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Stephen Vanek, Erik Huebsch, Ian Pitzman, and
United Cook Inlet Drift Association, Inc., and
Copper River Seafoods, Inc., an Alaska
corporation

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Stephen Vanek, Erik Huebsch, Ian Pitzman,
and United Cook Inlet Drift Association,
Inc., and Copper River Seafoods, Inc., an
Alaska corporation,

Case No.: 3AN-11-____CI

Plaintiffs,

v.

State of Alaska, Department of Fish and
Game, Alaska Board of Fisheries,

Defendants.

**PLAINTIFF'S VERIFIED COMPLAINT FOR DECLARATORY
AND OTHER INJUNCTIVE RELIEF**

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Plaintiffs, Stephen Vanek, Erik Huebsch, Ian Pitzman, United Cook Inlet Drift Association, Inc., and Copper River Seafoods, Inc., by and through their counsel, hereby allege as follows:

INTRODUCTION

1. This is an action brought under Alaska's declaratory judgment statute, Alaska Statute ("AS") 22.10.020, and the Alaska Administrative Procedure Act ("APA"), AS 44.62.300(2);

2. Plaintiff seeks declaratory judgment with respect to "emergency" regulations issued by the Alaska Department of Fish and Game (the "Department") and the Alaska Board of Fisheries (the "Board") restricting commercial salmon fishing in Cook Inlet. These regulations will affect at least half of the regular fishing periods during the most important commercial salmon fishing window this summer by placing significant restrictions on those days. These emergency regulations were issued without public comment or due process on June 30, 2011, well after the 2011 fishing season started, and will have an immediate impact on commercial fishing beginning July 9, 2011;

3. Declaratory relief is warranted because the Board and the Department lacked a factual basis to find an "emergency" as required by the APA. As explained in detail below, AS sections 44.62.250-270 instructs that emergencies are "rarely found to exist" and require the Board and Department to make "a written finding, including a statement of the facts that constitute the emergency, that the adoption of the regulation or order of repeal is necessary for the immediate preservation of the public peace, health,

safety, or general welfare.” Defendants lacked a factual basis – and their written finding provided none – to determine that “rare” circumstances constituting an immediate need to preserve public peace, health, safety, or the general welfare, exists;

4. In addition, because the Board and the Department enacted these emergency regulations only nine days before these punitive measures take effect, Plaintiffs seek immediate injunctive relief to restrain the Department from enforcing these illegal rule changes. As explained in detail below, there are only six regular fishing periods between July 9 and July 31 this year – the peak salmon fishing period for sockeye returning to the Kenai and Kasilof rivers. The emergency regulations affect three of those six days, or 50% of this critical fishing period, creating a significant financial hardship for Plaintiffs in this case.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction under AS 44.62.300;
6. This Court has venue under Civil Rule 3 and AS 44.62.300;

PLAINTIFFS

7. The United Cook Inlet Drift Association (“UCIDA”) is a corporation in good standing registered under the laws of the State of Alaska. UCIDA represents the economic, social, and political interests of drift gillnet fishermen in Cook Inlet. UCIDA currently has approximately 250 members who hold limited access salmon driftnet fishing permits in Cook Inlet;

8. Plaintiff Erik Huebsch lives in Kasilof, Alaska and is a commercial fisherman in Upper Cook Inlet. Huebsch holds a limited entry fishing permit for Upper Cook Inlet and is a member of UCIDA;

9. Plaintiff Ian Pitzman lives in Homer, Alaska and is a commercial fisherman in Upper Cook Inlet. Pitzman holds a limited entry fishing permit for Upper Cook Inlet and is a member of UCIDA;

10. Plaintiff Steven Vanek lives in Ninilchik, Alaska and is a commercial fisherman in Upper Cook Inlet. Vanek holds a limited entry fishing permit for Upper Cook Inlet and is a member of UCIDA;

11. UCIDA's members make their livings by commercial fishing. UCIDA's members hold State of Alaska limited entry fishing permits which authorize them to catch all five species of salmon;

12. Plaintiff Copper River Seafoods, Inc., ("CRS") is a seafood processing company with facilities across the State of Alaska, including the Kenai Peninsula. CRS handles salmon and other fish caught by commercial fishermen, including the plaintiffs named in this action. CRS is incorporated in the State of Alaska and employs up to 435 employees year round, many of whom are Alaska residents;

13. Prior Board decisions have effectively restricted UCIDA's members to fish only for sockeye. The single greatest source of sockeye in Cook Inlet is the Kenai River. The Kenai River is expected to return nearly 4 million sockeye this year, approximately 62% of all sockeye returning to Cook Inlet. The Kasilof River is expected to return 1 million. Together, the two rivers are expected to return nearly 80% of all salmon to Cook

Inlet. UCIDA's members rely on the health of the Kenai and Kasilof returns and reasonable access to those runs;

14. UCIDA and its members actively participate in the Board's regularly scheduled meetings. Most recently, UCIDA members attended and participated in the February 20 – March 5, 2011, meeting for Upper Cook Inlet Finfish. That meeting produced a number of regulations that seriously restricted commercial fishing opportunities for UCIDA's members. It also resulted in several rule changes intended to ameliorate the adverse impact to UCIDA's members. The emergency regulations at issue here effectively rescind these ameliorative provisions;

15. Plaintiffs have standing because they are directly and adversely impacted by the challenged regulations. These regulations will cause direct and immediate financial impacts on UCIDA's members by seriously reducing their fishing opportunities during key fishing periods this season;

DEFENDANTS

16. Defendant State of Alaska is a sovereign state of the United States of America;

17. Defendant Alaska Board of Fisheries is an agency of the state government;

18. Defendant Alaska Department of Fish and Game is a Department of the state government;

LEGAL BACKGROUND

19. Under Article III of the Alaska Constitution, “the legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the state, including land and waters, for the maximum benefit of the people;”

20. To that end, the Legislature created the Board and required it to conserve and develop the fishery resources of the state, by establishing season opening and closing dates, bag and possession limits, and allocation decisions. AS 16.05.221(a) and (b);

21. The Board issues fisheries regulations during regularly scheduled public meetings. At these meetings, the Board develops the substance of regulations, but delegates responsibility for their drafting to the Department;

22. The Board issues fishery regulations following the typical notice, public participation, and comment procedures of the APA;

23. The APA also grants the Board authority to adopt emergency regulations in limited circumstances. AS 44.62.250 provides that:

A regulation or order of repeal may be adopted as an emergency regulation or order of repeal if a state agency makes a written finding, including a statement of the facts that constitute the emergency, that the adoption of the regulation or order of repeal is necessary for the immediate preservation of the public peace, health, safety, or general welfare[.];

24. The APA further explains that this emergency authority should be rarely used: “emergencies are held to a minimum and are rarely found to exist.” AS 44.62.250;

25. Consistent with this policy, the Board recognizes that emergency regulations are rarely warranted and that petitions for emergency changes should be routinely denied. 5 AAC 96.625(f). By regulation, the Board limits an “emergency” to either (1) “an unforeseen, unexpected event” that “threatens a fish or game resource” or (2) “an unforeseen, unexpected resource situation where a biologically allowable resource harvest would be precluded by delayed regulatory action and such delay would be significantly burdensome to the petitioners because the resource would be unavailable in the future.” *Id.*;

FACTUAL BACKGROUND.

The Central District Drift Gillnet Fishery Management Plan 5 AAC 21.353

26. Drift gillnet commercial fishing is generally managed under the Board’s Central District Gillnet Fishery Management Plan (the “Drift Plan”). Under this Plan, the season opens on approximately June 19 and runs through August 15. During each “week” of the fishing season, the Plan provides two regular 12-hour fishing periods on Mondays and Thursdays. A “week” of fishing is comprised of two 12- hour periods, unless additional periods are authorized by emergency order of the Department;

27. The Plan places various restrictions based on time of year and run size. The Plan mandates different requirements for the drift fleet for each of the time frames between June 19-July 8; July 9-15; July 16-31; and August 1-15;

28. At issue in this case are the regulations governing July 9-15 and July 16-31. These periods are most critical for driftnet fishing because the bulk of the returning sockeye are present during that time;

29. There are generally two regular fishing periods during the July 9-15 time frame. As it existed for the 2010 fishing season, the Drift Plan for the week of July 9-15 restricted both of the regular fishing periods (Monday and Thursday) to fishing in the Kenai and Kasilof Sections and Drift Gillnet Area 1;

30. Last season, the Drift Plan authorized the Department to open one additional 12- hour fishing period when the run strength was over 2 million sockeye returning to the Kenai River during the July 9-15 time-period;

31. There are generally four regular fishing periods during the July 16–31 time period. Last year’s Drift Plan restricted gillnet fishing to the Kenai and Kasilof Section during two of the four periods, and Drift Gillnet Areas 1 and 2 when run strengths are between 2 and 4 million;

The Board’s March 2011 Regulatory Drift Plan Amendments

32. The Board of Fish met February 20, 2011, through March 5, 2011 for its regularly scheduled meeting on Upper Cook Inlet Finfish;

33. At that meeting, the Board enacted a number of amendments further restricting driftnet fishing. After more than two months of review, those changes were codified by the Department on May 18, 2011;

34. The revised regulations impacted four of the six regular fishing days in Cook Inlet between July 9-31. With respect to the first fishing period (July 9-15), the Board prohibited the drift fleet from fishing in Area 1. This action closed approximately 1300 square miles of fishing area available to the drift fleet on that day;

35. To mitigate the adverse impacts to the drift fleet resulting from that restriction and to ensure that the Department had the flexibility to meet escapement goals for the Kenai and Kasilof Rivers, the Board expanded the Kenai and Kasilof Corridors. It then applied the expanded Kenai and Kasilof Corridors to the second regular fishing day in the July 9-16 time- period, affording an additional 250 square miles as a result;

36. The Board also imposed additional restrictions in the July 16-31 period. The Board closed Area 2 on two of those days, resulting in an additional cumulative loss of about 640 square miles;

37. To mitigate for the loss of Area 2 on those two days, the Board allowed fishing in the Expanded Kenai and Kasilof corridors or an additional 180 square miles;

38. All told, the Board removed approximately 1,940 square miles on the six regular fishing days between July 9-31 and added approximately 430 square miles through use of the Expanded Corridors, resulting in a combined net loss of approximately 1,510 square miles;

The Board's June 30, 2011 Emergency Changes

39. On June 13, 2011, KRSA requested the Board to issue an "Emergency Petition for UCI Central District Drift Gillnet Fishery Management Plan." The Petition alleged that:

- a. the regulation governing the second regular fishing period during July 9-16 should not have authorized use of the Expanded Kenai and Kasilof Corridors;

- b. The regulation authorizing the Department to open an additional fishing day between July 9-16 should not have permitted use of the Expanded Kenai and Kasilof Corridors;
- c. The regulation closing Area 2 and restricting the drift fleet to either or both Area 1 or Expanded Kenai and Kasilof Corridors during one period per week between July 16-31 should be amended to further restrict the drift fleet to the Area 1 or the Expanded Kenai and Kasilof Corridors, but not both;

40. KRSA also requested the Department to issue a similar emergency order.

The Department took no action on that request, having determined that no errors had been made in adopting the March 2011 Drift Plan amendments;

41. KRSA alleged that the three errors identified in the Petition create an “emergency” that threatens a fish resource. KRSA argued that the intent of the Board was to further restrict driftnet fishing to allow more sockeye and coho to pass north to the Susitna River, and if the errors were not corrected, not enough fish will pass to the north;

42. KRSA’s petition provided no factual support demonstrating how many more northern bound fish will be caught if (if any) if the drift fleet operates in the Expanded Kenai and Kasilof Corridors as opposed to the narrow corridor. It also provided no factual support demonstrating how many northern bound fish will pass to the north as a result of the major restrictions imposed by the Board in closing Area 1 on one day, and Area 2 on two days;

43. Instead of producing the requisite factual support, KRSA's petition relied exclusively on the "potential" of the drift fleet to catch northern bound stocks. It neither explained what that potential is, nor provided any biological evidence demonstrating a "threat to a fishery resource;"

44. Instead of demonstrating a biological emergency, the petition alleged allocation concerns. The petition identified the fact that northern bound Susitna sockeye are listed as a stock of "yield" concern, having not consistently produced a harvestable surplus. It also explained that the regulations may impact sport fishery bag limits, again identifying an allocation issue, not a biological emergency;

45. The Board considered KRSA's emergency petition on June 30, 2011;

46. By a split vote of 4-3, the Board found that the KRSA's petition presented an emergency requiring immediate board action;

47. In making that determination, the Board received no additional facts from the Department, relying instead exclusively on the information presented in KRSA's petition;

48. The Board subsequently approved each of KRSA's three requests for a rule change by a 4-3 vote;

49. The Board issued a written finding, signed by the Commissioner of the Department, finding that its prior "errors" in issuing the original regulations created an emergency that threaten a fishery resource and that "emergency" action was necessary to protect the health, safety, and general welfare of the state. The written finding relied exclusively on the information provided by KRSA's Petition;

50. The Board's actions will harm UCIDA's members by severely restricting the geographical range in which they can fish during key fishing periods this season. These emergency regulations will result in a 30-50% reduction of the harvest yield that UCIDA's members would otherwise expect in their absence. This will result in a corresponding loss of income that cannot be recouped and will significantly impair UCIDA's members' ability to make a living through commercial fishing;

51. In addition to harming UCIDA's members, the Board's actions will also harm seafood processors by causing them to become "plugged." Plugging occurs when fishing occurs over a couple of key or peak days, instead of over a more orderly and progressive period. At the end of each fishing trip, boats deliver their catch to a processor. If all the fishing occurs in a very small, concentrated time, the deliveries to the processors overload their finite handling capacities. When this happens, the quality of fish becomes seriously degraded and both the processor and the fishermen economically suffer;

52. The Board's actions will also harm the fishery by causing too many fish to avoid harvest and thus "over-escape." When too many fish return to their natal streams without being harvested, they overcrowd the spawning and rearing grounds. This, in turn, results in reduced "returns" (harvest yield) in subsequent years;

COUNT 1

53. Plaintiffs incorporate by reference paragraphs 1-52;

54. The Defendants violated AS 44.62.250-270 and its own regulations codified at 5 AAC 96.625(f) by issuing emergency regulations without a valid emergency;

55. The Board's written finding fails to identify a sufficient factual basis to establish an emergency as required by AS 44.62.250. This failure alone entitles Plaintiffs to a declaratory judgment under AS 44.62.300(2); and

56. Not only did the Board fail to identify facts supporting an emergency in its written finding, such facts simply do not exist in the absence of a "threat [to] a resource" as required by 5 AAC 96.625(f). During the six regular fishing periods from July 9-31st, the drift fleet will be operating in approximately 1,510 fewer square miles than it did in 2010. Since the drift fleet's authorized harvest levels did not pose a threat to a fish resource in 2010, it will not pose a threat when restricted to reduced harvest levels this season. For these reason too, the Board's finding of emergency is arbitrary, capricious, and contrary to law;

PRAYER FOR RELIEF

Therefore the Plaintiffs respectfully request that this Court:

1. Enter a declaratory judgment that the Board and the Department violated the APA by issuing an emergency order without a factual basis for doing so, and that the emergency regulations are therefore invalid,
2. Enter an immediate injunction declaring that the Department may not enforce or rely on the emergency regulations;

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3. Declare that the Plaintiffs are prevailing parties in this action and award them their costs, including reasonable attorneys' fees pursuant to Alaska Rules of Civil Procedure 54(d), 79 and 82; and

4. Grant such other relief as this Court deems just and proper.

DATED: July 8, 2011

STOEL RIVES LLP

By: 

Melanie Baca Osborne

(Bar No. 9911068)

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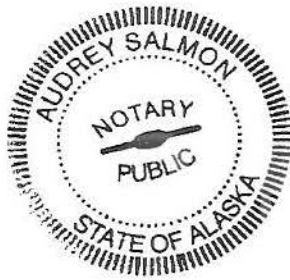
VERIFICATION

I, Roland Maw, having been duly sworn depose and state that I have read the foregoing Verified Complaint for Injunctive and Other Equitable Relief, and that the information stated therein is factual and true, and those factual matters which are stated upon information and belief are believed to be true.

Roland Maw

Roland Maw

Subscribed and sworn to or affirmed before me in Seldotna, Alaska on June 8, 2011.



Audrey Salmon

Clerk of Court, Notary Public, or other person authorized to administer oaths.

My commission expires 10-10-12

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CERTIFICATE OF SERVICE AND OF FONT


This certifies that on July 9th, 2011, a copy of this *PLAINTIFF'S VERIFIED COMPLAINT* was served via first class mail on:

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I further certify that this document was substantively produced in Times New Roman 13, in compliance with Alaska Appellate Rule 513.5(c)(1).



Melissa A. Kelly

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