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VIA Federal eRulemaking Portal at www.regulations.gov

Dr. James W. Balsiger
Administrator, Alaska Region
National Marine Fisheries Service
Attn: Ellen Sebastian
P.O. Box 21668
Juneau, AK 99802

Re: Comments on the Interim Final Rule to Implement Steller Sea Lion Protection Measures for the Bering Sea and Aleutian Islands Groundfish Fisheries Off Alaska, RIN 0648-BA31

Dear Dr. Balsiger:

The State of Alaska ("State" or "Alaska"), based on input from the Alaska Department of Fish and Game ("ADFG") and the Alaska Department of Law, submits these comments on the National Marine Fisheries Service's ("NMFS") Interim Final Rule implementing Steller sea lion protection measures for the Bering Sea and Aleutian Islands management area ("BSAI") groundfish fisheries off the coast of Alaska. *See* 75 Fed. Reg. 77535 (Dec. 13, 2010), amended at 75 Fed. Reg. 81921 (Dec. 29, 2010) (collectively, "Interim Final Rule").

NMFS developed the Interim Final Rule in response to a substantively and procedurally flawed Biological Opinion ("BiOp"), which included a Reasonable and Prudent Alternative ("RPA"). The Steller sea lion population for the western Distinct Population Segment ("DPS") has increased over the last 10 years and is trending toward recovery goals. Given this and other available information as detailed below, the Interim Final Rule—and the underlying jeopardy and adverse modification determinations in the BiOp—violates (i) NMFS's obligation to adequately consider the relevant factors and evidence contained in the record before the agency; (ii) NMFS's obligation to make a rational connection between the facts found and the choices made and conclusions reached in the BiOp; and (iii) the Endangered Species Act ("ESA") Section 7 standards for consideration of the best scientific and commercial data available. The selected RPA is similarly unsupported by the information presented by and available to NMFS.

Similarly, the analyses that NMFS prepared under the National Environmental Policy Act ("NEPA") to consider the effects of its action and alternatives were also flawed. The draft Environmental Assessment and Regulatory Impact Review ("EA/RIR") was incomplete and so inadequate that it deprived the public of a meaningful opportunity to review and comment on the proposed action before NMFS adopted the BiOp and Final Interim Rule. Furthermore, NMFS had inadequate justification for its Finding of No Significant Impact ("FONSI") based on the EA/RIR given the significant potential impacts to the communities in the western Aleutian Islands from the RPA measures adopted in the Interim Final Rule. These significant socioeconomic impacts interrelate with the physical and environmental impacts of the RPA measures and mandate that NMFS prepare an Environmental Impact Statement ("EIS") to comply with NEPA.

Also, in developing the Interim Final Rule, and its underlying ESA and NEPA documents, NMFS avoided its obligations under the Administrative Procedure Act ("APA") and Magnuson-Stevens Fishery Conservation and Management Act ("MSA") for notice-and-comment rulemaking. Contrary to NMFS' assertion, NMFS did not have "good cause" to waive prior notice and comment on the Interim Final Rule, or the final BiOp and EA/RIR and FONSI. Based on its flawed application of the "good cause" exception, NMFS also avoided its Regulatory Flexibility Act ("RFA") obligation to specifically consider the effects of the RPA on small businesses and governments.

Lastly, the fisheries closures, catch limitations and other restrictions imposed through the Interim Final Rule fail to satisfy the MSA's National Standards and other requirements of the MSA. The Interim Final Rule fails to achieve optimum yield of the Atka mackerel and Pacific cod fisheries in the Aleutian Islands, instead leaving large percentages of Total Allowable Catch ("TAC") unfished; is not based upon the best scientific information available; and did not allow for variations among, and contingencies in, fisheries, fishery resources, catches.

Given these procedural and substantive violations, the conclusions of the BiOp, RPA, and accompanying NEPA analyses do not provide NMFS a reasoned basis for issuing the Interim Final Rule and revising the regulations at 50 C.F.R. Part 679 (2010). The State requests that NMFS withdraw the Interim Final Rule, as discussed further below, and reconsider the relevant information, including the best scientific and commercial data available; follow the required ESA, NEPA, RFA, APA, and MSA procedures; and find, consistent with the status of the western DPS of the Steller sea lion as a whole, that continued status quo management (that in place prior to the Interim Final Rule) of groundfish fisheries will not cause jeopardy to the species or destroy or adversely modify its designated critical habitat. In the alternative, NMFS should implement a less restrictive and more narrowly tailored RPA that protects the Steller sea lion and its critical habitat but avoids unnecessary impacts to local economies in the Aleutian Islands. The State requests that NMFS recirculate a new draft BiOp and EIS with adequate time for meaningful public review and comment before implementing changes to the existing fisheries management policies in place prior to the Interim Final Rule.

Please consider and include these comments and the attached and referenced materials in the administrative record for NMFS's Section 7 consultation and NEPA processes on the proposed changes to the groundfish fisheries management, and the promulgation of the final rule on Steller sea lion protection measures for the BSAI groundfish fisheries off the coast of Alaska.

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I. Introduction

As a sovereign state, Alaska has an interest in the management, conservation, and regulation of all fish, wildlife, and other natural resources within its jurisdiction, including state fisheries and the Steller sea lion and its habitat. Alaska Const. Art. VIII, §§ 1, 2, 4; Alaska Stat. § 16.05.020. As a steward of its fish and wildlife resources, Alaska directly manages fish, wildlife, and habitat through its Departments of Fish and Game, Natural Resources, and Environmental Conservation. Alaska's

legal title and regulatory interests in its natural resources include the State's land area and extend to its offshore submerged lands and waters. *See* 43 U.S.C. §§ 1301, 1311; *see also Alaska v. United States*, 545 U.S. 75, 79 (2005) (as a general matter, Alaska is entitled to submerged lands beneath territorial waters extending three nautical miles seaward of its coastline). Alaska's coastal areas include much of the range of the western DPS of the Steller sea lion and its designated critical habitat. Alaska has a vested interest in both the Steller sea lion and the management of state fisheries that provide for conservation of the Steller sea lion, use of the Steller sea lion for subsistence purposes by Alaskan natives, as well as the sustained use of fishery resources to provide the maximum benefit for the people of the State.

Alaska's jurisdiction includes fishery regulation of state waters that would be directly and adversely affected by NMFS's decision to close and restrict parallel federal fisheries in the western Aleutian Islands. The State manages fisheries within state waters (0-3 miles seaward from the State's coastline). The state waters have two types of fisheries: solely-state managed fisheries and so-called parallel fisheries. The solely-state managed fisheries have no federal nexus, and they are regulated under the authority of the Alaska Board of Fisheries and managed by the ADFG. The BiOp considered the solely-state managed fisheries as part of the "environmental baseline" and did not include them in the RPA. We concur with and support this approach. While not directly impacted by the recommended RPA, the solely-state managed fisheries are subject to indirect impacts such as possible loss of processor capacity and loss of other infrastructure due to impacts to fisheries regulated under the RPA. The State parallel fisheries occur within State waters and have a federal nexus (e.g., parallel fishery harvests count against the federal total allowable catch (TAC)). That said, the State maintains control of the parallel fisheries through the Alaska Board of Fisheries. The Board has authorized the ADFG to mirror the federal regulations in these parallel fisheries. To foster coordinated state and federal management, Alaska requested that NMFS include these parallel fisheries in developing the BiOp. As such, the parallel fisheries are subject to both direct and indirect impacts from the RPA.

Alaska submitted comments on September 2, 2010, in response to and in disagreement with the draft BiOp, its proposed RPA, and the draft EA/RIR. After NMFS issued the final BiOp, its RPA, and accompanying NEPA documents, and promulgated the Interim Final Rule, Alaska filed a civil action in the United States District Court for the District of Alaska, which challenges NMFS's decision to issue the Interim Final Rule, as well as the underlying BiOp, RPA, and NEPA documents. Given the State's opposition to the Interim Final Rule, it does not support development of a final rule at this time for the reasons set forth in this letter, unless the final rule returns the fisheries management regime to that in effect prior to the Interim Final Rule.

II. Overview of the State's Comments

NMFS chose to promulgate the Interim Final Rule to implement by MSA regulation special fishery management measures purportedly to insure that the BSAI groundfish fisheries off Alaska are not likely to jeopardize the continued existence of the western DPS of the Steller sea lion or adversely modify its designated critical habitat. 75 Fed. Reg. at 77535, 77537. The Interim Final Rule adopts the management measures identified in the 2010 final BiOp. *Id.* at 77537. NMFS claims that by promulgating the new management measures via regulations under the MSA, the Interim Final Rule complies with NMFS's responsibilities under the ESA to avoid jeopardy and adverse modification to the ESA-listed Steller sea lion and its designated critical habitat. *Id.*

However, because the Interim Final Rule is premised upon an inadequate ESA process, an improper legal analysis and unsupported factual conclusions, and includes a seriously flawed RPA, the Interim Final Rule does not comply with the law and should not be adopted for the reasons set forth in this letter.

First, the process through which NMFS reached the Interim Final Rule was flawed and did not meet NMFS's procedural obligations or policy goals to consult with the State or to allow adequate time for meaningful public comment on either the underlying BiOp and related analyses or on the Interim Final Rule. NMFS thereby bypassed both the APA and MSA requirements for notice-and-comment rulemaking, despite a lack of evidence that delaying the Interim Final Rule to comply with these important procedures would cause harm to the Steller sea lion or that emergency action was required. By avoiding notice and comment review, NMFS also sidestepped its obligation under the RFA to consider the effects of the RPA on small businesses and governments. NMFS also failed to satisfy ESA Section 6 to cooperate with the State to the maximum extent practicable. 16 U.S.C. § 1535(a); 59 Fed. Reg. 34274 (July 1, 1994).

Second, the BiOp and its RPA, on which NMFS bases its purported need to adopt the Interim Final Rule, does not comply with the applicable ESA Section 7 jeopardy and adverse modification standards, for the reasons set out in Alaska's previous letter commenting on the draft BiOp, which include:

- NMFS's jeopardy determination is impermissibly based on population numbers in only one and a portion of a second of seven sub-regions within the western DPS, without providing an adequate explanation of the importance of these two sub-regions to the population as a whole. NMFS also discounts the fact that overall the western DPS population trends demonstrate steadily increasing populations over the past decade and now numbers over 73,000 animals across its range.

- NMFS's adverse modification finding is based solely on impacts to specific areas of "affected habitat" without adequate discussion of whether those effects will cause adverse modification to Steller sea lion critical habitat as a whole.

- NMFS did not apply the best scientific and commercial data available to assess the Steller sea lion's current biological status and the status of fisheries, including failing to consider relevant 2010 fish stock assessment surveys for this area.

- The BiOp's RPA is unsupported by the best scientific and commercial data available, which indicates that Steller sea lions in the western and central Aleutian Islands are not experiencing nutritional stress caused by federal fisheries.

- NMFS similarly did not adequately consider the relevant factors nor make a rational connection between the facts found and conclusions reached in the BiOp.

To the extent that NMFS based the Interim Final Rule on the BiOp and the RPA from the BiOp, the Interim Final Rule is similarly and fatally flawed. Further, the regulatory management measures promulgated through the Interim Final Rule fail to meet the substantive national standards of the MSA.

Third, the EA/RIR reviewing the potential impact to the human environment and the costs and benefits of the RPA (the management measures adopted in the Interim Final Rule) failed to meet NEPA requirements. The draft EA/RIR was incomplete and so inadequate that it denied a meaningful opportunity for informed public comment. Further, NMFS itself recognized in the EA/RIR that implementing the RPA in the Aleutian Islands will adversely impact local communities—through lost jobs, commercial revenue, and tax revenue—and have significant environmental justice concerns for Alaska Natives. NEPA requires that NMFS consider these potentially significant effects in an EIS pursuant to appropriate notice-and-comment requirements. NMFS thus violated NEPA by failing to prepare an EIS that takes a "hard look" at the socioeconomic impacts of proposed fishing restrictions. To the extent the Interim Final Rule relies on the NEPA analysis contained in the EA/RIR and FONSI, the Interim Final Rule similarly violates NEPA.

Given these serious deficiencies in the process and substance of the Interim Final Rule, the State requests that NMFS withdraw the Interim Final Rule and delay implementation of the RPA. The procedural mechanisms by which NMFS may withdraw the Interim Final Rule and delay implementation of the RPA are discussed in these comments below.

III. Comments Regarding the Interim Final Rule Adoption Process

A. NMFS's Failure to Involve The State in Developing the BiOp and RPA

The ESA requires NMFS to cooperate with States "to the maximum extent practicable" in carrying out the programs authorized by the ESA. 16 U.S.C. § 1535(a); *see also* 59 Fed. Reg. 34274 (July 1, 1994) (Notice of Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities). NMFS should involve interested parties, including affected state governments, in identifying RPAs when NMFS finds that an action will jeopardize the continued existence of a species or destroy or adversely modify its critical habitat. FWS & NMFS, *Consultation Handbook, Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act*, at 4-6 (Mar. 1988) ("ESA Consultation Handbook").

In this instance, NMFS did not, prior to releasing the draft BiOp, inform Alaska of the jeopardy and adverse modification decision, or specifically request the State's input in the development of the RPA, which will significantly impact local fisheries and economies in the western Aleutian Islands. The State formally learned of NMFS's jeopardy opinion on August 2, 2010, when the agency released the draft BiOp and RPA for a 25-day public comment period. The ADFG, the Alaska Board of Fisheries, and other state agencies have significant expertise in wildlife and fisheries management and should have been consulted before offering an RPA for public comment. In preparing the final BiOp, RPA, and Interim Final Rule, NMFS did not adequately address the comments made by Alaska on the draft BiOp and RPA. Also, NMFS should have reopened the public comment period when it completed the final BiOp and accompanying EA/RIR, and allowed pre-promulgation public review and comment on the Interim Final Rule.

B. Failure To Provide For Independent Peer Review

NMFS has not submitted the science on which the BiOp is based to the Center for Independent Experts for peer review. NMFS' decision to implement the Interim Final Rule without prior expert peer review of the documents the Interim Final Rule relies upon is inconsistent with the

approach noted in the agency's own 1994 Review Policy, which provides for independent peer review in the listing and recovery planning processes. 59 Fed. Reg. 34270 (July 1, 1994). While the policy does not apply explicitly to Section 7 consultation decisions, the policy's purpose—to ensure that biological decisions are based on the best scientific and commercial data available—applies equally to jeopardy and adverse modification decisions in the Section 7 context. Here, given the paucity of data supporting NMFS' theory that nutritional stress is causing Steller sea lion declines in the western Aleutian Islands and the overall recovery of the western DPS, NMFS should have provided for independent peer review *before* it promulgated regulations—without public notice and comment—implementing the RPA.

C. Inadequate Timeframe for Review

NMFS released the draft BiOp for a mere 25-day public comment period on August 2, 2010. The document itself was over 400 pages with an additional 383 pages of appendices, tables, and figures, and it cited to hundreds of scientific studies and other supporting documents. The accompanying EA/RIR (which was incomplete) added another 233 pages for review. Providing a thorough review and meaningful comments on this complex and lengthy draft BiOp and EA/RIR in such a short period was difficult at best. On August 18, 2010, Governor Parnell submitted his request for an extension of time until October 12, 2010, to provide more detailed comments. NMFS subsequently provided a brief seven-day extension request, much shorter than the additional time requested by Alaska.

Despite the short timeframe for review, the North Pacific Fishery Management Council ("NPFMC") met from August 16-20 at the request of NMFS to review and make recommendations regarding the proposed RPA. The Council had little time before its meeting to digest the BiOp or understand the full ramifications of implementing the proposed RPA. Indeed, the EA/RIR accompanying the draft BiOp was incomplete and did not provide sufficient information for a thorough analysis of the proposed RPA's impacts on local jobs and economies. Even under these significant constraints, the Council received public comment and recommended changes to the RPA for more targeted fishery restrictions based on the best available science. The Council's proposed recommendations were made available on August 20, only 14 days before the close of NMFS' extended public comment period on the draft BiOp. In its comments on the draft BiOp and draft EA/RIR, the State again requested additional time for a more thorough review of the draft BiOp and draft EA/RIR. While NMFS made a few minor modifications to the RPAs, NMFS did not provide the NPFMC or the State with an adequate explanation of the basis for not adopting other aspects of the NPFMC's recommendations.

D. NMFS Should Have Provided An Opportunity for Notice and Comment Before Issuing the Interim Final Rule

Both the APA and the MSA require the Secretary to give notice of any proposed rulemaking in the Federal Register and to provide an opportunity for public comment. 5 U.S.C. § 553(b); 16 U.S.C. § 1854. The notice-and-comment requirements of the APA do not apply if the agency has "good cause" to believe the process would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). The "good cause exception" to APA notice-and-comment requirements must be construed narrowly. *Natural Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 911-12 (9th Cir. 2003). "[N]otice and comment procedures should be waived only when 'delay

would do real harm.' " *Id.* at 911 (quoting *Haw. Helicopter Operators Ass'n v. Fed. Aviation Admin.*, 51 F.3d 212, 214 (9th Cir. 1995)).

NMFS promulgated the Interim Final Rule without providing the public with an opportunity for pre-promulgation notice and comment. NMFS did not have good cause pursuant to APA, 5 U.S.C. § 553(b)(B), to do so. NMFS claims that it could not comply with normal notice-and-comment procedures after the BiOp was signed on November 24, 2010, and before the start of the 2011 fishery season. But this sudden claim of urgency is undermined by the fact that the ESA Section 7 consultation on the effects of the BSAI federal groundfish fisheries on ESA-listed species began at least five years ago. *See, e.g.*, Final BiOp at 1, 6. In addition, as these comments demonstrate, the BiOp reflected considerable uncertainty and controversy about whether nutritional stress has caused population declines in the western Aleutian Islands of the Steller sea lion's range and considerable uncertainty even about whether those isolated declines will affect the recovery of the species as a whole. Thus, NMFS has not identified sufficient harm to excuse compliance with the APA procedures.

Similarly, NMFS has not met the requirements for rulemaking without prior notice and comment under the MSA. The MSA permits the Secretary to promulgate fisheries management measures without notice and comment only "[i]f the Secretary finds that an emergency exists." 16 U.S.C. § 1855(c)(1). According to NMFS guidelines, the exception should be used only in "extremely urgent, special circumstances where substantial harm to or disruption of the resource, fishery, or community would be caused in the time it would take to follow standard rulemaking procedures." 62 Fed. Reg. 44421 (Aug. 21, 1997). As described above, such emergency regulations are unwarranted in these circumstances, where the supposedly-threatened harm is not supported by science and time is nevertheless sufficient to permit public comment.

NMFS has also failed to provide any basis for use of an "interim final rule" process. As explained by the Administrative Conference of the United States' recommended "Procedures for Noncontroversial and Expedited Rulemaking," processes similar to an interim final rulemaking are appropriate only where a rule is noncontroversial and is expected to generate no significant adverse comment, including challenges to the rule's underlying premise or approach. *See* 60 Fed. Reg. 43108, 43110-12 (Aug. 18, 1995). Thus, where significant adverse comments are received on an interim final rule—as here—NMFS must withdraw the rule and proceed through the normal notice and comment procedures. *Id.*

E. NMFS's Non-Compliance with the Regulatory Flexibility Act

The RFA requires an agency, concurrent with proposing a new rule, to prepare a Regulatory Flexibility Analysis describing the impact of the proposed rule on small businesses. 5 U.S.C.§§ 603, 604. After receiving public comment, the agency then prepares a final Regulatory Flexibility Analysis to be published with the final rule. The agency is also required to make an extra effort to collect the input of small entities on the impact of the proposed rule by conducting open hearings, directly notifying small entities of the proposed rules, or publishing notice in trade publications. *Id.* § 609. This analysis is an important way for the public to participate and for the agency to consider the negative impacts of the proposed measures on crucial sectors of the economy and determine how they can be avoided or mitigated. Failing to conduct this kind of analysis for measures that will have

a significant economic impact on small businesses is a major breach of the agency's legal responsibilities.

In the Interim Final Rule, NMFS states that "[b]ecause notice and opportunity for public comment are not required for [the Interim Final Rule] by 5 U.S.C. § 553, or any other law, the analytical requirements of the [RFA] are inapplicable." 75 Fed. Reg. at 77543. But, as noted above, the Interim Final Rule does not qualify for the good cause exception, and NMFS was required to follow the normal notice-and-comment requirements for rulemaking under the APA and the MSA.

By issuing the Interim Final Rule without pre-promulgation notice and comment, NMFS avoided its RFA obligation to examine the effect of its rules on the small businesses and governments that are crucial to Alaska's economy. The central Aleutian Islands communities of Atka and Adak could be significantly affected by this action. The Council recognized these communities' dependence on the processing of Pacific cod in their December 2009 Regulatory Impact Review ("RIR") that would have established Aleutian Islands Pacific cod processing sideboards. Community representatives from Adak and Atka stated throughout the Council consideration of processing sideboards in the Aleutian Islands that processing Pacific cod in high volume is necessary for cod operations to be viable, regardless of whether processing occurs onshore or on a floating processor, and that processing capacity is necessary for long term viability of the community.

The processing sideboard RIR (p. 37) described efforts of the Aleut Corporation to develop Adak into a "commercial center and civilian community with a private sector" as "focused heavily on commercial fishing." The existing onshore processing facility in Adak has been heavily reliant on Pacific cod processing, with 75% of its revenues coming from the A season Pacific cod fishery supporting a year-round market in the area. Additionally, raw fish tax on Pacific cod was the main source of revenue for the City of Adak. Fuel sales also provide an important revenue stream and support for local fuel requirements. This economic activity is jeopardized if the local fisheries are insufficient to support a market in the area.

Although not as dependant as Adak and Atka on Pacific cod from the area affected by proposed action, other communities in the region, such as Dutch Harbor and Akutan in the Aleutian Islands and King Cove, Sand Point, and Chignik in the Gulf of Alaska benefit from catcher vessel deliveries of Pacific cod from the Aleutian Islands area and the associated economic impacts. *See generally* NPFMC, *Initial Review Draft Regulatory Impact Review/Environmental Assessment/Initial Regulatory Flexibility Analysis for a Regulatory Amendment to Establish Aleutian Islands Pacific Cod Processing Sideboards. Anchorage, Alaska* (Dec. 2009), available at http://www.fakr.noaa.gov/npfmc/current_issues/pcod/AIcodsideboards1209.pdf

F. Summary of Process Concerns

There is no indication that allowing for the necessary public comment and review of a proposed rule prior to adoption of a final rule would irreparably harm the Steller sea lion or its designated critical habitat. Numerous measures are already in place for sea lion conservation and protection, which have resulted in slowly, but steadily, increasing numbers of Steller sea lions within the western DPS over the past decade to a point where the overall population of the DPS now exceeds 73,000. As the BiOp indicates, Steller sea lion concerns are localized in this case to specific

subareas of two sub-regions outside of core habitat. There is no evidence of any range-wide or population-wide concern about the continued viability of this DPS. Given the controversial nature of NMFS' interpretation of the existing science, and the drastic impacts to Alaskan fisheries and communities of implementing fishing bans in the western Aleutian Islands, providing an adequate public comment period is both prudent and necessary.

IV. Substantive Comments on Final Groundfish Biological Opinion and RPA Underlying the Interim Final Rule

NMFS completed formal ESA Section 7 consultation for the Interim Final Rule under the FMPs for the groundfish fisheries of the BSAI and the GOA. *See* 75 Fed. Reg. at 77542. NMFS's BiOp determined that, as currently managed, NMFS could not insure that the Alaska groundfish fisheries are not likely to jeopardize the continued existence of the western DPS of Steller sea lions or adversely modify its designated critical habitat. In response to the BiOp, NMFS developed the Interim Final Rule under the MSA to insure that its action—i.e., authorization of the Alaska groundfish fisheries—does not result in jeopardy or adverse modification. *Id.* at 77537. The Interim Final Rule adopts the RPA established in the BiOp. *Id.* However, as these comments demonstrate, the BiOp and its RPA violate ESA standards. Therefore, NMFS's bases for issuing the Interim Final Rule are invalid and provide no legitimate support for the Interim Final Rule.

A. NMFS Applied an Incorrect Legal Standard for Jeopardy By Basing Its Determination on Population Declines in Only One and a Portion of a Second Sub-Region, Rather than the Population Trends for the Western DPS as a Whole

The ESA generally prohibits basing Section 7 decisions on effects at less than the species level—which level here is the Steller sea lion western DPS as a whole. *See* ESA Consultation Handbook at 4-34, 4-36. NMFS must base a jeopardy finding on more than just impacts to a sub-population; jeopardy must be to the recovery and survival of the species as a whole or throughout the species' range. *Id.*; *see generally Rock Creek Alliance v. U.S. Forest Serv.*, 703 F. Supp. 2d 1152, 1205 (D. Mont. 2010) (upholding agency finding that reduction in the Rock Creek sub-population of bull trout would not result in jeopardy to the Columbia River DPS); *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 2010 WL 3084194, *18 (D. Mont. 2010) (holding that FWS could not delist sub-populations of the northern Rocky Mountain gray wolf DPS).

A corollary to this requirement is that negative impacts to some portion of a listed species population will not constitute jeopardy under Section 7 if the entire species is not put at risk of jeopardy. *See Rock Creek Alliance*, 703 F. Supp. 2d at 1205. NMFS need not determine that an action improves a species' chances of recovery to avoid jeopardy; NMFS must only determine that the action does not "appreciably" diminish the species' chances. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008).

In this case, NMFS applied the incorrect legal standard in reaching its jeopardy determination. Rather than evaluating jeopardy to the entire western DPS, NMFS partitioned the DPS and based jeopardy to the entire DPS on the presumed status of only a portion of the DPS. Moreover, by basing its jeopardy determination on the status of only one and a portion of a second of seven Steller sea lion sub-regions, without explaining the relationship and importance of those two

sub-regions to the western DPS as a whole, the jeopardy opinion for the western DPS lacks a rational factual basis. Although the BiOp made conclusory statements that the population trend in the two sub-regions will be significant to the species as a whole, *see* BiOp at 345, its conclusions lack adequate scientific basis or record support given the overall indications of steadily increasing populations over the past decade for the western DPS as a whole. Further, NMFS made no finding on the relationship of the two declining sub-regions to the species range as a whole that would warrant a jeopardy determination for the entire western DPS.

B. The Jeopardy Opinion Lacks the Required Record Support Because the Overall DPS Trend is Toward Achieving Population Recovery Goals

Data on population trends from 2000 to 2008 in the agency record show that the western DPS of Steller sea lions as a whole has stabilized and is increasing. *See* BiOp at 332. The total population increased an average of 3% per year from 2000 to 2004 and stabilized between 2004 and 2008 for an overall average population growth of 1.4% per year between 2000 and 2008. *Id*. "Overall, the western DPS of Steller sea lion has had a statistically significant improvement in the rate of change from the 1990s to the 2000s." *Id*. at 337. Only one of seven sub-regions has declined at a statistically significant rate over the last decade, while one other sub-region has experienced declines, but not significant ones. *Id*. at 332, 337.

The BiOp's conclusion that the western DPS of the Steller sea lion is not satisfying the 2008 Recovery Plan because the overall population increase is not yet statistically significant and two sub-regions are in decline (only one at a statistically significant rate), *see id*. at 332-33, 337, lacks adequate record and scientific support. In fact, the western DPS trends are meeting the criteria for recovery established in the 2008 Recovery Plan for downlisting because (1) overall the population is increasing and moving toward the number of animals required for downlisting, and (2) no two adjacent sub-regions are in significant decline. *See id.* at 332 (stating recovery criteria). As to criterion #1, while the overall 1.4% average annual population gain is not yet statistically significant, if growth continues at this steady rate, the western DPS will have enough animals to represent a statistically significant average population increase from 2000 to 2015. *See id.* (indicating that a "consistent but slow" increase of 1.5% per year would result in a statistically significant overall average annual population increase by 2015); *id.* at 337 ("overall the population is increasing and moving toward the number of animals required for downlisting"). The DPS also meets criterion #2, because while two of the seven sub-regions have shown declines in the last decade, only one has experienced a statistically significant decline, and no two adjacent sub-areas are declining at a significant rate. *Id*. at 333. In addition, the western DPS population trends meet the 2008 Recovery Plan criteria for delisting, because in addition to meeting criterion #1 and #2, "no one sub-region has a decline in abundance of over 50%." *Id.* at 337; *see also id.* at 332 (stating the criteria). Thus, the BiOp's determination that the entire western DPS of the Steller sea lion is in jeopardy because one sub-region has shown a statistically significant decline and because the overall DPS population trend has not yet reached statistical significance fails to make the required record-supported rational connection between the facts found and conclusions reached in the BiOp.

Further, the fact that a species is not meeting the criteria for recovery to the point that protection under the ESA is no longer required (and delisting is justified) does not necessarily equate with a finding that current management actions are jeopardizing the species existence. The Section 7 jeopardy standard is not the same as the standard that must be met to downlist or delist a species

under Section 4. Jeopardy is defined as an action that reduces "appreciably the likelihood of both the survival and recovery of a listed species." 50 C.F.R. § 402.02.

By contrast, the standard for downlisting or delisting is that the species no longer meets the definition of endangered—in danger of extinction throughout all or a significant portion of its range—or threatened—likely to become endangered in the foreseeable future—because the species has recovered to the point that protection under the ESA is no longer required. 50 C.F.R. § 424.11(d)(2). Although in *National Wildlife Federation v. NMFS* the court precluded NMFS from "simply avoid[ing] any consideration of recovery impacts" in analyzing jeopardy, 524 F.3d 917, 932 (9th Cir. 2008), the court also noted that NMFS must not "improperly import ESA's separate recovery planning provisions into the section 7 consultation process." *Id.* at 936. "Some attention to recovery issues . . . simply provides some reasonable assurance that the agency action in question will not appreciably reduce the odds of success for future recovery planning, by tipping a listed species too far into danger." *Id.* at 936; *see also Salmon Spawning & Recovery Alliance v. NOAA*, 342 Fed. Appx. 336, 338 (9th Cir. 2009) (unpublished); *Cal. Native Plant Soc'y v. EPA*, 2007 WL 2021796, *21 n.7 (N.D. Cal. July 10, 2007) (FWS not obligated to "implement" the goals of a recovery plan via a biological opinion).

In sum, when (as here) the record demonstrates that the species is heading toward the recovery goals necessary for downlisting, but has not yet attained the criteria solely because population increases lack statistical significance, it cannot rationally be said that continuing the status quo management measures will cause jeopardy to the species. The presumption that two sub-regions of the population are not yet meeting recovery standards does not justify a finding that current fisheries management decisions would be reasonably expected "to reduce appreciably the likelihood of both the survival and recovery" of the Steller sea lion. 50 C.F.R. § 402.02; *see* BiOp at 336, 337 (citing work of Dr. Maschner showing that Steller sea lion abundance shifts in relation to oceanic regimes independent of fisheries).

C. NMFS Did Not Establish the Importance of the Two Noted Sub-Regions to the Western DPS as a Whole

Where an agency relies on the status of or effects to only a portion of the population, while the remainder of the population is stable or increasing, the agency must provide a reasoned, record-documented basis for its determination—i.e., the sub-population's significance to the species as a whole. *See* ESA Consultation Handbook at 4-36; *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679 (D.D.C. 1997).

NMFS did not provide a reasoned basis for relying on population conditions in certain areas in just two of seven sub-regions to support its conclusion that the western DPS is in jeopardy of extinction throughout all or a significant portion of its range. First, NMFS has not discussed the relative importance of any one sub-region in relationship to the other sub-regions or to the DPS as a whole. The BiOp used the 2008 Recovery Plan's delineation of seven sub-regions, yet the 2008 Recovery Plan itself offers little insight into how or why NMFS decided to divide the western DPS into seven sub-regions or why it chose those regional boundaries. In fact, the BiOp suggested that the two sub-regions for which the agency has expressed population concerns are outside of the Steller sea lion's core habitat. *See* BiOp at 84. The western and central Aleutian Islands are less hospitable

to Steller sea lions given the harsher climate and other conditions which may have contributed to a lower carrying capacity over time. *Id.* at xxvii, xxxi.

Further, NMFS' only explanation for relying on trends in certain areas of two sub-regions and excluding positive indicators of Steller sea lion recovery in the other five sub-regions is the 2008 Recovery Plan's statement that "[b]ecause the previous decline started in one area and spread to other areas, a substantial decline of any two adjacent sub-regions would indicate an active threat that was not predicted." BiOp at 334; 2008 Recovery Plan at V-16.[1] The BiOp and 2008 Recovery Plan do not expand on this statement or cite to authority. And if the 2008 Recovery Plan is accurate that historical declines began in one area and spread to others, NMFS has not identified the causes of such historical declines and whether those declines are comparable to the causes of declining populations in the western and central Aleutian Islands today. NMFS provided no evidence that current species threats will spread in the same way as historical ones did or that declines in one or more sub-regions are predictive of active species threats that may jeopardize the species as a whole. Further, while it might be "wise" to maintain viable populations in each sub-region, it is not documented that maintaining the population in the western and central Aleutian Islands is necessary to avoid jeopardy to the species as a whole. *See* BiOp at 334; 2008 Recovery Plan at V-16.

D. NMFS Failed to Adequately Address Whether the Supposed Negative Effects of Fisheries in Certain Areas of Two Sub-Regions Amount to Adverse Modification to Critical Habitat as a Whole

NMFS must base a determination of adverse modification to critical habitat on the proposed action's effects to the critical habitat as a whole, not just a portion of that habitat. "Adverse effects on . . . constituent elements or segments of critical habitat generally do not result in . . . adverse modification determinations unless that loss, when added to the environmental baseline, is likely to result in significant adverse effects throughout the species' range, or appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species." ESA Consultation Handbook, at 4-34. Consistent with this approach, the Ninth Circuit has held that an "adverse modification" occurs only when there is " 'a direct or indirect alteration that *appreciably diminishes* the value of critical habitat.' " *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 948 (9th Cir. 2010) (emphasis in original) (quoting 50 C.F.R. § 402.02; citing *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070, 1075 (9th Cir. 2004)). Thus, "[a]n area of a species' critical habitat can be destroyed without appreciably diminishing the value of critical habitat for the species' survival and recovery." *Id.* In *Butte*, the Ninth Circuit upheld the FWS'

[1] Though NMFS relies heavily on the 2008 Recovery Plan's downlisting and delisting criteria to justify its determination that continued fisheries management will jeopardize the existence of the Steller sea lion, it failed to acknowledge that the 2008 Recovery Plan also recommended that NMFS "[m]aintain current or equivalent fishery conservation measures until change is warranted." 2008 Recovery Plan at V-5. NMFS failed to provide a rational and reasonable explanation for taking action inconsistent with the 2008 Recovery Plan that includes new and different fisheries management measures. *See Sw. Ctr for Biological Diversity v. Bartelp*, 470 F. Supp. 2d 1118, 1136-37 (S.D. Cal. 2006) (holding an incidental take permit inconsistent with the "strategies and objectives in the recovery plan" and remanding to the FWS "to explain why it reached inconsistent conclusions from the same evidence").

determination that loss of a percentage of critical habitat for certain species did not amount to "adverse modification." *Id.*

Here, the BiOp did not address whether the supposed negative effects of fisheries management in the western and central Aleutian Islands amounts to adverse modification to Steller sea lion critical habitat *as a whole*. NMFS misstated the standard for adverse modification, claiming that "NMFS must determine whether *affected designated critical habitat* is likely to remain functional (or retain the ability to become functional) to serve the intended conservation role." BiOp at 329, 346 (emphasis added). The question is not whether the "affected" habitat will maintain its conservation function, but whether the loss of conservation function in the "affected" habitat will appreciably diminish the value of the species' critical habitat overall. *See Butte Envtl. Council*, 620 F.3d at 948 (an area of critical habitat can be destroyed without appreciably diminishing the value of critical habitat for the species' survival or recovery). Even if NMFS had concluded that a reduction in prey base in the western and central Aleutian Islands has reduced the conservation value of critical habitat in this area (a conclusion which itself is unsupported by the record, *see* BiOp at 347), NMFS still must show that continuing fisheries management would adversely modify Steller sea lion critical habitat as a whole.

E. NMFS Did Not Apply the Best Scientific and Commercial Data Available to Assess the Current Species and Fishery Status and Define the RPA, and Did Not Make A Rational Connection Between the Facts Found and Comments Made in the BiOp

The jeopardy and adverse modification decisions by NMFS must be based upon the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8). NMFS must gather all biological, ecological, or other scientific data, particularly information "disputing official positions, decisions, and actions proposed or taken by the Services." ESA Consultation Handbook, at xi. Once available information is gathered, NMFS must "impartially evaluate" the data to "ensure . . . [it] is reliable, credible, and represents the best scientific and commercial data available." *Id.* NMFS must also make a rational connection between the facts found and the choices made. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). While some degree of uncertainty is inherent in scientific analyses, it is not "sufficient for an agency to merely recite the terms 'substantial uncertainty' as a justification for its actions." *Id.* at 52. An agency must "articulate a satisfactory explanation for its action." *Id.* at 43.

Here, NMFS did not adequately consider the best available scientific information to assess jeopardy and adverse modification. NMFS also failed to make a rational connection between the available information considered and its conclusions that Steller sea lion populations in the western and central Aleutians are declining due to nutritional stress and that the RPA will reverse those declining population trends. NMFS relied on some studies to the exclusion of others without explanation, cited to findings that are uncertain and equivocal, and made sweeping conclusions that are unsupported by the record. NMFS' failure to use the best available scientific information led the agency to a flawed assessment of the status of the western DPS' biology, fisheries affecting prey species, and the potential effects of fisheries to Steller sea lion prey availability. Further, the BiOp does not provide a sound scientific justification for its RPA.

1. Inadequate Support for Nutritional Stress Theory

The basis for the BiOp's jeopardy and adverse modification determination and the foundation for the RPA and the Interim Final Rule was NMFS' finding that declines in the western DPS populations of the Steller sea lion can be attributed to nutritional stress, which can be relieved by restrictions on federal fisheries. However, of 32 possible biological indicators that NMFS identified to assess nutritional stress, data is available to evaluate only 17 of those indicators between 2000 and 2004. *See* BiOp, at Table 3.17. NMFS did not analyze the data for 3 of these 17 indicators (longer foraging trip duration, altered weaning age, and traditional ecological knowledge regarding body condition). *Id.* Of the remaining 14 indicators that NMFS did evaluate the data for, 13 showed a negative relationship—i.e., nutritional stress did not result in the expected biological manifestation. Only one indicator (reduced birth rate or natality) showed a positive relationship with nutritional stress. *Id*.

The one indicator that pointed to nutritional stress in the western and central Aleutians should be viewed with caution given the lack of life history data in this area. *Id*. at 93. The reduced birth rate relationship could also be attributed to factors other than nutritional stress, such as predation. *See e.g.*, *id.* at xxx, 94, 173. Further, all other 16 available indices suggest that nutritional stress is not a concern for the Steller sea lions in the western and central Aleutians. The following indicators were negatively correlated with western Steller sea lion populations: emaciated pups, reduced pup body size, reduced pup weight, reduced growth rate, reduced pup survival, reduced juvenile survival, reduced adult survival, reduced overall survival, reduced pup counts, reduced non-pup counts, changes in blood chemistry, and increased incidence of disease. *Id*. at Table 3.17. None of these indicators was present in higher proportions for the western and central sub-regions than other sub-regions of Steller sea lions. Indeed, the BiOp acknowledged the significant debate over the importance of nutritional stress in explaining the dynamics of the western DPS of Steller sea lions. *Id*. at 112, 342. While indications of nutritional stress were evident in the 1980s, they were not evident in the 1990s and are no longer present today. *Id*. at 113-15, 118, 339, 342.

Other recent data, gained from cooperative research between NMFS with ADFG, shows that Steller sea lion pups in the western DPS do not show evidence of poor body condition. *See* Rea, L. D. et al., *Percent Total Body Lipid Content Increases in Steller Sea Lion* (Eumetopias jubatus) *Pups During the First Year of Life in a Similar Pattern to Other Otariid Species*, oral presentation at the Alaska Marine Science Symposium, Anchorage, Alaska (Jan. 2009) (Attachment A). Other NMFS-funded research (Jemison and Pendleton 2010) shows out-migration of branded Steller sea lions moving between the western DPS and eastern DPS boundaries, questioning NMFS' assertion that there is no cross-migration between the two DPSs. *See* Lauri A. Jemison and Grey W. Pendleton, *Inter-stock Movement Patterns of Steller Sea Lions in Alaska,* poster presentation at Alaska Marine Science Symposium (Jan. 18-21, 2010) (Attachment B). This research is not cited in the BiOp. *See* BiOp at 417 (references section). Despite the overwhelming evidence to the contrary, the BiOp concludes that nutritional stress is the primary factor affecting the recovery of the western DPS of Steller sea lion.

The BiOp failed to provide a rational analytical basis for NMFS' hypothesis that low natality—the sole indicator of nutritional stress present in the western Steller sea lion population—is in fact caused by lack of adequate food supply. In fact, data are not available, especially in Rookery Concentration Area ("RCA") 1 (the RCA for which a total fishing ban was recommended) to

determine if the low pup to non-pup ratio is due to nutritional stress, the environment, or some other factor including measurement error in pup and non-pup counts relative to the other RCAs. The only information on this topic from the western Aleutians are the TEZ experiments reported in Ortiz and Logerwell (2010) for Kiska Island, which showed that the current production of Atka mackerel could support the consumption needs of all predators including the presumed predation by Steller sea lions that were in this area in 1977. The logic used on this issue was similar to that used to link fishing intensity with Steller sea lion growth rate, where the lack of a significant relationship (or no analysis possible) was taken to imply that there could (or should) actually be a relationship. If low natality cannot be linked to nutritional stress, then there is no positive evidence that nutritional stress is a factor in the exposure analysis.

The evidence for a reduced birth rate is largely from reduced pup/non-pup counts in the western and central Aleutian areas. The BiOp assumed that the decline in pup counts is a result of reduced natality and did not address other potential theories. For example, perhaps the decline in birth rates could be attributed to some sort of mortality that occurs between birth and the time that pup counts actually occur (i.e., predation). In addition, the data presented in Tables 3.6 and 3.7 of the BiOp does not support fully either the theory of nutritional stress nor the severe fishing restrictions outlined by the RPA for area 542. In Table 3.6, the estimated percentage of females with pups on rookeries in the central Aleutian Islands is actually greater than the estimated percentages for sub-areas where the Steller sea lion population is increasing (eastern Gulf, western Gulf, and eastern Aleutian Islands). In Table 3.7, the estimated percentage of females with pups on rookeries and haulouts in the central Aleutian Islands is also greater than the estimated percentages for sub-areas where the Steller sea lion population is increasing (i.e., eastern Gulf, central Gulf, western Gulf, and eastern Aleutian Islands).

Further, a number of factors other than nutritional stress may be affecting the recovery of the Steller sea lions in the western and central Aleutians, including killer whale predation and contaminants.

Effect of killer whale predation. The BiOp concluded that killer whales are only a "possible" stressor to Steller sea lions, and as such cannot explain the lack of recovery of Steller sea lions in the western Aleutians. However, published mathematical models (Williams *et al.* 2004; Guénette *et al.* 2006; Guénette *et al.* 2007) and life-history tags (Horning and Mellish 2009) indicate that killer whales are the major source of mortality of sea lions and have a greater impact when sea lion numbers are reduced. *See* BiOp at 109-11. In one of these studies seven of eight sea lions perished in a sudden, violent death at sea indicating that killer whale predation may be a major source of mortality. *Id.* at 110. Based on these studies, killer whales should be recognized by NMFS as a *likely* stressor and thereby could be affecting the recovery of Steller sea lions in the western and central Aleutian areas.

Effect of contaminants. Toxic substances can impair animal populations through complex biochemical pathways that suppress immune functions and disrupt the endocrine balance of the body causing poor growth, development, reproduction, and reduced fitness (de Wit et al. 2002). *See* BiOp at 163. Organochlorine ("OC") contaminant exposure in marine mammals has been associated with reproductive failures (Reijinders 1986), population declines (Martineau et al. 1987), and immune suppression (Beckman et al. 2003). No toxicological studies have been published on Steller sea lions to determine possible effects of OC contaminants; however, OCs that cause health impacts in other

species have been measured in subsets of Steller sea lion populations from Japan, the Russian far east, Aleutian Islands, Pribilof Islands, Gulf of Alaska, and southeast Alaska (Hoshino et al. 2006, Hong et al. 2005, Myers 2005).

At present, there is not enough information to determine what role, if any, exposure to contaminants plays in the health, survival, and recovery of Steller sea lions (Atkinson et al. 2008). The potential for Steller sea lion exposure to unknown contaminants is a significant gap in the understanding of impacts of pollutants on Steller sea lions (Barron et al. 2003).

Steller sea lions have shown various levels of toxic substances including heavy metals and OC with generally higher levels in the most western portions of the range including Russia. These concentrations of substances are not believed to have caused high levels of mortality or reproductive failure; however, there are no studies on the effects of toxic substances on Steller sea lions specifically to determine their impact on vital rates and population trends.

Adult females and pups are likely the age classes most vulnerable to toxic substances. Steller sea lion pups from the western DPS had statistically higher mercury levels in kidney and liver tissues and lead in liver tissues than animals from the eastern DPS (Holmes et al. 2008). Steller sea lion pups in the western portion of the range appear to have higher mercury and PCB levels than the eastern portion of the range (Castellini et al. 2009).

Based on these studies, there is reason for concern that toxic substances may have indirect impacts on individual vital rates, including reproductive potential.

2. Inconclusive Relationship Between Fisheries Management and Steller Sea Lion Populations

Biomass Apportionment Issues. While it may be theoretically possible for commercial fisheries to adversely impact the prey field of Steller sea lions, recent studies show very inconclusive relationships between fishery removals of prey and Steller sea lion sub-population growth (AFSC 2010). *See* BiOp, at xxx, 336, 345 (the evidence that fisheries management has caused declines in Steller sea lion populations is not "unequivocal"); 2008 Recovery Plan, at IV-4 (extent to which reductions in biomass from fisheries affects sea lion recovery is the subject of considerable debate and the recovery team could not reach consensus on this issue). It is also likely that these conditions vary geographically within the range of the western DPS of Steller sea lion (NMFS 2001, NMFS 2003). Such findings undermine the chronic nutritional stress basis used to justify the developed RPA.

Determining the nature and extent of commercial fisheries catch removed from the action area is an essential descriptive element in establishing the baseline from which to assess potential impacts. The description of catch represents the ongoing presence of the fisheries that are the subject of the BiOp, and describes the potential for overlap (short-term) between fishery actions and the Steller sea lion and its habitat. Forage biomass in 2008 was calculated by applying the 2008 model biomass to the summer survey distribution in only 2006, rather than to a three or four survey rolling average as used in the Stock Assessment and Fishery Evaluation ("SAFE") to calculate sub-area biomass distribution. This methodology is in contrast to the procedures used in the stock assessment and endorsed by the NPMFC Groundfish Plan Team and Scientific and Statistical Committee.

Further, the most recent (December 2010) prey surveys show increasing prey biomass in the action area, even increasing to levels sought as targets in the RPA. *See* NPFMC, *Bering Sea and Aleutian Islands SAFE*, at ch. 2 (copy in Attachment C); NPFMC, *Bering Sea and Aleutian Islands Region* (Dec. 2010), at BSAI Introduction, Appendix A and § 16 *Atka Mackerel* (copy in Attachments D-1 and D-2). Thus, neither the BiOp nor the Interim Final Rule adequately considered this recent biomass survey data.

Diet Data. The information in the BiOp to assess the Steller sea lion's diet is limited. Many of the conclusions are based on scat data. These data, particularly in the western Aleutians, are extremely limited. Only 46 scat samples *total* (all years, all seasons) exist from the western Aleutians and these were collected primarily during the summer. As a result, scat data from the central Aleutians were used as a proxy for the diet in the western Aleutians. Despite the acknowledgment that diets vary widely depending upon geographic areas and seasonally, NMFS did not test or assess the validity of grouping data and using a proxy approach. NMFS also did not provide methodology for converting frequency of occurrence to diet composition estimates. Thus, NMFS left untested critical assumptions regarding the importance of species in the diet of western Aleutian Steller sea lions, and the resultant conclusions should be viewed with skepticism.

Also, NMFS adopted a 10% threshold for assessing relative importance of a species in the diet. However, there is no justification given for the 10% threshold. Additional justification should have been presented for the selected 10% threshold. These limitations make assessments of importance of species, both overall and seasonally, in the diet of Steller sea lion tenuous at best.

Telemetry Data. Past telemetry data indicate Steller sea lions in certain areas have tended to forage close to land, most within 20 nm. New spatial analyses indicate that Steller sea lions indeed forage close to rookeries and haulouts, particularly in the 0 to 10 nm zone and also in the areas further offshore to 20 nm (Boor 2010, AFSC 2010b). Recent telemetry information indicates that in RCAs 1, 2 and 3 a moderately large proportion of telemetered animals forage outside 20 nm (AFSC 2010b). However, the number of telemetered animals is few and most are juvenile males (3 juvenile males that were tagged in central Aleutians). This may also be the case for parts of the central Gulf of Alaska sub-region. It is questionable whether juvenile male foraging behavior serves as a good proxy for adult female foraging behavior. Because the conclusions were based on such limited data, there was little support for the proposed RPA in Area 543 outside of critical habitat areas.

3. The RPA is Not Supported by the Best Scientific and Commercial Data Available

When NMFS reaches a "jeopardy/adverse modification" conclusion, it must include reasonable and prudent alternatives, if any, that can be taken to avoid such jeopardy or adverse modification. 50 C.F.R. § 402.02. In addition to avoiding jeopardy and adverse modification, the alternatives must be (1) able to be implemented consistent with the intended purpose of the original action, (2) within the scope of the federal agency's legal authority and jurisdiction, and (3) economically and technologically feasible. *Id.* In formulating "reasonable and prudent" alternatives, NMFS must use the best scientific and commercial data available and consider any beneficial actions already taken by the federal agency or applicant. *Id.* § 402.14(g)(8).

As part of the development of RPAs, "NMFS must explain how the RPAs would avoid jeopardy and adverse modification." *Greenpeace v. National Marine Fisheries Service*, 55 F. Supp. 2d 1248, 1268 (W.D. Wash. 1999); *see* ESA Consultation Handbook at 4-41; *see also Pacific Coast Fedn. of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1091 (9th Cir. 2005) ("To permit an agency to 'implicitly' conclude that a species would be jeopardized by a proposed activity, and not require the agency to articulate a basis for its conclusion, 'would reject the bedrock concept of record review.' ") (quoting *Gifford Pinchot Task Force*, 378 F.3d at 1072 n. 9)). An agency's decision to adopt an RPA that is not necessary to avoid jeopardy or adverse modification may be held arbitrary and capricious. *See Florida Key Deer v. Paulison*, 522 F.3d 1133, 1140, 1144 (11th Cir. 2008) (upholding district court's finding that FWS's reasonable and prudent alternatives were arbitrary and capricious); *Southwest Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998).

NMFS failed to provide a rational connection between the facts found and the choice made for its recommended RPA. Overall, the link between evidence used in the jeopardy and adverse modification determination and the RPA measures is weak. The rationale for the jeopardy and adverse modification finding and the need for the RPA lacks the statistical and scientific rigor needed to justify the recommended actions. NMFS did not posit or document the required rational connection between the facts found and the choices made in the BiOp RPA. Specifically:

Correlations between Steller sea lion population growth rate and fishing intensity over time and space indicate no significant relationship, yet these results are dismissed as preliminary and equivocal. Although the Steller sea lion count and demographic data at the regional level are relatively precise and comprehensive, the linkage between these data (population growth rate) and the amount of fishing (harvest or harvest rate) on major Steller sea lion prey items is equivocal at the scale of RCAs within regions (see Ortiz and Logerwell 2010). *See e.g.*, BiOp at 283, 345 ("fisheries cannot be unequivocally shown to be a causative factor in continued Steller sea lion declines in the western portion of the wDPS"). The BiOp did acknowledge these equivocal results, but chose to neither rely solely on or to ignore these results (in Chapter 7) for a variety of reasons detailed in Chapter 5. *See e.g.*, *id.* at 300-01. While these analyses are correlative in nature and were combined into a decadal temporal scale to account for imprecision of annual data points, they are no better or worse than the Steller sea lion trend data at this same scale (mostly non-significant Steller sea lion population growth rates during 2000-2008) and do indicate that there is likely no association between fishery harvest rate and Steller sea lion growth rate, especially since 2000.

Rather than an equivocal result, these data provide ample evidence that variation in Steller seal lion population growth rate is independent of fishery harvest rate. These data would further explain that the observation of a variety of regression slopes, some negative, some positive, but most insignificant at an acceptable significance level ($p = 0.10$ or less) would indicate that directional slopes are merely due to random chance, not indicative of a correlation, and that overall we would fail to reject the null hypothesis of a slope equal to zero or no correlation. When weighed against other evidence in the BiOp, this analysis presents a scientific basis for a *lack* of linkage between fishing intensity and Steller sea lion recovery, as measured by population growth rate, that NMFS must, but did not, address in the BiOp.

An increase in prey biomass after cessation of or reduction in fishing may not be detectable, yet these uncertainties were overlooked in the analysis. The BiOp used the average of

realizations made to project Atka and Pacific cod biomasses after cessation or reduction in fishing. While this is fairly typical for the short-term purposes of fishery management (e.g., status determinations), it does not meet the evidentiary standard that should be maintained for providing a detectable increase in prey for Steller sea lions to support a jeopardy finding. For example, Atka biomass projections in the Aleutians are based on a starting value of the average of the last three surveys (2002, 2004, 2006). Using area 543, the average biomass for the three surveys was 244,074, but ranged from 100,693 in 2006 to 376,414 in 2004 (Table 2 of Ianelli et al. 2010a), so that the CV of this average is 57% (i.e., the SD is 57% of the average). This means that the average biomass over three surveys would have to increase by 93% (from 244,074 to 471,399) to be a statistically detectable increase in prey biomass with 90% confidence. At a minimum it would have to increase by at least 57% (from 244,074 to 382,266) to have a 50% chance of being statistically detected as a true increase.

For area 543, Atka biomass is projected to increase 48% in 11 years, which will have a less than 50% chance of being detected given the variability in assessments of this species. Using this same statistical logic, Ianelli et al. 2010b (Table 3) show that increasing Atka biomass in the entire Aleutians from 500 kt to 750 kt (a 50% increase) occurs in only 44 of 100 iterations of the projection model at year 2019 (11 years from 2009) with a harvest of 5% of ABC (almost no fishing), which means that there is only a 44% chance that this 50% increase will be realized. One might reason that the increases in biomass will become more certain with the passage of time, but the chances of a 50% increase actually decrease to 38% in 20 years (Table 3 of Ianelli et al. 2010b). These sources of uncertainty were virtually ignored in the discussion of the action (closing directed fishing) versus the anticipated response (avoiding jeopardy or adverse modification).

The BiOp failed to balance the need for precaution with the need for proaction under uncertainty. While the BiOp claimed to justify the RPA as a precautionary measure in the face of considerable statistical and scientific uncertainty about the trend in Steller sea lion abundance and the link between Steller sea lion growth rate and fishing intensity, it failed to assess all of the risks of the claimed needed inaction (stop fishing, but we will not learn much) against all of the risks of continued action (continue fishing, with a chance that we will learn something). The precautionary principle argues that we should not act unless the risk of the predictability is weighed against the reversibility of the outcome (i.e., avoid a negative outcome). For example, NMFS contends that fishing in the Western Aleutian Islands needs to be stopped because it cannot predict what continued fishing will do to Steller sea lions and the situation with Steller sea lion trends in the western Aleutians may not be reversible. However, there is another equally important principle (the proactive or active precautionary principle) in science that argues that we must continue to fish in the Western Aleutians to see if the effects on Steller sea lions are predictable and reversible or not. This principle is based on the premise that we will never know whether Steller sea lion trends are related to fishing, or if they are reversible at all by stopping fishing and just waiting, since the links between cause and effect are complex and fraught with uncertainty.

This is not simply a philosophical argument for one very important reason: if the Steller sea lion population growth rate improves after fishing is stopped (for whatever reason), then vessels will never be able to start fishing again for fear that fishing will cause the Steller sea lion population to go down again. If the Steller sea lion population growth rate does not improve, we will have still stopped fishing and will likely continue to curtail fishing while we enact additional measures to improve the Steller sea lion status. NMFS will have predetermined the outcome of the experiment

and have learned nothing. However, if fishing continues, there are two possible alternatives: the Steller sea lion population continues to go down so NMFS needs to consider enacting the fishery closures later on, or the Steller sea lion population goes up and NMFS concludes that fishing was not the primary cause of the decline. The first situation is not designed to be reversible (vessels will never fish again regardless of outcome) with respect to all risks, whereas the second situation is designed to be reversible. The previous BiOp and many comments made by the NPFMC's SSC in the past point to this potential experiment as a way to clarify the relationship between fishing and Steller sea lion population growth rate.

Lack of basis for proposed Pacific cod restrictions. The case for Pacific cod as an important prey species for Steller sea lion is tenuous at best, and as a result the basis for its inclusion in the RPA is unjustified. First, the basis for inclusion of Pacific cod in the RPA is based on the presence of this species in the Steller sea lion diet based on evidence from scat samples. As discussed previously, critical assumptions regarding the importance of species, particularly Pacific cod, in the diet of western Aleutian Steller sea lions are untested and resultant conclusions should be viewed with skepticism. Available information suggests that 94% of sea lion scat samples collected during the summer (when major fisheries restrictions are proposed) contained no cod at all. Further, Pacific cod makes up a relatively small proportion of the overall biomass in the area of concern relative to Atka mackerel, and due to predation effects, any possible increase in the Pacific cod population could negatively affect the Atka mackerel population (which is a significantly more important prey species to Steller sea lions in this area). In addition, there is evidence to indicate that fisheries and sea lions have little overlap in terms of the size of the Pacific cod they target. Finally, the justification given for the complete closure of Area 543 is based on the feeding behavior of telemetered animals. However, as stated previously, the number of telemetered animals is few and most are juvenile males (3 juvenile males that were tagged in central Aleutians). It is unknown whether juvenile male foraging behavior serves as a good proxy for adult female foraging behavior. Because the conclusions regarding Pacific cod are based on such limited data, there is little support for the proposed RPA in Area 543 outside of critical habitat areas.

4. NMFS Should Have Considered a Less Restrictive RPA

"When faced with a range of possible measures [that may avoid jeopardy or adverse modification], NMFS can pick amongst them based on other factors, including effects on the fishing industry." *Greenpeace v. National Marine Fisheries Service*, 55 F. Supp. 2d at 1268. (*citing Southwest Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998)). *See also Bennett v. Spear*, 520 U.S. 154, 176-77 (1997) (stating that an important purpose of the "best scientific and commercial data available" requirement is to avoid needless "economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives"). As the Ninth Circuit specified in *Sw. Ctr. for Biological Diversity*, if more than one RPA would avoid jeopardy to a species, "the Secretary must be permitted to choose the one that best suits all of its interests, including political or business interests." 143 F.3d at 523 n. 5. In considering RPAs, the Secretary is not required to pick the alternative that would most effectively protect a species from jeopardy, the Secretary need only adopt an RPA that complies with the jeopardy standard and which can be implemented by the agency. *Id.* at 523.

The BiOp concluded that large portions of fishing areas need to be closed or restricted in the Aleutian Islands to rebuild Steller sea lion prey biomass and eliminate the *theory* that nutritional

stress is causing reduced natality in the western and central Steller sea lion subpopulations. But the scale of the areas in the RPA that are fished compared to the scale of the area closed is mismatched. NMFS should have considered a more local-scale solution that would also satisfy the fishery management performance measures and achieve the desired conservation goal. The RPA should also include a two-year sunset provision given the high degree of uncertainty over whether Steller sea lions in the western and central Aleutians are in fact nutritionally stressed and whether the RPA will have any effect in reversing declining trends in these sub-regions.

V. Comments on Final EA/RIR

A. NEPA Requires the Preparation of an EIS Given Potentially Significant Impacts to Local Economies and Alaskan Natives from the Interim Final Rule

NEPA requires federal agencies to prepare an EIS for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). To determine whether an EIS is necessary, an agency may first prepare an EA. *See* 40 C.F.R. §§ 1501.4(c), 1508.9. An EA must contain sufficient information and analysis to determine whether the proposed action is likely to have significant impacts, thus requiring preparation of an EIS. *See id*. § 1508.9. If the EA results in a finding of no significant impact ("FONSI"), an EIS need not be prepared. As explained below, NMFS fell short of this standard in failing to prepare an EIS in this instance.

Whether an action will have "significant" impacts requires consideration of both the context and intensity of the effects. 40 C.F.R. § 1508.27. Context requires consideration of the significance of the action to society as a whole, the affected region, the affected interests, and the locality. *Id*. § 1508.27(a). Intensity refers to the severity of the impacts. Factors considered in evaluating intensity include impacts that may be both beneficial and adverse, unique characteristics of the geographic area (such as proximity to historic or cultural resources, park lands, wetlands or ecologically critical areas), the degree to which the effects on the quality of the human environment are likely to be controversial, the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks, the degree to which the action may establish a precedent for future actions, whether the action is related to other actions with individually insignificant but cumulatively significant impacts, and the degree to which the action may adversely affect an endangered or threatened species or its critical habitat. *Id*. § 1508.27(b). The presence of just one of the intensity factors "may be sufficient to require preparation of an EIS in appropriate circumstances." *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 865 (9th Cir. 2004).

Through the NEPA process a federal agency must take a "hard look at the potential environmental consequences of the proposed action." *Oregon Natural Res. Council v. U.S. Bureau of Land Mgmt.*, 470 F.3d 818, 820 (9th Cir. 2006). "If an agency . . . opts not to prepare an EIS, it must put forth a 'convincing statement of reasons' that explain[s] why the project will impact the environment no more than insignificantly." *Ocean Advocates*, 402 F.3d at 864 (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)). When reviewing an agency's decision not to prepare an EIS, the Ninth Circuit has held that "[a]n agency *must* prepare an EIS if substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor." *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1119 (9th Cir. 2000) (quotations omitted) (emphasis

added, ellipsis by court). A party challenging an agency decision not to prepare an EIS need only raise a substantial question as to whether a project *may* have a significant effect on some human environmental factor; it need not demonstrate that such an effect will definitively result. *Ctr. for Biodiversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1219 (9th Cir. 2008).

NMFS itself admits that the economic and social impacts of the RPA will be substantial, yet it failed to prepare an EIS based on NMFS's flawed determination that the socio-economic impacts are not interrelated with physical impacts to the environment. But the socioeconomic impacts are interrelated with the physical impacts here. Changes in the fisheries management plan will have on-the-ground effects for wildlife and ecosystems, which effects will be significant for the local communities that will be dramatically affected by the loss of jobs and income. *See Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 944 (9th Cir. 2005) (quoting 40 C.F.R. § 1508.14) (requiring consideration of socioeconomic effects in determining whether impacts of the proposed action are significant enough to require preparation of an EIS); *see also Geertson Seed Farms v. Johanns*, 2007 WL 518624, *7 (N.D. Cal. Feb. 13, 2007) (unpublished) (same).

The EA estimated that gross revenue in the Aleutian Islands may be reduced by as much as $83 million a year under the RPA. *Id.* at 10-134, Table 10-69. The closure and restriction of groundfish fisheries in the western and central Aleutian Islands as called for in the final RPA, and implemented in the Interim Final Rule, are having severe and immediate adverse consequences for Alaska, its local communities, commercial fishing fleets, and the seafood processing industry. NMFS admits that implementing the RPA will cause losses in gross revenue in Alaska of over $83 million per year under the RPA alternative. Final EA/RIR at 10-134, Table 10-69. Up to 750 fishing, processing, and related jobs in Alaska may also be lost. *Id.* at 10-147. The EA/RIR claims that there may be mitigation to an unknown extent as the fishing fleet redeploys to other Bering Sea fisheries. *Id*. However, the onshore processing capacity and industry in the central Aleutians cannot redeploy and will remain adversely affected to a degree not adequately evaluated or disclosed in the EA/RIR.

Similarly, the State's Aleutian Island Pacific cod fishery will experience a loss of fisheries infrastructure. While NMFS predicts that some of these losses will be offset as the industry redeploys fishing vessels to other fishing areas, the communities in the western Aleutian Islands that rely on local fishing are not mobile and will be immediately and significantly affected by fishery closures and restrictions in adjacent waters. The overall impact of implementing the RPA could devastate small communities and residents in the Aleutian Islands that depend on fisheries for their livelihoods.

The central Aleutian Islands communities of Atka and Adak could be most significantly affected by this action. Processing Pacific cod in high volume is necessary for cod operations to be viable, and that processing capacity is necessary for the communities' long-term viability. *See, e.g.*, *NPFMC, Initial Review Draft Regulatory Impact Review/Environmental Assessment/Initial Regulatory Flexibility Analysis for a Regulatory Amendment to Establish Aleutian Islands Pacific Cod Processing Sideboards* (Dec. 2009), at 35-43, available at http://www.fakr.noaa.gov/npfmc/council.htm. The existing onshore facility in Adak has been heavily reliant on Pacific cod processing, with 70 percent of its revenues coming from the "A" season Pacific cod fishery supporting a year-round market in the area. *Id.* at 37. Additionally, a raw fish tax on Pacific cod was the main source of revenue for the City of Adak. *Id.* Fuel sales also

provide an important revenue stream and support for local fuel requirements. *Id.* This economic activity is jeopardized if the local fisheries are insufficient to support a market in the area. *Id.*

Other communities in the region, such as Dutch Harbor and Akutan in the Aleutian Islands and King Cove, Sand Point, and Chignik in the Gulf of Alaska benefit from catcher vessel deliveries of Pacific cod from the Aleutian Islands area and the associated positive economic effects. *Id.* at xiv, xvii, 53.

The Interim Final Rule also raises environmental justice concerns for Alaskan Natives. Of the fisheries that would be closed or restricted under the proposed RPA, a percentage of total allowable catch is allocated to the Community Development Quota ("CDQ") Program designed to improve the social and economic conditions in western Alaska communities by facilitating participation in the BSAI fisheries. Final EA/RIR at 10-29, 10-30. Sixty-five communities, including over 27,000 people, 87 percent of whom are Alaskan Native, participate in the CDQ Program. *Id.* at 10-30. These communities have fewer economic opportunities, chronically high unemployment rates, and are economically-depressed. *Id.* The CDQ Program allows the communities to benefit from fisheries by investing resources in the community infrastructure and providing employment opportunities to local residents. *Id.* The EA/RIR acknowledges that groups receiving CDQ Program funds are likely to be adversely affected by the closure of and restrictions on fisheries, particularly the Atka mackerel fishery. But the EA/RIR but does not discuss what that lack of funding means for the 65 communities that benefit from CDQ Program, including specific Alaskan Native populations. *Id.*

NMFS must take a "hard look" at these significant socioeconomic and environmental justice concerns in an EIS, providing appropriate notice and opportunity for public comment before implementing the proposed RPA or any other alternative with potential to devastate local economies and possibly an entire region.

B. The EA/RIR was Incomplete and Inadequate to Allow Adequate Opportunity for Public Review and Comment

NEPA's fundamental purpose is to insure that public officials fully consider, evaluate and disclose the impacts to the human environment in the context of and prior to undertaking major federal actions. 40 C.F.R. § 1500.1(c). NEPA's twin goals are to: (1) foster informed decisionmaking by "ensur[ing] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts," and (2) promote informed public participation by requiring full disclosure of and opportunities for the public to participate in governmental decisions affecting environmental quality. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989).

Even where an agency determines that an action is not likely to significantly affect the human environment and such action is not otherwise categorically excluded, the agency must still prepare an EA/FONSI that fully complies with NEPA's requirements. These requirements include the need for public participation in the preparation of an EA/FONSI. The "public [must] be given as much environmental information as is practicable, prior to completion of the EA, so that the public has a sufficient basis to address those subject areas that the agency must consider in preparing the EA." *Bering Strait Citizens for Responsible Dev. v. U.S. Army Corps of Eng'rs*, 511 F.3d 1011, 1025 (9th

Cir. 2008) (quoting *Sierra Nev. Forest Prot. Campaign v. Weingardt*, 376 F. Supp. 2d 984, 991 (E.D. Cal. 2005)).

Here, NMFS violated NEPA and its implementing regulations by failing to fully identify and consider the potential impacts to the human environment from the proposed action in its EA. This failure precluded the ability of the public—and Alaska—to have sufficient information on which to evaluate and comment on NMFS's proposed action. Among other things, NMFS effectively precluded adequate public involvement in the decisionmaking process and the opportunity to comment on the draft EA by providing an incomplete draft that failed to consider significant information regarding the likely environmental, economic, and social impacts of the proposed action and alternatives.

The review draft EA/RIR for the proposed RPA was deficient for NEPA's purposes of facilitating informed agency decisionmaking and public comment. Entire analyses were missing from the draft document. For example, Chapter 9 (Environmental Conclusions) was entirely blank. NMFS also chose not to obtain the information necessary for a thorough analysis of socioeconomic effects, declining to analyze changes in possible employment numbers resulting from loss of and restrictions on fisheries and failing to comply with NEPA's requirements for addressing situations where there is incomplete or unavailable information. *See* Draft EA/RIR, at 10-88; 40 C.F.R. § 1502.22. Nor was there any assessment of cumulative impacts to local communities or potential mitigation measures to ameliorate the effects of the RPA, given the variety of factors affecting fisheries and economies in the Aleutian Islands. *See* Draft EA/RIR, Chapter 10.

Also, the draft EA/RIR also failed to differentiate impacts on coastal communities from gross revenue estimates overall. Coastal communities in the BSAI and Gulf of Alaska will incur direct, indirect, and induced effects as noted by analysts. We understand the limitations of current input-output models to quantify these effects, but do expect additional qualitative description. Typically, EA/RIR analyses include a description of the fleet beyond gear and operation type. Vessel length, home port, vessel ownership, permit holder, crew size, and dependence on other fisheries are often summarized. Examining LLP holdings by affected vessels would clarify and better inform likely impacts of proposed actions on other fisheries.

NMFS also ignored the fact that fishing operations affected by the proposed actions will likely attempt to make up for lost revenue by increasing effort in fisheries where they are already permitted to do so, or where a costly permit is not required, thereby resulting in indirect impacts to those fisheries. For example, if a vessel fishing the Aleutian Islands Pacific cod fishery exclusively inside three miles of the coastline is displaced and does not hold a federal license, the vessel is likely to focus on other fishing opportunities in State waters, such as the Western Gulf of Alaska, where federal permits are not required, but there is already an established fleet dependent on the fishery in that area. The EA/RIR did note that vessels that simply move to the Bering Sea are likely to encounter higher bycatch rates, but again they will also impact the established fleet in that area. In addition to bycatch rates, gear conflicts and inconsistencies with issues under examination by the NPFMC, such as crab bycatch in the Bering Sea groundfish fisheries, did not receive sufficient treatment.

As set forth in the State's comments on the draft EA/RIR, the comments of the Scientific and Statistical Committee in its Draft Report dated August 16-17, 2010, at pages 4-6, which are set out below, identified several missing pieces of data.

EA/RIR – Revisions to the Steller Sea Lion Protection Measures for the Aleutian Islands Atka Mackerel and Pacific Cod Fisheries

Melanie Brown (NMFS-AKR) and Ben Muse (NMFS-AKR) presented the draft Steller sea lion EA/RIR. Public testimony was given by Jon Warrenchuk (Oceana), Dave Fraser (Adak Community Development Corporation, ACDC), Kenny Down (Freezer Longline Coalition), John Gauvin (Alaska Seafood Cooperative) and Frank Kelty (City of Unalaska).

The SSC recognizes that the EA/RIR was developed under a compressed timeframe and therefore several sections were incomplete (e.g., placeholder text on ecosystem considerations and cost and earnings data presented during the staff presentation are not incorporated in analysis). **Consequently, the SSC finds that the draft analysis does not presently provide a fully sufficient basis for public review of the likely environmental, economic, or social impacts of the alternatives.** During staff presentations, the analysts indicated their intention to replace placeholder text, backfill missing sections, clarify labels and legends on figures and tables and to rewrite some sections. Moreover, we note that other alternatives could be constructed that might achieve the intent of the RPA provided in the draft FMP BiOp. The SSC anticipates that the EA-RIR will undergo a substantial revision prior to final action in October and therefore **the SSC requests to review this document again at the October meeting.**

To assist the authors in their revisions we offer the following specific comments and suggestions.

Section 1.1.1. The SSC recognizes that additional alternatives may be submitted during the comment period. To assist the public, it would be useful to provide some guidance on how to interpret performance standards for fishery management measures used to develop the RPA in the FMP BiOp (listed on page 1-2). In particular, it would be useful to provide instructions on how the public should interpret the term "*conserve*" used in bullets 2, 3, and 5. Alternatives 2 and 3 use the standard of "*at least as protective as the RPA in the FMP BiOp*". The authors should clarify whether this standard would require all alternatives to prohibit all targeted fishing for Atka mackerel and Pacific cod in area 543 or whether other alternatives that would "conserve" Steller sea lion forage in area 543 would be considered. Likewise it would be useful to clarify in section 1.1.1 whether NMFS will consider any proposal that allowed fishing for Atka mackerel within critical habitat.

Section 3.3.1.2 – 3.3.1.3. These sections focus on direct impacts on Atka mackerel and Pacific cod. The impact of the action on Pacific cod abundance could also impact Atka mackerel abundance through predation effects and should be incorporated into the analysis and discussion. These impacts are discussed in Doug Kinzey's dissertation (University of Washington, School of Aquatic and Fisheries Science) and other papers by the same author. Likewise, Ivonne Ortiz (University of Washington, School of Aquatic and Fisheries Science) addresses the species interactions of fish found in the Aleutian Islands.

Section 3.4.3. The document should include a discussion of the impact of the action if the NPFMC finds sufficient evidence that Pacific cod in the AI and EBS are separate stocks and should be managed as such for conservation purposes. The SSC has reviewed several white papers on the subject of Pacific cod stock structure and the SSC and Groundfish Plan Teams have formed a working group to provide guidance on stock structure of BSAI/GOA groundfish stocks.

Section 4.4. This section addresses direct impacts of the action on forage fish; however, indirect impacts could

occur through changes in the foodweb, particularly the expected biomass increase in Pacific cod and arrowtooth flounder, both are major predators of Atka mackerel. Some consideration of indirect impacts of the action should be included in this section.

Section 8. The Ecosystem Impacts section needs considerable improvement. The SSC was informed that this section was a placeholder and will be revised in the final version. When considering revisions, the SSC encourages the authors to utilize the FEP framework for risk assessment.

The current version of the EA contains sections of the 2009 Ecosystem Considerations. Several bullets refer to changes from 2008 and 2009. These are not particularly relevant to assessing the impacts of this action. The authors should strive to focus their discussion of climate and environmental trends that are within a time frame relevant to the action.

. . . .

While the SSC acknowledges limitations in data available for analysis and limitations associated with confidentiality of some of the data that is available, there is nevertheless a need to provide a more detailed discussion of the likely impacts of the alternatives on the communities of Adak, Atka, and Unalaska. The impacts on these communities are distinct from impacts on the four fishing fleets discussed in the RIR. Additional discussion is also needed on how MRA's, PSC's and possible fishing ground interactions may be factor precluding sectors from re-deploying elsewhere in an effort to maximize catch and minimize losses.

The SSC urges the analysts to carefully qualify the values reported for changes in revenues, costs, and nonmarket values so that the public is not misled into inappropriate direct comparisons of these values. Where possible, the values should be expressed in similar time frames. Similar care should be given to community-level impacts, such as employment and income multipliers.

Critical to understanding the context under which this SSL management action will be implemented is a recognition that Amendments 79/80 (GRS and Co-ops) have been, and are presently in the process of being, amended (e.g., FMP A.93). While the Amendment 93 analyses supporting the proposed structural changes in Amendment 80 cooperative formation criteria are substantially advanced, that action is not final. Therefore, Amendment 93 will very likely be delayed until the amendment analysis is brought into agreement with the SSL action.

In addition, NMFS provided the public with an inadequate period of time within which to provide comments on the EA/RIR and the FONSI.

C. The EA/RIR Failed to Adequately Analyze the Benefits of the RPA Fishery Measures

Executive Order 12866, among other authorities, required NMFS in the EA/RIR to adequately evaluate both the costs and benefits of the proposed fishery measures and alternatives in the RIR. *See, e.g.,* attached Attachment E (comments of Dr. Gregory Leonard on NMFS economic analysis issues).

In the EA/RIR NMFS identified the categories of harm and quantified the negative impacts of maintaining the status quo fishery measures, but then explained that it was unable to quantify the benefits of new fishery measures to the Steller sea lion, yet went ahead with the action because it

claimed that the ESA required it to do so. Although the EA/RIR has a section on how people value saving the Steller sea lion, those studies are not reliable as a general matter. Even if one accepted such studies, NMFS did not connect the results of the studies to a quantifiable number to assess the proposed action. An agency cannot assume a positive effect of the action is anything greater than zero versus millions of lost revenue and hundreds of lost job to the fishing industry.

Also, NMFS has not drawn a causal connection between reduced fishing/increased prey biomass and the potential effect on Steller sea lion growth, which leads to some benefit to people's happiness with increasing sea lion populations. Whether the proposed fishery measures will actually increase Steller sea lion populations and whether that increase would benefit the human population are two missing steps. NMFS also did not fairly discount the benefits to account for the uncertainties. In addition, NMFS did not consider whether there is a human benefit to increasing Steller sea lion populations specifically in the two sub-regions of the Aleutian Islands, as opposed to increasing Steller sea lion populations as a whole.

Thus, there are tenuous, possible positive impact to certain areas of two sub-regions of the western DPS (where the western DPS is increasing under the prior fishery management measures and as NMFS acknowledges is moving toward recovery, *see* BiOp at 337), versus certain harm to fishing communities, jobs, the State economy, and local and State tax revenues.

VI. The Interim Final Rule Violates the MSA's Substantive Requirements

The MSA sets forth ten National Standards for fishery conservation and management. 16 U.S.C. § 1851(a)(1)-(10); *see also* 50 C.F.R. Part 600, Subpart D, §§ 600.305 *et seq.*. Fishery management regulations must be consistent with these ten National Standards. 16 U.S.C. § 1851(a). The Interim Final Rule promulgated by the Service constitutes a "regulation," as that term is used in 16 U.S.C. § 1851(a). Accordingly, the Interim Final Rule must be consistent with the National Standards.

The Interim Final Rule's compliance with the National Standards and with the MSA in general must be evaluated in light of the applicable standard of judicial review, which is the "arbitrary and capricious" standard set forth in the federal Administrative Procedure Act (5 U.S.C. § 706(2)(A)-(D). 16 U.S.C. § 1855(f)(1)(B).

The Interim Final Rule is arbitrary and capricious because it is not consistent with the National Standards. The Service provided only four short paragraphs in the EA/RIR that purport to demonstrate compliance with the National Standards. *See* EA/RIR at 11-1 to 11-2. This minimal discussion lacks adequate support, its conclusions are inadequately explained, and the conclusions lack a rational basis.

A. The Interim Final Rule Is Not Consistent with National Standard 1

The Interim Final Rule is not consistent with National Standard 1, which requires that "[c]onservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry." 16 U.S.C. § 1851(a)(1); *see also* 50 C.F.R. § 600.310. The MSA and courts interpreting National Standard 1 acknowledge that the optimum yield from a fishery must take into account "ecological

factors." 16 U.S.C. § 1802(18); *C & W Fish Co., Inc. v. Fox, Jr.*, 931 F.2d 1556, 1563 (D.C. Cir. 1992). However, NMFS has failed to establish that "ecological factors" warrant the fisheries restrictions called for in the RPA and imposed by the Interim Final Rule.

The EA/RIR states (p. 11-2):

> This action does not change the management of the Atka mackerel or Pacific cod fisheries in a way that would result in overfishing of these stocks and was designed to provide for as much harvest as possible while protecting Steller sea lions prey. This meets national standard 1 to prevent overfishing while achieving optimum yield for the fisheries to the extent practicable while complying with the ESA.

The critical flaw in the EA/RIR's conclusion is the presumption that the target closures, harvest limitations, and other restrictions regarding the Atka mackerel and Pacific cod fisheries are necessary to protect the Stellar sea lion's prey. As discussed above, NMFS's conclusion that these measures are necessary is built upon a decision that assumes that the western DPS is in decline, that the decline results from low natality, that the low natality results from nutritional stress, that competition by the Atka mackerel and Pacific cod fisheries exacerbates nutritional stress, and therefore that restricting the fisheries will alleviate that nutritional stress and facilitate recovery of the western DPS. Each of these determinations lacks adequate support.

First, as discussed in sections IV.A to IV.C above, NMFS's jeopardy determination regarding the western DPS fails to meet ESA standards because: (1) the agency improperly based the determination on asserted population declines in two sub-regions rather than the population as a whole, and (2) there is inadequate evidentiary support for NMFS's theory that the western DPS as a whole is not recovering. Thus, the RPA is unwarranted, and the limits on fishing are therefore inconsistent with achieving the optimum yield under National Standard 1.

Second, as discussed in section IV.E.1 above, NMFS'S determination that low natality is the cause of the failure of the western DPS subpopulations to recover is flawed because the agency assumes that the noted decline in pup counts results from low natality and does not address other potential theories that could explain the decline, such as predation between birth and the time pup counts are conducted.

Third, as discussed in Section IV.E.1 above, NMFS failed to provide adequate support that for its theory that western DPS subpopulations in the western and central Aleutian Islands are experiencing "nutritional stress" and that this stress is causing low natality. The vast majority of the biological indicators for which NMFS evaluated data to assess nutritional stress suggest that nutritional stress is not a concern at present. Moreover, NMFS failed to provide a rational basis for its hypothesis that low natality is caused by lack of adequate food supply. Finally, other stressors, such as killer whale predation and pollutants, may be affecting the recovery of the western DPS subpopulations of concern.

Finally, the evidence NMFS offers to support its theory that competition by fisheries for Pacific cod and Atka mackerel contributes to "nutritional stress" is inconclusive. The BiOp presents substantial evidence that Stellar sea lions feed on a wide variety of prey other than Pacific cod and

Atka mackerel. BiOp at 102-104. In addition, the BiOp states that the evidence that fisheries management has caused declines in Stellar sea lion populations is not "unequivocal." *Id.* at 345.

In sum, NMFS has failed to demonstrate that the targeted closure, harvest limits, and other restrictions imposed on these fisheries by the Interim Final Rule are required to meet ESA requirements for the western DPS. Accordingly, these measures are not consistent with National Standard 1 because they impose greater restrictions on the Pacific cod and Atka mackerel fisheries than are required by the ESA, and therefore fail to achieve the optimum yield for these fisheries.

B. The Interim Final Rule Is Not Consistent with National Standard 2

Second, the Interim Final Rule is not consistent with National Standard 2, which requires that "[c]onservation and management measures shall be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2); *see also* 50 C.F.R. § 600.315. Although courts have held that an agency's decision "need not be airtight or indisputable" to pass muster under National Standard 2, the agency's conclusion must at least "plausibly follow from the data before it." *Blue Water Fishermen's Ass'n v. National Marine Fisheries Service*, 226 F. Supp. 2d 330, 338, 340 (D. Mass 2002). Here, the fisheries restrictions imposed by the Interim Final Rule do not meet National Standard 2 because they are not based on the best scientific information available and do not plausibly follow from the data NMFS had before it.

In Section IV.E.3, above, the State has discussed in detail NMFS'S failure to base the Interim Final Rule on the best scientific information available in the context of the requirements of the Endangered Species Act. Those arguments are equally applicable here.

Overall, NMFS did not adequately consider the best available scientific information to assess jeopardy and adverse modification. NMFS also failed to make a rational connection between the available information considered and its conclusions that Steller sea lion populations in the western and central Aleutians are declining due to nutritional stress and that the RPA will reverse those declining population trends. NMFS relied on some studies to the exclusion of others without explanation, cited to findings that are uncertain and equivocal, and made sweeping conclusions that are unsupported by the record. NMFS'S failure to use the best available scientific information led the agency to a flawed assessment of the status of the western DPS' biology, fisheries affecting prey species, and the potential effects of fisheries to Steller sea lion prey availability. Further, the BiOp does not provide a sound scientific justification for its RPA. For these reasons, the Interim Final Rule is not consistent with National Standard 2.

C. The Interim Final Rule Is Not Consistent with National Standard 6

The Interim Final Rule is not consistent with National Standard 6, which requires that, "[c]onservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches." 16 U.S.C. § 1851(a)(6); *see also* 50 C.F.R. § 600.335. This standard "dictates flexibility on the part of fishery managers." *J.H. Miles & Co., Inc. v. Brown*, 910 F.Supp. 1138, 1155 (E.D. Va. 1995).

The Interim Final Rule fails to account for variations and contingencies in the Atka mackerel and Pacific cod fisheries and fishery resources because the restrictions it imposes are locked in place

until such time as NMFS undertakes a subsequent biological assessment of the status of the western DPS and determines that these measures are not required to prevent competition between the fisheries and the Stellar sea lions. This prevents NMFS from, for example, taking action earlier to reduce the restrictions imposed by the Interim Final Rule to the extent that greater proportions of Pacific cod and Atka mackerel migrate into the closure areas during closure periods than currently do. The constraints restrict the flexibility of fisheries managers and are therefore inconsistent with National Standard 6.

In addition, the Interim Final Rule is inconsistent with National Standard 6 because NMFS failed to analyze and avoid the cumulative effects of the potential displacement of fishing effort from the Aleutian Islands into the Gulf of Alaska and Bering Sea.

D. The Interim Final Rule Is Not Consistent with National Standard 7

The Interim Final Rule is not consistent with National Standard 7, which requires that "[c]onservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication." 16 U.S.C. § 1851(a)(7). Here, because NMFS has not undertaken an adequate consideration of both the costs and benefits of implementing the Interim Final Rule, NMFS has not demonstrated consistency with the standard to "minimize costs." As NMFS acknowledges, the costs imposed by the Interim Final Rule will be "substantial," and it has not fully investigated or considered practicable alternatives to minimize those costs consistent with the overall fishery management measures and Stellar sea lion conservation.

E. The Interim Final Rule Is Not Consistent with National Standard 8

The Interim Final Rule is inconsistent with National Standard 8, which requires that, "[c]onservation and management measures shall . . . take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2) [i.e., utilize the best scientific information available], in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities." 16 U.S.C. § 1851(a)(8); *see also* 50 C.F.R. § 600.345.

Fundamentally, the fisheries restrictions imposed by the Interim Final Rule are inconsistent with National Standard 8 because those restrictions are unwarranted. NMFS has not demonstrated that the western DPS is in a jeopardy condition under the ESA, nor has the agency provided adequate support for its determination that restricting the Atka mackerel and Pacific cod fisheries will support the recovery of the western DPS. Accordingly, the economic and social impacts of these restrictions on communities dependent on these fisheries are without basis.

In addition, even assuming for argument's sake that the Interim Final Rule is well-founded, NMFS failed to adequately consider the importance of the relevant fishery resources to fishing communities, as reflected by the best available economic and social data. *See also* attached Attachment E. By refusing to prepare a full Environmental Impact Statement, the agency failed to take a "hard look" at the socioeconomic effects of the Interim Final Rule.

Lastly, the Interim Final Rule does not provide for the sustained participation of local fishing communities, nor does it minimize the economic impact to those communities. The EA/RIR

estimates that the gross revenue in the Aleutian Islands may be reduced by as much as $83 million per year under the RPA. EA/RIR at 10-134. Up to 750 fishing, processing and related jobs in Alaska may also be lost. EA/RIR at 10-147. Although the EA/RIR claims that there may be mitigation to an unknown extent as the fishing fleet deploys to other Bering Sea fisheries, the onshore processing capacity and industry in the central Aleutian Islands cannot redeploy and will be adversely affected to an amount not disclosed in the EA/RIR. Consequently, NMFS failed to give due consideration to the impacts of the Interim Final Rule on the impacted fishing communities. *See Blue Water Fishermen's Ass'n*, 226 F. Supp. 2d at 344. As a result the Interim Final Rule will effectively prevent those communities from continuing their historic participation in the fisheries and related industries, and will maximize rather than minimize the adverse economic impacts to those communities, which is inconsistent with National Standard 8.

F. The Interim Final Rule Is Not Consistent with National Standard 9

The Interim Final Rule is inconsistent with National Standard 9, which requires that "[c]onservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch." 16 U.S.C § 1851(a)(9); *see also* 50 C.F.R. § 600.350. NMFS'S action fails to minimize bycatch because it will force vessels into already-congested mixed species fisheries outside of the Aleutian Islands, and the increased competition and crowding of vessels that will occur will increase bycatch rates.

VII. NMFS Can and Should Delay Implementing the RPA and Withdraw the Interim Final Rule

For the reasons set out in these comments, the State disagrees with NMFS' assertion in the BiOp, and as implemented in the Interim Final Rule, that the "RPA must be implemented quickly in order to halt the immediate effects of the fisheries on the acute population decline in the western portion of the range of the western DPS of Steller sea lion." BiOp at xxxiv. As documented in these comments, NMFS' RPA and Interim Final Rule are legally insufficient, both procedurally and substantively, under the APA, MSA, NEPA, and ESA. Adopting, as NMFS proposes, a final rule based on the Interim Final Rule plus comments (from the current ongoing public comment period) will not cure these underlying and systemic flaws. Although the ESA was intended to conserve endangered species, *see, e.g., TVA v. Hill*, 437 U.S. 153 (1978), it was also intended to prevent needless "economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives," *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997).

Here, a withdrawal of the Interim Final Rule and deferral of implementation of the RPA is appropriate. First, NMFS has both procedural and substantive shortcomings in the adoption of the rule and RPA. Those shortcomings should be cured prior to implementing a final rule. Also, there is a very high economic and social cost to the rule, which must be measured against uncertain, unproven, and by recent data and NMFS own recovery standards, unneeded species conservation benefits. Further, the *status quo* prior to the BiOp, RPA, and Interim Final Rule contained management measures that were consistent with the ESA and allowed for species recovery to the extent that eastern DPS may be eligible for delisting and the western DPS is trending towards recovery goals, not just avoiding jeopardy, in almost all areas across the DPS.

NMFS has several potential avenues it can pursue to withdraw the Interim Final Rule and defer implementation of the BiOp RPA. For instance, NMFS could withdraw the rule under the same emergency rulemaking or similar interim final rule authority under which it issued the rule. NMFS has the discretion to not follow the RPA if it can document other means to meet ESA §7(a)(2) standards. It can do so here where the data and information before NMFS do show that fishing is not and will not cause jeopardy to the western DPS as a whole under applicable ESA standards, biomass targets for prey species are being met as shown by the most current (November 2010) survey data, and the western DPS of Steller sea lion is not just avoiding jeopardy, but moving towards recovery. The pre-existing 2001 BiOp as supplemented in 2003, and the Fishery Management Plan ("FMP") and regulations adopted pursuant to that BiOp and RPA, allow for a fishery management framework and Steller sea lion conservation if the 2010 BiOp and interim final rule is not implemented (or is deferred by NMFS). Therefore, NMFS still has a management framework to apply and follow that has been evaluated in the ESA context.

Deferring implementation of the BiOp and withdrawing the Interim Final Rule are also consistent with ESA Section 7(d). Allowing for fishing under the previous BiOp and FMP framework for a brief period while NMFS addresses issues under the current RPA and interim final rule will not "make any irreversible or irretrievable commitment of resources with respect to agency action which has the effect of foreclosing the formulation of implementation of any reasonable and prudent alternative measures which would not violate [section 7(a)(2) of the ESA." 16 U.S.C. § 1536(d); *see, e.g., Sw. Ctr. Biological Diversity v. U.S. Forest Service*, 307 F.3d 964, 973 (9th Cir. 2002) (declining to enjoin ongoing livestock grazing activity where the continuing action would not jeopardize the species), *withdrawn as moot*, 355 F.3d 1203 (9th Cir. 2004); *Pacific Coast Fed'n of Fishermen's Ass'n v. Gutierrez*, 606 F. Supp. 2d 1122, 1192-93 (E.D. Cal. 2008) (Bureau of Reclamation's actions did not "permanently commit resources in a way that ties its hands for future actions").

In sum, a deferral of the RPA implementation and withdrawal of the Interim Final Rule is appropriate here given that neither jeopardy to the western DPS as a whole or adverse modification of its critical habitat will occur during period of deferred implementation, but substantial economic and social costs, up to more than $83 million in economic effects, $4 million in Alaska state and local tax revenue losses, and 750 job losses could occur in first year alone of RPA implementation. Final EA/RIR at 10-134, 10-147. The State's proposal is a rational way to avoid these quantified, known, and certain economic and social costs while still providing for conservation of western DPS of Steller sea lion and its designated critical habitat, following science-based determinations based on most current data available to NMFS, and acting in a way both allowed by and consistent with ESA, MSA, APA and NEPA.

VIII. Conclusion

Thank you for the opportunity to comment on the NMFS' Interim Final Rule for BSAI and GOA groundfish fisheries.

The State's fundamental concern is that the foundation for the Interim Final Rule, the NMFS' jeopardy and adverse modification findings, applied an incorrect legal standard and are not supported by the available information. While NMFS made some minor modifications to the BiOp and RPA, the modifications were insufficient to address the identified concerns on the foundational science

indicating that declines in Stellar sea lion numbers in the western and central Aleutian Islands are not a result of nutritional stress caused by federal fisheries management measures. NMFS' nutritional stress theory, and as a result its RPA, rest on speculation without an adequate rational basis in the record documenting the required rational relationship between the facts found and the decision made by NMFS.

Further, the jeopardy and adverse modification opinions are based on effects to only two portions of sub-populations of the western Stellar sea lion DPS, in violation of the ESA, NMFS policy, and applicable case law. Despite the lack of data supporting NMFS' nutritional stress theory, NMFS selected an RPA with real and severe consequences for the small coastal communities in the Aleutian Islands that depend on local fisheries to support the economic base. NMFS' EA/RIR for the proposed RPA failed to take a "hard look" at these potentially significant socioeconomic impacts.

To address the RPA and Interim Final Rule's procedural and substantive deficiencies, NMFS can and should withdraw the Interim Final Rule and delay implementation of the RPA as discussed above, while reinitiating consultation to address the shortcomings in the BiOp and RPA.

The State of Alaska looks forward to continuing to work collaboratively with NMFS to manage fisheries for the conservation of listed species. If you have questions about these comments or would like further clarification, please contact me by email at douglas.vicent-lang@alaska.gov or by phone at (907) 267-2339.

Sincerely,

Douglas Vincent-Lang, Endangered Species Coordinator
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