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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

**INTERVENOR-DEFENDANTS OCEANA, INC. AND GREENPEACE, INC.'S
BRIEF ADDRESSING REMEDY**

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INTRODUCTION

In its January 19, 2012 decision, the Court upheld the National Marine Fisheries Service's ("NMFS") 2010 Biological Opinion analyzing the effects of the agency's ongoing authorization of commercial groundfish fisheries in the Gulf of Alaska ("GOA") and in the Bering Sea and Aleutian Islands ("BSAI") on endangered species, including the Western Population of Steller sea lions. *Op.*, Doc. No. 130 at 3-4, 23-43. The Court likewise upheld protection measures that, based on the conclusions of the Biological Opinion, were adopted by NMFS in an Interim Final Rule to prevent the fisheries from causing jeopardy to the Western Population of Steller sea lions or adversely modifying its critical habitat. *Id.* at 15-22. The Court found that NMFS's actions complied with the Endangered Species Act ("ESA"), Magnuson-Stevens Fishery Conservation Act ("MSA"), and Administrative Procedure Act ("APA"), but it concluded that NMFS violated the National Environmental Policy Act ("NEPA") by failing to prepare a full environmental impact statement ("EIS") and failing to provide sufficient information and opportunity for public involvement. *Id.* at 50, 52. In light of its NEPA findings, the Court stated an intention to remand the matter to NMFS with instructions to prepare an EIS and invited the parties to submit supplemental briefing regarding this remedy. *Id.* at 55-56.

Given the broad nature of the activities authorized by NMFS and the resulting impacts, Intervenor-Defendants respectfully urge the Court to remand with a direction requiring NMFS to conduct its NEPA analysis in a manner that is consistent with the scope with the agency action at issue in this case, namely, authorization of the fisheries pursuant to the current GOA and BSAI fishery management plans. The Court should not otherwise prescribe or limit the scope of the agency's analysis. If, however, the Court does impose a deadline for agency action on remand, it should afford NMFS adequate time to complete an EIS that is appropriately comprehensive. It

may, in fact, be preferable for the Court to require the agency to report on its progress at regular intervals rather than impose a firm deadline before the agency's NEPA scoping process is complete. Beyond requiring that NMFS timely complete an EIS consistent with the Court's opinion and the agency's NEPA obligations, no additional injunctive relief is lawful or warranted.

ARGUMENT

I. THE COURT SHOULD DIRECT THE AGENCY TO PREPARE AN EIS THAT IS COMMENSURATE IN SCOPE WITH THE BROAD AGENCY ACTION AT ISSUE.

Pursuant to NEPA, federal agencies must prepare an EIS before undertaking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The "major Federal action" at issue in this case is exceptionally broad in scope: the ongoing authorization of the groundfish fisheries in the GOA and BSAI pursuant to the fishery management plans that govern fishing in each area. Int.-Defs.' Ex. 2 at 23 (BiOp at RULE002079) (Doc. No. 99-2 at 23).¹ In the Biological Opinion, NMFS acknowledged that this broad action is "complicated" and entails numerous "interrelated activities." *Id.* For example, the two fishery management plans address annual catch levels; where, when and how fish are caught; the interactions between the fisheries and the larger marine ecosystems, including marine mammals, seabirds, and other exploited resources; and a variety of other significant issues such as bycatch and habitat destruction. Int.-Defs.' Ex. 22 at 7-8 (GOA 2011 FMP at ES-5 – ES-6) (Doc. No. 99-34 at 7-8); Int.-Defs.' Ex. 23 at 9 (BSAI 2011 FMP at ES-7) (Doc. No. 99-35 at 9).

¹ Many factual documents cited in this brief were excerpted and attached as exhibits to Intervenor-Defendants' prior brief, Doc. No. 99; such documents are cited with reference to the exhibit and document numbers used for that filing. New exhibits (*i.e.*, Int.-Defs.' Exs. 30 through 33) have been numbered consecutively to those submitted with Intervenor-Defendants' prior brief and are attached hereto.

Together, the plans authorize an annual catch that exceeds four billion pounds of fish. Int.-Defs.’ Ex. 2 at 242 (BiOp at RULE002298) (Doc. No. 99-3 at 12).

As the Ninth Circuit has observed, “[o]nce an agency has an obligation to prepare an EIS, the scope of its analysis of environmental consequences in that EIS must be appropriate to the action in question.” *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002); *see also Greenpeace v. NMFS*, 55 F. Supp. 2d 1248, 1271-1274 (W.D. Wash. 1999) (requiring EIS to address fishery-level environmental impacts). The breadth of the NMFS action at issue here necessitates a similarly broad analysis of environmental impacts, addressing the multitude of groundfish fisheries issues, their interrelationships, and their direct, indirect, and cumulative environmental impacts. In remanding to NMFS, the Court should direct the agency to prepare an EIS that ensures the agency is in full compliance with NEPA for all aspects of the agency action here, namely, annual authorization of the GOA and BSAI fisheries.²

While the Court should specify the action to be addressed by NMFS’s environmental analysis on remand, the Court should otherwise refrain from narrowing or prescribing the scope or focus of the EIS. Only in “exceptional” cases may courts remand with instructions that limit the agency’s discretion to determine how to reconsider its decision. *Sierra Club v. EPA*, 346 F.3d 955, 963 (9th Cir. 2003). Otherwise, a court should not “direct the substance of the agenc[y]’s actions on remand.” *Nat’l Wildlife Fedn. v. NMFS*, 524 F.3d 917, 937 (9th Cir. 2008). Because environmental impact analysis is “a matter ... place[d] primarily in agency

² A programmatic evaluation of the environmental consequences of the ongoing authorization of the GOA and BSAI groundfish fisheries was conducted in 2004. Since that time, each fishery management plan has been amended more than 20 times, and the North Pacific ecosystem has been subject to numerous studies revealing significant new information, including the ongoing failure of the fishery management plans to avert jeopardy of Steller sea lions. *See* Int.-Defs.’ Ex. 2 at 47, 388-89 (BiOp at RULE002103, RULE002444-45); (Doc. No. 99-2 at 47, Doc. No. 99-3 at 158-59); Int.-Defs.’ Ex. 33 at 1 (Council Discussion Paper at 1).

hands,” the Court should allow the agency to “bring its expertise to bear upon the matter.” *INS v. Orlando Ventura*, 537 U.S. 12, 16-17 (2002); *see also Alaska Ctr. for the Env’t v. Browner*, 20 F.3d 981, 986-87 (9th Cir. 1994) (“the [district] court was careful to leave the substance and manner of achieving [statutory] compliance entirely to the [agency]”). Accordingly, beyond the minimum legal requirements addressed in the Court’s opinion, *see Op.*, Doc. No. 130 at 49-50 & n.237, we request that the Court otherwise decline to prescribe or limit the scope or content of the agency’s analysis on remand.

Consistent with the premise that an agency should, in the first instance, determine on remand the full scope of analysis required in an EIS, the Court should provide sufficient time and flexibility for NMFS to complete its analysis. To that end, the Court should consider an approach in which it simply requires regular reporting to the Court by NMFS on its progress toward completion of an EIS. Doing so would have the advantage of allowing the Court to ensure that an EIS is prepared in a timely manner while allowing the ultimate schedule to be determined based on the agency’s expertise and assessment of the scope of analysis required. An unrealistic timeline may compromise NMFS’s ability to undertake an analysis that is consistent with the broad scope of the action and may make it difficult for the agency to accommodate the fullest public involvement by all stakeholders.

The initial schedule suggested by NMFS contemplates that approximately two years will be required to prepare an EIS. While aggressive for a sufficient analysis, such a schedule may be adequate. Intervenor-Defendants recommend that the Court defer to NMFS’s assessment of the necessary timeframe and build into the remand order flexibility to allow potential modification of the schedule as required to complete an adequate analysis. If the Court does establish a

defined timeframe, any deadline should afford NMFS sufficient time to complete an EIS that is consistent with the agency's NEPA obligations in light of the broad action at issue.

II. FURTHER INJUNCTIVE RELIEF IS NEITHER LAWFUL NOR WARRANTED.

Consistent with the narrow claims on which Plaintiffs prevailed, any injunctive relief should be limited to requiring NMFS to remedy its failure to comply with NEPA within a reasonable timeframe. Injunctive relief “must be tailored to the specific harm,” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (quoting *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991)), and the Court has already determined that it will not vacate the Biological Opinion or Interim Final Rule because the “NEPA violations at issue here do not undermine NMFS’s ESA determinations[,]” and the Interim Final Rule itself “complied with the MSA and APA.” Op., Doc. No. 130 at 54. Any other injunctive relief, therefore, would be inconsistent with the Court’s opinion. However, given the constraints of simultaneous briefing and out of an abundance of caution, Intervenor-Defendants explain here that, to the extent Plaintiffs may request some intermediate form of injunctive relief that would modify the sea lion protection measures established by the Interim Final Rule, such relief would violate the ESA. Even if such relief were lawful, Plaintiffs’ request would fail the four-factor test for injunctive relief.

A. Any lesser protections than those established in the Interim Final Rule would violate the ESA.

As discussed in Intervenor-Defendants’ opposition to Plaintiffs’ motion for summary judgment, NMFS may authorize fishing under the conditions set forth in the Biological Opinion or not at all. *See* Int.-Defs.’ Br., Doc. No. 99 at 36-38. “Only after [an agency] complies with § 7(a)(2)” of the ESA “can any activity that may affect the protected [species] go forward.” *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1056–57 (9th Cir. 1994) (citing 16 U.S.C. §

1536(a)(2)). Here, NMFS has completed a Biological Opinion—upheld on the merits by this Court, Op., Doc. No. 130 at 3-4, 23-43—concluding that authorization of the GOA and BSAI groundfish fisheries may only proceed subject to the Steller sea lion protections outlined by the agency as a reasonable and prudent alternative to the status quo. Int.-Defs.’ Ex. 2 at 35-39 (BiOp at RULE002091-2095) (Doc. No. 99-2 at 35-39); *id.* at 403 (BiOp at RULE002459) (Doc. No. 99-3 at 173). The only alternative to proceeding under these protections consistent with ESA obligations is to authorize no fishing at all. “In the absence of a completed comprehensive biological opinion” addressing NMFS’s actions with particularity, the agency “cannot[] insure that continued fishing ... will not result in harm to endangered Steller sea lions.” *Greenpeace v. NMFS*, 106 F. Supp. 2d 1066, 1072 (W.D. Wash. 2000). The agency’s authorization of the fisheries under such circumstances therefore would “constitute[] a continuing violation of the ESA.” *Id.*; *see also Nat’l Wildlife Fed’n v. NMFS*, No. 01-00640, 2011 WL 3322793, at *10 (D. Or. Aug. 2, 2011) (holding that agency would “face severe penalties under [the ESA]” for operating without a valid biological opinion).

No party to this litigation, including Oceana and Greenpeace, is advocating that all fishing be halted. Rather, given that the Court has determined that the Biological Opinion and protective measures are valid and will not be vacated, Op., Doc. No. 130 at 54, NMFS should be allowed to authorize the groundfish fisheries during remand, pursuant to the particular Steller sea lion protection measures adopted by the Interim Final Rule.³ Any piecemeal approach that would enjoin select components of the Interim Final Rule is plainly unlawful.

³ Intervenor-Defendants acknowledge that a NEPA violation constitutes a serious procedural error that may be grounds for vacatur of a challenged agency action, particularly where the NEPA process was the lone forum for addressing environmental considerations and the challenged agency action is expected to lead to irreparable environmental harm. *See, e.g., Southeast Alaska Conservation Council v. Fed. Highway Admin.*, 649 F.3d 1050 (9th Cir. 2011)

Further, should Plaintiffs invite the Court to conduct its own assessment of whether lesser sea lion protection measures are consistent with the ESA, the Court should resist any such request to override the agency and make independent scientific findings. As the Court itself noted, “judges are not scientists” and “[i]t is not this Court’s place to supplant NMFS’s scientific judgment with its own.” Op., Doc. No. 130 at 3, 38 (internal citation omitted).⁴

B. Plaintiffs fail to meet the requirements for any injunctive relief that would lessen protective measures for the endangered Western Population of Steller sea lions.

Even if an intermediate remedy were not unlawful and necessarily premised upon the Court making independent scientific findings, no such remedy is available to Plaintiffs because they cannot meet the requirements for injunctive relief.

“[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief.” *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)) (alteration in original). In particular, “[a] plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that

(affirming vacatur of authorization to build road through old-growth forest where agency violated NEPA by considering inadequate range of alternatives). In this case, however, the action has undergone significant analysis in the form of the Biological Opinion, the action itself is intended to prevent irreparable environmental harm, and vacatur would lead to a violation of the ESA.

⁴ In both of their briefs and during oral argument, Plaintiffs contended that the Court could vacate the Biological Opinion and Interim Final Rule and order NMFS to authorize the fisheries pursuant to the conditions evaluated in the agency’s previous biological opinion, prepared in 2003. *See, e.g.*, Doc. No. 106 at 57; Doc. No. 80 at 79. Because the Court has upheld NMFS’s superseding 2010 Biological Opinion, which concluded that the measures adopted in 2003 are inadequate to prevent jeopardy to the Western Population of Steller sea lions, there can be no argument that reversion to the 2003 protection measures is lawful. *See* Int.-Defs.’ Ex. 2 at 388-89 (BiOp at RULE002444-45) (Doc. No. 99-3 at 241-42) (“NMFS’ [sic] finds that the current fisheries, as modified by the actions and RPAs contained in past Biological Opinions, continue to impede the survival and recovery of the western DPS of Steller sea lion. Thus, additional measures are necessary to avoid the likelihood of jeopardy.”).

injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *Id.*

As to the first two factors, Plaintiffs primarily allege economic injuries. *See* Pls. Br., Doc. No. 80 at 68, 70-71, 78-79; Pls. Reply Br., Doc. No. 106 at 57. Such injuries generally are compensable. *See Kitazato v. Black Diamond Hospitality Inv., LLC*, 655 F. Supp. 2d 1139, 1147-48 (D. Haw. 2009) (citing *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). Further, some evidence suggests that Plaintiffs’ economic injuries have not materialized to the degree they were predicted initially. For example, even with the new Steller sea lion protection measures, the total BSAI catch of Pacific cod increased from 171,857 metric tons in 2010 to 219,903 metric tons in 2011.⁵ To the extent Plaintiffs also suffer a distinct procedural harm as a consequence of NMFS’s failure to comply fully with NEPA, that temporary injury will be cured through a remand order directing the preparation of an EIS. Further, Plaintiffs have been clear that they seek NEPA compliance to advance primarily economic concerns. *See* Op., Doc. No. 130 at 49 n.237 (“The Court notes that the effects that primarily concern Plaintiffs are not environmental at all . . .”).

Whether or not the Plaintiffs meet the first two requirements for injunctive relief, the third and fourth factors—*i.e.*, the balance of hardships and consideration of the public interest—clearly preclude enjoining the existing protection measures in furtherance of Plaintiffs’ economic and social interests. The Interim Final Rule and associated fishery restrictions were adopted “in

⁵ The total catch of Pacific cod in the BSAI area was 171,857 metric tons in 2010; the 2011 catch in the same area—through October of 2011—was 181,192 metric tons. Ex. 31 at 8 (Table 2.3c) (2011 SAFE Report). By year's end, the total 2011 catch of Pacific cod in the BSAI area was 219,903 metric tons. *See* Int.-Defs.’ Ex. 32 at 3 (NMFS BSAI Catch Report through December 31, 2011) (219,903 metric tons is the summation of the total catch of the 11 Pacific cod accounts listed in the report).

order to halt the immediate effects of the fisheries on the acute population decline in the western portion” of the Steller sea lion’s range. Int.-Defs.’ Ex. 2 at 35 (BiOp at RULE002091) (Doc. No. 99-2 at 35). Aerial surveys conducted during the past summer confirmed that this alarming trend has continued. Int.-Defs.’ Ex. 30 at 4 (NMFS Memo re: 2011 Steller sea lion surveys) (“Pup production continues to decline in the western Aleutian Islands and in the eastern Bering Sea, and now appears to be declining throughout the entire central Aleutian Islands as well.”); *see also id.* at Fig. 2 & Fig. 3. “Under the Endangered Species Act, the third and fourth factors always tip in favor of protecting the species.” *S. Yuba River Citizens League v. NMFS*, 804 F. Supp. 2d 1045, 1052 (E.D. Cal. 2011) (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978)); *see also Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1035 (9th Cir. 2005) (“Congress has decided that under the ESA, the balance of hardships always tips sharply in favor of the endangered or threatened species.”). The Court “may not use equity’s scales to strike a different balance.” *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987); *see also S. Yuba River Citizens League*, 804 F. Supp. 2d at 1052 (“under the ESA, the balance of hardships and the public interest factors tip towards protecting the species ... [and] the Court could not undo Congress’ command in this regard”); *Or. Natural Desert Ass’n v. Tidwell*, No. 07-1871, 2010 WL 5464269, at *5 (D. Or. Dec. 30, 2010) (stating “economic concerns . . . fall short of outweighing the public interest in protecting a threatened species”).

CONCLUSION

For the foregoing reasons, Intervenor-Defendants respectfully request that the Court’s remand order be narrowly tailored and direct NMFS to prepare an EIS that is consistent with the Court’s opinion and the agency’s NEPA obligations in light of the broad scope of the agency action taken here—namely, authorizing fishing in the GOA and BSAI under the respective

fishery management plans. The Court should ensure its remand order provides sufficient time and flexibility to prepare an EIS of such scope and should not provide any additional injunctive relief. A proposed order is attached.

Respectfully submitted this 8th day of February, 2012.

s/ Colin O'Brien

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2012, a copy of foregoing INTERVENOR-DEFENDANTS OCEANA, INC. AND GREENPEACE, INC.'S BRIEF ADDRESSING REMEDY, with accompanying attachments and proposed order, was served electronically on Bradley Meyen, Murray Feldman, John Martin, Jessica Ferrell, Linda Larson, Svend Brandt-Erichsen, Jeffrey Leppo, Ryan Steen, Daniel Pollak, Dean Dunsmore, David Gross, William Horn, and Timothy Petumenos.

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TABLE OF EXHIBITS

Ex. No.	Description
30	DeMaster, Douglas, Alaska Fisheries Science Center, Memorandum for James Balsiger, <i>et al.</i> , Re: Results of Steller Sea Lion Surveys in Alaska, June-July 2011 (Dec. 5, 2011), <i>available at</i> http://www.afsc.noaa.gov/nmml/PDF/SSL-Survey-memo-2011.pdf
31	North Pacific Fishery Management Council, The Plan Team for the Groundfish Fisheries of the Bering Sea and Aleutian Islands, Stock Assessment and Fishery Evaluation Report for the Groundfish Resources of The Bering Sea/Aleutian Islands Regions (Dec. 2011) (excerpts), <i>available at</i> http://www.afsc.noaa.gov/REFM/Docs/2011/BSAIsafe.pdf
32	National Marine Fisheries Service, Alaska Region Sustainable Fisheries Catch Accounting, Bering Sea Aleutian Islands Catch Report (includes CDQ) Through: 31-Dec-2011 (Jan. 31, 2011), <i>available at</i> http://www.fakr.noaa.gov/2011/car110_bsai_with_cdq.pdf
33	North Pacific Fishery Management Council, Discussion about Updating the Groundfish FMP Programmatic SEIS and 2012 Review of the Groundfish Management Policy (Feb. 2012), <i>available at</i> http://www.fakr.noaa.gov/npfmc/PDFdocuments/fmp/PSEISdiscuspap211.pdf