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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

SECOND DECLARATION OF DOUGLAS VINCENT-LANG

I, Douglas Vincent-Lang, hereby declare and state as follows:

Declarant's Position and Background.

1. I am the same Douglas Vincent-Lang who previously submitted a declaration in this matter (Dkt. 87).

2. If called as a witness, I have personal knowledge of the matters set forth herein, and could and would competently testify thereto if called upon to do so.

3. I am currently the Acting Director of the Division of Wildlife Conservation of the Alaska Department of Fish and Game ("ADF&G"). I am also the Endangered Species Act ("ESA") coordinator for ADF&G and have the policy lead for ADF&G on Arctic and marine policy issues. I also have the lead policy responsibility in the Commissioner's office for coordination of habitat issues. I currently chair the North Slope Science Initiative and am vice-chair of the Arctic and Western Landscape Conservation Cooperatives. Previously I worked for ADF&G for 30 years, including positions as a research and management biologist and as an Assistant Director.

4. I hold a B.S. degree in biology/population dynamics from the University of Wisconsin – Green Bay and a M.S. degree in Biological Oceanography from the University of Alaska Fairbanks.

5. I also represent the Commissioner of ADF&G on the Governor's Climate Change Sub-cabinet, which is tasked with developing a climate change strategy for Alaska; on the Governor's Oceans Sub-cabinet; and as the Commissioner's alternate on a natural resources sub-cabinet, which is tasked with coordination of land and water resources issues. I chaired a think-tank of department scientists that developed a climate change adaptation strategy for fish and

wildlife and their consumptive and non-consumptive uses, including commercial, recreational, and personal use, subsistence fishing and hunting, and wildlife viewing activities.

6. Specifically, with respect to the ESA, I work on ESA issues with the Alaska Governor's office, and the Departments of Natural Resources, Environmental Conservation, Commerce, Community and Economic Development, and Law. I also serve on various committees or attend meetings on behalf of the State of Alaska and the Commissioner of ADF&G, including leading a state policy team on ESA issues; participating in ESA committees for the Western Association of Fish and Wildlife Agencies and the Association of Fish and Wildlife Agencies; and representing the State of Alaska on several international committees dealing with the ESA and the Convention on the International Trade of Endangered Species ("CITES"). I am one of six state representatives on a state-federal Joint Task Force examining means to improve state-federal coordination in the implementation of the ESA.

7. In my present position, I am responsible for all matters involving endangered and threatened species in the State of Alaska. I often prepare, collect, collate, and organize comments to federal agency actions involving all aspects of the ESA, including listings, critical habitat, recovery planning, and Section 7 consultations. Based on my employment experience, my present position, and my training and personal knowledge, I am intimately familiar with the effects of federal ESA actions on Alaska's state activities, sovereign interests, wildlife, habitat, and land and natural resource management interests, including the effects on (i) Alaska's management of its wildlife resources and the land, water, and other habitat for those resources; (ii) Alaska's wildlife research and information gathering and dissemination activities for numerous species, including the Steller sea lion; (iii) Alaska's interests in Native subsistence and management; (iv) Alaska's economic development and community interests in small businesses,

especially those related to or dependent upon commercial fishing activity, and how these businesses contribute to and are affected by the Alaska and regional economies; and (v) Alaska municipalities in the area of the range of the Steller sea lion.

Independent Scientific Review of NMFS 2010 Biological Opinion.

8. In February 2011, following the release of the NMFS Bering Sea and Aleutian Islands Management Area Groundfish Fisheries Management Plan Section 7 Consultation Biological Opinion, the states of Alaska and Washington, through the Alaska Department of Fish and Game and the Washington Department of Fish and Wildlife (“WFDW”), contracted an independent review of the NMFS Biological Opinion concerning the potential effects of the groundfish fishery management on Steller sea lions. ADF&G and WDFG did so by assembling an independent panel of scientists to evaluate whether NMFS used all relevant scientific information and impartially considered that information in the final Biological Opinion. The panel was co-chaired by Dr. David Bernard and Mr. Steven Jeffries. That panel produced its report in October, 2011, entitled “An Independent, Scientific Review of the Biological Opinion (2010) of the Fisheries Management Plan for the Bering Sea/Aleutian Islands Management Areas.” A complete copy of the report is attached as Exhibit A to this declaration.

9. Among other findings, the independent scientific review panel stated in its report that:

The available data and analyses indicate that current harvest rates of Atka mackerel have been too low, and the population of Pacific cod has been too small for the fishery on either species to cause nutritional stress in sea lions. Modeling efforts by NMFS reported in the BiOp support this observation, especially the lack of an effect of the Pacific cod fishery on sea lion biomass. Attempts in the BiOp to show spatial overlap between catches in fisheries and diets of sea lions, and hence local depletion of prey, failed to convincingly do so. Uncertainty and estimates of forage biomass is large and was ignored in the BiOp. Other measures of possible

competition between fisheries and sea lions (*e.g.*, size overlap, temporal overlap, depth overlap) were specified in the BiOp, but not investigated. *We provide data that were not presented in the BiOp showing limited overlap in sizes of fish taken in fisheries and by sea lions, especially limited in regards to Pacific cod. Steller sea lions ate younger, smaller fish than fisheries caught.*

Report at xiii (emphasis added).

10. The Report also concluded that:

Based on the evidence presented in the BiOp, we conclude that the proposed RPAs will not arrest the decline in the numbers of sea lions in the western and central Aleutian Islands. Evidence presented in this BiOp from multispecies modeling indicates that any future increase or stabilization in sea lion biomass in the western and central Aleutian Islands will *not* be due to restricting fisheries for Pacific cod. There is some modeling evidence in the BiOp indicating that halting fishing for Atka mackerel in the western and central Aleutian Islands might cause sea lion biomass to increase, but it is inconsistent with the data on forage ratios showing greater declines of sea lions are associated with greater relative biomasses of groundfish.

Report at xiv.

11. The Report also states that:

The RPAs are not relevant to the recovery of Steller sea lions.

As discussed in our Chapter 6, the RPAs are based on the premise that fisheries are inhibiting the recovery of sea lions in the western and central Aleutian Islands, and thus impose restrictions of those fisheries. The statistical and scientific evidence in and outside the BiOp show something other than fisheries is causing the decline in sea lion numbers. The evidence shows that RPAs based on restricting fisheries are incapable of causing recovery of sea lion populations.

Report at 97.

12. The Report further states that:

The BiOp and RIR do not demonstrate that the RPAs are likely to minimize economic and social impacts compared with

potential alternatives which would achieve the same benefit for Steller sea lion recovery.

As discussed in our Chapter 8, the BiOp and RIR do not demonstrate what the benefits of the RPAs are for the recovery of Steller sea lions, nor do they seek to identify alternatives that might have the same level of benefit but lower economic and social impact. Given the lack of evidence in the BiOp for the fishery-driven nutritional stress hypothesis, there is little evidence that the RPAs will have *any* benefit for Steller sea lion recovery. Thus it is very unlikely that the RPAs, which impose “*relatively heavy costs on the fishing and processing industry that targets Atka mackerel and Pacific cod in the Aleutian Islands,*” would minimize economic and social impacts compared with potential alternatives that would achieve the same benefit for sea lion recovery.

Report at 97-98.

13. The Report further states that:

The scientific record reported in the BiOp is extensive and cites most of the relevant literature. However, the BiOp does not accurately reflect the scientific evidence in the literature it reports.

The BiOp cites most of the scientific documents pertaining to Steller sea lions and groundfish in Alaska. But simply citing a document and putting it among a long list of literature cited does not mean that the BiOp reflected upon the findings or gave them any serious consideration. A number of studies . . . were referenced, but the significance of their findings was never mentioned or discussed in the BiOp. . . . All in all, the BiOp did not meet the basic academic standards in checking the accuracy and completeness of their citations. Thus, the scientific record as reflected by the literature cited and by manner in which the BiOp referenced the published literature contains a number of errors and some significant omissions of factual information that are at odds with the major conclusions of the BiOp.

Report at 98.

Testimony to House Natural Resources Committee.

14. On October 17, 2011, I provided testimony to the Natural Resources Committee of the United States House of Representatives concerning “NOAA’s Steller Sea Lion Science

and Fishery Management Restrictions.” In that testimony, I noted that the biomass of both Pacific Cod and Atka mackerel were increasing under the prior management regime, thus negating the need for the drastic changes implemented by NMFS. As a result, the management measures imposed by the final Reasonable and Prudent alternative are not consistent with the most recent 2010 biomass estimates for either Pacific cod or Atka mackerel, which were not considered in the Biological Opinion and Reasonable and Prudent alternative analysis even though they were available before the final Biological Opinion was signed. The most recent (November 2010) biomass surveys for these two species show increasing biomass in the Western Aleutians, even to levels sought as targets in the Reasonable and Prudent alternative.

January 2011 Letter from NMFS Concerning Replacement of Interim Final Rule.

15. On January 26, 2011, the Administrator for the NMFS Alaska region, Dr. James Balsiger, wrote to Chairman Eric Olson of the North Pacific Fishery Management Council (“Council”) concerning the final Steller sea lion Biological Opinion and Reasonable and Prudent Alternative implemented in the Interim Final Rule published in the December 13, 2010 Federal Register. The State of Alaska obtained a copy of that letter as it was made part of the agenda for the February 2011 Council meeting. A copy of that letter (without the enclosure) is attached as Exhibit B to this declaration. In that letter, Dr. Balsiger described the process that NMFS would follow in response to comments received on the interim final rule, specifically:

NMFS will assess comments received on the interim final rule and proceed to either: (a) develop a final rule, with any potential changes from the interim final rule governed under the Administrative Procedure Act 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. . . . Under either option (a) or (b), the Council could initiate separate exploration of an alternative RPA using its Seller Sea Lion Mitigation Committee or some other process. This process could

dovetail with the proposed and final rule process under option (b) if that was the Council's intent.

Exhibit B (Balsiger Ltr.) at 2.

Recent SSL Survey, Count, and Trend Data from 2010 and 2011.

16. Attached as Exhibit C is a January 31, 2011 memorandum from NMFS Alaska Fisheries Science Center National Marine Mammal Laboratory summarizing Steller sea lion survey results from summer 2010. Attached as Exhibits D and E are two documents from NMFS summarizing first the Steller sea lion 2011 aerial survey (Exhibit D), and second a set of slides from a presentation by Douglas DeMaster of the NOAA Fisheries (NMFS) Alaska Fisheries Science Center given at the December 2011 Council meeting (Exhibit E). Among the important and new information identified in these documents is that the trend of stable and increasing SSL counts for both pups and overall wDPS SSL population is continuing. For example, the pup count in 2011 was 11,547 pups in the wDPS, an increase of +3.84% from 2009, and an increase of +16.05% from 2005-2011. Also, adult and juvenile non-pup populations have increased 16% since 2008. Non-pup counts of juvenile and adult SSLs increased or stabilized since 2009, except for the Western Aleutian Islands. It is important to note, however, that for the pup count data not all rookeries and haulouts were surveyed, and for unsurveyed locations, NMFS used trend data based on previous measurements or extrapolations. As a consequence, if earlier trend data showed a declining trend in some of the unsurveyed areas, that trend was automatically continued through in the reporting because no actual sample or survey data was gathered in these areas.

17. The 2011 NMFS data shows an overall wDPS pup count trend increasing by a positive 1.8 % per year, which is also statistically significant at the 0.05 confidence level. *See* Exhibit E at 4. In sum, the recent 2011 NMFS survey results and trend analysis information

identify that there is now two additional years worth of information—for 2010 and 2011—that can be considered in the EIS process on remand, and this information shows that the overall stable-to-increasing trend of the entire wDPS SSL population is continuing.

18. The scientific and other information discussed above, including the recent Steller sea lion survey and count data and the independent scientific review of NMFS' 2010 Biological Opinion, identify some of the types of information that need to be addressed in the EIS prepared on remand, and also the type of information that Alaska would be submitting to NMFS' as part of Alaska's public review comments in the EIS process as an expert agency (through ADF&G), *see* 40 CFR §1500.1(b). Much of the information described above in this Second Declaration has been developed subsequent to the preparation of NMFS' Final Biological Opinion in 2010, highlighting the need for the EIS process on remand to address this information and for NMFS to reach a new decision and Record of Decision in that remanded EIS process.

19. Also, the information and circumstances to be addressed in the EIS process on remand may trigger the need for NMFS to reinitiate consultation on the groundfish fisheries management measures pursuant to the 2010 Biological Opinion. In that BiOp, it provides that "reinitiation of formal consultation is required" if "(2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; [or] (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion." 2010 BiOp at 384. The EIS process on remand can help develop information on effects, alternatives, and mitigation measures to address adverse effects (including the full range of environmental effects which encompasses socioeconomic effects) that would also then feed into the Biological

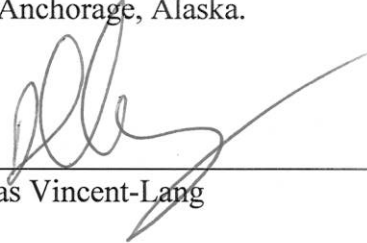
Opinion reinitiation of consultation process for consideration in NMFS' ESA Section 7 and Magnuson-Stevens Act regulatory processes as well.

20. During the pendency of the remand and EIS and Record of Decision preparation processes, consistent with the approach to replace the Interim Final Rule outlined in NMFS' January 26, 2011 letter (*see* Exhibit B), 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 Biological Opinion reviewed in this litigation. The most recent data indicates that the SSL counts continue to increase overall in a statistically significant positive direction, the independent science panel review of the 2010 Biological Opinion indicates that the 2010 BiOp RPA and IFR Steller sea lion protection measures are not relevant to recovery of the species, and harvest rates are too low to be causing nutritional stress to the wDPS SSL population. *See supra*, ¶¶ 9-14, 16-17. At the same time, Alaska's overall economy, community development, state fishery management, and resource management interests would continue to be adversely affected and harmed, suffering the same adverse effects from the 2010 Biological Opinion and IFR Steller sea lion restrictions as set out in my earlier declaration in this case and in the Declaration of Dr. Gregory Leonard previously submitted by Alaska in this matter. *See* Dkt. 87, ¶¶ 8, 11-14; Dkt. 88, ¶¶ 4, 6-14 ("As the examples above show, 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 Interim Final Rule remain in place."); *see also supra* ¶ 12 ("The BiOp and RIR do not demonstrate that the RPAs are likely to minimize economic and social impacts compared with potential alternatives ...").

21. In sum, the EIS process on remand provides NMFS the appropriate opportunity to address all of these items highlighted in paragraphs 9 through 19 above, consistent with NEPA's purpose of informed decisionmaking and informed public participation. The key to this process is reaching a new agency decision based on and considering the EIS to be prepared on remand, and not having that EIS process come after-the-fact where NMFS' final decision has already been made on the basis of what the Court has already determined to be an inadequate and incomplete NEPA process.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 7th day of February, 2012, at Anchorage, Alaska.



Douglas Vincent-Lang

Certificate of Service

I hereby certify that on February 8, 2012, I electronically filed the foregoing Second Declaration of Douglas Vincent-Lang via the CM/ECF system, which will send notification of the filing to attorneys of record, including as listed below:

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