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September 25, 2017

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

Re: Salmon FMP – Agenda Item C-8, FMP 17-006

Dear Chairman Hull and Council Members:

I am writing on behalf of Concerned Area M Fishermen (CAMF) and Cordova District Fishermen United (CDFU), whose members participate in drift gillnet fisheries in the South Alaska Peninsula and Prince William Sound areas, respectively.

CAMF and CDFU have reviewed the Discussion Paper for Revisions to the Fishery Management Plan for the Salmon Fisheries in the EEZ Off Alaska (October 2017). They disagree with a central premise of the analysis, that because the "record and rationale for excluding the Cook Inlet Area from the FMP [in Amendment 12] are the same for the Alaska Peninsula and Prince William Sounds Area...the FMP will have to be amended to address all three traditional net fishing areas." Discussion Paper at 24. CAMF and CDFU contend that the Council should instead confine its review of the FMP to addressing Cook Inlet and not consider including federal waters of the South Alaska Peninsula and Prince William Sound in the FMP's fishery management unit. In other words, keep Amendment 12 intact with respect to these two traditional net fisheries.

This position is based on a straightforward reading of the legal decisions that have prompted the Council to consider revising the FMP. The Ninth Circuit's opinion concludes that "Amendment 12 is contrary to law to the extent it removes Cook Inlet from the FMP." *UCIDA v. NMFS*, 837 F.3d 1055, 1065 (9th Cir. 2016). The District Court on remand granted the parties' Joint Motion for Entry of Proposed Judgment, in which all parties echoed the Ninth Circuit: "...Amendment 12 is contrary to law to the extent it removes federal waters in Cook Inlet from the FMP..." The Judgment of the District Court granting this motion repeatedly defined the task before the Council and NMFS as development of a new salmon FMP amendment "that addresses Cook Inlet." *UCIDA v. NMFS,* Case No. 3:13-cv-00104-TMB (August 3, 2017). Nowhere in these legal rulings did the Ninth Circuit or the District Court hold that Amendment 12 was contrary to law because it removed federal waters of the South Alaska Peninsula and Prince William Sound from the FMP, and neither court in any way directed the Council and NMFS to consider amending the FMP with respect to these two fisheries.

It is important to note that the *UCIDA* plaintiffs framed their challenge to Amendment 12 around a number of factual arguments specific to Cook Inlet. Their pleadings are replete with assertions that the Alaska Department of Fish and Game and the Alaska Board of Fisheries had mismanaged the fisheries in Cook Inlet to the detriment of the area's salmon stocks and user groups, and that only by subjecting Cook Inlet to the provisions of the Magnuson-Stevens Act (MSA) and oversight by this Council could these problems be remedied. The Ninth Circuit acknowledged the *UCIDA* plaintiffs' factual arguments in its opinion. 837 F.3d at 1060-61. Nowhere in the pleadings before the courts was there any discussion of the factual circumstances of the traditional net fisheries of the South Alaska Peninsula or Prince William Sound, nor any allegation that state management in these areas was in any way deficient. And while the ultimate conclusion of the Ninth Circuit rested primarily on its interpretation of specific language of the MSA, it cannot be disputed that the case was set in the context of Cook Inlet alone. Would the outcome have been different if the record before the court had included a full analysis of the facts regarding the South Alaska Peninsula and Prince William Sound fisheries? Maybe, maybe not – we can only speculate. The question of the Council's removal of the EEZ portions of these fisheries from the FMP's fishery management unit was simply not before the courts.

CAMF and CDFU acknowledge that the Council certainly has discretion to consider bringing the federal waters of the South Alaska Peninsula and Prince William Sound into the FMP's fishery management unit. Their argument is that the Council is not required to do so. Instead of rejecting a "no action" alternative at the outset, as the Discussion Paper states, the Council should instead consider that alternative in relation to these two fisheries outside Cook Inlet. The record and rationale for excluding the three traditional net fisheries from the FMP in Amendment 12 was well-reasoned and cogent, and provided a simple solution for dealing with the "square peg/round hole" problem of applying MSA provisions to the EEZ portions of these state managed fisheries, the harvest from which represents only a small fraction of the total. The Council would be on firm ground in reiterating its reasons for Amendment 12 in relation to the South Alaska Peninsula and Prince William Sound.

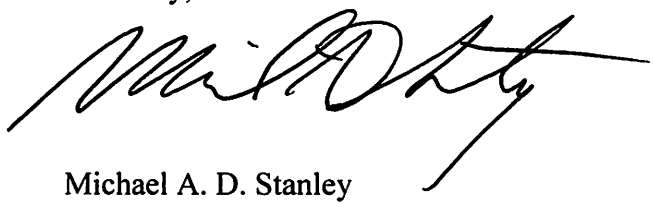
We anticipate that NOAA General Counsel will advise against this course of action because it would leave NMFS vulnerable to another legal challenge against Amendment 12 framed around the South Alaska Peninsula and/or Prince William Sound fisheries. CAMF and CDFU would not launch such a challenge – certainly not after reviewing the highly complicated regulatory alternatives set forth in the Discussion Paper – and they are not aware of any other user groups in these areas that would have any interest in doing so. Whether any parties outside the respective areas would bring suit on the basis of *UCIDA* is speculative. And even if such a challenge were brought, the plaintiffs at the threshold would face a formidable obstacle under 16 U.S.C. § 1855(f)(1). That provision bars any legal challenge to regulations implementing an FMP unless filed within 30 days of promulgation. The final rule implementing Amendment 12 was published on December 21, 2016 (77 FR 75570). To the extent those regulations exclude the EEZ potions of South Alaska Peninsula and Prince William Sound fisheries from the FMP, those regulations are well beyond legal challenge.

Should the Council nevertheless decide to accede to NMFS's claim that the FMP will have to be amended to address all three traditional net fishing areas, CAMF and CDFU have two recommendations. First, deal with Cook Inlet first and leave consideration of the other two fisheries for a later time. The situation in Cook Inlet is very complicated, with numerous competing use groups and stakeholders. The Discussion Paper appears to point the Council in this direction. The analysis of status determination criteria in section 2.5 (at 48-65) is limited to Cook Inlet and does not contain any information regarding development of those criteria in other portions of the West Area of the fishery management unit. CAMF and CDFU, as well as other stakeholders, are thus not in a position to comment on specific aspects regarding how this set of MSA provisions would be applied in these other areas. The Council should use Cook Inlet as a test vehicle for deciding how to proceed in bringing one of the three traditional net fisheries into the FMP before addressing the other two. This phased approach would satisfy the Judgment of the District Court but would preserve the Council's ability to adopt a different alternative with respect to the other two fisheries, learning from the difficulties it may encounter in dealing with Cook Inlet.

Second, CAMF and CDFU very much oppose alternative 3, federal management. If the Council decides to include federal waters of the South Alaska Peninsula and Prince William Sound in the salmon FMP, then it should focus on alternative 2, cooperative management with the state. The Council should maximize the extent to which state management of these two traditional net fisheries can be maintained without intrusive federal oversight and without imposing onerous, expensive and unnecessary regulations or process participation requirements on their membership.

Thank you for considering these comments. Representatives of CAMF and CDFU will be in attendance at your upcoming meeting, and would be happy to answer any questions about their position or otherwise engage you in discussion concerning the best way forward in light of the unfortunate decision in *UCIDA*.

Sincerely,



Michael A. D. Stanley

cc: CAMF and CDFU

United Cook Inlet Drift Association

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Date: September 28, 2017

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

RE: Salmon Fisheries Management Plan, Alaska Agenda Item C-8

Dear Mr. Hull,

Once again, United Cook Inlet Drift Association (UCIDA) and Cook Inlet Fishermen's Fund (CIFF) express our willingness to work cooperatively with NOAA/NMFS. NPFMC, State of Alaska and other stakeholders in the construction and development of a new salmon Fishery Management Plan (FMP) for Alaska. We first raised this issue of a legal and adequate salmon FMP a decade ago. Now, after several Federal court cases and rulings, we again ask for a legal and adequate salmon FMP for Alaska.

Concerning the latest Discussion Paper For Revisions to the Fishery Management Plan for the Salmon Fisheries in the EEZ Off Alaska, October 2017, UCIDA offers the following:

Review of Decisions, Orders and MSA Excerpts

1. We would ask that all Council members read the United States Court of Appeals for the Ninth Circuit Decision in Case No. 14-35928, Opinion, Filed September 21, 2016. This case is attached and incorporated into our comments by reference.
2. Additionally, we ask all Council members to read the case settlement Order signed by District Court Judge Timothy M. Burgess on August 3, 2017. This case settlement agreement is attached and incorporated into our comments by reference.

3. Lastly, we would ask that all Council members read "Magnuson-Stevens Act Excerpts," which is also attached and incorporated into our comments by reference.

In referencing these three documents, there are several issues:

A. There is no reference to anadromous species as explained or described by MSA;

B. The anadromous term "migratory range" does not appear anywhere in Discussion Paper;

> **"101-627**
> (29) The term "migratory range" means the maximum area at a given time of the year within which fish of an anadromous species or stock thereof can be expected to be found, as determined on the basis of scale pattern analysis, tagging studies, or other reliable scientific information, except that the term does not include any part of such area which is in the waters of a foreign nation."

C. The October 2017 Discussion Paper avoids or tries to reinterpret this definition.
D. The term "fishery" is a defined term in MSA and is not adequately addressed or incorporated into the Discussion Paper.

Factual Information Errors

In the March 2017 and October 2017 draft Discussion Papers, there are as many as 35 factual errors in the Tables, Figures and general discussions. There are conclusion statements in these documents that are not supportable or supported. We are resubmitting our written comments from March 28, 2017. These comments are attached and incorporated into this paper by reference. In the March 28 comments, we have described certain factual errors and omissions that were found in the March 2017 version of the Discussion Paper. The October 2017 version of the Discussion Paper has not corrected those errors. If the Council's Discussion Paper does not incorporate comments from the stakeholders, then this really isn't an "open and transparent" or meaningful process at all.

Peer Review

Both the March 2017 and the October 2017 Discussion Papers describe a "peer review process" that is nothing more than the State of Alaska agreeing with itself. The described peer review process bypasses all of the stakeholders along with the Science and Statistical Committee (SSC), which was established and mandated by MSA. In our view, there is nothing in MSA that allows a wholesale delegation of the peer review process.

Escapement Goal Management as an Alternative to MSA/OY

Escapement goal management, as a means of achieving the MSA, mandates providing food to the nation and national food security. Following the National Standards 1-10 for this mandate is awkward, incomplete and not well-described. The escapement goal discussion makes no sense in regard to tiers and the use of the percentile approach for setting escapement goals. Structurally and practically, MSY/OY will not be achieved. Just the opposite occurs as millions of salmon are preplanned and pre-prescribed for waste and underutilization; both of which are not in accordance with the stated purposes of MSA.

In the UCIDA comments on the March 2017 Discussion Paper, we raised the issue of the Kodiak Seine Fleet harvests of over a million salmon natal to Cook Inlet. Please read our letter to Mr. John Jensen, AK BOF Chairman, which is attached and incorporated into our comments by reference. Also, see Adjustments for Cook Inlet Reporting Groups to the Addendum to FMS 16-10: Redefinition of Reporting Groups to Separate Cook Inlet into Four Groups for Genetic Stock Composition of the Commercial Harvest of Sockeye Salmon in the Kodiak Management Area, 2014-2016, this document is referenced and incorporated into our comments by reference.

There is no discussion at all regarding the harvesting of salmon natal to Cook Inlet. There is no discussion of how these harvests relate to the National Standards. Lastly, the Discussion Paper is silent on how to approach achieving the National Standards throughout the migratory range of these salmon. We are willing to discuss and work on achieving solutions to these issues related to escapement goal management as an alternative approach to MSA/OY and other MSA mandates.

Stakeholder Working Group

UCIDA has repeatedly asked for a stakeholder salmon committee. Again, we support the formation of such a group. MSA and the August 3, 2017 settlement agreement mandate the formation of a stakeholder group to be established at the very early stages of developing the new FMP. The letter from UCIDA to NPFMC, dated April 6, 2017, is incorporated by reference into our comments. In the Settlement Agreement dated August 3, 2017, the plaintiffs are referenced as being members of the stakeholder committee. UCIDA and CIFF are prepared to provide the names to the NPFMC as appropriate.

In some respects, this letter has been cathartic in the sense that some of the legal issues have been resolved. In other aspects, this letter and the incorporated referenced documents expand the scope of depth of the issues we have regarding the development of a new salmon FMP. We, again, offer our time, energy, thoughtful considerations and suggestions. We believe that if all parties put forward a good faith effort, a draft of the new FMP for Cook Inlet could be ready for review in six to nine months.

Sincerely,

Original Signed Document

David R. Martin, President
United Cook Inlet Drift Association

Magnuson – Stevens Act excerpts

TITLE I—UNITED STATES RIGHTS AND AUTHORITY REGARDING FISH AND FISHERY RESOURCES

SEC. 101. UNITED STATES SOVEREIGN RIGHTS TO FISH 16 U.S.C. 1811 AND FISHERY MANAGEMENT AUTHORITY

99-659, 102-251
(a) IN THE EXCLUSIVE ECONOMIC ZONE.—Except as provided in section 102, the United States claims, and will exercise in the manner provided for in this Act, sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone.

99-659, 101-627, 102-251
(b) BEYOND THE EXCLUSIVE ECONOMIC ZONE.—The United States claims, and will exercise in the manner provided for in this Act, exclusive fishery management authority over the following:
(1) All anadromous species throughout the migratory range of each such species beyond the exclusive economic zone; except that that management authority does not extend to any such species during the time they are found within any waters of a foreign nation.
(2) All Continental Shelf fishery resources beyond the exclusive economic zone.

101-627
(29) The term "migratory range" means the maximum area at a given time of the year within which fish of an anadromous species or stock thereof can be expected to be found, as determined on the basis of scale pattern analysis, tagging studies, or other reliable scientific information, except that the term does not include any part of such area which is in the waters of a foreign nation.

(13) The term "fishery" means—
(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.

Adjustments for Cook Inlet Reporting Groups to the Addendum to FMS 16-10: Redefinition of Reporting Groups to Separate Cook Inlet into Four Groups for Genetic Stock Composition of the Commercial Harvest of Sockeye Salmon in the Kodiak Management Area, 2014-2016.



United Cook Inlet Drift Association, September 2017

Study Background to FMS 16-10, Shedd, et al., December 2016

"The Alaska Department of Fish and Game (ADF&G) used genetic mixed stock analysis (msa)* to estimate the stock composition and the stock-specific harvest of commercial sockeye salmon (Oncorhynchus Nerka) harvests in the Kodiak Management Area (KMA) from 2014 to 2016." (Shedd, et al., 2016). The first ADF&G report concerning the genetic msa was released in December 2016 as Fishery Manuscript Series No. 16-10, authors: Shedd, Foster, Dun, Hoyt, Wattum and Habicht (FMS 16-10). This genetic msa report FMS 16-10 was released to the public a few days prior to the Board of Fish (BOF) 2017 tri-annual Kodiak regulatory meeting. The FMS 16-10 report was released to the public nine (9) months after the close of submitting regulatory proposal changes for both the KMA and Cook Inlet Management Areas. The December 2016 public release of FMS 16-10 generated great concerns from the public, regional stakeholders, ADF&G managers and the BOF. Numerous questions arose as to the msa genetic findings, the significance of these findings and how these findings were to be used in the development and adjustments to salmon management plans and attending regulations.

In FMS 16-10, there were genetic findings concerning the sockeye harvests in KMA from six (6) regional reporting groups: 1. West of Chignik; 2. Chignik; 3. Cook Inlet; 4. Prince William Sound; 5. South of Cape Suckling and 6. Kodiak.

Addendum to FMS 16-10

At the January 2017 BOF meeting held in Kodiak, there was a specific request of ADF&G to further examine the Cook Inlet regional reporting group and divide it into four (4) subregional groups: 1. Other Cook Inlet (OCI); 2. Susitna; 3. Kenai; and 4. Kasilof. The Addendum to FMS 16-10 was made public in September 2017. In the Addendum to FMS 16-10, the regional (Cook Inlet) group was further defined, refined and reported as belonging to one of these four subregional groups. Tables 1-10 in the Addendum report the assignment of the Cook Inlet regional sockeye salmon stocks into the 4 subregional reporting groups. Also, in the Addendum to FMS 16-10, the original six (6) reporting groups have been expanded, refined and are now listed in Tables 1-9 as 19 reporting groups. In the Addendum to FMS 16-10, there are 19 reporting groups: three (3) original regional groups and sixteen (16) newly described subregional reporting groups. Among these newly described and listed reporting groups are the "Unknown." These "Unknown" are also listed as "Unsampled Areas." It is some of these sockeyes that, on a mathematical basis, will be assigned to one the four Cook Inlet subregional groups in the adjustments for Cook Inlet Reporting Groups.

* UCIDA suggests using non-capitalized letters, noting difference from the Magnuson Stevens Act (MSA).

In both the FMS 16-10 and the Addendum to FMS 16-10, all genetic msa are estimates, even though in both reports, both regional and subregional harvest numbers are often estimated to the single digit (sockeye). In the Addendum to FMS 16-10, on Tables 1-9 there are two notes: the first to Stock Specific and second to Results for Cook Inlet. Both of the notes alert the reader that the median number of sockeyes is biased low and that the value of sockeye in any strata below a 5% contribution are not reported in Tables 1-9. An asterisk (*) is shown rather than the numerical value. The 5% cut-off screening was reflected only in the 4 Cook Inlet subregional groups.

Tables 1A through 9A show the Cook Inlet subregional reporting group totals. There is a corresponding decrease in the “Unknown (Unsampled)” as some of these sockeyes were assigned to one of the four Cook Inlet subregional groups.

Table 1A (Adjusted for Cook Inlet). Kodiak Management Area, 2014, early temporal stratum. Median estimates of stock-specific harvest by sampling area for all subregional groups. Numbers for Unknown (reporting group) and for Total by Year are estimates based of fish ticket information by area. See Appendix A1, A13, A25 and A37 for additional stock composition and stock-specific harvest statistics.

Reporting Group	Unsampled Areas	Igvak	Alitak	Ayaklulik Halibut Bay	Karluk Sturgeon	Uyak	Uganik Kupreanof	Total by Reporting Group	Total UCI Adjusted
West of Chignik	0	0	0	2,479	1,292	2,066	5,273	11,403	11,403
Black Lake	0	0	0	1	146	1,348	3,486	5,250	5,250
Chignik Lake	0	0	0	0	0	0	977	1,168	1,168
Upper Station / Akalura	0	0	0	4,539	1,622	1,523	524	8,472	8,472
Ayakulik / Frazer	0	0	0	116,247	19,980	18,819	12,571	167,723	167,723
Karluk	0	0	0	16,588	26,303	31,477	16,000	90,526	90,526
Uganik	0	0	0	768	816	18,449	12,073	32,444	32,444
Northwest Kodiak	0	0	0	0	363	6,027	4,121	10,855	10,855
Afognak	0	0	0	0	313	936	3,869	5,301	5,301
Eastside Kodiak	0	0	0	348	425	0	0	1,353	1,353
Saltery	0	0	0	2,897	830	16,457	17,565	37,982	37,982
Other Cook Inlet (OCI)	0	0	0	1,223	*	*	*	2,784	3,740
Susitna	0	0	0	0	*	*	*	2	3
Kenai	0	0	0	1,601	*	*	*	2,056	2,762
Kasilof	0	0	0	8,228	*	*	*	10,854	14,583
PWS	0	0	0	3,866	881	2,009	1,065	8,095	8,095
South of Cape Suckling	0	0	0	1,625	49	1	0	2,105	2,105
Unknown (Unsampled)	137,712	0	0	0	0	0	0	137,712	132,320
Actual	137,712	0	0	160,410	53,020	99,112	77,524	536,085	536,085
Total by Sampling Area	137,712	0	0	162,984	56,018	102,346	79,494	538,554	

Note: Stock-specific harvest estimates may not sum to the total harvest because summed medians are biased low.

Note: Results for Cook Inlet subregional reporting groups are only reported if the overall contribution to the Cook Inlet group in the stratum or any contributing strata is greater than 5%.

Note: Actual figures calculated by UCIDA are shown in gray rows and columns

Table 2A (Adjusted for Cook Inlet). Kodiak Management Area, 2014, middle temporal stratum. Median estimates of stock-specific harvest by sampling area for all subregional groups. Numbers for Unknown (reporting group) and for Total by Year are estimates based of fish ticket information by area. See Appendix A1, A13, A25 and A37 for additional stock composition and stock-specific harvest statistics.

Reporting Group	Unsampled Areas	Igvak	Alitak	Ayaklulik Halibut Bay	Karluk Sturgeon	Uyak	Uganik Kupreanof	Total by Reporting Group	Total UCI Adjusted
West of Chignik	0	0	139	7,202	4	0	0	8,461	8,461
Black Lake	0	0	0	0	0	0	1,137	1,450	1,450
Chignik Lake	0	0	1,217	0	2,244	1,138	3,085	8,076	8,076
Upper Station / Akalura	0	0	5,383	3,428	0	0	0	9,641	9,641
Ayakulik / Frazer	0	0	65,573	90,666	17,635	6,804	4,331	185,249	185,249
Karluk	0	0	0	1,725	25,856	12,800	11,895	53,027	53,027
Uganik	0	0	2	0	3,665	2,305	8,208	14,736	14,736
Northwest Kodiak	0	0	0	0	115	0	0	538	538
Afognak	0	0	0	0	0	256	927	1,600	1,600
Eastside Kodiak	0	0	2,579	4,617	220	198	0	8,320	8,320
Saltery	0	0	935	22,990	13,690	90,992	88,284	217,070	217,070
Other Cook Inlet (OCI)	0	0	4,239	2,775	*	0	*	7,976	15,398
Susitna	0	0	1,194	1,173	*	1,081	*	4,214	8,136
Kenai	0	0	18,640	29,413	*	2,866	*	51,541	99,505
Kasilof	0	0	12,932	6,987	*	2,840	*	24,990	48,246
PWS	0	0	768	958	1,096	2,689	7,839	14,102	14,102
South of Cape Suckling	0	0	10	0	0	0	0	612	612
Unknown (Unsampled)	569,159	0	0	0	0	0	0	569,159	486,595
Actual	569,159	0	113,611	171,934	64,525	123,969	125,706	1,180,762	1,180,762
Total by Sampling Area	569,159	0	115,998	175,205	68,438	126,840	128,836	1,184,476	

Note: Stock-specific harvest estimates may not sum to the total harvest because summed medians are biased low.

Note: Results for Cook Inlet subregional reporting groups are only reported if the overall contribution to the Cook Inlet group in the stratum or any contributing strata is greater than 5%.

Note: Actual figures calculated by UCIDA are shown in gray rows and columns

The 2014 totals by Shedd, et al., and UCIDA, 2017 for all three time stratum are shown in Tables 11 and 11A, see page 13.

Table 3A (Adjusted for Cook Inlet). Kodiak Management Area, 2014, late temporal stratum. Median estimates of stock-specific harvest by sampling area for all subregional groups. Numbers for Unknown (reporting group) and for Total by Year are estimates based of fish ticket information by area. See Appendix A3, A15, A27, A39, and A50 for additional stock composition and stock-specific harvest statistics.

Reporting Group	Unsampled Areas	Igvak	Alitak	Ayaklulik Halibut Bay	Karluk Sturgeon	Uyak	Uganik Kupreanof	Total by Reporting Group	Total UCI Adjusted
West of Chignik	0	0	0	423	0	0	0	484	484
Black Lake	0	0	0	0	0	0	0	0	0
Chignik Lake	0	0	19	401	334	0	1,103	2,029	2,029
Upper Station / Akalura	0	0	3,449	12,307	11,887	11,664	7,194	46,775	46,775
Ayakulik / Frazer	0	0	1,366	29,735	7,688	3,581	0	43,013	43,013
Karluk	0	0	0	7,239	100,168	111,318	131,408	349,984	349,984
Uganik	0	0	0	0	0	13	0	254	254
Northwest Kodiak	0	0	0	0	0	0	0	2	2
Afognak	0	0	0	0	0	0	0	0	0
Eastside Kodiak	0	0	203	398	0	393	0	1,180	1,180
Saltery	0	0	0	2,403	3,591	25,780	18,364	50,307	50,307
Other Cook Inlet (OCI)	0	0	0	548	*	*	*	752	1,128
Susitna	0	0	0	0	*	*	*	24	36
Kenai	0	0	268	2,270	*	*	*	7,171	10,758
Kasilof	0	0	0	0	*	*	*	0	0
PWS	0	0	9	95	14	671	143	1,269	1,269
South of Cape Suckling	0	0	62	412	5	170	1,245	2,173	2,173
Unknown (Unsampled)	254,809	0	0	0	0	0	0	254,809	250,833
Actual	254,809	0	5,376	56,231	123,687	153,590	159,457	760,226	760,226
Total by Sampling Area	254,809	2,477	5,437	57,066	124,879	155,658	163,843	764,169	

Note: Stock-specific harvest estimates may not sum to the total harvest because summed medians are biased low.

Note: Results for Cook Inlet subregional reporting groups are only reported if the overall contribution to the Cook Inlet group in the stratum or any contributing strata is greater than 5%.

Note: Actual figures calculated by UCIDA are shown in gray rows and columns

Table 4A (Adjusted for Cook Inlet). Kodiak Management Area, 2015, early temporal stratum. Median estimates of stock-specific harvest by sampling area for all subregional groups. Numbers for Unknown (reporting group) and for Total by Year are estimates based of fish ticket information by area. See Appendix A5, A17, A29, A41, and A52 for additional stock composition and stock-specific harvest statistics.

Reporting Group	Unsampled Areas	Igvak	Alitak	Ayaklulik Halibut Bay	Karluk Sturgeon	Uyak	Uganik Kupreanof	Total by Reporting Group	Total UCI Adjusted
West of Chignik	0	0	50	0	182	0	63	546	546
Black Lake	0	0	290	3,628	0	2,161	2,806	9,149	9,149
Chignik Lake	0	0	0	0	0	0	0	12	12
Upper Station / Akalura	0	0	1,801	8,193	1,494	0	0	11,609	11,609
Ayakulik / Frazer	0	0	15,333	91,015	12,355	1,879	687	121,361	121,361
Karluk	0	0	110	19,035	15,885	13,736	4,404	53,331	53,331
Uganik	0	0	0	4,314	1,220	9,887	9,681	25,330	25,330
Northwest Kodiak	0	0	0	0	1,232	3,002	3,080	7,822	7,822
Afognak	0	0	242	1,064	687	962	3,446	6,617	6,617
Eastside Kodiak	0	0	429	0	0	0	0	677	677
Saltery	0	0	93	0	0	1,985	2,611	4,805	4,805
Other Cook Inlet (OCI)	0	0	1,970	8,289	*	5,490	1,327	17,240	25,864
Susitna	0	0	0	0	*	0	0	0	0
Kenai	0	0	858	9,964	*	1,269	232	12,500	18,753
Kasilof	0	0	4,809	38,593	*	163	947	46,174	69,273
PWS	0	0	2,068	16,111	1,271	6,565	1,725	27,747	27,747
South of Cape Suckling	0	0	0	0	0	0	0	134	134
Unknown (Unsampled)	119,569	0	0	0	0	0	0	119,569	81,593
Actual	119,569	0	28,053	200,206	34,326	47,099	31,009	464,623	464,623
Total by Sampling Area	119,569	0	28,723	203,170	35,183	49,515	31,607	467,767	

Note: Stock-specific harvest estimates may not sum to the total harvest because summed medians are biased low.

Note: Results for Cook Inlet subregional reporting groups are only reported if the overall contribution to the Cook Inlet group in the stratum or any contributing strata is greater than 5%.

Note: Actual figures calculated by UCIDA are shown in gray rows and columns

Table 5A (Adjusted for Cook Inlet). Kodiak Management Area, 2015, middle temporal stratum. Median estimates of stock-specific harvest by sampling area for all subregional groups. Numbers for Unknown (reporting group) and for Total by Year are estimates based of fish ticket information by area. See Appendix A6, A18, A30, A42, A53 and A60 for additional stock composition and stock-specific harvest statistics.

Reporting Group	Unsampled Areas	Igvak	Alitak	Ayaklulik Halibut Bay	Karluk Sturgeon	Uyak	Uganik Kupreanof	Total by Reporting Group	Total UCI Adjusted
West of Chignik	0	93	0	0	0	0	0	122	122
Black Lake	0	727	0	0	0	293	2	1,364	1,364
Chignik Lake	0	1,324	0	0	0	0	8,725	10,193	10,193
Upper Station / Akalura	0	0	0	0	0	0	0	36	36
Ayakulik / Frazer	0	0	28,542	156,626	2,394	7	2,974	191,277	191,277
Karluk	0	152	0	17,586	14,921	11,758	19,845	64,814	64,814
Uganik	0	54	0	0	0	4,822	9,812	15,550	15,550
Northwest Kodiak	0	74	0	0	1	0	871	1,246	1,246
Afognak	0	0	0	0	495	0	2	604	604
Eastside Kodiak	0	0	5,691	1,991	299	0	0	8,387	8,387
Saltery	0	119	810	18,453	1,921	52,377	121,181	195,662	195,662
Other Cook Inlet (OCI)	0	1,268	7,796	28,391	1,815	12,925	4,493	57,626	86,730
Susitna	0	220	14,845	14,172	1,707	16,184	11,840	59,809	90,015
Kenai	0	1,560	100,790	103,596	3,725	56,413	15,510	282,000	424,423
Kasilof	0	489	3,438	37,658	1,369	7,798	5,099	56,450	84,960
PWS	0	384	1,857	1,056	846	7,874	11,886	24,953	24,953
South of Cape Suckling	0	0	0	0	0	520	0	676	676
Unknown (Unsampled)	493,152	0	0	0	0	0	0	493,152	262,909
Actual	493,152	6,464	163,769	379,529	29,493	170,971	212,240	1,463,921	1,463,921
Total by Sampling Area	493,152	6,595	165,894	384,390	29,915	174,009	215,645	1,469,600	

Note: Stock-specific harvest estimates may not sum to the total harvest because summed medians are biased low.

Note: Results for Cook Inlet subregional reporting groups are only reported if the overall contribution to the Cook Inlet group in the stratum or any contributing strata is greater than 5%.

Note: Actual figures calculated by UCIDA are shown in gray rows and columns

The 2016 totals by Shedd, et al., and UCIDA, 2017 for all three time stratum are shown in Tables 11 and 11A, see page 13.

Table 6A (Adjusted for Cook Inlet). Kodiak Management Area, 2015, late temporal stratum. Median estimates of stock-specific harvest by sampling area for all subregional groups. Numbers for Unknown (reporting group) and for Total by Year are estimates based of fish ticket information by area. See Appendix A7, A19, A31, A43, and A54 for additional stock composition and stock-specific harvest statistics.

Reporting Group	Unsampled Areas	Igvak	Alitak	Ayaklulik Halibut Bay	Karluk Sturgeon	Uyak	Uganik Kupreanof	Total by Reporting Group	Total UCI Adjusted
West of Chignik	0	0	0	40	0	0	0	49	49
Black Lake	0	0	0	0	0	0	0	0	0
Chignik Lake	0	0	0	0	0	0	2,382	2,418	2,418
Upper Station / Akalura	0	0	10,719	3,271	2,498	0	919	17,591	17,591
Ayakulik / Frazer	0	0	11,648	5,105	162	0	0	17,150	17,150
Karluk	0	0	0	5,030	50,056	47,994	30,477	133,679	133,679
Uganik	0	0	0	38	0	294	4,338	5,343	5,343
Northwest Kodiak	0	0	0	41	0	0	0	84	84
Afognak	0	0	0	0	0	0	0	9	9
Eastside Kodiak	0	0	5,127	352	0	0	304	5,989	5,989
Saltery	0	0	2,214	4,475	3,821	36,573	49,391	96,587	96,587
Other Cook Inlet (OCI)	0	0	*	116	412	1,253	3,308	5,465	10,195
Susitna	0	0	*	1	1,101	8,896	5,713	16,009	29,864
Kenai	0	0	*	1,542	4,038	29,461	34,796	70,645	131,783
Kasilof	0	0	*	0	0	0	414	571	1,065
PWS	0	0	160	232	66	0	7,673	8,698	8,698
South of Cape Suckling	0	0	0	0	517	0	1,578	2,622	2,622
Unknown (Unsampled)	334,654	0	0	0	0	0	0	334,654	254,437
Actual	334,654	0	29,868	20,243	62,671	124,471	141,293	717,563	717,563
Total by Sampling Area	334,654	1,552	31,294	20,619	63,532	126,126	143,567	721,344	

Note: Stock-specific harvest estimates may not sum to the total harvest because summed medians are biased low.

Note: Results for Cook Inlet subregional reporting groups are only reported if the overall contribution to the Cook Inlet group in the stratum or any contributing strata is greater than 5%.

Note: Actual figures calculated by UCIDA are shown in gray rows and columns

Table 7A (Adjusted for Cook Inlet). Kodiak Management Area, 2016, early temporal stratum. Median estimates of stock-specific harvest by sampling area for all subregional groups. Numbers for Unknown (reporting group) and for Total by Year are estimates based of fish ticket information by area. See Appendix A9, A21, A33, A45, A56, and A62 for additional stock composition and stock-specific harvest statistics.

Reporting Group	Unsampled Areas	Igvak	Alitak	Ayaklulik Halibut Bay	Karluk Sturgeon	Uyak	Uganik Kupreanof	Total by Reporting Group	Total UCI Adjusted
West of Chignik	0	11,843	0	0	414	0	0	12,375	12,375
Black Lake	0	109,455	231	0	0	0	321	110,161	110,161
Chignik Lake	0	4,762	0	0	170	0	0	4,955	4,955
Upper Station / Akalura	0	13	1,548	0	674	0	0	2,459	2,459
Ayakulik / Frazer	0	4,166	6,022	3,859	3,073	1,698	1,349	20,301	20,301
Karluk	0	7,224	0	28	7,760	7,057	5,027	27,308	27,308
Uganik	0	1,565	244	7	778	19,102	43,092	64,998	64,998
Northwest Kodiak	0	5	0	0	58	88	2,066	2,632	2,632
Afognak	0	0	56	0	58	649	1,782	2,664	2,664
Eastside Kodiak	0	0	265	0	0	0	35	484	484
Saltery	0	0	0	0	0	1,609	2,424	4,147	4,147
Other Cook Inlet (OCI)	0	2,079	1,151	*	*	2,509	2,957	8,855	11,477
Susitna	0	0	2	*	*	0	0	20	26
Kenai	0	301	773	*	*	0	322	1,550	2,009
Kasilof	0	6,542	627	*	*	726	1,052	9,080	11,769
PWS	0	3,307	0	0	363	3,372	1,195	8,548	8,548
South of Cape Suckling	0	4	0	0	277	0	0	461	461
Unknown (Unsampled)	83,870	0	0	0	0	0	0	83,870	78,094
Actual	83,870	151,266	10,919	3,894	13,625	36,810	61,622	364,868	364,868
Total by Sampling Area	83,870	154,318	11,118	3,937	13,856	37,238	62,771	367,108	

Note: Stock-specific harvest estimates may not sum to the total harvest because summed medians are biased low.

Note: Results for Cook Inlet subregional reporting groups are only reported if the overall contribution to the Cook Inlet group in the stratum or any contributing strata is greater than 5%.

Note: Actual figures calculated by UCIDA are shown in gray rows and columns

Table 8A (Adjusted for Cook Inlet). Kodiak Management Area, 2016, middle temporal stratum. Median estimates of stock-specific harvest by sampling area for all subregional groups. Numbers for Unknown (reporting group) and for Total by Year are estimates based of fish ticket information by area. See Appendix A10, A22, A34, A46, A57, and A63 for additional stock composition and stock-specific harvest statistics.

Reporting Group	Unsampled Areas	Igvak	Alitak	Ayaklulik Halibut Bay	Karluk Sturgeon	Uyak	Uganik Kupreanof	Total by Reporting Group	Total UCI Adjusted
West of Chignik	0	0	0	0	0	0	0	52	52
Black Lake	0	440	1,172	0	0	0	0	1,802	1,802
Chignik Lake	0	9,300	0	0	0	0	0	10,137	10,137
Upper Station / Akalura	0	0	1,761	1,083	132	0	0	3,206	3,206
Ayakulik / Frazer	0	1,008	15,768	56,389	1,826	2,767	0	78,019	78,019
Karluk	0	0	0	4,487	3,455	5,442	13,192	27,061	27,061
Uganik	0	0	0	1,611	745	6,835	20,508	29,991	29,991
Northwest Kodiak	0	0	0	0	0	4	265	805	805
Afognak	0	0	0	242	109	0	1,912	2,406	2,406
Eastside Kodiak	0	0	789	252	100	0	0	1,448	1,448
Saltery	0	0	0	1,912	1,740	40,571	64,073	108,507	108,507
Other Cook Inlet (OCI)	0	20,696	1,839	3,507	154	767	7,512	35,065	60,777
Susitna	0	9,174	3,406	7,055	311	2,625	7,738	30,640	53,107
Kenai	0	131,637	34,067	36,642	306	6,465	18,257	227,515	394,342
Kasilof	0	3,087	1,588	3,005	341	1,140	2,119	11,774	20,407
PWS	0	0	294	0	1,322	1,854	94	4,992	4,992
South of Cape Suckling	0	0	0	317	0	0	0	1,471	1,471
Unknown (Unsampled)	423,895	0	0	0	0	0	0	423,895	200,255
Actual	423,895	175,342	60,684	116,502	10,541	68,470	135,670	998,786	998,786
Total by Sampling Area	423,895	177,315	61,930	120,068	10,700	69,803	138,281	1,001,992	

Note: Stock-specific harvest estimates may not sum to the total harvest because summed medians are biased low.

Note: Results for Cook Inlet subregional reporting groups are only reported if the overall contribution to the Cook Inlet group in the stratum or any contributing strata is greater than 5%.

Note: Actual figures calculated by UCIDA are shown in gray rows and columns

The 2016 totals by Shedd, et al., and UCIDA, 2017 for all three time stratum are shown in Tables 11 and 11A, see page 13.

Table 9A (Adjusted for Cook Inlet). Kodiak Management Area, 2016, late temporal stratum. Median estimates of stock-specific harvest by sampling area for all subregional groups. Numbers for Unknown (reporting group) and for Total by Year are estimates based of fish ticket information by area. See Appendix A11, A23, A35, A47, and A58 for additional stock composition and stock-specific harvest statistics.

Reporting Group	Unsampled Areas	Igvak	Alitak	Ayaklulik Halibut Bay	Karluk Sturgeon	Uyak	Uganik Kupreanof	Total by Reporting Group	Total UCI Adjusted
West of Chignik	0	0	0	0	0	0	0	110	110
Black Lake	0	0	0	0	0	0	0	0	0
Chignik Lake	0	0	0	0	0	0	0	0	0
Upper Station / Akalura	0	0	13,918	2,976	2,976	1,890	0	21,920	21,920
Ayakulik / Frazer	0	0	2,777	2,027	42	2,667	0	7,831	7,831
Karluk	0	0	936	15,965	103,210	79,005	75,234	274,309	274,309
Uganik	0	0	0	0	0	0	586	751	751
Northwest Kodiak	0	0	0	0	213	0	0	235	235
Afognak	0	0	0	120	0	0	0	131	131
Eastside Kodiak	0	0	185	153	0	0	0	494	494
Saltery	0	0	1,681	1,780	2,904	29,558	26,032	63,176	63,176
Other Cook Inlet (OCI)	0	0	114	1,196	*	298	3,343	5,262	7,078
Susitna	0	0	62	470	*	2,334	5,318	8,505	11,440
Kenai	0	0	1,178	6,918	*	8,874	24,262	42,846	57,634
Kasilof	0	0	54	914	*	0	159	1,352	1,819
PWS	0	0	42	383	125	0	727	1,928	1,928
South of Cape Suckling	0	0	0	191	302	804	1,050	2,625	2,625
Unknown (Umsampled)	153,272	0	0	0	0	0	0	153,272	133,266
Actual	153,272	0	20,947	33,093	109,772	125,430	136,711	584,747	584,747
Total by Sampling Area	153,272	9,228	21,243	33,721	113,445	126,837	139,612	597,358	

Note: Stock-specific harvest estimates may not sum to the total harvest because summed medians are biased low.

Note: Results for Cook Inlet subregional reporting groups are only reported if the overall contribution to the Cook Inlet group in the stratum or any contributing strata is greater than 5%.

Note: Actual figures calculated by UCIDA are shown in gray rows and columns

Table 10A shows the original and the adjusted harvest estimates by year for the four Cook Inlet subregional groups.

Table 10A (Adjusted for Cook Inlet). Kodiak Management Area, 2014-2016. Median estimates of stock-specific harvest by year across all sampling areas for all subregional reporting groups. Numbers for Unknown (reporting group) and for Total by Year are estimates based on fish ticket information. See Appendices A65-67 for additional stock composition and stock-specific harvest statistics for these years.

Reporting Group	2014	2014	2015	2015	2016	2016
West of Chignik	20,559	20,559	873	873	13,398	13,398
Black Lake	7,016	7,016	10,848	10,848	112,103	112,103
Chignik Lake	11,579	11,579	13,014	13,014	15,267	15,267
Upper Station / Akalura	65,196	65,196	29,702	29,702	27,924	27,924
Ayakulik / Frazer	396,083	396,083	329,848	329,848	106,364	106,364
Karluk	493,692	493,692	252,170	252,170	328,862	328,862
Uganik	47,797	47,797	46,650	46,650	96,205	96,205
Northwest Kodiak	11,895	11,895	9,569	9,569	3,938	3,938
Afognak	7,057	7,057	7,648	7,648	5,330	5,330
Eastside Kodiak	11,300	11,300	15,339	15,339	2,988	2,988
Saltery	305,476	305,476	297,204	297,204	175,968	175,968
Other Cook Inlet (OCI)	11,908	20,266	80,698	117,683	49,536	79,332
Susitna	4,466	8,175	75,989	105,726	39,440	64,573
Kenai	60,973	113,025	365,335	513,013	272,160	453,985
Kasilof	36,019	62,829	103,539	154,647	22,501	33,995
PWS	23,716	23,716	61,815	61,815	15,986	15,986
South of Cape Suckling	5,656	5,656	4,500	4,500	4,949	4,949
Unknown (Unsampled)	1,738,649	1,647,720	1,392,603	1,127,095	770,647	522,399
Total by Year	3,259,037	3,259,037	3,097,344	3,097,344	2,063,566	2,063,566

Note: Stock-specific harvest estimates may not sum to total harvest because summed medians are biased low.

Tables 11 and 11A separate out the 4 subregional Cook Inlet stocks that were estimated to have been harvested in the KMA. These harvest estimates are by year, combining all three temporal strata.

Table 11. Kodiak Management Area 2014-2016. Estimated Cook Inlet Harvests					
Reporting Group	2014	2015	2016	Total	Average
Other Cook Inlet (OCI)	11,908	80,698	49,536	142,142	47,381
Susitna	4,466	75,989	39,440	119,895	39,965
Kenai	60,973	365,335	272,160	698,468	232,823
Kasilof	36,019	103,539	22,501	162,059	54,020
Total	113,366	625,561	383,637	1,122,564	374,188
* All data taken from FMS 16-10, Shedd, et al., 2016					

Table 11A (Adjusted for Cook Inlet). Kodiak Management Area 2014-2016. Estimated Cook Inlet Harvests					
Reporting Group	2014	2015	2016	Total	Average
Other Cook Inlet (OCI)	20,266	117,683	79,332	217,281	72,427
Susitna	8,175	105,726	64,573	178,474	59,491
Kenai	113,025	513,013	453,985	1,080,023	360,008
Kasilof	62,829	154,647	33,995	251,471	83,824
Total	204,295	891,069	631,885	1,727,249	575,750
* All data taken from UCIDA, 2017					

As can be seen, when Tables 11 and 11A are compared, the estimate of Cook Inlet sockeye harvested in KMA increases. In some years, this adjusted harvests are small (2014 Sustina 4,466 as adjusted is now 8,175. A harvest adjustment of 3,709 additional harvests.) These 3,709 additional sockeye harvests came from the “Unknowns.” The largest subregional adjustments come from 2016: Kenai sockeyes are adjusted from 272,160 up to 453,985, an increased harvest adjustment of 181,825 sockeyes in the KMA.

12A (Adjusted for Cook Inlet). Commercial Harvest of Upper Cook Inlet Sockeye Salmon Stocks 2014-2016					
2014	**UCI Harvest**	**KMA % of UCI Harvest**	**KMA Harvest**	**KMA % of Total Harvest**	**Total Harvest**
UCI OCI	262,505	7.72%	20,266	7.17%	282,711
Susitna	123,768	6.61%	8,175	6.20%	131,943
Kenai	1,406,865	8.03%	113,025	7.44%	1,519,890
Kasilof	327,136	19.21%	62,829	16.11%	389,965
2014 Totals	2,120,274		204,295		2,324,509
2015					
UCI OCI	225,084	52.28%	117,683	34.33%	342,767
Susitna	200,251	52.80%	105,726	34.55%	305,977
Kenai	1,657,183	30.96%	513,013	23.64%	2,170,196
Kasilof	427,733	36.16%	154,647	26.55%	582,380
2015 Totals	2,510,251		891,069		3,401,320
2016					
UCI OCI	138,975	57.08%	79,332	24.92%	318,307
Susitna	124,257	51.97%	64,573	34.20%	188,830
Kenai	1,970,523	23.04%	453,985	18.72%	2,424,508
Kasilof	146,512	23.20%	33,995	18.83%	180,507
2016 Totals	2,380,267		631,885		3,112,152
Grand Totals 2014-2016	**7,010,792**		**1,727,249**		**8,837,981**

Discussion

There are two ways of calculating percent of harvest. In Table 12, first, the KMA harvests are calculated as a percent of total UCI harvest; second, the KMA harvests are calculated as a percent of the total KMA harvests. When this is done, the significance of the KMA harvests, both in UCI and KMA emerge. For example, in 2015 the KMA harvests of Susitna sockeyes was 52.8% of the total UCI harvests. In Kodiak, the Susitna sockeyes were 34.55% of the total 2015 and 2016 KMA harvest. The point being the harvests of one or all four of the Cook Inlet subregional reporting groups have vastly different significances depending on what area is used as a basis for calculating percentages.

Table 11A has newly constructed estimates for the adjusted sockeye harvests in the 4 Cook Inlet subregional reporting groups for 2014-2016. Table 11A also estimates the 2014-2016 total sockeye harvests in KMA for the 4 Cook Inlet subregions. Lastly, Table 11A provides an estimated harvest of 1,727,249 for these Cook Inlet subregional reporting groups for the 2014-2016 time period.

An estimated harvest of 1,727,000, Cook Inlet sockeye salmon at $8.00 per fish equates to approximately $14,000,000 over the 2014-2016 time period. This 1.727 million KMA sockeye harvests do not include the Chinook, coho, chum or pink KMA harvests that are natal to Cook Inlet.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED COOK INLET DRIFT ASSOCIATION; COOK INLET FISHERMEN'S FUND, *Plaintiffs-Appellants*, v. NATIONAL MARINE FISHERIES SERVICE; PENNY PRITZKER, in her official capacity as Acting United States Secretary of Commerce; KATHRYN SULLIVAN, Acting Under Secretary of Commerce and Administrator for the National Oceanic and Atmospheric Administration; JAMES W. BALSIGER, in his official capacity as NMFS Alaska Region Administrator, *Defendants-Appellees*, STATE OF ALASKA, *Intervenor-Defendant-Appellee*.	No. 14-35928 D.C. No. 3:13-cv-00104-TMB OPINION

Appeal from the United States District Court
for the District of Alaska
Timothy M. Burgess, Chief Judge, Presiding

Argued and Submitted August 2, 2016
Anchorage, Alaska

Filed September 21, 2016

Before: Raymond C. Fisher, Richard A. Paez, and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Hurwitz

SUMMARY*

Magnuson-Stevens Fishery Conservation and Management Act

The panel reversed the district court's summary judgment in favor of the government in an action under the Magnuson-Stevens Fishery Conservation and Management Act brought by two groups of commercial fishermen urging the rejection of Amendment 12, which removed the historic net-fishing area of Cook Inlet from the Salmon Fishery Management Plan ("FMP"); and remanded with instructions that judgment be entered in favor of plaintiffs.

The panel held that the National Marine Fisheries Service cannot exempt a fishery under its authority that required conservation and management from an FMP because the agency is content with State management. The panel held that the Magnuson-Stevens Act unambiguously

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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requires a Regional Fishery Management Council to create an FMP for each fishery under its authority that requires conservation and management. The panel further held that the Magnuson-Stevens Act allowed delegation to a state under the FMP, but did not excuse the obligation to adopt an FMP when a Regional Fishery Management Council opted for state management. The panel concluded that Amendment 12 was therefore contrary to law to the extent that it removed Cook Inlet from the FMP.

COUNSEL

Jason T. Morgan (argued) and Beth S. Ginsberg, Stoel Rives LLP, Seattle, Washington, for Plaintiffs-Appellants.

Ellen J. Durkee (argued) and Coby Howell, Attorneys, Appellate Section; John C. Cruden, Assistant Attorney General; Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.; Caroline Park, NOAA Office of the General Counsel, Silver Spring, Maryland; Lauren Smoker, NOAA Office of the General Counsel, Department of Commerce, Juneau, Alaska; for Defendants-Appellees.

Seth M. Beausang (argued), Assistant Attorney General, Anchorage, Alaska, for Intervenor-Defendant-Appellee.

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OPINION

HURWITZ, Circuit Judge:

The Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–91 ("Magnuson-Stevens Act," or "the Act"), creates a "national program for the conservation and management of the fishery resources of the United States." *Id.* § 1801(a)(6). The Act establishes eight Regional Fishery Management Councils, each of which "shall" prepare a fishery management plan ("FMP") "for each fishery under its authority that requires conservation and management." *Id.* § 1852(a), (h)(1). The Secretary of Commerce, acting through the National Marine Fisheries Service ("NMFS"), then reviews each FMP or amendment of a plan "to determine whether it is consistent with the [Act's] national standards, the other provisions of this chapter, and any other applicable law," 16 U.S.C. § 1854(a)(1). *See Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1108 (9th Cir. 2006).

The issue for decision is whether NMFS can exempt a fishery under its authority that requires conservation and management from an FMP because the agency is content with State management. The district court held that it could. We disagree, and reverse.

BACKGROUND

I. Factual and Legislative Background

Cook Inlet is one of the nation's most productive salmon fisheries. Its salmon are anadromous, beginning their lives in Alaskan freshwater, migrating to the ocean, and returning to freshwater to spawn.

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In 1953, the United States entered into the International Convention for the High Seas Fisheries of the North Pacific Ocean. In response, Congress enacted the North Pacific Fisheries Act of 1954 (the "1954 Act"), authorizing the Secretary of the Interior to promulgate regulations governing fisheries contiguous to Alaskan waters. *See* Pub. L. No. 83-579, §§ 10 & 12, 68 Stat. 698, 699–700 (previously codified at 16 U.S.C. §§ 1021–35). The Secretary then issued a regulation prohibiting salmon net fishing in the western waters of Alaska, but excepting Cook Inlet and two other areas where net fishing had historically been permitted under Alaska law; in those areas, federal regulation was to mirror existing Alaskan regulation. 50 C.F.R. § 210.10 (repealed).

Before 1976, the United States asserted authority only over waters up to twelve nautical miles from the coastline, and there was substantial concern that foreign fishers were depleting American fisheries. *See* Mark H. Zilberberg, *A Legislative History of the Fishery Conservation & Management Act of 1976* ("Legislative History") 237–41, 352, 448–49, 455–56, 472–73, 476–81, 519 (1976). In 1976, Congress enacted the Fishery Conservation and Management Act (the "1976 Act"), Pub. L. No. 94-265, 90 Stat 331 (codified as amended at 16 U.S.C. §§ 1801–1891), later renamed the Magnuson-Stevens Act. The 1976 Act extended federal jurisdiction to 200 miles from the coastline, *id.* § 101 (codified as amended at 16 U.S.C. § 1811), and regulated foreign fishing in that area, *id.* §§ 201, 204 (codified as amended at 16 U.S.C. §§ 1821, 1824). States retained jurisdiction over the first three miles from the coast, *id.* § 306(a) (codified as amended at 16 U.S.C. § 1856), and the federal government had jurisdiction over the next 197 miles, originally called the fishery conservation zone ("FCZ") and later named the exclusive economic zone ("EEZ"), *id.* § 101 (codified as amended at 16 U.S.C.

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§ 1811). *See also* 16 U.S.C. § 1801(b)(1); *Exclusive Economic Zone of the United States of America*, 48 Fed. Reg. 10,605 (Mar. 10, 1983).

The federal government manages its waters through eight regional Councils. 16 U.S.C. § 1852. During the debate on the 1976 Act, Senator Gravel of Alaska criticized the concept of federal management on one side of the three-mile line and state management on the other, because fish freely travel across the three-mile boundary. Legislative History 412–13, 460–67. Senator Gravel suggested that a state should manage its federal waters under a plan approved by the federal government. *Id.* at 467, 471. Senator Stevens of Alaska, one of the bill's managers, offered an even broader proposal, which provided for exclusive state management of "[t]hose fisheries capable of being managed as a unit, which reside principally within the waters of a single State." *Id.* at 422. But, Congress instead approved a more modest substitute offered by the bill's other manager, Senator Magnuson, directing Councils, if possible, to incorporate state management measures in FMPs. *Id.*; 1976 Act § 305(c) (codified at 16 U.S.C. § 1855).

In 1979, NMFS promulgated an FMP for salmon fisheries near Alaska. *See* Fishery Management Plan for the High Seas Salmon, 44 Fed. Reg. 33,250 (June 8, 1979) (the "Salmon FMP"). The Salmon FMP divided Alaskan federal waters into East and West Areas; Cook Inlet is in the West Area. *Id.* at 33,267. With respect to the West Area, the FMP tracked the regulations promulgated under the 1954 Act prohibiting commercial salmon fishing except in the three historic net-fishing areas, including Cook Inlet, which the State would continue to manage. *Id.* ("These fisheries are technically in the FCZ, but are conducted and managed by the State of Alaska as inside fisheries."). The decision to

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leave these fisheries in the hands of the State was not based on a finding that they were in good health; to the contrary, the Salmon FMP found that "[a]ll salmon species are at historic low levels in the Cook Inlet management area, with chinook stocks seriously depleted." *Id.* at 33,309.

In 1983, Congress amended the Act to specify that a Council need only prepare an FMP with respect to a fishery "that requires conservation and management." Pub. L. No. 97-453, § 5(4), 96 Stat. 2481, 2486 (codified as amended at 16 U.S.C. § 1852(h)(1)). The conference report explained this amendment was intended "to clarify that the function of the Councils is not to prepare a fishery management plan (FMP) for each and every fishery within their geographical areas of authority. Rather, such plans are to be developed for those fisheries which require conservation and management." H.R. Conf. Rep. No. 97-982, 97th Cong., 2d Sess., at *18.

Alaska had proposed to amend the Act "to direct the Secretary of Commerce to delegate authority of a domestic fishery in the FCZ to the adjacent state . . . if . . . 1) the fishery does not cross interstate boundaries; and 2) the State is capable and willing to provide conservation and management consistent with the National Standards." *Omnibus Authorization Bill for the National Oceanic and Atmospheric Administration: Hearings Before the S. Comm. on Commerce, Sci. & Transp.*, Serial No. 97-118, 97 Cong. 310 (1982) [hereinafter *Hearings*] (statement of Ronald O. Skoog, Commissioner, Alaska Department of Fish and Game). But, this proposal was not enacted. *See* Pub. L. No. 97-453, § 5(4), 96 Stat. 2481, 2486 (1982).

The Salmon FMP was revised in 1990. The revised FMP stated that, under the regulation implementing the 1954 Act, 50 C.F.R. § 210, salmon net fishing in the West Area was

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prohibited, with the exception of the three historic net-fishing areas, which "technically extend into the EEZ, but . . . are conducted and managed by the State of Alaska as nearshore fisheries."

In 1992, a new international convention prohibited all fishing for anadromous fish beyond the EEZ. Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, art. I, III. Congress promptly implemented that convention and repealed the 1954 Act. North Pacific Anadromous Stocks Act of 1992, Pub. L. No. 102-567, §§ 801–14, 106 Stat. 4309 (codified at 16 U.S.C. §§ 5001–5012). The Secretary of Commerce then concluded that regulations promulgated under the 1954 Act, including 50 C.F.R. § 210, no longer had statutory support, and repealed them. Removal of Regulations, 60 Fed. Reg. 39,271, 39,272 (Aug. 2, 1995). But, the Salmon FMP was not revised, and Alaska continued to manage the three historic net fisheries.

In 1995, a fishing vessel, "Mister Big," engaged in a massive unregulated harvest of scallops in the federal waters of Prince William Sound. *See Trawler Diane Marie, Inc. v. Brown*, 918 F. Supp. 921 (E.D.N.C. 1995). That scallop fishery was not covered by an FMP, but the Magnuson-Stevens Act provided that a State could regulate fishing vessels in federal waters that were registered in that state. *Id.* at 924, 926; *see* Pub. L. No. 98-623, § 404(4), 98 Stat. 3394, 3408 (1984) ("[A] State may not directly or indirectly regulate any fishing vessel outside its boundaries, unless the vessel is registered under the law of that State."). The Mister Big set sail from Seattle, renounced its Alaska registration, and began fishing for scallops in the Sound. *Trawler Diane Marie*, 918 F. Supp. at 924. By January 26, 1995, the quota that Alaska set for the area, 50,000 pounds of scallops, had

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been harvested, so Alaska closed the scallop season and Alaska-registered boats returned home. *Id.* But, the Mister Big continued to dredge, eventually harvesting 52,000 pounds of scallops before the Secretary of Commerce approved an emergency closure of the fishery. *Id.* at 925, 927. The North Pacific Council had drafted an FMP which addressed the possibility that an unregulated vessel might fish for scallops in the federal waters off Alaska, but had not adopted it "because of the belief that all vessels fishing in the EEZ would be registered in Alaska and thus bound by the state's regulations." *Id.* at 926.

The following year, Congress revised the provision regarding state authority to regulate fishing vessels in federal waters. *See* Sustainable Fisheries Act, Pub. L. No. 104-297, § 112, 110 Stat. 3559, 3595–97 (1996). After that amendment, the Magnuson-Stevens Act now provides, in relevant part:

> A State may regulate a fishing vessel outside the boundaries of the State in the following circumstances:
>
> (A) The fishing vessel is registered under the law of that State, and (i) there is no fishery management plan or other applicable Federal fishing regulations for the fishery in which the vessel is operating; 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

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> fishery to a State and the State's laws and regulations are consistent with such fishery management plan.

16 U.S.C. § 1856(a)(3). The version of the bill reported out of the House Committee on Resources would have authorized Alaska to enforce its regulations in federal waters even absent an FMP. H.R. Rep. No. 104-171, at *11–12 (1995). But, that version was not enacted. Pub. L. No. 104-297, § 112.

II. Amendment 12

The North Pacific Council has jurisdiction over the federal waters of Cook Inlet. Six of its 11 voting members are from Alaska and the remainder are from Washington and Oregon. 16 U.S.C. § 1852(a)(1)(G), (b)(1), (b)(2)(C).

In 2010, the North Pacific Council began a comprehensive review of the Salmon FMP. As a result, NMFS "realized" that Cook Inlet was "not exempt from the FMP as previously assumed." Council staff prepared a discussion paper, which summarized the situation as follows:

> The FMP is vague on the function of the FMP in these areas. Though the FMP broadly includes these three areas and the salmon and fisheries that occur there within the fishery management unit and states that management of these areas is left to the State under other Federal law, the FMP does not explicitly defer management of these salmon fisheries to the State. The FMP does not contain any management goals or objectives for these three areas or any provisions with which to

> manage salmon fishing. The FMP only refrains from extending the general fishing prohibition to those areas, where, as the FMP notes, fishing was authorized by other Federal law, [which has since been repealed]. Therefore, the FMP's reference to "other Federal laws" may no longer be fully effective.

The North Pacific Council circulated a draft Environmental Assessment, held five public meetings, and took testimony. In 2011, the North Pacific Council unanimously voted to remove the three historic net fishing areas from the Salmon FMP. In April 2012, NMFS solicited comments on this change, "Amendment 12," and proposed implementing regulations. 77 Fed. Reg. 19,605 (Apr. 2, 2012); 77 Fed. Reg. 21,716 (Apr. 11, 2012).

Two groups of commercial fishermen, the United Cook Inlet Drift Association and the Cook Inlet Fishermen's Fund (collectively, "United Cook"), submitted comments urging the rejection of Amendment 12. The comments cited a 51% decline since 1981 in the commercial catch of sockeye salmon. United Cook attributed this decline to two management failures by Alaska. First, United Cook argued that the State had failed to address the introduction of carnivorous northern pike into nearby lakes and streams. Second, United Cook argued that Alaska was not properly managing the escapement of salmon in Cook Inlet. The Magnuson-Stevens Act requires limits on the number of fish caught. 16 U.S.C. § 1853(a)(15). In contrast, Alaska manages commercial salmon fishing through escapement goals, *i.e.*, the number of salmon allowed to "escape" past a fishery to spawn. According to United Cook, "the State misses the high end of its escapement goal targets as much

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as 35% of the time," leading to a massive unharvested supply of fish, and "has no escapement goals at all for many runs in Cook Inlet."

In June 2012, NMFS issued a final Environmental Assessment, finding that "the State is the appropriate authority for managing Alaska salmon fisheries given the State's existing infrastructure and expertise," and that "the State's escapement based management system is a more effective management system for preventing overfishing than a system [like the federal one] that places rigid numeric limits on the number of fish that may be caught." NMFS also issued a finding that Amendment 12 would have no significant impact on the environment because it would not change the management of the fisheries. NMFS approved Amendment 12, and, in December 2012, promulgated implementing regulations. *See* Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Salmon, 77 Fed. Reg. 75,570 (Dec. 21, 2012); 50 C.F.R. § 679.2 (definition of West Area).

III. Procedural Background

United Cook filed this action in 2013, challenging Amendment 12 and its implementing regulations as contrary to the Magnuson-Stevens Act's requirement that a Council prepare an FMP "for each fishery under its authority that requires conservation and management," 16 U.S.C. § 1852(h)(1). United Cook also alleged that Amendment 12 was arbitrary and capricious and contrary to the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C). The district court granted Alaska's motion to intervene as a defendant, and entered summary judgment for the government. United Cook timely appealed.

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DISCUSSION

The Magnuson-Stevens Act requires that "[e]ach Council shall, in accordance with the provisions of this chapter—(1) for each fishery under its authority that requires conservation and management, prepare and submit to the Secretary (A) a fishery management plan . . . ." 16 U.S.C. § 1852(h)(1). Thus, the usual initial question is whether the fishery at issue even needs conservation and management. *See Anglers Conservation Network v. Pritzker*, 139 F. Supp. 3d 102, 114–15 (D.D.C. 2015). We review that administrative decision under the traditional arbitrary and capricious standard. *Id.* But we need not tarry over that issue here; the government concedes that the Cook Inlet fishery requires conservation and management.

But, the government argues that the Act only requires an FMP for fisheries that need *federal* conservation and management, and that Cook Inlet is in good hands with Alaska. The district court found the Act ambiguous, gave *Chevron* deference to the government's interpretation, and found not arbitrary and capricious the agency's decision that federal involvement was not necessary.

We determine whether to afford *Chevron* deference to an agency interpretation of a statute under a two-step analysis. First, we consider "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter." *Id.* Only "if the statute is silent or ambiguous with respect to the specific issue," do we go to step two, which considers "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

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"We start, as always, with the language of the statute." *Williams v. Taylor*, 529 U.S. 420, 431 (2000). Section 1852(h)(1) of the Act provides that a Council "shall" prepare an FMP for a fishery (1) "under its authority" that (2) requires "conservation and management." The government concedes that Cook Inlet is a fishery under its authority that requires conservation and management. But it argues that an FMP is only mandated by the Act when "federal" conservation and management is required. Thus, the government asks us to insert the word "federal" into § 1852(h)(1) before the phrase "conservation and management."

"[W]e ordinarily resist reading words or elements into a statute that do not appear on its face," *Bates v. United States*, 522 U.S. 23, 29 (1997), and the government never persuasively explains why we should deviate from that rule here. *See Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1095 (9th Cir. 2012) (rejecting a reading of the Magnuson-Stevens Act which "requires inserting the word 'only' or 'solely' into subsection [1853a](c)(5)"); *see also Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1020 (9th Cir. 1993) (stating that courts "lack . . . power" to "read into the statute words not explicitly inserted by Congress"). In arguing that we should insert the word "federal" into § 1852(h)(1), the government relies heavily on what it calls the "deferral" provision of the Act, § 1856(a)(3)(A)(i), which allows a state to regulate state-licensed vessels in federal waters when no FMP exists. The government argues that this provision assumes that NMFS can cede regulatory authority to a state over federal waters that require conservation and management simply by declining to issue an FMP. But, § 1856(a)(3)(A)(i) does not create an exception to the general obligation to issue an FMP when a fishery requires conservation and management;

rather, the provision only restates the longstanding principle that a State can regulate vessels registered under its laws in federal waters absent federal law to the contrary. This principle dates at least to 1976. *See* 1976 Act § 306(a) ("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.").

The 1996 amendment to the Magnuson-Stevens Act did not expand that traditional state authority, but rather *limited* state jurisdiction over state-registered vessels to when (i) there is no FMP, or (ii) state law is consistent with the FMP. *See* Sustainable Fisheries Act, § 112 (codified at 16 U.S.C. § 1856(a)(3)(A)). This "deferral provision" would be a strange form of delegation of federal regulatory authority, as it does not allow states to regulate vessels registered in other states. In contrast, the next paragraph of the 1996 amendments, the so-called "delegation" provision, expressly authorizes NMFS to "delegate[ ] management of the fishery to a State" through an FMP, at which point the state can regulate any fishing vessel in the federal waters at issue, regardless of registration. *Id.* (codified at 16 U.S.C. § 1856(a)(3)(B)).

The Act is clear: to delegate authority over a federal fishery to a state, NMFS must do so expressly in an FMP. 16 U.S.C. § 1856(a)(3)(B). If NMFS concludes that state regulations embody sound principles of conservation and management and are consistent with federal law, it can incorporate them into the FMP. *Id.* § 1853(b)(5). Indeed, Amendment 12 expressly delegates management of the East Area – certain federal waters off Alaska not including Cook Inlet – to Alaska. Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Salmon, 77 Fed. Reg. at 75,570–71;

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50 C.F.R. §§ 679.1(i)(2) ("State of Alaska laws and regulations that are consistent with the Salmon FMP and with the regulations in this part apply to vessels of the United States that are commercial and sport fishing for salmon in the East Area of the Salmon Management Area."), 679.3(f). Amendment 12 could have expressly delegated management of Cook Inlet to Alaska as well, but it did not. The government argues removing Cook Inlet from the FMP amounts to delegation. But, the federal government cannot delegate management of the fishery to a State without a plan, because a Council is required to develop FMPs for fisheries within its jurisdiction requiring management and then to manage those fisheries "through" those plans. 16 U.S.C. §§ 1801(b)(4)–(5), 1852(h)(1). The "deferral" provision covers those waters where for some reason a plan is not in effect; it is not an invitation to a Council to shirk the statutory command that it "shall" issue an FMP for each fishery within its jurisdiction requiring conservation and management.

Although we find the statutory language clear, we also note that the legislative history of the Act belies the government's argument.[1] The Act makes plain that federal fisheries are to be governed by federal rules in the national interest, not managed by a state based on parochial concerns. *Compare* 16 U.S.C. §§ 1801(a)(6) ("A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing . . . and to realize the full potential of the Nation's fishery

[1] "[W]e 'cautiously adhere' to the practice of consulting legislative history" at step one of a *Chevron* analysis, *Irvine Med. Ctr. v. Thompson*, 275 F.3d 823, 829 n.3 (9th Cir. 2002) (quoting *Am. Rivers v. Fed. Energy Reg. Comm'n*, 201 F.3d 1186, 1196 n.16 (9th Cir. 2000)), recognizing that "courts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point," *Shannon v. United States*, 512 U.S. 573, 584 (1994) (alterations omitted).

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resources.") and 1802(33)(A) ("The term 'optimum', with respect to the yield from a fishery, means the amount of fish which—(A) will provide the greatest overall benefit to the Nation.") and 1811(a) ("[T]he United States claims, and will exercise in the manner provided for in this chapter, sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone.") *with* Alaska Br. 13 ("The Alaska Constitution requires the State to manage natural resources for the maximum benefit and use for all Alaskans." (citing Alaska Const. art. VIII, §§ 1–2)). Congress therefore repeatedly rejected proposals to provide for state management of federal fisheries without an FMP. *Compare* Legislative History 422, 467, 471, *with* 1976 Act § 305(c); *compare Hearings*, *supra*, at 310, *with* Pub. L. No. 97-453, § 5(4) (1982); *compare* H. Rep. No. 104-171 at *11–12, *with* Pub. L. No. 104-297, § 112 (1996). We decline the government's invitation to vest in Alaska the very authority that Congress abjured.

Alaska argues that NMFS has discretion not to adopt an FMP for federal waters requiring management and conservation, because "shall" sometimes means "may." *See Sierra Club v. Whitman*, 268 F.3d 898, 904 (9th Cir. 2001). But, that is not the general rule; we recognized in *Sierra Club* that "'shall' in a statute generally denotes a mandatory duty." *Id.*; *see also United States v. Monsanto*, 491 U.S. 600, 607 (1989) (stating that by using "shall," "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory"); *Brower v. Evans*, 257 F.3d 1058, 1067 n.10 (9th Cir. 2001) ("'Shall' means shall." (quoting *Ctr. for Biological Diversity v. Norton*, 254 F.3d 833, 837–38 (9th Cir. 2001))). Our holding in *Sierra Club* that the Environmental Protection Agency did not have a mandatory duty to bring enforcement actions under the Clean Water Act

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was driven by "the traditional presumption that an agency's refusal to investigate or enforce is within the agency's discretion," and based on an "[a]nalysis of the structure and the legislative history of the Clean Water Act." 268 F.3d at 902, 904. No similar factors here support reading "shall" as "may."[2]

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. *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

[2] Alaska also argues that, if we fail to add the word "federal" before "conservation and management" in § 1852(h)(1), NMFS will be forced to issue an FMP for every fishery, because all fisheries require some conservation and management. However, the legislative history of the Act directly refutes this argument. A previous version of the statute required an FMP for every fishery under a Council's authority. In 1983, Congress amended the statute to specify that an FMP is necessary only where a fishery "requires conservation and management." Pub. L. No. 97-453 § 5(4), 96 Stat. 2481, 2486 (codified as amended at 16 U.S.C. § 1852(h)(1)). If every fishery required some type of conservation and management, this amendment would amount to a nullity. But, "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v. I.N.S.*, 514 U.S. 386, 397–98 (1995)). The amendment thus indicates Congress understood that some fisheries might not require conservation or management.

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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).[3]

Finally, the government argues that its interpretation is supported by National Standards 3 and 7 in the Magnuson-Stevens Act, 16 U.S.C. § 1851(a)(3), (7), and the implementing guidelines for those standards, 50 C.F.R. §§ 600.305–355. But, the National Standards only govern the *contents* of an FMP, not the decision whether to issue one. *See* 16 U.S.C. § 1851(a) (requiring that FMPs "be consistent with the following national standards for fishery conservation and management"). The government's advisory guidelines fare no better, as they do not have the force of law. *Id.* § 1851(b).

CONCLUSION

The Magnuson-Stevens Act unambiguously requires a Council to create an FMP for each fishery under its authority that requires conservation and management. The Act allows delegation to a state under an FMP, but does not excuse the

[3] The government also appears to argue that it fully discharged its statutory obligation when the Salmon FMP was adopted in 1990, because the FMP included Cook Inlet (albeit by placing it under Alaska's authority), and that it was thereafter free under the Act to remove any parts of the West Area from the FMP. But, removing a fishery from an FMP is no different than excluding that fishery from the start. An amendment to an FMP, like the FMP itself, must conform to the statutory scheme. *See* 16 U.S.C. §§ 1852(h)(1) ("Each Council shall . . . prepare and submit to the Secretary . . . (B) amendments to each such plan that are necessary."); 1854(a)(1) (requiring the Secretary to review an FMP amendment "to determine whether it is consistent with the national standards, the other provisions of this chapter, and any other applicable law").

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obligation to adopt an FMP when a Council opts for state management. Amendment 12 is therefore contrary to law to the extent it removes Cook Inlet from the FMP.[4] We reverse the judgment of the district court and remand with instructions that judgment be entered in favor of United Cook.

REVERSED and REMANDED.

[4] Because Congress has spoken clearly, we need not reach *Chevron* step two. And, because we conclude that Amendment 12 is contrary to law with respect to its removal of Cook Inlet from the FMP, we need not address United Cook's other challenges to the Amendment.

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

	Kenai River				Kasilof River		
Year	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 it's 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.

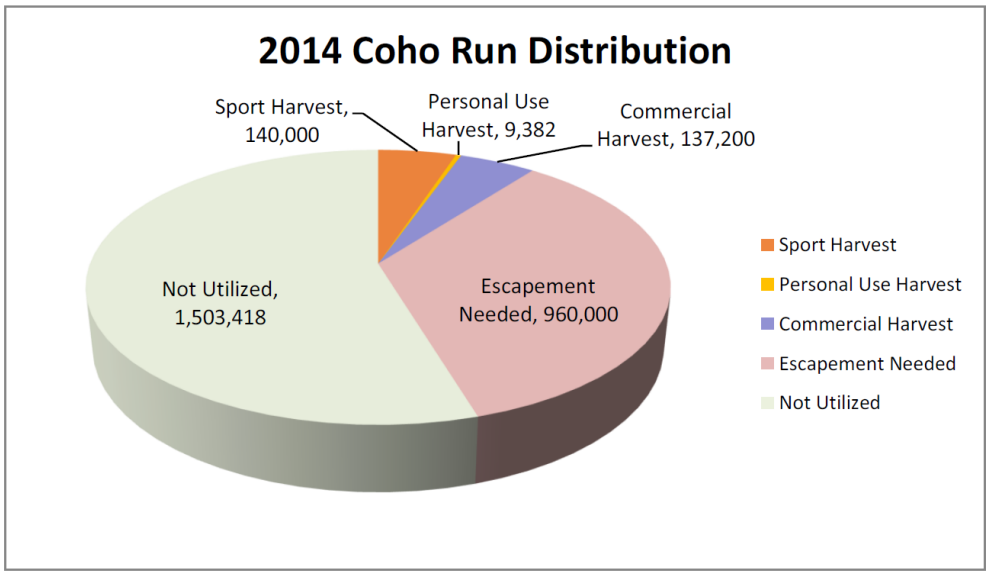
[34] *Id.*

[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

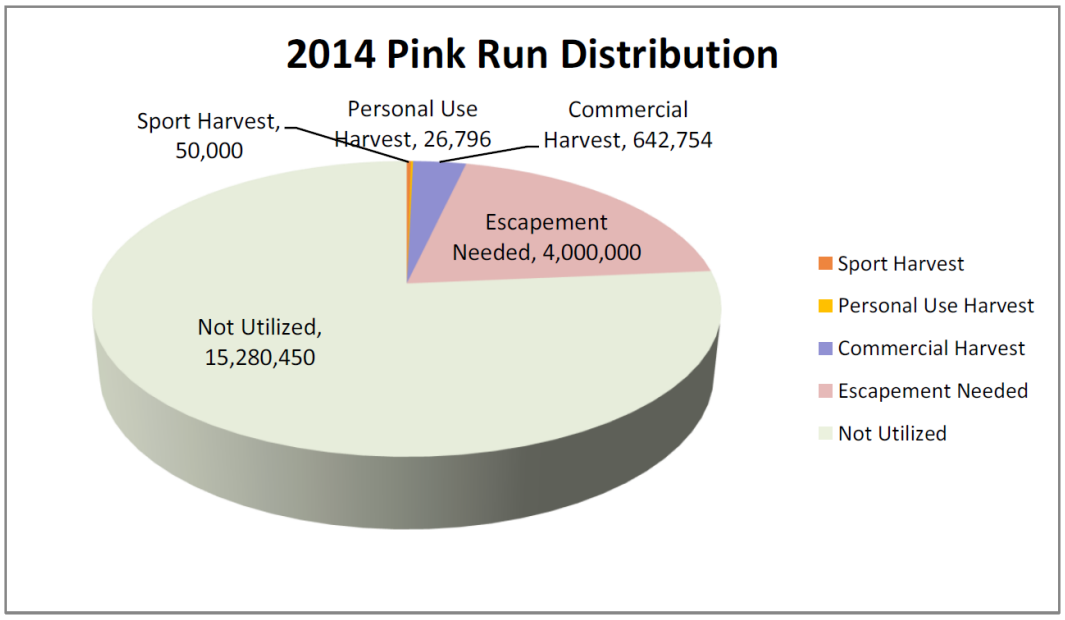
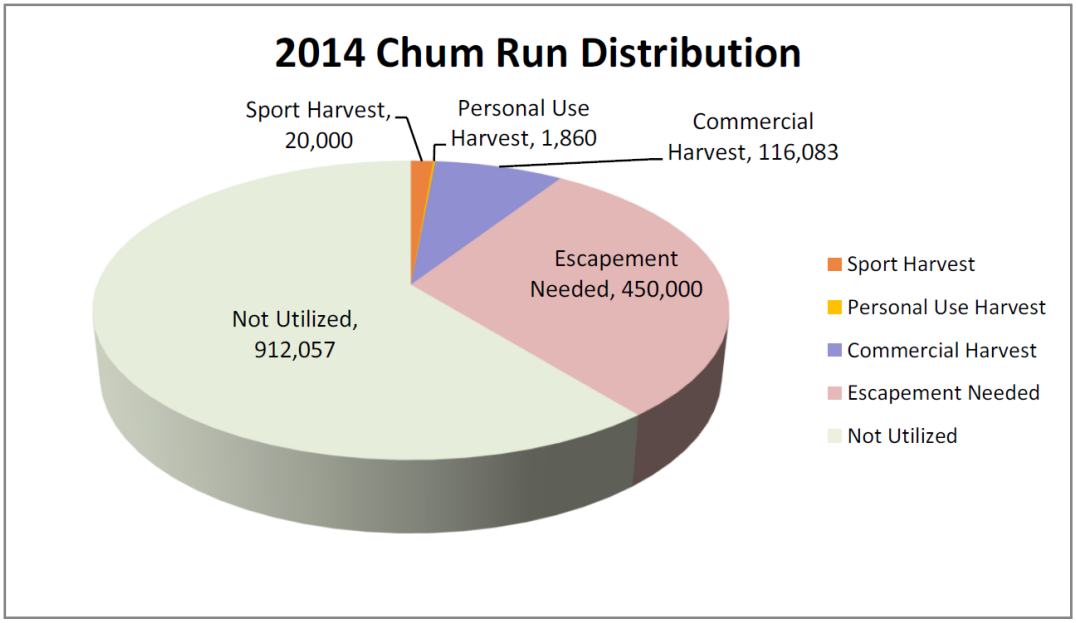


Figure 7. Distribution of the 1,500,000 Chum Run in Upper Cook Inlet, 2014



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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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

United Cook Inlet Drift Association

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• info@ucida.org •

April 6, 2017

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

Re: Recommendations for structure and goals for a salmon committee

Dear Chairman Hull and Council members:

Please consider the following pages as an example of how a salmon committee could be structured and how the committee could provide recommendations to the Council to assist in the development of a Salmon FMP.

Thank you,

Erik Huebsch
UCIDA Vice President

RECOMMENDATIONS FOR STRUCTURE AND GOALS FOR A SALMON COMMITTEE

Intent

Upper Cook Inlet has some of the largest wild, native runs of salmon in Alaska. For the local, regional and state economies to receive the full benefit from these abundant natural and renewable resources, a better method of management using the best available science must be considered. The purpose of this Salmon Committee is to provide a framework of ideas and methods for better utilization of the salmon resource while ensuring its sustainability and reducing the conflict between user groups. Engaging diverse stakeholders in a collaborative method of problem solving can provide new ideas and methods for achieving these goals. These recommendations would then be directed to the North Pacific Fisheries Management Council to facilitate the development of a Salmon FMP.

Membership

The Committee will be balanced in its membership in terms of the points of view represented and the functions to be performed. Members must have a demonstrated commitment to working collaboratively to find solutions and be knowledgeable in ecological, fisheries and economic issues impacting the Cook Inlet region. Committee members selected will represent the interests of state and local government, commercial and sport fishing interests, habitat and conservation groups and local/regional Native Alaskan groups.

Objectives and Scope of Activities

The Committee will be tasked with providing recommendations and goals for salmon management in Upper Cook Inlet that are in compliance with Federal and State laws. The overall purpose of this effort is to use the process of collaboration with the principles of stewardship and sustainability to create a multifaceted and integrated Fishery Management Plan that supports the social and economic health of the Cook Inlet region while maintaining healthy salmon populations.

Fisheries have played an enormous economic role in this region for over a century and have sustained the residents here for thousands of years. In spite of the value we all place on fisheries, many current management practices are proving to be unsustainable and wasteful. This Committee must objectively review past practices and provide advice on how to transition into a new method of management that fully utilizes surplus salmon stocks, maintain escapements within escapement goals and maintains healthy salmon stocks for future generations.

Enduring change will require addressing the fundamental problems with the existing system of creating management policies. Some of the problems that have been identified with the current

system are lack of knowledge about fisheries in Cook Inlet, management plans written by groups with a singular focus, management for political purposes and a disregard for science, economics and traditional uses.

In the Cook Inlet basin there are other specific problems that threaten the sustainability of salmon resources. Urbanization can be one of the most challenging problems as the effects on salmon populations happen gradually over time. Northern pike, an invasive specie, has devastated some salmon populations in the Mat-Su watershed. This threat has been recognized for over twenty years yet there is still no comprehensive plan to control or eradicate them. The invasive plant Elodea is of equal threat. There are large scale resource and industrial projects being considered for the Cook Inlet Basin that should be included when developing recommendations. These large projects have the potential for disrupting salmon harvest methods, impeding migration or eliminating spawning and rearing habitat.

Increasing revenues to the local, regional and state economies from Cook Inlet salmon resources will benefit all residents and could provide a model for increasing revenues from other regions of the state as well. Many fisheries resources around the state are underutilized and have the potential for increasing revenues and stabilizing economies.

The challenge in this effort is to understand and learn from the past while planning for the future. There must be a firm understanding of what is sustainable in order to develop clear, measureable, science based management policies that will provide benefits from our salmon resources for many decades to come.

The Committee will advise the Council by providing advice and recommendations for conserving and developing an ecologically, socially, and economically sustainable fisheries management strategy.

Description of Duties

The Committee will be solely advisory in nature. All activities of the Committee will be conducted in an open, transparent, and accessible manner. The Committee will be asked to perform the following duties or other requests made by the Council.

- Identify the key elements to be considered in a Salmon FMP while recognizing and balancing the unique and important resource values of Cook Inlet salmon for all user groups
- Offer recommendations on developing a Salmon FMP for Cook Inlet that will help to ensure the long term sustainability of our salmon resources and salmon fisheries.
- To the extent possible, for the greatest benefit of all users, develop recommendations to manage Cook Inlet salmon resources for maximum sustainable yield.

Membership and Designation

The Committee will be fairly balanced in its membership in terms of the points of view represented and the functions to be performed. Membership is intended to represent a broad range of stakeholders and be knowledgeable of ecological, social, and economic issues impacting

the Cook Inlet watershed, while providing a balanced and broad representation within the following interests:

1. Fishery scientists and managers;
2. Regional environmental and/or conservation organizations;
3. Commercial fishing representatives;
4. Commercial seafood processors;
5. Tourism and Recreation fisheries;
6. Subsistence fisheries;
7. Federally Recognized Tribes and/or Alaska Native Organizations;
8. Federal and State agencies;
9. Local government representatives.

Committee members must have a demonstrated commitment to working collaboratively and finding solutions that meet multiple stakeholder values.

Committee advice and recommendations must be approved by consensus of the groups represented but not consensus of all participants.

One substitute (alternate) member should be selected for each interest group.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT ASSOCIATION, AND COOK INLET FISHERMEN'S FUND, Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE ET AL., Defendants.	Case No. 3:13-cv-00104-TMB ENTRY OF JUDGMENT

The parties' Joint Motion for Entry of Proposed Judgment at docket 101 is GRANTED. Pursuant to that joint motion, the Court orders as follows:

JUDGMENT

1. The decision on Amendment 12 is remanded without vacatur. This Court shall retain jurisdiction to oversee compliance with the terms of this judgment.

2. The National Marine Fisheries Service ("NMFS") shall file a status report on a tri-annual basis with the Court.

3. In accordance with the North Pacific Council's Statement of Organization, Practices, and Procedures, including sections 2.3.4 Council Committees, 3.7 Public Hearings, and 3.11 Principles for Stakeholder Involvement, NMFS will work with the North Pacific Council ("Council") to ensure that the affected public has appropriate input in the development of any new Salmon FMP amendment that addresses Cook Inlet. Paragraphs 3, 4, and 5, of this judgment do not bind the Council or NMFS with regard to the contents of the new FMP amendment, which include, but are not limited to, a description of the fishery and conservation and management measures.

4. If the Council adopts a Salmon FMP amendment that addresses Cook Inlet, NMFS shall take final agency action and/or promulgate a final rule within 1 year from the Council meeting at which the Council takes final action to adopt that Salmon FMP amendment. In the unlikely event that the Council does not prepare an amendment and NMFS undertakes a Secretarial amendment to the Salmon FMP, NMFS and Plaintiffs shall negotiate a deadline for final agency action and/or promulgation of a final rule, and shall present such deadline in a proposed amended judgment to be filed with the Court. Plaintiffs and NMFS agree that negotiation of a deadline for final agency action and/or promulgation of a final rule if NMFS undertakes a Secretarial amendment to the Salmon FMP will not be considered enforcement of this judgment.

5. Plaintiffs reserve the right to seek a court-ordered deadline for implementation of a new Salmon FMP amendment that addresses Cook Inlet if the Council does not form a Council committee that includes Cook Inlet salmon fishery stakeholders, including Plaintiffs. If Plaintiffs choose to exercise this right, Plaintiffs and NMFS agree that the Parties retain their rights to brief the court on the deadline each Party thinks is most reasonable. Plaintiffs further agree that any exercise of this right by Plaintiffs will not be considered enforcement of this judgment.

6. By petitioning this Court to enter this Judgment, Plaintiffs' expressly reserve and do not waive their right to seek attorneys' fees and costs. Within 30 days of resolution of the State of Alaska's U.S. Supreme Court petition for *certiorari*, the parties will provide a status report on their efforts to resolve Plaintiffs' claim for attorneys' fees and costs.

IT IS SO ORDERED.

Dated at Anchorage, Alaska, this 3rd day of August, 2017.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE

United Cook Inlet Drift Association

43961 K-Beach Road, Suite E • Soldotna, Alaska 99669 • (907) 260-9436 • fax (907) 260-9438 • info@ucida.org •

Date: September 20, 2017

Addressee: John Jensen, Chairman, AK Board of Fisheries
AK Board of Fisheries Members
PO Box 15526
Juneau, AK 99811-5526

RE: ACR 11 Comments

Mr. John Jensen,

United Cook Inlet Drift Association (UCIDA) makes the following comments concerning ACR 11.

Introduction

ACR 11 was submitted in order to have a regulatory review of some of the Kodiak Management Area (KMA) salmon management plans. UCIDA expects the Board of Fisheries (BOF), ADF&G, and the stakeholders in Cook Inlet, KMA and Chignik areas to have the opportunity to discuss the harvests of local and non-local salmon species within the KMA. This dialog must ultimately cover all five species of salmon, however, Sockeye and Chinook salmon require immediate attention.

Historically, average weights and scale pattern methods were used by ADF&G, the BOF and the stakeholders as a means of identifying local and non-local salmon stocks.

The Genetic Stock Identification (GSI) studies, utilizing the best science available, have provided a new level of identifying non-local stocks. GSI has also provided a new tool that improves upon previous ADF&G estimates of the natal origins of the salmon harvested in the KMA. The new GSI methodology has demonstrated that the historical average weight, tagging studies and scale pattern analyses are inadequate and misleading when determining the natal origins of salmon in KMA harvests.

In the past, the BOF has communicated a clear intent to harvest local stocks in the KMA while avoiding and minimizing the harvests of non-local salmon. Currently, rather large harvest of non-local sockeye and Chinook salmon in the KMA is generating management problems and significant economic losses in other regions of Alaska.

UCIDA requests that the BOF accept and schedule a special hearing on ACR 11 for the spring of 2018. This will provide time for all user groups, ADF&G and the BOF to review the new GSI information and KMA harvest patterns involving non-local salmon stocks.

Regulatory History

The harvest of non-local stocks has been the subject of two previous out-of-cycle BOF regulatory hearings held in Kodiak. The first was in December of 1989 and the second was in March of 1995. In the 1989 BOF hearing, three significant decisions were made:

1. The intent of the BOF was to prevent any increased harvest of **Cook Inlet or other non-local stocks**. The following sections and language was added to the KMA regulations and quoted as follows:

   A. "5 AAC 18.363. North Shelikof Strait Sockeye Salmon Management Plan. (a) 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 [1987 and] 1988.**

   (b) From July 6 through July 25 in the Dakavak Bay, Outer Kakuk Bay, Inner Kakuk Bay, Hallo Bay, and Big River sections of the Mainland District, and in the Shuyak Island of Northwest Afognak Sections of the Afognak District, the department shall manage the fishery as follows:

   (1) The management of the fishery must be based on local stocks;

   (2) The fishery may remain open during normal fishing periods until the harvest exceeds 15,000 sockeye salmon…

   (c) From July 6 through July 25 in the Southwest Afognak Section of the Afognak District, the department shall manage the fisheries as follows:

   (1) management of the fishery must be based of local stocks consistent with 5 AAC 18.362(d)(3);

   (2) the fishery may remain open during normal fishing periods until the harvest exceeds 50,000 sockeye salmon;

(3) when the harvest exceeds 50,000 sockeye salmon, the commissioner shall restrict, by emergency order, the fishery to waters of the Southwest Afognak Section…

(d) from approximately July 6 through August 15, based on pink salmon returning to the major pink salmon systems in the Southwest Afognak Section and the Northwest Kodiak District; from July 6 through July 25, the section must also be managed according to 5 AAC 18.363(c), the North Shelikof Management Plan;"

2. New harvest limits, boundaries and effective dates. There were two harvest limits of 15,000 and 50,000 sockeye established. See 5 AAC 18.363. North Shelikof Strait Sockeye Salmon Management Plan. **New boundaries** and effective dates were also established.

3. No new or expanding harvest efforts. UCIDA has purchased an archived audio file from the 1989 out-of-cycle BOF hearing held in Kodiak. In listening to these audio files, members of the BOF were concerned that by restricting the harvest of **Cook Inlet salmon stocks (harvest limits, fishing areas and effective dates) in the North Shelikof area, the seine fishery would then move to other areas of the KMA and continue harvesting non-local and Cook Inlet sockeye salmon.** These areas identified were south along the east and west sides of Kodiak Island and across Shelikof Strait to the Mainland District. Some of these areas were also previously closed as they were known interception areas.

The 1989 BOF discussions clearly stated that the new outer boundaries, harvest limits and effective dates were each to be used by ADF&G to achieve two objectives:

a) Minimize the directed harvest of Cook Inlet sockeye salmon stocks;
b) Prevent the repetition of the non-traditional harvest pattern of [1987 and] 1988.

In spite of this, in the ensuing years, regulatory harvest caps have been routinely exceeded, harvest boundary lines have been adjusted seaward and previously recognized interception areas have been reopened to fishing.

New Biological and Scientific Reports released since November 2016

Within the last year, three ADF&G reports containing GSI information on the sockeye harvests in KMA and Cook Inlet have been published. The BOF specifically requested the Addendum that redefines (defines) the **Cook Inlet sockeyes that were harvested in the KMA for 2014, 2015 and 2016.**

1. Genetic Stock Composition of the Commercial Harvest of Sockeye Salmon in Kodiak Management Area, 2014–2016. FMS 16-10, December 2016.

2. Annual Genetic Stock Composition Estimates for the **Upper Cook Inlet Sockeye Salmon Commercial Fishery**, 2005–2016. RIR 5J17-05, July 2017.
3. Addendum to FMS 16-10: Redefinition of Reporting Groups to Separate **Cook Inlet** into Four Groups for the Genetic Stock Composition of the Commercial Harvest of Sockeye Salmon in Kodiak Management Area, 2014–2016. FM No. 17-07, September 2017.

These newly applied GSI analyses are much more accurate and reliable than ADF&G's past use of average weight and scale pattern analyses. In 2015, average weights would not have detected **Cook Inlet sockeye** in the KMA. That year all sockeye salmon across Alaska were at least a pound less than the historical average. It was the GSI work that correctly identified that there were **nearly one million Cook Inlet sockeyes** harvested in KMA in 2015**. The new GSI scientific work has reported much higher harvests of Cook Inlet sockeyes** than the older, less accurate average weight and scale pattern analyses.

In Adjustments for Cook Inlet Reporting Groups to the Addendum to FMS 16-10: Redefinition of Reporting Groups to Separate Cook Inlet into Four Groups for Genetic Stock Composition of the Commercial Harvest of Sockeye Salmon in the Kodiak Management Area, 2014-2016. (UCIDA 2017) there is GSI data specifically on the harvest of the four Cook Inlet reporting groups: Other Cook Inlet (OCI), Susitna, Kenai and Kasilof. The table below summarizes the harvests of these four reporting groups for the years 2014 through 2016. Page 13 of that report is reproduced below.

Table 11. Kodiak Management Area 2014-2016. Estimated Cook Inlet Harvests

Reporting Group	2014	2015	2016	Total	Average
Other Cook Inlet (OCI)	11,908	80,698	49,536	142,142	47,381
Susitna	4,466	75,989	39,440	119,895	39,965
Kenai	60,973	365,335	272,160	698,468	232,823
Kasilof	36,019	103,539	22,501	162,059	54,020
Total	113,366	625,561	383,637	1,122,564	374,188

* All data taken from FMS 16-10, Shedd, et al., 2016

Table 11A (Adjusted for Cook Inlet). Kodiak Management Area 2014-2016. Estimated Cook Inlet Harvests

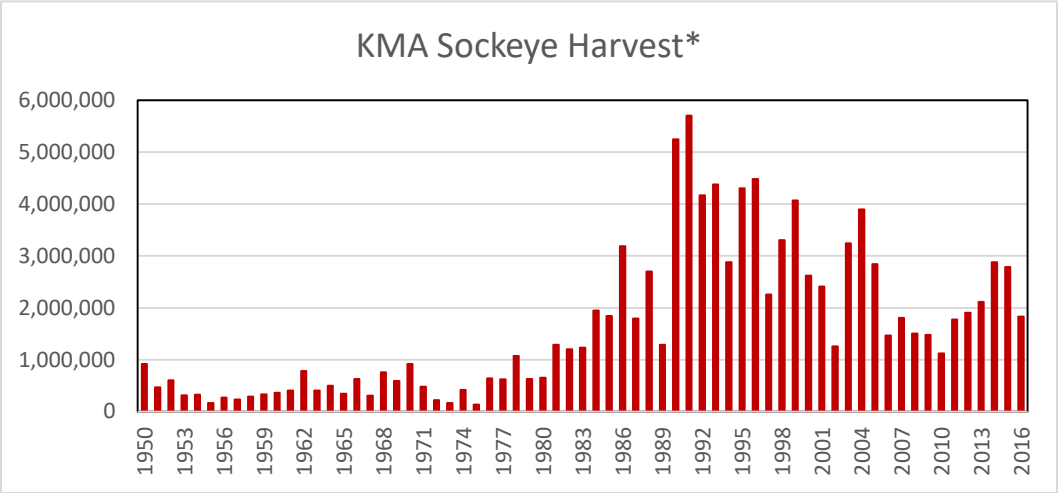
Reporting Group	2014	2015	2016	Total	Average
Other Cook Inlet (OCI)	20,266	117,683	79,332	217,281	72,427
Susitna	8,175	105,726	64,573	178,474	59,491
Kenai	113,025	513,013	453,985	1,080,023	360,008
Kasilof	62,829	154,647	33,995	251,471	83,824
Total	204,295	891,069	631,885	1,727,249	575,750

See UCIDA, 2017, page 13 for a discussion of Tables 11 and 11A.

Historic Kodiak Management Area Sockeye Harvests 1950-2017

Figure 1. KMA Sockeye Harvest

*KMA sockeye data does not include the harvest of Kodiak Regional Aquaculture Association sockeye. All data from UCI and KMA 2016 Annual Management Reports



In Figure 1, the total KMA sockeye harvest is displayed from 1950 through 2016. It must be noted that from 1950 through 1978 (28 years), the KMA harvest never reached one million sockeye annually. From 1979 through 1985 (6 years), KMA did not achieve a harvest of two million sockeye annually. Beginning in 1986, most KMA sockeye harvests were above two million. Beginning in 1986, several changes occurred. First, the average size, length and width of seine vessels started increasing; second, the average length, width and horsepower of seine skiffs increased; third, seine fishing on capes and headlands increased; fourth, new fishing areas were opened; fifth, existing boundaries were expanded seaward; sixth, previously known interception areas were reopened. In 1988 there was such a large harvest of non-local stocks that in 1989 the BOF took action to prevent that from reoccurring. In 1990 and 1991, over 5 million sockeyes are harvested. In KMA during 1992, 1993, 1995, 1996 and 1999, over 4 million sockeyes were harvested. Since 2000, the KMA sockeye harvests have ranged from nearly 4 million in 2004, to about 2.4 million in 2016. Clearly, the KMA harvests of non-local sockeye salmon have seen dramatic increases since the 1989 BOF hearing. We will never know the exact numbers, but Cook Inlet and Chignik stocks have been a major contributor to these increased and non-traditional KMA sockeye harvests.

Consequences of KMA Harvest of Cook Inlet Sockeye

Management

The science of sustaining salmon stocks and sustainable salmon management relies on accurate assessment and analysis of brood tables, spawner/recruit ratios, stock production models and escapement goals. Management plans and allocations depend on decisions being made with data derived from the best available science. Clearly, the management of both KMA and Cook Inlet salmon stocks are not scientifically valid if this new GSI data is ignored.

Stocks of Concern

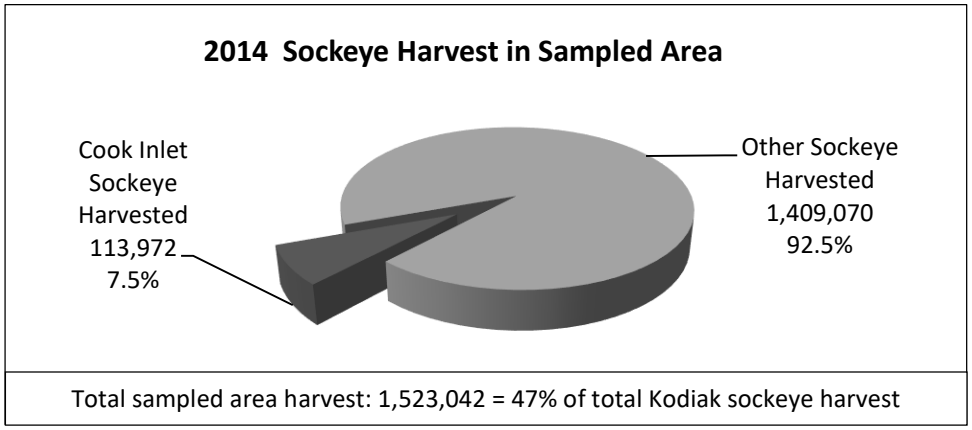
ACR 11 gives the BOF, ADF&G and the stakeholders a new and expanded opportunity to review the Stocks of Concern (SOC) designation for certain salmon stocks. This new information should help to inform the BOF regarding the validity of some SOC designations. This GSI information could improve recovery and rebuilding plans. ACR 11 provides an opportunity to reconsider some stocks of concern and act accordingly.

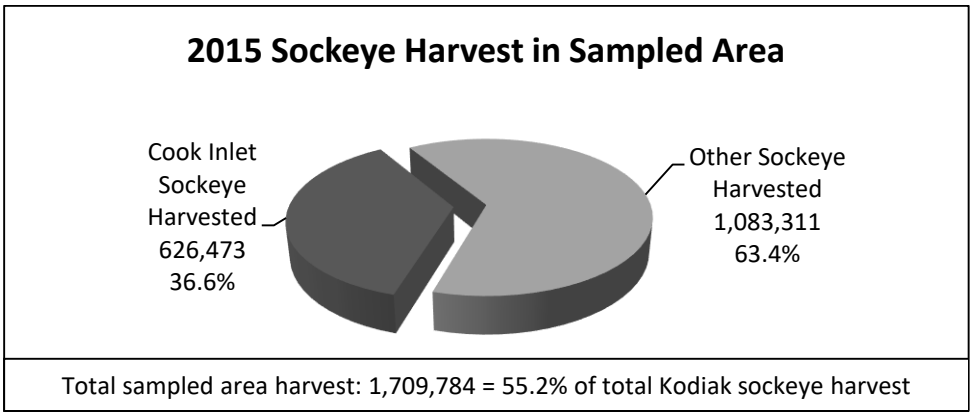
Since 2008, the Susitna Sockeye Salmon Stocks have been designated as a "Stock of Yield Concern" by the BOF. At that time, the ADF&G recommended that Susitna sockeye not be declared a Stock of Yield Concern. This SOC designation was based on faulty sonar data from the Susitna River. UCIDA has never agreed with the harvest restrictions placed on the drift fleet as a result. In retrospect, the yield concern designation is a self-fulfilling prediction. The harvest restrictions based on the designation have caused reduced yields which in turn provide a positive feed-back loop that only demonstrates reduced yields. Harvest restrictions have not led to increased yields of Susitna sockeye and they never will. Now, the GSI data has revealed significant harvest of Susitna sockeye stocks in the KMA (Tables 11 and 11A). No one in ADF&G or on the BOF were aware of these large harvests of Susitna sockeye in the KMA and have not factored those harvests in the review of this SOC designation.

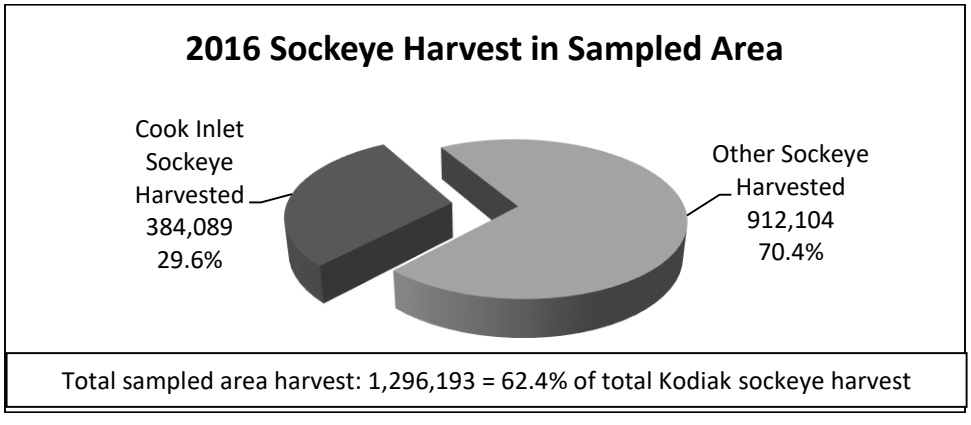
From the 2008 season through the 2017 season (10 years), the KMA has had average annual harvests range of 39,965 to 59,491, which equates to a total harvest of 399,650 to 594,910 Susitna-bound sockeye salmon. During the last 10 years, the KMA has benefitted from this harvest of nearly 400,000 to 600,000 Susitna sockeyes **without sharing any of the conservation burden.**

Summary of the sockeye harvest data in the Kodiak genetic stock composition report*.

Sampled area was only a portion of the entire Kodiak Management Area, see report for details.
Harvest numbers do not include catch data from previously identified intercept areas like North Shelikof and the Mainland district.







* FMS 16-10, Shedd, et al, 2016. Page 22.

Economics

Without question, there will be some economic issues with those that may lose and those that may gain from harvesting these salmon stocks from the area in which they originate. There is nothing new about rebalancing the economic scales. Any Cook Inlet salmon harvested in the KMA is an economic loss to the Kenai Peninsula Borough economy. However; all Kodiak salmon stocks may continue to be harvested in the KMA and it is quite unlikely that Upper Cook Inlet commercial fisheries will harvest any Kodiak salmon stocks.

During 2014, 2015 and 2016, there were over 1,700,000 Cook Inlet sockeye salmon harvested in the KMA (Tables 11 and 11A). At an average of $10 per sockeye, the ex-vessel value of these salmon is $17,000,000. The first wholesale value for these salmon would be about $34,000,000 and the economic value to the Kenai Peninsula Borough economy would be 3-5 times that value. However; for the 2014, 2015 and 2016 salmon seasons, Cook Inlet Drift Fishermen averaged about $20,000 for the entire season, some of our worst years ever, (CFEC Report No. 16-5N, page 31, reproduced on page 9). The loss to Cook Inlet commercial fisheries, the seafood processors and our entire economy is unacceptable. ACR 11 provides an opportunity to readjust the economic balance.

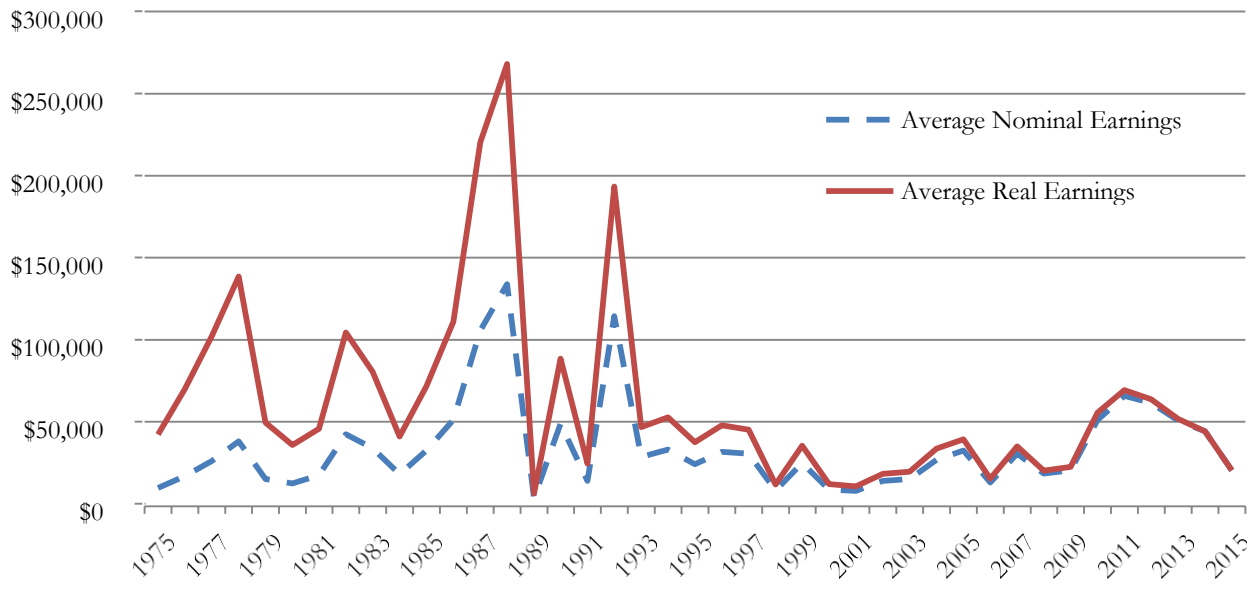
Participation and Earnings

Figure 9

CFEC reports the nominal and average gross earnings per Cook Inlet Salmon Drift Gillnet Permits from 1975-2015. In 2015, the drift gillnet permit average was $21,542.00. Cook Inlet Drift CFEC 16-5N, July 2106.

Table 29 reports the number of permits, permits and vessels with landings, and estimated gross earnings in the Cook Inlet salmon drift gillnet fishery from 1975 to 2015. Note that the figures by permit or vessel in this table span the entire year, regardless of who held the permit or however many times the permit was transferred.

Figure 9. Estimated Nominal and Real Average Gross Earnings Per Cook Inlet Salmon Drift Gillnet Permit



- *Real earnings are adjusted for inflation using the 2015 U.S. Bureau of Labor Statistics Consumer Price Index.*

Table 29. Estimated Total Gross Earnings (Real and Nominal) for the Cook Inlet Salmon Drift Gillnet Fishery, With Average Gross (Real) Earnings by Permit and Vessel, 1975-2015

Year	Viable Permits	Gross Earnings Nominal	Gross Earnings Real	Permits With Landings	Average Real Earnings	Vessels With Landings	Average Real Vessel Earnings
1975	636	$4,461,123	$19,653,571	466	$42,175	534	$36,804
1976	584	$8,569,607	$35,696,704	511	$69,857	563	$63,404
1977	572	$13,853,810	$54,184,629	531	$102,043	685	$79,102
1978	589	$22,033,557	$80,097,048	578	$138,576	605	$132,392
1979	599	$8,954,115	$29,232,473	592	$49,379	622	$46,998
1980	598	$6,894,765	$19,832,239	553	$35,863	578	$34,312
1981	599	$10,227,361	$26,667,310	584	$45,663	605	$44,078
1982	592	$24,514,672	$60,211,337	577	$104,352	588	$102,400
1983	588	$19,592,016	$46,622,900	580	$80,384	598	$77,965
1984	588	$10,381,576	$23,682,484	578	$40,973	609	$38,887
1985	591	$18,975,346	$41,798,138	584	$71,572	684	$61,108
1986	588	$29,948,905	$64,766,420	584	$110,901	658	$98,429
1987	586	$61,784,789	$128,908,849	585	$220,357	652	$197,713
1988	585	$78,128,882	$156,533,164	584	$268,036	657	$238,254
1989	585	$33,363	$63,770	10	$6,377	10	$6,377
1990	585	$28,384,895	$51,474,390	582	$88,444	625	$82,359
1991	584	$8,099,133	$14,094,216	578	$24,384	615	$22,917
1992	583	$66,362,059	$112,109,310	580	$193,292	642	$174,625
1993	583	$16,537,133	$27,125,132	580	$46,767	632	$42,920
1994	583	$18,766,136	$30,012,775	569	$52,747	565	$53,120
1995	582	$13,912,083	$21,636,484	577	$37,498	583	$37,112
1996	583	$17,736,374	$26,793,003	560	$47,845	563	$47,590
1997	581	$17,448,194	$25,766,470	572	$45,046	575	$44,811
1998	581	$4,303,378	$6,257,508	528	$11,851	527	$11,874
1999	576	$12,134,809	$17,263,841	487	$35,449	487	$35,449
2000	576	$4,438,593	$6,109,303	513	$11,909	510	$11,979
2001	574	$3,711,269	$4,966,877	467	$10,636	466	$10,659
2002	572	$5,686,049	$7,491,330	409	$18,316	409	$18,316
2003	572	$6,329,162	$8,152,820	418	$19,504	412	$19,788
2004	571	$11,798,178	$14,803,434	440	$33,644	435	$34,031
2005	571	$15,251,702	$18,509,538	471	$39,298	468	$39,550
2006	570	$5,159,160	$6,065,519	396	$15,317	396	$15,317
2007	571	$12,759,634	$14,585,806	417	$34,978	415	$35,147
2008	571	$7,823,008	$8,611,983	433	$19,889	415	$20,752
2009	570	$8,202,181	$9,061,637	416	$21,783	388	$23,355
2010	569	$19,300,530	$20,978,803	411	$51,043	353	$59,430
2011	569	$30,378,044	$32,009,179	493	$64,927	426	$75,139
2012	569	$30,546,478	$31,534,075	525	$60,065	460	$68,552
2013	569	$25,230,345	$25,670,063	538	$47,714	473	$54,271
2014	569	$21,897,315	$21,923,306	530	$41,365	483	$45,390
2015	569	$10,060,160	$10,060,160	518	$19,421	467	$21,542

- *Adjusted for inflation to 2015 dollars using U.S. Bureau of Labor Statistics Consumer Price Index.*
- *Counts will differ from CFEC on-line Basic Information Tables where the on-line data does not account for the combination of interim-entry permits that were issued as permanent permits in the same year; figures will also differ where dual permit operations were used and landings were solely recorded on one of the two permits.*
- *The 1989 fishing season was cut short due to the Exxon Valdez oil spill that occurred that year.*

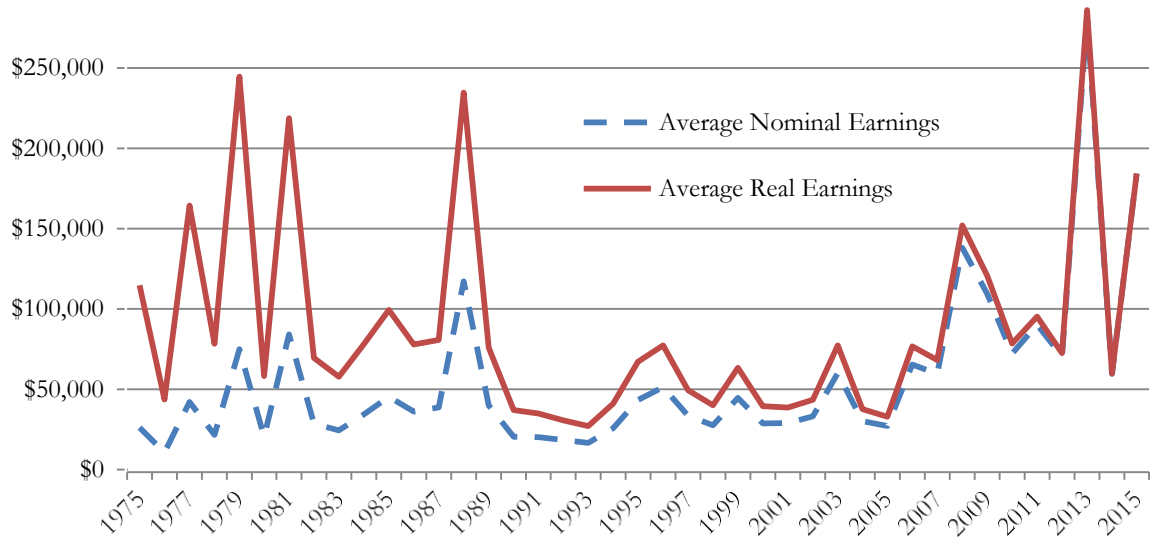
Participation and Earnings

Figure 4

CFEC reports the nominal and average gross earnings per Kodiak Purse Seine Fishery from 1975-2015. The 2015 average purse seine fishery vessel was $182,326.00

Table 13 reports the number of permits, permits and vessels with landings, and estimated gross earnings in the Cook Inlet salmon purse seine fishery from 1975 to 2015. Note that the figures by permit in this table span the entire year, regardless of who held the permit or however many times the permit was transferred.

Figure 4. Estimated Nominal and Real Average Gross Earnings Per Cook Inlet Salmon Purse Seine Permit



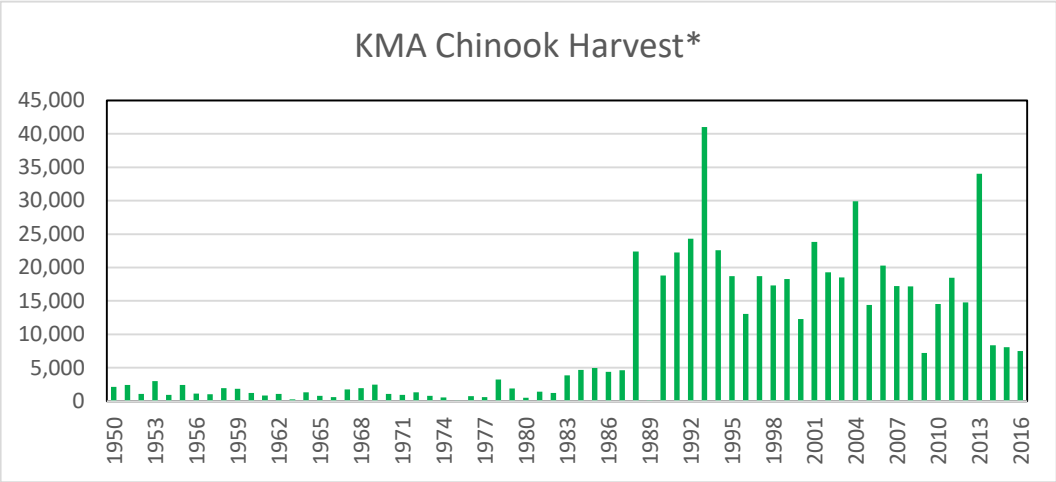
- *Real earnings are adjusted for inflation using the 2015 U.S. Bureau of Labor Statistics Consumer Price Index.*

Table 13. Estimated Total Gross Earnings (Real and Nominal) for the Cook Inlet Salmon Purse Seine Fishery, With Average Earnings (Real) by Permit and Vessel, 1975-2015

Year	Viable Permits	Gross Earnings Nominal	Gross Earnings Real	Permits With Landings	Average Real Earnings	Vessels With Landings	Average Real Vessel Earnings
1975	89	$1,406,224	$6,195,147	54	$114,725	60	$103,252
1976	78	$513,502	$2,138,994	49	$43,653	56	$38,196
1977	82	$2,563,292	$10,025,476	61	$164,352	71	$141,204
1978	83	$1,419,533	$5,160,330	66	$78,187	66	$78,187
1979	84	$5,769,152	$18,834,533	77	$244,604	81	$232,525
1980	84	$1,434,609	$4,126,539	71	$58,120	71	$58,120
1981	85	$6,882,516	$17,945,801	82	$218,851	87	$206,274
1982	84	$1,784,216	$4,382,275	63	$69,560	62	$70,682
1983	83	$1,720,680	$4,094,682	71	$57,672	73	$56,092
1984	81	$1,847,067	$4,213,535	54	$78,028	56	$75,242
1985	82	$2,302,420	$5,071,678	51	$99,445	50	$101,434
1986	83	$2,196,680	$4,750,461	61	$77,876	61	$77,876
1987	83	$2,591,820	$5,407,618	67	$80,711	68	$79,524
1988	83	$8,437,869	$16,905,481	72	$234,798	75	$225,406
1989	83	$2,539,823	$4,854,687	64	$75,854	66	$73,556
1990	83	$1,444,426	$2,619,383	71	$36,893	73	$35,882
1991	83	$1,360,809	$2,368,097	68	$34,825	74	$32,001
1992	83	$1,107,528	$1,871,012	61	$30,672	61	$30,672
1993	84	$842,496	$1,381,909	51	$27,096	54	$25,591
1994	84	$768,850	$1,229,626	30	$40,988	31	$39,665
1995	84	$1,982,432	$3,083,136	46	$67,025	45	$68,514
1996	85	$1,740,062	$2,628,580	34	$77,311	37	$71,043
1997	85	$768,043	$1,134,201	23	$49,313	24	$47,258
1998	83	$1,069,729	$1,555,485	39	$39,884	44	$35,352
1999	83	$1,912,728	$2,721,183	43	$63,283	43	$63,283
2000	83	$1,029,272	$1,416,695	36	$39,353	37	$38,289
2001	83	$721,111	$965,080	25	$38,603	31	$31,132
2002	82	$823,726	$1,085,253	25	$43,410	24	$45,219
2003	81	$1,558,569	$2,007,649	26	$77,217	30	$66,922
2004	81	$719,238	$902,444	24	$37,602	27	$33,424
2005	82	$786,252	$954,200	29	$32,903	33	$28,915
2006	82	$1,564,895	$1,839,815	24	$76,659	24	$76,659
2007	83	$1,131,535	$1,293,482	19	$68,078	18	$71,860
2008	82	$3,451,830	$3,799,958	25	$151,998	23	$165,216
2009	82	$1,420,257	$1,569,077	13	$120,698	12	$130,756
2010	82	$1,010,051	$1,097,879	14	$78,420	16	$68,617
2011	83	$2,076,973	$2,188,495	23	$95,152	20	$109,425
2012	83	$1,123,214	$1,159,529	16	$72,471	17	$68,208
2013	83	$3,374,183	$3,432,988	12	$286,082	13	$264,076
2014	84	$1,191,240	$1,192,654	20	$59,633	20	$59,633
2015	84	$3,500,945	$3,500,945	19	$184,260	18	$194,497

- *Adjusted for inflation to 2015 dollars using U.S. Bureau of Labor Statistics Consumer Price Index.*
- *Counts will differ from CFEC on-line Basic Information Tables where the on-line data does not account for the combination of interim-entry permits that were issued as permanent permits in the same year.*

Figure 2. KMA Chinook Harvest



*All data from UCI and KMA 2016 Annual Management Reports

KMA Chinook Harvests

In Figure 2, the KMA annual Chinook harvests are displayed from 1950 through 2017. As you examine the annual Chinook harvests from 1950 through 1983 (33 years), there were less than 2,000 Chinook harvested annually throughout the KMA. In the KMA, there are only two Chinook salmon systems with escapement goals: the Karluk escapement goal of 3,000 – 6,000, and Ayakulik escapement goal of 4,000 – 7,000. Beginning in 1984 and continuing for the next 30 years until 2013, Chinook harvests increased dramatically. In 1993 over 42,000 Chinook were harvested in the KMA. The December 2016 Escapement Goal Report for Kodiak by Shaberg, et al., Appendix A2 (page 37), indicates the 1993 commercial harvest from the Ayakulik system was 2,708 Chinook. Appendix B2, (page 45) indicates that the 1993 harvest from the Karluk system was 3,082 Chinook. Taken together, Ayakulik and Karluk total 5,790 commercially harvested Chinook salmon. Yet in 1993, there were over 42,000 Chinook commercially harvested in Kodiak, more than 36,000 are from other areas. Since 1984, these harvests of non-local Chinook have been repeated year after year.

This increased harvest of Chinook occurs at the same time as sockeye harvests increased. These increased harvests occurred simultaneously with the increased length and width of the seine vessels, the fishing on capes and headlands, the opening of increased fishing areas, the reopening of previously closed fishing areas, the extensive use of Emergency Order

authority to facilitate fishing 24 hours a day, 7 days a week for much of June, July and August. There is simply no biological possibility that the Karluk and Ayakulik systems can produce a harvest of over 42,000 Chinook, plus meet escapement needs, for a total run of over 50,000. **This inescapable reality is that most of the Chinook harvested in the KMA since 1984 are non-local stocks.**

After the 2012 season the BOF adopted **5 AAC 18.395. Retention of King Salmon taken in a commercial fishery.** This regulation states that King (Chinook) salmon 28 inches, or greater, in length taken incidentally must be returned to the water unharmed. This regulation has likely had no effect on the number of chinook caught in the KMA commercial fishery but appears to have reduced the reported harvest of Chinook salmon (See Figure 2, years 2014, 2015 and 2016). In 2017, the harvest of Chinook salmon in the KMA was about 6,500. From 2014 through 2016, a genetic stock identification research project was conducted. The purpose of this study was to use GSI tests to determine, if possible, the natal origins for Chinook harvested in the KMA. The results are reported by Genetic Stock Composition of the Commercial Harvest of Sockeye Salmon in Kodiak Management Area, 2014–2016 (Shedd, et al., December 2016).

There are three very important issues that must be placed in the public record regarding 5 AAC 18.395 and the Chinook Genetic Stock Identification study for the 2014-2016 time period.

1. First, the genetic samples were taken on tendering vessels or at the processing facilities. Genetic sampling did not occur at the time or point of harvest or capture.

2. Second, because of 5 AAC 18.395, all Chinook 28 inches or greater in length were never sampled. There is no information on: **how many** Chinook 28 inches or greater were incidentally caught and released; **when** these Chinook 28 inches or greater were incidentally caught and released; **where** these Chinook 28 inches or greater were caught and released, or the **mortality rate** of these Chinook 28 inches or greater that were incidentally caught and released.

3. Third, the reported natal origins (Shedd, et al., 2016) are only for the harvests of Chinook 28 inches or less.

This GSI determination has accurate natal determinations and assignments. The Shedd, et al., 2016 report makes no determinations, findings or conclusions on the Chinook 28 inches or greater that were incidentally caught and required to be released by regulation. Cook Inlet has numerous streams that Chinook return to and over 200,000 Chinook return there annually to spawn. Chinook salmon 28 inches or greater are often mature or are in pre-spawn developmental stages.

The effect that the harvest, capture and release of Chinook greater than 28 inches has on Cook Inlet and other areas of the state is an issue that ACR 11 addresses through the institution of harvest limits by week and by year. ACR 11 provides an opportunity to examine, discuss and resolve the Chinook harvesting issues in the KMA.

Policy Issues and Inconsistencies

ACR 11 provides a proposal to adjust regulatory management plans. There are several existing regulatory policies that should be applied to the KMA salmon management plans and harvests of non-local stocks. These are:

1. 5 AAC 39.222. Policy for the management of sustainable salmon fisheries.
2. 5 AAC 39.200. Application of fishery management plans.
3. 5 AAC 39.220. Policy for the management of mixed stock salmon fisheries.
4. 5 AAC 39.223. Policy for statewide salmon escapement goals.

The KMA management plans have numerous variances when compared to the above statewide policies. There are numerous instances where these referenced policies are not being followed, even ignored, and in some instances, misapplied. ACR 11 allows the BOF, ADF&G and the stakeholders to reexamine and adjust management plans and regulations.

Conclusion

Clearly, GSI has improved overall understanding about sockeye and Chinook salmon. Hopefully, future GSI projects will continue to improve our biological understanding on all species of salmon.

The BOF and ADF&G should, as a matter of public policy, incorporate the new and improved GSI biological information into their regulatory decisions and daily management. The BOF now has the opportunity to incorporate the new science into the regulatory process by scheduling ACR 11 for a regulatory hearing.

The Cook Inlet fishing community understands, but does not agree with the regulatory road and the new challenges ahead for many regions and communities. UCIDA asks that ACR 11 or something similar be scheduled for a regulatory hearing by the BOF before the 2108 salmon season. UCIDA further commits its resources and time to problem solving discussions. We

would hope that these discussions could occur in a timely fashion, prior to the 2018 salmon season.

Sincerely,

Original Signed Document

David Martin, President
United Cook Inlet Drift Association

cc:
Governor Bill Walker
Senate Resources Committee Members
House Fisheries Committee Members
Senator Majority Leader Peter Micciche
Senator Gary Stevens
House Speaker Bryce Edgmon
Representative Gary Knopp
Representative Paul Seaton
Kenai Peninsula Borough Mayor Mike Navarre
Kodiak Borough Mayor Dan Rohrer
Mat-Su Borough Mayor Vern Halter
City of Kenai Mayor Brian Gabriel