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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

PLAINTIFFS' JOINT MEMORANDUM ON PROPOSED REMEDY

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Table of Acronyms and Abbreviations

This table contains a list of acronyms and abbreviations used in this Plaintiffs' Joint Memorandum on Proposed Remedy.

ABC	Acceptable Biological Catch
AKSC	Alaska Seafood Cooperative, Alaska Groundfish Cooperative, The Groundfish Forum et al.
AO	Administrative Order
APA	Administrative Procedure Act
Area	Fishery Management Area
BiOp	Biological Opinion
BIOPxxxxxx	Administrative Record citation to BIOP (Biological Opinion) Bates-numbered document, where "xxxxxx" is the Bates-number page citation for the document
BSAI	Bering Sea and Aleutian Islands
CDQ	Community Development Quota
CEQ	Council on Environmental Quality
CIE	Center for Independent Experts
Council	North Pacific Fishery Management Council
DPS	Distinct Population Segment
EA	Environmental Assessment
eDPS	eastern Distinct Population Segment of Steller Sea Lion
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FLC	Freezer Longline Coalition
FMP	Fishery Management Plan
FONSI	Finding of No Significant Impact
FWS	U.S. Fish and Wildlife Service
GOA	Gulf of Alaska
IFR	Interim Final Rule
JAM	Jeopardy or Adverse Modification
MSA	Magnuson-Stevens Fishery Conservation and Management Act
NEPA	National Environmental Policy Act
nm	nautical miles

NMFS	National Marine Fisheries Service
NOA	Notice of Availability
NOAA	National Oceanic and Atmospheric Administration
RIR	Regulatory Impact Review
ROD	Record of Decision
RPA	Reasonable and Prudent Alternative
RULExxxxxx	Administrative Record citation to the RULE (Interim Final Rule) Bates-numbered document, where "xxxxxx" is the Bates-number page citation for the document
SEIS	Supplemental Environmental Impact Statement
SSC	Scientific and Statistical Committee (of Council)
SSLMC	Steller Sea Lion Mitigation Committee
TAC	Total Allowable Catch
W	west or western
wDPS	western Distinct Population Segment of Steller Sea Lion

I. INTRODUCTION

The State of Alaska, the Alaska Seafood Cooperative et al., and the Freezer Longline Coalition, Plaintiffs in these partially consolidated actions, submit this joint memorandum in response to the Court's January 19, 2012 Order (Dkt. 130) ("Order"), which provided "the Parties an opportunity to submit further briefing before entering an injunction." Dkt. 130 at 55. The Court held that "NMFS violated NEPA when it issued an EA and a FONSI instead of a full EIS and failed to provide sufficient information for the public to comment on the agency's decision-making process." *Id.* at 15.

These violations have major significance. As the Court held, NMFS failed to provide a sufficient analysis of the environmental effects of the Steller sea lion protection measures that NMFS adopted in its Interim Final Rule ("IFR"). Those effects were controversial, uncertain, and subject to "significant scientific differences of opinion." *Id*. at 50. Consequently, the agency's IFR was not informed by a lawful analysis of its environmental impacts, but nonetheless remains in effect, with significant ramifications to the regulated fisheries and the State of Alaska's environmental, fisheries, and community and economic development interests. Accordingly, Plaintiffs agree that "some degree of injunctive relief is appropriate to remedy the NEPA violations given that the restrictions at issue here are expected to continue into the future indefinitely." Dkt. 130 at 54-55. As set forth below and in the accompanying proposed order, Plaintiffs propose relief that is both meaningful and reasonable. Plaintiffs' proposed relief addresses the NEPA violations held by the Court, while respecting the Court's rulings that the 2010 NMFS Biological Opinion ("BiOp") complied with the Endangered Species Act ("ESA") and the IFR satisfied rulemaking requirements under the Administrative Procedure Act ("APA") and Magnuson-Stevens Fishery Conservation and Management Act ("MSA").

To address the NEPA violations, the Court's remedy should require NMFS on remand to (1) prepare an EIS that fully complies with NEPA, and (2) issue a new record of decision ("ROD"), and associated final agency action that are informed by a proper NEPA process. These remedial elements will ensure that the remedy for the agency's NEPA violations is faithful to the statute's twin goals of informed decision-making and informed public participation. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004). These remedial elements further ensure a meaningful remedy that will not simply result in a post-hoc rationalization of an existing rule that otherwise continues in effect indefinitely. On remand, NMFS should also be directed to proceed on a reasonable schedule that provides the agency with enough time to complete a thorough NEPA process but that also mitigates the ongoing harm suffered by Plaintiffs.

In addition, the Court's order should address the legal status of the 2010 Environmental Assessment ("EA") and associated Finding of No Significant Impact ("FONSI"), as well as the IFR, pending the completion of the remand. Because the EA and FONSI were found to violate NEPA, and because the IFR was implemented based upon the agency's unlawful NEPA process, Plaintiffs respectfully maintain that the APA judicial review provisions direct the Court to vacate the EA, FONSI, and IFR. In the alternative, an injunction against the IFR pending completion of the NEPA and decision-making processes on remand is appropriate based on the irreparable harm to Plaintiffs, the balance of the hardships, and the public interest. However, if the Court is not inclined to immediately vacate or enjoin the IFR, Plaintiffs propose that the Court's vacatur mandate be stayed as to the IFR pending the completion of the remand in a reasonable period of time and issuance of a new final agency action.

Therefore, Plaintiffs respectfully request that the Court vacate the EA and FONSI, and vacate or enjoin the IFR, effective immediately or partially stayed pending the remand, and remand those agency actions to NMFS with instructions to (1) submit a Notice of Availability and Final EIS to the Office of the Federal Register for publication no later than July 1, 2013, and (2) issue a ROD on or before September 3, 2013. This schedule would allow a new agency action, either a final rule or other lawful action under the MSA, informed by a lawful NEPA process, to be implemented prior to the start of the groundfish fisheries season on January 1, 2014. A timeline illustrating how these deadlines can be accomplished is attached as Attachment 1.

This remedy is within the Court's equitable powers and is consistent with well-established precedent that requires the NEPA process to inform agency decision-making. Moreover, this remedy strikes a reasonable balance between limiting the ongoing environmental, economic, and other harms suffered by Plaintiffs and the potential duration of unanalyzed adverse environmental impacts on the one hand, and the need for a complete analysis of the issues and informed public, North Pacific Fishery Management Council ("Council"), and expert agency participation on the other.

II. ARGUMENT

A. NEPA Requires a New Final Agency Action at the End of the EIS Process

NMFS' action that was at issue for NEPA purposes was the IFR, which represents NMFS' implementation of fishery management measures for the Bering Sea and Aleutian Islands ("BSAI") fishery areas based upon the 2010 BiOp. *See* 75 Fed. Reg. 77535, 77537 (Dec. 13, 2010) (RULE00554, -556). NMFS implemented those fishery management measures via regulations promulgated under the MSA. As NMFS stated, the NEPA analysis was "to inform

[NMFS'] decisions as to how best to manage the fishery in compliance with the ESA." 75 Fed. Reg. at 77538 (RULE000557). Similarly, NMFS' Administrative Order on NEPA procedures provides that "fishery regulatory actions developed under the [MSA] should be integrated with the required NEPA document." BIOP004649 (NOAA Administrative Order 216-6 § 6.03d) ("NOAA AO").

This Court held that the NEPA process underlying the IFR "amounted to a failure to adequately involve the public." Dkt. 130 at 52. The Court further concluded that "NMFS failed to provide sufficient environmental information for the public to weigh in and inform the agency decision-making process." *Id*. Accordingly, the remedy here must include not only completion of an EIS by a date certain, but also further action by NMFS that is informed by the conclusions and analyses in the EIS.[1]

The agency's NEPA violations represent a wholesale failure to satisfy NEPA's two principal mandates—(i) full and transparent analysis of effects, and (ii) meaningful public input—both of which must *inform* the agency's decision *before* decisions are made and actions are taken. As described by the U.S. Supreme Court:

> The NEPA EIS requirement serves two purposes. First, it ensures that the agency, *in reaching its decision*, will have available, and

[1] NMFS previously indicated to the Council that it would proceed to either develop a final rule or initiate a new proposed rulemaking to replace the IFR. *See* Letter from James W. Balsiger, Administrator, NMFS Alaska Region, to Eric A. Olson, Chairman, North Pacific Fishery Management Council, at 2 (Jan. 26, 2011) (copy attached as Ex. B to Second Declaration of Douglas Vincent-Lang ("Second Vincent-Lang Decl.")). In its January 26, 2011 letter to the Council, NMFS stated that it would assess the comments received on the IFR and then "proceed to either: (a) develop a final rule, with any potential changes from the interim final rule governed under the [APA] to reflect the same 'logical outgrowth' constraints that govern changes from a proposed rule to a final rule; or (b) initiate a new proposed rule and Section 7 consultation to change the RPA based on new information."

> will carefully consider, detailed information concerning significant environmental impacts. Second, it guarantees that the relevant information will be made available to the larger audience that may also *play a role in both the decisionmaking process and the implementation of that decision*.

Pub. Citizen, 541 U.S. at 768 (internal citations and quotations omitted; emphasis added). The Ninth Circuit also emphasizes the requirement that the NEPA process must inform agency decisions:

> Post-hoc examination of data to support a pre-determined conclusion is not permissible because this would frustrate the fundamental purpose of NEPA, which is to ensure that federal agencies 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.

Sierra Club v. Bosworth, 510 F.3d 1016, 1026 (9th Cir. 2007) (internal quotations omitted); *see also Barnes v. U.S. Dep't of Transp*., 655 F.3d 1124, 1131 (9th Cir. 2011) ("federal agencies [to] carefully weigh environmental considerations and consider potential alternatives to the proposed action *before* the government launches any major federal action.") (internal quotations omitted; emphasis added); *accord W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 492 (9th Cir. 2011); *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000) (NEPA analysis cannot merely "rationalize or justify decisions already made") (internal quotations omitted).[2]

[2] The case law support for this principle is extensive and consistent. *See, e.g., Pub. Citizen*, 541 U.S. at 769 ("The informational role of an EIS is to give the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process, and, perhaps more significantly, provide a springboard for public comment in the agency decisionmaking process itself . . . to ensure that the larger audience can provide input as necessary to the agency making the relevant decisions") (internal citations and quotations omitted); *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th (Cont'd)

NEPA regulations also expressly require an EIS to serve an action-forcing, informational purpose. *See* 40 C.F.R. § 1502.1 ("An [EIS] 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.") (emphasis added); *id.* § 1505.1(d) (agencies must ensure that NEPA documents accompany a proposal through review processes and are used in making decisions); *id.* § 1500.1(c) ("Ultimately, of course, it is not better documents but better decisions that count.").[3] Indeed, "[t]he primary purpose of an [EIS] 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." *Id.* § 1502.1 (emphasis added).

Similarly, NMFS' own NEPA regulations confirm that NMFS must make a new decision at the completion of the EIS process on remand. Under the NOAA AO:

> NEPA documents . . . must accompany the decision documents in the NOAA decision making process for any major Federal action. The alternatives and proposed action identified in all such documents must correspond. Any NEPA document prepared for a proposal will be part of the administrative record of any decision, rule making, or adjudicatory proceeding held on that proposal.

Cir. 2010) (an EIS must not be "a foreordained formality"); *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1100 (9th Cir. 2010) ("[A]n EIS must provide full and fair discussion of significant environmental impacts and shall inform decisionmakers . . . ."); (internal quotations omitted); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) ("NEPA emphasizes the importance of coherent and comprehensive *up-front* environmental analysis to ensure informed decision making[.]") (internal quotations omitted; emphasis added); *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) ("NEPA requires consideration of the potential impact of an action *before* the action takes place.") (internal quotation omitted).

[3] *Churchill Cnty. v. Norton*, 276 F.3d 1060, 1072 n.7 (9th Cir. 2001) (Council on Environmental Quality ("CEQ") regulations are binding on the agency).

BIOP004640 (NOAA AO 216-6 § 6.03).[4] Thus, in addition to the case law and regulations described *supra*, NOAA practices and procedures require an EIS to be part of and inform NMFS' decision-making process, not an after-the-fact rationalization of a decision previously made.

These principles are particularly important in this instance because NMFS' conclusions about the effects of the action "were both highly controversial and uncertain." Dkt. 130 at 50. As recognized by the Court, this uncertainty, and the resolution of controversy, could have a substantial effect on the outcome of the agency's final decision. *Id.* at 49 (acknowledging "uncertainty on potentially significant impacts on the natural and physical environment resulting from the removal of long-standing human intervention in the form of commercial fishing in vast areas of the BSAI"); *see, e.g.*, *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1115 (9th Cir. 2002), *abrogated by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) ("Because human intervention, in the form of forest management, has been part of the fabric of our national forests for so long, we conclude that, in the context of this unusual case, the reduction in human intervention that would result from the Roadless Rule actually does alter the environmental status quo.").

The agency's decision-making process culminates with a ROD. BIOP004626 (NOAA AO 216-16 § 5.04b.1(h)) (EIS shall conclude with a ROD). Section 4.01t of the NOAA AO defines a ROD as:

> A public document signed by the agency decisionmaker following the completion of an EIS. The ROD states the decisions, alternatives considered, the environmentally preferable alternative(s), factors considered in the agency's decisions, mitigation measures that will be implemented, and whether all

[4] *See also* BIOP004625 (NOAA AO 216-6 § 5.04a.1-2).

> practicable means to avoid or minimize environmental harm have been adopted (40 C.F.R. § 1505.2).

BIOP004615.[5] The issuance of a ROD is critical to the administrative process because "[u]ntil an agency issues a [ROD] . . . no action concerning the proposal shall be taken which would (1) [h]ave an adverse environmental impact; or (2) [l]imit the choice of reasonable alternatives." 40 C.F.R. § 1506.1.

Here, NMFS has already acted to implement the IFR, but the Court has now held that that action occurred in violation of NEPA. Thus, the Court's order on remand should instruct NMFS to issue a new final decision that is fully documented in a ROD. This remedy is consistent with the relief Plaintiffs originally requested in this action. *See* Dkt. 1 at 32 ¶ G ("Remand with an order with instructions requiring full compliance with the . . . NEPA"); *id*. at 31 ¶ D ("Vacate and set aside the . . . EA/RIR and FONSI"); Dkt. 39 at 38 ¶ F ("For an order remanding the EA/RIR and FONSI to the Defendants . . . for preparation of an EIS in a manner consistent with law"); Dkt. 41 at 38 ¶ D ("Vacate . . . the EA/RIR and FONSI, and the [IFR] and . . . remand with and order with instructions requiring full compliance with the . . . NEPA").

B. The Court Should Order NMFS to Complete an EIS and a New Action Prior to the Start of the 2014 Fishing Season

When a reviewing court determines that an agency violated NEPA by reaching an arbitrary and capricious FONSI, and where, as here, the record demonstrates that the agency's project or regulations may have a significant impact on the environment, Ninth Circuit case law

[5] *See also* BIOP004661 (Exhibit 2 of the NOAA AO 216-6, clearly showing that a ROD is the endpoint of the EIS process prior to implementation of the agency action) (copy attached as Attachment 2); 40 C.F.R. § 1505.2 (ROD requirement in CEQ NEPA regulations).

establishes that the court-ordered remedy of the NEPA violation appropriately includes a specific instruction to the agency to prepare an EIS. *See, e.g., Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 733-40 (9th Cir. 2001), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010); *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1154 (9th Cir. 1998), *overruled on other grounds by Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008); s*ee also* Dkt. 130 at 49-50.

An order from this Court requiring NMFS to complete an EIS within 18 months will put NMFS in a position to issue a new ROD and final agency action in the second half of 2013, prior to the start of the 2014 fishing season on January 1, 2014.[6] This schedule would minimize the number of fishing seasons adversely affected by NMFS' failure to comply with NEPA while also allowing the agency adequate time to complete the required administrative process with input from the public and the Council.[7]

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[6] As shown in Attachment 1, Plaintiffs' proposed schedule allows for robust public and Council participation, coupled with reasonable periods for agency analysis and revisions. Plaintiffs' schedule allows a two-and-a-half month scoping process, six months for the agency to prepare a preliminary draft EIS followed by a draft EIS, a sixty day public comment period, and over four months for NMFS to complete the response to comments report and FEIS. The NEPA process ends in September 2013, thus providing NMFS and the Council time to take new regulatory action that can be implemented at the start of the 2014 fishing season. Plaintiffs also request that NMFS be required to report to the Court and the parties regarding the status of the administrative process every three months.

[7] Based on a presentation by NMFS to the Council at the February 2012 Council meeting, we understand that NMFS may propose a 24-month period to develop and publish a final EIS. The proposal described by NMFS to the Council includes an eight-month process for review of the 2010 BiOp by the Council of Independent Experts ("CIE") and NMFS proposes to delay the EIS scoping process to accommodate this review. Consequently, under this proposal, the publication of the FEIS does not take place until the end of February 2014 and rulemaking to replace the IFR is not effective until the 2015 fishing season. Any such CIE review, if it occurs, can easily run concurrently with the development of an EIS. It should not, and need not, be used (Cont'd)

As the timeline in Attachment 1 demonstrates, 18 months is a reasonable timeframe for NMFS to correct its NEPA violation. *See, e.g., Nw. Envtl. Advocates v. U.S. Envtl. Prot. Agency*, No. 03-05760, 2006 WL 2669042, *10 (N.D. Cal. Sept. 18, 2006), *aff'd*, 537 F.3d 1006 (9th Cir. 2008) (rejecting government request that a remand have no timeline, explaining that the court "must decide upon a time frame for vacating the regulation that balances the need for prompt action against the need to allow EPA adequate freedom to address a complicated issue"). In addition, as set forth below, the EIS must analyze all relevant information, including new information developed since the end of 2010, and evaluate a broader range of alternatives than NMFS proposed in the 2010 EA.

1. NMFS must complete the EIS and issue a new decision in a reasonable period of time

In determining the appropriate timeframe for the NEPA remand process, the Court should consider the following factors:

1. NEPA regulations require an EIS to be completed "early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5. The National Oceanic and Atmospheric Administration's ("NOAA") NEPA Handbook indicates that the agency's average period for the completion of an EIS is approximately 420 days (14 months), from scoping through the publication of a ROD.[8]

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to delay the preparation of the EIS so that it results new final agency action a full calendar year—and fishing season—later.

[8] NOAA NEPA Handbook at 19, *available at* http://www.nepa.noaa.gov/NEPA_HANDBOOK.pdf.

2. NEPA prohibits an agency from taking action before an EIS is complete when the contemplated action will have an adverse environmental impact or limit the choice of reasonable alternatives. 40 C.F.R. § 1506.1. Here, the IFR has significant impacts that have not yet been analyzed by the agency and that have unknown consequences. Declaration of John Gauvin ("Gauvin Decl.") ¶¶ 4, 8-13; Declaration of Todd M. Loomis ("Loomis Decl.") ¶¶ 14-16; Second Declaration of Kenneth G. Down ("Second Down Decl.") ¶¶ 7-13. These unknown impacts and consequences will occur until the agency has undertaken a full analysis in an EIS, at which point it may become apparent that another alternative presents a wiser course of action.

3. Plaintiffs have already suffered serious harm during the pendency of this lawsuit, and this harm is expected to continue so long as the IFR remains in effect. Gauvin Decl. ¶¶ 5-6, 8, 10; Loomis Decl. ¶ 3; Second Down Decl. ¶¶ 7-15; Declaration of Lori Swanson (Dkt. 92) ("Swanson Decl."); Declaration of William R. Orr (Dkt. 91); Declaration of William E. McGill (Dkt. 93); Declaration of Douglas B. Wells (Dkt. 85) ("Wells Decl."); Declaration of Douglas Vincent-Lang (Dkt. 87) ("Vincent-Lang Decl.") ¶¶ 11, 12, 14; Declaration of Gregory K. Leonard (Dkt. 88) ("Leonard Decl.") ¶ 14 (documenting "substantial disruption in local, state, and regional economic activity caused by implementation of NMFS' Steller sea lion protection measures"). Every fishing season during which the IFR is in place—and before an EIS and new final agency action are issued—is another season that Plaintiffs are required to comply with regulations that were adopted in violation of NEPA.

4. It has now been over six years since this administrative process began. The new process can and should proceed much more expediently than the agency's last process given the work and scoping already done in that initial NEPA process. Moreover, the MSA requires that a

Court expedite the judicial review of matters involving MSA regulations "in every possible way," which counsels for an efficient and timely NEPA process on remand. *See* 16 U.S.C. § 1855(f)(4).

The above factors, which merit an efficient and expedient remand process, should be appropriately balanced against the need for a process that fully complies with NEPA, thoroughly evaluates *all* relevant environmental effects based on *all* relevant data and information, and meaningfully considers public and Council input. Plaintiffs appreciate that a fully compliant NEPA process takes time.

Taking into account all of these considerations, Plaintiffs' proposal for an 18-month remand process is reasonable. Even the longest estimates in the present administrative record (from 2007 when NMFS still planned to allow full public input on a draft EIS) show that NMFS initially planned to complete the EIS process in 18 to 21 months. BIOP007866; BIOP007868-69; BIOP008450. Of course, by March and April of 2010, NMFS had planned to develop and complete an EIS by December 2010, indicating that, by the agency's own estimate, it could still complete an EIS in approximately nine months. *See* RULE066891; RULE065903; RULE066895. Recognizing the significant amount of work NMFS has already completed, and NMFS' own estimates from the record, the remand process proposed by Plaintiffs can and should be accomplished in time for the start of the 2014 fishing season.

2. The new EIS must fully comply with NEPA by considering all relevant data and a full range of alternatives

NEPA requires that NMFS collect and analyze all relevant information in the EIS, including data demonstrating adverse environmental effects on fisheries and data that may suggest nutritional stress is not a factor affecting Stellar sea lion populations. "The very purpose

of NEPA's requirement that an EIS be prepared for all actions that may significantly affect the environment is to . . . insur[e] that available data is gathered and analyzed . . . ." *LaFlamme v. Fed. Energy Regulatory Comm'n*, 852 F.2d 389, 400 (9th Cir. 1988) (internal quotations omitted). NMFS has a continuing obligation on remand to collect and analyze new information that informs its environmental analysis. *Or. Natural Res. Council Action v. U.S. Forest Serv.*, 445 F. Supp. 2d 1211, 1228 (D. Or. 2006) (noting agency's duty on remand "to be alert to information that might alter the result of the original analysis") (citing *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557-58 (9th Cir. 2000)).

Since NMFS promulgated the IFR, additional scientific information has become available and must be considered in the EIS. *See* Gauvin Decl. ¶¶ 8-11 & Exs. A-D (describing impacts on Arrowtooth flounder and Pacific cod fisheries, on fisheries outside restricted areas, and on associated ecosystems; also describing recent study regarding shark and killer whale predation on Steller sea lions); *see also* Second Down Decl. ¶ 8 & Ex. A; Second Vincent-Lang Decl. ¶¶ 9-13, 16-18 & Exs. A, C, D, & E (summarizing information from 2010 and 2011 SSL survey data and independent scientific review of NMFS' 2010 BiOp). NMFS must also fully evaluate new information that was briefly mentioned, but not thoroughly considered, in the EA. For example, the Court specifically criticized NMFS for "rel[ying] on a single-species model to project significant increases in Atka mackerel and Pacific cod biomass in the affected areas" because the single-species model is overly simplistic and fails to account for predation of Atka mackerel by Pacific cod. Dkt. 130 at 50; *see also* Gauvin Decl. ¶ 12. To comply with NEPA, on remand NMFS must evaluate the ecosystem effects of fishery restrictions, taking into account the more sophisticated multi-species model. And NMFS cannot again overlook its obligation under

Executive Order 12898 to consider environmental justice impacts on minority and low income populations. Dkt. 130 at 55 n.263.

Furthermore, although the Court held that the range of alternatives NMFS analyzed in the EA was sufficient, the Court and the Federal Defendants have also acknowledged that an agency has a broader obligation to consider a more robust range of alternatives in an EIS. Dkt. 130 at 53 (citing *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008)); *see also* Fed. Defs.' Mem. in Opp'n to Pls.' Mot. for Summ. J. (Aug. 15, 2011) (Dkt. 98) at 80-81 (citing 40 C.F.R. § 1502.14(a) and *N. Idaho Cmty. Action*, 545 F.3d at 1153). Therefore, the Court's holding that NMFS considered an adequate range of alternatives *in the EA* does not control the question of the range of alternatives that must be evaluated *in the EIS*. In its original 2007 notice of intent to prepare an EIS for new Steller sea lion protection measures, NMFS described its plan to consider a full range of alternatives, including proposals from the public and the Council, and a variety of different spatial, temporal, and other management measures. RULE001063-64. NMFS must evaluate a similar range of alternatives in the forthcoming EIS to adequately inform its decision.

C. The Presumptive Remedy for NMFS' Violation of NEPA is Vacatur of the EA, FONSI, and Interim Final Rule

In addition to requiring the agency to prepare an EIS, issue a new ROD, and take new action upon completion of the remand, Plaintiffs maintain that NMFS' EA, FONSI, and IFR should be vacated, in accordance with the APA and U.S. Supreme Court and Ninth Circuit precedent. Below, Plaintiffs present the reasons why vacatur is appropriate. Alternatively, should the Court decide to not immediately vacate the IFR, a vacatur of the IFR that is stayed pending completion of the remand would be appropriate.

1. The Court should vacate the EA, FONSI and IFR

Vacatur is the presumptive remedy for violations of the APA and NEPA. 5 U.S.C. § 706(2)(A) (the court "shall . . . set aside" any agency action found to be "arbitrary, capricious . . . or otherwise not in accordance with law"); *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005); *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (a plaintiff who "prevails on its APA claim . . . is entitled to relief under that statute, which normally will be a vacatur"); *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) ("[B]oth the Supreme Court and the D.C. Circuit Court have held that remand, along with vacatur, is the presumptively appropriate remedy for a violation of the APA."). NMFS' violation of NEPA is also a violation of the APA, and the established remedy for such violations is to vacate the unlawful regulation and to reinstate the rule previously in force. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998); *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1106 (9th Cir. 2011) (citing *Nw. Envtl. Advocates v. U.S. Envtl. Prot. Agency*, 537 F.3d 1006, 1026-27 (9th Cir. 2008)); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 640 (9th Cir. 2004).

As an example, the District Court for the District of Columbia recently upheld an agency rule against ESA challenge, but found that the agency violated NEPA by failing to conduct a proper NEPA review. Consequently, the Court issued an order vacating the rule and instructing the agency to complete a proper NEPA process and issue a new final rule. *In re Polar Bear Endangered Species Act Listing & §4(d) Rule Litig.*, No. 08-00764, 2011 WL 5022771 (D.D.C. Oct. 17, 2011) (decision on the merits); *see also In re Polar Bear*, No. 08-00764 (D.D.C. Nov. 18, 2011), Dkt. 286 (order vacating rule and remanding to agency for new rulemaking) (copy

attached as Attachment 3). As another recent example, in *Pit River Tribe v. Bureau of Land Management*, several plaintiffs challenged agency actions under NEPA, the National Historic Preservation Act, and the Geothermal Power Act. Following the Ninth Circuit's reversal of a summary judgment order in favor of the federal defendants on NEPA grounds, the District Court for the Eastern District of California entered an order vacating the ROD and remanding to the agencies with instructions to prepare "a joint [EIS]," where, "[a]fter preparing the EIS, BLM shall issue a new ROD on lease extensions, BLM shall issue a new ROD on [the lessee's] plan of utilization, and the Forest Service shall issue a new ROD on proposed surface use or development . . . ." *Pit River Tribe v. Bureau of Land Mgmt.*, No. 02-1314, 2008 WL 5381779, at *4 (E.D. Cal. Dec. 23, 2008), *aff'd in part, rev'd in nonrelevant part sub nom. Pit River Tribe v. U.S. Forest Service*, 615 F.3d 1069, 1084-85 (9th Cir. 2010).

Here, the Court has declared that the EA and FONSI were issued in violation of NEPA, and therefore under the APA they must be "set aside." 5 U.S.C. § 706(2)(A). Although we recognize that the Court's Order suggests the Court is not inclined to vacate the IFR, we respectfully request that the Court consider immediate vacatur of the IFR, in addition to vacating the EA and FONSI, and a reinstatement of the Stellar sea lion mitigation measures previously in place, for the reasons stated below.[9]

[9] While recognizing, for purposes of this remedy briefing, the Court's determinations that NMFS complied with the ESA when it issued the BiOp, Plaintiffs respectfully reserve their position on these issues and do not waive any of their claims with respect to the ESA, MSA, or APA. However, even if the BiOp and its jeopardy and adverse modification determinations were made in accordance with law, the rulemaking that resulted in the IFR was necessarily not in accordance with law (NEPA) and consequently must be "set aside." *See, e.g.*, *Anderson v. Evans*, 371 F.3d 475, 494 (9th Cir. 2002) ("Because the agencies have not complied with NEPA, we set aside the FONSI, suspend implementation of the Agreement . . . , and vacate the approved (Cont'd)

First, the NEPA violations here were serious, and vacatur of the IFR will prevent the agency from prejudging the outcome of the remand. There is no way to determine how NMFS' decision regarding Steller sea lion mitigation measures for this complex regulatory regime might have been different had it performed the required analyses under NEPA with the benefit of public comment and Council input at a meaningful time in the process.[10] Indeed, courts generally preserve the status quo pending a remand to remedy a NEPA violation so as not to prejudge the decisions that the agency will make once the full environmental consequences of a proposed action have been determined. *See, e.g., Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d at 1081 (district court's order "that the agencies' decisions [in violation of NEPA] be 'undone,' void, as if they never happened" properly "sought to approximate what would have happened had the agencies used the proper procedures"); *Sierra Club*, 510 F.3d at 1023 ("We will defer to an agency's decision only if it is fully informed and well considered . . . .") (internal citations and quotations omitted); *Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977) ("NEPA analysis . . . might reveal substantial environmental consequences" that would allow the agency to reconsider its proposal, particularly when "the agency is in illegal ignorance of the

whaling quota for the Tribe."); *Reed v. Salazar*, 744 F. Supp. 2d 98, 119-20 (D.D.C. 2010) (FWS funding agreement "set aside" following violations of NEPA alone).

[10] "[A] telling illustration of how the [fishery management] process should and does work" with respect to consultations under the ESA was presented by the process used in the development of fishery mitigation measures for endangered sea turtles. *Turtle Island Restoration Network v. Dep't of Commerce*, 438 F.3d 937, 948 (9th Cir. 2006). There, the Western Pacific Fishery Management Council held public hearings on a fishery management plan amendment and NMFS published a proposed rule to implement the RPA. The notice of proposed rule provided information regarding the agency's efforts to comply with other applicable law, including an EIS and a biological opinion.

consequences, as when it should have prepared an EIS but failed to do so") (internal quotations and citations omitted).[11]

Second, the precise environmental consequences of leaving the IFR in place during remand are unknown, but may be significant. As the Court noted, the administrative record demonstrated the presence of "significant scientific differences of opinion, controversy, and uncertainty on potentially significant impacts on the natural and physical environment resulting from the removal of long-standing human intervention in the form of commercial fishing in vast areas of the BSAI." Dkt. 130 at 50. NEPA prohibits an agency from taking any action pending NEPA compliance which would (1) have an adverse environmental impact, or (2) limit the choice of reasonable alternatives. 40 C.F.R. § 1506.1(a). The IFR has resulted in substantial shifts in fishing patterns and concentrated fishing effort in the remaining open areas, with ongoing impacts on the environment that have not been analyzed in accordance with NEPA. *See* Gauvin Decl. ¶¶ 4-14; Swanson Decl. ¶¶ 6-7; Loomis Decl. ¶ 3; Second Down Decl. (Dkt. 87) ¶¶ 7-13; Vincent-Lang Decl. (Dkt. 87) ¶ 11.

Third, vacatur of the IFR provides plaintiffs with meaningful relief and assures the public that NMFS is taking the "hard look" at potential environmental impacts that NEPA requires. Indeed, vacatur of the agency's underlying decision is the standard remedy in cases in which the agency was found to violate NEPA. *See, e.g.*, *Reed*, 744 F. Supp. 2d at 119 ("vacating a rule or

[11] In *Metcalf*, for example, the Ninth Circuit went so far as to find that post-decisional NEPA compliance could be deemed to "slant[] in favor of finding that the . . . proposal [reviewed by a federal agency] would not significantly affect the environment." 214 F.3d at 1144; *see also id.* ("the die already had been cast"); *id.* at 1146 ("Having already committed in writing to support the Makah's whaling proposal, can the Federal Defendants now be trusted to take the clear-eyed hard look at the whaling proposal's consequences required by the law, or will the [NEPA review] be a classic Wonderland case of first-the-verdict, then-the-trial?").

action promulgated in violation of NEPA is the standard remedy").[12] Moreover, as long as the IFR remains in effect, the groundfish fisheries will continue to be regulated under a framework that was never subjected to a "hard look" under NEPA, and the admitted substantial economic impacts to fishing communities, the State, and Pacific cod and Atka mackerel fishermen will undoubtedly continue.[13] *See, e.g.*, Vincent-Lang Decl. ¶¶ 11, 12, 14; Leonard Decl. ¶¶ 8-14 ("the predicted substantial impacts from the EA/RIR in the economic sector are already occurring, and they can reasonably be expected to continue if the NMFS Steller sea lion protection measures as contained in the [IFR] remain in place"); Second Vincent-Lang Decl. ¶ 12 & Ex. A.

2. In the alternative, the Court should vacate the IFR and stay its mandate pending the issuance of a new ROD

Alternatively, if the Court does not find that immediate vacatur of the IFR is warranted, Plaintiffs request that the Court issue an order of vacatur as to the EA, FONSI, and IFR, but stay the mandate with respect to the IFR pending the completion of the remand. This remedy has been employed in cases in which the court recognized that an agency's statutory violation

[12] Even in rare circumstances—i.e., when a project has already been built—courts require an agency to reconsider its original decision when faced with NEPA violations. *See, e.g.*, *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 871-72, 875 (9th Cir. 2005) (holding a dock extension permit violated NEPA for failure to complete an EIS and ordering district court to direct the agency to either "revoke the permit or place conditions on the operation . . . to ensure compliance with the law," even after construction was complete).

[13] For example, although the Acceptable Biological Catch (the scientifically determined level of catch that prevents overfishing) is high enough to accommodate a larger Total Allowable Catch ("TAC") for Atka mackerel, the TAC was decreased in 2011 solely because of the area closures in the IFR, and similar proposals have been made for the 2012-2013 seasons. Gauvin Decl. ¶ 14.

required the agency to complete a new process and issue a new decision, but that equitable considerations weighed in favor of retaining the existing decision pending the remand.[14]

Under this approach, the IFR would remain in effect during the remand but would be "automatically" vacated upon completion of the remand and replaced with the agency's new final action. This approach would address any concerns about consistency with the 2010 BiOp because its reasonable and prudent alternative ("RPA") would remain in effect during the remand and would only be replaced upon issuance of a new rule that is fully informed by the NEPA process. Accordingly, this approach would be consistent with the APA's mandate that unlawful agency actions be "set aside" while also addressing any concerns the Court may have regarding the regulation of the fisheries during the remand.

D. In the Alternative, the Court May Enjoin the IFR Pending NMFS' Completion of the EIS, ROD, and New MSA Action on Remand

As set forth in Sections II.A and II.B, *supra*, Plaintiffs request that the Court remand the IFR to the agency and order relief that directs the agency to complete an EIS in full compliance with NEPA and issue a new final action, documented in a ROD, on a reasonable schedule. In

[14] *See, e.g., Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466 (D.C. Cir. 2009) (vacating and remanding DOI's five-year lease plan for the Chukchi, Beaufort and Bering Seas due to violations of NEPA and the Outer Continental Shelf Lands Act), *on rehearing*, No. 07-1247, Dkt. 1198608 (D.C. Cir. July 28, 2009) (subsequent order staying the effect of the court's mandate pending remand); *Chamber of Commerce of the U.S. v. Sec. Exch. Comm'n*, 443 F.3d 890 (D.C. Cir. 2006) (vacating a rule promulgated in violation of the APA, but staying the issuance of the mandate to allow the SEC to cure the procedural defects identified by the court); *Nw. Envtl. Advocates v. U.S. Envtl. Prot. Agency*, No. 03-05760, 2006 WL 2669042 (N.D. Cal. Sept. 18, 2006), *aff'd*, 537 F.3d 1006 (9th Cir. 2008) (remedial order following summary judgment decision holding EPA regulation *ultra vires* under the CWA; court ordered injunctive relief, effectively vacating rule but staying effect of the vacatur by providing two years to complete new rulemaking); *Hawaii Longline Ass'n v. Nat'l Marine Fisheries Serv.*, 288 F. Supp. 2d 7, 12 (D.D.C. 2003) (court stayed a mandate vacating a biological opinion and regulations pending completion of remand).

addition, in Section II.C, *supra*, Plaintiffs request that the Court vacate the IFR, EA, and FONSI, or, alternatively, stay the effect of the vacatur as to the IFR pending completion of the remand. Plaintiffs request an order of vacatur (whether immediate or partially stayed) in addition to a remand because such an order (1) is consistent with the APA and applicable case law and (2) provides an automatic mechanism that necessarily ensures the IFR is properly invalidated and superseded with a new decision upon completion of the remand. In this Section II.D, we address the alternative injunctive grounds for a similar remedy by the Court. In its January 19 Order, the Court indicated that "some degree of injunctive relief is appropriate." Dkt. 130 at 54. This section addresses the appropriate bases for, and scope of, injunctive relief.[15]

A plaintiff seeking an injunction must demonstrate (1) success on the merits, (2) that it has suffered an irreparable injury, (3) that the balance of hardships warrants a remedy in equity, and (4) that an injunction is in the public interest. *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1172 (9th Cir. 2011) (considering a preliminary injunction); *see also Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010) (permanent injunction); *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 546 (1987). In *Monsanto*, the U.S. Supreme Court determined that a district court abused its discretion by enjoining an agency from effecting a partial deregulation of a regulated substance and prohibiting certain acts pending the agency's completion of an EIS. 130 S. Ct. 2743. Specifically, the district court sought to remedy the agency's NEPA violation "in three ways: First, it vacated the agency's decision . . . ; second, it enjoined [the agency] from deregulating [a regulated substance], in whole or in part, pending completion of the mandated

[15] To the extent any of the relief requested in Sections II.A, II.B, or II.C above is characterized as injunctive, such relief is warranted for the reasons stated in this Section II.D.

EIS; and third, it entered a nationwide injunction prohibiting almost all future planting of [the regulated substance]." *Id.* at 2756. Vacatur is a remedy that is separate and distinct from injunctive relief, and both partial and complete vacatur are "less drastic remed[ies]" than injunctive relief. *Id.* at 2761.

In this instance, application of the injunctive relief factors warrants an order enjoining NMFS' continued application of the IFR pending NEPA compliance and a new decision from NMFS on remand. Of particular note, because the Court determined that NMFS violated NEPA, but not the ESA, the traditional standards for injunctive relief apply, and there is no "pre-balancing" of the equities or "thumb on the scales" in favor of listed species interests as there sometimes can be when possible violations of the ESA are at issue. *See, e.g., Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511 (9th Cir. 1994) (explaining that, in cases involving ESA violations, "Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests"); *contrast Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 201 (4th Cir. 2005) ("NEPA creates no exception to the traditional principles that govern injunctive remedies."); *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1259-60 (E.D. Cal. 1999) (applying standard four-part balancing test to determine whether to enjoin violations of Wild and Scenic Rivers Act, and rejecting plaintiffs' suggestion that environmental statutes other than the ESA "rebuttably presume . . . the balance of benefits in favor of the species").

1. Success on the merits

Plaintiffs have demonstrated success on the merits of their NEPA claim. The Court found that NMFS violated NEPA by failing to prepare an EIS and violated NEPA by failing to

involve the public in its decision-making. Dkt. 130 at 49-52. These violations undermine the required NEPA compliance for the IFR and necessarily invalidate the EA and FONSI. *See supra* Parts II.A-C. Plaintiffs are therefore entitled to a remedy correcting these violations. *See* Dkt. 130 at 54-55 ("It does appear . . . that some degree of injunctive relief is appropriate to remedy the NEPA violations . . . .").

2. Irreparable injury

Public involvement, including publication of a draft EIS as a "springboard for public comment," is a crucial element of decision-making under NEPA, because public involvement is "almost certain to affect the agency's substantive decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989); *see also Hall v. EPA*, 273 F.3d 1146, 1163 (9th Cir. 2001) ("[T]he point of notice-and-comment rulemaking is that public comment will be considered by an agency and the agency may alter its action in light of those comments . . . ."). Plaintiffs have suffered harm because, as the Court held, NMFS failed to adequately involve the public or allow for expert agency comments on the proposed restrictions set forth in the IFR. This NEPA violation deprived Plaintiffs of the appropriate opportunities to inform and affect NMFS' action, and thwarted NEPA's twin purposes of informed public disclosure and informed agency decision-making. *See* Dkt. 130 at 49-52. The First Circuit has described this kind of harm as:

> a harm to the environment, but the harm consists of the added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment. NEPA's object is to minimize . . . the risk of uninformed choice. . . . [C]ourt[s] should take account of the potentially irreparable nature of this

> decisionmaking risk to the environment when considering a request for [an] injunction.

Sierra Club v. Marsh, 872 F.2d 497, 500-01 (1st Cir. 1989); *see also Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1124-25 (9th Cir. 2005) (irreparable injury arose from agency action taken "without a proper environmental assessment"). The harm caused by NMFS' failure to comply with NEPA cannot be remedied by any means other than an order enjoining the IFR, which was adopted without proper NEPA compliance, and requiring NMFS to prepare an EIS, consider public comments, and issue a new agency action fully informed by that analysis.

The Court also determined that NMFS' failure to comply with NEPA resulted in fishing restrictions that may harm the environment in ways that NMFS has failed to consider. Dkt. 130 at 50 ("There is . . . evidence in the record to indicate that there might also be some detrimental environmental effects from the restrictions."). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co.*, 480 U.S. at 545. An injunction against implementation of the IFR and requiring an EIS, final ROD, and new agency action is therefore also justified by the potential harm to the environment caused by the fishing restrictions imposed by NMFS without the proper NEPA analysis. Gauvin Decl. ¶¶ 4, 8-13; Loomis Decl. ¶¶ 14-16; Second Down Decl. ¶¶ 7-15; Vincent-Lang Decl. (Dkt. 87) ¶ 11 (describing adverse environmental effects of "race for fish," grounds crowding, gear conflicts, and fisheries conservation and management impacts caused by IFR fishing restrictions).

Furthermore, Plaintiffs have documented, and the Court has recognized, the harm that NMFS' actions, taken without proper NEPA compliance, are causing to the Plaintiffs' interests, including the State of Alaska's unique environmental, wildlife, fishery regulatory, and

community and economic development interests. Vincent-Lang Decl. (Dkt. 87) ¶¶ 11-12; Leonard Decl. (Dkt. 88) ¶¶ 6-14 (citing, *e.g.*, BIOP003429; BIOP003427; BIOP003442); Second Down Decl. ¶¶ 10-15; Wells Decl.; Declaration of Kenneth G. Down (Dkt. 83). This harm includes total annual losses in gross earnings of up to $83.2 million, an impact NMFS admits is "substantial," BIOP003429; BIOP003462, Alaska state and local tax revenue losses from $1.4 million to $4 million per year, and the loss of up to 750 fishing, processing, and related jobs in Alaska, *see* Leonard Decl., ¶ 6. While economic injury, which is just one component of the injuries to Plaintiffs described here, is traditionally considered remediable at law, Plaintiffs have no means of recovering compensation from the government through NEPA or the APA for the injury to the economy of an entire state caused by its action, and the economic harm here is coupled with the environmental harm described above. *See also* Vincent-Lang Decl. ¶¶ 11, 18; Dkt. 130 at 49-50.

3. Balance of hardships

The balance of hardships also weighs in favor of injunctive relief. Against the significant harms established by Plaintiffs, the latest population data for Steller sea lions indicates that the wDPS continues to increase at a statistically significant rate over the past decade (1.8% per year as of 2011). Second Vincent-Lang Decl. ¶ 17 & Ex. E at 4. A steady increase has taken place under the prior regulatory regime, indicating that in the context of the equitable balancing of the appropriate remedy here, the IFR's measures, which under the Court's Order are permissible under the ESA and MSA, *see* Dkt. 130 at 54, are not *necessary* for the protection of Steller sea lion populations and recovery in the short period of a remand. Second Vincent-Lang Decl. ¶ 11 & Ex. A at 97 ("The RPAs are not relevant to the recovery of Steller sea lions." "The evidence

shows that RPAs based on restricting fisheries are incapable of causing recovery of sea lion populations."), ¶ 20 ("During the pendency of the remand and EIS and [ROD] preparation processes . . . the wDPS Steller sea lion population is unlikely to suffer significant adverse effects from ongoing fishery activity, including fishery activity conducted under the terms and conditions, Steller sea lion protection measures, and management regime in place prior to the IFR and 2010 [BiOp] . . . ."). These points are not made to reargue the merits, but rather to identify that, in the equitable remedy context, the Court may, in light of the NEPA violations, impose a short-term remedy on remand that differs from the agency's long-term approach in the BiOp and IFR.

Next, an injunction that enjoins application of the IFR will not unduly disrupt the current regulatory environment, or cause any violations of other applicable statutes, contrary to Defendant-Intervenor Oceana et al.'s assertions. *See*, *e.g.*, Dkt. 130 at 54 (citing Oceana Br., Dkt. 99 at 36 n.7); *see also* Second Vincent-Lang Decl. ¶ 20. NMFS' BiOp determination and IFR rulemaking, although confirmed by this Court as within NMFS' discretionary authority to issue and promulgate, are not binding determinations that those measures are the *only* ways that the agency's ESA section 7(a)(2) obligations can be satisfied, especially when the short-term considerations of a court-imposed remedy are weighed as against the long-term horizon of the agency action taken without required NEPA compliance.

First, the BiOp's RPA and terms and conditions are not absolutely or conclusively binding on NMFS or the Court in this equitable remedy context. As a matter of law in the Ninth Circuit, an action agency (NMFS here) "is not required to adopt the alternatives suggested in the

biological opinion." *Tribal Vill. of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1988).[16] An action agency's "departure from the suggestions in the biological opinion does not by itself constitute a violation of the ESA; [it] satisfie[s] section 7(a)(2) if [it takes] alternative, reasonably adequate steps to insure the continued existence of any endangered or threatened species." *Id.* Thus, in *Akutan*, although the Secretary of the Interior did not adopt all of a biological opinion's recommendations, but instead pursued other mitigating measures, that was not a violation of ESA section 7(a)(2). *Accord Ctr. for Marine Conservation v. Brown*, 917 F. Supp. 1128, 1146-47 (S.D. Tex. 1996) ("[E]ven if this Court concluded the Federal Defendants did not fully implement the reasonable and prudent alternative of the [biological o]pinion, the Court finds the alternative measures taken by the Defendants adequate and sufficient to avoid a jeopardy finding.").

Similarly here, enjoining the IFR during the brief period of a remand for NMFS' NEPA compliance would not lead to an ESA section 7(a)(2) violation. First, alternative mitigation measures, including those in the prior biological opinion and associated protection measures, would be in place pursuant to the Court's order, and the Court could impose additional measures as necessary to ensure no jeopardy to the species or adverse modification of critical habitat. But neither the Court nor the parties are, in the equitable remedy context, bound by to the 2010 BiOp and IFR measures as Oceana incorrectly suggests.

[16] However, if the action agency deviates from the Biological Opinion recommendations, it "does so subject to the risk that [it] has not satisfied the standard of section 7(a)(2)." *Akutan*, 869 F.2d at 1193 (quoting *Vill. of False Pass v. Watt*, 565 F. Supp. 1123, 1160-61 (D. Alaska 1983), *aff'd*, 733 F.2d 605 (9th Cir. 1984)). As explained above, that risk is minimized here and outweighed by the NEPA compliance and other interests at stake in the equitable balancing required for injunctive relief.

There is adequate evidence before the Court to show that proceeding with groundfish fishing activities in Areas 543, 542, and 541 consistent with the earlier protection measures and enjoining the IFR during the brief period of a remand will not result in jeopardy to the species or adverse modification of its critical habitat. *See* Second Vincent-Lang Decl. ¶ 11 & Ex. A at 97, ¶¶ 16-17 & Exs. C, D, & E, ¶ 20.

Moreover, the argument that the ESA trumps or displaces NEPA, or that there might be an irreconcilable conflict between NEPA and ESA compliance here, undercuts Congress's and the courts' longstanding recognition of the importance of NEPA compliance prior to agency decision-making and implementing agency actions. *See supra* Section II.A-B. NEPA and the action-forcing EIS requirement are to apply " to the fullest extent possible," 42 U.S.C. § 4332, as confirmed by NMFS' own regulations. BIOP004611 (NOAA AO 216-6, § 3.01a) (NOAA policy is to "fully integrate NEPA into the agency planning and decision making process"); BIOP004625 (NOAA AO 216-6 § 5.04a.1-2) ("primary purpose of an EIS is to serve as an action-forcing device to ensure that the policies and goals defined in NEPA are infused into the ongoing programs and actions of the Federal government"). There is no irreconcilable conflict here where both ESA section 7(a)(2) and NEPA's EIS requirement can be adhered to, and done *prior* to NMFS' final decision-making and implantation of that decision. *See, e.g.*, *Forelaws on Board v. Johnson*, 743 F.2d 677, 685-86 (9th Cir. 1984) (no irreconcilable conflict between NEPA and Northwest Power Planning Act where framework of both allowed sufficient time for EIS preparation).

Thus, on balance, there is no *per se* ESA section 7(a)(2) violation from enjoining the IFR for a brief period pending the remand to NMFS for NEPA compliance. Adequate alternative

measures can be followed during the remand to ensure that the approximately 70,000 Steller sea lions in the wDPS, *see* RULE002180, would not be likely to be jeopardized. Further, as the Court has noted, it is uncertain whether the effects of the IFR on critical habitat in Areas 543, 542, and 541 will be negative or positive. In light of these factors and those identified above in the record before the Court, the balance of hardships tips towards Plaintiffs on the requested limited injunctive relief to remedy the agency's NEPA violations here.

4. Public interest

The public interest will be served by an injunction against the IFR and requiring NMFS to prepare and EIS and ROD and take new action. "Congress's determination in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal projects may go forward." *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009). As the Court has recognized, some meaningful relief is necessary to achieve this public interest. Dkt. 130 at 54-55; *see also Pit River Tribe*, 615 F.3d at 1081 ("[T]he public interest favors issuance of an injunction because allowing a potentially environmentally damaging program to proceed without an adequate [ROD] runs contrary to the mandate of NEPA.") (quoting *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007)). The public interest therefore supports an injunction requiring meaningful compliance with NEPA. And while there is also a strong public interest in ESA compliance and listed species conservation, those interests are adequately addressed in this situation as noted above in Section II.D.3, and those ESA public interests do not preclude the entry of the requested injunctive relief.

III. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court vacate the EA and FONSI, and remand them to NMFS with instructions to (1) submit a Notice of Availability

and Final EIS to the Office of the Federal Register for publication no later than July 1, 2013, (2) issue a Record of Decision on or before September 3, 2013, consistent with the procedure set forth in Attachment 1, and (3) complete a new agency action establishing Steller sea lion mitigation measures for the groundfish fisheries season that will begin on January 1, 2014. In addition, Plaintiffs respectfully request the Court to vacate or enjoin the Interim Final Rule, effective immediately, or alternatively, to vacate the Interim Final Rule subject to stay pending the completion of the remand.

A proposed form of order is submitted concurrently with this brief.

Respectfully submitted this 8th day of February 2012.

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Certificate of Service

I hereby certify that on February 8, 2012, I electronically filed the foregoing Plaintiffs' Joint Memorandum on Proposed Remedy via the CM/ECF system, which will send notification of the filing to attorneys of record, including as listed below:

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