councils and NMFS to adopt a fishery management plan for every fishery under their authority. Plaintiffs are incorrect. The Court should uphold NMFS's reasonable interpretation of the Act as allowing a council to defer to state management of a fishery by removing that fishery from a plan. NMFS's interpretation is supported by the Act's plain language and legislative history, whereas plaintiffs' interpretation of the Act violates well-recognized rules of statutory interpretation.

Also meritless are plaintiffs' claims that NMFS's approval of Amendment 12 was arbitrary and capricious. The claim that NMFS failed to respond to plaintiffs' comments about a 2012 fishery resource disaster declaration for Chinook salmon in state waters is meritless. Even though NMFS did not have to respond to plaintiffs' untimely and immaterial comments about the resource disaster declaration, the record shows that NMFS addressed each of the issues that plaintiffs raised. Also, Plaintiffs fail to show how it was irrational for NMFS to conclude that Amendment 12 is consistent with the Act.

ARGUMENT

I. Standards of Review.

This Court reviews de novo the district court's decision granting summary judgment.[47] Where plaintiffs challenge NMFS's interpretation of the Magnuson-Stevens Act, the Court should apply the two-step *Chevron* framework.[48] First, the Court asks "whether Congress has directly spoken to the precise question at issue"; if so, the Court "must give effect to the unambiguously expressed intent of Congress," regardless of the agency's interpretation.[49] Second, if the Act is "silent or ambiguous" with regard to the issue, the Court asks "whether the agency's

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47 *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1091 (9th Cir. 2012).

48 *Id.* (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)).

49 *Id.* (quoting *Chevron*, 467 U.S. at 842-43).

answer is based on a permissible construction of the statute."[50] At step two, the Court "must defer to the agency's interpretation if it is reasonable."[51]

Where plaintiffs claim it was arbitrary and capricious for NMFS to remove part of the Cook Inlet salmon fishery from the fishery management plan, the Court must determine whether the agency "has considered the relevant factors and articulated a rational connection between the facts found and the choice made."[52] This standard of review is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision."[53]

The Court may affirm the district court "on any ground supported by the record, regardless of whether the district court relied upon, rejected, or even considered that ground."[54]

II. NMFS reasonably interpreted the Magnuson-Stevens Act as allowing the North Pacific Council to defer to State management of the Cook Inlet commercial salmon fishery.

The plain language of the Magnuson-Stevens Act, and its legislative history, show that the Act allows a council and NMFS to defer to state management of a

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50 *Id.* (quoting *Chevron*, 467 U.S. at 843).

51 *Id.* (quoting *Chevron*, 467 U.S. at 844).

52 *Id.* (quoting *Baltimore Gas & Elec. Co. v. NRDC, Inc.*, 462 U.S. 87, 105 (1983)).

53 *Id.* (quoting *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007)).

54 *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 748 (9th Cir. 2012).

fishery by removing the fishery from a fishery management plan. Especially under the deferential standard of review that applies under *Chevron*, plaintiffs' arguments to the contrary should be rejected.

A. The plain language of the Act shows that a council may defer to state management of a fishery.

The Magnuson-Stevens Act allows States to manage a fishery in the exclusive economic zone when a council explicitly *delegates* management of the fishery to the State, as in the case of the commercial and sport salmon fisheries in the East Area, and also when a council *defers* management of the fishery to the State by declining to adopt a plan for the fishery, as in the case of the three historical commercial salmon net fisheries and the sport salmon fishery in the West Area. That interpretation of the Act is confirmed by applying well-recognized rules of statutory interpretation.

When interpreting the plain language of the Act, the Court will "do more than view words or subsections in isolation. [The Court will] derive meaning from context, and this requires reading the relevant statutory provisions as a whole."[55] The Court's "goal is to 'understand the statute 'as a symmetrical and coherent regulatory scheme' and to 'fit, if possible, all parts into a . . . harmonious

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[55] *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 438 F.3d 937, 943 (9th Cir. 2006) (quoting *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1016 (9th Cir. 2004)).

whole.’’’’[56] The Court must “give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section.”[57]

Despite providing that each council “shall” prepare and submit to the Secretary a fishery management plan “for each fishery under its authority that requires conservation and management,”[58] the Act repeatedly recognizes that a council will sometimes not adopt a plan for a fishery under its authority that requires conservation and management. For example, the Act identifies two instances where States may regulate in-state fishing vessels in the exclusive economic zone in the absence of a fishery management plan for the fishery.[59] By allowing a State to regulate a fishery in the absence of a plan, Congress acknowledged that such a fishery needs “conservation and management,” and that a council might not adopt a plan for the fishery.

The Act also provides that the Secretary “may” prepare her own fishery management plan if a council fails to adopt a plan.[60] The Secretary may only

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56 *United States v. Wing*, 682 F.3d 861, 867 (9th Cir. 2012) (quoting *Am. Bankers Ass’n v. Gould*, 412 F.3d 1081, 1086 (9th Cir. 2005) & *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

57 *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (internal quotation marks omitted).

58 16 U.S.C. § 1852(h)(l).

59 16 U.S.C. §§ 1856(a)(3)(A) & (C).

60 16 U.S.C. §§ 1854(c)(1)(A)-(B).

prepare a plan "if such fishery requires conservation and management."[61] Yet again, the Act recognizes that a council might decline to adopt a plan for a fishery, by describing the consequences of such council inaction: after a reasonable period of time the Secretary is allowed to exercise discretion whether to adopt her own plan.[62] (Repeatedly, plaintiffs argue that the Secretary, acting though NMFS, has a *duty* under the Act to prepare a fishery management plan for the Cook Inlet commercial salmon fishery,[63] but that is plainly incorrect as the Act states that the Secretary "may" adopt a plan.[64])

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61 *Id.*

62 As if the statutory language were not clear enough, a Joint Explanatory Statement of the Committee of Conference accompanying the report of the conference committee for the Act explains that under the Act the Secretary has discretion to adopt a plan for a fishery when a council fails to adopt a plan:

> Section 304(c) *authorizes* the Secretary of Commerce to prepare a fishery management plan or amendment if (1) a Council fails to prepare a plan for a fishery in need of conservation, or (2) if the Secretary partially or wholly disapproves of a plan submitted by a Council and the Council fails to make necessary changes. *If the Secretary prepares his own plan*, the Council has 45 days to recommend changes; thereafter, the plan is implemented by the Secretary.

Alaska's Addendum at A-70 (emphasis added).

63 Pls.' Br. at 3-4 ("The plain language of the statute affords NMFS no discretion under these circumstances to decline to produce a fishery management plan for Cook Inlet."); 24 ("even if the statute afforded NMFS the discretion to decline to produce a fishery management plan (it does not)") & 51("The national standards … in no way exempt NMFS from developing a plan altogether.")

64 Plaintiffs are challenging NMFS's Final Rule for approving the Council's failure to adopt a fishery management plan for Cook Inlet. Had plaintiffs sued

These seemingly contradictory provisions, providing that each council "shall" prepare and submit fishery management plans, but repeatedly identifying what happens when a council declines to adopt a plan, make sense for at least three reasons.

First, as this Court has held: "Particularly when used in a statute that prospectively affects government action, 'shall' is sometimes the equivalent of 'may.'"[65] As the Act describes the consequences of a council declining to adopt a plan for a fishery, each council's duty to adopt a plan should be understood as discretionary and not mandatory.[66]

NMFS under the APA for *NMFS's* failure to independently adopt a plan, that action surely would have been dismissed, as the APA does not permit review when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The Magnuson-Stevens Act provides "no meaningful standard against which to judge [NMFS's] exercise of discretion" whether to adopt a plan. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 455-56 (1979) (holding an agency decision unreviewable where the underlying statute, which provided that the agency "may" take certain actions and was silent on what factors should guide the agency's decision, was "written in the language of permission and discretion"). Plaintiffs should not be allowed to make an end-run around the APA's judicial review bar by suing NMFS for approving the Council's failure to adopt a plan.

[65] *Sierra Club v. Whitman*, 268 F.3d 898, 904 (9th Cir. 2001) (quoting *Richbourg Motor Co. v. United States*, 281 U.S. 528, 534 (1930)).

[66] In *Sierra Club*, this Court held that despite a Clean Water Act provision that EPA "shall" bring an enforcement action after finding a violation of the act, EPA could, in its discretion, decline to bring such an action. 268 F.3d at 903-05. This Court reached that conclusion in part because the Clean Water Act permitted citizen suits to supplement EPA enforcement: "By allowing citizens to sue to bring about compliance with the Clean Water Act, Congress implicitly acknowledged

Second, the Act qualifies the word "shall," providing that each council, "shall, in accordance with the provisions of this chapter," prepare and submit plans and amendments. Contrary to plaintiffs' arguments that the Council failed to adopt a plan, the Council adopted the Fishery Management Plan for the Salmon Fisheries in the EEZ Off Alaska. Amendment 12 removed from the plan only those salmon fisheries the Council found should be removed to comply with National Standards 3 and 7. Accordingly, the Council adopted an amended plan "in accordance with the provisions of" the Act.

Third, these provisions make sense if one interprets, as NMFS does, the phrase "conservation and management" in § 1852(h)(1) as referring to "Federal" conservation and management, meaning a council does not have to adopt a plan if a fishery does not require "Federal" conservation and management. That is the only sensible way to read that phrase in context—after all, the Act was designed to enable "Federal" conservation and management of fisheries in the exclusive economic zone, and there would be no point for a council to undertake the expensive process of preparing and submitting a plan if Federal conservation and management of the fishery were not required.

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that there would be situations in which the EPA did not act." *Id.* at 905. The same reasoning applies to the Magnuson-Stevens Act, in which Congress implicitly and repeatedly acknowledged that there will be situations when a council will decline to adopt a fishery management plan.

Plaintiffs dispute this last point. Under plaintiffs' interpretation of the Act, councils would have no discretion at all, and would have to adopt a plan for each and every fishery under their authority, for every on-going fishery needs general conservation and management. But that interpretation violates well-recognized rules of statutory interpretation, as it renders meaningless the provisions of the Act that explain what happens when a council declines to adopt a plan for a fishery.[67] Plaintiffs' interpretation of the Act should be rejected.[68]

Even if the Court were to find that the Act is ambiguous or silent as to whether "conservation and management" refers to Federal conservation and management, or to conservation and management generally, the Court should affirm NMFS's reasonable interpretation of the Act. That interpretation harmonizes all the provisions of the Act, so that a council may decline to adopt a plan for a

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[67] *See, e.g.*, *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.").

[68] Plaintiffs incorrectly argue that NMFS is attempting to "rewrite" the Act by adding the word "Federal" to "conservation and management" in § 1852(h)(1). Pls.' Br. at 37-39. That Congress used the word "Federal" in some parts of the Act, but not there, cannot overcome all the other indications in the Act that show that in § 1852(h)(1) "conservation and management," in context, must mean Federal conservation and management. And contrary to plaintiffs' argument, that Congress in § 1853(b)(5) chose to specifically reference the "conservation and management measures of the coastal States" does not say anything about the meaning of "conservation and management" in § 1852(h)(1).

fishery that does not require "Federal" conservation and management, and allow a State to step in and regulate the fishery under § 1856(a)(3)(A).[69]

B. The legislative history of the Act confirms that a council may defer to state management of a fishery.

That the Act allows a council to both formally delegate management of a fishery to a State, and defer management to a State by declining to adopt a plan for the fishery, is confirmed by reviewing the legislative history of the Act. The Court can look to legislative history to assist its interpretation of a statute if the statute is ambiguous,[70] and can also look to legislative history at *Chevron* step one in "in attempting to ascertain a clear congressional directive."[71]

While plaintiffs rely exclusively on the legislative history from the original enactment of the Act in 1976, it makes more sense to examine the legislative history from the Act's reauthorization in 1996, when the provisions that specify the

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[69] NMFS has in the past removed other fisheries from fishery management plans in order to defer management of a fishery to a State, and it does not appear that anyone has ever sued NMFS and alleged that NMFS violated the Act by doing so. ER 23-24.

[70] *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1222 (9th Cir. 2015) (citing *Natural Res. Def. Council v. EPA*, 526 F.3d 591, 603 (9th Cir. 2008)).

[71] *Irvine Med. Ctr. v. Thompson*, 275 F.3d 823, 829 n.3 (9th Cir. 2002). This Court has stated that it will "cautiously adhere" to the practice of consulting legislative history at *Chevron* step one, *see id.* (quoting *Am. Rivers v. Fed. Energy Regulatory Comm'n*, 201 F.3d 1186, 1196 n.16 (9th Cir. 2000)), while acknowledging that "courts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point." *Id.* (quoting *Shannon v. United States*, 512 U.S. 573, 584 (1994)).

authority of States to regulate fisheries in the absence of a fishery management plan were enacted.

As enacted in 1976, the Act allowed States to regulate fishing vessels in the exclusive economic zone that were registered in that State:

> No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.[72]

In 1996, the Act was amended[73] to replace this language with specific provisions allowing States to regulate fishing vessels in certain instances where a council and NMFS decline to adopt a fishery management plan,[74] or where the plan explicitly delegates management of the fishery to the State.[75]

Two congressional committee reports were generated in connection with the 1996 amendments. The reports make clear that through the amendments Congress intended to allow a council to either formally delegate management of a fishery to a State, or defer management by declining to adopt a fishery management plan. For example, the Senate report states that, for its bill:

> Subsection (b) of this section of the reported bill would amend section 306(b) to allow the State of Alaska to enforce its fishing laws and regulations in fisheries in the EEZ off Alaska in cases where [1] no Federal fishery management plan exists or [2] where the North Pacific

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72 Pub. L. No. 94-265, § 306(a).

73 Pub. L. No. 104–297, § 112.

74 16 U.S.C. §§ 1856(a)(3)(A) & (C).

75 16 U.S.C. § 1856(a)(3)(B).

> Council has delegated management authority to the State through a fishery management plan, provided there is a legitimate State interest in the conservation and management of the fishery.[76]

The House report also made clear that its bill would allow the North Pacific Council and NMFS to delegate or defer management of a fishery to Alaska:

> Chairman Young offered an amendment authorizing the State of Alaska to enforce its laws or regulations for a fishery in Federal waters in cases where no Federal or State (for fisheries where the North Pacific Fishery Management Council has delegated management authority to the State) Fishery Management Plan exists, and if there is a legitimate State interest in the conservation and management of the fishery. … The amendment was then adopted by voice vote.[77]

The final bill allowed a council and NMFS to delegate or defer management of a fishery to all States, not just to Alaska. Still, the delegate or defer concepts remained and were codified at 16 U.S.C. § 1856(a)(3)(A)-(C). Plaintiffs' argument that the Act only provides one "mechanism" for a State to manage a fishery in the exclusive economic zone[78] is simply not correct.

C. NMFS reasonably interpreted National Standards 3 and 7.

While plaintiffs argue that NMFS's reliance on National Standards 3 and 7 is "arbitrary and capricious," for the most part what they challenge is NMFS's

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76 S. Rep. No. 104-276, at 30 (1996), reprinted in 1996 U.S.C.C.A.N. 4073, 4103.

77 H. Rep. No. 104-171, at 21 (1995), 1995 WL 390916, at *22.

78 Pls.' Br. at 39-40.

interpretation of those Standards.[79] Where plaintiffs challenge NMFS's interpretation of the Act, those claims should be reviewed under the *Chevron* framework. Each of plaintiffs' arguments is meritless.

1. NMFS reasonably interpreted National Standard 3.

Plaintiffs argue "there is no plausible way" to read National Standard 3 as allowing management of a stock of fish by a State.[80] That argument is meritless. National Standard 3 requires that, "[t]o the extent practicable, an individual stock of fish shall be managed as a unit throughout its range," and plainly does not require that plans provide for federal management of all stocks of fish.[81] A plan that allows a State to manage a particular stock of fish as a unit throughout its range is consistent with National Standard 3.[82]

Even if the plain language of National Standard 3 were not enough to reject plaintiffs' interpretation of it, the Court should reject plaintiffs' arguments after applying the *Chevron* framework. NMFS reasonably interpreted National Standard 3 as allowing councils to determine "the appropriate management unit for a stock," which "may not encompass all Federal waters if,

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79 *Id.* at 48-56.

80 *Id.* at 48-49.

81 16 U.S.C. § 1851(a)(3).

82 *Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1121 (9th Cir. 2006) ("When a stock of fish is managed in the same manner throughout its geographical range, National Standard No. 3 is satisfied.").

such as here, complementary management exists for a separate geographic area." ER 243-44.[83]

NMFS determined that removing the three historical commercial salmon net fisheries and the sport salmon fishery from the West Area would "best enable the State to manage salmon as a unit throughout their range." ER 243 & 347-54. NMFS reasoned that "the biology of salmon is such that escapement is the point in the species' life history that is more appropriate for assessing stock status, and that escapement happens in the river systems, not in the [exclusive economic zone] waters." ER 243. Accordingly, NMFS concluded that the "State is in a unique

[83] In the Final Rule, NMFS cited its advisory guidelines at 50 C.F.R. § 600.320(e)(2) as supporting its interpretation of National Standard 3. ER 243-44. This Court has not decided what standard of review should apply to a challenge to regulations approving a fishery management plan in which NMFS interprets the Act and relies on the advisory guidelines. *See Natural Res. Def. Council, Inc. v. NMFS*, 421 F.3d 872, 878-79 (9th Cir. 2005). But *Chevron* should apply here, because plaintiffs are challenging NMFS's Final Rule, which has the force of law, interprets the Act, and was adopted through the notice-and-comment procedure, and also because the Rule relies in part on the guidelines, which themselves were adopted in regulation through the notice-and-comment procedure. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."). Even if the Court does not apply *Chevron*, the Court should still give considerable deference to NMFS's longstanding interpretation of the National Standards. *See Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 487-88 (2004) ("We 'normally accord particular deference to an agency interpretation of 'longstanding' duration ....'") (quoting *Barnhart v. Walton*, 535 U.S. 212, 220 (2002)); *see also Oceana, Inc. v. Pritzker*, 24 F. Supp. 3d 49, 69-70 (D.D.C. 2014) ("The Court

position to manage Alaska salmon as a unit in consideration of all fishery removals and to meet escapement goals." ER 350. Furthermore, NMFS examined the State's salmon management and concluded that the State's management is "consistent with the policies and standards of the" Magnuson-Stevens Act. ER 352. These findings led NMFS to reasonably conclude that allowing the State to manage the Cook Inlet salmon fishery as a unit was consistent with National Standard 3.

Plaintiffs incorrectly argue that NMFS's interpretation of National Standard 3 is contradicted by legislative history. Plaintiffs point to several statements by Senator Gravel that show the Senator preferred having Alaska manage fisheries in the exclusive economic zone.[84] But during the dialogue that plaintiffs rely on, Senator Stevens recognized that Alaska was already exercising jurisdiction over salmon fisheries in the exclusive economic zone (including over Cook Inlet salmon fisheries since statehood), and Senator Stevens stated that "nothing in this act is intended to take away from the State any jurisdiction it has now."[85]

Senator Stevens stated that any conflicts between state and federal management

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concludes that the [National Standard] Guidelines deserve considerable deference.").

[84] Pls.' Br. at 49.

[85] Pls.' Addendum at 42. Senator Stevens stated that Alaska's jurisdiction in the zone was contested only as to "non-Alaskans." *Id.* Consistent with Senator Stevens's views, the Act preserved Alaska's non-contested authority to regulate fishing vessels in the zone that were registered in the state. Pub. L. No. 94-265, § 306(a).

"will be worked out by the regional council and not by the Federal Government."[86] Here, consistent with how Senator Stevens thought the Act would work, the Council considered the National Standards and determined that the State is best situated to manage the entire Cook Inlet commercial salmon fishery (and NMFS agreed).

Plaintiffs' observation that Senator Stevens agreed to substitute language for Amendment 1302[87] does not show that Congress intended to prohibit State management of fisheries in the exclusive economic zone—the Act itself easily refutes that argument.[88] Amendment 1302 would have *required* States to manage fisheries that are capable of being managed as a unit and reside principally in the waters of a single state.[89] Although Amendment 1302 was not adopted, the "managed as a unit" concept was retained in National Standard 3, which does not require State management but does not forbid it either, leaving the issue up to the councils to resolve as Senator Stevens envisioned.[90]

Plaintiffs also rely on the Report of the Senate Committee on Commerce for the Senate version of the bill, which states that for anadromous species such as

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86 Pls.' Addendum at 44.

87 Pls.' Br. at 31-32 & 49.

88 Pub. L. No. 94-265, § 306(a) (allowing States to regulate in-state fishing vessels in the exclusive economic zone).

89 Pls.' Addendum at 31.

90 Pls.' Addendum at 44.

salmon, "councils [would] collaborate with the States and develop non-conflicting management programs."[91] But that does not help plaintiffs, since here the North Pacific Council did just what the committee thought councils would do: Working with the State, the Council developed and adopted Amendment 12, which allows the State to manage the entire Cook Inlet commercial salmon fishery consistent with the Act and as a unit. That the report explains that under National Standard 3 "unity of management, or at least close cooperation, is vital,"[92] also does not help plaintiffs, as Amendment 12 defers to unified State management of the fishery.

Plaintiffs also rely on the Report of the House Committee on Merchant Marine and Fisheries for the House version of the bill, which states that "conservation and management of our fish stocks cannot be obtained without improved coordination and integration of the respective State and Federal roles."[93] The House report is about fisheries in general and is not specific to Alaska, as the report asserts that "there is also a sole Federal jurisdiction over the fisheries resources found beyond the three-mile territorial sea,"[94] which at the time was not correct for Alaska where the State was managing three salmon fisheries extending

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91 Pls.' Br. at 49 (citing Pls.' Addendum at 62).

92 Pls.' Br. at 49 (citing Pls.' Addendum at 57-58).

93 Pls.' Br. at 49-50 (citing Pls.' Addendum at 64-65). Plaintiffs' brief could be read to suggest that this statement is from the Senate report, but that is incorrect.

beyond the territorial sea. In any event, the plan the Council developed is a good example of federal-state coordination and integration of roles, as the plan asserts federal authority over most of Alaska's salmon fisheries in federal waters, but not over the three historical commercial salmon net fisheries and the sport salmon fishery in the West Area, which NMFS and the Council determined were best managed solely by the State. ER 243 & 347-54.

For all of these reasons, NMFS reasonably interpreted National Standard 3.

2. NMFS reasonably interpreted National Standard 7.

Plaintiffs argue that National Standard 7 does not "exempt" NMFS from the "statutory requirement to produce a fishery management plan."[95] As noted above, *NMFS's* declining to independently adopt a plan cannot be reviewed under the APA. Moreover, National Standard 7, which requires that "Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication," plainly does not require a council to adopt a plan for every fishery.[96]

If the plain language is not enough to reject plaintiffs' interpretation of National Standard 7, then under *Chevron* the Court should find that NMFS reasonably interpreted National Standard 7 as implicitly recognizing "the principle

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94 Pls.' Addendum at 64.

95 Pls.' Br. at 51-52.

that not every fishery needs management through regulations implementing a[fishery management plan]." ER 242. The Council's declining to adopt a plan, and allowing the State to manage certain fisheries in accordance with the Act, does "minimize costs and avoid unnecessary duplication." NMFS's interpretation of National Standard 7 is at least a reasonable interpretation.

D. The Act's legislative history does not support plaintiffs' interpretation of the Act.

To support their argument that the Act requires a council to adopt a fishery management plan for every fishery under its authority that requires conservation and management, plaintiffs embark on a lengthy discussion of the legislative history from the Act's enactment in 1976.[97] Plaintiffs' reliance on the legislative history from 1976 is misplaced for several reasons.

First, as explained above, the more pertinent legislative history is from the 1996 amendments to the Act, and that history leaves no doubt that in 1996 Congress amended the Act to allow councils and NMFS to delegate or defer management of a fishery to a State.

Second, even assuming plaintiffs are correct to focus on the legislative history from 1976, plaintiffs' observation that Senator Gravel failed to gain support for a proposal that would have directed Alaska to manage fisheries in the exclusive

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96 16 U.S.C. § 1851(a)(7).

97 Pls.' Br. at 30-34.

economic zone, rather than the Federal government,[98] does not demonstrate that Congress intended to prohibit State management of fisheries in the zone. The Act itself refutes that argument in that it clearly allowed States to regulate all fishing vessels in the exclusive economic zone that were registered in that State.[99] Plaintiffs' claim that the Act failed to initially grant States this authority is simply incorrect.[100] Plaintiffs' suggestion that there is a difference under the Act between regulating a "fishery" and a "fishing vessel,"[101] is also incorrect—in both cases what is regulated is "fishing."[102]

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98 Pls.' Br. at 30-32.

99 Pub. L. No. 94-265, § 306(a).

100 As an example, prior to the 1996 amendments the Federal government declined to regulate the scallop fishery in the waters adjacent to Alaska, and the State regulated all fishing vessels participating in this fishery that were registered in the State, including vessels in the exclusive economic zone. *See Trawler Diane Marie, Inc. v. Brown*, 918 F. Supp. 921, 924 (E.D.N.C. 1995) ("Previously, the State of Alaska was able to regulate the scallop fisheries off its coast, in both state and federal waters, because all fishing vessels venturing into the waters were registered in Alaska and thus bound by the state's fishing regulations. Under the Magnuson Act, a state may only regulate fishing in federal waters if the vessel is registered under the law of that state."), *aff'd Trawler Diane Marie, Inc. v. Kantor*, 91 F.3d 134, No. 95-2587,1996 WL 406255 (4th Cir. July 22, 1996).

101 Pls.' Br. at 33 n.10.

102 *See* 16 U.S.C. §§ 1802(13) (defining "fishery" as "any fishing for such stocks"); 1802(18) (defining "fishing vessel" as a vessel used for "fishing"). In another part of their brief, even plaintiffs appear to agree that regulating fishing vessels in a fishery is the same as regulating a fishery. *See* Pls.' Br. at 8-9 (agreeing that § 1856(a)(3)(B), which allows States to regulate "fishing vessel[s]" in the exclusive economic zone through a delegation of authority, allows States to regulate "all fishing activities" in the exclusive economic zone).

III. NMFS's approval of Amendment 12 was not arbitrary and capricious.

Plaintiffs argue that NMFS's approval of Amendment 12 was arbitrary and capricious because NMFS supposedly failed to address in its Final Rule untimely comments from plaintiffs about the Secretary's declaration in 2012 of a fishery resource disaster for Chinook salmon in Cook Inlet state waters. Plaintiffs also argue that it was arbitrary and capricious for NMFS to rely on National Standards 3 and 7 in approving Amendment 12. All of plaintiffs' arguments are meritless.

A. Plaintiffs' arguments about the 2012 fishery resource disaster declaration are meritless.

Plaintiffs allege that as a result of State "management failures," in 2012 the Governor of Alaska requested that the Secretary declare a fishery disaster under the Magnuson-Stevens Act, 16 U.S.C. § 1861a(a).[103] Plaintiffs are incorrect. The Governor requested the disaster declaration due to "the abrupt decline of Chinook salmon in the Kenai River and Northern District [of Cook Inlet] streams" (ER 296-97) and the Acting Secretary granted the declaration, not because of "management failures," but finding instead that: "Exact 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 65-66.

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[103] Pls.' Br. at 19.

Under the Act, the Secretary may declare a "commercial fishery failure due to a fishery resource disaster" only if the disaster occurs as a result of "(A) natural causes; (B) man-made causes beyond the control of fishery managers to mitigate through conservation and management measures . . .; or (C) undetermined causes."[104] There is nothing in the Act that would allow a disaster declaration for "management failures" as plaintiffs allege.

Furthermore, as plaintiffs point out, because of the 2012 low Chinook salmon returns, the primary management response by the State was to close the commercial setnet fishery in Cook Inlet.[105] What plaintiffs fail to mention is that the setnet fishery occurs exclusively in state waters (because setnets are attached to the beach). ER 409-11. There is no evidence that the fisheries in the exclusive economic zone that are the subject of Amendment 12 were affected by the 2012 low Chinook salmon returns or the State's management decisions in response.

As there is nothing in the record to support a connection between the 2012 low Chinook salmon returns and NMFS's decision to approve Amendment 12, the Court should reject plaintiffs' claim that NMFS was required to respond to their comments about the fishery resource disaster declaration.[106]

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104 16 U.S.C. § 1861a(a)(1).

105 Pls.' Br. at 18.

106 *See, e.g.*, *Vermont Yankee Nuclear Power Corp. v. Nat. Resources Def. Council, Inc.*, 435 U.S. 519, 553 (1978) ("[C]omments must be significant enough

Even if the fishery resource disaster declaration were material, for two additional reasons the Court should reject plaintiffs' claims that NMFS failed to adequately address their comments.

First, the letter from plaintiffs about the disaster declaration was received by NMFS more than two months after the deadline for public comment on Amendment 12.[107] By the time NMFS received plaintiffs' letter, NMFS had already notified the public that it had approved Amendment 12.[108] Agencies are only very rarely required to re-open administrative proceedings to consider new evidence. As the Supreme Court explained:

> Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed]. . . . If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening."[109]

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to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern. The comment cannot merely state that a particular mistake was made . . . ; it must show why the mistake was of possible significance in the results . . . .") (inner quotation marks and citations omitted).

[107] ER 237 (noting that comments on Amendment 12 were accepted until May 29, 2012); ER 265-67 (plaintiffs' August 16, 2012 letter raising the disaster declaration).

[108] ER 299 (letter from NMFS dated June 29, 2012).

[109] *Vermont Yankee*, 435 U.S. at 554-55 (quoting *ICC v. City of Jersey City*, 322 U.S. 503, 514 (1944)).

This Court has held that a plaintiff who alleges that an agency erred by failing to re-open administrative proceedings to consider new evidence must show that the failure to re-open is arbitrary and capricious.[110] Other courts have held that such a plaintiff must show that the new evidence "is not merely 'material' but rises to the level of a change in 'core' circumstances, the kind of change that goes to the very heart of the case."[111] The 2012 low Chinook salmon returns, whose exact causes NMFS did not know, do not come close to meeting that standard.

Second, even assuming NMFS was required to respond to plaintiffs' letter, NMFS did address in the Final Rule the issues that plaintiffs raised. For example, NMFS explained that there is no connection between the fishery resource disaster declaration for Chinook salmon in state waters, and whether the Cook Inlet federal waters fishery is managed under a Federal fishery management plan:

> [U]nder the Magnuson-Stevens Act, at 16 U.S.C. 1861a(a), the Secretary can determine a commercial fishery failure due to a fishery resource disaster for any commercial fishery regardless of whether the fishery occurs in Federal waters or is managed under a Federal fishery management plan. For example . . . [i]n 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

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110 *Nance v. EPA*, 645 F.2d 701, 708 (9th Cir. 1981).

111 *Am. Optometric Ass'n v. FTC*, 626 F.2d 896, 907 (D.C. Cir. 1980) (quoting *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 283 (D.C. Cir. 1971)); *see also Union Mechling Corp. v. United States*, 566 F.2d 722, 726 (D.C. Cir. 1977) ("So strong is this policy that the Supreme Court has only once remanded a case because of an agency's refusal to reopen evidentiary hearings.").

> 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.[112]
> Plaintiffs do not show that NMFS's explanation is irrational.

NMFS also addressed the substantive concerns that plaintiffs raised. In their late comments, plaintiffs argued that: (1) the State's management response caused an over-escapement of sockeye in the Kenai River for 2012 that may depress future run sizes; and (2) the State mismanages salmon fisheries. ER 267.

NMFS addressed both of these comments in the Final Rule and Environmental Assessment.

NMFS discussed at length plaintiffs' concerns with salmon over-escapement. ER 240-41 & 446-59. The Final Rule explains that the State sets escapement goals but that over-escapement is a "common occurrence" in salmon fisheries and is usually due to: "(1) A lack of fishing effort, (2) unexpectedly large salmon runs, or (3) management or economic constraints on the fishery." ER 241. Management constraints result in part from the presence of mixed stocks and State management of "the largest, most productive salmon stocks." ER 241. NMFS found that: "Layering Federal management on top of State management for the commercial fisheries in the Cook Inlet Area would not reduce the potential for over-escapement or address any of the factors that cause over-escapement."

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112 ER 253.

ER 241. NMFS went on to explain that it revised the Environmental Assessment "to expand the discussion on over-escapement to better explain the issue." ER 241. That expanded discussion thoroughly explains over- and under-escapement, and discusses State management of escapement. ER 446-59. NMFS responded to plaintiffs' comments about over-escapement of Cook Inlet sockeye.

NMFS also thoroughly reviewed the State's management of salmon fisheries, and reached the following conclusions:

> NMFS assessed the State's current salmon management and the sustainability of salmon returns under the current management procedures, and determined that current management, as codified in the Alaska constitution, laws, regulations, and policies, is consistent with the Magnuson-Stevens Act's national standards. For this and other reasons explained in this preamble and the [Environmental Assessment], the Council and NMFS concluded that Federal conservation and management are not required and would not serve a useful purpose.[113]

NMFS responded to plaintiffs' comments about the State's management of salmon fisheries.

In sum, plaintiffs submitted an untimely and immaterial comment about the 2012 fishery resource disaster declaration to which NMFS was not required to respond. Nonetheless, the record is clear that NMFS addressed every issue that plaintiffs raised. Plaintiffs have not come close to showing that NMFS's conclusions are irrational.

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113 ER 242.

B. It was not arbitrary and capricious for NMFS to rely on National Standard 3.

Plaintiffs argue that it was arbitrary and capricious for NMFS to rely on National Standard 3 because, according to plaintiffs, Amendment 12 "creates a jurisdictional loophole where vessels from out of state can fish in an unrestricted manner."[114] The record shows that NMFS thoroughly considered this issue and concluded that the risk of unregulated fishing under the plan is "negligible." ER 244-45 & 354-55.

NMFS explained that the Council heard testimony that the State would prosecute any unregistered vessel attempting to fish in these areas. ER 354.[115]

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[114] Pls.' Br. at 40-42 & 50. Plaintiffs go as far as to say that interpreting the Act to allow for this supposed "loophole" is "absurd," even though 16 U.S.C. § 1856(a)(3)(A) plainly allows State regulation of in-state but not out-of-state vessels.

[115] The state attorney testified to the Council about the only case of an unregistered vessel attempting to fish in the exclusive economic zone adjacent to Alaska, and explained that in that case the State obtained a conviction for violating state law. Audio_0000038-39 (The audio recording of this testimony is part of the certified administrative record for this case. The State has moved for leave to transmit a copy of this recording to the Court as the State's supplemental excerpts of record). The state attorney further explained that the State has broad authority to prosecute unregistered fishing vessels, and that an unregistered vessel attempting to fish in the Cook Inlet salmon fishery would be easily detected and prosecuted in every case. *Id.* Under Alaska Statutes 16.05.475(a), a "person may not employ a fishing vessel in the waters of this state unless it is registered under the laws of the state." Fishing vessel" is defined as including a vessel "aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing , including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing." *Id.* The Alaska Board of Fisheries has broadly defined the term "employ" in regulation as "taking or attempting to take fish, or

Given the remoteness of the net fishing areas, the need for fishing vessels to come into Alaska ports where they would be subject to State enforcement, that such vessels would have to abandon all state permits and licenses, and other business risks, the NMFS concluded that it was "reasonable to expect that salmon fishing in the net fishing areas will be by vessels registered with the State and that fishing in these areas will be regulated by the State." ER 244. The risk of unregulated fishing was a relevant factor for NMFS to consider, and plaintiffs do not show that NMFS made an irrational assessment of that risk.[116]

C. It was not arbitrary and capricious for NMFS to rely on National Standard 7.

Concerning National Standard 7, plaintiffs suggest that NMFS could have minimized costs and avoided duplication by delegating management over the three historical commercial salmon net fisheries to the State as NMFS did for salmon fisheries in the East Area.[117] But NMFS explained that "salmon fisheries [in the West Area] are already adequately managed by the State," and that removing those

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transporting fish which have been taken or any operation of a vessel aiding or assisting in the taking or transportation of unprocessed fish." 5 AAC 39.120(a)(1). Violation of this law is a misdemeanor punishable by a fine of up to $15,000, up to one year imprisonment, and forfeiture of the vessel and gear. AS 16.05.723.

[116] *See, e.g.*, *Fishermen's Finest*, 593 F.3d at 894 ("In reviewing regulations promulgated under the Magnuson Act, 'our only function is to determine whether the Secretary [of Commerce] 'has considered the relevant factors and articulated a rational connection between the facts found and the choice made.'"") (quoting *Alliance Against IFQs v. Brown*, 84 F.3d 343, 345 (9th Cir. 1996)).

[117] Pls.' Br. at 51-52.

fisheries from the plan "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 243.

NMFS explained that in "the East Area, the Pacific Salmon Treaty controls the total Chinook salmon harvest and the [fishery management plan] is the nexus for implementing the Treaty, so a[plan] is" needed. ER 351. The Magnuson-Stevens Act exempts stocks managed under an international fisheries agreement in which the United States participates from the Act's annual catch limit requirement. ER 238.[118] In the West Area, by contrast, a fishery management plan "would not be able to rely on the measures in the Pacific Salmon Treaty, like in the East Area, and would instead need provisions that explicitly address each requirement in the [Act]," including annual catch limits. ER 349. NMFS concluded that adopting a plan for the three historical commercial salmon net fisheries and sport fishery in the West Area would require "dual management" and would sacrifice "[e]fficient and effective fisheries management" because of the "close coordination" required between federal and state managers and the "more lengthy [federal] process." ER 349. Plaintiffs do not show that NMFS's conclusion is irrational.

[118] *See* 16 U.S.C. § 1853 (Effective and Applicability Provisions).

Plaintiffs also attack NMFS's application of its own guidelines interpreting National Standard 7, which NMFS has adopted in regulation at 50 C.F.R. § 600.340(b).[119] In that regulation, NMFS lists the factors that determine whether "Federal" management of a fishery through a plan is required.

Plaintiffs argue that NMFS did not consider the first factor, which calls for NMFS to consider the "importance of the fishery to the Nation and to the regional economy."[120] But NMFS considered that factor and determined that "Amendment 12 will not change the importance of the salmon fishery in the regional economy of Cook Inlet or for the Nation because the State will remain as the primary manager of the fishery, and the vast majority of the [exclusive economic zone] will remain closed to commercial salmon fishing." ER 242-43. Plaintiffs do not challenge that conclusion. NMFS also provided detailed information on the economic importance of the fishery. ER 242-43; ER 432-33. Plaintiffs' argument that this factor calls for a different analysis should be rejected given the deference that NMFS is due when interpreting its own regulations.

Plaintiffs also argue that NMFS failed to adequately address the third factor, under which NMFS is to consider:

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[119] Pls.' Br. at 54-56. NMFS's interpretation of its own regulations should be upheld unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

[120] 50 C.F.R. § 600.340(b)(2)(i).

> The extent to which the fishery could be or is already adequately managed by states, by state/Federal programs, by Federal regulations pursuant to [fishery management plans] or international commissions, or by industry self-regulation, consistent with the policies and standards of the Magnuson–Stevens Act.[121]

Concerning the third factor, Plaintiffs' argument that NMFS made a "complete about-face"[122] from the 1990 fishery management plan is meritless, as the 1990 plan allowed the State to manage the three historical commercial salmon net fisheries, and Amendment 12 continued State management of those fisheries. ER 123. Their argument that NMFS failed to consider the adequacy of State management of the Cook Inlet salmon fishery is also meritless, as NMFS concluded after an extensive review that the State manages salmon fisheries consistent with the National Standards. ER 242-43. That plaintiffs disagree with NMFS does not show that NMFS's conclusion is irrational.

Finally, that the Alaska Department of Law advised the Board of Fisheries that the 1990 fishery management plan did not apply to the three historical commercial salmon net fisheries does not show that NMFS acted irrationally in approving Amendment 12.[123] The Department of Law's advice to the Board of Fisheries was correct. The 1990 plan allowed the State to manage those fisheries and deemed them as "provided by other Federal law" (i.e., not by the Magnuson-

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121 50 C.F.R. § 600.340(b)(2)(iii).

122 Pls.' Br. at 54-55.

Stevens Act). ER 123. In any event, the Board of Fisheries and Department of Fish & Game are bound by state law, and NMFS concluded that under those laws the State manages salmon fisheries consistent with the Act. ER 243. Plaintiffs do not show how that conclusion is irrational.

CONCLUSION

For all of these reasons, the Court should affirm the decision of the district court.

DATED: September 3, 2015.

Respectfully submitted by,

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[123] Pls.' Br. at 55.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,775 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 2010 with 14-point font in Times New Roman type style.

Dated this 3rd day of September, 2015.

By: /s/ Seth M. Beausang
Seth M. Beausang

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the State of Alaska is not aware of any related cases pending in this Court.

CERTIFICATE OF SERVICE

I certify that on September 3, 2015, I electronically filed the foregoing ANSWERING BRIEF OF THE STATE OF ALASKA with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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