IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

STATE OF ALASKA, Plaintiff, v. JANE LUBCHENCO, et al., Defendants.	Case No. 3:10-cv-00271-TMB
ALASKA SEAFOOD COOPERATIVE, et al., Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE, et al., Defendants.	Case No. 3:11-cv-00001-TMB
FREEZER LONGLINE COALITION, Plaintiff, v. JANE LUBCHENCO, et al., Defendants.	Case No. 3:11-cv-00004-TMB

I. INTRODUCTION

The western Distinct Population Segment of the Stellar Sea Lion ("WDPS") is an endangered species inhabiting waters adjacent to Alaska. In these three partially consolidated actions, the Plaintiffs challenge a series of agency determinations which imposed restrictions on

the Atka mackerel and Pacific cod fisheries in the Bering Sea and Aleutian Islands to protect the WDPS's food source.[1] On January 18, 2011, the Court granted, in part, and denied, in part, the Plaintiffs' motions for summary judgment.[2] The Court indicated that it intended to enter an injunction requiring the National Marine Fisheries Service ("NMFS") to prepare an environmental impact statement ("EIS") and permitted the Parties to submit further briefing on its proposed remedy.[3] As discussed below, after considering the Parties' submissions, the Court hereby enters an injunction requiring Defendants to prepare an EIS in accord with its proposed schedule and the applicable law.

II. BACKGROUND

The Court previously set forth the background of these actions in detail in its summary judgment order.[4] Familiarity with that order is assumed, and the Court will only briefly summarize the pertinent facts here.

In these actions, Plaintiffs challenge a biological opinion ("BiOp"), environmental assessment ("EA") and finding of no significant impact ("FONSI"), and an Interim Final Rule ("IFR") issued by NMFS.[5] These determinations imposed the disputed restrictions on the Atka mackerel and Pacific cod fisheries in the Bering Sea and Aleutian Islands.[6] Plaintiffs moved for

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[1] *See* Dkt. 1; Dkt. 1 in Case No. 3:11-cv-00001-TMB; Dkt. 1 in Case No. 3:11-cv-00004-TMB; Dkt. 36; Dkt. 80 at 18.

[2] Dkt. 130.

[3] *Id.* at 54-56.

[4] *Id.* at 4-13.

[5] *See* Dkt. 80 at 18.

[6] *See, e.g.*, Dkt. 1 ¶¶ 47-74.

summary judgment, arguing that the NMFS's determinations were substantively and procedurally flawed in violation of the Administrative Procedure Act ("APA"), Magnuson Stevens Fishery Conservation and Management Act ("MSA"), Endangered Species Act ("ESA"), and National Environmental Policy Act ("NEPA").[7]

On January 18, 2011, the Court ruled that NMFS violated NEPA by failing to prepare an EIS and adequately involve the public in the agency's decision-making process.[8] Otherwise, however, the Court found that the BiOp and IFR complied with the ESA, APA, and MSA.[9] Accordingly, the Court indicated that it intended "to remand the matter to NMFS to prepare an EIS in compliance with NEPA procedures" including "requiring NMFS to prepare and circulate a draft EIS for public comment and provide meaningful responses to comments on the draft EIS."[10] The Court further indicated that it intended "to set a reasonable, but definite, deadline for NMFS to complete this process."[11]

The Court also stated that it would "not vacate the BiOp or the IFR" as, contrary to Plaintiffs' arguments, "[t]he NEPA violations . . . do not undermine NMFS's ESA determinations and . . . the IFR complied with the MSA and APA."[12] Although the Parties had briefed the remedy issue generally, the Court permitted them to submit further briefing as they

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[7] Dkts. 79, 80, 81, 84, 89.

[8] Dkt. 130 at 43-52.

[9] *See id.* at 15-43.

[10] *Id.* at 55.

[11] *Id.*

[12] *Id.* at 54.

had not discussed the specific result the Court had reached in detail.[13] All Parties subsequently submitted briefs and in some cases, additional materials.[14]

III. DISCUSSION

The Parties' briefing generally discusses two possible remedies: (1) the Court's proposal to enter an injunction requiring NMFS to prepare an EIS; and (2) Plaintiffs' argument that the Court should vacate or otherwise enjoin the IFR, EA, and FONSI. For the reasons discussed below, the Court will enter a narrowly-tailored injunction requiring Defendants to prepare an EIS, but declines to vacate or enjoin any of the agency determinations.

A. Preparation of an EIS

In their briefing in response to the Court's summary judgment order, none of the Parties suggest that the Court should not enter an injunction requiring NMFS to prepare an EIS. Instead, the Parties focus on Defendants' proposed timeline to complete the process and various possible additional requirements. The Court finds that an injunction is appropriate to remedy the NEPA violations and that some Court oversight of the process is necessary in light of the lengthy delays in the past, but the Court otherwise will not dictate how NMFS should go about fulfilling its obligations under NEPA.

1. Entitlement to Injunctive Relief

In NEPA cases, there is no presumption that the plaintiff is entitled to injunctive relief.[15] "An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course."[16] As in other cases, in order to obtain a permanent injunction:

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[13] *Id.* at 55.

[14] *See* Dkts. 131-39.

[15] *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010).

> A [NEPA] plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[17]

"The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court . . . ."[18]

NEPA does not dictate particular results; rather, it imposes procedural requirements to ensure that agencies carefully consider environmental impacts when making a decision.[19] Preparation of an EIS, in particular, focuses agency and public attention on those impacts and allows the public to play a role in the agency's decision-making process.[20] "In the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action."[21] "Where action is ongoing while the agency complies with NEPA, [the Ninth Circuit] has held that injunctive relief and the ordering of an EIS is an appropriate remedy."[22]

Here, the Court concludes that an injunction requiring NMFS to prepare an EIS is warranted. In its summary judgment order, the Court concluded that NMFS violated NEPA by

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[16] *Id.* at 2761 (citation omitted).

[17] *Id.* at 2756 (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

[18] *eBay Inc.*, 547 U.S. at 391 (citations omitted).

[19] *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 23 (2008) (citations omitted).

[20] *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 487 (9th Cir. 2011) (citations omitted).

[21] *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004) (citation omitted).

[22] *Id.* at 644 (citations omitted); *see also Winter*, 555 U.S. at 33 ("A court concluding that the Navy is required to prepare an EIS has many remedial tools at its disposal, including declaratory relief or an injunction tailored to the preparation of an EIS rather than the Navy's training in the interim." (citation omitted)).

failing to prepare an EIS, as opposed to an EA, and did not provide the public with a sufficient opportunity for review and comment on the EA.[23] Accordingly, NMFS did not take a "hard look" at the environmental consequences of the action or adequately involve the public in its decision-making process as Congress intended. Given that NEPA is a procedural statute, these violations are significant regardless of whether they affected the outcome of NMFS's decision-making process.

NMFS's NEPA violations accordingly caused irreparable harm to the Plaintiffs' and the public's procedural rights which cannot be remedied through damages. The harm is exacerbated by the fact that the restrictions may continue indefinitely. Furthermore, given the nature of the statutory rights and continuing harm, an injunction requiring NMFS to complete an EIS in compliance with NEPA is warranted despite the significant time, effort, and expense that it will require. The public interest also supports injunctive relief given that NMFS failed to adequately involve the public in its decision-making process and give the environmental consequences full consideration as Congress intended. The Court further observes that if it were to completely excuse NMFS's violations here, such a lack of compliance might very well become routine, further undermining Congress's intent in enacting NEPA.

2. Specific Aspects of the Injunction

Although district courts enjoy broad discretion in determining whether to enter an injunction,[24] the courts must narrowly tailor injunctive relief to address the particular harm at

[23] Dkt. 130 at 43-52.

[24] *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (citations omitted); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008) ("The district court has broad latitude in fashioning equitable relief when necessary to remedy an established wrong." (citation omitted)).

issue.[25] "An overbroad injunction is an abuse of discretion."[26] Accordingly, district courts should generally refrain from dictating "the substance and manner" of the agency's action on remand.[27] Nonetheless, specific and targeted requirements, such as setting a deadline for compliance with NEPA, may be appropriate in certain cases.[28]

Plaintiffs appear to argue that the Court should require NMFS to not only prepare an EIS, but also to "issue a new final decision that is fully documented in" a record of decision, complete the EIS prior to the start of the 2014 fishing season, file quarterly status reports, analyze new information developed since 2010, and evaluate a broader range of alternatives than NMFS proposed in the EA.[29] Amici Curiae agree with Plaintiffs and also argue that NMFS should be required to consider the impacts of the alternatives on the Aleut people and communities.[30] Defendants propose a 23-month process including full participation from the North Pacific

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[25] *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) ("Injunctive relief must be tailored to remedy the specific harm alleged." (citation and ellipsis omitted)); *see also id.* at 1142.

[26] *Id.* (citation omitted).

[27] *Nat'l Wildlife Fed'n*, 524 F.3d at 937 (citation omitted); *see also W. Oil & Gas Ass'n v. U.S. E.P.A.*, 633 F.2d 803, 813 (1980) ("Our intervention into the process of environmental regulation, a process of great complexity, should be accomplished with as little intrusiveness as feasible."); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, No. CV 01-00640-RE, 2011 WL 3322793, at *10 (D. Or. Aug. 2, 2011) ("In the absence of 'substantial justification,' . . . a court should not dictate to an administrative agency 'the methods, procedures, and time dimension' of the remand." (citation omitted)).

[28] *See High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 643-45 (9th Cir. 2004) (finding that district court acted within its discretion when it required agency to assess cumulative impacts by a set date); *see also Nat'l Wildlife Fed'n*, 524 F.3d at 937 (noting that the district court had discretionary authority to impose a deadline for remand proceedings).

[29] Dkt. 133 at 12-23.

[30] Dkt. 132.

Fishery Management Council ("Council"), or alternatively, a more abbreviated 15-month process, with the opportunity to request extensions upon a showing of good cause in either case.[31] Otherwise, Defendants argue that any further deadlines or requirements are inappropriate.[32] Intervenors, calling Defendants' 23-month schedule "aggressive," argue that the Court should merely require regular reporting in lieu of setting any deadlines or requirements "beyond the minimum legal requirements addressed in the Court's opinion[.]"[33] The Parties also appear to contemplate that the Court should retain jurisdiction to supervise compliance with the injunction.[34]

Given the extensive delays in the underlying agency process,[35] a deadline for compliance is appropriate here. The Court construes the Defendants' 23-month proposal as a representation that it is both a sufficient and achievable timeline for the completion of an EIS process that will remedy the violations identified in the Court's summary judgment order[36] and allow a fair opportunity for input from the public and the Council. Additionally, to the extent that this process indicates that further rulemaking is necessary, Defendants' proposed schedule suggests

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[31] Dkt. 131 at 2-5. Plaintiffs also appear to contemplate that Defendants should be able to obtain extensions on a showing of good cause. *See* Dkt. 133-4 at 2.

[32] *See* Dkt. 131 at 4.

[33] Dkt. 138 at 6-9.

[34] *See* Dkt. 133-4 at 4; Dkt. 138-5 at 2.

[35] *See* Dkt. 130 at 9-11.

[36] The Court observes that, contrary to Plaintiffs' suggestion, it did not "specifically criticize[]" NMFS for relying on a single-species model as opposed to a multi-species model to project Atka mackerel and Pacific cod biomass increases. *Cf.* Dkt. 133 at 22. The Court was discussing the issue because it "demonstrate[d] significant scientific differences of opinion, controversy, and uncertainty" requiring preparation of an EIS. *See* Dkt. 130 at 50. The Court did not express a view as to whether multi-species modeling is preferable to single-species modeling.

that there will be ample time to complete it in time for the commencement of the 2015 fishing season. Accordingly, the Court will order Defendants[37] to issue a final EIS by March 2, 2014, in accordance with its proposed schedule, and complete any additional rulemaking prior to the commencement of the 2015 fishing season, with the opportunity to obtain extensions upon a showing of good cause. The Court will also require Defendants to file quarterly status reports indicating whether it is on schedule and, if it is not, whether it still anticipates that it will complete the EIS by March 2, 2014, and any additional rulemaking prior to the commencement of the 2015 fishing season.

The Court, however, declines to impose further requirements on Defendants. Defendants will have to prepare an EIS that complies with the applicable law and addresses the deficiencies identified in the Court's summary judgment order. Depending on the results, Defendants may also have to revisit the IFR, but those results are unknowable at this time. The Court defers to the agency's expertise as to how the process should develop, and declines Plaintiffs' invitation to predict or otherwise dictate the results of that process.

B. Vacatur

In addition to the injunctive relief proposed by the Court, Plaintiffs further argue that the Court should vacate the IFR, EA, and FONSI with vacatur either effective immediately or stayed pending remand.[38] Alternatively, Plaintiffs ask the Court to enjoin the IFR pending NMFS's

[37] Given that these actions were brought against all Defendants, and Defendants own Proposed Order contemplates that the injunction will issue against all Defendants, Dkt. 131-2, the Court will enter the injunction against all Defendants. All Parties appear to contemplate, however, that NMFS will be the agency actually preparing the EIS.

[38] Dkt. 133 at 23-29.

completion of the remand process.[39] Defendants and Intervenors oppose vacatur or any further injunctive relief.[40]

Courts review NEPA compliance under APA standards.[41] The APA provides that a procedurally flawed rule should be "set aside."[42] Nonetheless, it is well-established that as a matter of equity a court may remand to the agency without vacating a flawed rule under the APA or otherwise.[43] The Ninth Circuit has previously recognized that concerns "regarding the potential extinction of an animal species" may constitute such equitable grounds.[44] Moreover, the proper remedy for a procedural violation under the APA is a reconstruction of the agency's deliberative process while correcting the shortcomings to protect the procedural rights of the

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[39] *Id.* at 29-38.

[40] Dkt. 131 at 6-8; Dkt. 138 at 9-13.

[41] *See, e.g.*, *Se. Alaska Conserv. Council v. Fed. H'way Admin.*, 649 F.3d 1050, 1056 (9th Cir. 2011) (citation omitted); *W. Oil & Gas Ass'n v. U.S. E.P.A.*, 633 F.2d 803, 813 (1980).

[42] *See* 5 U.S.C. § 706(2)(A).

[43] *United States v. Afshari*, 426 F.3d 1150, 1056 (9th Cir. 2005) (citing *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995), and *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944)); *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (citing *Idaho Farm Bureau Fed'n*, 58 F.3d at 1405-06, and *W. Oil & Gas Ass'n*, 633 F.2d at 813); *Idaho Farm Bureau Fed'n*, 58 F.3d at 1405 ("[W]hen equity demands, the regulation can be left in place while the agency follows the necessary procedures." (citing, inter alia, *W. Oil & Gas Ass'n*, 633 F.2d at 813)); *but cf. Ctr. for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 951 (N.D. Cal. 2010) (suggesting that the better practice is to stay the vacatur pending remand, but recognizing Ninth Circuit precedent permits remand without vacatur when warranted by equity).

[44] *Idaho Farm Bureau Fed'n*, 58 F.3d at 1405-06; *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, No. CV 01-00640-RE, 2011 WL 3322793, at *9 (D. Or. Aug. 2, 2011) ("Despite the APA's requirement that an invalid agency action be 'set aside,' equity can authorize the district court to keep an invalid biological opinion in place during any remand if it provides protection for listed species within the meaning of the ESA." (citations omitted)).

plaintiffs and the public.[45] Additionally, even where an EIS is required under NEPA, the regulations do not preclude all agency action during the EIS preparation.[46]

In a typical environmental case where the challenged action allegedly threatens environmental harm, vacatur is a less drastic remedy than an injunction.[47] In certain unusual cases – such as the present one – where the action is intended to preserve the environment, however, leaving the rule in place represents the most narrowly-tailored alternative.[48] Additionally, although the issue here is the appropriate relief to remedy the NEPA violation, there are still significant ESA concerns that impact the analysis.[49] The Court upheld the BiOp which found that the fishing that occurred under the prior restrictions caused jeopardy or adverse modification.[50] A possible reversion to those more lenient restrictions, which Plaintiffs seek, would thus be impermissible under the ESA.

Accordingly, on the facts of this case, the Court concludes that vacatur is not warranted at this time. Instead, the Court will rely on a narrowly-tailored injunction requiring Defendants to

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[45] *See W. Oil & Gas Ass'n*, 633 F.2d at 813.

[46] *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2750 (2010) (quoting, inter alia, 40 C.F.R. § 1506.1 for the proposition that "no action concerning the proposal shall be taken which would: (1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives").

[47] *See, e.g., Monsanto*, 130 S. Ct. at 2761.

[48] *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1406 (9th Cir. 1995).

[49] *See, e.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 794 (9th Cir. 2005) ("As the Supreme Court has noted, 'Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities.'" (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978)).

[50] *See* Dkt. 130 at 23-43.

prepare an EIS to remedy the NEPA violations while preserving the protections dictated by the agency's valid ESA analysis.

IV. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. Defendants shall complete an EIS in accordance with the applicable law and addressing the deficiencies identified in the Court's Order dated January 18, 2012 (Docket No. 130). Defendants shall proceed in accordance with the schedule they have proposed (*see* Docket No. 131-1 at 3-4) as follows:

a. Notice of Intent to prepare an EIS to be issued in April 2012 after consultation with the Council at its April 2012 meeting;

b. Scoping period: 6 months;

c. Scoping report: 1 month;

d. Provide the scoping report to the Council, work on a range of alternatives with the Council, writing a preliminary draft EIS and providing the preliminary draft EIS to the Council for review: 5 months;

e. Review of the preliminary draft EIS by the Council and the Council's Scientific and Statistical Committee, recommendations by the Council and revision of the preliminary draft EIS: 1 month;

f. Draft EIS published with 60-day public comment period, review of comments and development of responses: 5 months;

g. Responses to Council and completion of final EIS: 4 months; and

h. File the final EIS with the Environmental Protection Agency pursuant to 40 C.F.R. § 1506.9 such that a notice of availability of the final EIS is published in the Federal Register on or before March 2, 2014;

2. If necessary based upon their findings in the EIS, Defendants shall issue a new final rule, or take other lawful action under the MSA, to establish Stellar sea lion protection measures for the Bering Sea and Aleutian Islands Management Area groundfish fisheries by December 31, 2014, or in sufficient time as is required to implement new measures for the 2015 fishing season commencing on January 1, 2015;

3. Commencing on July 2, 2012, Defendants will make periodic status reports on the first business day of January, April, July, and October advising the Court and the Parties as to whether they are proceeding in accordance with the schedule outlined in Paragraph 1 and, if they are not, whether they anticipate that they will file the EIS by March 2, 2014, and complete any additional rulemaking in time for the commencement of the 2015 fishing season; and

4. Defendants may move for and the Court will, upon a showing of good cause, grant appropriate extensions of the deadlines set forth above.

Dated at Anchorage, Alaska, this 5th day of March, 2012.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE