



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

National Marine Fisheries Service

P.O. Box 21668

Juneau, Alaska 99802-1668

January 16, 2003

MEMORANDUM FOR: William T. Hogarth
Assistant Administrator For Fisheries

FROM: *For* James W. Balsiger *Arnold J. Berg*
Administrator, Alaska Region

SUBJECT: Agency Response To The Steller Sea Lion 2001 Biological Opinion
Remand Order – DECISION MEMORANDUM

Judge Zilly has remanded to NMFS the Steller Sea Lion 2001 Biological Opinion (Opinion) for further action in compliance with his December 18, 2002, Order. The Judge is, however, allowing the Opinion to remain in effect until June 30, 2003. Although Judge Zilly has not ordered NMFS to respond to the remand by June 30, 2003, NMFS is exposed to additional litigation after this date.

I request that you concur with my recommendation that we prepare supplemental information to the 2001 Opinion that addresses only the issues in the Opinion that were identified by Judge Zilly in his Order. I have been advised by NOAA General Counsel that this approach is both defensible and represents an appropriate level of response to the Court Order. Further, this approach results in less litigation exposure because it leaves undisturbed those parts of the Opinion that were not challenged or were unsuccessfully challenged in the litigation. The supplement would be based on the best scientific and commercial data including the results now available of recent studies on the issues addressed in the Order and would allow for coordination to occur between NMFS and the North Pacific Fishery Management Council in the development of the Court Order response.

BACKGROUND

On December 18, 2002, United States District Court Judge Zilly granted plaintiff's motion for summary judgment (*Greenpeace v. NMFS*, No. C98-492Z). Judge Zilly found that the 2001 Steller sea lion Opinion was arbitrary and capricious and remanded it to NMFS for further action. Judge Zilly identified two elements leading to that determination:

First, he found that NMFS's determination that the near shore zone of critical habitat (3 nm to 10 nm) is 3 times more important to the foraging needs of Steller sea lions than the offshore critical habitat (10 nm to 20 nm) was not supported by the filtered telemetry data cited by NMFS and stating that "the relevant filtered data shows that Steller sea lions use the 3-10 nm and the 10-20 nm zones almost equally";

Second, Judge Zilly found that NMFS failed to adequately analyze the likely effects of fishing under the Steller sea lion protection measures on Steller sea lions, their prey, and their critical habitat. In this part of the Order, Judge Zilly concluded that even if NMFS had correctly



evaluated the differing importance of the zones of critical habitat, the 2001 Opinion failed to evaluate "the differing effect of the current and proposed level of fishing on those zones of critical habitat and Steller sea lions. Without an analysis of how fishing within critical habitat impacts the differing zones of importance, or an explanation in the record of why such an analysis was not required, Judge Zilly found that NMFS failed to articulate a rational connection between the facts found and the choice made for this item in the biological opinion.

Consequently, the completed remand must address the following issues noted on pages 27 and 30-32 of the December 18 Order:

1. The factual basis in the telemetry data (or in other new data) for the relative weighting of importance of critical habitat zones;
2. Comparison of the 1999 "jeopardy" fishery pattern analyzed in the FMP Biological Opinion and the fishery pattern under the revised Steller sea lion protection measures.

This comparison should (1) address the levels of fishery removals in the zones of critical habitat and in critical habitat overall, and the effect of these removals on seasonal prey availability to Steller sea lions of pollock, Pacific cod, and Atka Mackerel in critical habitat; (2) address the so-called "edge effect" of fishing in the offshore critical habitat (10 nm to 20 nm zone) on the nearshore critical habitat and the sea lions that forage there; and (3) explain why the revised Steller sea lion protection measures relieve the impacts that caused jeopardy and adverse modification of critical habitat.

We recommend supplementing the 2001 Opinion with information that addresses these concerns identified by Judge Zilly in his December 18 Order. The information used would be based on the best scientific and commercial data including the results of studies now available that are responsive to the concerns identified in the Order.

Summary: I recommend that you concur with this approach.

JD Hagan
I concur with your recommendation

1-30-03
Date

I do not concur with your recommendation

Date