



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, Maryland 20910
THE DIRECTOR

James N. Butler, III
Gregory R. Gabriel, Jr.
Baldwin & Butler, LLC
125 North Willow Street
Kenai, Alaska 99611

Dear Mr. Butler and Mr. Gabriel:

Thank you for your "Petition for Emergency Rules Related to Salmon Management in Cook Inlet, Alaska" (Petition), dated June 12, 2008, and submitted to the Secretary of Commerce by the United Cook Inlet Drift Association and the Kenai Peninsula Fishermen's Association (Petitioners). We have reviewed and considered the Petition. The attached document constitutes the National Marine Fisheries Service's (NMFS's) response to the Petition.

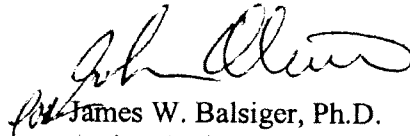
For various reasons explained fully in the attached response, NMFS denies Petitioners' claims that challenge the consistency of certain State of Alaska (State) salmon regulations applicable within the Exclusive Economic Zone (EEZ) with the provisions of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the Fishery Management Plan for the Salmon Fisheries in the EEZ Off the Coast of Alaska (FMP), and other applicable Federal law. Before appealing such regulations to NMFS, the FMP requires persons challenging State salmon fishing regulations to first exhaust their remedies through the appropriate State procedures. The information provided in the Petition indicates that Petitioners have failed to exhaust their remedies with the State. Petitioners may resubmit these claims to NMFS after exhausting their remedies with the State in accordance with Chapter 9 of the FMP.

NMFS also declines to pursue Petitioners' request that NMFS preempt State management of salmon fisheries within the State waters of Upper Cook Inlet because the Magnuson-Stevens Act prevents NMFS from preempting a state's management authority within that state's waters if NMFS is unable to find that the fishery occurs predominantly within the EEZ. The catch data for salmon in the EEZ versus State waters clearly show that fishing for salmon governed by the FMP, on a broad scale as well as solely within the Cook Inlet Management Area, does not occur predominately within the EEZ.



Finally, the attached document provides the agency's position relative to a number of interpretations of several provisions of the Magnuson-Stevens Act and the scope of Federal authority to manage salmon fisheries under the provisions of the Magnuson-Stevens Act and the FMP that are included in the Petition.

Sincerely,


James W. Balsiger, Ph.D.
Acting Assistant Administrator for

Fisheries

cc: Denby Lloyd, Commissioner, State of Alaska Department of Fish & Game

Attachments:

1. NMFS's Response to "Petition for Emergency Rules Related to Salmon Management in Cook Inlet, Alaska"
2. The portion of commercial salmon catch harvested in the EEZ
3. Petition for Emergency Rules Related to Salmon Management in Cook Inlet, Alaska, submitted by the United Cook Inlet Drift Association and the Kenai Peninsula Fishermen's Association

**National Marine Fisheries Service's Response To
"Petition for Emergency Rules Related to Salmon Management in Cook Inlet, Alaska"
Dated June 12, 2008, and Submitted By the
United Cook Inlet Drift Association and the Kenai Peninsula Fishermen's Association**

The United Cook Inlet Drift Association and the Kenai Peninsula Fishermen's Association ("Petitioners") submitted to the Secretary of Commerce ("Secretary") a document entitled "Petition for Emergency Rules Related to Salmon Management in Cook Inlet, Alaska" ("Petition"), dated June 12, 2008. The National Marine Fisheries Service ("NMFS") has reviewed and considered the Petition, and offers the following response.¹

I. Categorization of Petitioners' claims

Petitioners make a number of claims in their Petition. In reviewing and considering the Petition, NMFS categorized Petitioners claims into three groups. The first group includes those claims that challenge the consistency of certain State of Alaska ("State") salmon regulations applicable within the U.S. Exclusive Economic Zone ("EEZ") with various provisions of the Fishery Management Plan for the Salmon Fisheries in the EEZ Off the Coast of Alaska ("FMP"), the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), and other laws. The second group includes one claim that requests the Secretary² to preempt State management of salmon fisheries within State waters. The final group includes those claims that interpret provisions of the Magnuson-Stevens Act and NMFS's scope of authority under the Magnuson-Stevens Act and the FMP.³

NMFS has determined that the first group of claims challenging the consistency of certain State salmon regulations with the FMP, the Magnuson-Stevens Act and other applicable Federal law are appealable to NMFS under Chapter 9 of the FMP. These claims challenge the consistency of the State's regulations for (1) mandatory interim closures, (2) season opening and closing dates, and (3) escapement goals for salmon fisheries within the Cook Inlet Management Area. Petition

¹ Petitioners cite section 305(f) of the Magnuson-Stevens Act (16 U.S.C. 1855(f)), and its requirement that the Secretary file a response to a judicial action within 45 days of receipt, as providing the statutory timeline in which NMFS must respond to the Petition. Petitioners misconstrue section 305(f); section 305(f) applies to challenges filed in judicial courts of the United States and not to petitions for rulemaking submitted to NMFS under Chapter 9 of the FMP. Chapter 9.1 of the FMP does not set forth a timeframe by which the Secretary must respond to an appeal. Although Petitioners submitted the Petition to the Secretary in June 2008, NMFS was unaware of the existence of the Petition until January 2009. Therefore, although the time in which it took NMFS to issue this response is not typical, NMFS's response is not untimely under the FMP or the Magnuson-Stevens Act.

² The Secretary delegated fishery management authority under the Magnuson-Stevens Act to NMFS so the remainder of this response refers to NMFS.

³ Chapter 9 is provided as an attachment to this response. The complete FMP is available on the North Pacific Fishery Management Council web page at: <http://www.fakr.noaa.gov/npfmc/fmp/salmon/salmon.htm>

at 31, 23, and 33, respectively. These claims challenge State regulations that have applicability within the EEZ. NMFS can supersede State regulations applicable within the EEZ if those regulations are found to be inconsistent with the FMP, Magnuson-Stevens Act, or other applicable Federal law. The State also has the authority to modify its regulations as it determines necessary. NMFS addresses these claims in section II of this response.

NMFS has determined that Petitioners' request for preemption of State management of salmon fisheries within State waters is not an appealable challenge under Chapter 9 of the FMP because it is not a challenge to Magnuson-Stevens Act and FMP consistency of State salmon regulations applicable within the EEZ. Instead, Petitioners are asking NMFS to extend Federal management authority into State waters. NMFS addresses Petitioners' request in section III of this response.

Finally, NMFS has determined that the remaining group of claims does not challenge Magnuson-Stevens Act and FMP consistency of State salmon regulations applicable within the EEZ, but instead presents Petitioners' interpretations of the Magnuson-Stevens Act and the scope of Federal authority to manage salmon fisheries under the provisions of the Magnuson-Stevens Act and the FMP. NMFS has determined that this group of claims is not appealable under Chapter 9 of the FMP. However, in order to provide Petitioners' with the agency's position relative to these interpretations, NMFS addresses Petitioners' interpretations in section IV of this response.

II. NMFS's Determination Concerning Petitioners' Claims That Are Appealable Under the FMP

Chapter 9 of the FMP provides a process for review of State statutes or regulations by the Secretary and allows any member of the public to appeal a statute or regulation issued by the State for the salmon fisheries in the EEZ off the coast of Alaska. FMP at 46. NMFS considers appeals under Chapter 9 of the FMP to be petitions for rulemaking, as they are requests that NMFS take some regulatory action to supersede application of State salmon statutes or regulations in the EEZ. Chapter 9.1 of the FMP sets forth the general process NMFS will follow if an appeal challenges annual or perennial regulations issued by the State; Chapter 9.2 sets forth the general process NMFS will follow if an appeal challenges inseason management actions taken by the State.

Petitioners claim that the State's season opening and closing dates and regulatory interim closures, or "windows", should be superseded because they are inconsistent with the Magnuson-Stevens Act. Petition at 31-33. State regulations at 5 AAC 21.363(e) establish guidelines for when the Alaska Department of Fish and Game ("ADF&G") managers can open and close the commercial salmon fisheries, including salmon fisheries conducted within the EEZ, during the fishing season to provide for escapement and to allow fish to enter the Kenai and Kasliof rivers on a predictable schedule for sport and personal use fisheries.

Petitioners claim that the fixed mandatory closures within a commercial fishing season and the season opening and closing dates are inconsistent with the Magnuson-Stevens Act because they (1) are arbitrary, capricious, and not based on the best available science or objective conservation and management criteria but are politically motivated; (2) have led to over-escapement and fail to meet optimum yield; (3) result in the reallocation of salmon stocks from the commercial fishery to the personal use fishery; (4) force participants to go to sea in conditions that jeopardize their safety in an attempt to remain economically viable; (5) result in lost yield for the commercial fishery which affects fishermen, processors, and communities; and (6) are not adaptive management measures per Magnuson-Stevens Act requirements. Petition, generally, at 20, 26-27, and 31-34. Further, Petitioners state that regulations are not in best interest of the Nation because they result in lost food production, reduced exports, and lower employment. Petition at 32.

Petitioners claim that the State of Alaska Board of Fisheries (Board) began implementing regulations that manage for the bottom of the yield curve by setting sustainable, rather than optimal, escapement goals which threaten economic viability of Upper Cook Inlet commercial fishing communities and are otherwise inconsistent with the Magnuson-Stevens Act. Petition at 33. Petitioners also claim that the State's escapement goals for the salmon fisheries managed under the FMP are not based on the best available science but based on political compromise. Petition at 34. Petitioners request that the Secretary provide guidance to the State and the Council that exploitation rates on most salmon stocks in Upper Cook Inlet are far below what is necessary to ensure optimum yield and provide the greatest benefit to the Nation. Petition at 34.

Although the mandatory closure window regulations have an inseason component and ADF&G has discretion within the regulations on when to implement the closure windows, Petitioners do not challenge any specific inseason management action. Based on NMFS's review of the Petition, NMFS concludes that Petitioners challenge the State's regulatory framework for the closure windows, which are perennial regulations, rather than a specific inseason closure. Therefore, NMFS has determined that the Petitioners challenge annual or perennial regulations issued by the State, and NMFS considered the Petition under Chapter 9.1 of the FMP.

As stated in Chapter 9.1 of the FMP, persons are required to exhaust their remedies with the State before appealing to NMFS. FMP at 46. The North Pacific Fishery Management Council (Council) and NMFS stated in the FMP at page 46 and in the preambles to the proposed and final rules for Amendment 3 to the FMP⁴ that this requirement encourages persons with serious concerns to participate fully in the State procedures before seeking Secretarial intervention. According to the Petition at page 10, Petitioners are aware of the process contained in Chapter

⁴ The proposed rule for Amendment 3 was published at 55 Fed. Reg. 28661, 28663 (July 12, 1990), and the final rule for Amendment 3 was published at 55 Fed. Reg. 47773, 47774 (November 15, 1990).

9.1 but argue that exhaustion of State remedies is inappropriate because the Board is the delegate of the Secretary, and any petition challenging a State salmon regulation must be brought under federal law given the federal statutes, Federal APA requirements, and Federal law applicable to the Secretary's decisions. Additionally, Petitioners argue that the Secretary is not subject to State jurisdiction regarding salmon fishery regulations. For reasons explained more fully in section IV of this response, NMFS disagrees with Petitioners' rationale for failing to exhaust State remedies prior to submitting this Petition to NMFS.⁵

Because of Petitioners' failure to exhaust their remedies with the State as required by Chapter 9.1 of the FMP, NMFS denies Petitioners' appeal of the State's mandatory window closures, season opening and closing dates, and escapement goal regulations for the salmon fisheries in Upper Cook Inlet. Petitioners may resubmit their appeal to NMFS after exhausting their remedies with the State in accordance with Chapter 9 of the FMP.

III. NMFS's Determination Concerning Petitioners' Request for Preemption of State Management of Salmon Fisheries Within State Waters

For the following reasons, NMFS declines to pursue Petitioners' request that the Secretary initiate preemption proceedings against State of Alaska management of salmon fisheries within State waters.

Petitioners make the following statements in their Petition: (1) "The commercial salmon fishery in Cook Inlet takes place in the EEZ"; (2) "Drift gillnet harvest of salmon in Cook Inlet occurs predominately in the EEZ of the US"; and (3) "A majority of the Cook Inlet drift gillnet fishery occurs in the EEZ." Petition at 13, 4, and 25, respectively. Petitioners further state that because "[r]ecently promulgated regulations by the [Board] and ADF&G will substantially and adversely affect the commercial fishery and EFH beginning in June 2008 because they attempt to reduce or eliminate historical commercial fishing interests in Cook Inlet by limiting the economic viability of processors and harvesters", the State's management is inconsistent with the FMP and the Magnuson-Stevens Act National Standards. Petition at 3-4. Based on these assertions, Petitioners ask NMFS to begin preemption proceedings for the Upper Cook Inlet salmon fishery under Magnuson-Stevens Act section 306(b) and 50 CFR 600.615. Petition at 3. For the reasons provided below, NMFS concludes that the salmon fishery governed by the FMP does not occur predominately within the EEZ. Because NMFS is unable to make one of the two required

⁵ Section IV of the Petition is entitled "Statutory Authority for Petition." Petitioners cite to various provisions of the Magnuson-Stevens Act and the Administrative Procedure Act that they argue support their claim that the Secretary must consider the Petition. NMFS concludes that Petitioners have misconstrued a number of provisions in the Magnuson-Stevens Act as lending support for this claim. However, as explained in this response, NMFS freely recognizes the ability of persons, such as Petitioners, to appeal State regulations under Chapter 9 of the FMP, provided persons follow the procedure and requirements set forth in Chapter 9.

findings for preemption, NMFS declines to initiate preemption proceedings against the State and its management of salmon fisheries within State waters, and rejects Petitioners' request.

As explained more fully in section IV of this response, the Magnuson-Stevens Act explicitly recognizes a state's jurisdiction and its authority to manage its fishery resources within its waters. Furthermore, NMFS may not regulate fishing within a state's waters unless NMFS undertakes the process and makes the factual findings required by 16 U.S.C. 1856(b). This section states:

If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of title 5, United States Code, that -

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this Act, is engaged in predominately within the [EEZ] and beyond such zone; and

(B) any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan; the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

16 U.S.C. 1856(b). Thus, in order for NMFS to regulate fishing within State waters, NMFS must find that: (1) the fishing in a fishery that is covered by an FMP is predominately within the EEZ; **and** (2) a state has taken an action, or omitted to take any action, the results of which will "substantially and adversely affect" the carrying out of the FMP. The Magnuson-Stevens Act prevents NMFS from preempting a state's management authority within that state's waters if NMFS is unable to make both of the required findings. Regulations at 50 CFR 600.610(b)⁶ provide some guidance on determining predominance as used in 16 U.S.C. 1856(b)(1)(A):

Whether fishing is engaged in "predominately" within or beyond the EEZ will be determined after consideration of relevant factors, including but not limited to, the catch (based on numbers, value, or weight of fish caught, or other relevant factors) of fishing effort during the appropriate period, and in light of historical patterns of the distribution of catch or fishing effort for such stock or stocks of fish.

⁶ 50 CFR 600.610(c) provides regulatory guidance on the phrase "substantially and adversely affect" the carrying out of an FMP: "Whether relevant effects are substantial will be determined after consideration of the magnitude of such actual or potential effects. Relevant to this determination are various factors, including but not limited to, the proportion of the fishery (stock or stocks of fish and fishing for such stocks) that is subject to the effects of a particular state's action or omission, the characteristics and status (including migratory patterns and biological condition) of the stock or stocks of fish in the fishery, and the similarity or dissimilarity between the goals, objectives, or policies of the state's action or omission and the management goals or objectives specified in the FMP for the fishery or between the state and Federal conservation and management measures of the fishery."

In considering Petitioners' request, NMFS examined commercial fisheries catch data for all five species of salmon governed by the FMP (see the attachment "The portion of commercial salmon catch harvested in the EEZ"). These commercial fisheries occur in the EEZ in the Southeast Alaska, Prince William Sound, Cook Inlet, and the Alaska Peninsula areas. The attachment includes commercial catch data from 1991 to 2008. This data represents all commercial fishing in these areas since implementation of Amendment 3 to the FMP and therefore provides a reasonable representation of the distribution of catch over time. The data shows that the commercial catch of all salmon species during this time period was slightly less than 4 percent of the total commercial catch from both the EEZ and State waters in these areas. The attachment does not include commercial catch of salmon within State waters but outside of these four areas. Therefore, if all catch statewide was included, the total portion harvested in the EEZ would be significantly smaller.

The attachment also provides catch data by species and by region for each year. The data show that even by region or by species, with the exception of chum salmon in Upper Cook Inlet, the catch predominately is from State waters. Based on these data, NMFS concludes that fishing in the salmon fishery governed by the FMP is not conducted predominately within the EEZ and beyond.

NMFS also examined salmon catch data from the EEZ and the State waters comprising the Cook Inlet Management Area.⁷ These data show that the commercial catch of all FMP species of salmon from the EEZ within the Cook Inlet Management Area during this time period was about 31 percent of the total commercial catch of these salmon species from both the EEZ and State waters in the Cook Inlet Management Area. Even with these higher salmon catch levels in the EEZ within the Cook Inlet Management Area, NMFS concludes that fishing occurring in the EEZ is not greater than fishing occurring within State waters of that area and 31 percent of the total salmon catch that occurs within the EEZ of the Cook Inlet Management Area does not demonstrate "predominance" of salmon fishing within Federal waters.

The catch data for salmon in the EEZ versus State waters during this time period clearly show that fishing for salmon governed by the FMP, on a broad scale as well as solely within the Cook Inlet Management Area, is not conducted predominately within the EEZ. Therefore, in accordance with regulatory guidance as well as analysis of this data, NMFS has determined that the salmon fishery does not occur predominately within the EEZ. Because the Magnuson-Stevens Act prevents NMFS from preempting a state's management authority within that state's waters if NMFS is unable to make both of the required findings set forth in 16 U.S.C. 1856(b)

⁷ The portion of total catch in the EEZ represents a maximum amount. As described in the attachment "The portion of commercial salmon catch harvested in the EEZ", ADF&G catch data is recorded by state statistical area which can include both State and EEZ waters in one statistical area. All catch in State statistical areas that have both EEZ and State waters were assumed to be EEZ catch; therefore, it is likely that more catch is attributed to the EEZ than actually occurred.

and because NMFS has determined that one of the findings cannot be made, NMFS declines to initiate preemption proceedings as requested by the Petitioners.⁸

IV. NMFS's Position Relative to Petitioners' Interpretations of the Magnuson-Stevens Act and the Scope of Federal Authority to Manage Salmon Fisheries Under the Provisions of the Magnuson-Stevens Act and the FMP

In the Petition, Petitioners interpret several provisions of the Magnuson-Stevens Act and the scope of Federal authority to manage salmon fisheries under the provisions of the Magnuson-Stevens Act and the FMP. These interpretations are summarized as follows:

1. The Magnuson-Stevens Act gives the Council and NMFS the authority to manage anadromous species throughout the species' migratory range, and that authority extends into state waters and "include beyond the fresh and estuarine waters of the State of Alaska." As such, the mandates of the Magnuson-Stevens Act apply to the State's salmon management regime in Upper Cook Inlet, and NMFS must examine State salmon regulations in light of the stated purposes of the Magnuson-Stevens Act, finding regulations that conflict with those purposes inconsistent with the Magnuson-Stevens Act. Petition, generally, and at 8, 13-14, 34.
2. Under the FMP, the Council and NMFS asserted their Magnuson-Stevens Act management authority over anadromous salmon species within State waters and delegated to the Board the responsibility for management of salmon in Alaska. Petition at 7, 8, 25.
3. As a result of this delegation to the Board, State regulations affecting salmon fisheries in Cook Inlet must comply with the provisions of the Magnuson-Stevens Act, and NMFS must repeal or amend those rules that are inconsistent with the Magnuson-Stevens Act. Petition, generally, and at 8.
4. Furthermore, as a result of this delegation, when the Board issues regulations, the Board is amending the FMP and NMFS has a duty to review and ensure that the Board's amendments to the FMP are consistent with the Magnuson-Stevens Act. Petition at 9, 21.
5. NMFS must take action to restore and protect essential fish habitat ("EFH") on the Kenai River and other essential fish habitats in the upper Cook Inlet basin.

⁸ Petitioners also claim that preemption is warranted because the State's management regime has adverse effects on salmon EFH, and therefore substantially and adversely affects the carrying out of the FMP. NMFS did not address this claim in the preemption context because of its determination on the lack of predominance of salmon fishing in the EEZ. However, NMFS addresses Petitioners' EFH claims at pages 12 - 13 of this response.

6. The State's resident-only Personal Use fishery is inconsistent with the Magnuson-Stevens Act and NMFS must eliminate it.
7. NMFS must promulgate emergency regulations to supersede State regulations and manage Upper Cook Inlet salmon stocks.

The following provides NMFS's position relative to these interpretations.

Section 101(b)(1) of the Magnuson-Stevens Act (16 U.S.C. 1811(b)(1)) does not vest the agency with management responsibility and authority over anadromous species within State waters and the requirements of the Magnuson-Stevens Act do not apply to the State's management of salmon within the State waters of Upper Cook Inlet.

Under the Magnuson-Stevens Act, Congress vested NMFS, by and through the Secretary, with exclusive management authority over all fish and all Continental Shelf fishery resources within the EEZ. 16 U.S.C. 1811(a). Off the State of Alaska, the EEZ extends from 3 nautical miles seaward of the State's baseline to 200 nautical miles offshore. 16 U.S.C. § 1802(11). Congress also vested in NMFS management authority over all anadromous species throughout the migratory range of each species beyond the EEZ. 16 U.S.C. 1811(b)(1) (emphasis added).

Congress recognized that the exercise of federal jurisdiction must be balanced against the interest of the various coastal States to manage their own fisheries. The Magnuson-Stevens Act explicitly recognizes that "nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries [and] ... except as provided in subsection (b), the jurisdiction and authority of a State shall extend to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States" 16 U.S.C. § 1856(a)(1) & (2).⁹

NMFS has interpreted "beyond the EEZ" as used in 16 U.S.C. 1811(b)(1) to mean seaward of the EEZ, or those areas of the ocean that are more than 200 nautical miles from the baseline. NMFS does not interpret the phrase to include the territorial seas of the states, or those waters within 0 to 3 nautical miles from the State's baseline. NMFS's interpretation is consistent with the statutory language of 16 U.S.C. 1811(b)(1), which excludes the waters of foreign nations from the United States' jurisdiction over anadromous species and clearly indicates Congressional intent to extend authority over anadromous species that are seaward, and not landward, of the EEZ. NMFS's interpretation is also consistent with the statutory scheme set forth in the Magnuson-Stevens Act given 16 U.S.C. 1856, which explicitly recognizes a state's jurisdiction

⁹ The Magnuson-Stevens Act also recognizes a state's authority to regulate a fishing vessel outside the boundaries of the state in certain circumstances. See 16 U.S.C. 1856(a)(3).

and authority to manage fishery resources within its boundaries, as explained above, and which contains no exception for anadromous species. Furthermore, NMFS's interpretation is consistent with the legislative history for 16 U.S.C. 1811 wherein Congress refers to the high seas and waters seaward of the EEZ when referring to "beyond the EEZ" in section 1811(b).¹⁰ Therefore, 16 U.S.C. 1811(b)(1) of the Magnuson-Stevens Act does not vest NMFS with the authority to manage anadromous species within a state's territorial sea.

NMFS may regulate fishing for anadromous species within a state's waters only if NMFS has undertaken the process and made the required findings for preemption set forth in 16 U.S.C. 1856(b). Without preemption of State fishery management in accordance with 16 U.S.C. 1856(b) of the Magnuson-Stevens Act, the requirements of the Magnuson-Stevens Act do not apply to the State's management of fishery resources within its waters.

NMFS disagrees with Petitioners' interpretations that: (1) the Council and NMFS through the FMP preempted State management of salmon within State waters and then delegated to the Board the responsibility for management of salmon in Alaska; (2) State management of salmon fisheries within State waters must be consistent with the Magnuson-Stevens Act; and (3) Board regulations are amendments to the FMP.

The Council adopted the original FMP in 1978, and NMFS approved and implemented it in 1979. Among other things, the original FMP established the Council's and NMFS's authority over the salmon fisheries in the Federal waters off the coast of Alaska from 3 to 200 nautical miles offshore (the EEZ), but excluded that portion of the EEZ west of 175 degrees East longitude from the FMP. In 1990, NMFS approved and implemented Amendment 3 to the FMP. Among other things, Amendment 3 extended the jurisdiction of the FMP to the EEZ west of 175 degrees East longitude and deferred regulation of the sport and commercial salmon fisheries in the EEZ to the State, thereby removing the Council and NMFS from routine management of the salmon fisheries but maintaining Federal participation and oversight of, and final authority over salmon management within the EEZ.

The fishery management unit for the FMP is all waters of the EEZ off the coast of Alaska and the salmon and fisheries that occur there. FMP at chapter 2. Two management areas are established within the EEZ, the West Area and the East Area, with the border for the areas at the

¹⁰ While there are several examples in the legislative history for the original Magnuson-Stevens Act that explain that "beyond the EEZ" as used in 16 U.S.C. 1811(b)(1) means the high seas seaward of the EEZ and not the territorial seas of the coastal states (see A LEGISLATIVE HISTORY OF THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976, at 99, 144, and 274 (1976)), the following excerpt is particularly informative: "The assertion of exclusive authority over anadromous species of fish is meant to apply when such fish are found on the high seas beyond the U.S. [EEZ], but outside the jurisdiction of any other nation. It is anticipated that the United States will use this authority to ban any capture of anadromous species of fish on the high seas and regulate their taking in the [EEZ]. Furthermore, this assertion of authority is not intended to preempt coastal States' authority to manage anadromous species of fish within their boundaries." (Emphasis added.) Id., at 678.

longitude of Cape Suckling (143° 53' 36" West longitude). The West Area includes the EEZ in the Bering, Chukchi, and Beaufort Seas, as well as the EEZ in the North Pacific Ocean west of Cape Suckling. The FMP authorizes sport (or recreational) salmon fishing in the EEZ of the West Area. However, the FMP prohibits commercial salmon fishing in the EEZ of the West Area with the exception of three pockets of EEZ waters adjacent to three historical State commercial fishing areas: the Cook Inlet Area, the Prince William Sound Area, and the Alaska Peninsula Area.¹¹

Through the FMP and implementing Federal regulations,¹² the Council and NMFS have asserted management authority over salmon fisheries within the EEZ of the West Area, and have deferred routine management of the salmon fisheries that occur within the EEZ of the West Area, including the three historical areas open to commercial fishing, to the State. FMP at 34, 35, 41. This deferral means that State management of salmon fishing within the EEZ of the West Area, including the three historical areas, must be consistent with the FMP, the Magnuson-Stevens Act, and other applicable Federal law. Although NMFS and the Council defer management of salmon fisheries within the West Area's EEZ to the State, the Council and NMFS have ultimate management authority over salmon fishing in the West Area's EEZ, including the three historical areas.

As to Petitioners' first assertion, NMFS disagrees that the Council and NMFS, through the FMP, have preempted the State's management authority over salmon within State waters and delegated Federal management responsibilities for salmon fishing within State and Federal waters to the Board. The FMP is clear that Federal management of salmon fisheries does not extend into State waters (0 to 3 nautical miles from the State's baseline). The FMP explicitly states that the FMP governs salmon fishing from 3 to 200 nautical miles off the coast of Alaska. FMP at i, 1, and 5. Furthermore, at no time have the Council and NMFS preempted the State's management of salmon fisheries within State waters.

Because NMFS has not preempted the State's management of salmon fisheries within State waters, NMFS has not delegated Federal management responsibilities for salmon fishing within State waters to the Board. Rather, the Council and NMFS asserted Federal management over salmon species solely within the EEZ and then extended to the State, through deferral, routine management of those EEZ salmon fisheries. Through the FMP, NMFS and the Council maintain Federal participation and oversight of State management in the EEZ to ensure consistency with the FMP, the Magnuson-Stevens Act, and other applicable law. Under the FMP's deferral of management authority to the State, the Council and NMFS are not frequently involved in the

¹¹ Appendix C of the FMP contains descriptions and geographic coordinates for these areas.

¹² See 50 CFR 679.3(f)(4): "Commercial fishing for salmon in the EEZ west of Cape Suckling is not allowed except in three net fisheries managed by the State of Alaska as described in Section 2.2.2 and Appendix C of the Salmon FMP. For State of Alaska regulations governing these fisheries, see 5 Alaska Administrative Code 09 (Alaska Peninsula), 5 Alaska Administrative Code 21 (Cook Inlet), and 5 Alaska Administrative Code 24 (Prince William Sound)."

State's routine management of the salmon fisheries within the EEZ. As described earlier in this response, the FMP provides persons with the opportunity to ask NMFS to review State regulations as they apply in the EEZ for consistency with the FMP, the Magnuson-Stevens Act, and other applicable law. The FMP also authorizes the Council and NMFS to implement regulations applicable in the EEZ in order for the salmon fisheries conducted within the EEZ to achieve the objectives of the FMP or to be consistent with the Magnuson-Stevens Act or other applicable law.

Finally, Petitioners' assert that State management of salmon fisheries within State waters must be consistent with the Magnuson-Stevens Act and that Board regulations are amendments to the FMP. These assertions appear to be based on the premise that the FMP extends Federal management authority over salmon fisheries into State waters. However, as explained above, NMFS has not preempted the State's authority to manage salmon fisheries within its waters. Therefore, there is no requirement that State management of salmon fisheries within State waters be consistent with the Magnuson-Stevens Act and no basis for concluding that Board regulations are amendments to the FMP. Furthermore, FMPs and amendments to them are specialized documents prepared by fishery management councils and approved by NMFS under provisions of the Magnuson-Stevens Act. The Magnuson-Stevens Act contains no provisions for entities other than the councils or NMFS to prepare or approve FMPs or FMP amendments. Therefore, NMFS disagrees with these assertions.

The provisions of the Magnuson-Stevens Act do not apply to the State's resident-only Personal Use fishery and NMFS lacks authority to regulate or eliminate it.

Petitioners make a number of claims that the personal use fishery is inconsistent with the Magnuson-Stevens Act and requests NMFS to eliminate the resident-only personal use net fishery because it discriminates against non-residents, harms the environment, harms the commercial salmon fishery, and substantially and adversely affects the carrying out of the FMP for salmon in the EEZ. Petition at 29-31. There are four personal use fisheries in Cook Inlet, a set gillnet fishery at the mouth of the Kasilof River, and three in-river dipnet fisheries on the Kasilof and Kenai rivers, and at Biglake (closed since 2001). No personal use fishing occurs in the EEZ. As discussed previously, NMFS has not preempted State management of salmon fisheries within State waters and the factual circumstances of the salmon fishery do not warrant initiation of preemption proceedings at this time. Therefore, NMFS lacks authority to regulate the State's personal use fishery conducted within State waters and the requirements of the Magnuson-Stevens Act do not apply to the personal use fishery.

Petitioners further claim that the Board regulations that manage the personal use fishery are amendments to the FMP that must meet the Magnuson-Stevens Act requirements, including a social impact assessment, and be supported by a NEPA analysis. Petition at 21. Board actions to

manage salmon fisheries in State waters are not FMP amendments as discussed above, and therefore the Board is not required to conduct analyses that are required for amendments to the Federal FMP.

NMFS lacks the authority to take action to restore and protect essential fish habitat (“EFH”) on the Kenai River and other EFH in the upper Cook Inlet basin.

Petitioners request that NMFS take action to restore and protect EFH on the Kenai River and other EFH in the Upper Cook Inlet basin. Petitioners claim that the purpose of the Magnuson-Stevens Act is to promote EFH, that salmon management regulations promulgated by the Board must be reviewed for consistency with the purpose of protecting EFH, and that any State regulations that negatively impact EFH must be preempted by the Secretary. Petition at 15.

The FMP identifies the Kenai River and all known salmon in-river habitat as salmon EFH.¹³ The Magnuson-Stevens Act does not require the Secretary to review each State salmon management action for consistency with an FMP’s EFH provisions. The Magnuson-Stevens Act establishes specific but limited requirements for EFH. Each FMP must describe and identify EFH for the fishery, minimize to the extent practicable adverse effects on EFH caused by fishing, and identify other actions to encourage the conservation and enhancement of EFH. 16 U.S.C. 1853(a)(7). With regard to State agency actions, the Magnuson-Stevens Act provides that if the Secretary receives information that an action authorized, funded, or undertaken by a state or federal agency would adversely affect any EFH, then the Secretary shall recommend measures to the applicable agency to conserve EFH. The Magnuson-Stevens Act contains no other requirements or authority for NMFS to engage in a review of State management programs regarding effects to EFH, and there is no exception to the process and factual findings required by 16 U.S.C. 1856(b) that permits NMFS to preempt State management actions.

The Magnuson-Stevens Act states that “Each Council shall comment on and make recommendations to the Secretary and any Federal or State agency concerning any such activity that, in the view of the Council, is likely to substantially affect the habitat, including essential fish habitat, of an anadromous fishery resource under its authority.” 16 U.S.C. 1855(b)(3)(B). The Council has not determined that any State actions trigger this requirement and has not commented on or made recommendations to the State for salmon EFH. The Council is beginning a 5-year review of the FMP’s EFH provisions per the requirement at 50 CFR 600.815(a)(10) that “a review and revision of EFH components” be completed every 5 years, and EFH provisions be revised or amended, as warranted, based on available information. This review will include an analysis of whether there have been changes to the available information

¹³ The EFH amendments to the FMP are available at the NMFS Alaska Region web page at: http://www.fakr.noaa.gov/analyses/salmon/amds_7_8.pdf

regarding fishing and non-fishing activities affecting essential fish habitat since the EFH FEIS analysis. Through this process, the Council may determine that the activities identified in the Petition, or any other fishing activities occurring in State waters or in the EEZ, substantially affect salmon EFH and may make recommendations accordingly to the State. NMFS encourages Petitioners to become involved in the Council 5-year review process¹⁴. If NMFS or the Council determines that measures are necessary to protect salmon EFH in the EEZ, NMFS will follow the established process whereby the Council develops and analyzes alternatives in a public process and makes a recommendation to the Secretary.

Additionally, as discussed in the FMP, during EFH consultations between NMFS and other agencies, NMFS strives to provide reasonable and scientifically-based recommendations that account for restrictions imposed under various state and federal laws by agencies with appropriate regulatory jurisdiction. FMP Appendix E at 83. Moreover, the coordination and consultation required by the Magnuson-Stevens Act do not supersede the regulations, rights, interests, or jurisdictions of other federal or state agencies. 16 U.S.C. 1855(b). Further NMFS's EFH conservation recommendations are not binding. FMP Appendix E at 84.

Petitioners also claim that the substantial and adverse effects of the personal use net fishery were not fully explained in the EFH FEIS, raising the question of whether a supplemental EIS must be prepared prior to the start of the 2008 personal use net fishery. Petition at 24. Petitioners also claim that although the adverse impacts to EFH were known at the time of the EIS, the impacts are not addressed. Petition at 24. NMFS disagrees. The EFH FEIS does analyze the impacts to in-river salmon EFH, including the impacts of the personal use fisheries. The EFH FEIS discusses drift, set, troll, recreational, and personal use salmon fisheries. EFH FEIS at 3-148 through 3-150. Appendix B of the EFH FEIS also contains a comprehensive, peer-reviewed analysis of fishing effects on EFH and detailed results for each managed species. For each non-fishing activity, known and potential adverse impacts to EFH are described in Appendix G of the EFH FEIS. The descriptions explain the mechanisms or processes that may cause the adverse effects and how these may affect habitat function. The EFH analysis concluded that no fisheries managed under the Council FMPs cause more than minimal and temporary adverse effects on EFH. At this time, NMFS does not intend to prepare a supplemental EIS to analyze the impacts to in-river salmon EFH. After the 5-year review, the Council and NMFS may decide to prepare a supplemental EIS if the 5-year review reveals that significant new circumstances or information exist relevant to environmental concerns and bearing on the proposed action or its impacts. 40 CFR 1502.9(c)(1).

¹⁴ More information about the 5-year review is available at the Council web site: <http://www.fakr.noaa.gov/npfmc/default.htm>.

NMFS declines to promulgate emergency regulations to supersede State regulations and manage Upper Cook Inlet salmon stocks.

Petitioners request NMFS to promulgate emergency regulations to supersede State regulations and manage Upper Cook Inlet salmon stocks. Specifically, Petitioners' request NMFS to issue an emergency rule that: (1) removes mandatory closures and season opening and closing dates from the salmon management plans for Upper Cook Inlet, (2) establishes one optimum escapement goal range for all species in Upper Cook Inlet, (3) protects salmon habitat/EFH, (4) eliminates the resident-only personal use net fishery, and (5) enacts measures necessary to ensure harvest opportunity on those stocks. Petition, at 31-32 and 34-36.

To the extent Petitioners' request is asking NMFS to impose emergency regulations that would have applicability within State waters, NMFS declines Petitioners' request for the reasons already provided in this response concerning preemption of State management of salmon fisheries within State waters. Furthermore, to the extent Petitioners' request is asking NMFS to impose emergency regulations that would have applicability within the EEZ and would supersede State management measures applicable in the EEZ, NMFS declines to take emergency action under 16 U.S.C. 1855(c) of the Magnuson-Stevens Act at this time. According to NMFS policy guidelines, the use of emergency actions should be limited to extremely urgent, special circumstances where substantial harm to or disruption of the resources, fishery, or community would be caused in the time it would take to follow standard rulemaking procedures.¹⁵ For reasons provided earlier in this response, NMFS has concluded that Petitioners have not provided information that indicates that substantial harm would occur in the EEZ due to State salmon management measures applicable in the EEZ.

If NMFS were to determine that measures are necessary to supersede State management measures applicable in the EEZ, then NMFS would follow the standard procedures for notice and comment rulemaking, including conducting the required analysis under the National Environmental Policy Act, the Regulatory Flexibility Act, and Executive Order 12866. Applicable Federal law establishes processes for assessment and responsive implementation of appropriate management measures if warranted, and NMFS cannot truncate this process without good cause.

¹⁵ 62 FR 44422, August 21, 1997.

Attachment: The portion of commercial salmon catch harvested in the EEZ

To determine whether the commercial salmon fisheries occur predominantly in the U.S. Exclusive Economic Zone (EEZ), NMFS examined commercial salmon catch data for all five species of salmon governed by the FMP. These commercial fisheries occur in the EEZ in the Southeast Alaska, Prince William Sound, Cook Inlet, and the Alaska Peninsula areas. This attachment includes commercial catch data provided by the Alaska Department of Fish and Game (ADF&G) for each area from 1991 to 2008. The period from 1991 to 2008 represents fishing under the current FMP and provides a reasonable representation of the distribution of catch over time.

To estimate the portion of catch harvested in the EEZ, catches in the statistical areas that include the EEZ were tabulated and compared to the total catch for that management area. ADF&G catch data is recorded by statistical areas which can include both State and EEZ waters in one statistical area. All catch in statistical areas that have both EEZ and State waters were assumed to be EEZ catch; therefore it is likely that these tables attribute more catch to the EEZ than actually occurred. Thus, the portion of total catch estimated to have been harvested in the EEZ represents a maximum amount.

Table 1 shows that the commercial catch of all salmon species during this time period was slightly less than 4 percent of the total commercial catch from both the EEZ and State waters in these areas. Note that this table does not include commercial catch in state waters in all other areas. If all catch statewide was included, the total portion harvested in the EEZ would be significantly smaller because the EEZ waters in all other areas are closed to salmon fishing.

Table 1: Commercial salmon catch data and estimated percentage of total catch from the EEZ in the areas where salmon fisheries occur in the EEZ; Alaska Peninsula, Cook Inlet, Southeast Alaska, and Prince William Sound/Copper River.

	EEZ catch	Total catch	EEZ as % of total
AK Peninsula	30,295,085	244,662,687	12.38%
Cook Inlet	32,810,061	105,486,193	31.10%
SEAK	2,926,919	1,118,674,467	0.26%
PWS Copper River	18,113,825	681,134,615	2.66%
Total	84,145,890	2,149,957,962	3.91%