No. 15-35940

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OCEANA, INC. and GREENPEACE, INC.,

Plaintiffs-Appellants,

v.

NATIONAL MARINE FISHERIES SERVICE *ET AL.*,

Defendants-Appellees,

and

ALASKA SEAFOOD COOPERATIVE *ET AL.*,

Intervenor-Defendants-Appellees.

On Appeal from the United States District Court
for the District of Alaska

APPELLANTS' REPLY BRIEF

Rebecca Noblin
EARTHJUSTICE
441 W. 5th Avenue, Suite 301
Anchorage, AK 99501
T: 907.792.7103
E: rnoblin@earthjustice.org

Brettny E. Hardy
EARTHJUSTICE
50 California Street, Suite 500
San Francisco, CA 94111
T: 415.217.2142
E: bhardy@earthjustice.org

Eric P. Jorgensen
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
T: 907.586.2751
E: ejorgensen@earthjustice.org

Attorneys for Plaintiffs-Appellants
Oceana, Inc. and Greenpeace, Inc.

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INTRODUCTION

All of the parties to this litigation agree that endangered Steller sea lions continue to decline in the central and western Aleutian Islands and that the population is not meeting established criteria for recovery. All parties also agree that there is uncertainty regarding how and to what degree fisheries are causing the decline and failure to recover. The conflict here arises from a disagreement about the National Marine Fisheries Service's (NMFS) legal obligations in the face of this uncertainty.

The government argues that the law allows it to remove important protections based on uncertainty about whether nutritional stress is contributing to sea lion decline. In fact, the uncertainty—combined with the dire situation for sea lions in the western Aleutian Islands—triggers NMFS's duty under the Endangered Species Act (ESA) to act in a precautionary manner. NMFS must be able to ensure that allowing increased fishing will not result in jeopardy to the species. It cannot do so here. Instead of addressing Oceana and Greenpeace's arguments head-on, NMFS's brief has adopted a post hoc rationale that discounts the 2014 BiOp's overlap analysis and rewrites its conclusions regarding nutritional stress. NMFS also disagrees that it has a duty to determine roughly at what point the fisheries will preclude recovery of sea lions, despite acknowledging that sea lions are declining significantly in the western Aleutian Islands and are not on track to

recover. Finally, NMFS downplays the serious critiques from its own sea lion experts in an attempt to defend its pollock and Atka mackerel findings in the 2014 BiOp and the FEIS. None of NMFS's arguments can save these two documents from their legal infirmities.

ARGUMENT

I. The Decision To Allow Increased Fishing Based on the 2014 BiOp Was Arbitrary and Capricious and Violated the ESA by Failing To Ensure That Jeopardy Would Not Result.

The 2014 BiOp reflects an unacknowledged and unexplained departure from the agency's prior analysis that illegally places the burden of uncertainty on endangered Steller sea lions and fails to ensure against jeopardy. NMFS and Intervenors' chief defense against this claim appears to be that the 2014 BiOp used the same analytical framework as previous analyses, but that the protections NMFS instituted to prevent jeopardy in 2010 are no longer necessary because the agency has now concluded that it is less likely that nutritional stress is contributing to the sea lions' decline and failure to recover. This post hoc rationale is contrary to the record. The 2014 BiOp, like the 2010 BiOp, assumes that commercial fishing may result in localized depletions of fish that cause nutritional stress in sea lions. NMFS therefore did not—and, in fact, could not—rely on uncertainties about nutritional stress to weaken sea lion protections.

Instead, starting from the premise that fisheries may be causing nutritional stress, NMFS relied on the degree to which the authorized fisheries overlap with sea lions in reaching its no-jeopardy conclusion in the 2014 BiOp. In this crucial overlap analysis, NMFS failed to ensure that the fisheries would not jeopardize sea lions by changing its approach to overlap so that low overlap in just one dimension of time, space, depth, or size would mitigate harm to sea lions sufficiently to avoid jeopardy. This change is unexplained and reflects an impermissible shift in where NMFS places the burden of uncertainty.

Under the ESA, NMFS must give the benefit of the doubt to Steller sea lions and act with institutionalized caution, especially when, as here, the science is uncertain. *TVA v. Hill*, 437 U.S. 153, 194 (1978); *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988). In 2014, NMFS complied with its obligation to give sea lions the benefit of the doubt when, in the face of uncertain science, it continued to conclude that fisheries may cause localized prey depletion resulting in nutritional stress. However, the agency abrogated its ESA duty in the subsequent overlap analysis when it raised the bar to finding jeopardy. It also acted arbitrarily and capriciously in failing to acknowledge or explain this fundamental change. Finally, NMFS violated the ESA when, in the face of continuing declines, it failed to identify the point at which the species would be pushed past its ability to recover.

A. NMFS's Brief Amounts to a Post Hoc Rationalization that Misrepresents the 2014 BiOp.

1. The 2014 BiOp starts from the premise that nutritional stress may be contributing to sea lion decline and failure to recover.

NMFS's argument that the 2014 BiOp's no-jeopardy conclusion is based on uncertainties in the science regarding nutritional stress is not borne out by the record. Like the 2010 BiOp, the 2014 BiOp proceeds from the premise that "fisheries have the potential to reduce the availability of food to Steller sea lions, and thus the potential to indirectly affect the birth rate of Steller sea lions." III-ER-221 (2014 BiOp). According to the 2014 BiOp, localized prey depletion could cause "chronic nutritional stress where reduced food resources result in increased maternal investment into juveniles at the expense of high reproduction." III-ER-411 (2014 BiOp).

Like the 2010 BiOp, the 2014 BiOp emphasizes the uncertainty and controversy surrounding localized prey depletion and acknowledges that much of the uncertainty arises from logistical difficulties of studying sea lions. III-ER-244 (2014 BiOp). Notwithstanding this uncertainty, the 2014 BiOp shows that nutritional stress remains a persuasive explanation for the sea lion decline in the central and western Aleutian Islands. The BiOp presents evidence that "the commercial groundfish fisheries have reduced the spawning biomass of some Steller sea lion prey species by approximately 40-60% of the theoretical, unfished

spawning biomass." III-ER-242 (2014 BiOp). It also cites recent studies that confirm that fisheries are creating localized depletions in some areas. III-ER-394 (2014 BiOp) (stating that "exploitation rates in some localized areas exceed the overall target fishing mortality rate"). And it acknowledges that "the western Aleutian Islands population continues to decline at a steep, significant rate [and] the central Aleutian Islands population is decreasing slightly at a non-significant rate." *Id.* Finally, the 2014 BiOp does not call into question the circumstantial evidence on which NMFS relied in 2010 showing that sea lion numbers have declined as fishing increased. *See Alaska v. Lubchenco*, 723 F.3d 1043, 1050 (9th Cir. 2013) ("[A]lthough the nutritional stress hypothesis had been questioned by some experts, fishery presence in the two wDPS sub-regions was nevertheless negatively correlated with population numbers. In other words, as fishing increased, the wDPS population fell.").

Given the evidence, the 2014 BiOp concludes that "[i]ndirect anthropogenic threats such as . . . commercial fishing for Steller sea lion prey may be limiting population growth in the [w]DPS today." III-ER-246 (2014 BiOp). According to the 2014 BiOp, despite uncertainties in the nutritional stress mechanism,

> important data gaps hinder our ability to rule out . . . effects of fishing, as contributing to the continued decline in the western Aleutian Islands and the lack of recovery in the central Aleutian Islands . . . . Given these important data gaps, NMFS maintains that a cautionary approach to

> fishing for prey species in Steller sea lion critical habitat is warranted . . . .

III-ER-394 (2014 BiOp). In other words, despite uncertainties, in 2014, NMFS continued to assume that nutritional stress caused by the fisheries may be contributing to the decline of sea lions. Indeed, as the agency acknowledges, II-ER-27 (FEIS), the ESA requires NMFS to tip the scale in favor of sea lions and continue to assume nutritional stress is a factor in sea lion decline, just as it did in 2010. *See Lubchenco*, 723 F.3d 1050-51 (notwithstanding the fact that there were likely multiple factors contributing to sea lion decline, because nutritional stress was one possible cause, NMFS "was mandated by the ESA to take steps to prevent continued fishing from likely reducing or negatively affecting the survival and recovery of the wDPS"). Having established that the fisheries may be causing nutritional stress, the 2014 BiOp therefore focuses on "whether the [authorized] groundfish fisheries compete with sea lions by creating localized depletions of fish stocks," i.e., the overlap analysis. III-ER-393 (2014 BiOp).

Thus, the story NMFS tells in its brief of weakening sea lion protections because of uncertainties in the science regarding nutritional stress simply is not

borne out by the record.[1] NMFS's attempt to rewrite the BiOp on appeal amounts to an impermissible post hoc rationalization. *See, e.g., Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010) ("We cannot gloss over the absence of a cogent explanation by the agency by relying on the post hoc rationalizations offered by defendants in their appellate briefs . . . . Defendants' post hoc explanations serve only to underscore the absence of an adequate explanation in the administrative record itself."); *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 688 (9th Cir. 2007) (explaining that the court "may not accept appellate counsel's post hoc rationalizations for agency action" (internal quotation marks and citation omitted)).

2. Evidence about the likelihood of nutritional stress does not support the 2014 BiOp's conclusion.

Even if the agency had relied on the idea that nutritional stress was less likely, NMFS's post hoc rationale does not provide support for the reduced fishery restrictions the agency authorized in 2014. According to NMFS,

> given that the Service's studies had been unable to demonstrate causation between fishing effort and Steller sea lion population dynamics, it concluded that the proposed fishing management measures "are unlikely to yield population level effects that would appreciably

[1] NMFS's assumption of nutritional stress is in fact the crux of Intervenors' argument that the agency acted in a precautionary manner: "NMFS continues to assume that fishing *does* affect Steller sea lions and to restrict fishing, even though the hypothesis that fisheries may indirectly cause chronic nutritional stress in the WDPS remains scientifically unproven." Intervenor Br. at 36.

> change the likelihood of survival or recovery" of the western Aleutian Islands sub-regional population.

NMFS Br. at 32. NMFS seems to be arguing that because it was less certain about nutritional stress in 2014, it instituted fewer protection measures. This, of course, is not what the agency actually did in the 2014 BiOp. *See supra* pp. 4-6. Regardless, this explanation does not satisfy the ESA, which requires that NMFS specifically analyze the particular measures it adopts to ensure they do not jeopardize sea lions. 16 U.S.C. § 1536(a)(2). Neither the 2014 BiOp nor the government's brief connects new evidence about the likelihood of nutritional stress to the actual measures the agency put in place. *See infra* p. 12. The "less certain, less protection" framework also does not comport with the Administrative Procedure Act (APA), which requires NMFS to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

If NMFS's assertion is that there is no support for nutritional stress, this argument proves too much.[2] If NMFS had determined that fisheries do not affect sea lions, any protection measures would be superfluous and unnecessary. But NMFS itself argues that the authorized measures are "designed to 'prevent localized depletion' of prey resources by 'spatially and temporally dispersing catch, particularly in critical habitat.'" NMFS Br. at 15. In fact, the lead author of the 2014 BiOp did not believe the protection measures could have been relaxed any more than they were; following a presentation to industry representatives on the completed 2014 BiOp, she relayed that she was "asked . . . if the Council could have gone a little further in relaxing measures and I answered no, that they likely used all of the available 'room.'" I-FER-1 (Gerke Email). NMFS has not explained how or why it drew the line where it did in 2014, choosing to continue some protections while removing others. In sum, NMFS's brief presents a post hoc rationale that is not supported by the record and does not explain the suite of measures NMFS adopted in 2014.

[2] NMFS's brief seems to want to have it both ways. On one hand, it demonstrates that it relied on nutritional stress as a reason to disperse the fisheries in time and space, NMFS Br. at 39, and on the other, it argues that it could not show any causation between fisheries and sea lion decline. *Id*. at 32. Regardless of whether NMFS's argument is that it was less certain about nutritional stress or that it dropped the nutritional stress theory entirely, NMFS's post hoc rationale does not support NMFS's reversal of specific protection measures in 2014.

B. Peer Reviews and Other New Information Are Not the Basis for NMFS's New Conclusions.

In their briefs, NMFS and Intervenors argue that external peer reviews[3] criticizing the 2010 BiOp played a significant role in NMFS reversing its jeopardy conclusion in 2014. *See, e.g.*, NMFS Br. at 35; Intervenor Br. at 46-47. The record belies these assertions because the peer reviewers' critiques revolve mainly around questions about nutritional stress, which, as discussed above, remains the starting point for the 2014 BiOp. Other specific critiques and NMFS's analyses performed in response to them likewise are not connected to changes in the agency's overlap analysis. Moreover, NMFS's additional studies disproved many of the reviewers' assertions.

NMFS's argument is premised on the idea that, because peer reviewers criticized the use of pup-to-non-pup ratios as a proxy for birth rate in the 2010 BiOp, the agency chose not to rely on the ratios in 2014. According to this argument, there was therefore less support for the conclusion that fisheries may cause chronic nutritional stress, which meant that the agency could reach a no-jeopardy conclusion. This contention misrepresents the 2014 BiOp. As outlined above, in 2014, even without the pup-to-non-pup ratios, NMFS continued to

[3] The term "peer reviews" encompasses the reviews by the States of Washington and Alaska, II-INT-SER-419-546, and the reviews by the Center for Independent Experts, I-INT-SER-131-32, I-INT-SER-172, I-INT-SER-240. There have been no external peer reviews of the 2014 BiOp.

assume that fisheries may cause localized prey depletion that may lead to nutritional stress. What NMFS changed in 2014 was its overlap analysis—that is, its conclusion about whether and where the particular authorized fisheries were contributing to localized prey depletion. Pup-to-non-pup ratios do not speak to this question, and thus, the peer reviewer concerns about the ratios are not relevant to changes to the overlap analysis.[4]

Intervenors point to reviewer criticism of the 2010 overlap analysis, Intervenor Br. at 46-47, but those critiques do not address the question here: whether it was reasonable for NMFS to rely on low overlap in only one dimension to infer a lack of competition that would prevent a risk of jeopardy. The peer reviewers' criticism largely focused on the lack of transparency in the overlap analysis, a problem that was not remedied in 2014. *See*, *e.g.*, III-ER-178 (2014 BiOp). None of the reviewer critiques Intervenors rely on in their brief justifies NMFS's decision to weaken protections based on partitioning in only one

[4] Although NMFS ultimately chose not to use the pup-to-non-pup ratios based on the peer review critiques, the agency's own analysis showed that such ratios were useful in inferring birth rates in situations such as the one present in the western Aleutian Islands. NMFS conducted a study to test the relationship between pup-to-non-pup ratios and sea lion birth rates. The study found that in six out of seven simulations with variables similar to those in the western Aleutian Islands, pup-to-non-pup ratios were positively correlated with birth rates, making them a "powerful proxy" for birth rates in that population. III-ER 225-26 (2014 BiOp). Thus, had the agency actually relied on peer critiques of pup-to-non-pup ratios when it weakened sea lion protections, such a decision would not have reflected the best scientific evidence and would therefore not have comported with the ESA.

dimension. Intervenor Br. at 46-47. Moreover, none of the external criticisms are relevant to NMFS's decision to reopen the pollock fishery because that fishery had been closed for a decade at the time of the 2010 BiOp and was not under consideration at that time. Thus, the reviewers' critiques of the 2010 overlap analysis could not, and did not, form a basis for NMFS's 2014 conclusions.

Intervenors also cite information from studies NMFS conducted in response to the peer reviews as evidence that NMFS relied on new data in 2014. *Id*. at 28. But the 2014 BiOp did not rely on those additional studies (with the exception of telemetry data, discussed in detail *infra* pp. 22-24) to determine that the action would not jeopardize sea lions. Intervenors have merely listed these additional studies and have not linked them to any place in the 2014 BiOp where NMFS relied on such studies to weaken protections.

In fact, in many cases the new studies NMFS undertook in response to the peer reviews affirmed information in the 2010 BiOp and proved the external reviews to be wrong. In addition to the supplemental analysis of pup-to-non-pup ratios that showed they could be a powerful proxy for birth rate in the western Aleutian Islands, *see supra* p. 11 n.4, NMFS conducted several other supplemental analyses. For example, a new sea lion trend estimation method confirmed the "dire" situation in the western Aleutian Islands. III-ER-209-10 (2014 BiOp). Additional NMFS work also demonstrated that statistical studies cited in the state-

sponsored review to argue that the fisheries do not negatively affect Steller sea lion demographics have "little to no power to detect prey removal effects on Steller sea lion populations." III-ER-175-77, 385-86 (2014 BiOp); *see also* I-FER-2 (Kurland Notes) (same).

For all these reasons, the 2014 BiOp itself does not rely on the peer reviews, or studies conducted in response to those reviews, to reverse the jeopardy conclusion. Although, in the 2014 BiOp, NMFS acknowledged the relevance of the external reviews and endeavored to answer their concerns, NMFS neither explicitly nor implicitly relied on the external reviews, or any information generated because of them, to support its no-jeopardy conclusion. Any attempt to treat the peer reviews as driving NMFS's 2014 reversal is an unavailing post hoc rationalization.[5]

C. NMFS's Overlap Analysis Is Arbitrary and Capricious and Fails to Give Sea Lions the Benefit of the Doubt.

When NMFS's post hoc and demonstrably incorrect nutritional stress and peer review arguments are set aside, all that is left is an arbitrary and capricious overlap analysis. Oceana and Greenpeace have shown that the 2014 overlap analysis shifted the burden of uncertainty, which violates the ESA, and that NMFS did not acknowledge or explain this fundamental change, which is unlawful under

[5] Moreover, it is a post hoc rationalization that NMFS has adopted for the first time on appeal. In its briefing below, the agency did not point to the peer reviews to defend its reversal of sea lion protections. CR 50.

the APA. Contrary to NMFS and Intervenors' arguments, the ESA's benefit of the doubt standard is not satisfied by acting cautiously in the first step of the analysis, by assuming nutritional stress, but reversing the burden in the second step, by assuming jeopardy will be avoided by low overlap in only one dimension.

NMFS's main defense regarding the overlap analysis itself is to deny that it was different in 2014 and to deny that the 2014 BiOp relied on low overlap in only one dimension to support its no-jeopardy conclusion. NMFS Br. at 36-38. NMFS asserts, incorrectly, that Oceana and Greenpeace's overlap argument oversimplifies the 2010 BiOp. *Id.* at 36-37. Oceana and Greenpeace agree with NMFS that in both 2010 and 2014, NMFS's analytical framework included analyses of both how fisheries affect sea lions (nutritional stress) and how much the fisheries overlap with sea lions. The point here is that the nutritional stress conclusion remained the same in both, but NMFS's overlap analysis changed in 2014 to something less precautionary than in 2010, and that the agency failed to explain or even acknowledge this change.

In arguing that the overlap analysis has not changed, NMFS incorrectly characterizes Oceana and Greenpeace's argument as relying entirely on analytic framework flowcharts from 2010 and 2014 and asks the Court to disregard those charts. In fact, the flowcharts provide a simple, visual representation of NMFS's change. They show that the 2010 BiOp's "significant effects" test pointed to

jeopardy if there was overlap in three dimensions, IV-ER-646 (2010 BiOp), while the 2014 BiOp required overlap in all four dimensions, III-ER-379 (2014 BiOp). *See* Opening Br. at 36-37.

Moreover, contrary to NMFS and Intervenors' implication, Oceana and Greenpeace do not solely rely on the flowcharts to show the importance of partitioning in one dimension to the 2014 BiOp's jeopardy conclusion. The opening brief, Opening Br. at 37-38, specifically pointed to the Jeopardy Assessment itself, which states that depth partitioning "mitigates any localized depletion" for pollock. III-ER-399 (2014 BiOp); *see also* III-ER-414 (2014 BiOp) (depth partitioning); III-ER-414 (2014 BiOp) (spatial partitioning for Atka mackerel). It also showed that NMFS's own experts perceived the 2014 BiOp as using low overlap in a single dimension to support NMFS's no-jeopardy conclusion. *See* Opening Br. at 39-40. As the opening brief explained, this focus on partitioning in just one dimension as a basis for a no-jeopardy conclusion signaled a shift in where the agency placed the burden of uncertainty. *Id*. at 41-42.

This shift violates NMFS's duty to give sea lions the benefit of the doubt. *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1127 (N.D. Cal. 2006) ("To the extent that there is any uncertainty as to what constitutes the best available scientific information, Congress intended 'to give the benefit of the doubt to the species.'" (quoting *Conner*, 848 F.2d at 1454)). This duty is built

into the ESA and requires NMFS to act in a precautionary manner in every step of the consultation process. It also means that if there is no new science allowing NMFS to conclude fisheries are not contributing to sea lion decline, NMFS cannot use uncertainty in the existing science to remove protections. *Cf. Brower v. Evans*, 257 F.3d 1058, 1071 (9th Cir. 2001) (agency violates the law when it finds no jeopardy when available science shows that the protected species is not recovering, that the fishery "could have a population level effect," and that NMFS is "unable to attribute the failure to recover to any source other than the fishery"). While NMFS acted cautiously when it assumed nutritional stress, it failed to give sea lions the benefit of the doubt when it switched and used low overlap in just one dimension to avoid a jeopardy conclusion.[6]

In failing to acknowledge, let alone explain, that it has changed its approach to assessing overlap, NMFS has acted arbitrarily and capriciously. *Encino*

[6] NMFS's argument that giving sea lions the benefit of the doubt "would effectively always require the Service to make a determination that the agency action is likely to cause jeopardy," NMFS Br. at 34, is wrong. The outcome is driven by the facts in the record, which here show affirmatively that fisheries may be having an impact, even if the currently available science does not allow NMFS to prove causation. Fisheries have been restricted for more than a decade based on scientists' belief that they compete with sea lions for prey, causing chronic nutritional stress. *See* Opening Br. at 10-18. Sea lion populations have rebounded in areas with greater protections but are still declining in areas with fewer protections. *See Lubchenco*, 723 F.3d at 1050. NMFS instituted an emergency rule increasing protections in those specific areas in 2010, and this Court upheld NMFS's decision. *Id*. at 1047. And NMFS cannot point to science proving that the drastic sea lion decline in the western Aleutian Islands can be attributed to anything other than fishing.

Motorcars, LLC v. Navarro, No. 15-415, 2016 WL 3369424, at *7 (U.S. June 20, 2016) (explaining that an "unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice" (internal quotation marks omitted)). The "unexplained inconsistency" in how NMFS dealt with interactions between sea lions and fisheries in 2010 and 2014 is just the sort of action courts have found to be unlawful under the APA. *Id.* at *8-*9; *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (explaining that when an agency's new policy "rests upon factual findings that contradict those which underlay its prior policy," it must "provide a more detailed justification than what would suffice for a new policy created on a blank slate").

D. NMFS Failed to Ensure That the Western Population of Steller Sea Lions Would Not Be Pushed Past Its Ability to Recover.

NMFS asserts that it had no duty to identify the point at which sea lions would be pushed past their ability to recover and that, in any case, the criteria for recovery established in the Recovery Plan satisfy its obligation. These arguments are legally and factually incorrect.

NMFS's principal argument seems to be that an agency need only consider a "tipping point" when it has identified "significant impairments" that are certain to occur. NMFS Br. at 41-42. This is a misreading of the caselaw. Although in *National Wildlife Federation v. NMFS*, the court found that the record showed there would be "significant impairments" from the agency action, the court did not

hold that the tipping point analysis should only apply when such impairments are certain to occur. *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 936 (9th Cir. 2008) ("It is only logical to require that the agency know roughly at what point survival and recovery will be placed at risk before it may conclude that no harm will result from 'significant' impairments to habitat that is already severely degraded.").

In fact, the tipping point requirement is rooted in two basic ESA principles that apply equally whether the risk to the species is certain or uncertain: (1) the agency must ensure against jeopardy, 16 U.S.C. § 1536, and (2) jeopardy includes recovery considerations. *See, e.g., Lubchenco*, 723 F.3d at 1054 (while jeopardy and recovery are distinct concepts, "recovery considerations are an important component of both the jeopardy and adverse habitat modification determinations."). Courts have required a tipping point analysis in cases such as this, where the species is already in trouble and is approaching a level of peril that may preclude recovery. *Nat'l Wildlife Fed'n*, 524 F.3d at 936. NMFS's uncertainty regarding the degree to which fisheries are contributing to the decline of endangered Steller sea lions does not allow it to shirk its duty to ensure against jeopardy. And, to ensure against fisheries jeopardizing sea lions, NMFS must know "roughly at what point survival and recovery will be placed at risk." *Id.*

NMFS recasts the 2014 Final Rule as "protection measures" and asserts that they "avoid significant impairment" to sea lions. NMFS Br. at 42. In reality, the

2014 rule weakened pre-existing protection measures and increased the chance of harming endangered sea lions,[7] which face a "dire" situation in the western Aleutian Islands. III-ER-210 (2014 BiOp). In this part of their range, sea lions are declining at over seven percent per year, and pup counts are declining at nine percent annually. III-ER-210, 260 (2014 BiOp). And the fisheries' effects, while uncertain, are potentially significant.[8] *See* Opening Br. at 6-7, 20-23. Because NMFS cannot rule out fisheries as contributing to the decline of sea lions in the western and central Aleutian Islands, it has a duty to determine the point at which such decline would preclude recovery of the species. *Nat'l Wildlife Fed'n*, 524 F.3d at 936; *see also Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 527 (9th Cir. 2010).

NMFS's assertion that Oceana and Greenpeace would require the agency to find a "tipping point within [the] tipping point," NMFS Br. at 43, has no merit.

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[7] NMFS points to isolated measures that increase fishing restrictions. NMFS Br. at 15-16. In fact, these changes do not balance the substantial increases in commercial fishing that the new measures authorize. The reduction in Pacific cod harvest is due to separate management action and the significant decline in cod population in the Aleutian Islands. III-ER-277-78 (2014 BiOp) (tables showing declines in Pacific cod biomass). Similarly, the area around Kanaga Rock/Ship Island was already closed to trawling; changing the designation only adds non-trawl cod fishing to the restrictions on catch of sea lion prey species. *Id.* at 185-86.

[8] The fact that the BiOp concluded the fisheries would not jeopardize sea lions does not excuse NMFS from conducting such an analysis. In fact, in all the cases in which this Court has enforced the tipping point analysis requirement, the agency had made a no-jeopardy determination. *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 526-27 (9th Cir. 2010); *Nat'l Wildlife Fed'n*, 524 F.3d at 923, 936.

Contrary to NMFS's argument, the Recovery Plan does not and cannot determine whether NMFS's specific action here will push sea lions in the western and central Aleutian Islands past the point at which they cannot recover. Instead, it establishes criteria "compos[ing] the core standards upon which a decision to remove the [w]DPS [from] the Endangered Species List will be based." III-ER-213 (2014 BiOp at 46). These Recovery Plan criteria require statistically significant growth in five out of seven sub-regions and preclude declines of more than 50 percent in any one sub-region. III-ER-214 (2014 BiOp); *see also Lubchenco*, 723 F.3d at 1049. The Western Population "is not on track to meet" either of these recovery criteria. III-ER-214-15, 245 (2014 BiOp). By establishing that the loss of sea lions in only one subpopulation, such as the western Aleutian Islands,[9] would preclude recovery for the whole population, the Recovery Plan sets the framework from which NMFS must conduct its tipping point analysis.[10] But the Recovery Plan does not seek to determine at what point weakening protections for western

[9] NMFS's failure to grapple with the question at issue is evident in its misleading statement that the "sea lion's continued survival was not a significant issue in the Biological Opinion because the risk that the species will cross the 'quasi-extinction threshold' in the next 100 years is 'virtually nil.'" NMFS Br. at 42. What the 2014 BiOp actually says is that the risk of crossing the quasi-extinction threshold in the next 100 years is virtually nil, "[w]ith the exception of the Western Aleutian Islands," which has a "high probability" of quasi-extinction in the next 50 years and "near certain" probability of quasi-extinction in the next 100 years. III-ER-216 (2014 BiOp) (emphasis added).

[10] If the Recovery Plan's criteria did provide the basis for determining whether sea lions are being pushed past their ability to recover, then sea lions have already passed the tipping point because they are not meeting recovery criteria.

and central Aleutian Islands sea lions will lead to subpopulation impacts precluded by the Recovery Plan. *Nat'l Wildlife Fed'n*, 524 F.3d at 936; *see also Lubchenco*, 723 F.3d at 1052 ("Where trends in a subpopulation may affect the entire population, the ESA requires the agency to consider the effects of the declining subpopulation."). Because the Recovery Plan cannot substitute for the tipping point analysis, and NMFS points to nowhere in the 2014 BiOp where it considered the point at which the authorized fisheries could push sea lions past their ability to recover, NMFS has not fulfilled its duty to ensure against jeopardy under the ESA.

E. The ESA Does Not Permit NMFS To Weigh Protection of Endangered Sea Lions Against Economic Considerations.

Notwithstanding NMFS and Intervenors' arguments to the contrary, decisions made regarding a listed species are not a balancing act. *See* NMFS Br. at 1; Intervenor Br. at 31. NMFS must ensure it does not jeopardize Steller sea lions, regardless of its additional duties under the Magnuson-Stevens Act or other laws. Economic impacts to the fisheries are simply not relevant to an evaluation of whether or not the authorized activities jeopardize sea lions.[11] *TVA*, 437 U.S. at 187-88 (explaining that "the plain language of the [ESA], buttressed by its

[11] Intervenors' argument that NMFS was free to choose among different reasonable and prudent alternatives (RPAs), Intervenor Br. at 43-44, is misplaced. If NMFS reaches a jeopardy conclusion, it must then go on to lay out RPAs that protect the species. 16 U.S.C. § 1536(b)(3)(A). Here, NMFS never designated RPAs because it did not find jeopardy in the first instance. III-ER-416 (2014 BiOp). The question at issue in this case is whether NMFS's no-jeopardy conclusion complied with the law, not whether its non-existent RPAs complied with the law.

legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable'" and holding that the ESA does not permit a "weighing process" to balance economic harm against the protection of a species).

II. The Record Does Not Support NMFS's Conclusions Regarding Low Overlap in a Single Dimension for the Pollock and Atka Mackerel Fisheries.

NMFS misunderstands Oceana and Greenpeace's argument that, even if the new overlap approach were valid, the record does not support the agency's conclusion that there was low overlap in even a single dimension in the pollock and Atka mackerel fisheries. Rather than asserting that NMFS's finding was arbitrary and capricious "because some agency personnel disagree," NMFS Br. at 44, Oceana and Greenpeace have shown that the data on which NMFS relied to remove restrictions on the pollock and Atka mackerel fisheries do not support the agency's actions. Opening Br. at 45-50. Likewise, rather than asserting that there was some better science NMFS disregarded, Oceana and Greenpeace have shown that NMFS relied on science its own experts showed was unreliable or inappropriate for the purposes for which the agency used it, without showing any support in the record—in the form of contrary expert opinions, new data, new analysis, or anything else—for relying on that science. *Id.*

NMFS has no support, other than telemetry data that its experts showed cannot be used for this purpose, for its conclusion that there will be low depth

overlap in the pollock fishery and low spatial overlap in the Atka mackerel fishery. This is not an instance of an agency making decisions at the frontiers of science or resolving scientific debate; rather it is a situation in which the agency has misused data to reach conclusions the data do not support. The foremost sea lion experts—NMFS's Steller sea lion coordinator and scientists at the National Marine Mammal Laboratory (NMML), among others—warned NMFS that the telemetry data could not be used to determine overlap. *See* Opening Br. at 25-27. NMFS's chief response regarding its depth analysis is that the pollock fisheries are fishing in much deeper waters than where sea lions dive. NMFS Br. at 46-47. But this assertion relies on the very telemetry data NMFS's own scientists said was too weak to support inferences about overlap. *See*, *e.g.*, V-ER-780 (Sea Lion Coordinator Comments) (stating "[y]ou cannot draw conclusions . . . from sample sizes like these"); V-ER-747 (NMML Memo) ("[T]elemetry data from such a limited data set should not be used in this form for this type of analysis . . . ."). It also ignores the scientific reality that fish move vertically in the water column. II-ER-39 (Brown Comment); *see also* V-ER-785 (Sea Lion Coordinator Comments).

With regard to spatial partitioning, NMFS agreed with much of its scientists' criticism about use of the telemetry data. III-ER-323 (2014 BiOp) (noting that there are "several limitations with the available data" which "complicate

interpretation of the extent of expected spatial overlap," including the fact that "the sample size of telemetered animals is small and may not be representative of the whole population."). Nonetheless, the agency relied on the data to weaken protections anyway. Thus, the 2014 BiOp's inclusion of the flawed analysis also runs afoul of the fundamental requirement that an agency "must support its conclusions . . . with studies that the agency, in its expertise, deems reliable." *Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008) (en banc), *overruled on other grounds by Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008).[12]

Having relied upon telemetry data in a manner that is not scientifically valid, the 2014 BiOp is both irrational and arbitrary. NMFS's 2001 biological opinion was similarly invalidated for reaching a "conclusion that . . . is not rationally related to the data." *Greenpeace v. NMFS* (*Greenpeace IV*), 237 F. Supp. 2d 1181, 1198 (W.D. Wash. 2002). There, the court observed that "telemetry data is the 'best available science' for tracking where Steller sea lions are located," but nonetheless found that NMFS had used the data arbitrarily, reaching conclusions

[12] This Court's 1992 decision in *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1337 (9th Cir. 1992), is not on point. There is now more than two and a half decades of additional science showing how the pollock fishery interacts with sea lions. The 2014 Final Rule reopened the pollock fishery in critical habitat after it was closed for more than a decade because of the fishery's impacts on sea lions. Moreover, in the 1992 case, the court was not faced with significant dissent from the agency's own experts regarding the appropriateness of using telemetry data as NMFS used it. Here, NMFS scientists have argued that NMFS cannot use telemetry data to weaken pollock fisheries restrictions, and there is no countervailing expert opinion.

"not rationally connected to the data presented." *Id.* at 1196, 1199. It has likewise done so here. In ignoring its own experts' scientific advice and relying on the overlap analysis despite its fundamental flaws, the 2014 BiOp arbitrarily "runs counter to the evidence before the agency," *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, and fails to reflect a "reasoned" decision. *Greenpeace v. NMFS*, 80 F. Supp. 2d 1137, 1147 (W.D. Wash. 2000); *see also Greenpeace IV*, 237 F. Supp. 2d at 1199 (finding "that the 2001 BiOp's no jeopardy and no adverse modification conclusions are arbitrary and capricious because they rely on [an analytical approach] which is not rationally connected to the data presented").

III. The FEIS Unlawfully Fails To Disclose Significant Scientific Dissent.

Under the National Environmental Policy Act (NEPA), NMFS has a duty to disclose and meaningfully respond to any reasonable opposing viewpoints in its FEIS, particularly those viewpoints that call into question the analysis and conclusions of the FEIS. NMFS failed to meet its duty here. Prominent Steller sea lion experts voiced substantial criticism about NMFS's use of its overlap analysis, which was central to NMFS's selection of alternatives and evaluation of potential impacts in the FEIS. Yet, NMFS failed to even acknowledge the existing dissent in the FEIS, much less meaningfully respond to it.

Neither NMFS nor the Intervenors dispute that: (1) the expert views at issue here represent reasonable opposing scientific viewpoints; (2) the opinions

contradict NMFS's conclusions; and (3) the FEIS's recommendations rest on the overlap analysis and conclusions based on that analysis. They also fail to demonstrate that the FEIS or the 2014 BiOp contain any reference to the specific controversy the Steller sea lion experts raised. Instead, NMFS and Intervenors posit that the agency was not required to disclose these viewpoints because they are from "internal" experts or because the viewpoints represented long-standing uncertainties. These excuses highlight the very problems that NEPA is meant to address. By sweeping dissent under the rug, NMFS failed to present an accurate, scientifically-informed accounting of the environmental impacts of its chosen alternative. As a result, the public was left in the dark about the strong opposition that sea lion experts expressed against NMFS's use of its overlap analysis to support greater amounts of fishing in the western Aleutian Islands.

A. NEPA Requires NMFS to Disclose and Respond to the Reasonable Opposing Views of Its Own Experts.

NMFS and Intervenors misleadingly state that this Court has never struck down an EIS on the basis of a failure to disclose "disagreement solely within an agency at a preliminary stage." NMFS Br. at 51-53; *see also* Intervenor Br. at 58-60. This Court in fact has repeatedly affirmed an agency's duty to respond to significant criticism, whether internal or external. For example, in *Western Watersheds Project v. Kraayenbrink*, internal experts identified significant concerns with eliminating fundamental standards and requirements, and other

agencies expressed similar concerns. 632 F.3d 472, 488 (9th Cir. 2010). This Court found the EIS to be arbitrary, citing in part 40 C.F.R. § 1502.9(b), because the agency did not disclose reasonable opposing views, including the internal views of its own experts made during an internal review process. *Id*. at 493. The Court did not throw out the internal critiques but considered them along with the external ones. *Id.*; *see also Pac. Coast Fed'n of Fishermen's Ass'ns v. NMFS*, 482 F. Supp. 2d 1248, 1253-55 (W.D. Wash. 2007) (holding an EIS violated NEPA for failing to adequately disclose and discuss dissenting scientific opinions from the agency's own experts); *Seattle Audubon Soc'y v. Moseley*, 798 F. Supp. 1473, 1482-83 (W.D. Wash. 1992) (finding an EIS violated NEPA for failing to provide a reasoned analysis and response to criticism from its own experts).

In addition, this court has indicated that an agency has a duty to disclose and respond to viewpoints that arise solely within the agency. In *WildWest Institute v. Bull*, this Court analyzed the responsible opposing view of one internal agency scientist to determine whether the Forest Service had violated NEPA. 547 F.3d 1162, 1171 (9th Cir. 2008). The Court affirmed that an agency has an independent duty to respond to reasonable opposing viewpoints apart from an agency's duty to respond to outside comments under 40 C.F.R. § 1503.4. *Id*. Although the Court ultimately concluded that the agency had adequately discussed and responded to the scientist's concerns in the FEIS by specifically citing his opinions and

modifying the project in response, the Court did not discount the scientist's responsible opposing views merely because he was internal to the Forest Service. *Id*. at 1171-72.

In *Greater Yellowstone Coalition v. Lewis*, this Court again suggested that an agency has a responsibility to respond to uncertainty from an internal agency reviewer, if that uncertainty rises to the level of "significant uncertainty." 628 F.3d 1143, 1151-52 (9th Cir. 2010). In that case, one member of a 24-person interdisciplinary review team raised a concern about a model early in the review process. *Id*. at 1147-48. In response, the interdisciplinary review team acknowledged the controversy, hired outside consultants to conduct additional studies, and ultimately concluded it was confident in the model. *Id*. The Court held that the agency's response to the expert's concern complied with NEPA, but the Court did not discount the viewpoint solely because it was "internal." *Id*. at 1151-52.

Requiring an agency to disclose internal opposing viewpoints is consistent with NEPA obligations. The disclosure requirements exist to ensure that NMFS carefully considers all environmental implications of its action and makes available to the public high quality information, accurate scientific analysis, and expert agency opinions. Otherwise, the NEPA process becomes an exercise in "form over substance." *W. Watersheds*, 632 F.3d at 491. There would be no sense in a rule

that requires the agency to disclose expert criticism outside the agency but sweep under the rug significant critiques from the foremost experts in the field simply because they are employed by the same agency. Here, the dissent came from, among others, NMFS's Steller sea lion coordinator and the head of NMML, experts eminently qualified to speak to Steller sea lion science, and went to the heart of the FEIS's conclusions. This is precisely the significant expert criticism NEPA envisions disclosing to the public.

B. Neither the FEIS nor the 2014 BiOp Adequately Disclosed or Responded to Significant Dissent from Sea Lion Experts.

NMFS and Intervenors' attempt to cast the expert disagreement as fitting into a category of general uncertainty over the causes of sea lion decline is unavailing. NMFS Br. at 52-53; Intervenor Br. at 60. To the contrary, here sea lion experts expressed specific concerns about the way that NMFS was using data in the 2014 BiOp to support its overlap findings and the agency's reliance on overlap to justify increased fishing in critical habitat. *See* Opening Br. at 52-53. The opposition expressed in this case is akin to the type of opposition this Court has determined an agency must meaningfully disclose and respond to in an EIS. This Court has found relevant uncertainty to exist when a reasonable opposing scientific viewpoint "directly challenge[s] the scientific basis upon which the Final EIS rests and which is central to it." *Ctr. for Biological Diversity v. Forest Service*, 349 F 3d. 1157, 1167 (9th Cir. 2003). Here, the myriad criticisms NMFS

received from its experts "directly challenged" the reliability of the overlap analysis, which was key to the manner in which NMFS evaluated the type and amount of environmental impacts the fishery would have on Steller sea lions, and was "central" to its choice of a preferred alternative.[13]

Contrary to NMFS's assertions, the FEIS did not disclose or discuss the experts' strong dissent regarding the use of the overlap analysis to weaken sea lion protections, but rather buried this important controversy. Reading the FEIS and 2014 BiOp, the public would have no way of knowing that scientists who specialized in Steller sea lion behavior and biology believed that the existing information did not support NMFS's conclusions about potential overlap or that those experts believed the overlap analysis could not sustain NMFS's final action to allow fishing in critical habitat. This Court need only review the pages NMFS cites, NMFS Br. at 53-54, to see that the agency never disclosed or discussed the overlap controversy. II-SER- 224-25 (FEIS) ("Areas of Controversy"); II-ER-29-33 (FEIS); II-SER-380-90, 398-404 (FEIS); II-SER-370, 363-65, 354-55, 368-69 (FEIS).

In order to disclose these expert concerns, NMFS needed to, at a minimum, acknowledge that experts in the field did not believe that the agency could rely on

[13] This case is, thus, unlike those where this Court has found that studies that support an agency or that do not directly challenge the agency's conclusions do not rise to a level meriting disclosure under NEPA. *Lands Council*, 537 F.3d at 1001-03; *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 659, 668 (9th Cir. 2009).

the overlap analysis to support a no-jeopardy conclusion. *See Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1172-73 (9th Cir. 2006) ("[T]he FEIS[] must respond explicitly and directly to conflicting views in order to satisfy NEPA's procedural requirements."), *abrogated on other grounds by Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008). NMFS did not make such a disclosure in the body of the FEIS, and none of the pages NMFS cites, NMFS Br. at 53-54, provide such an acknowledgement.[14] The general uncertainties that have always existed regarding nutritional stress are not relevant to the specific criticism NMFS failed to disclose. Moreover, NMFS's reference to a section of the FEIS that discusses controversy surrounding the earlier, 2010 BiOp, II-ER-29-33 (FEIS), merely serves to underscore the absence of a similar discussion regarding the responsible opposing views expressed in regards to the 2014 BiOp.

Ultimately, NMFS failed to meet its duty under NEPA to disclose and meaningfully respond to the reasonable opposing viewpoints of its Steller sea lion biologists, choosing instead to ignore and conceal those viewpoints. As a result, NMFS did not take the required "hard look" at its choice of alternatives and did not

[14] NMFS also cites pages from the response to comments section of the FEIS. II-SER-380-90, 398-404 (FEIS). Again, those responses merely consider the overarching controversies surrounding an evaluation of prey competition. Further, any disclosure and response must be contained in the body of the FEIS itself, not just in response to comments. *See, e.g.*, *Pac. Coast Fed'n of Fishermen's Ass'ns*, 482 F. Supp. 2d at 1255.

inform the public about the significant controversy that existed surrounding that choice. The FEIS is therefore arbitrary and must be vacated.

REMEDY

NMFS does not dispute that vacatur is the normal remedy. NMFS Br. at 56. The agency also concedes that "the ESA gives species conservation great weight in an equitable analysis." *Id*. at 57. While NMFS asks the court to remand without vacatur, it cites no extraordinary circumstances that would warrant departing from the normal rule under the APA. 5 U.S.C. § 706(2)(A). Intervenors argue that reinstating the prior rule would cause significant harms. Intervenor Br. at 62. But "courts do not have discretion to balance the parties' competing interests in ESA cases." *See Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1090 (2015) (citing *TVA*, 437 U.S. at 185); *see also TVA*, 437 U.S. at 193-94. And while vacatur is not required, neither NMFS nor Intervenors have demonstrated exceptional circumstances that overcome the factors weighing in favor of vacating the 2014 Final Rule and FEIS.

The jeopardy analysis contained in the 2010 BiOp is still valid, as NMFS has recognized, 79 Fed. Reg. 70,286, 70,296 (Nov. 25, 2014), and supports the fishing restrictions contained in the 2010 BiOp and Rule. This court has upheld the analysis and conclusions contained in the 2010 BiOp. Thus, vacatur of the

2014 Final Rule and reinstatement of the preceding 2010 Rule pursuant to the normal procedure is the appropriate relief here.

CONCLUSION

For the reasons stated above, Appellants respectfully request this Court to vacate the 2014 BiOp, Final Rule, and FEIS.

Respectfully submitted this 11th day of July, 2016.

s/ Rebecca Noblin
Rebecca Noblin
EARTHJUSTICE

Attorneys for Plaintiffs-Appellants Oceana, Inc. and Greenpeace, Inc.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 29-2(c)(2) and (3), 32-2 or 32-4[1] for Case Number 15-35940

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (check appropriate option):

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b). The brief is 8,246 words or 33 pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☒ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature of Attorney or Unrepresented Litigant: s/ Rebecca Noblin

Date: July 11, 2016

("s/" plus typed name is acceptable for electronically-filed documents)

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2016, I electronically filed the foregoing APPELLANTS' REPLY BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Respectfully submitted this 11th day of July, 2016.

s/ Rebecca Noblin

Rebecca Noblin
EARTHJUSTICE

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ADDENDUM

16 U.S.C.A. § 1536
§ 1536. Interagency cooperation

. . .

(b) Opinion of Secretary

. . .
(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a) (2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

. . . .

40 C.F.R. § 1503.4
§ 1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement.

Possible responses are to:

(1) Modify alternatives including the proposed action.

(2) Develop and evaluate alternatives not previously given serious consideration by the agency.

(3) Supplement, improve, or modify its analyses.

(4) Make factual corrections.

(5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (§ 1502.19). The entire document with a new cover sheet shall be filed as the final statement (§ 1506.9).