Nos. 12-35201, 12-35203, 12-35204

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STATE OF ALASKA, et al.,
Plaintiffs-Appellants,

v.

JANE LUBCHENCO, et al.,
Defendants-Appellees,

and

OCEANA, INC. and GREENPEACE, INC.,
Intervenor-Defendants-Appellees.

On Appeal from the United States District Court for the District of Alaska
District Court Nos. 3:10-cv-00271; 3:11-cv-00001; 3:11-cv-00004
Hon. Timothy M. Burgess, District Judge

# APPELLANTS' JOINT OPENING BRIEF

Bradley E. Meyen
Andrew R. Naylor
Assistant Attorneys General
State of Alaska, Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
(907) 269-5232
*Attorneys for Plaintiff-Appellant State of Alaska*

Murray D. Feldman
Holland & Hart LLP
101 South Capitol Blvd., Suite 1400
P.O. Box 2527
Boise, ID 83701
(208) 342-5000

Linda R. Larson
Jessica K. Ferrell
Marten Law PLLC
1191 Second Avenue, Suite 2200
Seattle, WA 98101
(206) 292-2600
*Attorneys for Plaintiff-Appellants Alaska Seafood Cooperative, et al.*

Ryan P. Steen
Jeffrey W. Leppo
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101
(206) 624-0900
*Attorneys for Plaintiff-Appellant Freezer Longline Coalition*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each of the following Appellants represents that it has no parent corporation and that it does not issue stock and, accordingly, no corporation owns 10% or more of its stock:

- Alaska Seafood Cooperative ("AKSC");
- Cascade Fishing, Inc.;
- Iquique U.S., LLC; Unimak Vessel, LLC; Cape Horn Vessel, LLC; Rebecca Irene Vessel, LLC; Tremont Vessel, LLC; and Arica Vessel, LLC (together, "Iquique");
- O'Hara Corporation;
- The Groundfish Forum;
- FCA Holdings, Inc.;
- The Fishing Company of Alaska, Inc.; Alaska Juris, Inc.; Alaska Spirit, Inc.; and Ak Victory, Inc. (together, "FCA");
- Alaska Groundfish Cooperative;
- U.S. Marine Corporation; and
- USS Group, LP.

Appellants Ocean Peace, Inc. and M/V Savage Inc. are wholly owned subsidiaries of U.S. Marine Corporation. They do not issue stock; accordingly, no corporation owns 10% or more of their stock.

United States Seafoods, LLC; Alaska Alliance, LLC; Alaska Legacy, LLC; Seafreeze Alaska 1, LLC; Ocean Alaska LLC; and Alaska Vaerdal, LLC are wholly owned by USS Holdings, LLC. USS Holdings, LLC is wholly owned by

USS Group, LP. None of the entities listed in this paragraph issue stock; accordingly, no corporation owns 10% or more of their stock.

Appellant Freezer Longline Coalition ("FLC") represents that it has no parent corporation and does not issue stock; accordingly, no corporation owns 10% or more of its stock.

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## TABLE OF ACRONYMS AND ABBREVIATIONS

*This table contains a list of acronyms and abbreviations used in this joint brief.*

| | |
|---|---|
| ABC | Acceptable Biological Catch |
| AKFSC | Alaska Fisheries Science Center (NMFS) |
| AO | Administrative Order |
| APA | Administrative Procedure Act |
| Area | Fishery Management Area |
| BiOp | Biological Opinion |
| Council | North Pacific Fishery Management Council |
| Consultation Handbook | Endangered Species Consultation Handbook |
| DPS | Distinct Population Segment |
| EA | Environmental Assessment |
| EA/RIR | Environmental Assessment/Regulatory Impact Review |
| eDPS | eastern Distinct Population Segment of Steller Sea Lions |
| EIS | Environmental Impact Statement |
| ER | Excerpts of Record |
| ESA | Endangered Species Act |
| FMP | Fishery Management Plan |
| FWS | U.S. Fish and Wildlife Service |
| GOA | Gulf of Alaska |
| IFR | Interim Final Rule |

| | |
|---|---|
| MSA | Magnuson-Stevens Fishery Conservation and Management Act |
| Mt | metric tons |
| NEPA | National Environmental Policy Act |
| Nm | nautical miles |
| NMFS | National Marine Fisheries Service |
| NOAA | National Oceanic and Atmospheric Administration |
| NPFMC | North Pacific Fishery Management Council |
| RCA | Rookery Cluster Area |
| ROD | Record of Decision |
| RPA | Reasonable and Prudent Alternative |
| SSL | Steller Sea Lion |
| State | State of Alaska |
| TAC | Total Allowable Catch |
| wDPS | western Distinct Population Segment of Steller Sea Lions |

## INTRODUCTION

In this appeal, the State of Alaska ("State") and participants in the Atka mackerel and Pacific cod fisheries in the Aleutian Islands challenge a biological opinion ("BiOp") and Interim Final Rule ("IFR") issued by the National Marine Fisheries Service ("NMFS") pursuant to the Endangered Species Act ("ESA") and Magnuson-Stevens Act ("MSA"). These actions impose severe new restrictions on mackerel and cod fishing in the North Pacific Ocean, closing over 145,000 square miles to fishing.

The challenged actions pertain to the endangered western distinct population segment of Steller sea lions ("wDPS" or "western DPS"). This DPS sharply declined in population decades ago, when deliberate shooting and other intentional killings of the species were legal. Listing this DPS under the ESA, and the resulting conservation management changes, curbed these practices. Also, a series of ESA consultations on the fisheries' authorizations from 1998 to 2003 resulted in time, area, and catch restrictions for the various fisheries in the Aleutian Islands and addressed the perceived need to protect possible food sources of the wDPS.

In the early 2000s, the wDPS began to show signs of recovery. In 2006, NMFS reinitiated consultation under ESA section 7 to evaluate the existing fishing restrictions in light of new scientific and fishery information. That consultation produced the BiOp at issue here. In the BiOp, NMFS found that, from 2000 to

2008, the wDPS as a whole had stabilized, with "robust" increases in the core areas of its range. However, based upon its assumptions regarding the recovery status of two small subpopulations, NMFS speculated in the BiOp that continued operation of the fisheries under the 2003 restrictions would likely jeopardize the overall wDPS and adversely modify its critical habitat rangewide. NMFS then imposed the new, more severe fishery restrictions as a reasonable and prudent alternative ("RPA") to promote recovery of the wDPS. In December 2010, NMFS published the IFR, establishing the restrictions set forth in the RPA on an emergency basis, without normal notice and comment rulemaking, effective January 1, 2011.

Appellants then raised various legal challenges to the BiOp and the IFR. The U.S. District Court for the District of Alaska dismissed on summary judgment Appellants' ESA, MSA, and Administrative Procedure Act ("APA") claims, but held that NMFS violated the National Environmental Policy Act ("NEPA") by failing to prepare an environmental impact statement ("EIS") on the measures established by the IFR. The court entered an injunction directing NMFS to prepare an EIS, but denied Appellants' request to enjoin the BiOp and IFR. The court also declined to require NMFS to make a new decision based on the EIS.

As set forth below, the BiOp and IFR violate the ESA and APA, and should be vacated by this Court because: (1) NMFS' jeopardy and adverse modification findings are based on an assessment of only two small subpopulations and not, as

required, on the wDPS and its designated critical habitat as a whole; (2) the findings are based on a review of whether the wDPS has fully met ESA section 4 recovery criteria and on postulated indirect effects, rather than on the standards governing section 7 consultations; (3) NMFS failed to apply the governing regulatory standards in reaching its adverse modification finding; and (4) the RPA is tailored to achieve recovery, rather than to avoid jeopardy or adverse modification of critical habitat, and lacks a reasoned explanation.

Finally, the district court erred in ordering limited injunctive relief and not requiring NMFS to issue a new decision after completing the court-ordered EIS.

## STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. §§ 2201-2202 (declaratory judgment), 16 U.S.C. §§ 1855(f) and 1861(d) (MSA), and 5 U.S.C. §§ 702 and 706 (APA).

This appeal is from the district court's summary judgment order entered January 19, 2012 (ER0014-69) ("summary judgment order"), and the remedy order entered March 5, 2012 (ER0001-13) ("remedy order"). Appellants timely appealed these orders on March 19, 2012. ER0096-118; Fed. R. App. P. 4(a). This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1). *See also Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1175-76 (9th Cir. 2011); *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83-84 (1981).

## ISSUES PRESENTED FOR REVIEW

1. Whether NMFS erred by making jeopardy and adverse modification findings under ESA section 7 based upon the status of two small subregions within the range of the listed DPS, without providing a reasoned analysis of the effects of the proposed action on the DPS as a whole.

2. Whether NMFS erred by: (a) requiring that the proposed action insure that the DPS would meet section 4 recovery criteria rather than insuring as required by section 7 that the action would not appreciably reduce the DPS' prospects of survival and recovery; and (b) considering hypothesized indirect effects without finding that those effects are "caused by" the proposed action.

3. Whether NMFS erred by failing to apply the regulatory definition of "destroy or adversely modify critical habitat" in reaching its section 7 adverse modification determination.

4. Whether NMFS erred in adopting an RPA that: (a) was designed to insure satisfaction of section 4 recovery criteria rather than to avoid section 7 jeopardy or adverse modification; and (b) was not supported by a reasoned explanation of how each RPA element avoids jeopardy or adverse modification.

5. Whether the district court abused its discretion or misapplied the correct legal principles by not requiring NMFS to issue a new decision based upon the EIS ordered by the district court.

## STATEMENT OF THE CASE

Appellants include: (1) the State, which manages the fisheries in its territorial waters; and (2) participants in the mackerel and cod fisheries, which fish using about a dozen boats in federally managed waters off the western and central Aleutian Islands, the Bering Sea, and the Gulf of Alaska ("GOA"). ER0742-46, -50 (EA). Appellants have standing to bring this suit. *See* ER0056; ER0485-92.

In December 2010, NMFS released the BiOp and published the IFR. In December 2010 and January 2011, pursuant to the MSA, Appellants filed timely judicial challenges to the BiOp, the IFR, and the procedures followed by NMFS under the MSA, APA, and NEPA. ER2219, -23. The district court partially consolidated the cases and subsequently allowed Oceana, Inc. and Greenpeace, Inc. to intervene as defendants. ER2222-23.

The parties filed cross-motions for summary judgment. ER2228, -30; ER0493-518; ER0463-64; ER0465-76. In its summary judgment order, the district court partially granted and partially denied both motions, holding that NMFS did not violate the ESA, MSA, or APA, but did violate NEPA by failing to prepare an EIS. ER0017; ER0068-69. In the remedy order, the court entered an injunction directing NMFS to prepare an EIS, but leaving the BiOp and IFR in effect during preparation of the EIS. ER0002, -09-13. Each of the plaintiffs appealed both orders. ER0096-102, -0103-110, -0111-118.

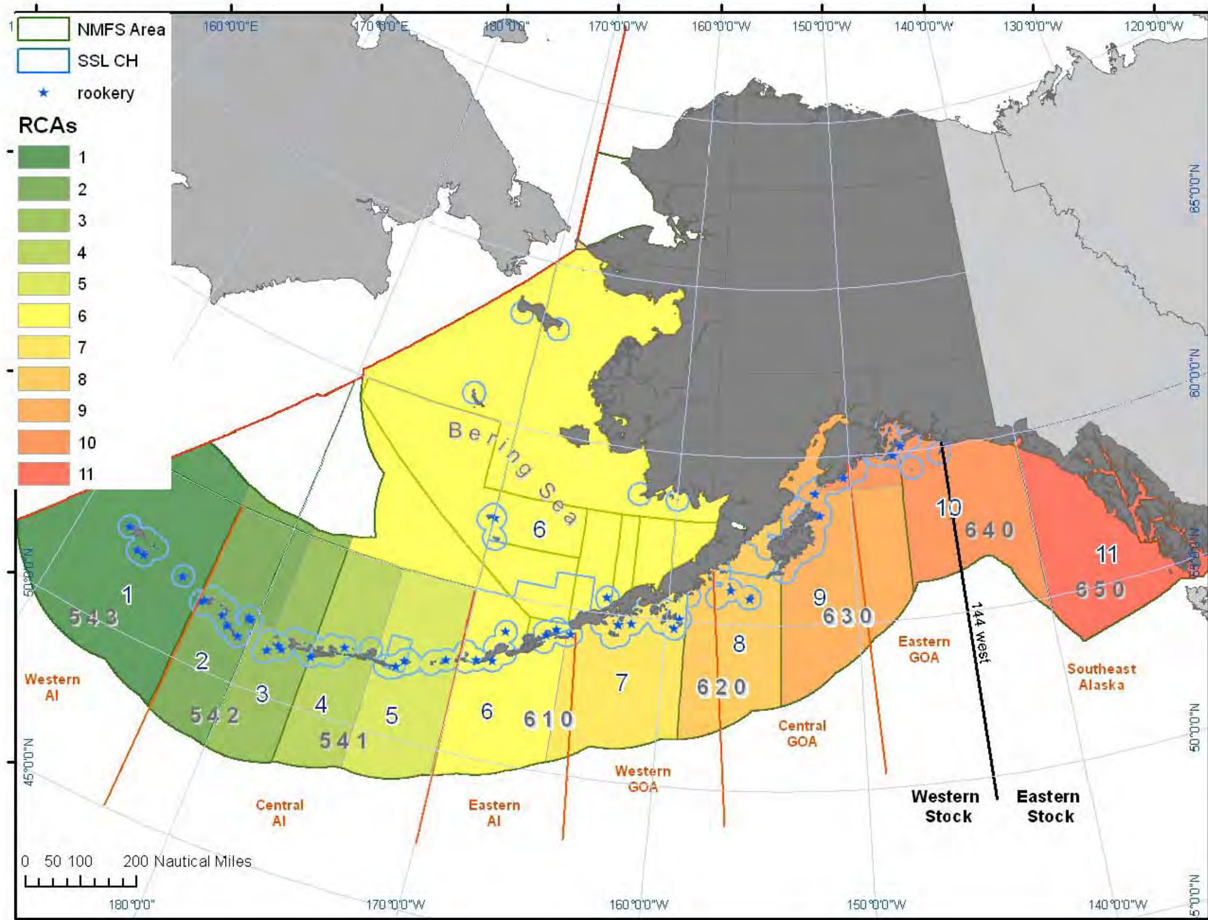
## STATEMENT OF FACTS

## I. Factual Background

### A. The Atka mackerel and Pacific cod fisheries

The North Pacific Ocean off the coast of Alaska is a vast, diverse, and complex ecosystem. It is home to the wDPS and to some of the most productive fisheries in the world. ER1986-87, -2002-09; ER0960 (BiOp). Fisheries in this region are managed by NMFS as Fishery Management Areas ("Areas") 541, 542, and 543, as depicted on the following map:

Map showing the spatial relationship between Steller sea lion Recovery Plan Areas, Rookery Cluster Areas (RCAs), and NMFS Groundfish Fishery Management Areas.




Source: ER1391

The Aleutian mackerel and cod fisheries are relatively small compared to other North Pacific groundfish fisheries. Both Atka mackerel (*Pleurogrammus monopteryguis*) and Pacific cod (*Gadus macrocephalus*) are abundant, and NMFS has determined that they are not overfished or approaching an overfished condition. ER0612-13 (EA). The fisheries are sustainably and conservatively managed by the North Pacific Fishery Management Council ("Council") and NMFS. ER1994; ER0960 (BiOp). Pursuant to the MSA, the Council and NMFS set annual catch limits, known as "Total Allowable Catch" ("TAC"), for each stock of fish. In turn, TAC is derived from "Acceptable Biological Catch" ("ABC"), the annual sustainable harvest target that prevents overfishing. ER0963 (BiOp). The State coordinates with NMFS in establishing the catch levels in State-managed fisheries, and typically imposes mitigation measures similar to those of the federal fisheries. ER0959 (BiOp).

The Atka mackerel fishery operates primarily with non-pelagic trawl gear and occurs only in the Aleutian Islands. ER0610 (EA). NMFS estimates that this fishery removes 6-8% of the mackerel biomass (stock size) in the Aleutians. ER1588 (BiOp). Pacific cod is caught by vessels using multiple gear types, including trawl, longline, pot, and jig, and the cod fisheries occur in the Bering Sea, GOA, and far western reaches of the Aleutians. ER0750 (EA); ER0989, ER1114-15 (BiOp). Pacific cod is widely distributed throughout the Aleutians,

Bering Sea, and GOA, and although NMFS estimates that the cod fishery removes a higher proportion of the cod biomass in the Aleutians, cod makes up a very small portion (approximately 3%) of overall fish biomass in the Aleutians. The Aleutian cod fishery also has a very low exploitation rate. ER1804-08; ER1583, -88 (BiOp). Overall, the combined biomass of pollock, Pacific cod, and Atka mackerel in the Aleutians has increased by 44% from 2000 to 2009. ER1581 (BiOp).

### B. Steller sea lions

Steller sea lions (*Eumetopias jubatus*) occupy an expansive range that reaches from northern Japan, along the coast of Alaska, and south to California. ER1011 (BiOp). For purposes of the ESA, NMFS has divided the species into two distinct population segments, or "DPSs": (1) the eastern DPS ("eDPS"), which occupies the southern end of the range north to Southeast Alaska and is listed as "threatened" under the ESA; and (2) the wDPS, at issue here, which occupies all areas west of the eDPS to Russia and Japan and is listed as "endangered." ER1014 (BiOp). Designated critical habitat for the wDPS consists of all major rookeries and haulouts in Alaska west of 144°W longitude, including waters within 20 nautical miles ("nm") of these sites, and three special aquatic foraging areas. *See* 58 Fed. Reg. 45,269, 45,278 (Aug. 27, 1993).

NMFS has proposed delisting the eDPS. 77 Fed. Reg. 23,209, 23,213 (Apr. 18, 2012). NMFS has also concluded that "overall the [wDPS] is increasing

and moving toward the number of animals required for downlisting [reclassification to threatened status]." ER1273 (BiOp). As of 2008, NMFS estimated the worldwide sea lion population at about 133,000 animals, with about 70,000 animals in the wDPS and about 45,000 of those located in the United States. ER1841; ER1275 (BiOp); ER2107-08; *see also* ER1016 (BiOp).

Steller sea lions are generalist predators that consume a wide variety of fishes, octopus, squid, and other marine mammals and birds. ER1038-39 (BiOp). Mackerel, pollock, and salmon are the most common Steller sea lion prey items in the central and western Aleutians. *Id.* NMFS estimates that Atka mackerel makes up 55% of sea lion diet in the summer and 96% in the winter in the Aleutians. ER0924 (BiOp). Cod make up a relatively small portion of sea lion diet in the Aleutians, estimated at 6% of total diet in the summer and 16 to 25% in the winter. ER0924, -1040 (BiOp); ER1927-28; ER1892.

Cod, like Steller sea lions, prey upon mackerel. NMFS estimates that of the 62% of mackerel mortality due to predation, slightly less than half is due to cod predation, one quarter to Steller sea lion predation, and the remainder to a range of other predators. ER2038.

## II. Procedural Background

### A. Consultations establishing the status quo mitigation measures

NMFS manages the mackerel and cod fisheries pursuant to a fishery management plan ("FMP") developed under the MSA. 16 U.S.C. §§ 1852-53. The ESA requires NMFS to "insure" that any proposed agency action, such as implementation of fishery management regulations, is not likely to "jeopardize" the continued existence of any threatened or endangered species or destroy or adversely modify such species' designated critical habitat. 16 U.S.C. § 1536(a)(2). If NMFS determines that a proposed action may adversely affect a species, it must undertake a formal consultation under ESA section 7, which results in a biological opinion stating NMFS' opinion whether "the Federal action is likely to jeopardize the continued existence of [a] listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.02; *see also id*. § 402.14(a); 16 U.S.C. § 1536(b)(3)(A).

From 1998 to 2001, NMFS prepared a series of biological opinions or "BiOps" regarding the effect of the pollock, mackerel, and cod fisheries on Steller sea lions. Each of those BiOps was the subject of litigation.[1] The BiOps established comprehensive mitigation measures as "reasonable and prudent

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[1] *See*, *e.g.*, *Greenpeace v. Nat'l Marine Fisheries Serv.*, 237 F. Supp.2d 1181, 1183-84 (W.D. Wash. 2000), 106 F. Supp.2d 1066, 1067-68 (W.D. Wash. 2000), 198 F.R.D. 540, 541-42 (W.D. Wash. 2000), 80 F. Supp.2d 1137, 1139 (W.D. Wash. 2000), 55 F. Supp.2d 1248, 1252-53 (W.D. Wash. 1999).

alternatives," or "RPAs," to avoid jeopardy to the wDPS and adverse modification to its critical habitat. Under ESA section 7, an RPA is an alternative action identified during consultation that NMFS determines "would avoid the likelihood" of jeopardy or adverse modification. 50 C.F.R. §§ 402.02, 402.14(h)(3); 16 U.S.C. § 1536(b)(3)(A).

The RPA in effect at the start of the 2006 consultation combined a "global control rule" governing allowable harvest with a complex system of open and closed areas and no-transit zones (within 3 nm of rookeries) designed to disperse fishing effort spatially and temporally.[2] ER0996-1004 (BiOp). That RPA closed substantial portions of critical habitat in the Aleutians to commercial fishing: 57% was closed to mackerel fishing; 35% to cod longline/pot fishing; and 23% to cod trawling. ER1506 (BiOp). The Aleutians were closed entirely to directed pollock fishing. ER1089 (BiOp).

NMFS, at the request of the Council, initiated the 2006 consultation "to evaluate the effects of current Federal fisheries management on listed species because of information gained and management actions taken since previous consultations." 75 Fed. Reg. 77,535, 77,536 (Dec. 13, 2010); ER0071 (IFR). That new information was considerable since over $190 million in federal funding had

[2] The global control rule reduces the catch for a species when its spawning biomass is estimated to be less than 40% of the projected unfished biomass. ER0996 (BiOp).

been spent between 2003 and 2008 on Steller sea lion research conducted by agency and independent scientists. ER2094.

A member of the BiOp team wrote in April 2008 that "the crux of the decisions [in the new consultation] will come down to the fundamental question, 'Are sea lions better off (or the same) today than they were 8 years ago?'" ER2093. The administrative record shows that, in fact, the wDPS in the United States increased at an average rate of about 3% per year from 2000 to 2004, and has been stable overall from 2004 to 2008, for an average increase of about 1.4% per year between 2000 and 2008. ER1268 (BiOp). The latest population data show that the U.S. population of the wDPS has continued to increase at a statistically significant rate over the past decade (1.8% per year as of 2011). ER0249-50, -0423.[3]

### B. The 2008 Revised Recovery Plan

In March 2008, NMFS published a revised Recovery Plan pursuant to ESA section 4, establishing new criteria for downlisting and delisting of the wDPS. These criteria divided the wDPS into seven geographical subregions to evaluate

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[3] This trend has continued for both pups and the overall wDPS population since the 2008 data reported in the BiOp. For example, the data collected in summer 2010 showed 11,547 pups in the wDPS, an increase of 16.05% since 2005. ER0249-50, -0423. Adult and juvenile non-pup populations have increased 16% since 2008. Non-pup counts of juvenile and adult SSLs have increased or stabilized since 2009, except in the western Aleutians. *Id.*

population trends. ER0915 (BiOp). The wDPS would be considered for *downlisting* if the U.S. population increased for 15 years on average. "Based on an estimated population size of roughly 42,500 animals in 2000 and assuming a consistent but slow (*e.g.*, 1.5%) increasing trend, this would represent approximately 53,100 animals in 2015." ER2103. Additionally, the trends in non-pups in at least five of the seven subregions must be increasing, and the trend in any two adjacent subregions cannot be declining significantly. *Id.* For *delisting*, all of the following conditions must be met: (1) the U.S. population must increase at an average rate of 3% for 30 years; (2) the population trends in non-pups in at least five of the seven subregions must be stable or increasing; (3) the trends in any two adjacent subregions cannot be declining significantly; and (4) the population in any single subregion cannot have declined by more than 50%. ER2104.

### C. The 2010 Biological Opinion

The proposed action addressed in the consultation at issue was NMFS' reauthorization of the federal groundfish fisheries as managed under the sea lion mitigation measures imposed from 1999 to 2003, together with any effects from the parallel state fisheries. In other words, the consultation was to evaluate the effects of the already-mitigated fisheries on the wDPS *after* 2003. *See* ER0914-15 (BiOp).

In August 2010, NMFS released a draft BiOp and an incomplete draft environmental assessment ("EA"). ER1931-51; ER1952-63. On December 8, 2010, it released the final BiOp, concluding that the pollock fisheries, which accounted for 78% of the 1.7 million metric tons ("mt") total Bering Sea groundfish catch in 2007, ER1475, do not need additional restrictions to avoid jeopardy to Steller sea lions or adverse modification to their critical habitat. *See, e.g.*, ER1784, -92. In contrast, the mackerel and cod fisheries combined account for less than 9% of the Bering Sea catch. ER1475. NMFS concluded, however, that the much smaller mackerel and cod fisheries in the Aleutians may impact the foraging success of Steller sea lions through "chronic nutritional stress" and reduced birth rates. ER1295 (BiOp).

NMFS' conclusion depended on a series of theoretical causal connections rife with uncertainty. The administrative record demonstrates considerable scientific controversy and lack of consensus as to whether the wDPS has experienced reduced pup production ("natality"), whether any reduced natality is a result of chronic nutritional stress, whether nutritional stress occurs at all, whether any nutritional stress is of such a magnitude that it adversely affects the entire wDPS, and whether fishing causes any nutritional stress. *See*, *e.g.*, ER1200 ("considerable scientific evidence is inconsistent with the nutritional stress hypothesis"); ER0063.

After reviewing the draft BiOp, the Assistant Regional Administrator for Protected Resources worried that NMFS' proposed action could be challenged as arbitrary and capricious:

> One note that esp. caught my attention is the statement . . . that says the preponderance of evidence does not show that there is competition between the fisheries and SSL [Steller sea lions] . . . . I think we need to be careful with that statement (and if it's in the draft BO) that it does not get us into trouble being challenged for being arbitrary and capricious if we say that the preponderance of evidence does not support the competition impacts yet we are imposing these RPAs (burdensome to those upon whom they are imposed). I don't think it's really enough to say that the burden is toward the species b/c of simple precautionary concerns. There's still got to be enough evidence of a problem for us to exercise the precautionary principle.

ER1964. In response, the head of NMFS' Alaska Fisheries Science Center noted the "lack of *any* statistically significant correlations between commercial fisheries and SSL production in the last decade" and commented that "we have considerable data from the last decade on biochemistry, foraging behavior, and survival *that all suggest nutritional stress is not a problem*." *Id.* (emphasis added).

NMFS based its conclusion on an evaluation of the 14 out of 17 possible indicators of nutritional stress for which it had data. ER1535 (BiOp); ER1930. Of those 14 indicators, 13 showed a *negative relationship* (*i.e.*, they did not indicate the presence of nutritional stress): emaciated pups; reduced pup body size; reduced pup weight; reduced growth rate; reduced pup survival; reduced juvenile survival; reduced adult survival; reduced overall survival; reduced pup counts;

reduced non-pup counts; changes in blood chemistry; and increased incidence of disease. ER1535 (BiOp).

Just one indicator, natality, showed a positive relationship. *See id.* Yet that indicator was not based on actual natality data because there was no natality data available from the western Aleutians. ER1224-25 (BiOp). Due to this lack of data, NMFS instead relied upon data from the GOA regarding the ratio of Steller sea lion pups to non-pups as "a proxy of sorts for natality." ER1020-21 (BiOp); *see also* ER1225 (BiOp).[4]

In the BiOp, NMFS acknowledged that "[i]f it were not for [the western Aleutians subregion] it could be argued that the western DPS of Steller sea lions were moving toward recovery" because the overall population is increasing, no two adjacent subregions are in significant decline, and no subregion is declining over 50% in abundance. ER1273 (BiOp). Nonetheless, NMFS stated that because of the status of the western Aleutian subregion, "the recovery of this DPS is not meeting the" criteria in the revised Recovery Plan. ER0919, -1273 (BiOp).

[4] Even the "proxy" data on which NMFS presumes reduced natality is of questionable accuracy. NMFS identified reduced natality as a possible indicator of nutritional stress based on a study reported in Holmes (2007). ER1020-21 (BiOp). However, since the Holmes study was completed, sea lion pup counts in the wDPS have increased by 10%. ER1518, -1392 (BiOp). Additionally, a more recent study on natality in the wDPS, published in 2010, examined data from 2003 to 2008 and found considerably higher natality rates than those reported in Holmes (2007). ER1975-83.

NMFS based its jeopardy finding on the *potential* for prey competition and its inability to eliminate the *possibility* of a causal connection between fishing and reduced natality:

> [W]hile fisheries *cannot be unequivocally shown to be a causative factor* in continued Steller sea lion declines in the western portion of the wDPS in Alaska, analysis of available data indicate that an adverse relationship between Steller sea lions and the commercial fisheries *may exist* in the western Aleutian Islands subregion and portions of the central Aleutian Islands subregion . . . .

ER1281 (BiOp) (emphasis added); *see also id.* (noting that "competition between Steller sea lions and the commercial fisheries *may* compromise the availability of [sea lion] food resources"; "[f]ishery removals of prey in the western and central Aleutian Islands subregion *may be* adversely affecting the western DPS"; and "[t]he *possibility* that this interaction *may* be one of several primary causes of the observed declines in non-pup counts cannot be eliminated") (emphases added).

NMFS reasoned that it had to reach a jeopardy conclusion—despite the fact that "new information indicates other regions of the western DPS is [sic] or may be showing positive growth"—based on the status of the two small western Aleutian subpopulations that make up a very small fraction of the entire wDPS. *Id.* Incorporating the analysis from its jeopardy evaluation, NMFS also concluded that the proposed action is likely to adversely modify critical habitat. ER1282-84 (BiOp).

### D. The IFR and new fishery restrictions

The challenged IFR implemented a new RPA, with additional "conservation measures that will promote the recovery of [Steller sea lions]." ER1281 (BiOp). Among other measures, the RPA: (1) closes mackerel and cod fishing in all of Area 543, including 124,000 square miles outside critical habitat; (2) prohibits nearly all directed fishing for mackerel by federally licensed vessels in waters 0 to 20 nm around SSL sites in Area 542; (3) creates new limitations on the participation in, total catch of, and amount and seasonal apportionment of the mackerel fishery within critical habitat in Area 542; and (4) establishes substantially more restrictive time and area closures for the cod fishery both inside and outside of critical habitat in Areas 541 and 542. *See* ER1450, -52 (BiOp); *see also infra* Addendum A-15, A-16 (RPA maps at ER1450, -52).

NMFS acknowledged that these measures would have substantial economic and social impacts, including annual losses of up to $83.2 million in total earnings (ER0863); up to $61 million in fishing revenue (ER0876); up to $4 million in Alaska state and local tax revenue (ER0861); and up to 750 fishing, processing, and related jobs in Alaska (ER0876).

## SUMMARY OF ARGUMENT

NMFS made four critical legal errors in its decision to impose severe new restrictions on fishing in the Aleutian Islands, and did not supply the required reasoned explanations for key factual findings.

*First*, NMFS erroneously concluded, without a rational basis, that continued authorization of the Atka mackerel and Pacific cod fisheries under existing sea lion mitigation measures would jeopardize the wDPS and adversely modify its critical habitat. NMFS based that finding on the status of two small subregions of the wDPS, and not on the required evaluation of the wDPS as a whole. The wDPS population as a whole has stabilized and increased over the last decade.

*Second*, NMFS erred in applying the wrong standards for finding jeopardy and adverse modification in a section 7 consultation. NMFS based its jeopardy and adverse modification findings on its conclusion that the wDPS is satisfying many but not all of the section 4 Recovery Plan downlisting or delisting criteria. Consequently, NMFS failed to appropriately address and apply the governing section 7 standard—whether the proposed action would "*reduce appreciably*" the likelihood of survival and recovery of the wDPS or "*appreciably diminish*" the value of its critical habitat. NMFS also erred by basing its conclusions on hypothesized indirect effects that the agency did not determine were "caused by" the proposed action.

*Third*, NMFS, by admission, did not apply the regulatory standard for "adverse modification" in determining that the fisheries action would adversely modify the wDPS critical habitat. Instead, NMFS applied a different, broader standard.

*Fourth*, NMFS erred by adopting an RPA that was tailored to achieve section 4 recovery criteria, rather than to avoid jeopardy or adverse modification of critical habitat under section 7. It further erred by failing to provide a reasoned explanation for how each of the various fishing restrictions imposed in the RPA would avoid jeopardy or adverse modification.

For all these reasons, NMFS failed to apply the applicable ESA section 7 consultation standards, and failed to adequately support its findings in the administrative record. Thus, this Court should vacate the BiOp and IFR and reinstate the previous regulations.

Additionally, the Court should correct the district court's error in the scope of the remedy entered below for NMFS' NEPA violation. The district court directed NMFS to prepare an EIS, but failed to require a new decision after completion of the EIS, making the exercise potentially meaningless. This Court should cure that legal error and direct NMFS to issue a final new decision and Record of Decision ("ROD") at the conclusion of the remanded NEPA process.

## ARGUMENT

### I. Standard of Review

This Court reviews district court decisions on summary judgment *de novo*. *Yakutat, Inc. v. Gutierrez*, 407 F.3d 1054, 1066 (9th Cir. 2005); *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir. 2002). The Court reviews that part of a summary judgment order "granting or denying a permanent injunction for abuse of discretion and application of the correct legal principles." *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1079 (9th Cir. 2004). However, the determinations of law relied upon by the district court in awarding injunctive relief are reviewed *de novo*. *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1107 (9th Cir. 2006); *Sierra Forest Legacy*, 646 F.3d at 1177.

This case involves final agency action under the MSA that triggered formal consultation under the ESA. The MSA, 16 U.S.C. § 1855(f)(1), provides that regulations promulgated by the Secretary to implement an FMP or amendment "shall be subject to judicial review" in accordance with the APA, 5 U.S.C. § 706(2)(A)-(D). *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 n.4 (1986). Likewise, issuance of a biological opinion is a final agency action subject to judicial review under the APA. *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

Judicial review under the APA is limited to the administrative record before the agency at the time it made its decision. *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir. 2004). In reviewing biological opinions issued under the ESA, courts "may only rely on what the agency said in the record to determine what the agency decided and why." *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1072 n.9 (9th Cir. 2004).

Under the APA, the reviewing court must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or "without observance of procedure required by law," *id.* § 706(2)(D); *accord Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1116 (9th Cir. 2006); *see also Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 438 F.3d 937, 946 (9th Cir. 2006). Agency action is arbitrary and capricious when the agency relies on factors Congress has not intended it to consider, fails to consider an important aspect of the problem, or offers an explanation that runs counter to the evidence before the agency. *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983). Reliance on a legally flawed biological opinion is also arbitrary and capricious. *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010).

In determining whether the challenged actions are arbitrary and capricious, this Court must inquire whether NMFS considered the relevant factors and

articulated a rational connection between the facts found and the choices made. *Pac. Coast Fed'n of Fishermen's Ass'ns v. NMFS*, 265 F.3d 1028, 1034 (9th Cir. 2001). In making this inquiry, the Court "must engage in a careful, searching review to ensure that [NMFS] has made a rational analysis and decision on the record before it." *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 927 (9th Cir. 2008); *see also Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1090-91 (9th Cir. 2005).

Although factual and scientific determinations within an agency's expertise are generally entitled to deference, the agency still must cogently explain why it has exercised its discretion in a particular manner. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 48. When available data do not settle a regulatory issue, the agency cannot merely recite the terms "substantial uncertainty" as a justification, but instead must justify on the record the basis for its decision. *Id.* at 52; *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 847 (9th Cir. 2003).

## II. NMFS unlawfully based its "jeopardy" and "adverse modification" determinations on only a small portion of the wDPS

NMFS did not perform a species or DPS-level assessment of jeopardy and adverse modification, as ESA section 7 requires. Instead, it based its jeopardy and adverse modification determinations on the apparent localized population decline in the western Aleutian subregion and a perceived lack of increased pup production in the central Aleutian subregion. Together, these two subpopulations make up a

small fraction of the entire wDPS. The district court ignored this legal error, erroneously holding that "NMFS did . . . find that harm to the two sub-regions threatened the overall survival and recovery of the [w]DPS." ER0049.[5]

### A. The ESA requires jeopardy to be assessed at the species or DPS level, but NMFS did not do so here

ESA section 7(a)(2) requires each federal agency to "insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of the species' designated critical habitat. 16 U.S.C. § 1536(a)(2).[6] Section 7(a)(2)'s consultation requirement thus applies to "any endangered species or threatened species." *Id.*; *see also* 50 C.F.R. § 402.02 (defining "jeopardy" and "destruction or adverse modification" in terms of "listed species"). The ESA defines "species" as "any subspecies of fish or wildlife or plants, and *any distinct population segment* of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16) (emphasis added).

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[5] Appellants raised this issue below at ER0494-99. The district court ruled on it at ER0046-49.

[6] NMFS explained in the BiOp that because the jeopardy analysis "is primarily a habitat-based assessment," the jeopardy and adverse modification assessments "are very similar." ER0925 (BiOp). It therefore incorporated its jeopardy analysis as the primary support for its adverse modification determination. *Id.* Thus, except where specifically indicated, Appellants' arguments apply equally to NMFS' jeopardy and adverse modification determinations.

The phrase "distinct population segment" is not defined in the ESA or its implementing regulations. However, the term has long been recognized by this Court and other courts to constitute the smallest regulatory biological unit within a species. *See*, *e.g.*, *Trout Unlimited v. Lohn*, 559 F.3d 946, 951 (9th Cir. 2009) ("'[T]he ESA does not allow the Secretary to make listing distinctions below that of species, subspecies or a distinct population segment of a species.'") (citation omitted); *Defenders of Wildlife v. Salazar*, 729 F. Supp.2d 1207, 1215-16 (D. Mont. 2010) ("[T]he statute stops at a designated DPS—nothing smaller."); *Gifford Pinchot*, 378 F.3d at 1075 (purpose of consideration of localized impacts is to evaluate whether they, "*when aggregated*, do pose a significant risk to *a species*") (emphasis added).

Accordingly, a listed DPS is the smallest unit on which an agency's section 7 jeopardy and adverse modification determinations may be based. The Endangered Species Consultation Handbook ("Consultation Handbook"), which is jointly published by NMFS and the U.S. Fish and Wildlife Service ("FWS") to govern section 7(a)(2) consultations, further provides:

> Adverse effects on individuals of a species or constituent elements or segments of critical habitat generally do not result in jeopardy or adverse modification determinations unless that loss . . . is likely to result in significant adverse effects *throughout the species' range*, or appreciably diminish the capability of the critical habitat to satisfy essential requirements of *the species*.

ER2206 (emphasis added). Indeed, FWS recently explained that it is "not given the discretion under the ESA to assess 'jeopardy' and 'appreciably reduce the likelihood of survival and recovery' at a smaller scale (e.g., stock) unless the listed entity is in fact smaller than the entire species or subspecies (e.g., a discrete [sic] population segment)." 73 Fed. Reg. 76,249, 76,253 (Dec. 16, 2008); *see also* 76 Fed. Reg. 76,987, 77,004 (Dec. 9, 2011) (FWS/NMFS joint draft guidance explaining that "the provisions of the Act generally apply to the entire species" and that under section 7, "[j]eopardy analyses would be conducted at the scale of the species as a whole").

The requirement that a section 7 consultation occur at the species or DPS level is significant. Without such a minimum threshold, an agency could declare virtually any action to result in jeopardy or adverse modification, so long as it analyzed the action against an artificially selected subset of the species or fragment of critical habitat. *See generally Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) ("'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion'") (citation omitted).

Thus, an agency may consider site-specific impacts to subpopulations only to assess whether, when aggregated, those impacts pose significant risk to the species or DPS as a whole. *See, e.g.*, *Rock Creek Alliance v. U.S. Fish & Wildlife*

*Serv.*, 663 F.3d 439, 441, 443 (9th Cir. 2011) (affirming "the district court's well-reasoned opinion" in *Rock Creek Alliance v. U.S. Forest Serv.*, 703 F. Supp.2d 1152, 1193, 1193-1205 (D. Mont. 2010), where the district court upheld a BiOp's no jeopardy/adverse modification finding despite harmful effects on a species' recovery in select critical habitat areas, in part because "the value of overall critical habitat for recovery will not be appreciably diminished" and "effects on the core area population will be 'minor'"). *See also Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 948 (9th Cir. 2010) ("An area of a species' critical habitat can be destroyed without appreciably diminishing the value of critical habitat for the species' survival or recovery.").

Here, NMFS unlawfully premised its jeopardy and adverse modification findings on the status of sea lions in the western and central Aleutian subregions, even though by NMFS' own analysis the wDPS as a whole has stabilized and "core areas" in the heart of its range are increasing. *See* ER1020 (BiOp) ("The western DPS continues to show significant improvement in pup production in the core of its range, the eastern Aleutian Islands and western Gulf of Alaska."). The BiOp states:

> If it were not for [the western Aleutians subregion] it could be argued that the western DPS of Steller sea lions were moving toward recovery, as (1) overall the population is increasing and moving toward the number of animals required for downlisting, (2) no two juxtaposed subregions are in significant decline, and (3) no one subregion has a decline in abundance of over 50%. However, because

> of the current decline in the western Aleutians [subregion], as well as the slow decline observed in the central Aleutian subregion, the recovery of this DPS is not meeting the criteria in the Revised Recovery Plan (NMFS 2008a).

ER1273 (BiOp).[7]

In sharp contrast to its singular focus on the two subregions in the Aleutians, the BiOp never predicts what effect the continuation of the fisheries under the status quo mitigation measures would have on the wDPS *as a whole*. Indeed, NMFS omitted projections of the future size of the total wDPS population so as to avoid "considerable controversy." ER1972-74 (NMFS redline of internal draft BiOp deleting "Population Projection" section on total female wDPS population). NMFS discusses the current and past total population size of the wDPS in only a few sentences. Although NMFS summarizes the evidence of potential risks to the wDPS, it expressly states that its "focus . . . is on what additional measures, or changes in measures, may be required in the two sub-areas *that are not increasing in abundance currently*." ER1278 (BiOp) (emphasis added). It provides no analysis showing the projected size of the wDPS under the action as proposed or in contrast to the pre-action (*i.e.*, before 2003) condition of the wDPS. This failure to

[7] As explained in Argument Section III.A, *infra* at 36-42, NMFS' error was compounded by its mistaken assumption that the alleged failure of the wDPS to "meet[] the criteria in the Revised Recovery Plan" equates to a determination that the proposed action jeopardizes the wDPS or adversely modifies critical habitat.

analyze or explain how the effects of the action jeopardize or adversely modify the critical habitat of the wDPS as a whole violated the ESA.

### B. NMFS did not articulate a rational basis for concluding that localized adverse effects may jeopardize the wDPS

NMFS did not offer a rational connection between the status of the selected subpopulations and its conclusion that the proposed action jeopardizes or adversely modifies the critical habitat of the wDPS. Subpopulations may be relevant to a jeopardy determination if the agency supplies reasoned, detailed explanations showing how the population in a subregion is biologically or ecologically significant, or could otherwise result in jeopardy, to *the whole DPS or species*. *See*, *e.g.*, *Wild Fish Conservancy*, 628 F.3d at 529.

#### 1. The Aleutian subregions were created for geographical convenience—not for independent biological or ecological significance to the wDPS as a whole

In the BiOp, NMFS focused on a combination of Recovery Plan subregions and newly created, even smaller geographical units called "Rookery Cluster Areas" or "RCAs." *See supra* at 6 (map). The Recovery Plan created seven geographical subregions: "Russia/Asia; western, central, and eastern Aleutians Islands; [and] western, central, and eastern Gulf of Alaska." ER0915 (BiOp). The BiOp further divided the U.S. subregions into a total of nine RCAs for its analysis. *See* ER0919.

The record shows that the RCAs were developed by a few NMFS staff scientists in 2008 (ER2090) and documented in an unpublished agency report in

2010. *See* ER1160 (BiOp) (referring to AFSC 2010a). The RCA concept is not discussed in any peer-reviewed scientific papers and is not used for other management purposes. Moreover, it appears that the concept was not understood by those preparing the BiOp. On several occasions, including just before the draft BiOp was issued, team members asked Lowell Fritz, the primary creator of the RCA concept, about the meaning of the RCAs. *See* ER1970-71 (June 29, 2010: BiOp Team meeting notes asking Lowell what was the "criteria for lumping rookeries in RCAs?"); ER1969 (July 13, 2010: "Can Lowell provide an explanation of how the RCAs were stratified"); ER1968 (again: "Can Lowell provide an explanation of how the RCAs were stratified"). The record does not provide any such explanation or any biological basis for the RCAs.

In fact, in addition to providing no biological basis for the RCAs, NMFS admitted that the larger subregions delineated in the Recovery Plan were created for geographical convenience and were not necessarily based on their biological significance to the wDPS. ER0472 (subregions are "geographically convenient" and "do not necessarily reflect biologically important units") (quoting ER1017 (BiOp)).

Further, the population viability analysis or "PVA" model that the Recovery Team used to develop the section 4 Recovery Plan criteria did not even consider the effects of subpopulations on the viability of the entire wDPS. ER1276 (BiOp)

("[L]oss of subpopulation connectedness was not considered in the PVA reported in the Revised Recovery Plan . . . ."). Moreover, neither the Recovery Plan nor the BiOp explains how the populations in these subregions are biologically or ecologically "significant," as is required by the policy used by NMFS and FWS to evaluate population segments for potential management as a DPS. *See Nw. Ecosystem Alliance v. U.S. Fish and Wildlife Serv.*, 475 F.3d 1136, 1143-46 (9th Cir. 2007); *see also* ER2131-32 (I. Boyd, St. Andrews University pinniped expert: "changes in the balance of numbers in different regions within a range over time periods of decades to centuries should be considered to be normal" in pinnipeds with large ranges such as Steller sea lions).

The record thus lacks an adequate analysis or explanation from NMFS showing whether the status of sea lions in specific subregions is relevant to the viability of the whole DPS under the measures set forth in the proposed action, and, if so, how. *Compare Wild Fish Conservancy*, 628 F.3d at 519 (bull trout "population segment" previously found to be biologically significant to DPS listing decision); *Blue Water Fishermen's Ass'n v. NMFS*, 226 F. Supp.2d 330, 341 (D. Mass. 2002) (NMFS may predicate "its species-at-large jeopardy finding on the impact of a threat to a subpopulation, *provided that sound science supports its analysis*") (emphasis added).

### 2. NMFS' conclusion that the wDPS is jeopardized by the status of two subregions is unexplained and unsupported by the administrative record

The BiOp provides no reasonable explanation for how or why a decline observed in one small subregion would result in jeopardy (or adverse modification) to the entire wDPS, when most subregions, as well as the wDPS as a whole, are stable or increasing in abundance.

Even if NMFS had found that the geographic subregional groupings have biological or ecological significance, NMFS' own analysis shows that only *one* of *nine* RCAs within the wDPS (and only one of seven subregions—the western Aleutian subregion) is reported as declining in the past decade. *See* ER0919 (BiOp). The subpopulation in this sole declining subregion is tiny, comprising 3.4% (2008) to 6.9% (2000) of the entire wDPS, as measured by non-pup counts. ER1516 (BiOp). Additionally, according to the BiOp, a portion of the central Aleutian subregion "appears" to be declining at a statistically insignificant rate, while the other portion has inconsistent trends but increasing pup production. ER0919 (BiOp).

In the remaining RCAs and subregions, population counts are either increasing at "robust" rates or steadily increasing. ER0921 (BiOp) ("Sea lion abundance is increasing at a statistically significant rate *in four of remaining the* [sic] *five subregions*.") (emphasis added). The BiOp states that these four

subregions represent "a very large portion of the existing range of the western DPS and therefore create[] a strong position on which to diminish further the risk of extinction." ER1270 (BiOp). In U.S. waters, the wDPS increased at an average annual rate of about 3% from 2000 to 2004, and about 1.4% per year from 2000 to 2008. ER1268 (BiOp).

Moreover, the Recovery Plan identifies the extirpation of subregions as a threat only if two or more adjacent subregions are declining at significant rates. ER2110. However, as stated in the BiOp, no two adjacent subregions are declining at significant rates, and NMFS made no finding that sea lions will be extirpated in even one subregion. NMFS also inaccurately characterized these criteria in the BiOp: "[T]he Recovery Team strongly believed that *all parts of the range* must remain occupied *to ensure recovery*." ER1267 (BiOp) (emphasis added). In fact, the Recovery Plan would permit delisting even if two adjacent subregions were declining and a single subregion was declining at a rate of up to 50%, so long as other recovery criteria were satisfied. *See* ER2104. The existing status of the wDPS is consistent with these criteria.

The Recovery Plan's "two adjacent subregion" criterion primarily derives from NMFS' finding that pre-1990 declines may have resulted from declines in one subregion spreading to other subregions. *See* ER1270 (BiOp). Yet NMFS indicates that this concern is no longer warranted: "Our review . . . found that the

overall western DPS decline was likely due to the cumulative effect of multiple factors, and that the marked change in the rate of the decline since 1990 suggests that the factors that contributed to the more rapid declines may not be the most significant stressors now operating." ER1271 (BiOp). NMFS also indicates that the most significant historical stressors are substantially reduced (*e.g.*, intentional, non-subsistence-related shooting, incidental catch, and entanglement) or eliminated (*e.g.*, commercial harvests). ER1244-45, -71 (BiOp). Instead, NMFS postulates that the current "likely" and "possible" stressors are environmental change, indirect fisheries effects, killer whale predation, contaminants, and inter-species competition. ER1214, -1567 (BiOp). NMFS does not explain how a spread of declines from one subregion to another might reasonably be expected to occur under these changed circumstances.

NMFS has thus failed to cogently explain why it exercised its discretion in a particular manner. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 48; *accord Natural Res. Def. Council v. Daley*, 209 F.3d 747, 755 (9th Cir. 2003) (an agency "cannot rely on reminders that its scientific determinations are entitled to deference in the absence of reasoned analysis") (citation omitted). Instead, NMFS uncritically relies on its unsupported "belief" that the decline in the western Aleutians and lack of growth in the central Aleutians justify a conclusion that the proposed action jeopardizes the wDPS and adversely modifies critical habitat:

> It is *plausibl*e that significant declines in the western Aleutian Islands subregion *could indicate* that the extinction risk for the western DPS may still be too high unless stressors affecting the population in subregions are mitigated. Additional research will be important to better understand the threats and risks to each subregion and the DPS overall. NMFS *believes* it is important to maintain viable sub-populations within the western DPS and not rely solely on the core of the range to provide for increasing population numbers over the short-term.

ER1270 (BiOp) (emphases added); *see also* ER1267, -81 (BiOp). This unsupported "belief" is not rationally connected to the record evidence or even to the reasons subregions were created and addressed in the Recovery Plan. The APA requires agency decisions to be based on reasoned explanations that consider all of the evidence in the administrative record, not unsupported statements of "belief." Nowhere does NMFS satisfy this basic APA standard by providing a rational explanation connecting the BiOp's conclusions regarding two subregions with its findings as to the entire DPS.

In sum, NMFS did not articulate a rational connection between: (1) its conclusions that the wDPS and its critical habitat as a whole likely would be jeopardized or adversely modified; and (2) the status of the two small subregions on which NMFS relies for these conclusions. NMFS therefore violated the APA and ESA.

## III. NMFS failed to apply the governing legal standards in reaching its jeopardy and adverse modification findings

As discussed below, NMFS misapplied at least three key legal standards in its jeopardy and adverse modification determinations.[8]

### A. NMFS unlawfully required that the proposed action would insure that the DPS meet recovery criteria, rather than insuring that the action was not likely to jeopardize the DPS or adversely modify critical habitat

NMFS failed to answer the question compelled by section 7(a)(2) of the ESA: Whether the continuation of fisheries under the status quo mitigation measures, when added to the underlying baseline conditions, would cause "additional harm" in the form of new or deepened jeopardy to the wDPS or adverse modification of its critical habitat. *See Nat'l Wildlife Fed'n*, 524 F.3d at 930. Instead, NMFS incorrectly asked whether all the Recovery Plan criteria had been met, and it found jeopardy and adverse modification because, by its assessment, downlisting and delisting criteria for the wDPS have not yet been satisfied. Fundamentally, NMFS' determinations are grounded in its observation that the wDPS experienced a "lack of a robust recovery" between 2000 and 2008 that may or may not have been caused by the fisheries, killer whale predation, climate change, or the fluctuating carrying capacity of the North Pacific. *See* ER1273-76 (BiOp).

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[8] Appellants raised this issue below at ER0499-509. The district court ruled on it at ER0036-40, -0043-46.

Section 7(a)(2) has a specific and focused statutory purpose: to insure that a proposed action is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). Accordingly, the ESA regulations frame the jeopardy and adverse modification inquiries narrowly and in the negative—*i.e.*, whether the proposed action will "*reduce appreciably* the likelihood of both the survival and recovery of a listed species," and whether the proposed action will "*appreciably diminish*[] the value of critical habitat for both the survival and recovery of a listed species." 50 C.F.R. § 402.02 (emphasis added).

This Court has interpreted the "appreciable" reduction and diminishment standards as necessitating that the proposed action cause "some deterioration in the species' pre-action condition" or "some new jeopardy." *Nat'l Wildlife Fed'n*, 524 F.3d at 930. A species may be declining in certain areas of its range (or even across its entire range), and yet a proposed action will not jeopardize the species or adversely modify critical habitat so long as it does not make the species' current status appreciably worse than its pre-action condition. *See id*. Therefore, a degraded baseline (or, as here, an existing fished environment) is not enough to result in a jeopardy or adverse modification finding; there must be some *additional* action by the agency that *further* harms the species. *See id*. In short, section 7(a)(2) requires federal agencies to insure that specific actions will not worsen the

status of listed species. *See* 16 U.S.C. §§ 1536(a)(2), 1536(b)(3)(A); *see also* 50 C.F.R. §§ 402.02, 402.14(h)(3).

Section 7 consultation does require "some attention to recovery," in which the consulting agency must "simply provide[] some reasonable assurance that the agency action in question will not appreciably reduce the odds of success for future recovery planning, by tipping a listed species too far into danger." *Nat'l Wildlife Fed'n*, 524 F.3d at 936. However, this does not mean that an individual proposed action must insure the recovery of listed species that may be affected by the action. Nor does it mean that recovery is the only consideration to be addressed in a section 7(a)(2) consultation. *See id.* at 932 (only "in exceptional circumstances" would "injury to recovery alone . . . warrant" a jeopardy finding) (quoting 51 Fed. Reg. 19,926, 19,934 (June 3, 1986)).[9] Indeed, in a recent unpublished opinion, this Court clarified that a proposed agency action "need not boost the [listed species'] chances of recovery; NMFS must only determine those chances are not appreciably diminished by the plan." *Salmon Spawning & Recovery Alliance v. NMFS*, 342 Fed. Appx. 336, 338 (9th Cir. Aug. 14, 2009) (quotations and citation omitted). Were it otherwise, any federal action occurring within the range of a

[9] The administrative record contains no finding, and NMFS has not argued, that "exceptional circumstances" were present in the consultation at issue.

listed species that is not meeting downlisting or delisting criteria (*i.e.*, almost every listed species) could be found to cause jeopardy.

By contrast, ESA section 4 recovery planning places broad, affirmative duties on agencies to accomplish species recovery. *See* 16 U.S.C. § 1533(f)(1)(B)(ii) (recovery plan must include "objective, measurable criteria which, when met, would result in a determination . . . that the species be removed from the list"); *see also id.* § 1536(a)(1) (agencies must affirmatively carry out programs for "the conservation of endangered species and threatened species"); *Gifford Pinchot*, 378 F.3d at 1070 ("it is clear that Congress intended that conservation and survival be two different (though complementary) goals of the ESA"); 51 Fed. Reg. 19,926, 19,934-35 (June 3, 1986) (contrasting the affirmative obligations of section 7(a)(1) with the prohibitory function of section 7(a)(2)). Consequently, the broad *affirmative* duties assigned to agencies to accomplish recovery of listed species pursuant to section 4 are substantially different and broader than the action-specific *preventative* duty imposed by section 7(a)(2).

Here, NMFS improperly anchored its section 7(a)(2) analysis on the downlisting and delisting criteria from the Recovery Plan. *See* ER1268 (BiOp) (NMFS "must show" that Steller sea lions "are 'recovering'"); ER1266 (BiOp) (NMFS must "*ensure future recovery* of Steller sea lions throughout the range of the western DPS") (emphasis added); ER1200, -22, -37, -75, -76 (BiOp) (jeopardy

decision was based on "lack of a robust recovery"); ER1281 (BiOp) (BiOp is to "promote the recovery of SSLs"). Indeed, the *only* explanation NMFS provided in the BiOp for its jeopardy and adverse modification determinations is its finding that the wDPS does not (yet) satisfy all downlisting or delisting criteria. ER1273 (BiOp) ("the recovery of this DPS is not meeting the criteria in the Revised Recovery Plan"); *see also* ER0473 (federal defendants acknowledging that NMFS used "delisting and downlisting criteria" as the "definition of the levels at which survival and recovery will be impeded").

NMFS raised the bar too high by using the recovery criteria as a surrogate for the correct, and statutorily mandated, jeopardy/adverse modification analysis. In so doing, it failed to establish that the agency action under consideration—continued authorization of the existing fisheries, not authorization of any additional fishing or fisheries—would impair recovery to such a degree as to rise to the level of jeopardy. *See Nat'l Wildlife Fed'n*, 524 F.3d at 936. NMFS also did not determine whether continued authorization of the fisheries would result in a "significant impairment[]" of recovery efforts or would "appreciably reduce the odds of success for future recovery planning." *See id.* Instead, NMFS simply determined that the wDPS has not yet met delisting or downlisting criteria and, based on that determination, assumed that the fisheries must be causing jeopardy.

In addition to overlooking this overarching flaw in the BiOp, the district court's ruling is incorrect for at least two additional reasons. *First*, the court mistakenly framed the issue as whether NMFS may consider recovery *at all* in a section 7(a)(2) consultation. *See* ER0053 ("NMFS was permitted to consider recovery in making its § 7(a)(2) determinations"); ER0039 ("An agency may not be obliged to ensure recovery in the context of a § 7(a)(2) consultation, but it is another thing entirely to say that it is prohibited from discussing what is needed to do so."). However, NMFS' obligation to consider recovery at all in its jeopardy analysis is not at issue in this case, and Appellants have not contended otherwise.

*Second*, the district court erroneously reasoned that agency action need not boost a listed species' chances of recovery only "so long as" those chances are not appreciably diminished by the action. ER0038. By inserting the phrase "so long as" into the standard described in *Salmon Spawning*, the court incorrectly implied that an action found to appreciably diminish a listed species' chances of recovery can proceed only if it is revised (through an RPA) such that it "boosts" a species' chances of recovery. However, section 7(a)(2) does not require an action to "boost" a species' chances of recovery in *any* circumstance. Rather, if an action is found to cause jeopardy, then an RPA is required only to avoid "appreciably diminishing" the chances of recovery.

In short, NMFS improperly framed the pivotal question in the consultation as whether reauthorization of the fisheries *would not increase* the chances of, and ultimately achieve, recovery for the wDPS, rather than whether the ongoing fishing under status quo mitigation measures *appreciably diminishes* the chances of recovery. By failing to apply the correct section 7(a)(2) standard, NMFS violated the ESA and APA.

### B. The BiOp did not adequately address whether the fisheries "appreciably reduce" the chances of survival and recovery of the wDPS

NMFS further violated the ESA because it did not adequately address whether the proposed action *appreciably reduces* the likelihood of survival and recovery. Nowhere does NMFS determine the point at which impacts from the fisheries place the survival and recovery of the wDPS at risk.

This Court has held that, in evaluating whether an action appreciably reduces the likelihood of recovery, an agency must identify when a species will likely pass the tipping point for recovery and must determine whether the proposed action will cause that tipping point to be reached. *Wild Fish Conservancy*, 628 F.3d at 527 (biological opinion unlawful in part because FWS had not determined whether tipping point would be reached as a result of agency action). The district court incorrectly concluded that "the fact that NMFS did not specifically find that the proposed action would push the [w]DPS beyond the

'tipping point' from which it could possibly recover" was not dispositive. ER0039. The court apparently reasoned that the agency needs to identify the "tipping point" only when it *does not* find jeopardy and adverse modification, but need not do so when it *does* find jeopardy and adverse modification. *Id*. The APA does not sanction such results-oriented decision-making. *See Nat'l Wildlife Fed'n*, 524 F.3d at 927 (agency decision must be based on "rational analysis"); *Envtl. Def. v. U.S. Army Corps of Eng'rs*, 515 F. Supp.2d 69, 85 (D.D.C. 2007) (overturning the Corps' "result-oriented decision-making" because it "was neither rational nor based on consideration of the relevant factors").

Here, instead of identifying and evaluating the proposed action against a "tipping point," NMFS required the wDPS to be recovered before it could conclude that fisheries are not a threat to recovery:

> Without further understanding of the threats, or proof that the threats are no longer occurring, the [wDPS] population will retain the potential of 16% annual decline rates as observed in the late 1980s. Ultimately, the only way for the Steller sea lion population to demonstrate that threats are reduced is to increase over an extended time period.

ER1267 (BiOp); *see also* ER1273 (BiOp) (basing jeopardy conclusion on determination that recovery criteria are not yet satisfied). The only reason identified in the BiOp—that the species is not meeting all the delisting criteria—offers no indication of the specific point at which the fisheries would appreciably reduce the likelihood of recovery.

In addition, for section 7(a)(2) purposes, the "pre-action condition" against which the action is measured is the status of the wDPS before 2003. NMFS did not assess jeopardy using the relevant period of the action—the fishery operation under the mitigation measures from 2003 to 2008. After reviewing an internal draft of the 2010 BiOp, the Director of NMFS' Alaska Fisheries Science Center observed:

> Throughout the document there are references to "declining numbers of sea lions" in characterizing the current status of wSSL. I think that is misleading and we should discourage that phrase, when referring to trends in the wSSL DPS. Of course, if we use the maximum from the 70s as the starting point, we will always be able to talk about declines. But that is not really informative. Over the past decade, there is no statistically significant trend and the point estimate shows a slight increase (1% per year or so—for pup counts). I think we should refer to recent trends for the wSSL DPS as one of lacking a robust recovery or one that has stabilized.

ER1985. Despite these comments, NMFS consistently, and mistakenly, points to the entire period of decline prior to 2000 as evidence that fishing under the status quo RPA measures will adversely impact the wDPS. *See*, *e.g.*, ER0468, -0469; ER1271-73 (BiOp).

Without providing any reasoned evaluation of how the fisheries cause an "appreciable" harm to the wDPS, and without identifying any point (other than satisfaction of recovery criteria) at which such "appreciable" harm would occur, NMFS arrives at the unsupported conclusion that the fisheries are likely to present "additional harm" and that the proposed action is "not adequate to ensure that the

likelihood of jeopardy to the western DPS of Steller sea lion is avoided." ER1280 (BiOp). NMFS is not entitled to deference merely because it recites the statutory standards. NMFS was required to actually apply those standards and offer rational and reasoned explanations, supported by the administrative record, showing how the standards were or were not met. *See Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) ("An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."); *Chem. Mfrs. Ass'n v. Envtl. Prot. Agency*, 28 F.3d 1259, 1266 (D.C. Cir. 1994) (agency may not rely on mere conclusory statements to explain its decision). NMFS failed to do so and, therefore, violated the APA and ESA.

### C. NMFS improperly evaluated "nutritional stress" as an "indirect effect" without following the applicable regulations

NMFS also did not apply the correct regulatory standard for assessing "indirect effects." Specifically, NMFS based its jeopardy and adverse modification determinations on the fisheries' perceived "indirect effects" without making the necessary regulatory finding that those supposed indirect effects were actually "caused by" the proposed action.

"Effects of the action" may include both "the direct and indirect effects of an action." 50 C.F.R. § 402.02. "Indirect effects" are "*caused by* the proposed action and are later in time, but still are *reasonably certain to occur*." *Id*. (emphases

added). According to NMFS, "[t]he most notable indirect effect of commercial fisheries on Steller sea lions is the removal of prey species which could alter the animal's natural foraging patterns and their foraging success rate," resulting in "nutritional stress." ER1134-35 (BiOp) (emphasis added); *see generally* ER1133-38 (BiOp).

NMFS made no finding that this "indirect effect" was "caused by the proposed action," as required by 50 C.F.R. § 402.02. Instead, NMFS stated that it does not know whether nutritional stress is occurring at all and, more importantly, if so, whether it is "caused by" the fisheries. *See*, *e.g.*, ER0917 (BiOp) (with respect to nutritional stress, "[t]he data required to demonstrate cause and effect are not available"); ER1138 (BiOp) (referring to nutritional stress as a "hypothesis" that "may be occurring"); ER1964 ("we have considerable data from the last decade on biochemistry, foraging behavior, and survival that all suggest nutritional stress is not a problem").

The district court dismissed this issue, without referencing or discussing the regulatory definition, on the grounds that "ESA consulting agencies are not the equivalent of tort plaintiffs," who must prove causation. ER0045. However, Appellants do not contend that NMFS must meet a tort standard of "proof" in determining indirect effects. NMFS may determine, based upon its evaluation of the record evidence, whether or not a particular effect is "caused by" an action for

purposes of 50 C.F.R. § 402.02. But here, NMFS determined in the BiOp that it *cannot conclude* that nutritional stress (if it occurs at all) is "caused by" the fisheries, and yet it proceeded to evaluate nutritional stress as an "indirect effect" contrary to the regulatory definition. This violated the ESA and APA.

## IV. NMFS failed to properly apply its adverse modification regulation

NMFS failed to apply the correct legal standard, set forth in its own regulations, in reaching its conclusion that the existing fishery authorizations are likely to adversely modify critical habitat. This error was not harmless.[10]

An agency is bound by its own regulations unless: (1) they are invalidated by a court; (2) the agency revises them; or (3) Congress changes the law. *See Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1035 (9th Cir. 2007); *see also Found. for N. Am. Wild Sheep v. U.S. Forest Serv.*, 681 F.2d 1172, 1182 (9th Cir. 1982). This Court previously invalidated the "survival and recovery" portion of NMFS' regulatory definition for "adverse modification." *See Gifford Pinchot*, 378 F.3d at 1070; 50 C.F.R. § 402.02. However, the Court "did not alter the rule that an 'adverse modification' occurs only when there is 'a direct or indirect alteration that *appreciably diminishes* the value of critical habitat.'" *Butte Envtl. Council*, 620 F.3d at 948 (quoting 50 C.F.R. § 402.02).

[10] Appellants raised this issue below at ER0503-04. The district court ruled on it at ER0040-43.

Courts have rejected the argument that "appreciable" means merely "perceptible," holding instead that "appreciably diminish" means "considerably reduce." *See*, *e.g.*, *Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 606 F. Supp.2d 1195, 1208-09 (E.D. Cal. 2008); *cf. Butte Envtl. Council*, 620 F.3d at 948 (an "area of a species' critical habitat can be destroyed without appreciably diminishing the value of critical habitat for the species' survival or recovery"). This inquiry is made in the context of the critical habitat as a whole. Consultation Handbook at 4-41; *Nw. Envtl. Def. Ctr. v. NMFS*, 647 F. Supp.2d 1221, 1234 (D. Or. 2009).

Thus, NMFS was required to determine that the proposed action appreciably diminishes, *i.e.*, considerably reduces, the value of critical habitat as a whole before it could conclude that adverse modification was likely to occur. But NMFS admits that it did not do so here. ER0471. In lieu of applying the regulatory definition, NMFS asked "whether affected designated critical habitat is likely to remain functional (or retain the ability to become functional) to serve the intended conservation role for the species in the near and long term under the effects of the action, environmental baseline and any cumulative effects." ER0925; *see also* ER0927, -1213, -64, -65, -82, -84 (BiOp); ER1226 (asking whether the action "inhibits" the ability of critical habitat to remain or become functional to "serve the intended conservation role" (*i.e.*, to promote recovery)).

The district court nonetheless held that the BiOp standard "closely resembles" the regulatory definition and therefore satisfied the "appreciable diminishment" standard. ER0042-43. In essence, the court concluded—incorrectly—that NMFS' application of the wrong standard was harmless error. However, the harmless error doctrine "may be employed only 'when a mistake of the administrative body is one that *clearly* had *no bearing* on the procedure used or the substance of [the] decision reached.'" *Gifford Pinchot*, 378 F.3d at 1071 (citation omitted) (emphasis added by the *Gifford Pinchot* court). Further, "[a]n explanation that 'even if the [agency] had not used the incorrect regulatory definition, the same outcome would have resulted' is a post hoc decision explanation that is disfavored." *Id*. at 1072.

Here, the record does not show that NMFS' use of an incorrect standard clearly had no bearing on the substance of its adverse modification conclusion. NMFS' "remain or become functional" standard focuses on the preservation or improvement of habitat, in sharp contrast to the regulatory standard, which asks whether there is an appreciable reduction in existing habitat. Thus, application of the correct standard almost certainly would have affected the agency's conclusions. The district court erred in assuming that NMFS' failure to apply the binding regulatory standard was harmless.

The district court's holding is also contrary to the well-established principles that: (1) a court must set aside an agency's action where it failed to consider mandatory factors set forth in a regulation, *Natural Res. Def. Council v. U.S. Envtl. Prot. Agency*, 638 F.3d 1183, 1190 (9th Cir. 2011); (2) a reviewing court must evaluate a BiOp based on what the agency actually said, *Pac. Coast Fed'n*, 426 F.3d at 1091; and (3) an agency cannot make de facto amendments to regulations without going through notice-and-comment rulemaking. *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1091 (9th Cir. 2003). Based on these principles, NMFS' express refusal to apply the regulatory standard violated the ESA and APA.

## V. NMFS applied the wrong standard and failed to provide a rational basis in developing the RPA

The RPA is fundamentally flawed because it is designed to affirmatively achieve the recovery of the wDPS rather than to avoid the likelihood of jeopardy or adverse modification. Additionally, and independently, NMFS' decision to adopt the RPA should be set aside because it has no rational basis.[11]

### A. The RPA was unlawfully designed to achieve recovery, not to avoid jeopardy

If NMFS reaches an affirmative "jeopardy" or "adverse modification" determination in a section 7(a)(2) consultation, it must include RPAs, if any, that can be taken to avoid the likelihood of jeopardy or adverse modification.

[11] Appellants raised this issue below at ER0510-16. The district court ruled on it at ER0051-54.

16 U.S.C. § 1536(a)(2), (b)(3)(A); 50 C.F.R. §§ 402.02, 402.14(h)(3). In formulating an RPA, NMFS must use the best scientific and commercial data available and must consider any beneficial actions already taken by the agency or applicant. 50 C.F.R. § 402.14(g)(8). NMFS must also articulate a rational connection between the facts found, the action proposed under the RPA, and how each part of the RPA: (1) avoids the likelihood of jeopardy or adverse modification; (2) is consistent with the purpose of the underlying action; (3) is within the agency's authority; and (4) is economically and technologically feasible. 50 C.F.R. §§ 402.02, 402.14(h)(3); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp.2d 855, 954-55 (E.D. Cal. 2010); *see also Greenpeace v. Nat'l Marine Fisheries Serv.*, 55 F. Supp.2d 1248, 1264 (W.D. Wash. 1999).

NMFS compounded the errors in its jeopardy and adverse modification analyses by constructing an RPA that the agency believed would enhance species growth or promote recovery, rather than one that would avoid the likelihood of jeopardy and adverse modification. *See*, *e.g.*, ER1309 (BiOp) (the "overall intent of [the] RPA" is to trigger population growth through measures "expected to lead to higher survival and natality rates"); ER0523; ER1278 (BiOp) (RPA measures are aimed to recover "two sub-areas"); ER1281 (BiOp).

However, the question for an agency in developing an RPA is not whether a proposed action may be altered to *enhance* species growth or promote recovery; it

is whether measures can be taken to *avoid* jeopardy and adverse modification. The district court recognized the legal standards for RPAs, but erred in treating the issue as a factual dispute over scientific issues. ER0051-54. Here, the RPA is inherently grounded in an erroneous legal standard, and consequently is arbitrary and capricious or without observance of procedure required by law. 5 U.S.C. § 706(2)(A), (D); *see also Pac. Coast Fed'n,* 426 F.3d at 1090, 1095.

**B. The RPA measures lack a rational basis**

In the RPA, NMFS further restricted already restricted fishing in the Aleutians, including closing an area the size of New Mexico to fishing by approximately a dozen boats, to theoretically improve the "foraging success of Steller sea lions" and thereby, in the agency's view, achieve recovery. ER0072. Neither the agency's explanation in the BiOp of the RPA nor its counsel's post hoc rationalizations below meet the standards that require an agency to rationally explain based on the administrative record why it exercised its discretion in a particular manner. *See Pac. Coast Fed'n*, 426 F.3d at 1090-91.

NMFS must explain "why each part of a multi-part RPA ensures against jeopardy or adverse modification." *San Luis*, 760 F. Supp.2d at 954. The Consultation Handbook is even more specific: "When a reasonable and prudent alternative consists of multiple activities, *it is imperative* that the [biological] opinion contain a thorough explanation of how each component of the alternative

is essential to avoid jeopardy and/or adverse modification." Handbook at 4-43 (emphasis added). Even if only certain components of an RPA lack such explanation, the entire RPA must be set aside. *See*, *e.g.*, *Pac. Coast Fed'n*, 426 F.3d at 1095.

The district court erred by dismissing Appellants' challenges as "good faith scientific disagreements with NMFS," without evaluating the agency's analysis of each element of the RPA and determining whether it has a rational basis. ER0053-54. *See Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998) (court must determine whether "there was a rational connection between the facts found in the [biological opinion] and the choice made to adopt the final RPA"). As discussed below, NMFS failed to provide a rational basis for each element of the RPA, and its conclusions are contradicted by the administrative record.

#### 1. NMFS arbitrarily ignored information in the record that contradicted its rationale for increased fishing closures

NMFS stated in the BiOp that the RPA measures "are designed to ameliorate adverse effects of removing prey biomass in two subregions in the range of the western DPS and avoid competition in the short- and long-term." ER1293 (BiOp). NMFS further postulated that the theoretical adverse fishery effects in critical habitat "are exacerbated in areas of low ecosystem productivity and habitat spatial heterogeneity." ER1284 (BiOp). Essentially, the agency's rationale was: (1)

fisheries "may" be competing for food with sea lions; (2) forage ratios[12] are relevant because they indicate how much food is available in a given area; and, therefore, (3) forage ratios can be used to determine which areas should, in NMFS' view, be closed to fishing. However, this rationale ignores NMFS' own analysis demonstrating that the "forage ratios" in critical habitat in the western and central Aleutians, where new restrictions were imposed, are actually *higher* (*i.e.*, more beneficial to sea lions) than in the areas not affected by the RPA. ER1233-35 (BiOp); ER1810.

NMFS then compounded its error by overestimating the amount of forage that would be made available to sea lions by closing over 140,000 square miles to fishing. NMFS arbitrarily relied on a single-species model that: (1) assumes larger removals by the fisheries than in fact occur; (2) incorrectly characterizes the Aleutians as a relatively unproductive ecosystem; and (3) over-predicts increases in fish biomass by ignoring inter-species predation. ER1178 (BiOp) ("ecosystem modeling indicates that the single-species predictions may underestimate the status of commercially fished population [sic] relative to the unfished condition"); ER1179, -1186-89, -1220, -1233-35, -1298 (BiOp); ER1781-83; ER2148-55. NMFS did not provide a reasoned explanation for ignoring this bias; instead, it

[12] A "forage ratio" is the ratio of required prey for sea lion consumption to available groundfish by area.

simply commented on "the disadvantage of increased uncertainty due to additional model complexity." ER1298 (BiOp). NMFS argued inconsistently below that although a multi-species model was available and would be more accurate, it chose not to use the model because its relative complexity somehow made it more uncertain. ER0474-76; *compare Oceana, Inc. v. Evans*, 384 F. Supp.2d 203, 220 (D.D.C. 2005) (upholding NMFS' choice of model where a different or more complex model *did not exist and could not even be constructed*).

By relying on single-species modeling to justify RPA closures, NMFS arbitrarily disregarded the important and undisputed dynamic that: (1) cod eat mackerel at a very high rate; (2) sea lions feed primarily on mackerel; and (3) restricting cod fisheries will result in more cod, which will compete with sea lions for mackerel. *See* ER1178-79, -1298 (BiOp); ER1820-30. While NMFS may generally be entitled to deference in its choice of methodology, it is not entitled to deference when it chooses a method that creates a known bias without reasonable explanation and that disregards an "important aspect of the problem." *Motor Vehicle Mfrs.*, 463 U.S. at 43; *see also San Luis*, 760 F. Supp.2d at 909 (overturning choice of model where "FWS has not addressed or explained the material bias created by its methodological choices," and it "cannot be determined whether FWS would have reached the same result had the bias been considered or addressed").

### 2. Historical sea lion declines are not linked to current fishing practices

NMFS and Oceana misleadingly implied below that because the steepest declines in the wDPS occurred during the same time as the fishery growth in the North Pacific during the 1980s and 1990s, there must be an adverse relationship between the two trends, and that adverse relationship must be continuing. ER0464; ER0468. To the contrary, the BiOp explains that "no one factor accounts for the dynamic trends in Steller sea lion abundance in the western population, and that factors responsible for the period of steep decline (*e.g.*, 1980s), slow decline (*e.g.*, 1990s) and slow recovery (*e.g.*, 2000s) differ." ER1195 (BiOp). The Recovery Plan elaborates that "incidental take in fishing gear and the shooting of sea lions by fishermen and others were factors in the decline [of the wDPS] during the 1970s and 1980s," but "it is unknown whether fishery conservation measures have been effective in reducing threats to Steller sea lions." ER2109. The BiOp concludes that "[c]orrelations between recent trends in abundance for the western DPS of Steller sea lions and catches of commercial groundfish are highly varied, with no clear findings of significant positive relationships." ER1279 (BiOp); *see also* ER1310 (BiOp) (acknowledging that NMFS experimental design to confirm effects of 2003 conservation measures was never implemented).

The record thus does not support the contention that earlier declines were correlated with fishing effort, and, in any event, such post hoc rationalizations do

not provide a basis on which to uphold agency action. *See Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1164-65 (9th Cir. 1998).

**3. The record does not support NMFS' "178°W longitude" theory**

In a few summary sentences in the BiOp, NMFS attempted to justify the RPA by theorizing that the supposed "less restricted" fishing in the Aleutians is responsible for population declines west of 178°W longitude, while the supposed "more restricted" areas east of 178°W longitude are not declining. *See*, *e.g.*, ER1283-1284 (BiOp). This theory is based on a geographical "line" that has no regulatory significance for fishery management and no correlation with the Recovery Plan subregions. Moreover, the administrative record demonstrates that there is *no* connection between sea lion subpopulation trends in the western and central Aleutians and the relative degree of fishing restrictions.

*First*, fishing west of 178ºW longitude has, in fact, been substantially restricted through a series of RPAs implemented from 1998 to 2003. These RPAs established a complex suite of open and closed areas, open and closed periods, and limits on the amount of catch harvested inside critical habitat, thereby pushing the majority of mackerel fishing to locations outside of critical habitat. ER1814; *see also* ER2161-62; *Greenpeace*, 55 F. Supp.2d at 1255, 1262-63 (upholding "no jeopardy" biological opinion for mackerel fishery). All told, the RPAs closed 57% of critical habitat to mackerel fishing, 35% to cod longline/pot fishing, and 23% to

cod trawling. ER1506 (BiOp); *see also* ER1004 (BiOp) (total mackerel catch in critical habitat reduced by 40%). NMFS also banned directed trawl fishing for pollock in the Aleutians. ER0996-97, -1089, -1487-93 (BiOp). Despite all these measures, sea lions west of 178°W longitude (*i.e.*, in the western Aleutian subregions) *declined* between 2000 and 2008. ER1588 (BiOp).

*Second*, the rate of fishing east of 178°W longitude did not change as a result of any fishing restrictions under the previous RPA. *See* ER1585-86 (BiOp). In 2002, a large portion of critical habitat east of 178°W longitude was closed to mackerel fishing. However, the mackerel fleet had not historically fished in those areas, so there was no actual reduction in fishing effort due to the RPA restrictions. *See* ER1229 (BiOp); ER1712-13 (BiOp); ER2161-62. In addition, there has been no commercial fishery for mackerel in the GOA since 1996. ER1058 (BiOp). Despite the lack of change in fishing efforts, sea lion populations *increased* in the eastern Aleutian Islands and the GOA after 2001.

Thus, the record does not support NMFS' theory that the relative population trends were caused by varying fishing restrictions east and west of 178°W longitude. *See* ER1311 (BiOp); ER1832-38 (scientific assessment showing no correlation between prior restrictions and sea lion abundance). NMFS downplayed evidence that killer whale predation in the western Aleutians could be sufficient to suppress population growth in those areas. *See*, *e.g.*, ER1967 (BiOp team member

exclaiming that NMFS Office of Protected Resources biologists' "concerns over killer whales is almost a passion! Holy cow, they don't like to hear that killer whales eat SSLs."); ER1845-47; ER1880-82. Studies report that "fewer than 40 killer whales could have caused the recent Steller sea lion decline in the Aleutian archipelago, and a pod of five could suppress a low population," and that the population of the Aleutian/Bering Sea/GOA transient killer whale stock numbers well into the hundreds.[13] ER1047, -1103-05 (BiOp). Thus, to the extent that the RPA is grounded in the "178° W longitude" theory, it is arbitrary and capricious.

In sum, NMFS did not apply the correct legal standard in developing the RPA and did not articulate a rational connection between the facts found, the action taken in the RPA, and how each part of the RPA avoids jeopardy or adverse modification.

## VI. The district court erred in the NEPA remedy by not requiring NMFS to prepare a ROD on the new EIS

The district court erred in misconstruing the applicable legal principles that require NMFS to make a new decision on remand and to issue a record of decision ("ROD") for the EIS. The court specifically rejected Appellants' request that the new EIS be used to inform a new decision on the Steller sea lion protection

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[13] NMFS argued below that "surveys [in the far western Aleutians] have never observed any transient killer whales." ER0470. In fact, no killer whale surveys have been conducted in the far western Aleutians. *See* ER2134-46.

measures, and that the decision be memorialized in a ROD.[14] The district court "necessarily abuses its discretion when it bases its decision on an erroneous legal standard." *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1298 (9th Cir. 2003).

Under NEPA, a ROD is required to complete the EIS process because NMFS' action is ongoing; *i.e.*, the agency continues to implement the IFR and revised SSL protection measures. *See* ER0009-11 (remedy order declining to vacate or enjoin the IFR but ordering NMFS to prepare an EIS); ER0070-95 (IFR). A ROD is "a concise public record of decision" that describes the factors the agency considered in making its decision and "all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered." 40 C.F.R. § 1505.2; *see also* NOAA AO 216-6 § 5.04b.1(h) (ER2158) (EIS shall conclude with a ROD).

The ROD is necessary as part of NEPA's action-forcing EIS process, 40 C.F.R. § 1500.1(a), which requires NMFS to actually consider the EIS information in making its decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1026 (9th Cir. 2007) ("the fundamental purpose of NEPA . . . is to ensure that federal agencies

[14] Appellants raised this issue below at ER0436-41. The district court ruled on it at ER0001-13.

take a 'hard look' at the environmental consequences of their actions early enough so that it can serve as an important contribution to the decision making process"); *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000) (NEPA analysis cannot merely "rationalize or justify decisions already made"); *see also* 40 C.F.R. § 1502.1 ("An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions."); NOAA AO 216-6 § 6.03 (ER2159) ("NEPA documents . . . must accompany the decision documents in the NOAA decision-making process for any major Federal action.").

By not requiring a ROD, the district court thwarted NEPA's requirement that federal agencies "carefully weigh environmental considerations and consider potential alternatives to the proposed action before the government launches any major federal action." *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1131 (9th Cir. 2011) (citation omitted); *accord W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 492-93 (9th Cir. 2011). The EIS is to be part of both the agency's decision-making process and the agency's implementation of that decision.

The need to uphold this action-forcing aspect of an EIS is particularly important here. New scientific and other information is available to be considered in the remanded EIS and then acted upon in a ROD. The 2010 and 2011 Steller sea lion surveys show continued population increases in the wDPS overall.

ER0249-50; ER0423. The states of Washington and Alaska also contracted an independent scientific review of the BiOp, which provided data that was not present in the BiOp. The reviewers concluded that "any future increase or stabilization in sea lion biomass in the western and central Aleutian Islands will *not* be due to restricting fisheries for Pacific cod," and that the RPA is "not relevant to the recovery of Steller sea lions." ER0245-46; *see also* ER0264-65; ER0366. ER0121-25, ER0234-41 (impacts on fisheries from closures and new study regarding shark and killer whale predation on Steller sea lions).

This is exactly the type of information that NEPA requires to be considered in an EIS, and then acted upon in a ROD when an agency pursues and implements an action—here, the IFR—for which NEPA compliance and an EIS is required. 40 C.F.R. §§ 1500.1(a), (b) (requiring that EIS information "must be of high quality" and include "[a]ccurate scientific analysis, expert agency comments, and public scrutiny"); *id.* § 1502.7(b) (EIS must discuss responsible opposing views); *id.* § 1502.24 (agency must "insure the professional . . . [and] scientific integrity" of the EIS); *id.* § 1509.2 (ROD requirement). *See also Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1169 (9th Cir. 2003) (EIS must "disclose and discuss responsible opposing scientific viewpoints").

In rejecting the Appellants' request to require NMFS to make a new decision and prepare a ROD on remand, the district court misapplied controlling NEPA legal principles. This Court should reverse.

**VII. This Court should vacate the BiOp and the IFR**

The appropriate remedy for NMFS' ESA and APA violations is vacatur of the actions taken in reliance on the flawed ESA analysis. Both the BiOp and the IFR should be vacated.[15]

The APA directs that a reviewing court "shall . . . set aside" agency action held to be "arbitrary, capricious . . . or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Both the Supreme Court and this Court have held that vacatur is the presumptive remedy for an APA violation. *F.C.C. v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003) ("In all cases agency action must be set aside if the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or if the action failed to meet statutory, procedural, or constitutional requirements.") (internal quotations and citations omitted); *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011) ("[W]here a regulation is promulgated in violation of the APA and the

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[15] Appellants raised this issue below at ER0517-18. The district court did not rule on it due to its erroneous dismissal of Appellants' ESA and APA claims, although it did deny Appellants' request for vacatur based on the NEPA violation. *See supra* at 5; ER0009-11.

violation is not harmless, the remedy is to invalidate the regulation."); *Alsea Valley Alliance v. U.S. Dep't of Commerce*, 358 F.3d 1181, 1185 (9th Cir. 2004) ("vacatur of an unlawful agency rule normally accompanies a remand"). Only in "rare circumstances" does this Court remand without vacating an improper agency action. *See*, *e.g.*, *Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995).

Here, vacatur of the BiOp and IFR is both warranted and necessary. The circumstances are not "rare," and the deficiencies in the agency's decisions are serious: NMFS failed to apply the correct statutory standards in at least four areas under the ESA, and therefore reached decisions that were arbitrary and capricious. Although the ESA is intended to conserve endangered species, *see*, *e.g.*, *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174-75 (1978), Congress also intended it to prevent needless "economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett*, 520 U.S. at 176-77.

The flawed BiOp, RPA, and IFR also have direct adverse impacts on Appellants. By NMFS' own estimates, the IFR is resulting in annual losses of: $83.2 million in total earnings; $4 million in State revenue; $61 million in gross fishing revenue; 750 jobs; $6-7 million in the longline fishery's gross revenues; and $34-44 million in trawl catcher/processor sector gross revenues. ER0543-44, -

0842, -61, -63, -76-77; *see also* ER0482 (Ph.D. economist Gregory Leonard: "These are real economic effects occurring because of the Steller sea lion protection measures and being experienced now in the affected communities and Alaska's regional economy.").

By contrast, the record demonstrates that the overall wDPS of approximately 70,000-plus Steller sea lions is *increasing* each year. See *supra* at 9, 12 & n.3. Further, there is insufficient evidence to demonstrate that the population status of two subpopulations of the wDPS is affected by nutritional stress and, even assuming it were, that nutritional stress is caused by regional fishing activity. *See supra* at 14-17, 45-47. At a minimum, the wDPS as a whole has stabilized. The most current information shows that the wDPS pup count trend increased at an average annual rate of 1.8% over the past decade, and that the overall wDPS population trend remains positive. ER0249; *see also supra* at 12 & n.3.

Upon vacatur, the prior regulations should be reinstated. *See Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force."); *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1020 (9th Cir. 2009) (applying *Paulsen* to ESA proceeding). The applicable rules to be reinstated are the RPA measures promulgated under NMFS' 2001 BiOp, as supplemented in 2003—products of extensive processes involving NMFS, the Council, scientific advisors, and the

public. The effect of the prior RPA measures was to disperse fishing efforts temporally and spatially. ER0995-1004 (BiOp). Re-implementation of the prior RPA measures would not result in disruptive consequences to the wDPS, or for the fisheries managers or regulated industries who have the prior Steller sea lion protection measures to use and rely upon to continue listed species conservation efforts. ER0251-52; *see also* ER0123; ER0491; ER0479 (the "effects of the RPA on the response of the Steller sea lion population cannot be projected with . . . certainty") (citing ER0817 (EA)). Accordingly, considering the equitable factors, vacating the BiOp and IFR is the appropriate remedy.

## CONCLUSION

For the above reasons, this Court should reverse the district court's judgment as to: (1) the ESA and APA claims; and (2) the NEPA remedy order, to the extent that the district court did not direct NMFS on remand to make a new decision on its IFR and to document it in a ROD. Appellants further request that the Court: (1) vacate the BiOp and IFR; (2) reinstate the prior regulations; (3) require NMFS to issue a new decision after completion of the EIS; and (4) remand to NMFS for further proceedings.

Dated: June 27, 2012.

Respectfully submitted,

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

Bradley E. Meyen
Andrew R. Naylor
Assistant Attorneys General
Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Telephone: (907) 269-5232
Facsimile: (907) 279-2834
Email: brad.meyen@alaska.gov

By: /s/ Murray D. Feldman
Murray D. Feldman
Holland & Hart LLP
101 South Capitol Blvd., Suite 1400
P.O. Box 2527
Boise, ID 83701
Telephone: (208) 342-5000
Facsimile: (208) 343-8869
Email: mfeldman@hollandhart.com

**Attorneys for Plaintiff-Appellant State of Alaska**

By: /s/ Linda R. Larson (consent)
Linda R. Larson
Jessica K. Ferrell
Marten Law PLLC
1191 Second Avenue, Suite 2200
Seattle, WA 98101
Telephone: (206) 292-2600
Facsimile: (206) 292-2601
Email: llarson@martenlaw.com
Email: jferrell@martenlaw.com

**Attorneys for Plaintiffs-Appellants Alaska Seafood Cooperative, et al.**

By: /s/ Ryan P. Steen (consent)
Ryan P. Steen
Jeffrey W. Leppo
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
Facsimile: (206) 386-7500

**Attorneys for Plaintiff-Appellant Freezer Longline Coalition**

## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs-Appellants state that there are no related cases.

## CERTIFICATE OF COMPLIANCE PURSUANT TO 9TH CIRCUIT RULES 28-4, 29-2(C)(2) AND (3), 32-2 OR 32-4

I certify that (check appropriate option):

☒ This brief complies with the enlargement of brief size permitted by Ninth Circuit Rule 28-4. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This brief is 15,360 words, N/A lines of text or N/A pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

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☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: June 27, 2012

/s/ Murray D. Feldman
Attorney for State of Alaska

## CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Murray D. Feldman

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# ADDENDUM

## ADDENDUM

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**Administrative Procedure Act, 5 U.S.C. § 706**

**Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

…

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

**Endangered Species Act, 16 U.S.C. § 1532**

**Definitions**

For the purposes of this chapter—

…

(3) The terms “conserve”, “conserving”, and “conservation” mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

…

(5)(A) The term “critical habitat” for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

…

(6) The term “endangered species” means any species which is in danger of extinction throughout all or a significant portion of its range other than a

species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

…

(16) The term “species” includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

…

(20) The term “threatened species” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

**Endangered Species Act, 16 U.S.C. § 1533**

**Determination of endangered species and threatened species**

…

(f) Recovery plans

(1) The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable—

(A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity;

(B) incorporate in each plan—

(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;

(ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

(iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

(2) The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.

(3) The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.

(4) The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan. The Secretary shall consider all information presented during the public comment period prior to approval of the plan.

(5) Each Federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).

**Endangered Species Act, 16 U.S.C. § 1536**

**Interagency cooperation**

(a) Federal agency actions and consultations

…

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

…

(b) Opinion of Secretary

…

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a) (2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

**Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1855**

**Other requirements and authority**

…

(f) Judicial review

(1) Regulations promulgated by the Secretary under this chapter and actions described in paragraph (2) shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of Title 5, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable; except that--

(A) section 705 of such Title is not applicable, and

(B) the appropriate court shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D) of such Title.

(2) The actions referred to in paragraph (1) are actions that are taken by the Secretary under regulations which implement a fishery management plan, including but not limited to actions that establish the date of closure of a fishery to commercial or recreational fishing.

(3) (A) Notwithstanding any other provision of law, the Secretary shall file a response to any petition filed in accordance with paragraph (1), not later than 45 days after the date the Secretary is served with that petition, except that the appropriate court may extend the period for filing such a response upon a showing by the Secretary of good cause for that extension.

(B) A response of the Secretary under this paragraph shall include a copy of the administrative record for the regulations that are the subject of the petition.

(4) Upon a motion by the person who files a petition under this subsection, the appropriate court shall assign the matter for hearing at the earliest possible date and shall expedite the matter in every possible way.

**40 C.F.R. § 1502.1**

**Purpose**

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

**40 C.F.R. § 1505.2**

**Record of decision in cases requiring environmental impact statements**

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A–95 (Revised), part I, sections 6 (c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

**50 C.F.R. § 402.02**

**Definitions**

*Act* means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq*.

*Action* means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

(a) actions intended to conserve listed species or their habitat;

(b) the promulgation of regulations;

(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or

(d) actions directly or indirectly causing modifications to the land, water, or air.

*Action area* means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

*Applicant* refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

*Biological assessment* refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat.

*Biological opinion* is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

*Conference* is a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the Act regarding the

impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.

*Conservation recommendations* are suggestions of the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

*Critical habitat* refers to an area designated as critical habitat listed in 50 CFR Parts 17 or 226.

*Cumulative effects* are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

*Designated non-Federal representative* refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment.

*Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

*Director* refers to the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration, or his authorized representative; or the Fish and Wildlife Service regional director, or his authorized representative, for the region where the action would be carried out.

*Early consultation* is a process requested by a Federal agency on behalf of a prospective applicant under section 7(a)(3) of the Act.

*Effects of the action* refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation

in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

*Formal consultation* is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act.

*Incidental take* refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.

*Informal consultation* is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.

*Jeopardize the continued existence of* means 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.

*Listed species* means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11–17.12.

*Major construction activity* is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. 4332(2)(C)].

*Preliminary biological opinion* refers to an opinion issued as a result of early consultation.

*Proposed critical habitat* means habitat proposed in the Federal Register to be designated or revised as critical habitat under section 4 of the Act for any listed or proposed species.

*Proposed species* means any species of fish, wildlife, or plant that is proposed in the Federal Register to be listed under section 4 of the Act.

*Reasonable and prudent alternatives* refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

*Reasonable and prudent measures* refer to those actions the Director believes necessary or appropriate to minimize the impacts, i.e., amount or extent, of incidental take.

*Recovery* means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.

*Service* means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

**50 C.F.R. § 402.14**

**Formal consultation**

…

(g) *Service responsibilities*. Service responsibilities during formal consultation are as follows:

…

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) *Biological opinions*. The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

## RPA Maps

RULE002614

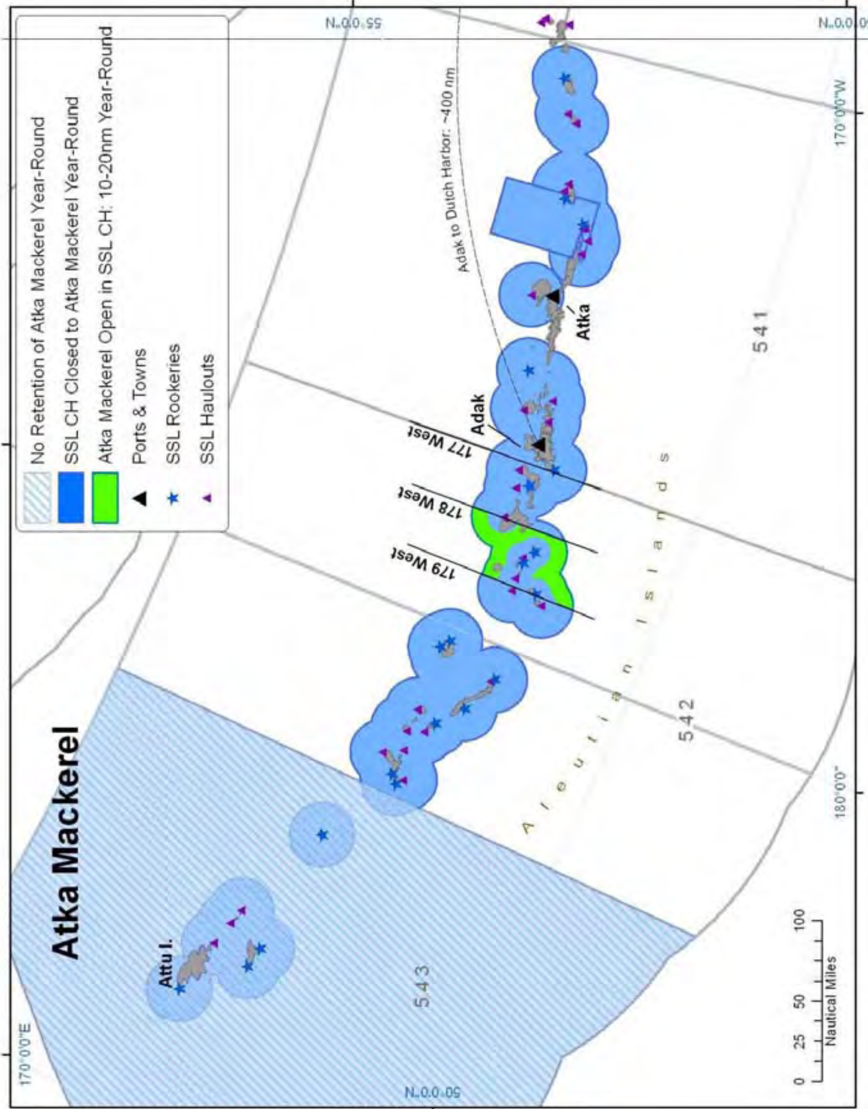


Figure 8.2. Map of the RPA for Atka mackerel fisheries in Areas 543, 542, and 541.

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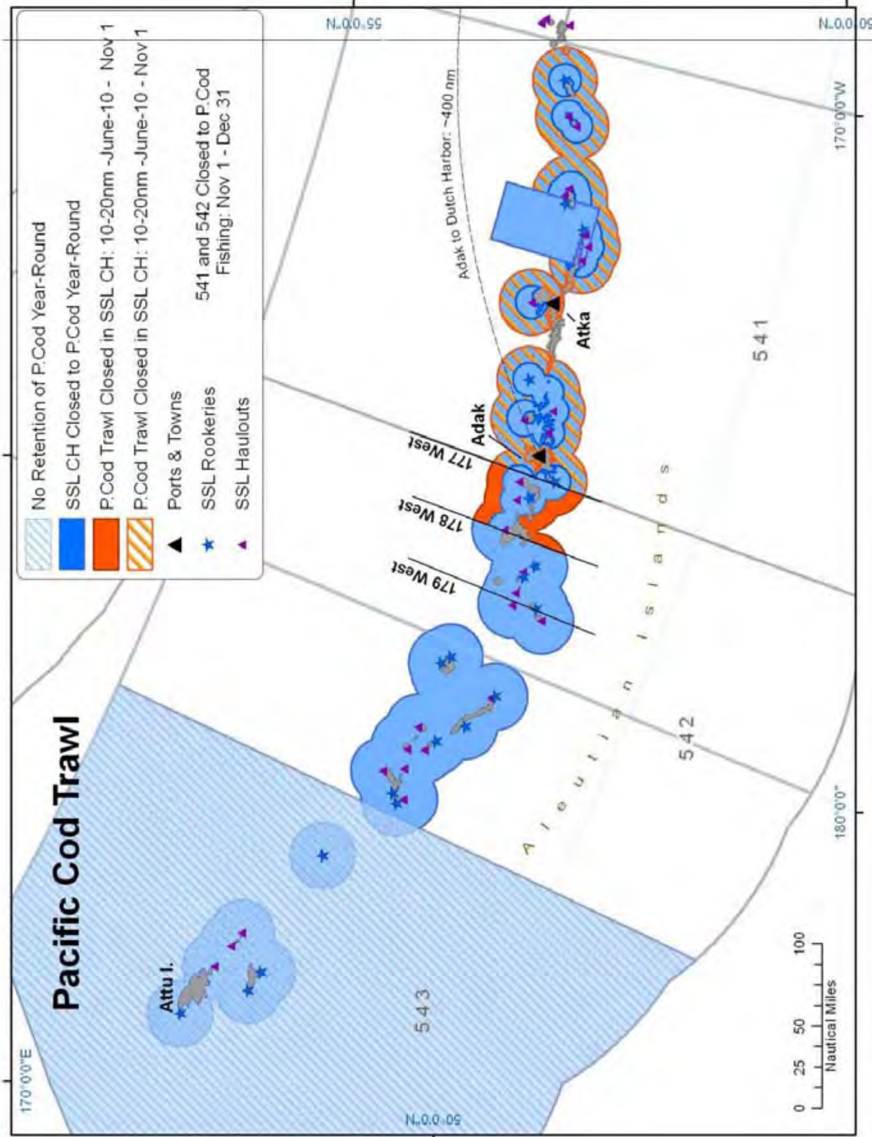


Figure 8.4. Map of the RPA for Pacific cod trawl fisheries in Areas 543, 542, and 541.

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