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

ASSOCIATION OF VILLAGE COUNCIL
PRESIDENTS and TANANA CHIEFS
CONFERENCE,
Plaintiffs,

CITY OF BETHEL,
Intervenor-Plaintiff,

v.

NATIONAL MARINE FISHERIES SERVICE *et*
al.,
Defendants,

AT-SEA PROCESSORS ASSOCIATION and
UNITED CATCHER BOATS,
Intervenor-Defendants.

Case No. 3:23-cv-00074-SLG

**BRIEF OF AMICI CURIAE OCEAN CONSERVANCY, SALMONSTATE,
NATIVE PEOPLES ACTION, KUSKOKWIM RIVER INTER-TRIBAL FISH
COMMISSION, AND ALASKA MARINE CONSERVATION COUNCIL IN
SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

The National Marine Fisheries Service (Service) violated the National Environmental Policy Act (NEPA) by adopting the 2023-2024 harvest specifications for the groundfish fisheries in the Bering Sea and Aleutian Island region without considering dramatically changed ocean conditions as part of its NEPA process. As described below, numerous marine species, including Western Alaska salmon stocks, are declining as the effects of climate change rapidly impact overall ocean health and productivity. Against this backdrop, the Service has continually authorized the trawl industry to remove billions of pounds of groundfish, as well as many non-target species such as salmon and crab, from the Bering Sea and Aleutian Island region. Top fisheries experts and Alaska’s congressional representative agree that trawling is extremely taxing on the marine environment.¹ These impacts are compounded in the context of Alaska’s rapidly changing ocean system. Yet, continuing its long-held practice, this year the Service once again approved a harvest specification that allows industrial trawlers to catch millions of metric

¹ See, e.g., Adam Federman, *Alaska’s Fisheries Are Collapsing*, POLITICO, Mar. 3, 2023, <https://www.politico.com/news/magazine/2023/03/03/alaskas-fisheries-collapsing-peltola-industry-blame-00066843> (“For 30 years, this industry has been tossing over juvenile salmon, halibut and crab by the metric ton . . . [a]t some point we have to imagine that that is not sustainable. That that catches up with us.”) (quoting U.S. Representative Peltola); *id.* (“It should’ve been more obvious two decades ago. Removing three to four billion pounds of fish from the Bering Sea every year for four decades is not a benign activity.”) (quoting Jim Balsiger, who served as a top Service official in Alaska for 20 years before retiring in 2021) [hereinafter “Federman”].

tons of groundfish based on outdated and inadequate analysis that ignores today’s increasingly concerning ocean conditions. For the reasons described herein and in Plaintiffs’ principal brief, this action violates NEPA, and the Court should grant Plaintiffs’ motion for summary judgment.

II. ARGUMENT

A. COMMERCIAL GROUND FISH FISHERIES HAVE FAR-REACHING ECOSYSTEM IMPACTS THAT HAVE NOT BEEN ASSESSED OR ACCOUNTED FOR.

1. The North Pacific Marine Ecosystem Has Undergone Major Ecosystem Changes Over the Past Decade.

The last decade has brought extreme warming to the North Pacific. Many of the resulting ecosystem shifts have vastly outpaced climate model predictions.² From 2014-2019, the North Pacific was characterized by marine heatwaves and record-breaking temperatures. Marine heatwaves are associated with decreases in nutrient supply, net primary production and community production in the North Pacific, all processes essential to overall ecosystem function.³ Marine heatwaves are also predicted to become

² See K.K. Holsman et al., *Ecosystem-based Fisheries Management Forestalls Climate-Driven Collapse*, 11 NATURE COMMUNICATIONS 4579, at 2 (2020); see 5TH NATIONAL CLIMATE ASSESSMENT, U.S. GLOBAL CHANGE RESEARCH PROGRAM (Nov. 14, 2023), <https://nca2023.globalchange.gov/>.

³ See Whitney, F.A., *Anomalous Winter Winds Decrease 2014 Transition Zone Productivity in the NE Pacific*, 42(2) GEOPHYSICAL RESEARCH LETTERS 428–431 (2015); see Yang et al., *How “The Blob” Affected Groundfish Distributions in the Gulf of Alaska*, 28(4) FISHERIES OCEANOGRAPHY 434–453 (2019); see Cheung, W.W. & Frölicher, T.L., *Marine Heatwaves Exacerbate Climate Change Impacts for Fisheries in the Northeast*

frequent in the future. Associated changes have and will include significant shifts in physical oceanography, such as the loss of sea ice and ice quality, a general decrease in the size of the “cold pool,” and increased salinity and acidification.⁴

Ecosystem changes and marine heatwave events have driven a transformation of the Bering Sea region from a system of abundance to one of scarcity and uncertainty. The Bering Sea, Northern Bering Sea, and Arctic have experienced unprecedented numbers of seabird die-off events or Unusual Mortality Events (UMEs) since 2015 affecting a number of fish- and plankton-eating species, including common murre, puffins, shearwaters, and fulmars.⁵ Seabirds in particular are considered important indicators of ecosystem health,⁶ and the number of seabird species affected suggests large-scale declines in marine ecosystem productivity and function across Alaska.

Pacific, 10(1) SCI. REPORTS 6678 (2020); Peterson Williams, et al., *The Heat is on: Gulf of Alaska Pacific Cod and Climate-ready Fisheries*, 79(2) ICES J. OF MARINE SCI. 573–583 (2022).

⁴ 2022 EASTERN BERING SEA STATUS REPORT, NOAA FISHERIES (2022) at 6–7, 12, 53, available at <https://www.fisheries.noaa.gov/resource/data/ecosystem-status-report-2022-eastern-bering-sea> [hereinafter “Eastern Bering Sea Status Report”].

⁵ See Van Hemert et al., *Investigation of Algal Toxins in a Multispecies Seabird Die-Off in the Bering and Chukchi Seas*, 57(2) J. OF WILDLIFE DISEASES 399, 400–01 (2021); see Jones et al., *Unusual Mortality of Tufted Puffins (*Fratercula Cirrhata*) in the Eastern Bering Sea*, 14(5) PLOS ONE e0216532 (2019).

⁶ Mallory et al., *Seabirds as Indicators of Aquatic Ecosystem Conditions: A Case for Gathering Multiple Proxies of Seabird Health*, 60(1) MARINE POLLUTION BULLETIN 7, 8–9 (2010).

Marine mammals have also exhibited extreme responses following the 2014-2016 and 2019 marine heatwaves. Fin and humpback whale die-offs were identified as UMEs from 2015 to 2016,⁷ and more than 688 gray whale deaths have been reported since 2019 along the coastlines of the western United States, Canada, and Mexico.

While 2020-2023 represents a return to more average conditions, the cumulative impacts of successive warm years and low-quality sea ice suggest that, overall, Bering Sea ecosystems are becoming less productive.⁸ Meanwhile, a warming trend continues in the Aleutian Islands.⁹ Food web dynamics and individual species' responses to these conditions are difficult to predict as historical data becomes increasingly less relevant.¹⁰

In 2021, there were negative trends in measurements related to fish body condition for nearly all groundfish in the Bering Sea and Aleutian Islands.¹¹ Despite closer to average temperatures in 2023 in the Eastern Bering Sea, biomass estimates for

⁷ KATE SAVAGE, ALASKA AND BRITISH COLUMBIA 2015 LARGE WHALE UNUSUAL MORTALITY EVENT (UME) SUMMARY REPORT, NOAA FISHERIES (Aug. 17, 2017), available at <https://www.fisheries.noaa.gov/resource/document/alaska-and-british-columbia-2015-large-whale-unusual-mortality-event-ume-summary>.

⁸ Eastern Bering Sea Status Report, *supra* n.4.

⁹ 2022 ALEUTIAN ISLANDS ECOSYSTEM STATUS REPORT, NOAA FISHERIES (2022) at 34, available at <https://www.fisheries.noaa.gov/resource/data/ecosystem-status-report-2022-aleutian-islands>.

¹⁰ M.A. Karp et al., *Accounting for Shifting Distributions and Changing Productivity in the Development of Scientific Advice for Fishery Management*, 76(5) ICES J. OF MARINE SCIENCE 1305, 1311 (2019).

¹¹ Eastern Bering Sea Status Report, *supra* n.4, at 117.

approximately three-quarters of surveyed groundfish declined from 2022 to 2023.¹²

Notably, Bristol Bay red king crab and Bering Sea snow crab crashed in 2022, resulting in a complete closure of commercial fisheries and significant impacts on communities in Alaska.¹³ Despite the devastating impact marine heatwaves have had on crab stocks, the Service has not implemented additional protection measures for crab.

2. Western Alaska Salmon Stocks Have Declined Dramatically and Demand Immediate Action.

Salmon are experiencing dramatic multi-year declines throughout the Arctic-Yukon-Kuskokwim area. Chinook salmon runs that began to decline around 2007 have been in a chronically depressed state for over a decade, and chum salmon have declined

¹² MARKOWITZ ET AL., RESULTS OF THE 2023 EASTERN BERING SEA BOTTOM TRAWL SURVEY, NOAA FISHERIES GROUND FISH ASSESSMENT PROGRAM (Sept. 2023), available at <https://meetings.npfmc.org/CommentReview/DownloadFile?p=1b51df79-db6d-4f68-896c-6cd2174b8675.pdf&fileName=EBS%20survey%202023%20PRESENTATION.pdf>.

¹³ N. Pacific Fisheries Mgmt. Council, *Groundfish Area Closures within the Bristol Bay Red King Crab Stock Assessment Area 100* (May 2023), available at <https://meetings.npfmc.org/CommentReview/DownloadFile?p=2faac872-c0a4-4a05-93a2-352be833fef1.pdf&fileName=C4%20BBRKC%20Analysis.pdf>; KATIE PALOF, BRISTOL BAY RED KING CRAB STOCK ASSESSMENT 2023, ALASKA DEP'T OF FISH & GAME (Sept. 2023) at 1, available at <https://meetings.npfmc.org/CommentReview/DownloadFile?p=91463040-bc4f-49ff-82e6-33618e0faeee.pdf&fileName=C1%20BBRKC%20SAFE.pdf>; CODY SZUWALSKI, AN ASSESSMENT FOR EASTERN BERING SEA SNOW CRAB, NOAA FISHERIES (Sept. 2023) at 3, 119, available at <https://meetings.npfmc.org/CommentReview/DownloadFile?p=62f8b7ae-5eb7-49fd-a2bc-051434c8bc19.pdf&fileName=C1%20EBS%20Snow%20Crab%20SAFE.pdf>.

as well.¹⁴ Western Alaska Chinook salmon runs from 2020 to 2022 were some of the lowest observed over the last 40 years.¹⁵ In 2023, the Chinook Salmon 3-River Index, estimating Chinook salmon abundance in the Unalakleet, Upper Yukon, and Kuskokwim rivers, was just 148,443 fish, representing the lowest level since this index was adopted.¹⁶ While the Chinook salmon crisis has been a long-term issue, the more recent and precipitous collapse of chum salmon in Western Alaska has severely compounded subsistence and food security impacts in the region. In 2020 and 2021, all Western Alaska areas had chum salmon run sizes below recent year averages and many were among the lowest in the historical dataset. An index of Western Alaska chum salmon abundance

¹⁴ SUPP01995; SUPP00292–97; Alaska Fisheries Science Ctr., *What’s Behind Chinook and Chum Salmon Declines in Alaska?*, NOAA FISHERIES NEWS, Aug. 23, 2023, <https://www.fisheries.noaa.gov/feature-story/whats-behind-chinook-and-chum-salmon-declines-alaska>.

¹⁵ STOCK STATUS SUMMARY FOR MAJOR WESTERN ALASKA CHUM SALMON AND CHINOOK SALMON STOCKS, ALASKA DEP’T OF FISH & GAME (June 2022) at 5, *available at* <https://meetings.npfmc.org/CommentReview/DownloadFile?p=7bb8ba14-30b7-440f-8d79-57ebf95c5ca9.pdf&fileName=D1a%20ADFG%20WAK%20Chinook%20and%20chum%20stock%20status%20update.pdf> [hereinafter “ADF&G Stock Status Summary”].

¹⁶ Letter from Sam Rabung, Director, Division of Comm. Fisheries, Alaska Dep’t of Fish & Game, to Jon Kurland, Administrator, NOAA Fisheries, Alaska Region (Sept. 11, 2023), *available at* <https://meetings.npfmc.org/CommentReview/DownloadFile?p=d2d66943-4228-4b82-9f98-dc6dcf04b44d.pdf&fileName=B5%20Chinook%20index%202023%20letter%20to%20NMFS.pdf>.

showed the 2021 run size was “roughly one-third as large as the previous record poor abundance seen in 2000, by far the poorest abundance ever documented.”¹⁷

The loss of this once plentiful resource is an ecological, cultural, spiritual, and economic crisis.¹⁸ Commercial salmon harvests on the Yukon and Kuskokwim rivers that were once plentiful¹⁹ are now either severely restricted or no longer allowed.²⁰ For the first time ever, in 2021, subsistence fishing for Chinook salmon was completely closed on the Yukon River.²¹ It has not reopened since. Subsistence chum fishing on the Yukon River has also been severely limited or closed for the last several years and was closed for the entire 2023 season.²² Kuskokwim River subsistence communities have similarly

¹⁷ ADF&G Stock Status Summary, *supra* n.15, at 2.

¹⁸ KUSKOKWIM RIVER SALMON SITUATION REPORT, KUSKOKWIM RIVER INTER-TRIBAL FISH COMMISSION, 2–3 (2022), *available at* https://static1.squarespace.com/static/5afdc3d5e74940913f78773d/t/6359792089ec3e15693c80dd/1666808118921/Salmon+Sit+Report+2022_10-03-22_FINAL.pdf [hereinafter “Kuskokwim Report”].

¹⁹ *Id.* at 3 (noting the Kuskokwim River commercial salmon fishery averaged over 1.5 million salmon annually during the early 1990s).

²⁰ Liz Ruskin, *Salmon Are Disappearing on the Yukon and Kuskokwim*, ALASKA PUBLIC MEDIA, June 8, 2023, <https://alaskapublic.org/2023/06/08/salmon-are-disappearing-on-the-yukon-and-kuskokwim-heres-what-to-know-about-the-crisis-this-summer/> [hereinafter “Ruskin”].

²¹ DEENA M. JALLEN, ET AL., YUKON RIVER SALMON STOCK STATUS AND SALMON FISHERIES, 2022: A REPORT TO THE ALASKA BOARD OF FISHERIES, ALASKA DEP’T OF FISH & GAME (Dec. 2022) at 3, *available at* <https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=138820>.

²² 2023 PRELIMINARY YUKON RIVER SALMON FISHERIES REVIEW, U.S. FISH & WILDLIFE SERV. YUKON TEAM & ALASKA DEP’T OF FISH & GAME (2023), *available at* <https://www.doi.gov/sites/doi.gov/files/tab2-yukon-river-salmon-summary-fall-2023508.pdf>.

endured years of closures and significantly restricted Chinook and chum salmon harvests.²³ In a desperate attempt to meet Chinook salmon escapement goals, Kuskokwim River subsistence harvesters have gathered less than half of the Chinook salmon that the State of Alaska considers adequate to meet subsistence needs for the last eight years.²⁴

The loss of subsistence salmon harvests is “a disaster that repeats annually” for Indigenous communities across Western and interior Alaska.²⁵ While thousands of pounds of frozen fish have been flown to remote communities in need, survival and food supply is only one part of the problem.²⁶ Subsistence salmon harvests are fundamental to the culture and Indigenous identity of communities across the region and have been so for thousands of years. The loss of salmon has disrupted cultural and religious practices and opportunities to pass such traditions on to the next generation.

Though the causes of this crisis may be multifaceted, one important contributing factor is directly controlled by the Service—the predictable bycatch of salmon in trawl fisheries. The Alaska pollock industry’s bycatch of salmon is closely tracked.²⁷

²³ Kuskokwim Report, *supra* n.18, at 5.

²⁴ Ruskin, *supra* n.20.

²⁵ *Id.*

²⁶ Federman, *supra* n.1.

²⁷ See N. Pacific Fishery Mgmt. Council, *Pacific Salmon Bycatch Overview*, <https://www.npfmc.org/fisheries-issues/bycatch/salmon-bycatch/>, (last visited Nov. 8, 2023) (“Every vessel in the pollock fishery is required to have 100% observer coverage. This provides very precise count of salmon bycatch, as the observers count every salmon caught.”) [hereinafter “Council’s Bycatch Overview”].

Cumulatively, from 1991 to 2022 over 6 million chum salmon and 1 million Chinook salmon were killed as bycatch.²⁸ Genetic data from 2011 to 2022 confirms that an average of 17.7% of the chum salmon caught as bycatch in the Bering Sea pollock fishery were destined for Western Alaska river systems, equating to 648,876 chum salmon that were unable to return to spawn and provide for subsistence harvests and the cultures, practices, and way of life that salmon support.²⁹ In 2021, 51% of Chinook bycatch originated from Coastal Western Alaska rivers, and from 2011 to 2021 approximately 137,358 Chinook salmon from Coastal West Alaska, Yukon and North Alaska Peninsula stocks were caught as bycatch.³⁰ These are substantial numbers of wasted fish, and the waste is particularly shameful in the context of collapsed fisheries where the subsistence

²⁸ NOAA Fisheries, *Fisheries Catch and Landing Reports in Alaska*, (last updated Sept. 29, 2023), available at <https://www.fisheries.noaa.gov/alaska/commercial-fishing/fisheries-catch-and-landings-reports-alaska> (click links to “BSAI Chinook Salmon Mortality Estimates 1991 – present” and “BSAI Non-Chinook Salmon Mortality Estimates 1991 – present”).

²⁹ North Pacific Fishery Management Council, *Bering Sea Chum Salmon Bycatch Management* 87 (September 8, 2023) available at <https://meetings.npfmc.org/CommentReview/DownloadFile?p=5b15695d-d544-4385-87cb-b5cdf54909.pdf&fileName=C4%20Chum%20Salmon%20Bycatch%20Analysis.pdf>.

³⁰ C.M. GUTHRIE III ET AL., GENETIC STOCK COMPOSITION ANALYSIS OF THE CHINOOK SALMON (*ONCORHYNCHUS TSHAWYTSCHA*) BYCATCH FROM THE 2021 AND 2022 BERING SEA POLLOCK TRAWL FISHERY, NOAA FISHERIES (April 2023) at iii, 19–20, available at <https://meetings.npfmc.org/CommentReview/DownloadFile?p=fa49f858-0a9d-4b72-b3cd-4e1df8511ff5.pdf&fileName=C2a%20BS%20Chinook%20Genetics%20Report%202021-2022.pdf>.

harvest of even one salmon is prohibited. This is true regardless of how “low” the rate of bycatch might be compared to the fleet’s massive take of pollock.³¹

3. The Current Management System and NEPA Analyses Have Failed to Analyze or Address These Ecosystem Impacts.

In the face of this desperate situation, large-scale groundfish fisheries and their bycatch have been prioritized without sufficient analysis or consideration of broader ecosystem and community factors.

Despite dramatic salmon declines throughout Western Alaska, the Service has maintained a “status quo approach [that] is failing Alaskans.”³² Salmon bycatch limits remain high, and the Bering Sea pollock fishery has become the source of most of the catch of Yukon and Kuskokwim Chinook salmon.³³ The Service’s 2023-2024 harvest specifications allow for the removal of millions of metric tons of groundfish,³⁴ — including 1.3 million metric tons of pollock, which represents a 17% increase over the

³¹ NOAA Fisheries, *Empowering a Fleet Through Electronic Technologies*, NOAA FISHERIES NEWS, Jan. 11 2023, <https://www.fisheries.noaa.gov/feature-story/empowering-fleet-through-electronic-technologies> (“The pollock fishery has a very low rate of bycatch (less than 1 percent.)”); *see also* Council’s Bycatch Overview, *supra* n.27 (attributing 2.3% of the Chinook salmon bycatch in 2020 and “less than 1 of the 2021 chum salmon bycatch to salmon bound for the Yukon River).

³² Mary Peltola, *Trawler Statement*, MARY PELTOLA FOR CONGRESS (last visited Nov. 20, 2023), <https://www.marypeltola.com/trawler-statement>.

³³ *Compare* ADF&G Stock Status Summary, *supra* n.15, Tables 3–4 (indicating Chinook salmon commercial fisheries were closed and that subsistence harvests were limited or closed on both rivers in 2020 and 2021), *with* n.30 (indicating the pollock fishery caught 137,358 Western Alaska Chinook salmon between 2011 and 2022).

³⁴ NMFS00018 (setting an overall catch limit for groundfish of 2.0 million metric tons).

previous year³⁵ and a 40% increase over the 2010 quota.³⁶ This approach is unsustainable. Salmon bycatch is incidental to trawling,³⁷ and increased trawling will result in increased bycatch without meaningful action to prevent it.³⁸

Other types of bycatch are being allowed to continue at unacceptable levels as well. For instance, as Bering Sea halibut stocks declined, halibut bycatch in the trawl fisheries became the largest source of halibut removals. Moreover, in 2020, herring bycatch in the Bering Sea pollock fishery increased dramatically. Additionally, just this past year, at least nine killer whales were killed as bycatch in the Bering Sea trawl fisheries.³⁹

In addition to these harmful bycatch impacts, the pollock fishery is harming widespread areas of seafloor habitat. New data shows that the Bering Sea pollock fishery, which is defined as a “pelagic” or mid-water trawl fishery, is making contact with the

³⁵ Compare NMFS0020-21 with 87 Fed. Reg. 11,626, 11,628 (Mar. 2, 2022).

³⁶ Hal Bernton, *A Struggle to Dodge Salmon in Pursuit of a Massive Pollock Bounty*, ANCHORAGE DAILY NEWS, Oct. 21, 2023, available at <https://www.adn.com/business-economy/2023/10/13/a-struggle-to-dodge-salmon-in-pursuit-of-a-massive-pollock-bounty/>.

³⁷ See Council’s Bycatch Overview, *supra* n.27 (“Salmon are caught incidentally in the Bering Sea and Aleutian Islands (BSAI) offshore trawl fisheries, especially in the pollock pelagic trawl fishery.”).

³⁸ See NMFS06713.

³⁹ NOAA Fisheries, *Response to Recent Reports of Killer Whale Incidental Catches in Alaska*, NOAA FISHERIES NEWS, Sept. 21, 2023, <https://www.fisheries.noaa.gov/agency-statement/response-recent-reports-killer-whale-incident-catches-alaska>.

bottom 40-90% of the time.⁴⁰ In effect, the “pelagic trawl” pollock fishery is allowed to operate in areas closed to bottom trawling despite open acknowledgment that the gear is on the seafloor the majority of the time. Bottom contact has negative impacts for benthic habitat, long-lived corals and sponges, invertebrates and many crab and fish species that rely on suitable habitat during various life stages.⁴¹

B. AFTER A LONG HISTORY OF INADEQUATE NEPA REVIEW FOR NORTH PACIFIC FISHERIES, IT IS TIME FOR A CHANGE.

1. Legal Framework

The Service manages commercial groundfish fisheries in the North Pacific through two fishery management plans (FMPs)—one for the Bering Sea/Aleutian Islands region (which is the subject of this litigation) and another for the Gulf of Alaska. The Service reviews and approves each FMP and FMP amendment prepared by the Council to ensure it meets the requirements of the Magnuson-Stevens Act⁴² and other laws. An FMP “regulate[s] all aspects” of a fishery.⁴³ Each FMP must therefore include the “full suite of management measures,”⁴⁴ including “all of the rules, regulations, conditions, methods,

⁴⁰ SAM CUNNINGHAM & KELLY CATES, BRISTOL BAY RED KING CRAB INFORMATION NORTH PACIFIC FISHERY MANAGEMENT COUNCIL (April 2022) at 26, *available at* <https://meetings.npfmc.org/CommentReview/DownloadFile?p=7608c5c6-d20a-4b3e-a23a-7fb0754d3f71.pdf&fileName=D1%20BBRKC%20Information%20Paper.pdf>.

⁴¹ Hiddink, J.G. et al., *Selection of Indicators for Assessing and Managing the Impacts of Bottom Trawling on Seabed Habitats*, 57(7) J. OF APPLIED ECOLOGY 1199, 1200 (2020).

⁴² See 16 U.S.C. §§ 1851, 1852, 1854.

⁴³ *Greenpeace v. NMFS I*, 55 F. Supp. 2d 1248, 1252 (W.D. Wash. 1999).

⁴⁴ *Greenpeace v. NMFS III*, 106 F. Supp. 2d 1066, 1068 (W.D. Wash. 2000).

and other measures” necessary to manage the fishery.⁴⁵ An FMP must be designed to ensure that “irreversible or long-term adverse effects” are avoided, both for the commercial “fishery resources” and for the broader “marine environment.”⁴⁶

Accordingly, an FMP should include a “high level of detail concerning all the variables involved in fishing, including Total Allowable Catch (TAC) limits for targeted species, ‘time and area closures, gear restrictions, bycatch limits of prohibited species, and allocation of TACs among vessels delivering to different types of processor groups, gear types, and qualifying communities.’”⁴⁷ The agency is also required to make “certain discrete management decisions annually,” including “setting the harvest specifications for the fishing year.”⁴⁸

FMPs “undisputedly constitute major federal actions requiring an [environmental impact statement]” under NEPA.⁴⁹ Indeed, “NEPA requires that environmental information is made available to decision-makers, including the Council and the Secretary of Commerce, as well as to the public, for use in such decision-making as the creation and amendment of the FMPs.”⁵⁰ The alternatives section should “present the

⁴⁵ *Greenpeace v. NMFS II*, 80 F. Supp. 2d 1137, 1144-45 (W.D. Wash. 2000) (quoting 16 U.S.C. § 1802(5)).

⁴⁶ *Id.* at 1140 (quoting 16 U.S.C. § 1802(5)(ii)).

⁴⁷ *Greenpeace I*, 55 F. Supp. 2d at 1255.

⁴⁸ *Greenpeace II*, 80 F. Supp. 2d at 1145.

⁴⁹ *Greenpeace I*, 55 F. Supp. 2d at 1257. *See* 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.3.

⁵⁰ *Greenpeace I*, 55 F. Supp. 2d at 1253.

environmental impacts of the proposed action and the alternatives in comparative form.”⁵¹ NEPA also requires an agency to “continue evaluating a project’s environmental effects, even after preparation of an initial EIS.”⁵² A supplemental EIS is required where an agency “makes substantial changes in the proposed action that are relevant to environmental concerns” or where there are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”⁵³

2. The Service Has Evaded Comprehensive NEPA Review Concerning North Pacific Fishery Management for Decades.

The Service published its original EISs for the Gulf of Alaska and Bering Sea/Aleutian Island FMPs in 1978 and 1981, respectively.⁵⁴ These FMPs and their corresponding EISs addressed a wide range of issues, including “when, where, and how the fish are caught, TAC levels, bycatch, habitat destruction, socioeconomic issues, and other marine mammals affected.”⁵⁵ During the ensuing twenty years, there were dramatic changes in the North Pacific ecosystem, including changes in the climate, changes in the fishing industry and its economic effects on Alaskan communities, and declines in the

⁵¹ 40 C.F.R. § 1502.14.

⁵² *Greenpeace I*, 55 F. Supp. 2d at 1270. *See generally* 40 C.F.R. §§ 1502.4, 1502.5, 1502.9(d).

⁵³ *See Greenpeace I*, 55 F. Supp. 2d at 1272 (quoting 40 C.F.R. § 1502.9(d)(1)(i)–(ii)).

⁵⁴ *See id.* at 1257-58.

⁵⁵ *Id.*

populations of Steller sea lions, fur seals, harbor seals, several whale species, birds, and fish.⁵⁶ Despite these major changes, the Service and the Council amended the FMPs more than 40 times and made numerous annual fishery management decisions implementing the FMPs without preparing a new or supplemental EIS.⁵⁷ They finally prepared an SEIS in 1998 after many years of “sharp criticism” from Service personnel “over the adequacy of the existing documents for NEPA compliance.”⁵⁸

The 1998 SEIS evaluated alternatives focused narrowly on variations of a single component of management — total allowable catch.⁵⁹ In a challenge brought by conservation groups, the court agreed with the plaintiffs that the range of alternatives was not reasonable and explained that NEPA requires the agencies to develop “more comprehensive alternatives” addressing

... all elements of the FMP (i.e. location and timing of each fishery, harvestable amounts, exploitation rates, exploited species, groupings of exploited species, gear types and groupings, allocations, product quality, organic waste and secondary utilization, at-sea and on-land organic discard, species at higher and lower trophic levels, habitat alterations, and relative impacts to coastal communities, society, the economy, and the domestic and

⁵⁶ *See id.* at 1258.

⁵⁷ *See id.* at 1270-71.

⁵⁸ *Id.* at 1258. Conservation groups had been advocating for better management of the groundfish fishery for many years as well. *See, e.g.,* Jerry McBeath, *Greenpeace v. National Marine Fisheries Service: Steller Sea Lions and Commercial Fisheries in the North Pacific*, 21 ALASKA L. REV. 1, 10-11 (2004).

⁵⁹ *Greenpeace I*, 55 F. Supp. 2d. at 1258-59.

foreign groundfish markets) and vari[ous] TAC levels outside of the present status quo range.”⁶⁰

On remand, the Service completed a Programmatic SEIS (PSEIS) in 2004.⁶¹ The agency indicated that it would address the environmental impacts of the “ongoing management of the groundfish fisheries” in the North Pacific,⁶² but the document did not actually live up to this description. Instead of evaluating and comparing alternatives addressing the myriad aspects of fishery management in the FMPs, as required by the federal statutes and by the court’s ruling, the alternatives focused on policies that could be used to guide future FMP development.⁶³ The PSEIS thus skirted the important issues and failed to inform decisionmakers or the public about the relative impacts of “actions” that the agencies could take to “avoid or minimize adverse impacts or enhance the quality of the human environment.”⁶⁴ The document was widely criticized.⁶⁵ In 2007, the agencies prepared a more limited EIS that relied heavily on the 2004 PSEIS and

⁶⁰ *Id.* at 1274-75 (agreeing with comments submitted by the U.S. Environmental Protection Agency).

⁶¹ *See* Pls. Principal Br. 9, 12, 14, ECF No. 32; NMFS23604-26827.

⁶² NMFS23768.

⁶³ *See generally* Alaska Oceans Program et al., Comment Letter on the Draft Programmatic SEIS for the Bering Sea/Aleutian Islands and Gulf of Alaska Groundfish Fisheries (Nov. 6, 2003).

⁶⁴ 40 C.F.R. § 1502.1.

⁶⁵ *See* Comments on the Draft Programmatic SEIS, *supra* n.63.

addressed “harvest strategies” for the annual fishery specifications.⁶⁶ In the sixteen years since then, the Service has prepared no new comprehensive NEPA documents, and it has relied heavily on “supplemental information reports,” which do not satisfy the requirements of NEPA.⁶⁷ The agency has failed, on a continuing basis, to engage in robust environmental review and decision-making. As a result, the Bering Sea groundfish fishery has remained stuck in a single-species-focused management system that is out of touch with the severe and wide-ranging harms caused by the industry’s operations. The lack of adequate NEPA review also undermines the agency’s ability to respond to the dramatic changes happening in the Bering Sea.

3. In the Face of Multiple Crises in the Bering Sea Region, the Service Must Act Now.

The consequences of these management failures have intensified in recent years. The Bering Sea region has been undergoing dramatic changes over the past decade, which are even more severe than those experienced in the late 1990s. As described above and in Plaintiffs’ opening brief, the climate system is disrupted, the fishing industry is changing, and there have been severe declines in populations of salmon and many other fish and wildlife species. Alaska Native communities have been bearing the brunt of these

⁶⁶ See Pls. Principal Br. 9, 13, 14, 33, ECF No. 32. It is worth noting that a “harvest strategy” is not one of the “conservation and management measures” required by the Magnuson-Stevens Act. See 16 U.S.C. § 1853.

⁶⁷ See Pls. Principal Br. 12, 13, 25, 28, 33, 34, 36, 37, 42, 47, ECF No. 32.

impacts. Unfortunately, the Service is still failing to respond, and has landed back in court. As explained in detail in Plaintiffs' opening brief, the Service's approval of the 2023-2024 harvest specifications in reliance on the outdated and inadequate 2004 and 2007 NEPA documents is unlawful.

Some members of the Service and Council staff appear to be concerned about the inadequacy of the NEPA review, just as their counterparts were thirty years ago, and there have been discussions suggesting the Service might initiate a new programmatic EIS through the Council process. The Service and Council seem inclined, however, to consider only policy alternatives that are even less robust than those used in the 2004 PSEIS. In May 2023, for example, the Council's Ecosystem Committee recommended advancing an EIS that evaluates three alternatives: (1) maintaining the current "policy approach, goal statements, and objectives;" (2) adopting a less precautionary "management policy;" and (3) adopting a more precautionary "management policy."⁶⁸ Similarly, in June 2023, the Council recommended that the Service initiate the development of a PSEIS evaluating similar policy-oriented alternatives.⁶⁹ These

⁶⁸ Ecosystem Committee, North Pacific Fishery Mgmt. Council, *Ecosystem Committee Programmatic EIS Recommendation 3* (May 17, 2023), available at <https://meetings.npfmc.org/CommentReview/DownloadFile?p=2b296e82-8f3c-4a80-8af2-9e1d3e72a92c.pdf&fileName=D2%20Programmatic%20EIS.pdf>.

⁶⁹ North Pacific Fishery Management Council, *D2 PEIS Council Motion 1* (June 11, 2023), available at <https://meetings.npfmc.org/CommentReview/DownloadFile?p=37104c8f-4824-41ed-a730-dd195dd32d5c.pdf&fileName=D2%20Motion.pdf>.

proposals would not address the fundamental problems, and the Court should pay them no heed. The last time there was a full EIS evaluating alternatives linked with the management decisions in the Bering Sea/Aleutian Island FMP was more than forty years ago in 1981. It is long past time for the Service to truly grapple with the adverse impacts of its ongoing management decisions. A ruling from this Court in favor of Plaintiffs would help set the stage for a robust, timely, and action-oriented NEPA process that fully engages affected Alaska Native communities and the general public in developing solutions to reduce the commercial groundfish industry's harmful contributions to the recent upheavals in the Bering Sea region.

III. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment.

Respectfully submitted this 22nd day of November, 2023,

TRUSTEES FOR ALASKA

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.4(a)(3), I certify that this brief complies with the word limitation of Local Civil Rule 7.4(a)(1) and Federal Rule of Appellate Procedure 29(a)(5) as it contains 4319 words, excluding items exempted by Local Civil Rule 7.4(a)(4).

Respectfully submitted this 22nd day of November, 2023,

s/ Joanna Cahoon
Joanna Cahoon

CERTIFICATE OF SERVICE

I certify that on November 22, 2023, I caused a copy of the foregoing BRIEF OF AMICUS CURIAE OCEAN CONSERVANCY, SALMON STATE, NATIVE PEOPLES ACTION, KUSKOKWIM RIVER INTER-TRIBAL FISH COMMISSION, AND ALASKA MARINE CONSERVATION COUNCIL IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT to be electronically filed with the Clerk of the Court for the U.S. District Court of Alaska using the CM/ECF system, which will send electronic notification of such filings to the attorneys of record in this case, all of whom are registered with the CM/ECF system.

s/ Joanna Cahoon
Joanna Cahoon