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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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

FEDERAL DEFENDANTS' BRIEF ON PROPOSED REMEDY

Plaintiffs in this consolidated action challenged restrictions imposed by the National Marine Fisheries Service (NMFS) on the groundfish fisheries for Pacific cod and Atka mackerel in the western and central Aleutian Islands to avoid jeopardy or adverse modification of critical habitat for the endangered western distinct population segment of the Steller sea lion, pursuant to a Biological Opinion ("BiOp") prepared by NMFS under the requirements of Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536. The Court entered its decision (Docket No. 130) on the merits in this case on January 19, 2012. In that decision at pages 43-53, the Court concluded that NMFS erred when it did not prepare an environmental impact statement ("EIS") prior to the issuance of an interim final rule ("IFR") imposing those restrictions. The Court specifically found that "NMFS was required to prepare an EIS." *Id*. at 43, 49, 50.

The Court also found that the "NEPA violations at issue here do not undermine NMFS's ESA determinations and the Court has found that the IFR complied with the MSA and APA." Id. at 54. Accordingly, the Court stated that it "will not vacate the BiOp or the IFR," but "that some degree of injunctive relief is appropriate to remedy the NEPA violations," and that "the Court intends to remand the matter to NMFS to prepare an EIS in compliance with NEPA procedures." *Id*. at 54-55. The Court further explained that the injunctive relief would take the form of an order directing NMFS to prepare an EIS by a given deadline. *Id*. at 55.[1]

[1] Accordingly, Federal Defendants do not believe that the Court's order contemplates any remedies beyond addressing the identified NEPA violations. Indeed, any injunctive relief must be narrowly tailored to address the specific violations identified by the Court and should be no more burdensome to the defendant than necessary. 42 AM. JUR. 2D INJUNCTIONS § 261 (noting that any injunction issued by the Court would be subject to the principles of equity and, as such, would have to be "molded to the necessities of the particular case," and "should be no more burdensome to the defendant than necessary . . . ."). The Ninth Circuit has admonished that "intervention into the process of environmental regulation, a process of great complexity, should be accomplished with as little intrusiveness as feasible." *Western Oil & Gas Ass'n v. EPA*, 633

The Court has provided the parties with the opportunity to submit briefs as to remedy. *Id*. at 56. This brief is submitted in response to that invitation.[2]

With respect to the question of timing of an EIS, NMFS has considered two options which lead to two different possible deadlines. Declaration of Robert D. Mecum, Exhibit 1 hereto, ¶¶ 3 to 9 (hereinafter, "Mecum Declaration"). The difference between the two schedules is whether the public process that NMFS will follow directly involves the North Pacific Fishery Management Council. *Id*. If the Council is more fully included, the minimum time needed to complete a final EIS and release it to the public is 23 months, or March 2, 2014. If the Council is not as fully involved, then the minimum time needed to complete a final EIS and release it to the public is 15 months, or June 29, 2013.[3] Given the role of the Council in the fishery management process, NMFS prefers the time line that permits it to more fully include the Council in the NEPA process. This longer schedule would also be consistent with the concern the Court expressed in its decision at pages 50-52, that there had been inadequate public involvement in the NEPA process. An order allotting 23 months for the preparation of the NEPA compliance

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F.2d 803, 813 (9th Cir. 1980). Accordingly, Federal Defendants have limited this brief to addressing a remedy tailored to the specific NEPA violations identified in the Court's order. Should Plaintiffs argue for a more expansive remedy, such a remedy would not comport with the law governing the imposition of injunctive relief, would risk violating the ESA, and would present major practical obstacles for NMFS's management of the fishery. See *infra* at 6. Accordingly, in that event, Federal Defendants would seek leave to file additional briefing in response.

[2] By submitting the instant brief, Federal Defendants do not waive any claim or defense, nor do they waive any right to seek appellate review of the Court's Order (Docket No. 130) and/or any subsequent order on remedy and/or final judgment. *Alsea Valley Alliance v. Department of Commerce*, 358 F.3d 1181, 1184 (9th Cir. 2004) (administrative agencies are permitted to appeal remand orders as "final decisions" for purposes of 28 U.S.C. § 1291).

[3] The 23 months and 15 months start with the publication of the notice of intent to prepare an EIS by the end of April 2012.

documents would also allow NMFS to complete a potentially more robust EIS, insure more public involvement, and utilize more fully the knowledge and expertise of the Council.

Therefore, Federal Defendants suggest that the appropriate injunctive relief consistent with the Court's determinations is an injunction that NMFS issue a final EIS analyzing the environmental impacts of the Interim Final Rule, 75 Fed. Reg. 77,535 (Dec. 13, 2010), by March 2, 2014. That injunction should also explicitly provide Federal Defendants with the opportunity to move for and be granted, upon a showing of good cause, extensions of that date. *See* 40 C.F.R. § 1501.8 (recognizing that prescribed universal time limits for the entire NEPA process as too inflexible). Accordingly, Federal Defendants do not believe the Court should establish any date or dates in its injunction,[4] other than the date of publication of notice of the filing of the EIS with the Environmental Protection Agency ("EPA") and of making it available to the public pursuant to 40 C.F.R. § 1506.9.

NMFS would use the requested 23 months to complete the various steps that must be taken under NEPA's implementing regulations prior to finalizing an EIS. This NEPA process commences with publication in the Federal Register of a notice of intent to prepare an EIS and an invitation for the public and government agencies to participate in the agency scoping process. 40 C.F.R. § 1501.7. This scoping process includes, among other things, a determination of significant issues that are to be analyzed in depth; identification of issues that may be

[4] The presumption is that government agencies will properly carry out their functions. *Federal Communications Comm'n v. Schreiber*, 381 U.S. 279, 296 (1965). This presumption has been applied specifically to the NEPA process. *Conner v. Burford*, 848 F.2d 1441, 1448 (9th Cir. 1988), *cert. denied sub nom, Sun Exp. and Prod. Co. v. Lujan*, 489 U.S. 1012 (1989). ("We cannot assume that the Government agencies will not comply with their NEPA obligations in later stages of development.") Therefore, it should be presumed that NMFS will meet all of the intervening requirements of the NEPA process. It is not necessary to require compliance with any of those procedures or to establish deadlines for the same.

eliminated or which do not require extensive discussion; and identification of other environmental review and consultation requirements. 40 C.F.R. § 1501.7(a).

A draft EIS is then to be prepared in accordance with the scope decided upon in the scoping process. 40 C.F.R. § 1502.9(a). Following completion of a draft EIS, publication of notice of the availability of that draft EIS is required, 40 C.F.R. § 1506.10(a), and an opportunity for public and other comments on that draft must be provided before a final EIS may be prepared. 40 C.F.R. § 1503.1(a). The comments received to the draft EIS must be considered and responded to in the final EIS. 40 C.F.R. § 1503.4. How much time may be needed to perform these tasks is dependent on the scope, the analysis, and the content of any comments received. The more substantive the comments received, or the more detailed and especially technical or factual nature of the comments, the more time that could be required.

Once a final EIS is completed, that statement together with comments received and responses thereto, are filed with the U.S. Environmental Protection Agency ("EPA"). 40 C.F.R. § 1506.9. EPA publishes weekly in the Federal Register a notice of the EISs it received during the preceding week. 40 C.F.R. § 1506.10(a). That publication completes the process of preparing an EIS. It is the completion of the EIS that the Court has required. Therefore, any injunction should only provide the date of publication of notice in the Federal Register of the availability of the final EIS. This is the relief that is consistent with the requirement that injunctions are to be "narrowly tailored to give only the relief to which plaintiffs are entitled." *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990). Federal Defendants also request that this date be no earlier than March 2, 2014, as this date permits NMFS to more fully include the North Pacific Fishery Management Council in that process.

The IFR Should Remain In Effect.

The Court has permitted the parties to submit briefs responding to the Court's finding that an appropriate remedy in this case would be to require that NMFS prepare and issue an EIS pursuant to a specified deadline. Docket No. 130 at 55-56. Plaintiffs may argue that in addition to imposing a deadline for completion of the EIS, the Court should also enjoin or alter the application of the IFR pending completion of the mandated EIS. Any such request would lack merit for a number of legal and practical reasons. The Court has already decided that it would not be appropriate to vacate either the IFR or the biological opinion. *Id*. at 54. An injunction that would alter or suspend the IFR would be similarly inequitable, unjustified, and overbroad.

It would be inequitable to enter an injunction because the third and fourth prongs of the traditional injunction analysis tip in favor of protecting the Steller sea lion, an endangered species.[5] Any order adjusting the IFR and its complex suite of protection measures designed avoid jeopardy to the Steller sea lion or adverse modification of critical habitat would improperly lessen the protections afforded to the Steller sea lion under a valid biological opinion. Altering those protections would run counter to the mandate of the ESA making protection of listed species from jeopardy and adverse modification paramount. In *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987), the Ninth Circuit concluded that Congress' policy in the ESA of "institutionalized caution" means that "the balance of hardships [i.e., prong three of the traditional injunctive relief analysis] and the public interest [i.e., prong four of the traditional

[5] In *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 129 S. Ct. 365 (2008), the Supreme Court made it clear that the traditional four-factor test for an injunction applies when considering a permanent injunction to remedy a NEPA violation and there is no presumption that an injunction is warranted, regardless of the underlying legal violation or claim. *Id*., 555 U.S. at 32-33; *see also Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010).

injunctive relief analysis] tip heavily in favor of endangered species." *Id*. at 1383. "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). Accordingly, in cases involving the ESA, courts "may not use equity's scales to strike a different balance." *Sierra Club*, 816 F.2d at 1383 (9th Cir.1987); *see also Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir.1996) ("Congress has determined that under the ESA the balance of hardships always tips sharply in favor of endangered or threatened species.") and *National Wildlife Fed. v. NMFS*, 422 F.3d 782, 793–94 (9th Cir. 2005).

More particular to the circumstances presented here, there is no factual basis in the record for adjusting the IFR to permit additional commercial fishing opportunities for Atka mackerel or Pacific cod. The Court has already found that the IFR and biological opinion fully comply with the law, particularly the ESA and Magnuson-Stevens Act (MSA), and that the "NEPA violations at issue here do not undermine" such compliance. Docket No. 130 at 54. As NMFS explained in its biological opinion, it reviewed a series of alternative proposals for modifying the IFR, and "did not identify alternate time or area closures that would be adequate to remove the likelihood of the fisheries causing jeopardy or adverse modification." RULE002462 (Biological Opinion at p. 362). It would be improper for an injunction to establish a regulatory regime for these commercial fisheries that would, in all likelihood, not comply with the ESA.

Furthermore, any alteration of the IFR to allow more fishing for Atka mackerel or Pacific cod in the western or central Aleutian Islands would likely require additional changes to the harvest specifications for other fish species and in other Bering Sea and Aleutian Islands (BSAI) management areas. *See* Mecum Declaration ¶ 10. Any changes to the IFR would require other adjustments to the BSAI harvest specifications to ensure that the allowable catch for all species

and in all areas comply with the requirements of the BSAI fishery management plan and the applicable harvest specifications determined annually by the North Pacific Fishery Management Council and approved by NMFS. *See e.g.* 76 Fed. Reg. 11,139 (March 1, 2011). Thus, an injunction modifying the IFR would not only threaten an ESA violation, but also require regulatory changes that would affect the interests and expectations of fishermen who depend on the annual specifications to direct their activities. It is important to note that although NMFS has the ability to make in-season adjustments to harvest specifications, that authority is limited to certain circumstances not present here and subject to specific procedural requirements. 50 C.F.R. § 679.25.

Finally, judicial alternation of the IFR would also violate the cardinal principle that injunctive relief be narrowly tailored to the violations found and no more burdensome to the defendant than necessary. As the Supreme Court has stated, a court finding a NEPA violation "has many remedial tools at its disposal, including declaratory relief or an injunction tailored to the preparation of an EIS." *Winter*, 555 U.S. at 33, 129 S. Ct. at 381 ; *National Wildlife Fed'n*, 422 F.3d at 799-800 (noting need for narrow tailoring); *Western Oil and Gas Ass'n,* 633 F.2d at 813 . The entry of an injunction establishing a deadline for completion of an EIS in this case affords Plaintiffs an adequate remedy.

Dated this 8th day of February, 2012.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 8, 2012, I filed a true and correct copy of the Federal Defendants' Brief on Proposed Remedy with attachment and proposed order to the Clerk of the Court for the United States District Court, District of Alaska, by using the CM/ECF system. Participants in this Case Nos. 3:11-cv-00001-TMB, 3:10-cv-00271-TMB, and 3:11-cv-00004-TMB who are registered CM/ECF users will be served by the CM/ECF system.

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