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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

STATE OF ALASKA,)
)
Plaintiff,)
)
v.)
)
)
JANE LUBCHENCO, in her official capacity)
as Administrator, National Oceanic and)
Atmospheric Administration; NATIONAL)
MARINE FISHERIES SERVICE; JAMES W.)
BALSIGER, in his official capacity as NMFS)
Alaska Region Administrator; and GARY)
LOCKE, in his official capacity as the United)
States Secretary of Commerce,)
)
Defendants.)

CIVIL ACTION NO.:

**COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTIVE
RELIEF, AND PETITION FOR
REVIEW (42 U.S.C. § 4332; 16 U.S.C.
§§ 1535, 1536; 16 U.S.C. §§ 1801-1891d;
5 U.S.C. §§ 601-612; 5 U.S.C. §§ 553,
701-706)**

INTRODUCTION

1. Plaintiff State of Alaska (“Alaska” or the “State”) brings this action against Defendants Jane Lubchenco, Administrator of the National Oceanic and Atmospheric Administration (“NOAA”); the National Marine Fisheries Service (“NMFS”); James W. Balsiger, NMFS Alaska Regional Administrator; and Gary Locke, United States Secretary of Commerce (collectively, “the Service” or “Defendants”), to challenge (1) the final Biological Opinion (“BioOp”), including the Reasonable and Prudent Alternative (“RPA”), prepared under the Endangered Species Act (“ESA”), which contains NMFS’ evaluation of the effects of the Bering Sea and Aleutian Islands (“BSAI”) and Gulf of Alaska (“GOA”) groundfish fisheries management activities on the ESA-listed Steller sea lion and its designated critical habitat; (2) the accompanying final Environmental Assessment and Regulatory Impact Review (“EA/RIR”) and Finding of No Significant Impact (“FONSI”) prepared under the National Environmental Policy Act (“NEPA”), which addresses the environmental, social, and economic effects of alternative Steller sea lion protection measures for the Aleutian Island Atka mackerel and Pacific cod fisheries identified in the BioOp; and (3) the Interim Final Rule which implements the RPA in the final BioOp.

2. Alaska brings this action to address the Service’s failure, in formulating and approving the BioOp, the RPA, the EA/RIR and FONSI, and the Interim Final Rule, to comply with its legal obligations under: (1) NEPA, 42 U.S.C. § 4332; (2) ESA Section 7, 16 U.S.C. § 1536; (3) ESA Section 6, 16 U.S.C. § 1535(a); (4) the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”), 16 U.S.C. §§ 1801-1891d; (5) the Regulatory Flexibility Act (“RFA”), 5 U.S.C. §§ 601-612; and (6) the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 553, 701-706.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. §§ 2201-2202 (declaratory judgment); 16 U.S.C. §§ 1855(f) & 1861(d) (MSA); and 5 U.S.C. §§ 702, 706 (APA).

4. The federal government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 702 and 16 U.S.C. § 1855(f).

5. Alaska has exhausted all administrative remedies.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because this action is brought against officers of agencies of the United States in their official capacities and against the Service. Plaintiff State of Alaska is located within this District, and a substantial part of the events or omissions giving rise to the claims made here occurred in this District. The NMFS Alaska Region, Juneau Office, was the lead agency for the EA/RIR and the consulting agency for the BioOp. Dr. James W. Balsiger, Administrator of the NMFS Alaska Region, is the signatory official for the BioOp and the listed responsible official for the EA/RIR.

PARTIES

Plaintiff

7. Alaska is a sovereign state with an interest in managing, conserving and regulating fish, wildlife, and other natural resources within its jurisdiction, including state-managed Atka mackerel and Pacific cod fisheries, and the Steller sea lion and its habitat. Alaska Const. Art. VIII, §§ 1, 2, 4; Alaska Stat. § 16.05.020. As a steward of its fish and wildlife resources, Alaska directly manages fish, wildlife, and habitat through its Departments of Fish and Game, Natural Resources, and Environmental Conservation.

8. Alaska's legal title and regulatory interests in its natural resources extend beyond its land area to the State's offshore submerged lands and waters. *See* 43 U.S.C. §§ 1301, 1311; *Alaska v. United States*, 545 U.S. 75, 79 (2005) (stating that Alaska is generally entitled to regulate submerged lands beneath territorial waters extending three nautical miles seaward of its coastline). Thus, Alaska's sovereign interests in its fish and wildlife resources and its management of those resources extends to coastal areas, including much of the range of the western distinct population segment ("DPS") of the Steller sea lion and its designated critical habitat. Figures showing the worldwide distribution of the Steller sea lion and the location of ESA-designated critical habitat for the western DPS are reproduced in attached Exhibit 1.

9. Alaska's fisheries regulation and management would be significantly and immediately impacted by the Service's decisions to close and restrict federal fisheries in the western and central Aleutian Islands. Alaska has an interest in both Steller sea lions and in managing state fisheries to provide for both conservation of Steller sea lions and the sustained use of fishery resources for the maximum benefit of the people of Alaska.

10. Alaska's wildlife conservation and fisheries management programs, the State's own natural resource actions, and the State's economic, revenue, and community development interests are also adversely affected by the Service's decisions challenged here.

11. Alaska participated to the extent allowed of other members of the public in the proceedings leading to the Service's decisions challenged here, including submitting through its Department of Fish and Game detailed comments on the August 2, 2010 draft NMFS BioOp and accompanying draft EA/RIR, and also through Alaska's participation on the North Pacific Fishery Management Council ("NPFMC") in reviewing and commenting on these draft documents.

12. Alaska has standing to bring this action, and the challenged agency decisions are final and ripe for review by this Court.

Defendants

13. Defendant Gary Locke is the Secretary of the United States Department of Commerce (“Commerce”) and is being sued in his official capacity. The Secretary is the official ultimately responsible for the approval of the BioOp, the RPA, the EA/RIR and FONSI, and the Interim Final Rule and for Commerce’s compliance with federal law, including the ESA, NEPA, MSA, RFA, and APA.

14. Defendant Jane Lubchenco is the Administrator of the NOAA and is being sued in her official capacity. The Secretary of Commerce has delegated responsibility to the Administrator and NOAA to ensure compliance with the ESA, NEPA, MSA, RFA and APA, which in turn has sub-delegated this responsibility to NMFS.

15. Defendant NMFS is a federal agency within Commerce and NOAA that has been delegated the responsibility for implementing the ESA, NEPA, MSA, RFA and APA, and is the federal agency that prepared and approved the BioOp, RPA, the EA/RIR and FONSI, and promulgated the Interim Final Rule.

16. Defendant James W. Balsiger is the Administrator of the NMFS Alaska Region and is being sued in his official capacity. Dr. Balsiger is the signatory official for the BioOp and the listed responsible official for the EA/RIR.

LEGAL BACKGROUND

A. National Environmental Protection Act

17. NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a).

18. “The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” *Id.* § 1500.1(c). NEPA’s twin goals are to: (1) foster informed decisionmaking by “ensur[ing] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts,” and (2) promote informed public participation by requiring full disclosure of and opportunities for the public to participate in governmental decisions affecting environmental quality. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989).

19. NEPA requires that a federal agency proposing a major federal action with significant environmental effects prepare a detailed statement, which must include the environmental impacts of and alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(i), (iii). This detailed written statement is an Environmental Impact Statement (“EIS”). 40 C.F.R. § 1508.11.

20. To determine whether an EIS is necessary, an agency may first prepare an Environmental Assessment (“EA”). *See id.* §§ 1501.4(c), 1508.9. An EA is a “concise public document . . . that serves to . . . [b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact.” *Id.* § 1508.9. An EA must contain sufficient information and analysis to determine whether the proposed action is likely to have significant impacts, thus requiring preparation of an EIS. *Id.*

21. If an agency concludes, based on the EA, that an EIS is not required, it must prepare a finding of no significant impact (“FONSI”), which explains the agency’s reasons for its decision. *Id.* §§ 1501.4(e), 1508.13.

22. The analysis of alternatives to a proposed agency action is “the heart of the NEPA” document, and agencies should “[r]igorously explore and objectively evaluate all reasonable alternatives.” *Id.* § 1502.14(a). The analysis must include a “no action” alternative, as well as reasonable alternatives beyond the agency’s jurisdiction. *Id.* § 1502.14(c)-(d). These alternative analysis requirements also apply to Environmental Assessments. *See, e.g., Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1229 (9th Cir. 1998); *see also* 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b).

23. Through the NEPA process a federal agency must take a “hard look at the potential environmental consequences of the proposed action.” *Oregon Natural Res. Council v. U.S. Bureau of Land Mgmt.*, 470 F.3d 818, 820 (9th Cir. 2006) (citation and internal quotation omitted).

24. Whether an action will have “significant” impacts requires consideration of both the context and intensity of effects. 40 C.F.R. § 1508.27. Context refers to the significance of the action to society as a whole, the affected region, the affected interests, and the locality. *Id.* § 1508.27(a). Intensity refers to the severity of the impacts. Factors considered in evaluating intensity include impacts that may be both beneficial and adverse, unique characteristics of the geographic area (such as proximity to historic and cultural resources, park lands, wetlands or ecologically critical areas), the degree to which the effects on the quality of the human environment are likely to be controversial, the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks, the degree to which the action may establish a precedent for future actions, whether the action is related to other actions with individually insignificant but cumulatively significant impacts, and the degree to which the

action may adversely affect an endangered or threatened species or its critical habitat. *Id.* § 1508.27(b).

25. A challenge that the Service violated NEPA is reviewable under the judicial review provisions of the APA. *See Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 858 (9th Cir. 2005).

B. Endangered Species Act

26. Section 7 of the ESA requires federal agencies to ensure that any action they authorize, fund, or carry out is not likely to jeopardize a listed species or destroy or adversely modify its designated critical habitat. 16 U.S.C. § 1536(a)(2).

27. NMFS has defined “to jeopardize” the continued existence of a species as “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. Therefore, an action that is “not likely” to appreciably reduce the survival or recovery of the species does not cause jeopardy.

28. Courts have construed the ESA Section 7 “destruction or adverse modification” of critical habitat standard, 16 U.S.C. § 1536(a)(2), as requiring the Service to consider the value of critical habitat for the recovery of the listed species, and to address whether the loss of conservation function in affected habitat will appreciably diminish the value of the critical habitat overall for the species’ survival or recovery. *Butte Env'tl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 948-49 (9th Cir. 2010); *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070, 1075 (9th Cir. 2004).

29. If a federal agency determines that a proposed federal action may adversely affect a listed species or its designated habitat, the agency must engage in formal consultation with NMFS, 50 C.F.R. § 402.14(a), after which NMFS must issue a Biological Opinion detailing how the proposed action will affect the species or its critical habitat, 16 U.S.C. § 1536(b)(3)(A).

30. If the Biological Opinion determines that a proposed action will jeopardize the continued existence of a threatened or endangered species or destroy or adversely modify its designated critical habitat, NMFS must suggest, if possible, “reasonable and prudent alternatives” that it believes will avoid jeopardy and adverse modification and allow the agency to proceed with the action. *Id.* § 1536(a)(2), (b)(3)(A).

31. Throughout the Biological Opinion’s development and identification of any reasonable and prudent alternatives, NMFS must use the “best scientific and commercial data available.” 50 C.F.R. § 402.14(g)(8).

32. A challenge that the Service violated ESA Section 7 in rendering its Biological Opinion and identifying RPAs is reviewable under the judicial review provisions of the APA. *See Bennett v. Spear*, 520 U.S. 154, 174, 176 (1997).

33. ESA Section 6 requires that “[i]n carrying out the program authorized by this [Act], the Secretary shall cooperate to the maximum extent practicable with the States.” 16 U.S.C. § 1535(a); *see also* 59 Fed. Reg. 34274 (July 1, 1994) (Notice of Interagency Cooperative Policy Regarding the Role of the State Agencies in Endangered Species Act Activities).

34. The Service’s ESA Consultation Handbook further provides that interested parties, including affected state governments, should be involved in the development of RPAs when the Service finds that an action will jeopardize the continued existence of a species or destroy or adversely modify its critical habitat. *See* FWS & NMFS, *Consultation Handbook*,

Procedures for Conducting Consultation & Conference Activities Under Section 7 of the ESA, at 4-6 (Mar. 1988).

35. A challenge that the Service violated ESA Section 6 in rendering its Biological Opinion and identifying RPAs is reviewable under the judicial review provisions of the APA.

C. Magnuson-Stevens Fishery Conservation and Management Act

36. The MSA is the primary domestic legislation governing management of marine fishing activities in federal waters. 16 U.S.C. §§ 1801-1891d.

37. The MSA establishes a system for conserving and managing fish populations and fisheries. The MSA created eight regional fishery management councils that are primarily charged with preparing Fishery Management Plans (“FMPs”) and plan amendments for each managed fishery. 16 U.S.C. § 1852(a)(1).

38. The North Pacific Fishery Management Council (“NPFMC”) manages the Exclusive Economic Zone off Alaska’s coast. *See* NPFMC, *Navigating the North Pacific Council Process*, at 5, available at <http://www.fakr.noaa.gov/npfmc/>. FMPs implemented by the NPFMC govern the management of groundfish fisheries in the BSAI and GOA. *Id.*

39. The fishery management councils submit proposed FMPs and FMP amendments together with proposed implementing regulations to the Secretary of Commerce for review and approval. 15 U.S.C. §§ 1853, 1854. The Secretary, acting through NMFS, must disapprove a FMP amendment to the extent it is inconsistent with provisions of the MSA or any other applicable law. *Id.* at § 1854. The Secretary must disapprove proposed regulations to the extent they are inconsistent with the FMP, FMP amendments, or other applicable law. *Id.*

40. Approvals of FMPs, FMP amendments, and implementing regulations are subject to the procedural requirements of NEPA, 42 U.S.C. §§ 4321 et seq.; 16 U.S.C. § 1854(i).

41. The MSA requires the Secretary of Commerce to give notice of proposed rulemaking in the Federal Register and to provide an opportunity for public comment. 16 U.S.C. § 1854.

D. Administrative Procedure Act

42. The APA provides for judicial review of final agency action by persons “aggrieved” by such action. 5 U.S.C. § 702. The actions reviewable under the APA include any “preliminary, procedural, or intermediate agency action or ruling . . . on the review of the final agency action.” *Id.* § 704.

43. The APA also provides standards applicable when a federal agency proposes and adopts final rules and regulations. *Id.* §§ 553, 551(4). Specifically, agencies must provide “[g]eneral notice” of any “proposed rule making” to the public through publication in the Federal Register. That notice must include “(1) a statement of the time, place, and nature of the public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” *Id.* § 553(b). An agency’s responsibility to consider public comments on a proposed rulemaking is required by 5 U.S.C. § 553(c).

44. Under the APA, a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). A reviewing court shall also “hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

E. Regulatory Flexibility Act

45. The RFA requires an agency, concurrent with proposing a new rule, to prepare a Regulatory Flexibility Analysis describing the impact of the proposed rule on small businesses and small governments. 5 U.S.C. § 601; *id.* at § 603, *amended by* Pub. L. No. 111-203, 124 Stat. 1376 (2010). After receiving public comment, the agency then prepares a final Regulatory Flexibility Analysis to be published with the final rule. *Id.* § 604.

46. The agency is also required to make an extra effort to collect the input of small businesses and small governments on the proposed rule's impact by conducting open hearings, directly notifying small entities of the proposed rules, or publishing notice in trade publications. *Id.* § 609.

FACTUAL BACKGROUND

A. The Steller Sea Lion

47. Steller sea lions are closely related to other types of sea lions and to fur seals and belong to the genus *Eumetopias*. See NMFS, *North Pacific Groundfish Fishery Biological Opinion* (Nov. 24, 2010) ("final BioOp"), at 75, available at <http://www.fakr.noaa.gov/protectedresources/stellers/esa/biop/final/1210.htm>.

48. Female Steller sea lions average 2.28 meters in length and 263 kilograms in weight, while some males are somewhat larger, at 2.8 meters and 566 kilograms. *Id.*

49. Although the Steller sea lion's full range occurs along the entire North Pacific Rim, the largest rookeries are in Southeast Alaska and British Columbia. *Id.*

50. Between the 1970s and the year 1990, the Steller sea lion experienced a population decline within the United States portion of its range, declining by 80 percent of its population. *Id.* at 78.

51. In 1990, NMFS listed the Steller sea lion as a threatened species under the ESA, and established emergency protective regulations to address the population decline and to begin recovery. *Id.*

52. In 1993, NMFS designated critical habitat for the Steller sea lion based in significant part on protecting food resources for the sea lions. *Id.* This critical habitat consists of the areas around rookeries and haulouts, which provide areas for reproduction, feeding, rest, and protection from predators and weather. *Id.* at 119.

53. In 1997, based on genetic distinctions, NMFS separated the Steller sea lion populations into the western and eastern distinct population segments. NMFS then changed the western DPS' status from threatened to endangered. *Id.* at 78.

54. In 2000 and 2001, NMFS prepared a biological opinion on the effects of the federal groundfish fisheries on Steller sea lions, which NMFS supplemented in 2003. The 2001 biological opinion and its supplement implemented Steller sea lion protection measures for the BSAI and GOA groundfish fisheries. *Id.* at 4-5.

55. In the last 10 years, the Steller sea lion population for the western DPS has increased and is trending towards recovery goals. *Id.* at 81. Recent data on population trends (2000-2008) indicate that the western DPS as a whole has stabilized and overall is increasing, but in two sub-regions at the edge of the range the populations are not increasing as rapidly as NMFS may desire. *Id.* at xxiii-xxiv, xxvi, 81.

56. A definitive cause for these limited sub-regional population numbers has not been identified. *Id.* at xxiii. Although Steller sea lion populations in some sub-regions have been slower to respond to conservation efforts, there is little to no existing information that nutritional

stress, and annual harvests of Pacific cod and Atka mackerel in particular, are the cause of slower than desired recovery.

B. Biological Opinion and Environmental Assessment/Regulatory Impact Review

57. In 2006, NMFS re-initiated formal ESA Section 7 consultation to evaluate the possible effects of current management practices for groundfish fisheries in the BSAI and GOA on Steller sea lions and other ESA-listed species in light of new information gained, management actions taken, and changes to the fisheries since the last biological opinion was supplemented in 2003. *Id.* at 5-6.

58. In 2008, NMFS prepared a Steller sea lion recovery plan, pursuant to ESA Section 4(f), which divided Alaskan waters into seven sub-regions stretching from the eastern Gulf of Alaska to Russia/Asia for purposes of determining recovery. The 2008 Recovery Plan concluded that to achieve recovery, among other things, no two adjacent western DPS sub-regions may have *significantly* declining non-pup population trends. *See* 2008 Revised Recovery Plan for the Steller Sea Lion at V-21 (Mar. 2008) (“2008 Recovery Plan”), available at www.nmfs.noaa.gov/pr/pdfs/recovery/stellersealion.pdf.

59. In August of 2010, NMFS completed a draft of the BioOp. NMFS found that changes to the Pacific cod and Atka mackerel fisheries in the Aleutian Islands were necessary to avoid the likelihood of jeopardy to the western Steller sea lion DPS’ continued existence or adverse modification of its critical habitat (the “jeopardy/adverse modification” determination). *See generally* NMFS, *Draft Biological Opinion*, at xxxvii-xxx, available at <http://www.fakr.noaa.gov/protectedresources/stellers/esa/biop/final/1210.htm>. The draft BioOp included a proposed RPA to modify groundfish management in the Aleutian Islands, specifically, by closing Atka mackerel and Pacific cod fisheries in Area 543 in the western Aleutian Islands,

and restricting such fisheries in the adjacent Areas 542 and 541 in the central Aleutian Islands. *See id.* at xxxiii-xxxiv.

60. In August 2010, NMFS released a review draft EA/RIR under NEPA to analyze the proposed RPA identified in the draft BioOp. The EA/RIR considered only three alternatives: (1) the No Action or “Status Quo” alternative, under which fisheries would continue to be managed under existing policy; (2) the “Enhanced Conservation Approach,” which would be even more protective of Steller sea lions than the RPA by closing larger areas to fishing; and (3) the “RPA Specific Approach,” which would implement the proposed RPA. *See Revisions to the Steller Sea Lion Protection Measures for the Aleutian Islands Atka Mackerel and Pacific Cod Fisheries, Council Review Draft EA/RIR (Aug. 2010) (“draft EA/RIR”),* at ii-iv.

61. On August 2, 2010, NMFS released the draft BioOp and draft EA/RIR for a limited 25-day comment period. That period was later extended by seven days. *See NOAA, NMFS, Revisions to the Steller Sea Lion Protection Measures for the Bering Sea and Aleutian Islands Management Area Groundfish Fisheries EA/RIR (Nov. 2010) (“final EA/RIR”),* at 10-8, available at <http://www.fakr.noaa.gov/protectedresources/stellers/esa/biop/final/1210.htm>.

62. NMFS did not, before releasing the draft BioOp, inform Alaska of the jeopardy/adverse modification determination nor specifically request the State’s input in developing the proposed RPA. Alaska formally learned of NMFS’ jeopardy/adverse modification determination on August 2, 2010, when NMFS released the draft BioOp and associated analyses for public comment. NMFS also did not involve Alaska, as a sovereign state, in the development of the BioOp, despite Alaska’s March 2006 notification to NMFS of the State’s desire to participate in the Section 7 consultation process leading to the BioOp.

63. On August 18, 2010, Alaska Governor Sean Parnell requested an extension of time until October 12, 2010, to provide more detailed comments given the size of the draft BioOp (nearly 800 pages) and draft EA/RIR (more than 240 pages) and the difficulty of providing a thorough review and meaningful comments in the short period of time provided by NMFS. NMFS provided a brief seven-day extension. *See* Final EA/RIR at 10-8.

64. Despite the short timeframe for review, the NPFMC met in August of 2010, to review and make recommendations regarding the proposed RPA. The NPFMC had little time before its meeting to analyze in detail the BioOp or understand the full ramifications of implementing NMFS' proposed RPA. Also, the draft EA/RIR was incomplete and did not provide sufficient information for an adequate analysis of the RPA's impacts.

65. Under these significant constraints, the NPFMC received public comment and considered changes to the proposed RPA for more targeted fishery restrictions based on the best available science. On August 20, 2010, 14 days before the close of NMFS' extended public comment period on the draft BioOp, the NPFMC made its proposed recommendations available to the public.

66. The NPFMC offered an additional alternative, recommended by the Advisory Panel and supported by industry groups, that included less restrictive measures still designed to support the survival and recovery of the Steller sea lion and the conservation value of its critical habitat.

67. On September 2, 2010, Alaska again requested additional time for a more thorough review of the draft BioOp and draft EA/RIR.

68. On September 2, 2010, Alaska also provided comments in response to and in disagreement with the draft BioOp, including the proposed RPA, and the draft EA/RIR. Alaska

provided the Service with, among other relevant information, scientific and commercial data supporting a determination that the jeopardy/adverse modification finding and the proposed RPA was not warranted, and that NMFS should at least adopt the less restrictive RPA developed by the NPFMC.

69. On December 8, 2010, NMFS made available for public release on its website a final BioOp, with an RPA similar to that identified in the draft BioOp with some modifications. The final BioOp was signed by James W. Balsiger, NMFS Administrator, Alaska Region, and dated November 24, 2010.

70. Specifically, the final BioOp recited negative population trends for Steller sea lion non-pups in fishery management Areas 543, 542 and 541 in the western and central Aleutian Islands. NMFS concluded that negative growth rates and counts in those areas (which differ from the sub-regions defined in the recovery plan) indicated that Steller sea lions were having difficulty maintaining or increasing their populations, and that removal of potential fisheries effects (nutritional stress) in those areas was needed to ensure fisheries activities were not likely to cause jeopardy or adverse modification. *See* Final BioOp at xxiv-xxxiii. The BioOp concluded that although two areas evaluated in the BioOp were having difficulty maintaining or increasing their populations, that no two sub-regions as defined in the 2008 Recovery Plan were experiencing significant declines.

71. The final RPA would modify groundfish management in the Aleutian Islands. The approach would close Atka mackerel and Pacific cod fisheries in Area 543 in the western Aleutian Islands, and would restrict such fisheries in the adjacent Areas 542 and 541 in the central Aleutian Islands. *See* attached Exhibit 2 for a location map of these areas; Final BioOp at xxxiv-xxxv.

72. On December 8, 2010, NMFS issued the final EA/RIR and a FONSI.

73. On December 8, 2010, NMFS, by John Oliver, Deputy Assistant Administrator for Operations, signed an Interim Final Rule to implement the fishery closure and restriction measures identified in the final RPA before the 2011 fishing season starts on January 1, 2011. *See* NOAA, *Interim Final Rule, Fisheries of the Exclusive Economic Zone Off Alaska; Steller Sea Lion Protection Measures for the Bering Sea and Aleutian Islands Groundfish Fisheries Off Alaska*, 75 Fed. Reg. 77535 (Dec. 13, 2010).

74. The Service issued the Interim Final Rule without providing the public with an opportunity to comment on the rule itself. The Service did not submit the science underlying the BioOp for independent peer review before finalizing the BioOp, nor did it respond to the State regarding the multiple comments that the State provided on the draft BioOp and EA/RIR.

C. Impacts to Alaska's Fishery Management, Economic Development, Conservation and Other Interests

75. The closure and restriction of groundfish fisheries in the western and central Aleutian Islands as called for in the final RPA will have severe and immediate adverse consequences for Alaska, its local communities, commercial fishing fleets, and the seafood processing industry. NMFS admits that implementing the RPA would cause losses in gross revenue in Alaska of up to \$83.2 million per year under the RPA alternative. Final EA/RIR at 10-134, Table 10-69. Up to 750 fishing, processing, and related jobs in Alaska may also be lost. *Id.* at 10-147. The EA/RIR claims that there may be mitigation to an unknown extent as the fishing fleet redeploys to other Bering Sea fisheries. *Id.* However, the onshore processing capacity and industry in the central Aleutians cannot redeploy and will remain adversely affected to a degree not adequately evaluated or disclosed in the EA/RIR.

76. Similarly, the State's Aleutian Island Pacific cod fishery will experience a loss of fisheries infrastructure. While NMFS predicts that some of these losses will be offset as the industry redeploys fishing vessels to other fishing areas, the communities in the western Aleutian Islands that rely on local fishing are not mobile and will be immediately and significantly affected by fishery closures and restrictions in adjacent waters. The overall impact of implementing the RPA could devastate small communities and residents in the Aleutian Islands that depend on fisheries for their livelihoods.

77. The central Aleutian Islands communities of Atka and Adak could be most significantly affected by this action. Processing Pacific cod in high volume is necessary for cod operations to be viable, and that processing capacity is necessary for the communities' long-term viability. *See, e.g., NPFMC, Initial Review Draft Regulatory Impact Review/Environmental Assessment/Initial Regulatory Flexibility Analysis for a Regulatory Amendment to Establish Aleutian Islands Pacific Cod Processing Sideboards* (Dec. 2009), at 35-43, available at <http://www.fakr.noaa.gov/npfmc/council.htm>. The existing onshore facility in Adak has been heavily reliant on Pacific cod processing, with 70 percent of its revenues coming from the "A" season Pacific cod fishery supporting a year-round market in the area. *Id.* at 37. Additionally, a raw fish tax on Pacific cod was the main source of revenue for the City of Adak. *Id.* Fuel sales also provide an important revenue stream and support for local fuel requirements. *Id.* This economic activity is jeopardized if the local fisheries are insufficient to support a market in the area. *Id.*

78. Other communities in the region, such as Dutch Harbor and Akutan in the Aleutian Islands and King Cove, Sand Point, and Chignik in the Gulf of Alaska benefit from

catcher vessel deliveries of Pacific cod from the Aleutian Islands area and the associated positive economic effects. *Id.* at xiv, xvii, 53.

79. Implementing the RPA may have significant environmental justice concerns for Alaskan Natives. Of the fisheries that would be closed or restricted under the proposed RPA, a percentage of total allowable catch is allocated to the Community Development Quota (“CDQ”) Program designed to improve the social and economic conditions in western Alaska communities by facilitating participation in the BSAI fisheries. Final EA/RIR at 10-29, 10-30. Sixty-five communities, including over 27,000 people, 87 percent of whom are Alaskan Native, participate in the CDQ Program. *Id.* at 10-30. These communities have fewer economic opportunities, chronically high unemployment rates, and are economically-depressed. *Id.* The CDQ Program allows the communities to benefit from fisheries by investing resources in the community infrastructure and providing employment opportunities to local residents. *Id.*

80. The EA/RIR acknowledges that groups receiving CDQ Program funds are likely to be adversely affected by the closure of and restrictions on fisheries, particularly the Atka mackerel fishery. But the EA/RIR but does not discuss what that lack of funding means for the 65 communities that benefit from CDQ Program, including specific Alaskan Native populations. *Id.*

FIRST CLAIM FOR RELIEF

(Violation of NEPA—Failure to Prepare Environmental Impact Statement)

81. Alaska incorporates by reference each of the allegations in paragraphs 1 through 80.

82. Defendants violated NEPA by failing to prepare an EIS for the proposed action, which may significantly affect the human environment. The Service’s decision to prepare only

an EA, which resulted in the issuance of a FONSI rather than a complete EIS, violated NEPA, 42 U.S.C. § 4332, where there is a potential for significant environmental effects to occur from the proposed action.

83. NMFS failed to adequately consider the potential for significant environmental effects from the proposed action, including but not limited to:

a. NMFS did not fully consider or properly analyze the socioeconomic effects—e.g., changes in possible employment numbers resulting from loss of and restrictions on fisheries—and did not comply with NEPA’s requirements for addressing incomplete or unavailable information, *see* 40 C.F.R. § 1502.22;

b. NMFS did not adequately assess the cumulative impacts to local communities or potential mitigation measures to ameliorate the effects of the RPA, given the variety of factors affecting fisheries and economies in the Aleutian Islands;

c. NMFS failed to properly differentiate the impacts on coastal communities from gross revenue estimates overall even though coastal communities in the BSAI and GOA will incur direct, indirect, and induced effects;

d. NMFS failed to adequately address Alaskan Native and environmental justice concerns; and

e. NMFS failed to adequately consider the context and intensity of the potential adverse environmental effects.

84. NEPA requires that NMFS prepare an EIS where there is a potential for significant environmental effects.

85. NMFS therefore violated NEPA in failing to prepare an EIS. This violation of NEPA, 42 U.S.C. § 4332(2)(C), (E), and its implementing regulations is arbitrary, capricious, an

abuse of discretion, otherwise not in accordance with law, or without observance of procedure required by law, which has caused or threatens serious prejudice and injury to Alaska's rights and interests, is reviewable under the APA, 5 U.S.C. §§ 701-706, and entitles Alaska to the relief requested below.

SECOND CLAIM FOR RELIEF

(Violation of NEPA—Inadequate Range of Alternatives)

86. Alaska incorporates by reference each of the allegations in paragraphs 1 through 85.

87. The Service violated NEPA, 42 U.S.C. § 4332(2), by failing to consider an adequate range of reasonable alternatives in the EA/RIR, including an alternative or alternatives more narrowly tailored to conserve fishery resources for Steller sea lions while providing opportunities for local fishing fleets.

88. The final EA/RIR considered only four alternatives and did not provide a reasoned or quantified basis for selecting an RPA that closes Area 543 and restricts fishing of Areas 541 and 542.

89. NMFS failed to adequately consider additional reasonable alternatives including the full scope of the alternative recommended by the NPFMC, which included less restrictive measures still designed to support the survival and recovery of the Steller sea lion and the conservation value of its critical habitat. This proposed alternative was supported by the science available to NMFS and provided a reasonable alternative with less impact to the Aleutian Island fishermen and their communities.

90. These violations of NEPA, 42 U.S.C. § 4332(2)(C), (E), and its implementing regulations are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with

law, or without observance of procedure required by law, which has caused or threatens serious prejudice and injury to Alaska's rights and interests, are reviewable under the APA, 5 U.S.C. §§ 701-706, and entitle Alaska to the relief requested below.

THIRD CLAIM FOR RELIEF

(Violation of NEPA—Insufficient Opportunity for Public Comment)

91. Alaska incorporates by reference each of the allegations in paragraphs 1 through 90.

92. NMFS violated NEPA and its implementing regulations by failing to provide the public with as much environmental information as was practicable, prior to EA completion, so that the public—including Alaska—had a sufficient basis to address those areas, including environmental and socioeconomic effects, that NMFS must consider in preparing an EA, thus precluding an adequate opportunity to comment on the EA/RIR and the FONSI.

93. Among other things, NMFS effectively precluded adequate public involvement in the decisionmaking process and the opportunity to comment on the EA by providing an incomplete draft that failed to consider significant information regarding the likely environmental, economic, and social impacts of the proposed action and alternatives.

94. NMFS provided the public with an inadequate period of time within which to provide comments on the EA/RIR and the FONSI.

95. These violations of NEPA, 42 U.S.C. § 4332(2)(C), (E), are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or without observance of procedure required by law, which has caused or threatens serious prejudice and injury to Alaska's rights and interests, are reviewable under the APA, 5 U.S.C. §§ 701-706, and entitle Alaska to the relief requested below.

FOURTH CLAIM FOR RELIEF

(Violation of NEPA—Failure to Adequately Consider Potential Environmental Effects)

96. Alaska incorporates by reference each of the allegations in paragraphs 1 through 95.

97. NEPA and its implementing regulations require that an environmental document, such as the EA/RIR prepared by NMFS here, discuss the environmental impacts of the agency's proposed action and alternatives, which discussion forms the scientific and analytic basis for the document and the selection of an alternative by the agency decisionmaker. *See* 40 C.F.R. §§ 1502.16, 1508.9, 1508.10.

98. The environmental impacts discussion must include a discussion of direct effects and their significance, indirect effects and their significance, and cumulative effects and their significance. *Id.* §§ 1502.16, 1508.7, 1508.8, 1508.25.

99. Environmental effects, which term is synonymous with “environmental impacts” under the NEPA regulations, *id.* § 1508.8(b), include “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health [effects], whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.” *Id.* § 1508.8(b).

100. NMFS failed to adequately consider and evaluate the complete scope and effect of the potential direct, indirect, and cumulative effects and their significance here, including potential economic, social, environmental justice, and other environmental effects.

101. NMFS' failure to adequately consider the environmental effects of its proposed action and alternatives in its EA/RIR in violation of NEPA, 42 U.S.C. § 4332(2)(C), (E), is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or without observance of procedure required by law, and has caused or threatens serious prejudice and injury to Alaska's rights and interests, is reviewable under the APA, 5 U.S.C. §§ 701-706, and entitles Alaska to the relief requested below.

FIFTH CLAIM FOR RELIEF

(Violation of the ESA and APA—Failure to Comply with ESA Section 7 Requirements for a Biological Opinion)

102. Alaska incorporates by reference each of the allegations in paragraphs 1 through 101.

103. The Service violated ESA Section 7, 16 U.S.C. § 1536, in reaching its jeopardy/adverse modification determination and developing the RPA because, among other things: (A) NMFS did not adequately assess the current species and fishery status; (B) in formulating the RPA, NMFS failed to make a rational connection between the available information considered and its conclusions that certain Steller sea lion populations of the western DPS in the western and central Aleutian Islands are declining due to nutritional stress and that its recommended RPA will reverse declining population trends; and (C) NMFS failed to consider the relevant factors in making this determination. In particular, NMFS' specific failures include, but are not limited to:

a. NMFS based its jeopardy/adverse modification determination on the status of only two of seven Steller sea lion sub-regions without explaining the relationship and importance of these two sub-regions to the Steller sea lion species as a whole. The ESA prohibits basing Section 7 decisions on effects at less than the species level—which level here is the Steller

sea lion western DPS as a whole. The BioOp makes only conclusory, inadequately documented or inadequately supported statements that the population trend in these two sub-regions will be significant to the species as a whole. The BioOp also does not explain NMFS' jeopardy/adverse modification determination against the record-based factual background that no two adjacent sub-regions showed a significant non-pup population trend decline, which standard was adopted by NMFS in the 2008 Recovery Plan (that the non-pup population trend in any two adjacent sub-regions cannot be declining significantly) as one of the criteria for determining when the western DPS had recovered significantly to be downlisted to "threatened" or delisted under the ESA. *See* 2008 Recovery Plan at V-17, V-21.

b. NMFS' jeopardy/adverse modification determination is inconsistent given the record before the agency showing the overall western DPS population trend toward achieving population recovery goals;

c. NMFS concluded that the Steller sea lion is not meeting certain of the recovery goals in the 2008 Recovery Plan solely because the overall population *increase* is not yet statistically significant, but a steady overall population increase of 1.5 percent a year is on track to meet NMFS' recovery goals for downlisting;

d. NMFS' adverse modification determination is based solely on impacts to specific areas of "affected [critical] habitat" without adequate discussion of whether those effects will cause adverse modification to Steller sea lion critical habitat as a whole;

e. NMFS relied on some studies to the exclusion of others without explanation, cited findings that are uncertain and equivocal, and made sweeping conclusions that are unsupported by the record;

f. The best scientific and commercial data available indicates that Steller sea lions in the western and central Aleutian Islands are not experiencing nutritional stress caused by federal groundfish fisheries, and there is little or no existing information that nutritional stress, and annual harvests of Pacific cod and Atka mackerel in particular, are the cause of slower than desired Steller sea lion recovery;

g. There is insufficient documentation supporting that NMFS' proposed RPA will reverse the existing trend for outlier Steller sea lion populations; and

h. NMFS should have considered a less restrictive RPA.

104. These violations of ESA Section 7, 16 U.S.C. § 1536, are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or without observance of procedure required by law, which has caused or threatens serious prejudice and injury to Alaska's rights and interests, are reviewable under the APA, 5 U.S.C. §§ 701-706, and entitle Alaska to the relief requested below.

SIXTH CLAIM FOR RELIEF

(Violation of the ESA and APA—Failure to Cooperate With the State)

105. Alaska incorporates by reference each of the allegations in paragraphs 1 through 104.

106. The Service violated ESA Section 6, 16 U.S.C. § 1535(a), by failing to cooperate with Alaska to the maximum extent practicable in reaching the jeopardy/adverse modification determination in the final BioOp and in developing the RPA.

107. This claim is brought pursuant to the judicial review provision of the APA, 5 U.S.C. § 706.

108. This violation of ESA Section 6, 16 U.S.C. § 1535, is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or without observance of procedure required by law, which has caused or threatens prejudice and injury to Alaska's rights and interests, are reviewable under the APA, 5 U.S.C. §§ 701-706, and entitles Alaska to the relief requested below.

SEVENTH CLAIM FOR RELIEF

(Violation of the MSA and APA—Failure to Comply with MSA)

109. Alaska incorporates by reference each of the allegations in paragraphs 1 through 108.

110. The Service violated the MSA by promulgating a fishery management regulation that fails to comply with the substantive requirements of the MSA. The MSA requires, among other things, that any fishery management regulation shall be consistent with the national standards for fishery management and conservation. 16 U.S.C. § 1851(a). These standards require that fishery management regulations shall, among other things, be based upon the best scientific information available, consider efficiency in the utilization of fishery resources, minimize costs and unnecessary duplication, and take into account the importance of fishery resources to fishing communities by utilizing economic and social data.

111. The Interim Final Rule promulgated by the Service constitutes a "regulation," as that term is used in 16 U.S.C. § 1851(a), and fails to comply with the National Standards and other requirements of the MSA.

112. These violations of the MSA are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, or without observance of procedure required by law, which has caused

or threatens serious prejudice and injury to Alaska's rights and interests, are reviewable under the APA, 5 U.S.C. §§ 701-706, and the MSA, 16 U.S.C. § 1855, and entitle Alaska to the relief requested below.

EIGHTH CLAIM FOR RELIEF

(Violation of the MSA and APA—Failure to Comply With Requirements for Notice-and-Comment Rulemaking)

113. Alaska incorporates by reference each of the allegations in paragraphs 1 through 112.

114. The Service violated the APA and the MSA's requirements that the Secretary give notice of any proposed rulemaking in the Federal Register and provide an opportunity for public comment. 5 U.S.C. § 553(b); 16 U.S.C. § 1854.

115. NMFS lacks good cause to excuse the APA's notice-and-comment procedures. The Interim Final Rule is inappropriate in the circumstances of this case because, among other things, any impracticability to complete normal notice-and-comment as claimed by NMFS is due to the agency's own delay in a four-year plus ESA consultation process, and not a present need for urgent action. Also, because the BioOp RPA is not supported by ESA standards, NMFS' claimed need to implement the RPA does not support abandoning the required notice-and-comment process. In particular, as identified in the comments of Alaska and others on the draft BioOp, the final BioOp's jeopardy/adverse modification determination suffers from uncertainty and controversy about, among other things, whether nutritional stress (and fisheries in particular) has caused the Steller sea lions to have difficulty in maintaining or increasing their populations in the Aleutian Islands, and whether those isolated effects will affect the species' recovery as a whole.

116. NMFS also failed to explain or provide adequate justification for why it could not comply with the normal notice-and-comment procedures prior to implementing the final rule measures before January 1, 2011, when it started the formal ESA Section 7 consultation process four-and-a-half years ago in 2006.

117. There is no indication by NMFS that allowing additional time for review of the RPA would cause harm to Steller sea lions or that urgent or immediately effective rulemaking action was required. Numerous measures are already in place for sea lion conservation and protection, and the numbers of Steller sea lions within the western DPS have steadily increased over the past decade. The final BioOp indicates that Steller sea lion concerns are localized to two sub-regions outside core habitat and there is not evidence of a range-wide or population-wide concern about the western DPS' continued viability. This situation undermines NMFS' purported justification that an interim final rule without notice and comment prior to implementation is necessary to prevent the likelihood of jeopardy to the western DPS of Steller sea lions or adversely modify its designated critical habitat.

118. These violations of the MSA and APA notice-and-comment requirements for rulemaking are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, or without observance of procedure required by law, which has caused or threatens serious prejudice and injury to Alaska's rights and interests, are reviewable under the APA, 5 U.S.C. §§ 701-706, and the MSA, 16 U.S.C. § 1855, and entitle Alaska to the relief requested below.

NINTH CLAIM FOR RELIEF

(Violation of the RFA and APA—Failure to Examine Effects on Small Entities)

119. Alaska incorporates by reference each of the allegations in paragraphs 1 through 118.

120. The Service violated the RFA, 5 U.S.C. §§ 603, 604, 609, by failing to prepare a Regulatory Flexibility Analysis that adequately considers the impact of the Interim Final Rule on small businesses and small governments. Specifically, by issuing the new fisheries measures without notice and comment, NMFS failed to satisfy its obligation to examine the effect of its rules on the small businesses and governments that are crucial to Alaska's economy.

121. These violations of the RFA are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or without observance of procedure required by law, which has caused or threatens serious prejudice and injury to Alaska's rights and interests, are reviewable under the APA, 5 U.S.C. §§ 701-706, and entitle Alaska to the relief requested below.

TENTH CLAIM FOR RELIEF

(Violation of the APA—Arbitrary and Capricious, Abuse of Discretion, Not in Accordance with Law)

122. Alaska incorporates by reference each of the allegations in paragraphs 1 through 121.

123. The Service's conduct in issuing the Interim Final Rule and accompanying EA/RIR, as described in the preceding Claims for Relief, was arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or without observance of procedure required by law.

124. Under the APA, this Court has authority to “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), and to set aside an agency decision “without observance of procedure required by law,” 5 U.S.C. § 706(2)(D). Alaska is therefore entitled to the relief requested below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment providing the following relief:

- A. Issue immediate injunctive relief, including temporary restraining order(s) and/or preliminary injunction(s), as well as a permanent injunction, to prohibit the Defendants from relying on, enforcing, or applying the BioOp, the RPA, the EA/RIR and FONSI, and the Interim Final Rule to implement changes to the groundfish fisheries in the BSAI and GOA;
- B. Declare that Defendants violated the ESA, MSA, RFA, NEPA, and the APA;
- C. Declare that Defendants’ actions, as set forth above, were arbitrary and capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law;
- D. Vacate and set aside the BioOp, the RPA, the EA/RIR and FONSI, and the Interim Final Rule;
- E. Enjoin the Defendants from relying on or enforcing the BioOp, the RPA, the EA/RIR and FONSI, and the Interim Final Rule;
- F. Vacate and set aside the Interim Final Rule to implement changes to groundfish fisheries management in the Bering Sea and Aleutian Islands and Gulf of Alaska;

G. Remand with an order with instructions requiring full compliance with the ESA, MSA, RFA, NEPA, and APA; and

H. Award Alaska its attorneys' fees and costs incurred in bringing and maintaining this action; and

I. Grant Alaska such other and further relief as the Court may deem necessary and appropriate.

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DATED this 14th day of December, 2010.

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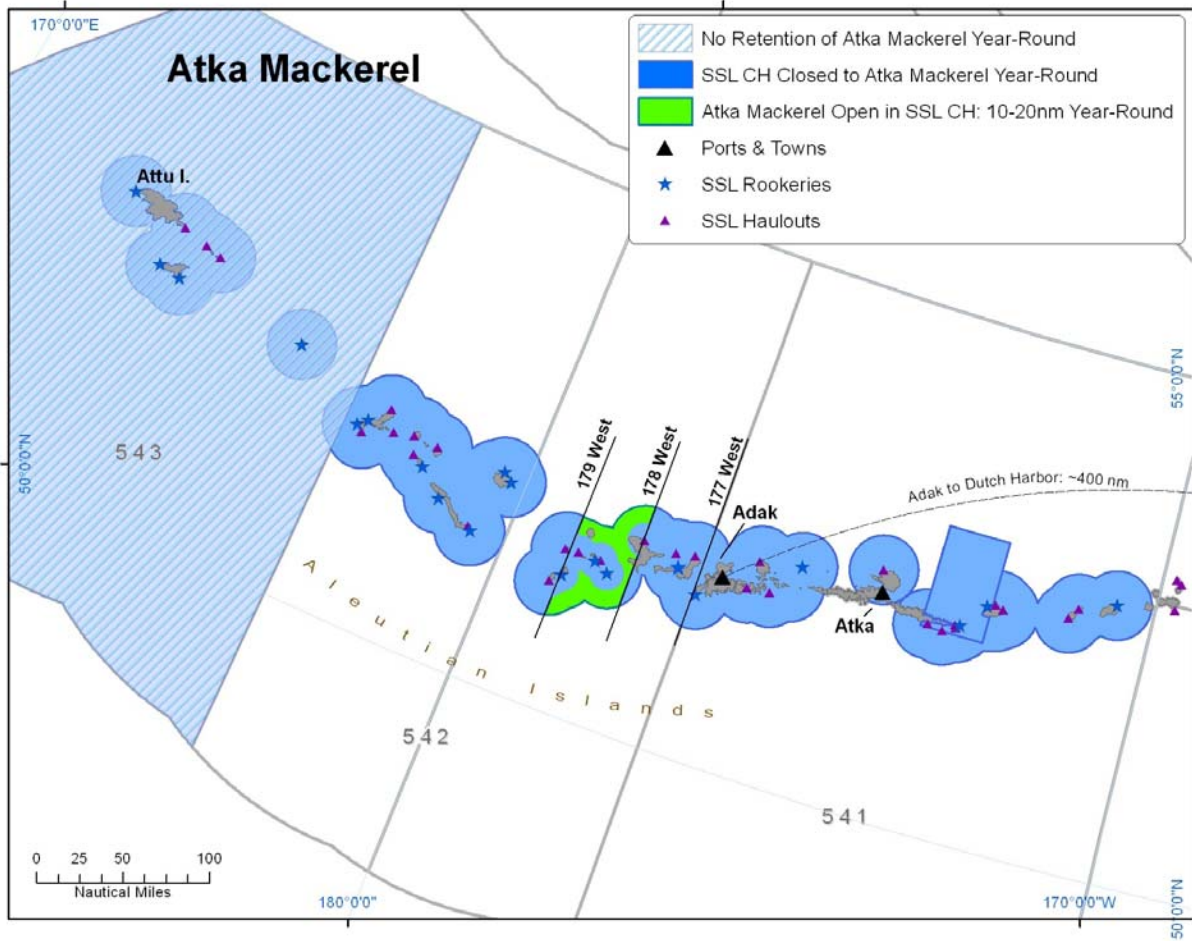


Figure 8.2. Map of the RPA for Atka mackerel fisheries in Areas 543, 542, and 541.