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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED COOK INLET DRIFT
ASSOCIATION AND COOK INLET
FISHERMEN'S FUND,

Plaintiffs,

vs.

NATIONAL MARINE FISHERIES
SERVICE, ET AL.,

Federal Defendants.

Case. No. 3:13-cv-00104-TMB

**SUPPLEMENTAL BRIEF IN
ACCORDANCE WITH COURT
ORDER (ECF 182)**

United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv., No. 3:13-cv-00104-TMB
Supplemental Brief, Court Order (ECF 182)

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INTRODUCTION

The Court has ordered the National Marine Fisheries Service (“NMFS”), *et al.*, (“Federal Defendants”) to respond to a letter filed by the United Cook Inlet Drift Association and Cook Inlet Fishermen’s Fund (collectively “Plaintiffs”). ECF 182. Plaintiffs’ letter (ECF 180) responds to Federal Defendants’ Eleventh Status Report (ECF 179). Plaintiffs allege that Federal Defendants failed to comply with this Court’s remand order requiring Federal Defendants “to prepare and adopt a salmon [fishery management plan] compliant with the Ninth Circuit’s decision on or before December 31, 2020 and final agency action and/or promulgation of a final rule shall occur within one year thereafter.” ECF 180 at 2. As explained below, Federal Defendants have complied, and continue to comply, with the terms of the judgment (ECF 102) and the deadlines imposed by subsequent court order. ECF 168. Moreover, at this time, NMFS has no reason to believe it will seek an extension and anticipates that it will promulgate final regulations by December 11, 2021. Furthermore, Plaintiffs cannot renew their substantive allegations concerning Amendment 14 at this time, as consideration of those allegations would be inconsistent with the judicial review provisions of the Magnuson Stevens Fishery Conservation and Management Act (“Magnuson Act”), 16 U.S.C. § 1855(f)(1), and previous decisions of this Court and the Ninth Circuit.

DISCUSSION

I. FEDERAL DEFENDANTS HAVE COMPLIED WITH THE COURT’S JUDGMENT AND SUBSEQUENT ORDER.

Plaintiffs, Federal Defendants, and Defendant-Intervenor jointly submitted a proposed judgment to this Court in July 2017 (ECF 101), which this Court signed without modification on August 3, 2017 (ECF 102). Plaintiffs subsequently challenged Federal Defendants’ compliance

with the judgment by arguing that the North Pacific Fishery Management Council's ("Council") alternatives for a Salmon fishery management plan ("FMP") amendment violated the "letter and spirit" of the Ninth Circuit's opinion. In January 2020, this Court determined that Plaintiffs failed to show noncompliance by Federal Defendants with the judgment but required Federal Defendants "to prepare and adopt a salmon FMP compliant with the Ninth Circuit's decision **on or before December 31, 2020** and final agency action and/or promulgation of a final rule shall occur within one year thereafter." ECF 168. Plaintiffs appealed. The Ninth Circuit affirmed this Court's order. *United Cook Inlet Drift Ass'n v. NMFS*, 807 F.App'x 690 (9th Cir. 2020).

Importantly, the Ninth Circuit reiterated what was required by this Court's decision:

The district court properly exercised its discretion when it imposed a deadline by which **the Council must adopt a recommendation for referral to NMFS**. The district court found there was no evidence of intentional delay and set a date certain—December 31, 2020—**for the Council to adopt a recommendation of the final federal salmon fishery management plan ("FMP") amendment**, with "final agency action and/or promulgation of a final rule [to] occur within one year thereafter."

Id. at 691 (emphasis added).

Consistent with this Court's order and the Ninth Circuit's opinion, the Council's action at its December 2020 meeting adopted a recommendation for a final FMP amendment. Exhibit A to Status Report 11, filed with this Court on February 19, 2021 (ECF 179, ECF 179-1), informed the Court that the Council took this action and that the deadline for adopting a recommendation for the FMP amendment had been met. *Id.* As reported, the Council selected (*i.e.*, adopted) Alternative 4 as its preferred alternative for amending the Salmon FMP on December 7, 2021. ECF 179-1 ("After considering all of this information, the Council selected Alternative 4 as its

preferred alternative for amending the Salmon FMP.”).¹ Alternative 4 “[a]mend[s] the Salmon FMP to include the Cook Inlet EEZ in the FMP’s fishery management unit in the West Area and apply Federal management by applying the existing West Area prohibition on commercial salmon fishing in the EEZ to the Cook Inlet EEZ.”² After adopting that recommendation, the Council did not reconsider its action for the remainder of the meeting, which ended on December 11, 2020, or anytime thereafter. The Council’s action in December 2020 was the Council’s final decision to recommend Alternative 4 as Amendment 14 to the Salmon FMP.

Plaintiffs state in their May 11, 2021 letter that, “[a]s of the April 2021 meeting, there was still no FMP ‘prepared and adopted’ as required by the court order.” ECF 180. This is inaccurate. As the Ninth Circuit affirmed, the Court’s order required that the Council adopt a recommendation for an amendment to the Salmon FMP by December 31, 2020, and that amendment was then referred to NMFS. The Council’s adoption in December 2020 was final action. Indeed, counsel for Plaintiffs fully acknowledged that the Council had taken final action and the subsequent rulemaking schedule was explained in detail to Plaintiffs on January 7, 2021. *See* Fed. Defs.’ Ex. 1 (Plaintiffs’ counsel stating that “I know that the Council took final action on December 7, 2020.”). The Court’s order and Ninth Circuit’s opinion do not require that the FMP is actually amended by the December 31, 2020, deadline. That is left to NMFS.

¹ The Council’s final motion is available at: <https://meetings.npfmc.org/CommentReview/DownloadFile?p=7b0cdbec-5be7-4490-911a-d471166506eb.pdf&fileName=C2%20Motion.pdf> (last visited Aug. 19, 2021).

² *See* <https://meetings.npfmc.org/CommentReview/DownloadFile?p=96f2b5db-397e-42df-b455-013f171130ab.pdf&fileName=C2%20Cook%20Inlet%20Salmon%20Analysis.pdf> (last visited Aug. 19, 2021) at page 61, which provides the suite of alternatives under consideration by the Council at its December 2020 meeting.

Additionally, Plaintiffs are mistaken that the “Draft FMP Language in Concept” document presented by NMFS at the Council’s April 2021 meeting is evidence that the Council failed to “prepare and adopt” a recommendation for an FMP amendment to the Salmon FMP by the December 31, 2020 deadline. Despite the confusing nomenclature, the recommendation for Amendment 14 to the Salmon FMP made by the Council at its December 2020 meeting was still in effect at the April 2021 Council meeting, and the Council made no effort to rescind or reconsider that decision following the December 2020 meeting. The “Draft FMP Language in Concept” document is language that effectuates the Council’s December 2020 final action.³ In other words, the Council takes final action (“adopts a recommendation”) and then it is left for Council and NMFS staff to provide the precise language for this final action. Once staff are satisfied that draft FMP amendment text is consistent with the Council’s final action, the FMP amendment text is included in the FMP amendment package that is then submitted by the Council for NMFS’s review. *See* 16 U.S.C. § 1854(a).

Consistent with this process, shortly after its April 2021 meeting, the Council submitted Amendment 14 for NMFS’s review. Exhibit A to Status Report 12 (ECF 181-1) informed this Court and Plaintiffs that (a) the Council submitted Amendment 14 to NMFS for review on May 11, 2021; (b) NMFS immediately published a notice of availability for Amendment 14 on May 18, 2021 (86 Fed. Reg. 26,888); and (c) NMFS published proposed regulations to implement Amendment 14 on June 4, 2021 (86 Fed. Reg. 29,977). Federal Defendants also informed the

³ Although the Council took final action in December 2020, as Federal Defendants have noted previously, the Council is not a party to this litigation and thus the Court lacks jurisdiction over its actions. ECF 157 at 19; *see also Flaherty v. Ross*, 373 F.Supp.3d 97, 110 (D.D.C. 2019) (“[T]he Court concludes that Congress, through the APA, has not waived the federal government’s sovereign immunity as applied to the Council. Thus, the Court lacks subject-matter jurisdiction over Plaintiffs’ claims against it.”).

Court and Plaintiffs that NMFS was required to make its decision whether to approve, disapprove, or partially approve Amendment 14 no later than August 18, 2021, in accordance with the timeframes set forth in 16 U.S.C. § 1854(a)(3). ECF 181-1. NMFS has since decided to approve Amendment 14.⁴ Publication of the final regulations will follow NMFS's decision on the FMP amendment, and at this point NMFS remains on schedule to publish those final regulations within one year after the Council adopted its recommended FMP amendment.

As the foregoing demonstrates, Federal Defendants have not missed any deadlines imposed by this Court and the process for implementing an FMP amendment to the Salmon FMP is well on its way toward completion.

II. PLAINTIFFS' SUBSTANTIVE OBJECTION TO THE COUNCIL'S AMENDMENT IS PREMATURE.

As the Ninth Circuit stated in this case: “Neither this Court’s decision in *United Cook*, nor any relevant statute, required the district court to intervene in the administrative process, before the final agency action, to set deadlines and mandate the contents of the FMP amendment.” *United Cook Inlet Drift Ass'n.*, 807 F. App'x at 691. This remains equally true today. Plaintiffs’ letter requests this Court to make determinations on non-final agency action. But Plaintiffs cannot bring a claim asserting a violation under either the Magnuson Act or the Administrative Procedure Act (“APA”) until NMFS issues the final regulations. 16 U.S.C. § 1855(f)(1)-(2) (The Magnuson Act provides for judicial review of “[r]egulations promulgated by the Secretary under this chapter and . . . actions that are taken by the Secretary under regulations which implement a fishery management plan”); *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 668-69 (D.C. Cir. 2016) (determining that the Court did not have jurisdiction under

⁴ See <https://www.npfmc.org/wp-content/PDFdocuments/fmp/Salmon/Amendment14.pdf> (last visited Aug. 19, 2021).

either the Magnuson Act or APA to review a fishery council's action); *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 987 (9th Cir. 2006) (explaining that a plaintiff must challenge a final agency action in order to obtain judicial review under the APA). Nor are courts empowered to prematurely review future agency actions in order to issue prophylactic remedies. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 164 (2010) ("Until such time as the agency decides whether and how to exercise its regulatory authority, however, the courts have no cause to intervene."); *see also McKart v. United States*, 395 U.S. 185, 194 (1969) ("The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction.").

It is no secret that Plaintiffs are dissatisfied with the Council's decision to adopt and refer Alternative 4 to NMFS, but that does not mean they are entitled to substantively challenge non-final agency action. Plaintiffs will have the opportunity to challenge that decision when final regulations issue. 16 U.S.C. § 1855(f).⁵ As explained in Exhibit A to Status Report 12, NMFS intends to publish final regulations as soon as possible no later than December 11, 2021.⁶ But right now Plaintiffs' substantive challenge is premature.

DATED: August 20, 2021

Respectfully Submitted:

⁵ NMFS's decision to approve Amendment 14 on August 12, 2021, is not judicially reviewable. *See Gulf Restoration Network v. NMFS*, 730 F.Supp.2d 157, 172 (D.D.C. 2010) ("Section 1855(f)(1), which discusses the 30-day time frame in which a suit brought under the MSA must be filed, unambiguously refers to the promulgation of the regulations, and not the FMPs, as the event which marks the beginning of that time frame. The statute clearly distinguishes between FMPs and regulations throughout. *See* 16 U.S.C. §§ 1854(a)-(b) (separating the procedures for FMPs and regulations into different sub-sections). The Court therefore finds no merit in Plaintiffs' assertion that 'the MSA explicitly provides for pre-implementation judicial review of FMPs and actions under them.'").

⁶ December 11, 2021, represents the one-year mark from the close of the meeting at which the Council adopted Amendment 14 as its recommended FMP amendment for the Salmon FMP.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served today via the Court's
CM/ECF system on all counsel of record.

/s/Coby Howell