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IN THE DISTRICT COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT KODIAK

STATE OF ALASKA,

Plaintiff,

vs.

STEVEN DALE SPAIN  
DOB: 05/16/1961  
APSIN ID: 6808287  
DMV NO.: 6808287 AK  
ATN: 118712349

Defendant.

Court No. 3KO-23-00193CR (Steven Dale Spain)

OPPOSITION TO MOTION TO DISMISS

I certify this document and its attachments do not contain the (1) name of a victim of a sexual offense listed in AS 12.61.140 or (2) residence or business address or telephone number of a victim of or witness to any offense unless it is an address identifying the place of a crime or an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

Comes now the State of Alaska in opposition to defendant motion to dismiss this case. Defendant first argues that this case should be dismissed because federal law preempts state law for trawl fishing in state waters. This argument is a misinterpretation of the law as the Magnuson Stevens Fisheries Conservation and Management Act (hereafter "MSA") explicitly states that the state has jurisdiction over state waters, and there is also no actual conflict between state and federal laws. Secondly, defendant has not proven that the state definition of pelagic trawl as codified under 5AA39.105(10)(C) is unconstitutionally vague. Here, a pelagic trawl net simply cannot have attached to it any protective devices, such as chafing gear, rollers, or bobbins, that make it suitable for fishing on the seabed. This language is not unclear or hard to understand and gives defendant adequate notice of what is prohibited gear when fishing in state waters. Thus, this court should deny defendant's Motion to Dismiss.

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I. FACTS

On December 20, 2022, Mark Stichert, the Regional Ground Fish Management Coordinator issued Emergency Order 4-GF-01-23 authorizing parallel ground fisheries in state waters (0-3 nautical miles from the coast) off Kodiak and other Alaska coastlines. This Emergency Order specifically stated that:

5 AAC 28.410. *Fishing seasons for Kodiak Area.* (a) In 2023, except as otherwise provided in this section, groundfish may be taken in waters of the Kodiak Area only during federal fishing seasons applicable to waters of the Exclusive Economic Zone (EEZ) adjacent to waters of the Kodiak Area. All federally allowed gear types, bycatch limits, and inseason adjustments as announced by the NOAA Fisheries and published in the Federal Register, applicable to fishing in the adjacent EEZ also apply to fishing in waters of the Kodiak Area, except federal sector allocations in the EEZ based on processing activity will not be recognized in state waters. Adjacent federal waters opened to a gear type, whether to both catcher-processor vessels and catcher vessels, or only one of those, will be considered open in state waters to both catcher-processor vessels and catcher vessels until closed to all vessels using the designated gear type. **This section does not supersede the nonpelagic trawl gear restrictions in 5 AAC 39.164.<sup>1</sup>**

In April 2023, NOAA Office of Law Enforcement (hereafter "NOAA OLE") in coordination with the United States Coast Guard and State of Alaska Wildlife Troopers began "Operation Bottom Drag". This operation aimed to inspect trawl gear in Alaska state and federal waters to ensure compliance with state and federal commercial fishing regulations. Under federal regulation which apply to federal waters only (those within the Exclusive Economic Zone (3-200 mile off the coast)) a pelagic trawl is defined as follows.

Pelagic trawl gear means a trawl that:

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<sup>1</sup> Defense Exhibit 3 at page 3 . (Emphasis Added).

- 1 (i) Has no discs, bobbins, or rollers;
- 2 (ii) Has no chafe protection gear attached to the footrope or fishing line;
- 3 (iii) Except for the small mesh allowed under paragraph (14)(ix) of this definition:
  - 4 (A) Has no mesh tied to the fishing line, headrope, and breast lines with less than 20
  - 5 inches (50.8 cm) between knots and has no stretched mesh size of less than 60
  - 6 inches (152.4 cm) aft from all points on the fishing line, headrope, and breast lines
  - 7 and extending passed the fishing circle for a distance equal to or greater than one
  - 8 half the vessel's LOA; or
  - 9 (B) Has no parallel lines spaced closer than 64 inches (162.6 cm) from all points on
  - 10 the fishing line, headrope, and breast lines and extending aft to a section of mesh,
  - 11 with no stretched mesh size of less than 60 inches (152.4 cm) extending aft for a
  - 12 distance equal to or greater than one-half the vessel's LOA;
  - 13 (iv) Has no stretched mesh size less than 15 inches (38.1 cm) aft of the mesh
  - 14 described in paragraph (14)(iii) of this definition for a distance equal to or greater than
  - 15 one-half the vessel's LOA;
  - 16 (v) Contains no configuration intended to reduce the stretched mesh sizes described
  - 17 in paragraphs (14)(iii) and (iv) of this definition;
  - 18 (vi) Has no flotation other than floats capable of providing up to 200 lb (90.7 kg) of
  - 19 buoyancy to accommodate the use of a net-sounder device;
  - 20 (vii) Has no more than one fishing line and one footrope for a total of no more than
  - 21 two weighted lines on the bottom of the trawl between the wing tip and the fishing
  - 22 circle;
  - 23 (viii) Has no metallic component except for connectors (e.g., hammerlocks or swivels)
  - 24 or a net-sounder device aft of the fishing circle and forward of any mesh greater than
  - 25 5.5 inches (14.0 cm) stretched measure;
  - 26 (ix) May have small mesh within 32 ft (9.8 m) of the center of the headrope as
  - 27 needed for attaching instrumentation (e.g., net-sounder device); and
  - (x) May have weights on the wing tips. See 50 CFR 679.2

Under state law and in state waters (0-3 miles off the Alaska coast) a pelagic trawl is defined as:

A pelagic trawl is a trawl where the net, or the trawl doors or other trawl-spreading device, do not operate in contact with the seabed, and which does not have attached to it any protective device, such as chafing gear, rollers, or bobbins, that would make it suitable for fishing in contact with the seabed; See 5AAC 39.105(10)(C).

During that operation NOAA OLE inspected numerous trawl nets and charged multiple violation under 50 CFR 679.2 for having non-pelagic nets in federal waters.

Between April 12, 2023 and April 16, 2023, Alaska State Troopers observed that the F/V Mar Pacifico 23131 operated by the defendant had fished a non-pelagic net in Sitkalidak Strait and within 3 miles of Alaska coast, thus within state waters. This area was closed to non-pelagic trawl gear fishing.

On April 16, 2023, Troopers and NOAA OLE agents inspected defendant's vessel and noted that it had an aft real with a non-pelagic net and a forward real which the defendant indicated was a "pelagic" net.<sup>2</sup> Upon inspection of the forward net troopers

<sup>2</sup> See Attachment 1.  
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1 noted that the net had “chain riblines.” Chain riblines are protective devices which are  
2 more durable than ropes and can have dual functionality to prevent backlash, strengthen  
3 the codend, and also make it more durable if contacted with the seabed. Under the plain  
4 language 50 CFR 600.10 and 50 CFR 679.2 these devices are prohibited. “Chain riblines”  
5 are also implicitly prohibited under 5AAC39 105(10)(C) because they make the net more  
6 suitable to fishing on the sea floor. Trooper also noted “chaffing gear” on the net which is  
7 explicitly prohibited under state regulation 5AAC 39. 105(10)(C). NOAA OLE agents  
8 further noted floats on the codend of the net in violation of the plain language of 50 CFR  
9 CFR 679.2(B)(vi).<sup>3</sup> These floats also have dual functionality as it allows the net to be  
10 fished on the bottom while keeping the codend off the seabed and free of sand and debris.  
11 Defendant however did not fish this gear within a federally restricted area. Thus, he was  
12 not cited by NOAA OLE agents and instead was charged under state regulations and state  
13 jurisdiction for having prohibited protective devices.

14 On June 11, 2023, North Pacific Fishery Management Council (hereafter  
15 “NPFMC”) requested that the National Marine Fisheries Service (hereafter “NMFS”) and  
16 OLE work with industry to identify revisions to the federal regulatory definition of  
17 pelagic gear. This was done largely in reaction to” Operation Bottom Drag” and  
18 reverberation that enforcement action caused throughout the trawl industry. One area of  
19 contention highlighted after “Operation Bottom Drag” was whether the federal definition  
20 regulated the codend of net. The framing of the NPFMC motion dated June 11, 2023  
21 makes clear that from the beginning of this regulatory process NPFMC assumed codend  
22 was not intended to be regulated and was pushing this outcome.<sup>4</sup> It is not clear from  
23 plain language of 50 CFR 679.2 and 50 CFR 600.1 that this was a correct assumption and  
24 certainly at this stage of the regulatory processes the federal definition of pelagic gear had  
25 not been legally scrutinized.<sup>5</sup>

26 <sup>3</sup> See Attachment 2.

27 <sup>4</sup> See Defendant’s Exhibit 7.

<sup>5</sup> Cf. 50 CFR 679.2 (vi), 50 CFR 679.2 (viii); Defendant’s Exhibit 8 at page 5. ( CFR 679.2(viii) prohibits metallic objects aft of opening and forward of mesh 5.5 inches. Trawl nets have tapered mesh with the aft most end (Codend)

1 On January 22, 2024, NPFMC followed up their motion with a discussion paper  
2 focused, in part, on whether they intended to regulate the codend of a pelagic trawl net. In  
3 this discussion paper they stated many times that it is of the opinion of current NPFMC  
4 members and NMFS regulators that they do not believe 50 CFR.679. 2 intended to  
5 regulate the codend. They based this opinion not on the plain language of the regulation  
6 under 50 CFR 676.2 and 50 CFR 600.1 but rather a 1994 analysis by NMFS concerning  
7 regulation codend mesh sizes. In that analysis NMFS stated “at the present time  
8 groundfish regulations governing the North Pacific the North Pacific trawl fisheries do  
9 not require minimum mesh size or specific design for codends.” Nevertheless the actual  
10 proposal cited by NMFS to justify its opinion had nothing to do with the definition of a  
11 pelagic fishing gear and was specific to whether they should regulate codend mesh sizes  
12 with alternative options ranging from 3.5 to 8 inches depending on the fishery.<sup>6</sup> Thus, it  
13 appear that NMFS reliance on this language in forming it’s opinion was simply a means  
14 to justify an end that NPFMC made clear from the onset that they wanted to hear.

15 On September 19, 2024, the NMFS issued Regulatory Impact Review where it  
16 analyzed a proposed changes to definition of pelagic trawl gear. Interestingly this  
17 proposal appears to concede that the current federal law, as it stands today regulates the  
18 codend of the net. This is highlighted by the fact that their “no action” alternative states  
19 that if “no action” is taken and the status quo remain the “codends attached to pelagic  
20 trawl nets would continue to be subject to the limitations specified in the definition of  
21 pelagic trawl gear.”<sup>7</sup> This appears to be a tacit admission that while the current regulators  
22 NMFS and council members NPFMC believe the codend should not be regulated, it in  
23 fact is under current federal law.

24 typically having smaller mesh sizes around 4.5 in inches. The regulators explicitly mention codend by description  
25 and exclude in some sections but not others).

26 <sup>6</sup> See Attachment 3.

27 <sup>7</sup> NMFS, Alaska Region, Regulatory Impact Review for Proposed Regulatory Amendments to modify the Pelagic  
Trawl Gear Definition, at page 12. Found at:

<https://meetings.npfmc.org/CommentReview/DownloadFile?p=1cbe7580-4c2b-4b21-81ed-3cacc74353f8.pdf&fileName=C6%20Pelagic%20Trawl%20Gear%20Definition%20Analysis.pdf>

1 As of October 17, 2024, undersigned knows of no federal legal ruling or litigation  
2 which has legally scrutinized NMFS or NPFMC opinion contained in their January  
3 Discussion Paper or Regulatory Impact Review. It is also not aware of any state  
4 proposals to change the state's separate definition of pelagic trawl under 5AAC 39.105  
5 (10)(C).

6  
7 **II. ARGUMENT**

8 **A) State Regulation of the Trawl Fishery within State Waters is not Pre-**  
9 **empted by Federal Law.**

10 Federal law can pre-empt state law in three different ways. First, if Congress  
11 "expressly" declares that state law be pre-empted. Second, if Congress intends the federal  
12 government to occupy a field exclusively. Third, if federal and state law conflict.<sup>8</sup>

13 Federal regulation may not preempt state regulation without "persuasive  
14 reasoning". The Alaska Supreme court has made clear that:

15 When considering pre-emption, "courts start with the assumption that the  
16 historic police powers of the States were not to be superseded by the federal  
17 Act unless that was the clear and manifest purpose of Congress".<sup>9</sup>

18 Like in *Kelve* defendant argues that Federal Law pre-empts state law because a  
19 conflict exists between the two laws. The Alaska Court of Appeals rejected this argument  
20 in *Kelve*. An actual conflict exists when both the federal and state laws are "physically  
21 impossible" or where "state law stands "as an obstacle to accomplishment and execution  
22 of the of the full purposes and objective of federal law."<sup>10</sup> In this case, neither scenario  
23 applies.

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26 <sup>8</sup> *Totemoff v. State*, 905 P.2d 954,958 (Alaska 1995).

27 <sup>9</sup> *State v. Kelve*, 9 P.3d 291 (Alaska App. 2000)(quoting *Totemoff v. State*, 905 P.2d 954,958 (Alaska 1995).

<sup>10</sup> *Id.* Citing *Qinn v. Alaska Ste Employees Ass'n*, 944 P2d 468,471 (Alaska 1997).

1 The mere fact that a state regulation is more restrictive than a federal definition  
2 does not mean they are in conflict. First it is not physically impossible to comply with  
3 both state and federal laws because they apply to different jurisdictions. Thus, the  
4 defendant could simply have not fished with the restricted gear in state waters.

5 Alternatively, defendant could have fished with a clean net, one without chaffing  
6 gear, metal rib lines, or prohibited floats. This would have allowed him to comply with  
7 both state and federal definitions and thus fish in either state or federal waters. None of  
8 the prohibited devices mentioned in state or federal regulation are required on a pelagic  
9 net. Rather, these gear types are prohibited to meet a common goal of allowing the  
10 harvest of pelagic (mid water) fish while protecting other sensitive ground fish species  
11 and habitat.

12 The defendant does not address these truths in his brief but rather blanketly states  
13 that there is a conflict without any persuasive reasoning that there is in fact in conflict as  
14 proscribed by the law. Lacking persuasive reasoning to suggest otherwise this court  
15 should deny defense motion to dismiss due to Federal Pre-emption.

16 **B) The definition of “pelagic trawl” as defined in 5AAC 39.105(10)(C)) is not  
17 unconstitutionally vague.**

18 i. Burden of Proof

19 In Alaska, the defendant has the burden to prove that a regulation is void for  
20 vagueness.<sup>11</sup>

21 ii. Vagueness

22 The Alaska Supreme Court discussed the vagueness doctrine in *Marks v. City of*  
23 *Anchorage*.<sup>12</sup> This doctrine is related to but distinct from the doctrine of overbreadth.<sup>13</sup>  
24 The overbreadth doctrine evolved to give “breathing room to specific first amendment

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26 <sup>11</sup> *State v. Martushev*, 846 P.2d 144,149 (Alaska App.1993); See also *State v. Lawler*, 919 P.2d 1364, 1367 (Alaska  
27 App. 1996) and *Chaney vs. State* 478 P. 3d 222, 228-229 (Alaska App. 2020).

<sup>12</sup> 500 P.2d 644, 646 (Alaska 1972).

<sup>13</sup> *Id.*

1 freedoms[.]”<sup>14</sup> By contrast, the void-for-vagueness doctrine “comes into play when the  
2 statutory language is so indefinite that the perimeters of the prohibited zone of conduct  
3 are unclear; a statute may be unconstitutionally vague even though no activities  
4 specifically protected by the Constitution are outlawed.”<sup>15</sup> A truly vague statute violates  
5 due process,<sup>16</sup> but vagueness “is not a principle designed to convert into a constitutional  
6 dilemma the practical difficulties in drawing criminal statutes both general enough to take  
7 into account a variety of human conduct and sufficiently specific to provide fair warning  
8 that certain kinds of conduct are prohibited.”<sup>17</sup>

9 Alaskan courts consider two factors to determine whether a statute or regulation is  
10 unconstitutionally vague in the absence of a First Amendment challenge.<sup>18</sup> First, they  
11 look to whether the statute gives adequate notice of the conduct that is prohibited.<sup>19</sup>  
12 Second, they consider whether the statute’s language is “so imprecise that it encourages  
13 arbitrary enforcement by allowing prosecuting attorneys too much discretion in  
14 determining the scope of the law.”<sup>20</sup> To be unconstitutionally vague, a statute must be  
15 impermissibly vague in all of its applications.<sup>21</sup> “In other words, the possibility of  
16 difficult or borderline cases will not invalidate a statute where there is a hard core of  
17 cases to which the ordinary person would doubtlessly know the statute unquestionably  
18 applies.”<sup>22</sup> This is a high bar and the question becomes whether the statute’s meaning “is  
19 unresolvably confused or ambiguous after it has been subject to legal analysis [through]

22 <sup>14</sup> *Id.*

23 <sup>15</sup> *Id.*

24 <sup>16</sup> *Id.*

25 <sup>17</sup> *Turney v. State*, 936 P.2d 533, 542 (Alaska 1997) (quoting *Colten v. Commonwealth of Kentucky*, 407 U.S. 104,  
26 110, 92 S.Ct. 1953, 1957, 32 L.Ed.2d 584 (1972)).

27 <sup>18</sup> *Leu v. State*, 251 P.3d 363, 367 (Alaska App. 2011) (citing *Summers v. Anchorage*, 589 P.2d 863, 866–67 (Alaska  
1979)).

<sup>19</sup> *Summers*, 589 P.2d at 866–67; *Leu*, 251 P.3d at 367.

<sup>20</sup> *Summers*, 589 P.2d at 867; *Leu*, 251 P.3d at 367.

<sup>21</sup> *Leu*, 251 P.3d at 367 (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–95,  
102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982); *Bachlet v. State*, 941 P.2d 200, 204 (Alaska App.1997)).

<sup>22</sup> *Id.* (quoting *Stock v. State*, 526 P.2d 3, 9 (Alaska 1974)) (internal quotation marks omitted).



1 study of the statute's wording, examination of its legislative history and reference to other  
2 relevant statutes and case law.”<sup>23</sup>

3 Nevertheless, “a statute which may be criticized because it fails to give adequate  
4 notice of every type of conduct which is prohibited may still be sustained (1) if the  
5 offense charged falls squarely within its prohibitions and (2) if construction may be placed  
6 upon the statute so that its reach may be understood in the future.”<sup>24</sup>

7  
8 *a. The defendants had adequate notice that their conduct was prohibited  
9 under the 5AAC 28.410, 5AAC 39.164, 5AAC 39.105(10)(c).*

10 The Emergency Order in this case which opened a Ground Fishing Seasons in the  
11 Kodiak area was clear that all federal regulation would apply except that the order did not  
12 “superseded nonpelagic trawl gear restrictions in 5 AAC 39.164”. Under 5AAC 39.164  
13 the regulation is clear that non-pelagic trawl gear cannot be operated in the Kodiak  
14 Ground Fish Area. State regulation 5AAC 39.105 clearly defines a pelagic trawl as:

15 A pelagic trawl is a trawl where the net, or the trawl doors or other trawl-spreading  
16 device, do not operate in contact with the seabed, and which does not have attached  
17 to it any protective device, such as chafing gear, rollers, or bobbins, that would make  
18 it suitable for fishing in contact with the seabed; See 5AAC 39.105(10)(C).

19 Thus, the defendant was clearly put on notice that state not federal law would  
20 apply as to the gear restrictions when fishing in state waters.

21 The question then becomes is the state law unconstitutionally vague. So that and  
22 ordinary person would not have notice of what is prohibited.

23 <sup>23</sup> *Kinmon v. State*, 451 P.3d 392,397 (Alaska App. 2019)

24 <sup>24</sup> *Summers v. Anchorage*, 589 P.2d 863, 867 (Alaska 1979); *See Also Haggblom v. City of Dillingham*, 191 P.3d  
25 991, 997 (Alaska 2008)

1 When interpreting a statute, the court should give the language “a reasonable or  
2 common-sense construction, consonant with the objectives of the legislature” (i.e. strict  
3 construction).<sup>25</sup> In doing so, the court may rely on common rules of grammar.<sup>26</sup>

4 The word “or” normally signals the disjunctive. Meaning, at least one of the things  
5 is both necessary and sufficient. The word “other” denotes “additional or extra,” or  
6 “alternative,” or “different type of.” The word “and” means in addition to.

7 Here the words “net” “trawl doors” and “other trawl spreading device” are  
8 separate by the word “or”. This use of the word “or” makes clear that regulator  
9 understood that pelagic trawl consisted of multiple parts each of which they did not want  
10 in contact with the seabed. The use of the word “and” then signals that the regulators  
11 additionally did not want the “net” or other listed parts of a pelagic trawl to have  
12 “attached to it any protective devices, such as chaffing gear, rollers, or bobbin, that would  
13 make it suitable for fishing in contact with the seabed.”

14 Additionally relevant to this interpretation is the doctrine of *ejusdem generis*:  
15 “when a general word follows a list of specific persons or things, the general word will be  
16 construed to apply only to persons or things of the same type as those specifically listed.”  
17 Thus, for example, in *Northern Alaska Environmental Center*, the language “lease, or  
18 other disposal” manifested a legislative intent that “‘leases’ be included in its definition  
19 of a ‘disposal.’”<sup>27</sup> Here the specific term “chaffing gear” thus should be interpreted to be  
20 included in the general term of “protective device... that would make it suitable for  
21 fishing in contact with the seabed. Thus “chaffing gear” on any portion of the net is  
22 simply prohibited under state commercial fishing laws in the Kodiak area.

23 Defendant spends much time arguing that the Federal Regulation were never  
24 intended to regulate the codend of the net but this argument is misplaced as defendants  
25 reasoning rest on inapplicable federal law.

26 <sup>25</sup> 3 C. Sands, *Sutherland Statutory Construction* s 59.06, at 18-19 (4th Ed. 1974), quoted in *Belarde v. Municipality*  
27 *of Anchorage*, 634 P.2d 567, 568 (Alaska App. 1981).” *Siggelkow v. State*, 648 P.2d 611, 615 (Alaska App. 1982).

<sup>26</sup> *State v. Fyfe*, 370 P.3d 1092, 1099 (Alaska, 2016).

<sup>27</sup> *N. Alaska Env't Ctr. v. State, Dep't of Nat. Res.*, 2 P.3d 629, 636 (Alaska 2000).

1 Congress created the MSA in 1976 to assert federal authority over “200 miles  
2 from the coastline, and regulated foreign fishing in that area.”<sup>28</sup> However, the MSA also  
3 delineated where the new federal jurisdiction ended and the states retained jurisdiction  
4 began: “[s]tates retained jurisdiction over the first three miles from the coast, *id.* § 306(a)  
5 (codified as amended 16 U.S.C. § 1856), and the federal government had jurisdiction  
6 over the next 197 miles, originally called the fishery conservation zone (“FCZ”) and later  
7 named the exclusive economic zone.”<sup>29</sup> The MSA further defined the “exclusive  
8 economic zone” as “the zone established by Proclamation Numbered 5030, dated March  
9 10, 1983. For purposes of applying this chapter, *the inner boundary of that zone is a line  
10 coterminous with the seaward boundary of each of the coastal States.*”<sup>30</sup>

11 The MSA took pains to clarify that nothing in the law diminished State authority  
12 over State waters. Section 306 is titled “State Jurisdiction” and Section 306(a) reads in  
13 relevant part as follows:

14 **State Jurisdiction**

15 (a) In general

16 (1) Except as provided in subsection (b), nothing in this chapter shall  
17 be construed as extending or diminishing the jurisdiction or authority of  
18 any State within its boundaries.

19 (2) For the purposes of this chapter, except as provided in subsection  
20 (b), the jurisdiction and authority of a State shall extend--

21 (A) to any pocket of waters that is adjacent to the State and  
22 totally enclosed by lines delimiting the territorial sea of the United  
23 States pursuant to the Geneva Convention on the Territorial Sea and  
24 Contiguous Zone or any successor convention to which the United  
25 States is a party;...<sup>31</sup>

26 <sup>28</sup> *UCIDA*, 837 F.3d at 1058. (internal citations omitted).

27 <sup>29</sup> *Id.* (some internal citations omitted).

<sup>30</sup> 16 U.S.C. § 1802(11) (emphasis added).

<sup>31</sup> 16 U.S.C. § 1856.

1  
2 Thus, the MSA explicitly states that it is state law not federal law that applies in  
3 this case as the state retains “jurisdiction or authority” over state waters.

4 Nevertheless, defendant spent no time in his brief discussing the state definition of  
5 5AAC 39.105(10)(C) or the original federal definition of pelagic trawl for which he states  
6 5AAC 39.105(10)(C) was copied.<sup>32</sup> Instead his argument rest solely on NPFMC’s  
7 January 22, 2023, discussion paper analyzing a federal pelagic trawl definition  
8 promulgated in 1993. This current federal definition moved away from specific protective  
9 devices and ground contact prohibitions to a definition which allowed for ground contact  
10 and regulated mesh size to reduce bycatch. Thus, comparing the current state definition  
11 under 5AAC 39.105(10)(C) to the 1993 federal definition is like comparing apples to  
12 oranges as they take completely different approaches to regulating pelagic trawl gear.

13 Regardless even minimal legal analysis of 50 CRF 679.2 makes clear that  
14 regulators in 1993 knew how to regulate the codend of the net by referencing its smaller  
15 mesh size, which it did under that regulation.<sup>33</sup> NMFS original intent to regulate the  
16 codend under 50 CFR 679.2 is further highlighted by NMFS September 19, 2024  
17 Regulatory Impact Review in which they admit that no change in the current pelagic  
18 trawl gear definition would result in the current definition continuing to apply to the  
19 codend of the net. Thus, to the extent defendant analysis of 50 CFR 679.2 is applicable,  
20 he still falls well short of meeting his high burden to prove that state definition under  
21 5AAC 39.105(10)(C) is unconstitutionally vague in all its applications.

22 Seafloor impact from pelagic trawl gear have long been a concern of fisheries  
23 managers and the effects that pelagic trawl gear have on sensitive ground fish habitat is  
24

25 <sup>32</sup> See defendant’s Motion to Dismiss at 12.

26 <sup>33</sup> Cf. 50 CFR 679.2 (vi), 50 CFR 679.2 (viii); Defendant’s Exhibit 8 at page 5. ( CFR 679.2(viii) prohibits metallic  
27 objects aft of opening and forward of mesh 5.5 inches. Trawl nets have tapered mesh with the aft most end (Codend)  
typically having smaller mesh sizes around 4.5 in inches. The regulators explicitly mention codend by description  
and exclude in some sections but not others).

1 still largely unknown.<sup>34</sup> What we do know is that current federal definition allows for  
2 seabed contact and trawl fisherman operating under that definition do in fact fish those  
3 nets in contact with the seabed.<sup>35</sup> The state's current definition has not changed in  
4 almost 40 years and it explicitly prohibits seabed contact and devices placed on pelagic  
5 trawls nets that make them better suited to fish the seabed. This is a fundamental  
6 difference between the federal and state regulations that this court should not overlook. It  
7 is the defendant's burden to prove that this lack of regulatory change was something  
8 other than intentional and that current state law does not give him adequate notice of  
9 what is prohibited. Mere confusion between the federal and state law is not enough.<sup>36</sup> If  
10 defendant cannot meet this high burden this court should uphold the state's definition of  
11 pelagic trawl as proscribe under 5AAC 39.105(10)(C) and deny defendant's Motion to  
12 Dismiss.

### 13 III. CONCLUSION

14 Since federal law does not pre-empt state regulation and the defendant fails to  
15 prove that 5AAC 39.105(10)(C) is unconstitutionally vague this court should deny his  
16 Motion to Dismiss.

17  
18 Dated at Anchorage, Alaska, this 21<sup>nd</sup> day of October, 2024.

19  
20 TREG TAYLOR  
21 ATTORNEY GENERAL  
22

23  
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25  
26 <sup>34</sup> See Defendant's Exhibit 8 pages 12-13.

27 <sup>35</sup> *Id.*

<sup>36</sup> See *Haggen v. State*, 829 P.2d 842 (Alaska App. 1992)

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By:



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Ronald Dupuis  
Assistant Attorney General  
Alaska Bar No. 1011076

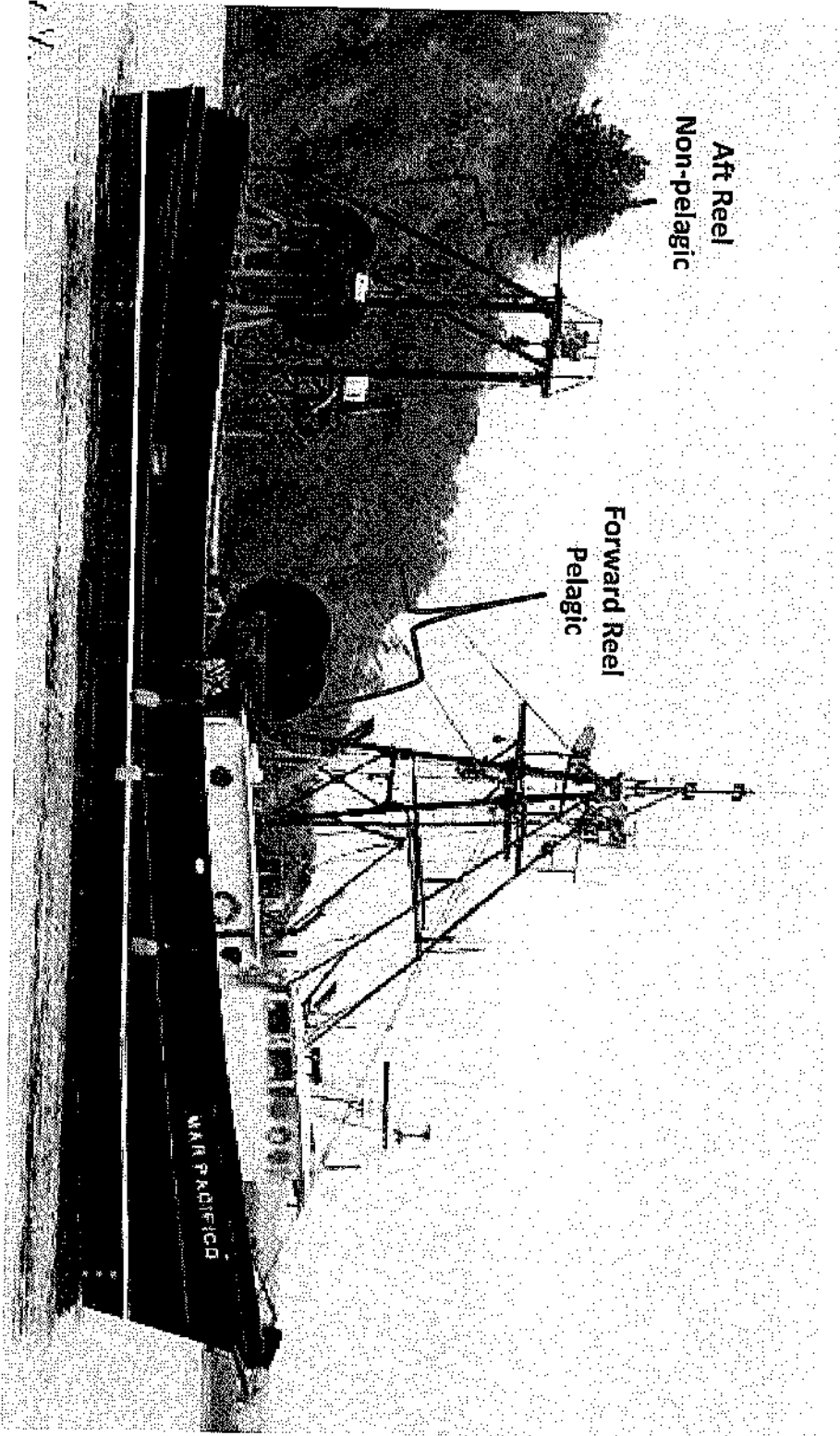
I certify that a copy of this pleading was mailed/emailed/hand-delivered on October 22, 2024, to:  
Brent R. Cole  
The Law Office of Brent R. Cole, PC 821 N Street, Suite 208  
Anchorage, AK 99501

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NOAA OFFICE OF LAW ENFORCEMENT



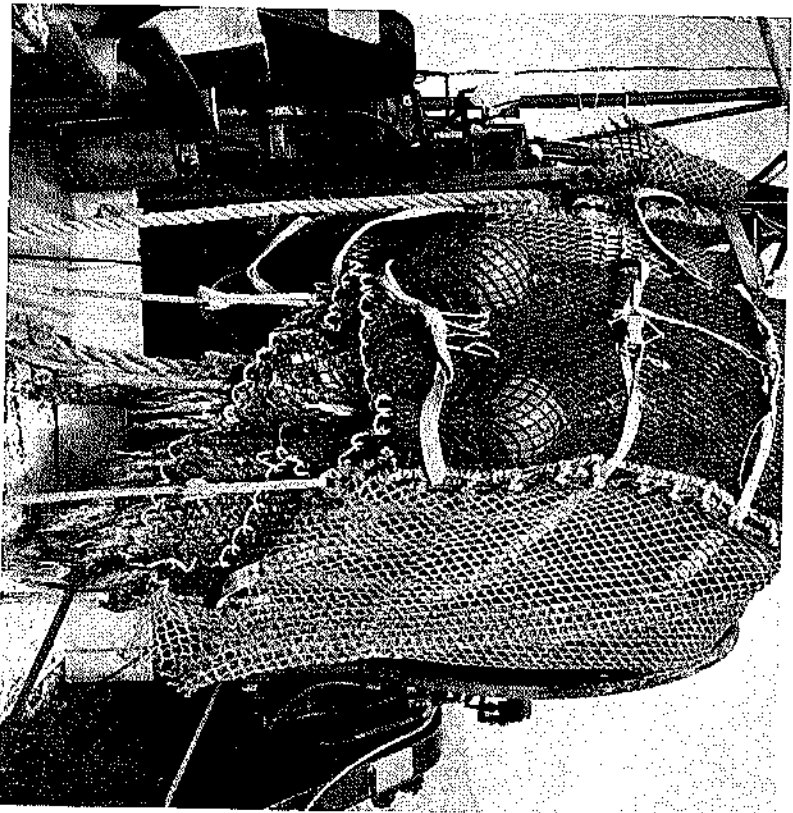
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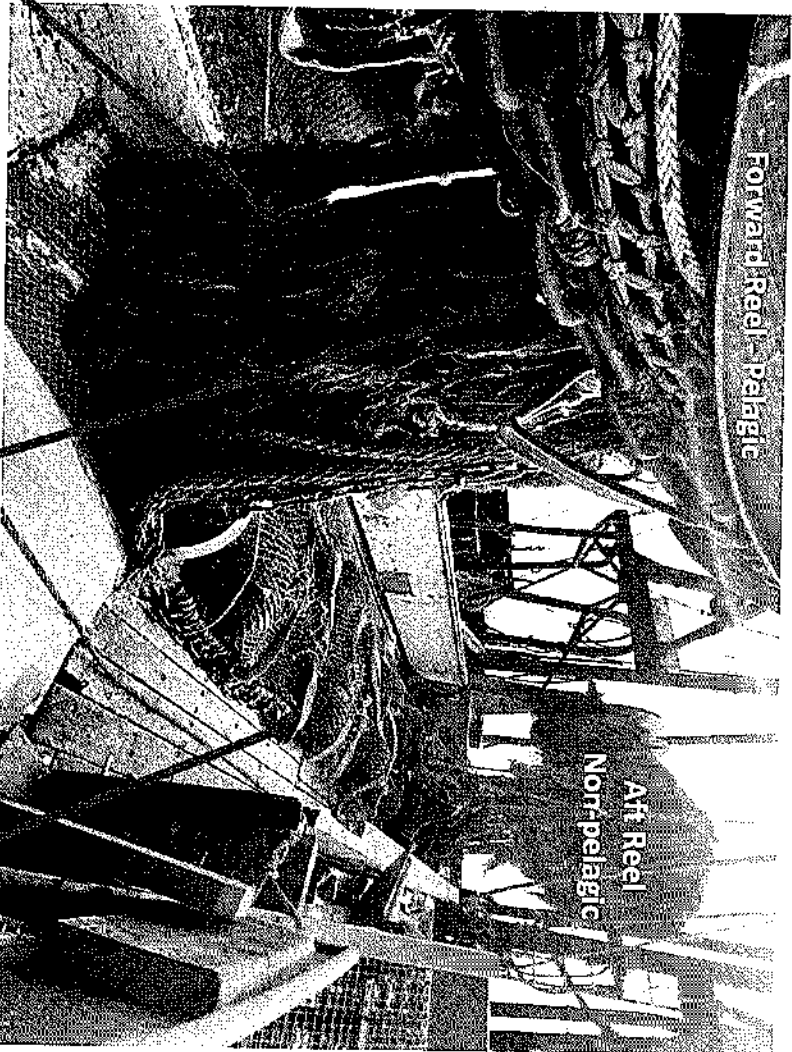
Attachment 1



Forward Reel - Pelagic (Midwater) Gear



Chafing Gear



Chain Riblines

Floats



MEMORANDUM

TO: Council, SSC and AP Members

FROM: Clarence G. Pautzke  
Executive Director

DATE: September 20, 1994

SUBJECT: Groundfish Regulatory Amendments

ESTIMATED TIME  
4 HOURS

**ACTION REQUIRED**

- (a) Review Analysis of Total Weight Measurement - final action.
- (b) Review Analysis of Mesh Regulations and Separate Rock Sole VIP Rates.

**BACKGROUND**

Total Weight Measurement

In June, the Council reviewed a draft analysis for a proposed regulatory amendment to improve total catch weight estimates in the groundfish fisheries. Based on Council recommendations, the analysis was revised to include other approved procedures for determining total weight, and released for public review on September 6, 1994. Five alternatives were analyzed and briefly these are:

- Alternative 1: status quo.
- Alternative 2: standardize and improve current methods of total catch estimation for trawl catcher/processors and mothership processor vessels (by using certified bins).
- Alternative 3: the total weight of all catch harvested or processed by processors with 100 percent observer coverage must be assessed (using scales or other approved procedures) prior to discard or processing.
- Alternative 4: the total weight of all catch harvested or processed by all processors must be assessed (using scales or other approved procedures) prior to discard or processing.
- Alternative 5: the total weight of all catch in the groundfish fisheries must be assessed (using scales or other approved procedures) prior to discard or processing.

An executive summary for the analysis is attached as agenda item D-4(a)(1). If the Council takes final action at this meeting, regulations could be published in early 1995. Because additional time may be necessary for all vessels to comply (depending on which alternative is recommended), the Council may recommend to NMFS that implementation of regulations be delayed, perhaps until the 1996 fishing year or some other date.

## Mesh Regulations and Rock Sole VIP Rates

In June 1994, based on recommendations by the AP and public comment, the Council adopted for analysis minimum mesh sizes for top quarter panels of trawl codends for the Pacific cod, walleye pollock, and rock sole fisheries. Specifically, the Council recommended analysis of codend mesh regulations for the BSAI rock sole fishery (6" diamond), BSAI cod fishery (8" diamond), GOA cod fishery (6" diamond), and GOA and BSAI pollock fisheries (4" square). In order to provide flexibility during the semi-annual setting of VIP guidelines, the Council also initiated analysis of a regulatory amendment to separate rock sole from the other flatfish category, as part of this package. The Council also formed an ad-hoc committee to fine-tune codend mesh recommendations. The committee met on June 28, 1994 and recommended additional codend configurations to be analyzed (Item D-4(b)(1)). A draft EA/RIR analysis was prepared and reviewed by the groundfish plan teams in August. A revised draft was released for Council and public review on September 7, 1994. Three alternatives were examined, and briefly these were:

Alternative 1. Status quo. Codends used in North Pacific trawl fisheries would not require minimum mesh size or configuration.

Alternative 2. Under this alternative, regulations would require codends to have a single layer top panel with the following minimum mesh sizes in the trawl fisheries specified:

- BSAI rock sole and GOA Pacific cod, 6 inch minimum diamond mesh;
- BSAI Pacific cod, 8 inch diamond mesh;
- GOA and BSAI pollock, 4 inch square mesh;

To accommodate changes in bycatch rates that would likely be caused by a mesh regulation of the BSAI rock sole fishery, rock sole would be separated out from the other trawl category in the Vessel Incentive Program and assigned a maximum allowable rate.

**Option:** Set mesh regulations for only the rock sole, Pacific cod, or pollock fishery.

Alternative 3. Similar to Alternative 2, except mesh would be square configuration, and of slightly smaller size. Under this alternative, regulations would require codends to have a single layer top panel with the following minimum mesh sizes in the trawl fisheries specified:

- BSAI rock sole and BSAI and GOA Pacific cod, 6 inch square mesh;
- GOA and BSAI pollock, 3.25 inch square mesh;

To accommodate changes in bycatch rates that would likely be caused by a mesh regulation of the BSAI rock sole fishery, rock sole would be separated out from the other trawl category in the Vessel Incentive Program and assigned a maximum allowable rate.

**Option 1:** Set mesh regulations for only the rock sole, Pacific cod, or pollock fishery.

**Option 2:** Entire codends, rather than just the top panel, could be made of single layer diamond mesh with the same BK size as specified above.

An executive summary for the analysis is attached as agenda item D-4(b)(2). If the Council takes final action at this meeting, regulations may be published in early 1995.

After the draft EA/RIR was released for review, NMFS staff and the Fisheries Research Institute (FRI) jointly revised the analysis of potential changes in yield and discarding. Revisions were made using empirical data from recent mesh selectivity studies for BSAI pollock, and a different theoretical model based on morphology. The analysis suggests that the proposed alternatives may result in less retention of juvenile pollock (hence, lower discard) than reported in the draft EA/RIR. Dr. Ellen Pikitch (FRI) has requested an opportunity to report on these results.