

CONCERNED AREA M FISHERMEN
35717 Walkabout Road, Homer, Alaska 99603
(907) 235-2631

March 28, 2017

Dan Hull, Chair
North Pacific Fishery Management Council
605 W. 4th, Suite 306
Anchorage, Alaska 99501

Re: Salmon FMP – Agenda Item C-2

Dear Chairman Hull and Council Members:

Concerned Area M Fishermen (CAMF) submits these comments on agenda item C-2, under which you will review a Discussion Paper for Revisions to the Fishery Management Plan for the Salmon Fisheries in the EEZ Off Alaska (March 2017). CAMF represents the interests of Alaska Peninsula (Area M) drift gillnet fishermen. Our members participate in fisheries on both the north and south sides of the Alaska Peninsula, including in the waters of the South Alaska Peninsula that extend into the EEZ. Our fisheries in this area, along with fishing by the purse seine fleet, collectively constitute one of the three historical net fisheries that are the subject of the discussion paper. CAMF has been active in the regulatory process before the Alaska Board of Fisheries for over thirty years, but this is our first time to appear before the North Pacific Fisheries Management Council.

CAMF is very dismayed that the Council finds itself in the position of having to review the salmon FMP so soon after adoption of Amendment 12. The Council's decision to remove the three historical net fisheries from the management area, thus leaving management of these fisheries to the State, was well-reasoned and rational. It just made sense. But because of an unfortunate and, we believe, incorrect decision by the Ninth Circuit Court of Appeals, the Council is obliged to consider adding a layer of federal oversight to the state management process. Our basic message to the Council regarding this issue is simple – to the maximum extent possible, delegate authority over the EEZ portion of our fisheries to the State of Alaska and minimize the extent of federal intrusion into the current management process.

Most drift gillnet fishing along the South Alaska Peninsula takes place in state waters, not the EEZ, and is concentrated in the month of June. Drift gillnets are permitted to operate only in the Unimak District during the June fishery. Purse seines are allowed in both the Unimak District and in the Shumagin Islands. We primarily target sockeye salmon, but also harvest

Dan Hull, NPFMC
March 28, 2017
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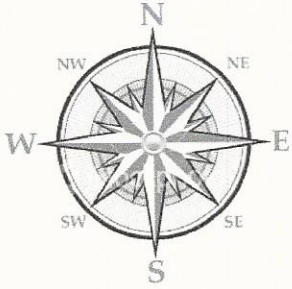
chum salmon along with small amounts of chinook, coho and pink salmon. Since the mid-1980s, the Alaska Board of Fisheries has worked to strike a balance between providing sufficient fishing opportunity in the June fishery to maintain a viable sockeye harvest, while at the same time controlling the harvest of migrating chum salmon. Various management strategies and plans have been employed in an attempt to fulfill these often competing objectives, with varying degrees of success. The current South Unimak and Shumagin Islands June Salmon Management Plan, 5 AAC 09.365, has been in place since 2004, with some revisions over the years, and has proven highly effective at stabilizing our harvests and achieving the plan's goals. In general, the plan establishes a weekly fishing schedule of openings and closures that allows the fleets time to move around in search of sockeye while avoiding areas with higher concentrations of chum. This strategy is complemented by having a relatively large area in which the fleets can maneuver, including some waters that extend into the EEZ. Although only a relatively small percentage of our salmon harvest is taken in the EEZ, the flexibility afforded by having those waters open is important to the success of the management plan and the health of the June fishery.

After reviewing the discussion paper, we have many questions regarding how management of the EEZ portion of our salmon fishery can be integrated with the requirements of the Magnuson-Stevens Act. CAMF intends to participate actively in the Council process on this issue, and would welcome the opportunity to have one or more of our representatives serve on any working group or committee that the Council may establish to address the questions presented. Thank you.

Sincerely,

A handwritten signature in black ink that reads "Steve Brown". The signature is written in a cursive, flowing style.

Steve Brown, President
Concerned Area M Fishermen



COOK INLET FISHERMAN'S FUND

Non-Profit Advocate for all Commercial Gear Types in Area H
PO Box 39408 / Ninilchik, AK 99639 / Phone 907-252-2752 / Fax 907- 567-3306

Date: March 28, 2017

Addressee: Chairman Dan Hull
North Pacific Fishery Management Council
605 W. 4th Avenue, Suite 306
Anchorage, AK 99501-2252

RE: Comments by Cook Inlet Fisherman's Fund on Agenda Item C2

Dear Chairman Hull:

On behalf of the Cook Inlet Fisherman's Fund (CIFF), I am writing to provide comments on agenda item C2, the Salmon FMP Amendment – Discussion Paper. CIFF is a non-profit corporation registered under the laws of the State of Alaska. CIFF's mission is to advocate on behalf of all commercial fishermen of Cook Inlet and for the coastal community more generally. CIFF's members and volunteers are fueled by the desire to save the commercial fishing industry in Cook Inlet as well as all of Alaska, and to protect the habitat and ecosystems that those species depend on.

CIFF has 446 members, including commercial fishermen of all Cook Inlet gear types (including 201 driftnet fishermen and 224 set net fishermen), seafood processors, and community members. The majority of CIFF's members are from Alaska, but CIFF also has members from 21 other states, including Washington, Oregon, Utah, California, Minnesota, Iowa, Wisconsin, New York, Arizona, Delaware, Texas, Colorado, Florida, Indiana, New Mexico, Oklahoma, South Dakota, Virginia, Vermont, and Wyoming.

CIFF supports and endorses the comments filed by the United Cook Inlet Drift Association (UCIDA) on Agenda Item C2. CIFF also supports UCIDA's request that the Council form a committee, in accordance with the North Pacific Council's Statement of Organization, Practices, and Procedures Section 2.3.4 (Council

Committees), to help develop the options for a salmon FMP for Cook Inlet. CIFF believes that its broad membership of commercial fishermen, processors, and community members can significantly aid the Council in developing options for the Cook Inlet salmon fishery, and respectfully request to participate in any such committee.

Sincerely,

A handwritten signature in black ink, appearing to read "John McCombs". The signature is fluid and cursive, with a long horizontal stroke at the end.

John McCombs
CIFF President

March 28, 2017

VIA EMAIL TO NPFMC.COMMENTS@NOAA.GOV

Dan Hull
Chairman
North Pacific Fishery Management Council
605 W. 4th Avenue, Suite 306
Anchorage, AK 99501-2252

Re: Comments by United Cook Inlet Drift Association on Agenda Item C2

Dear Chairman Hull:

I am writing on behalf of the United Cook Inlet Drift Association (“UCIDA”) to provide comments and offer UCIDA’s assistance with respect to agenda item C2, the Salmon FMP Amendment – Discussion Paper. As you know, UCIDA’s members are strongly committed to establishing a Salmon FMP for the Cook Inlet salmon fisheries that protects and develops this important fishery in a manner consistent with the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”).

The purpose of this letter is two-fold. *First*, UCIDA below provides specific comments on the Discussion Paper. As detailed below, the Discussion Paper misses some of the context and background essential to properly evaluate the problems facing Cook Inlet salmon fisheries and the solutions needed to address those problems. Due to the short time available for public comment, it is not possible for UCIDA to fully address all of its concerns in this letter. UCIDA will supplement this response in the coming weeks and months, and looks forward to working with you and the other Council members to ensure a successful and effective process.

Second, and relatedly, UCIDA requests that the Council form a committee, in accordance with the North Pacific Council’s Statement of Organization, Practices, and Procedures Section 2.3.4 (Council Committees), to help develop the options for a salmon FMP for Cook Inlet. UCIDA’s members have decades of invaluable first-hand experience with the Cook Inlet salmon fishery and its particular challenges and opportunities. This critical perspective is currently lacking in the Discussion Paper, and UCIDA respectfully submits that inclusion of its members in the development of alternatives for the Council’s consideration is both necessary and essential to producing a workable and effective FMP for Cook Inlet.

I. BACKGROUND

A. The Commercial Salmon Fishery in Cook Inlet Is Declining

Everyone agrees that “Cook Inlet is one of the nation’s most productive salmon fisheries.”¹ Upper Cook Inlet is home to five species of anadromous salmon – chinook, sockeye, coho, pink, and chum – as well as steelhead. Some of these wild runs are among the largest in the world. But the salmon resources in the Upper Cook Inlet watershed are facing growing threats to their survival, and some stocks are in decline from the effects of climate change, warm water, invasive species, urbanization, and ineffective management schemes.

The harvest numbers demonstrate this decline. By one estimate, there has been “a 51% decline since 1981 in the commercial catch of sockeye salmon” in Cook Inlet.² The numbers from the Alaska Department of Fish and Game (“ADF&G”) also show major declines: the 2013 salmon harvest was 21% less than the 1966-2012 average; the 2014 harvest was 23% less than the 1966-2013 average; the 2015 harvest was 23% less than the 1966-2014 average; and the 2016 harvest was 23% less than the 1966-2015 average.³ Even worse, *the forecast for the 2017 harvest is the lowest in the past 15 years.*

B. The State’s Management Decisions Are a Major Reason the Commercial Fishery Is Declining

The State of Alaska’s management decisions have played a significant role in the decline of these fisheries in Cook Inlet. One major problem is over-escapement. As demonstrated in Fig. 1 below, the State has exceeded the in-river goal in the Kenai River for sockeye (the most important sockeye run in Cook Inlet) *six years in a row*. And the State is not doing much better with the Kasilof River (the second most important sockeye run in Cook Inlet), exceeding the biological escapement goal for that system *four of the last six years*. Furthermore, for both of these rivers these goals have been exceeded in eight of the last 10 years.

¹ *United Cook Inlet Drift Ass’n v. Nat’l Marine Fisheries Serv.*, 837 F.3d 1055, 1057 (9th Cir. 2016).

² *Id.* at 1060-61.

³ Pat Shields & Aaron Dupuis, Alaska Dep’t of Fish & Game, Fishery Management Report No. 16-14, Upper Cook Inlet Commercial Fisheries Annual Management Report, 2015, App. B2, at 126 (Apr. 2016), <http://www.adfg.alaska.gov/FedAidPDFs/FMR16-14.pdf> (Upper Cook Inlet commercial sockeye harvest by gear type and area, 1966-2015).

Fig. 1 Sockeye Escapements and Surplus 2011-2016

Year	Kenai River			Kasilof River		
	Inriver Goal* (Thousands of Sockeye)	Sonar Count (Thousands of Sockeye)	Est. Pounds Over Midpoint of Goal	Escapement Goal (Thousands of Sockeye)	Sonar Count (Thousands of Sockeye)	Est. Pounds Over Midpoint of Goal
2011	1,100-1,350	1,599	2,431,000	160-340	245	-
2012	1,100-1,350	1,582	2,428,000	160-340	375	705,000
2013	1,000-1,200	1,360	1,638,000	160-340	490	1,520,000
2014	1,000-1,200	1,525	2,635,000	160-340	440	1,093,000
2015	1,000-1,200	1,703	3,317,000	160-340	470	1,119,000
2016	1,000-1,200	1,384	1,647,000	160-340	240	-

There are two distinct impacts from this over-escapement. *First*, it is well established that the over-escapement of sockeye in these systems leads to decreased future sockeye returns. The State has over-escaped the Kenai River six years in a row, and the Kasilof River four of the last six years. Unsurprisingly, the worst returns in 15 years are forecast for 2017.

Second, this over-escapement causes immediate financial loss from foregone harvest. As demonstrated in Fig. 2, the foregone harvest from the Kenai and Kasilof Rivers over the last six years amounts to nearly \$33 million in ex-vessel value alone.

Fig. 2 Ex-vessel Value of Surplus/Unharvested Kenai & Kasilof Sockeye 2011-2016

Year	Est. Lbs. Over Midpoint of Goal	Avg. Commercial Price/lb. for Sockeye	Est. Ex-Vessel Value of Surplus - Unharvested Sockeye	Surplus/Unharvested as Percentage of Actual Harvest
2011	2,431,000	\$1.50	\$3,646,500	10.10%
2012	3,133,000	\$1.50	\$4,699,500	21.00%
2013	3,158,000	\$2.25	\$7,105,500	26.90%
2014	3,728,000	\$2.25	\$8,388,000	36.50%
2015	4,436,000	\$1.60	\$7,097,600	44.30%
2016	1,647,000	\$1.50	\$2,470,500	11.9%
Total	18,533,000 lbs		\$32,964,000	
Estimated First Wholesale Value Loss				- \$66,000,000

These reduced returns and foregone harvest have devastated the commercial fishing industry and the communities of Cook Inlet. For example, in 2015, the State's management decisions left nearly a million sockeye unharvested. Not coincidentally, that was the same year the Great Pacific Seafoods Company went bankrupt, taking with it 300 jobs and a payroll of over \$2 million. Many other processors in Cook Inlet have suffered similar fates, unwilling or unable to operate in this unstable regulatory environment.

These economic problems are exacerbated by the fact that the escapement goals for these systems are already set well above levels that can be scientifically justified. Since 2001 the ADF&G has been using a method known as the Percentile Approach (Bue and Hasbrouck) to set nearly half the escapement goals across the State, including several goals in Cook Inlet. This methodology was based on incomplete data and was never peer reviewed. Not until 2014 did the ADF&G reveal that the Percentile Approach upper level escapement goals were "unsustainable" and likely exceeded the "carrying capacity" for many stocks.⁴

There are numerous other documented management problems in Cook Inlet. The State's repeated failures to properly count salmon returns to the Susitna River is another prime example. For many years, ADF&G thought that the Susitna River had chronic *under-escapements* of sockeye salmon because, according to the State's counting method, not enough sockeye were getting back to the Susitna River. To address those "problems," ADF&G and the Alaska Board of Fish ("BOF") imposed severe restrictions on driftnet harvests, including strict limitations on fishing in the EEZ portions of Cook Inlet. These unnecessary restrictions arising from the State's counting errors resulted in great financial hardship to the commercial fishing industry.

Indeed, as confirmed by study, these same restrictions proved unnecessary and counter-productive because ADF&G was badly *miscounting fish*. A study conducted by ADF&G from 2006 through 2009 revealed that methods used for counting sockeye salmon in the Susitna River were grossly inaccurate and, in fact, *had been undercounting the fish returns for the prior 27 years*.⁵ The ADF&G study revealed the Susitna River sockeye *escapement goal had been exceeded 96% of the time* during that period. In some of those years the goal was exceeded by as

⁴ Robert A. Clark et al., Alaska Dep't of Fish & Game, Fishery Manuscript No. 14-06, An Evaluation of the Percentile Approach for Establishing Sustainable Escapement Goals in Lieu of Stock Productivity Information, at 9 (Dec. 2014), <http://www.adfg.alaska.gov/FedAidPDFs/FMS14-06.pdf>.

⁵ Lowell F. Fair et al., Alaska Dep't of Fish & Game, Fishery Manuscript Series No. 09-01, Escapement Goal Review For Susitna River Sockeye Salmon, 2009 (Jan. 2009), <http://www.adfg.alaska.gov/FedAidpdfs/FMS09-01.pdf>.

much as 300% to 400%.⁶ After 2009, ADF&G switched to the Percentile Approach to set escapement goals for the Susitna River system. Recently it determined that those goals were also unsustainable, were set too high, and likely exceeded the carrying capacity for many stocks. Furthermore, genetic studies conducted by ADF&G in 2013 to 2015 also indicated that Susitna-bound salmon were not concentrated in any particular area in Cook Inlet so restrictions on fishing in the EEZ made no difference.⁷

When this data was presented to the BOF, they took no action to walk back the inappropriate fishing restrictions that had been developed for the non-existent problem. These restrictions – based on flawed science and faulty data – are *still being used in the current management plans*.

In short, the entire commercial fishing industry has suffered *and continues to suffer* immense economic loss by not being allowed to harvest these surplus salmon stocks. The BOF and ADF&G have, based on faulty information, systematically reduced commercial salmon harvests in Upper Cook Inlet to a current crisis point where commercial fishing produces such marginal economic returns that fishermen and salmon buyers/processors are being forced out of business here.

C. UCIDA Is Seeking Help from the Council to Help Address These Difficult Problems

UCIDA originally turned to the Council during the Amendment 12 process precisely because of these failures by ADF&G and the BOF. Since the Council passed Amendment 12, things have continued to get worse for Cook Inlet. For example, in 2012, the Secretary of Commerce issued a fishery disaster declaration in Cook Inlet due to the unexpected and unexplained crash in returns of Chinook salmon. This caused widespread fishery closures and severe economic hardship for the commercial fishing industry and communities. As detailed above, this was followed by poor harvests in 2013, 2014, 2015, and 2016, and a projected 15-year low for 2017. Things are getting worse, not better.

⁶ Catherine Cassidy & Erik Huebsch, United Cook Inlet Drift Ass'n, Fishery Related Aspects of Faulty Sonar Data, Over-Escapement and Impaired Habitat for Susitna Sockeye (Jan. 2014), <http://www.ucida.org/wp-content/uploads/2014/11/Fishery-Related-Aspects-of-Faulty-Sonar-Data-Over-Escapement-and-Impaired-Habitat-for-Susitna-Sockeye1.pdf>.

⁷ Andrew W. Barclay et al., Alaska Dep't of Fish & Game, Regional Information Report 5J17-03, Genetic Stock Identification of Upper Cook Inlet Coho Salmon Harvest, 2013-2015 (Feb. 2017), <http://www.adfg.alaska.gov/static/regulations/regprocess/fisheriesboard/pdfs/2016-2017/uci/AR06.pdf>.

UCIDA's motivations for turning to the Council for help have been consistently misrepresented. UCIDA is not looking to reallocate the fishery. UCIDA simply wants management of the fishery to be transparent, based on sound science and rational decision-making, and consistent with the principles of maximum sustained yield established by the MSA. Properly managed, there are enough fish in Cook Inlet for all user groups. As currently managed, the fishery is poised for continued decline and crisis.

The State's process is not working in Cook Inlet. The Council has a more deliberative, transparent, and science-driven management process that can help develop sound management objectives and accountability measures for the Cook Inlet salmon fishery. The problems facing the fishery are difficult. So are the problems associated with coordinating management of the fishery between the State and the Council. But these problems are solvable, and UCIDA is willing to put the time and effort to work with the Council and the State to make that happen.

II. SPECIFIC COMMENTS

A. The Fishery Should Be Managed as a Unit Throughout Its Range

The Discussion Paper states that the Council previously "recognized that salmon are best managed as a unit throughout their range" ⁸ UCIDA agrees with that sentiment. The Cook Inlet salmon fishery should be managed as a unit throughout the species' range.

However, the Discussion Paper takes the position that the Salmon FMP must focus solely on management goals and objectives for the portion of the fishery occurring in the EEZ, and that the fishery in the EEZ "would have to be responsive to harvests in state waters" and that the "EEZ portion of the fishery would only occur if there was a harvestable surplus after accounting for removals in state waters." ⁹

This position misapprehends the responsibility of the Council. There are not two separate fisheries in Cook Inlet (a state and a federal fishery) – there is one fishery, and the Council has a mandatory duty to develop an FMP for that fishery. As the Ninth Circuit explained in the Amendment 12 case:

The government argues that § 1852(h)(1) does not expressly require an FMP to cover an entire fishery, noting that "the provision says nothing about the geographic scope of plans at all." But, the statute requires an FMP for a fishery, a defined term.

⁸ Discussion Paper at 28.

⁹ *Id.* at 33-34.

See 16 U.S.C. § 1802(13). No one disputes that the exempted area of Cook Inlet is a salmon fishery. But, under the government’s interpretation, it could fulfill its statutory obligation by issuing an FMP applying to only a single ounce of water in that fishery. We disagree. When Congress directed each Council to create an FMP “for each fishery under its authority that requires conservation and management,” *id.* § 1852(h)(1), it did not suggest that a Council could wriggle out of this requirement by creating FMPs only for selected parts of those fisheries, excluding other areas that required conservation and management. *See id.* § 1853(a) (setting out the required contents of FMPs).^[10]

Thus, the Council’s obligation is over the entire “fishery” – not merely one area of that fishery.

This is confirmed by the definition of fishery. The MSA 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.^[11]

The five salmon stocks in Cook Inlet “*can be* treated as a unit for purposes of conservation and management” and are currently being treated as such by the State and the Council. The Council must therefore produce an FMP for the entire fishery, not “only for selected parts of those fisheries.”¹²

To be clear, this does not mean that the Council is required to take over the State’s job or preempt state fishery management. Rather, it means that the Council, through the FMP, *has to set the standards* for this fishery based on the requirements of the MSA and its 10 national standards. Whether the State is ultimately willing to voluntarily meet those standards is a separate question, as is the potential need for preemption if the State does not meet those standards. The State previously entered into a memorandum of understanding to manage the entire Cook Inlet salmon fishery in a manner consistent with the MSA, putting aside artificial

¹⁰ *United Cook Inlet Drift Ass’n*, 837 F.3d at 1064.

¹¹ 16 U.S.C. § 1802(13).

¹² *United Cook Inlet Drift Ass’n*, 837 F.3d at 1064.

boundaries that bear no relationship to the geographic range of the fish. There is no reason why it could not do so again.

Nor is there any legitimate reason why the State should not want to do so. The MSA and the FMP process is the gold standard for sustainable fishery management. Although the State does an excellent job with many fisheries, it is plainly struggling with the Cook Inlet salmon fishery. The State's process is not working, and it should embrace this opportunity to develop a science-based approach to sustainable fishery management.

In any event, regardless of the scope of the FMP, the Council at the very least may not delegate management of the EEZ portion of the Cook Inlet salmon fishery to the State unless "the State's laws and regulations are consistent with" the FMP.¹³ The Council cannot adopt and rely on the State's regulatory framework, including escapement goals or time and area restrictions, unless those regulations are "consistent with the national standards, the other provisions of [the MSA], and any other applicable law."¹⁴ While this may require the State to change the way it does business in Cook Inlet, such changes imposing additional scientific rigor and greater accountability are plainly needed.

B. Escapement Goals May Serve as an Appropriate Proxy for Annual Catch Limits, but Only if Those Goals Are Based on Sound Science, Subject to Independent Peer Review

UCIDA agrees, in principle, that escapement-based management is an appropriate way to manage salmon fisheries. However, the escapement goals themselves must be based on sound scientific data and be scientifically defensible.

The Discussion Paper states that:

The State's salmon management program is based on scientifically defensible escapement goals and inseason management measures to prevent overfishing. Accountability measures include the State's inseason management measures and the escapement goal setting process that incorporates the best available information of stock abundance.^[15]

¹³ 16 U.S.C. § 1856(a)(3)(A), (B).

¹⁴ 16 U.S.C. § 1853(b)(5).

¹⁵ Discussion Paper at 41.

With respect to Cook Inlet, these statements are not accurate. As detailed above, ADF&G has conceded that its Percentile Approach (Bue and Hasbrouck) used to set escapement goals sets upper levels that are “unsustainable” and likely exceeded the “carrying capacity” for many stocks.¹⁶ Likewise as detailed above, the BOF has imposed “inseason management measures” based on supposed impacts to Susitna River sockeye that were based on faulty escapement data, and are currently doing more harm than good. The BOF has repeatedly refused (including earlier this year) to make corrections or withdraw these in-season management measures in light of the best available information on escapement data and genetic testing showing the lack of efficacy of these restrictions. Again, these are just examples of the many problems inherent in the State’s escapement goals.

The Discussion Paper also suggests that the State has a “peer review” process for setting escapement goals. According to the National Standard Guidelines, “Peer review is a process used to ensure that the quality and credibility of scientific information and scientific methods meet the standards of the scientific and technical community.”¹⁷ The “participants in a peer review should be based on expertise, independence, and a balance of viewpoints, and be free of conflicts of interest.”¹⁸ The peer review process must also be open and transparent, and the public must have “full and open access to peer review panel meetings.”¹⁹

The State has no such peer review process. As the State’s latest escapement goal report plainly demonstrates, the escapement goals for Cook Inlet are reviewed and set entirely by ADF&G staff.²⁰ ADF&G staff (sitting in committee) recommend escapement goals, and those “recommendations are reviewed by ADF&G regional and headquarters staff prior to adoption as escapement goals.”²¹ ADF&G may consider this internal review as “peer review,” but it plainly

¹⁶ Clark et al., *supra* note 4.

¹⁷ 50 C.F.R. § 600.315(a)(6)(vii).

¹⁸ 50 C.F.R. § 600.315(b)(2).

¹⁹ 50 C.F.R. § 600.315(b)(3).

²⁰ Jack W. Erickson et al., Alaska Dep’t of Fish & Game, Fishery Manuscript Series No. 17-03, Review of Salmon Escapement Goals in Upper Cook Inlet, Alaska, 2016, at 20 (Feb. 2017), <http://www.adfg.alaska.gov/static/regulations/regprocess/fisheriesboard/pdfs/2016-2017/uci/FMS17-03.pdf> (listing participants).

²¹ *Id.* at 2-3.

lacks all the attributes of “peer review” required by the MSA. ADF&G’s review process has no independence, has no balance of viewpoints, is plainly hampered by conflicts of interest (it is reviewing its own work), and has zero transparency because the review by “regional and headquarters staff” is entirely internal to ADF&G. What the State calls a peer review process is in reality just ADF&G agreeing with itself.

C. The State of Alaska Cannot Serve as a Proxy for the Scientific and Statistical Committee

Relatedly, the Discussion Paper suggests that the State’s peer review process “could serve as a functional substitute for SSC recommendations on acceptable biological catch under the Magnuson-Stevens Act § 302(h)(6).”²² This is not legally permissible. The Council is required to set annual catch limits (“ACLs”) at or below the expert recommendations generated by the scientific and statistical committee (“SSC”); no other body may produce and provide these recommendations. In passing the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Pub. L. No. 109-479, 120 Stat. 3575 (“Reauthorization Act”), Congress intended “to increase the role of science in fishery management.”²³ To help accomplish this, the Reauthorization Act added provisions requiring members of the SSC to “have strong scientific or technical credentials and experience.”²⁴ Additionally, Congress “requir[ed] regional fishing councils to set hard, science-based caps on how many fish could be caught each year.”²⁵

Particularly relevant, the Reauthorization Act amendments provide that, among other things, “[e]ach scientific and statistical committee shall provide its Council ongoing scientific advice for fishery management decisions, including recommendations for acceptable biological catch”²⁶ After receiving the SSC’s recommendation, “[e]ach Council shall . . . develop annual catch limits for each of its managed fisheries that may not exceed the fishing level

²² Discussion Paper at 39.

²³ *Lovgren v. Locke*, 701 F.3d 5, 17 (1st Cir. 2012).

²⁴ 16 U.S.C. § 1852(g)(1)(C).

²⁵ *Conservation Law Found. v. Pritzker*, 37 F. Supp. 3d 254, 266 (D.D.C. 2014) (emphasis added).

²⁶ 16 U.S.C. § 1852(g)(1)(B) (emphases added).

recommendations of its scientific and statistical committee”²⁷ A plain reading of these provisions unequivocally requires that the SSC produce “hard, science-based” ACLs, and that the Council subsequently adopt ACLs at or below the SSC’s recommendations.²⁸

Case law confirms that a Council’s failure to set ACLs at or below recommendations based on the expertise of, and coming from, the SSC is unlawful. *Lovgren v. Locke*, 701 F.3d 5, 17 (1st Cir. 2012) (“[P]roposed ACLs c[an] ‘not exceed the fishing level recommendations of [a council’s] scientific and statistical committee.’” (third brackets in original) (quoting 16 U.S.C. § 1852(h)(6))); *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 60 (D.D.C. 2012) (“[I]n the process of setting the final ACL, the council must solicit scientific advice from the SSC and, based on that advice, establish a rule for acceptable biological catch to account for scientific uncertainty, and then set an ACL that permits no greater fishing levels than the SSC recommends.” (emphases added)). Any attempt by the Council to circumvent these statutory mandates will be heavily scrutinized and invalidated by a court. *See, e.g., Conservation Law Found. v. Pritzker*, 37 F. Supp. 3d 254, 266-67 (D.D.C. 2014) (rejecting Council’s “simply nonsensical” attempt to circumvent requirement to set ACLs at or below SSC recommendations because it “contravenes the plain language of the Act”).

Accordingly, while it may be appropriate for the Council to use escapement goals as an alternative approach for ACLs, that alternative approach must still be carefully vetted through the SSC.

D. The Discussion Paper’s Treatment of Over-Escapement Is Based on Outdated Information

The Discussion Paper marginalizes the problems associated with over-escapement, citing a 2007 ADF&G study and stating that for the last 15 years “foregone harvest was small” and that “the stock which exhibited the largest foregone harvests were not heavily exploited, lacked fishing power and were unable to fully exploit large runs when they occurred.”²⁹ This discussion presents an inaccurate, incomplete, and outdated picture of the escapement problem in Cook Inlet.

²⁷ 16 U.S.C. § 1852(h)(6) (emphasis added).

²⁸ *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (“‘Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.’” (citation omitted)).

²⁹ Discussion Paper at 72.

Critically, the study cited by the Discussion Paper is *10 years old*. During the last 10 years, the Kenai River exceeded the in-river goal eight times, 12 times since the year 2000, including major over-escapements the last six years in a row.³⁰ Likewise, the Kasilof River also exceeded the biological escapement goal eight times during the last 10 years and 14 times since the year 2000.³¹ These were not situations where the “foregone harvest was small.” In 2015, the foregone harvest to the Kenai River alone (approximately 500,000 sockeye) was equal to about 50% of the entire catch by the drift fleet for that year. Nor was this a situation where the drift fleet “lacked fishing power” to exploit these runs.³² The State just over-escaped the fishery through mismanagement – a practice that has unfortunately become the norm, rather than the exception, in Cook Inlet.

In addition, the Discussion Paper incorrectly assumes that the problems of over escapement are limited to situations where ADF&G exceeds its stated escapement goals. But the problems are actually much more pervasive because, as discussed above, ADF&G and/or the BOF have in many cases set their escapement goals at levels that are “unsustainable” or based on data that undercounts actual returns. Over-escapement is a pervasive problem in Cook Inlet.

E. The Discussion Paper Presents an Incomplete Picture of the Cook Inlet Salmon Fishery and the Current and Historical Regulatory Environment

In addition, the Discussion Paper’s commentary on the Cook Inlet fishery includes errors and faulty assumptions that miss the larger historical regulatory context of the fishery.

The Discussion Paper uses the State’s regulation of Susitna River sockeye beginning in 2008 as an example of how the State manages the Cook Inlet sockeye fishery.³³ As written, the discussion details a seemingly rational process of responding to yield concerns by imposing fishery restrictions. But this superficial discussion misses the context (detailed above) showing

³⁰ Pat Shields & Aaron Dupuis, Alaska Dep’t of Fish & Game, Fishery Management Report No. 17-05, Upper Cook Inlet Commercial Fisheries Annual Management Report, 2016, at 1 (Feb. 2017), <http://www.adfg.alaska.gov/FedAidPDFs/FMR17-05.pdf>.

³¹ *Id.*

³² It is also estimated that appropriately 200,000 sockeye entered the Kenai River after the ADF&G suspended the sonar counter and the management plans had closed the commercial fisheries in all but the west side of Cook Inlet.

³³ Discussion Paper at 58.

that these same actions were based both on faulty data (namely, grossly erroneous return numbers) and that the area restrictions were based on no data at all (and on assumptions that were later disproven by genetic testing). This example, selected by the Discussion Paper as typical state management in Cook Inlet, is an example of *gross mismanagement*, and the fact that these same baseless restrictions remain in place today only demonstrates the need for the Council to be involved in this fishery.

This Discussion Paper also states that “[c]oho salmon are fully utilized” and that “an increase in commercial opportunity for pink, chum, or coho salmon could result in unsustainable harvest rates on coho salmon” in Upper Cook Inlet.³⁴ This statement is not correct. The commercial exploitation rate on the total coho return to Northern Cook Inlet is about 10% to 15%,³⁵ and the sport exploitation rate on the total coho return to Northern Cook Inlet is about 8% to 12%.³⁶ Combining these rates is far, far below the 60% overall exploitation rate that ADF&G claims is acceptable. The best science actually points to a 77% optimum exploitation rate for MSY management for coho salmon.³⁷

The coho salmon return data from 2014 demonstrates this. As shown in the chart below, of the estimated 2.75 million coho salmon returning in 2014, there were 1.5 million coho salmon that went unutilized. Any claim that “[c]oho salmon are fully utilized” in Cook Inlet is not supportable.

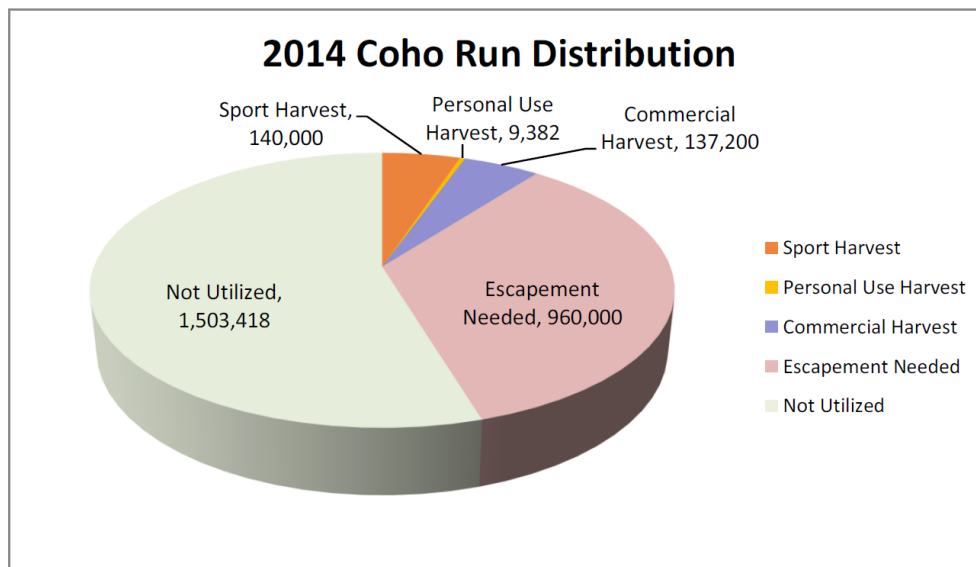
³⁴ *Id.*

³⁵ T. Mark Willette, Robert DeCino & Nancy Gove, Alaska Department of Fish & Game, Report No. 2A03-20, Mark-Recapture Population Estimates Of Coho, Pink And Chum Salmon Runs To Upper Cook Inlet In 2002 (June 2003), <http://www.adfg.alaska.gov/FedAidpdfs/RIR.2A.2003.20.pdf>

³⁶ Samantha Oslud, Sam Ivey & Daryl Lescanec, Alaska Department of Fish & Game, Report No. 17-07 (February 2017), <http://www.adfg.alaska.gov/static/regulations/regprocess/fisheriesboard/pdfs/2016-2017/uci/AR03.pdf>.

³⁷ Barclay et al, *supra* note 7.

Figure 5. Distribution of the 2,750,000 Coho Run in Upper Cook Inlet, 2014



The Discussion Paper’s confusion on this point is understandable. For a long time, ADF&G used coho salmon as an excuse not to allow fishing on underutilized stocks like pinks and chums. This position is not scientifically sustainable as coho salmon are plainly not fully utilized. As the charts below illustrate, there are significant, underutilized stocks in the Inlet, and the State’s failure to authorize harvest on these stocks based on misinformation has imposed significant and unnecessary hardship on the Cook Inlet commercial fishing industry.

Figure 6. Distribution of the 20,000,000 Pink Run in Upper Cook Inlet, 2014

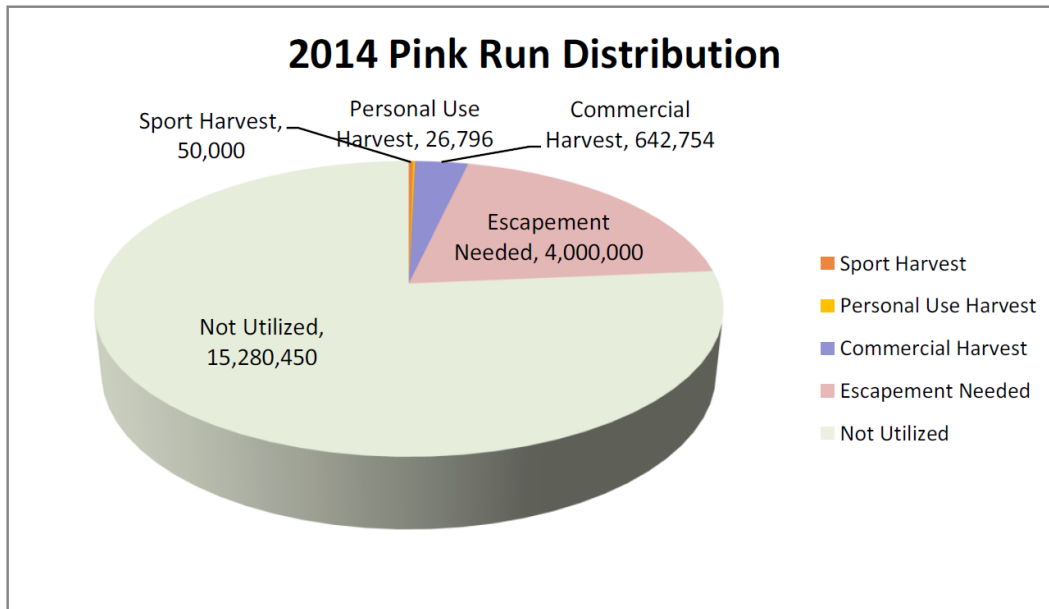
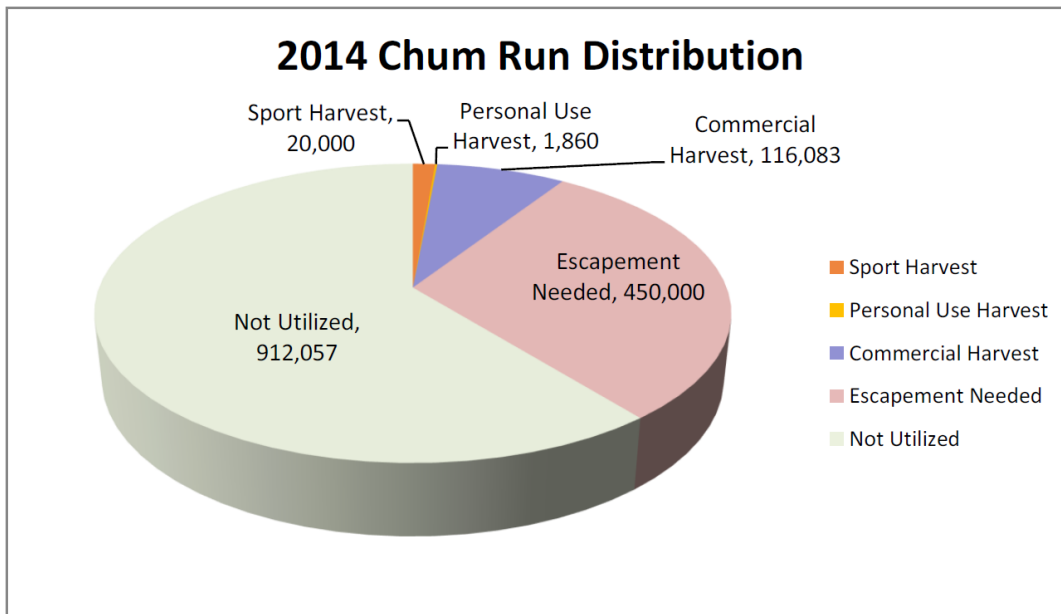


Figure 7. Distribution of the 1,500,000 Chum Run in Upper Cook Inlet, 2014



The Discussion Paper also provides an incomplete picture of the history of state regulation of the commercial fishing fleet in Cook Inlet. For example, the Discussion Paper

provides historical catch data that goes back only to 1991, and states that “ADF&G managers estimate that in recent years approximately half of the drift fleet’s salmon harvest comes from waters of the EEZ.”³⁸ The problem with using a data set that only goes back to 1991 is that a lot of the State’s restrictions on drift fishing started in the 1990s and then got progressively worse over the years. As demonstrated in the figure below, looking at a broader set of data shows how the average harvests have declined under the State’s management.

Fig. 4 Average and Annual Number of UCI Salmon Commercially Harvested

	Coho	Pink	Chum
1975 - 1984	363,000	730,000	833,000
1985 - 1994	506,000	397,000	441,000
1995 - 2004	222,000	209,000	178,000
2005 - 2014	171,000	247,000	123,000
2014 Harvest	137,376	642,879	116,093
2015 Harvest	216,032	48,004	275,960
2016 Harvest	147,469	382,436	123,711

As for the fact that half of the drift fleet harvest currently occurs in the EEZ, that too is a product of historical state regulations. The best fishing locations in Upper Cook Inlet are in the EEZ. Historically, the drift fleet has operated predominately in the EEZ. Given their choice, commercial fishermen would continue to spend the vast majority of their fishing effort in the EEZ today. But beginning in the mid-1990s, the State progressively limited fishing in the EEZ, restricting operations based on erroneous or unsupported assumptions about the fishery and unfounded and unsustainable escapement goals.

Furthermore, the Discussion Paper asserts that the “State monitors harvest in all of the salmon fisheries and manages salmon holistically by incorporating all the sources of fishing mortality on a particular stock or stock complex in calculating the escapement goal range.”³⁹ This gives the State much more credit than is due. A recently released Genetic Stock Composition report (FMS 16-10) documents that *over a million Upper Cook Inlet sockeye*

³⁸ Discussion Paper at 57.

³⁹ *Id.* at 69.

*salmon were targeted and harvested in just a portion of the Kodiak Management Area in the years 2014 to 2016.*⁴⁰

ADF&G did not account for those removals when setting or reviewing its escapement goals for the Upper Cook Inlet fishery, even though it was aware of the problem over a year ago. In 1989 the BOF took action and developed the North Shelikof Straits Sockeye Salmon Management Plan to reduce the interception of Cook Inlet sockeye in the Kodiak Management Area. The express purpose of this plan is stated in the preamble: *“The purpose of the North Shelikof Strait Sockeye Salmon Management Plan is to allow traditional fisheries in the area to be conducted on Kodiak Area salmon stocks, while minimizing the directed harvest of Cook Inlet sockeye salmon stocks. The board recognizes that some incidental harvest of other stocks has and will occur in this area while the seine fishery is managed for Kodiak Area salmon stocks. The board intends, however, to prevent a repetition of the nontraditional harvest pattern which occurred during 1988.”*⁴¹

That action by the BOF in 1988 was the result of a harvest of Cook Inlet sockeye estimated at less than half a million. The new genetics study (FMS 16-10) and numerous other ADF&G reports from the Kodiak Management Area reveal the magnitude of the interception far exceeds the previous quantity measured in 1988. In spite of this being the best available science and in spite of the directive from the BOF in 1988, the ADF&G has not taken action to alter current management in the Kodiak Management Area or incorporate the new data. As this example demonstrates, the State does not account for all removals from the fishery or utilize the best available science.

Lastly, the Discussion Paper overlooks the significant role that other federal entities currently have (or may have in the future). Much of the core spawning and rearing habitat for Cook Inlet salmon stocks occur on federally managed lands, including, parks, refuges, reserves, and national forests. The agencies that administer these federal areas can control access to the Cook Inlet fishery stocks above and beyond the NPFMC, NMFS, and the State. All of these entities have a say in the management of fish habitat, and some, such as the Federal Subsistence Board and U.S. Fish and Wildlife Service, can authorize or manage harvests without state approval. The State is not the only regulatory entity involved here, and the role of these other federal agencies and entities needs to be carefully considered and discussed.

⁴⁰ Kyle R. Shedd et al., Alaska Dep’t of Fish & Game, Fishery Manuscript Series No. 16-10, Genetic Stock Composition of the Commercial Harvest of Sockeye Salmon in Kodiak Management Area, 2014–2016 (Dec. 2016), <http://www.adfg.alaska.gov/FedAidPDFs/FMS16-10.pdf>.

⁴¹ 5 AAC 18.363(a)

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March 28, 2017
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We sincerely appreciate your consideration of these comments and concerns and look forward to working with you to develop a robust, science-based FMP for the Cook Inlet salmon fisheries.

Very truly yours,



Jason T. Morgan