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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

OCEANA, INC. and GREENPEACE, INC.,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICE, et al.,

Defendants.

Case No. 3:14-cv-00253-TMB

**DEFENDANT-INTERVENORS' PRINCIPAL BRIEF ON SUMMARY JUDGMENT
AND CROSS-MOTION FOR SUMMARY JUDGMENT**

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Table of Acronyms and Abbreviations

This table contains a list of acronyms and abbreviations used in this brief.

ABC	Acceptable Biological Catch
ACDC	Adak Community Development Corporation
AIHCA	Aleutian Islands Habitat Conservation Area
AKSC	Alaska Seafood Cooperative
APA	Administrative Procedure Act
Area	Fishery Management Area
BiOp	Biological Opinion
BSAI	Bering Sea/Aleutian Islands
CIE	Center for Independent Experts
Council	North Pacific Fishery Management Council
DEIS	Draft Environmental Impact Statement
DPS	Distinct Population Segment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FMP	Fishery Management Plan
FWS	U.S. Fish and Wildlife Service
GFF	Groundfish Forum
GOA	Gulf of Alaska
IFR	Interim Final Rule
MSA	Magnuson-Stevens Fishery Conservation and Management Act
mt	metric tons

NEPA	National Environmental Policy Act
nm	nautical miles
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
RPA	Reasonable and Prudent Alternative
SSC	Science and Statistical Committee
SSL	Steller Sea Lion
TAC	Total Allowable Catch
WDPS	western Distinct Population Segment of Steller Sea Lions

Defendant-Intervenors Alaska Seafood Cooperative (“AKSC”), Adak Community Development Corporation (“ACDC”), Aleut Corporation, and the Groundfish Forum (“GFF”) (collectively, “Intervenors”) oppose the motion for summary judgment of plaintiffs Oceana, Inc. and Greenpeace, Inc. (collectively, “Oceana”) and cross-move for summary judgment of dismissal of all claims in Plaintiffs’ complaint pursuant to Federal Rule of Civil Procedure (“Fed. R. Civ. P.”) 56(a) and Local Rule 16.3.

I. INTRODUCTION

After completion of the Environmental Impact Statement (“EIS”) ordered by this Court in 2012 and a new consultation under section 7 of the Endangered Species Act (“ESA”), the National Marine Fisheries Service (“NMFS”) determined in 2014 that a few of the severe Aleutian Island fishing restrictions imposed in 2011 could be modified without jeopardizing Steller sea lions or adversely modifying their designated critical habitat. Oceana paints the agency’s action as a drastic departure from prior actions related to Steller sea lions. It was not. After re-examining its analyses in prior biological opinions (“BiOp”) in light of new information, as it is obligated to do under the ESA, NMFS concluded that some but not all of the fishing that was restricted in 2011 could resume without causing jeopardy to Steller sea lions or adverse modification of sea lion habitat.

The fundamental question raised by Oceana is whether NMFS made those determinations (i) using the correct legal standards, (ii) following the correct procedures, and (iii) based upon a rational analysis supported by the administrative record. The development of the 2014 fishing regulations did meet these basic requirements for lawful administrative action, and Oceana has not shown to the contrary. Defendants are entitled to summary judgment of dismissal for at least the following reasons:

First, NMFS' action is fundamentally precautionary because NMFS continues to assume that fishing *does* affect Steller sea lions, even though NMFS admits that despite decades of research there is no direct evidence of *any* effect, let alone a negative effect, on sea lions from the federal groundfish fisheries. The hypothesis that fisheries may indirectly cause chronic nutritional stress in the western distinct population segment ("WDPS") of Steller sea lions remains scientifically unproven and controversial, but nonetheless NMFS continues to limit fishing in order to avoid this theoretical possibility.

Second, the 2015 fishing regulations are not a radical departure from the 2010 measures. Contrary to Oceana's characterization, the 2015 fishing regulations implement modest incremental changes that allow moderately more fishing in more areas than was allowed in 2011, but significantly less fishing than was allowed prior to 2011. The vast majority of designated critical habitat in the Aleutians is still closed to fishing. The suite of management measures based on the 2014 biological opinion are comprised of the same type of harvest limits and time and area closures that NMFS has imposed under a series of biological opinions since 2000. NMFS has consistently sought to disperse the fisheries in time and space in order to avoid the possibility of localized depletion of sea lion prey species and hypothetical nutritional stress, and did not depart from that practice here. NMFS provided a reasoned explanation of how each of the changes to the mitigation measures is consistent with this purpose.

Third, although the courts upheld the validity of the 2010 biological opinion under the Administrative Procedure Act's ("APA") deferential standard of review, NMFS properly re-evaluated the analyses in the 2010 biological opinion in light of new information and in response to severe criticism by the independent scientific review that it commissioned, as well as an equally negative review commissioned by the States of Washington and Alaska. The seven

independent scientific reviewers, who were not bound by the deferential judicial review standard, unanimously concluded that the jeopardy and adverse modification conclusions of the 2010 biological opinion were not supported by sound science. Furthermore, NMFS did not abandon an established “up or down” test for jeopardy and adverse modification, as Oceana contends, but instead continued its prior course of evaluating the weight of equivocal, indirect, and limited evidence.

Fourth, the record shows that NMFS acknowledged and responded to competing internal and external views of how to respond to long-running scientific controversies regarding the causes of Steller sea lion declines, impediments to recovery, and the potential role of commercial fisheries. NMFS’ decisions with respect to the Aleutian Islands fisheries in this instance are adequately explained, and the agency’s decision-makers, who are ultimately responsible for balancing the varied scientific opinions within the agency, are entitled to deference.

NMFS articulated a rational basis for the changed fishing regulations, and its decision to do so was not arbitrary or capricious. The Court should dismiss Oceana’s complaint and enter summary judgment in favor of defendants.

II. FACTUAL BACKGROUND

A. Intervenorers represent Aleutian Island residents and participants in the federal groundfish fishery.

Intervenorers are four entities which represent: 1) the Native Aleut people who comprise the shareholders of Aleut Corporation; 2) Adak, the Alaskan community with the most significant dependency on the fisheries at issue in this proceeding; and 3) long-standing participants in the Bering Sea/Aleutian Islands (“BSAI”) federal groundfish fishery.

Aleut Corporation is the Alaska Native Corporation created under the Alaska Native Claims Settlement Act to represent the Native people of the Aleutian region. Aleut Corporation

holds a statutory allocation of pollock, and its shareholders' traditional fishing grounds overlap with Steller sea lion critical habitat. *See* Declaration of Ryuichi Rudy Tsukada (“Tsukada Decl.”). Aleut Corporation participated as amicus curiae in the predecessor case filed in this court, *State of Alaska, et al., v. Lubchenko, et al.*, No. 3:10-cv-00271-TMB (“2011 Sea Lion Litigation”).¹

ACDC is a nonprofit created to develop seafood harvesting and processing within Adak. Declaration of Rick Koso ¶¶ 2-3 (“Koso Decl.”). The commercial fishing industry is the sole remaining source of private sector income for Adak—it provides revenue from a seafood processing plant in Adak, with associated employment, and from the provision of services to groundfish fishing vessels in the area. *Id.* ¶ 4.

AKSC is a fishing cooperative with member vessels owned by the companies that hold fishing quota shares to participate as a cooperative in the non-pollock federal groundfish fisheries, referred to as the “Amendment 80” or “A80” sector. Declaration of Mark Fina ¶¶ 2, 4a (“Fina Decl.”). GFF is a trade association representing five companies and sixteen catcher-processors that are part of the Amendment 80 sector. *See* Declaration of Todd M. Loomis ¶¶ 2-3 (“Loomis Decl.”). In coordination with NMFS, GFF’s members have conducted research related to the effects of fishing on the Aleutian environment. *Id.* ¶ 5.

B. The Aleutian Islands, fishing, and Steller sea lions.

The North Pacific Ocean off the coast of Alaska is a vast, diverse, and complex ecosystem. It is home to Steller sea lions and to some of the most productive fisheries in the

¹ All of the parties to this litigation, with the exception of ACDC, participated in the prior case. *See* Notice of Related Case Under Local Rule 40.2, Dkt. 5. Intervenor also actively participated in the regulatory process triggered by the Court’s 2012 injunction that culminated in the agency action challenged here. Fina Decl. ¶ 6, Ex.1; Loomis Decl. ¶ 8, Ex.1; Koso Decl. ¶ 6, Exs.1-2; Tsukada Decl. ¶ 5.

world. Fisheries in this region are managed by NMFS as Fishery Management Areas (“Areas”) 541, 542, and 543. *See* Int. Ex. 30 at 10 (4004077)².

Steller sea lions (*Eumetopias jubatus*) occupy an expansive range that reaches from northern Japan, along the coast of Alaska, and south to California. Pl. Ex. 28 at 34-35 (2014 BiOp at 1027585-86). For purposes of the ESA, NMFS has divided the species into two distinct population segments, or “DPSs”: (1) the eastern DPS, which occupies the southern end of the range from California north to Southeast Alaska and was removed from the lists of threatened and endangered species in 2013; and (2) the western DPS (WDPS”), at issue here, which occupies all areas west of the eastern DPS to Russia and Japan and is listed as “endangered.” Pl. Ex. 28 at 35 (1027586). Designated critical habitat for the WDPS consists of all major rookeries and haulouts in Alaska west of 144°W longitude, including waters within 20 nautical miles (“nm”) of these sites, and three special aquatic foraging areas. *See* 58 Fed. Reg. 45,269, 45,278 (Aug. 27, 1993).

In 2010, NMFS concluded that “overall the [WDPS] is increasing and moving toward the number of animals required for downlisting.” Int. Ex. 11 at 43 (2010 BiOp at 1054501). As of 2014, NMFS estimated the WDPS sea lion population at about 79,300 animals, with about 52,200 of those located in the United States. Pl. Ex. 28 at 39 (2014 BiOp at 1027590). There is strong evidence that non-pup counts in the entire WDPS in Alaska increased at an average rate of 1.67 percent per year and pup counts increased 1.45 percent per year between 2000 and 2012. Pl. Ex. 28 at 35, 43 (2014 BiOp at 1027586, 1027594). However, there is an east-west population trend for both pups and non-pups, with increases to the east and steady declines in the

² Citations to Intervenor’s Exhibits are identified as “Int. Ex.” Citations to the plaintiffs’ exhibits are identified as “Pl. Ex.” References to the final EIS (“FEIS”), 2010 BiOp, and 2014 BiOp are noted.

far western Aleutians sub-area. Pl. Ex. 28 at 43 (2014 BiOp at 1027594). The western Aleutians is the only sub-region with a consistent negative population trend. Int. Ex. 30 at 17 (4004084). The causes of this sub-area decline continue to be unknown. Pl. Ex. 28 at 95 (2014 BiOp at 1027646). NMFS concluded in the 2010 BiOp that, if not for this area of decline, “the WDPS would be on the path to recovery.” Pl. Ex. 28 at 246 (2014 BiOp at 1027797).

Steller sea lions are generalist predators that consume a wide variety of fishes, octopus, squid, and other marine mammals and birds, depending on location and season. Pl. Ex. 28 at 81 (2014 BiOp at 1027632). Mackerel and salmon are the most common Steller sea lion prey items in the central and western Aleutians, whereas pollock is a less frequent prey item. Int. Ex. 11 at 50-52, 54 (2010 BiOp at 1054951-52, 1054954, 1055008); Pl. Ex. 28 at 81-83 (2014 BiOp at 1027632-34). Atka mackerel, Pacific cod, and pollock are abundant, and NMFS has determined that they are not overfished or approaching an overfished condition. Int. Ex. 23 at 51, 55, 65 (FEIS at 3160623 (mackerel), 3160639 (cod), 3160659 (pollock)).

The fisheries are sustainably and conservatively managed by the North Pacific Fishery Management Council (“Council”) and NMFS. Int. Ex. 11 at 23 (2010 BiOp at 1054188). Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”), the Council and NMFS set annual catch limits, known as “Total Allowable Catch” (“TAC”), for each stock of fish. In turn, TAC is derived from “Acceptable Biological Catch” (“ABC”), which is the annual sustainable harvest target that prevents overfishing. Int. Ex. 11 at 24 (2010 BiOp at 1054191).

The Atka mackerel fishery operates primarily with non-pelagic trawl gear and occurs only in the Aleutian Islands. Int. Ex. 23 at 51 (FEIS at 3160623). NMFS estimates that prior to 2011, this fishery removed 6-8% of the mackerel biomass (stock size) in the Aleutians. Int. Ex.

11 at 54 (2010 BiOp at 1055008). Atka mackerel biomass estimates show consistent cyclical trends, and fluctuate widely between NMFS' biennial surveys for its MSA stock assessments. Pl. Ex. 28 at 97, 220-21 (2014 BiOp at 1027648, 1027771-2). There was a declining abundance trend between the most recent peak in 2005 and 2014. Pl. Ex. 28 at 220 (1027771). Harvest levels are adjusted in accordance with estimated abundance. Int. Ex. 23 at 52-53 (FEIS at 3160624-25). Since June 1998, fishing regulations promulgated to protect Steller sea lions have dispersed the mackerel fishery both temporally and spatially. Int. Ex. 23 at 54 (FEIS at 3160628).

Pacific cod is caught by vessels using multiple gear types, including trawl, longline, pot, and jig, and the cod fisheries have historically occurred in the Bering Sea, GOA, and far western reaches of the Aleutians. Int. Ex. 23 at 55, 57-64 (FEIS at 3160639, 3160650-57). Pacific cod is widely distributed throughout the Aleutians, Bering Sea, and GOA. Cod makes up a very small portion (approximately 3%) of overall fish biomass in the Aleutians. Int. Ex. 23 at 55 (FEIS at 3160639). NMFS' best estimate of long-term average cod biomass distribution is 93% in the Bering Sea and 7% in the Aleutians. Int. Ex. 23 at 56 (FEIS at 3160641).

A large portion of the Aleutian Islands was closed to non-pelagic trawling, including trawling for cod and mackerel, in 2006. 71 Fed. Reg. 36,694 (June 28, 2006), revised 73 Fed. Reg. 9,035 (Feb. 19, 2008). The closures consist of the Aleutian Islands Habitat Conservation Area ("AIHCA"), a 279,114 nm closure, and a combined 5,329 nm closure of two other areas. These closures, in combination with closures for Steller sea lion protection measures, substantially limit the locations available for non-pelagic trawling in the Aleutians. Int. Ex. 23 at 49-50 (FEIS at 3160574, 3160576); 79 Fed. Reg. 37,486, 37,490 (July 1, 2014).

The Aleutians were closed to directed fishing for pollock in 1999. Int. Ex. 23 at 65 (FEIS at 3160659). In 2004, Congress allocated the entire Aleutian directed pollock fishery to the Aleut Corporation. Consolidated Appropriations Act of 2004, Pub. L. 108-199 (Jan. 23, 2004). The directed fishery was reopened for this allocation in areas outside of 20 nm of sea lion rookeries and haulouts in 2005. 69 Fed. Reg. 67,107 (Nov. 16, 2004); Int. Ex. 23 at 65-66 (FEIS at 3160659, 3160664). This limited potential fishing to two small areas with commercial concentrations of pollock within easy delivery distance of Adak Island. Int. Ex. 23 at 66 (FEIS at 3160664). In 2005, two vessels attempted to fish for pollock but failed to find commercially harvestable quantities outside of critical habitat. Int. Ex. 23 at 67 (FEIS at 3160665). The Aleut Corporation has thus far been unable to harvest a significant fraction of its allocation. 79 Fed. Reg. at 37,490.

C. Early ESA consultations lead to comprehensive fishing mitigation measures.

NMFS manages the mackerel, Pollock, and cod fisheries pursuant to a fishery management plan (“FMP”) developed under the MSA by the Council. 16 U.S.C. §§ 1852-53. If NMFS determines that a proposed action may adversely affect a species, it must undertake a formal consultation under ESA section 7, which results in a biological opinion stating NMFS’ opinion whether “the Federal action is likely to jeopardize the continued existence of [a] listed species or result in the destruction or adverse modification of critical habitat.” 50 C.F.R. § 402.02; *see also id.* § 402.14(a); 16 U.S.C. § 1536(b)(3)(A).³

From 1998 to 2001, NMFS prepared a series of biological opinions, or “BiOps,” regarding the effect of the pollock, mackerel, and cod fisheries on Steller sea lions. Each of

³ NMFS consults with itself. NMFS’ Sustainable Fisheries Division is the “action agency” and NMFS’ Protected Resource Division acts as the “expert agency” for ESA purposes. *Greenpeace v. NMFS*, 237 F. Supp. 2d 1181, 1185 n.2 (W.D. Wash. 2002).

those BiOps was the subject of litigation.⁴ Those BiOps established comprehensive Steller sea lion mitigation measures as “reasonable and prudent alternatives,” or “RPAs,” to avoid jeopardy to the WDPS and adverse modification to its critical habitat. Under ESA section 7, an RPA is an alternative action identified during consultation that NMFS determines “would avoid the likelihood” of jeopardy or adverse modification. 50 C.F.R. § 402.02; *see also id.* § 402.14(h)(3); 16 U.S.C. § 1536(b)(3)(A).

The RPA established by the 2000 and 2003 BiOps was in effect until December 31, 2010 (“the Pre-2011 Rule”). It combined a “global control rule” governing allowable harvest with a complex system of open and closed areas and no-transit zones (within three nm of rookeries) designed to disperse fishing spatially and temporally in order to avoid localized depletion of Steller sea lion prey species of fish that might cause nutritional stress.⁵ Int. Ex. 11 at 25-33 (2010 BiOp at 1054224-32). The Pre-2011 Rule closed substantial portions of critical habitat in the Aleutians to commercial fishing: 57% was closed to mackerel fishing; 35% to cod longline/pot fishing; and 23% to cod trawling. Int. Ex. 11 at 29-30 (2010 BiOp at 1054228-29).

In 2006, NMFS began a new section 7 consultation at the request of the Council in order “to evaluate the effects of current Federal fisheries management on listed species because of information gained and management actions taken since previous consultations.” 75 Fed. Reg. 77,535, 77,536 (Dec. 13, 2010). That new information was considerable since millions of dollars in federal funding was spent between 2003 and 2008 on Steller sea lion research conducted by

⁴ *See, e.g., Greenpeace v. NMFS*, 55 F. Supp. 2d 1248, 1252-53 (W.D. Wash. 1999); *Greenpeace*, 237 F. Supp. 2d at 1183-84; *Greenpeace v. NMFS*, 106 F. Supp. 2d 1066, 1067-68 (W.D. Wash. 2000); *Greenpeace v. NMFS*, 198 F.R.D. 540, 541-42 (W.D. Wash. 2000); *Greenpeace v. NMFS*, 80 F. Supp. 2d 1137, 1139 (W.D. Wash. 2000).

⁵ The global control rule reduces the catch for a species when its spawning biomass is estimated to be less than 40% of the projected unfished biomass. Int. Ex. 11 at 25 (2010 BiOp at 1054224).

agency and independent scientists. Int. Ex. 23 at 43 (FEIS at 3160431) (\$241 million between FY 1992-2011).

In August 2010, NMFS released a draft BiOp and an incomplete draft environmental assessment. It released the final BiOp on December 8, 2010, concluding that the mackerel and cod fisheries in the Aleutians might impact the foraging success of Steller sea lions, and might result in “chronic nutritional stress” and reduced birth rates that explained the population declines in the western Aleutians. Int. Ex. 11 at 46 (2010 BiOp at 1054523).

NMFS’ conclusion in 2010 depended on a series of theoretical causal connections rife with uncertainty. The jeopardy and adverse modification determination was based on an evaluation of the 14 out of 17 possible indicators of nutritional stress for which NMFS had data. Int. Ex. 11 at 53 (2010 BiOp at 1054955). Of the 14 indicators, 13 showed a *negative relationship* (*i.e.*, they did not indicate the presence of nutritional stress): 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. Int. Ex. 11 at 53 (2010 BiOp at 1054955). Just one indicator, natality, showed a positive relationship. *See* Int. Ex. 11 at 53 (2010 BiOp at 1054955). Yet that indicator was not based on actual natality data because there was no natality data available from the western Aleutians. Int. Ex. 11 at 41-42 (2010 BiOp at 1054452-53). Due to this lack of data, NMFS instead relied upon data from the Gulf of Alaska (“GOA”) regarding the ratio of Steller sea lion pups to non-pups as “a proxy of sorts for natality.” Int. Ex. 11 at 34-35 (2010 BiOp at 1054248-49); *see* Int. Ex. 11 at 42 (2010 BiOp at 1054453).

NMFS based its 2010 jeopardy finding on the *potential* for prey competition and its inability to eliminate the *possibility* of a causal connection between fishing and reduced natality:

[W]hile fisheries *cannot be unequivocally shown to be a causative factor* in continued Steller sea lion declines in the western portion of the WDPS in Alaska, analysis of available data indicate that an adverse relationship between Steller sea lions and the commercial fisheries *may exist* in the western Aleutian Islands subregion and portions of the central Aleutian Islands subregion

Int. Ex. 11 at 45 (2010 BiOp at 1054509) (emphasis added); *see also* Int. Ex. 11 at 45 (2010 BiOp at 1054509) (noting that: “competition between Steller sea lions and the commercial fisheries *may* compromise the availability of [sea lion] food resources”; “[f]ishery removals of prey in the western and central Aleutian Islands subregion *may be* adversely affecting the western DPS”; and “[t]he *possibility* that this interaction *may* be one of several primary causes of the observed declines in non-pup counts cannot be eliminated” (emphases added)).

D. The 2010 Interim Final Rule closes vast areas of the Aleutians to fishing.

In December 2010, NMFS issued an interim final rule (“IFR”) which implemented a new RPA based on the 2010 BiOp. 75 Fed. Reg. 77,535, 77,536 (Dec. 13, 2010). Among other measures, the IFR: (1) closed mackerel and cod fishing in all of Area 543 (the western Aleutians), including 124,000 square miles outside critical habitat; (2) prohibited nearly all directed fishing for mackerel by federally licensed vessels in waters 0 to 20 nm around SSL sites in Area 542 (the central Aleutians); (3) created new limitations on the participation in, total catch of, and amount and seasonal apportionment of the mackerel fishery within critical habitat in Area 542; and (4) established substantially more restrictive time and area closures for the cod fishery both inside and outside of critical habitat in Areas 541 (the eastern Aleutians) and 542. *See* Int. Ex. 11 at 48-49 (2010 BiOp at 1054870, 1054872). Restrictions in the Aleutian pollock fishery that effectively led to almost no directed pollock harvest remained unchanged.

These measures had substantial economic and social impacts, including annual losses of approximately \$44 million to \$61 million in fishing revenue. Int. Ex. 24 at 54-55 (FEIS at 3162334-35); Int. Ex. 36 at 3 (5001588). *See also* Ex. 24 at 27-28, 29-30, 31-33 (FEIS at 3161831-32, 3161840-41, 3161851-53). Revenue for Amendment 80 participants in the mackerel fishery was cut in half. Int. Ex. 36 at 10 (5001595). NMFS estimates that had the Aleut Corporation been able to harvest its pollock allocation during this period, the revenues would have been approximately \$9 to 23 million. Ex. 24 at 34 (FEIS at 3161856).

Adak, which is comprised of 81.9% minority residents, was the community hardest hit by the IFR. Int. Ex. 31 at 2-3 (5002432-33); Int. Ex. 23 at 40 (FEIS at 3160426); Int. Ex. 24 at 51-52 (FEIS at 3162136, 3162161). As a result of the IFR, port visits to Adak by the groundfish fleet were substantially reduced, with substantial negative impacts on this small and remote community. For example, the average number of cod catcher vessels visiting Adak declined from about 118 a year from 2004 through 2010, to 11 in 2011. Int. Ex. 24 at 35-36 (FEIS at 3161996-97). Fuel sales at Adak plummeted to less than 50% of pre-IFR sales, causing economic hardship for the entire community as fixed costs for fuel were spread across fewer gallons and fuel prices increased. Int. Ex. 31 at 2 (5002432).

In December 2010 and January 2011, pursuant to the MSA, fishing participants and the State of Alaska filed the 2011 Sea Lion Litigation challenging the 2010 BiOp, the IFR, and the procedures followed by NMFS under the MSA, APA, and NEPA. This Court held that NMFS did not violate the ESA, MSA, or APA, but did violate NEPA by failing to prepare an EIS. 2011 Steller Sea Lion Litigation, Dkt. 130. In its remedy order, the Court entered an injunction directing NMFS to prepare an EIS, but leaving the BiOp and the IFR in effect during preparation of the EIS. 2011 Steller Sea Lion Litigation, Dkt. 142. The Court's decision was upheld by the

Ninth Circuit. *Alaska v. Lubchenko*, 723 F.3d 1043 (9th Cir. 2013).

E. Two independent scientific reviews find that the 2010 Biological Opinion’s jeopardy conclusion was not supported by science.

1. Scientific review by Center for Independent Experts commissioned by NMFS.

In 2012, while the Ninth Circuit appeal was pending, NMFS commissioned an external independent scientific peer review of the 2010 BiOp through the Center for Independent Experts (“CIE”).⁶ *See* 77 Fed. Reg. 34,350 (June 11, 2012). The three expert reviewers were highly critical of the BiOp—citing in particular its lack of scientific support, its internal inconsistencies, and its apparent predetermined outcome. Int. Ex. 25 at 2-3 (4001961-2); Int. Ex. 26 at 2 (4002023); Int. Ex. 27 at 3 (4002091).

Among other tasks, NMFS specifically asked the reviewers “to reevaluate the scientific basis for the conclusions of the final 2010 BiOp, that fisheries are causing nutritional stress in Steller sea lions, which in turn is adversely impacting the survival and recovery of the WPDS of the Steller sea lion.” Int. Ex. 26 at 58-59 (4002079-80). The reviewers were directed to “evaluate and comment on the strength of the relationship between fishery removals and recovery of the WDPS.” Int. Ex. 26 at 59 (4002080). The independent reviewers, in three separate reports issued on September 5, 2012, each concluded that the jeopardy and adverse modification conclusions of the 2010 BiOp as to the conduct of the groundfish fisheries under the Pre-2011 Rule were not supported by science. Int. Ex. 25 at 2 (4001961); Int. Ex. 26 at 2

⁶ The CIE provides independent peer reviews of NMFS science supporting management decisions, and adheres to a strict conflict of interest policy. Pl. Ex. 28 at 10 (2014 BiOp at 1027561). In 1998, in order to strengthen its Science Quality Assurance Program, NOAA formalized the process of independent peer reviews of its science. The CIE first consisted of a pool of qualified scientists who reviewed NOAA stock assessments and was later expanded to include reviews of matters pertaining to endangered species, marine mammals and other coastal and marine management issues. *See* The Center for Independent Experts, <http://ciereviews.org/bkg.php> (last visited May 14, 2015).

(4002023); Int. Ex. 27 at 3 (4002091); *see also* Pl. Ex. 28 at 8-14 (2014 BiOp at 1027559-65); Int. Ex. 3 at 1-10 (1007861-70).

The findings of one reviewer, D. W. Bowen (Bedford Institute of Oceanography Department of Fisheries and Oceans, Canada), are representative of the reviews' negative results:

Overall, I conclude that there is no evidence for the hypothesized indirect effects of the identified fisheries on the availability of food to SSL. As this is the only hypothesized effect on SSL, there is no reason to expect that the RPAs proposed for management areas 541-543, which will reduce or eliminate fisheries for Atka mackerel and Pacific cod, would have positive effects on SSL population trends in those areas.

Int. Ex. 26 at 8 (4002029).

Expounding on the failings of the 2010 BiOp's methodology and reasoning, Dr. Bowen explained why the BiOp "fails to provide reasonable support for the conclusion that continued fishing" for pollock, cod and mackerel in the BSAI and the GOA is "likely to jeopardize the survival or adversely modify critical habitat (JAM) of the western population of SSL." Int. Ex. 26 at 2 (4002023). Noting that there is "no direct evidence that by removing fish, these fisheries compete with SSL in the central and western Aleutians and elsewhere," he observed that "[h]arvest rates for Atka mackerel are too low and the fraction of the Pacific cod stock in these areas is too small for a fishery on these species to result in nutritional stress." Int. Ex. 26 at 2 (4002023). The only indirect evidence in the BiOp to support the effects of fishing on SSL "is the suggestion of reduced natality, based on pup to non-pup ratios." Int. Ex. 26 at 2 (4002023). Dr. Bowen pointed out that it is "not known if these ratios are a reliable proxy for natality." Int. Ex. 26 at 2 (4002023). He concluded, "[r]educed natality is speculated to result from nutritional stress cause[d] by the removal of groundfish by fishing. In my opinion, the weigh-of-evidence argument for JAM rests on speculation of what is thought possible rather than what is supported by scientific evidence." Int. Ex. 26 at 2 (4002023); *see also* Int. Ex. 26 at 5 (4002026) (only

indicator of nutritional stress is inferred reduced natality); Int. Ex. 26 at 3 (4002024) (pup/nonpup ratios not indicator of natality).

Dr. Brent Stewart (Hubbs-Sea World Research Institute, U.S.) observed that “[o]pinions, sometimes presented as beliefs, routinely overwhelm the presentation of data in the main text and are often not supported by the generally scant data.” Ex. 25 at 8 (4001967). He concluded that “the hypothesis that the commercial groundfish fisheries . . . have caused, are causing or may cause . . . nutritional stress . . . remains unsupported” and consequently the RPA was not necessary. Ex. 25 at 13-14 (4001972-73). Dr. Stewart flatly stated that the pup/non-pup ratios used to find reduced sea lion natality in the 2010 BiOp were not a valid proxy for natality. Int. Ex. 25 at 14 (4001973).

Dr. Kevin Stokes (Consultant, New Zealand) echoed the other two reviewers’ criticism of the “evidence” for the existence of competition with fisheries and nutritional stress. Dr. Stokes determined that the evidence for a change in natality as the basis population declines in the WDPS was “weak.” Ex. 27 at 19-20 (4002107-08). Moreover, “[t]he nutritional stress hypothesis depends on needing to explain that weakly evidenced trend and is itself only weakly supported” with an absence of most evidence that would support it, such as direct estimates of changes in weaning age and near-term pregnancy rates by area. Ex. 27 at 19-20 (4002107-08). “The primary evidence used to support the hypothesis is in fact the putative trend in natality.” Ex. 27 at 19 (4002107). He continued:

Even accepting nutritional stress, the evidence for fishery-induced nutritional stress is weak. Considering nutritional stress as a threat the measures of exposure, necessary to translate the threat in to a risk, are weak. The exposure is considered in terms of i) overlap between SSL and fisheries, through poorly justified and incompletely measured indicators, and ii) the extent of fishing, through removal and rate measures on a scale wider than the likely scale of importance.

Ex. 27 at 19-20 (4002107-08).

2. Scientific review commissioned by States of Washington and Alaska.

The negative findings of the CIE reviewers reaffirmed those of the independent scientific review of the 2010 BiOp convened by the States of Washington and Alaska in 2011. Int. Ex. 32 at 1-128 (6001518-645). The four-member panel, comprised of internationally-recognized marine mammal and fisheries scientists and one economist, also found no scientific support for the 2010 BiOp's jeopardy and adverse modification conclusions. The States' reviewers bluntly stated that "[t]he conclusions in the [2010] BiOp regarding the finding of jeopardy and its posited cause (nutritional stress from food competition with fisheries) do not follow logically from scientific, economic, and social information presented in the BiOp and attendant documents." Int. Ex. 32 at 112 (6001629). Moreover, the panel's review of the scientific evidence "show[ed] that RPAs based on restricting fisheries are incapable of causing recovery of sea lion populations." Int. Ex. 32 at 114 (6001631).

III. PROCEDURAL BACKGROUND

A. NMFS prepares an EIS in accordance with the Court's 2012 injunction which led to a new ESA consultation.

In accordance with the Court's 2012 injunction in the 2011 Sea Lion Litigation, NMFS began preparation of an EIS. As with any other rulemaking involving the management of the BSAI federal fisheries, the proposed action and alternatives were developed in coordination with the Council. 79 Fed. Reg. 70,286, 70,287 (Nov. 25, 2014). Under the MSA, the Council proposes FMPs, amendments, and implementing regulations for the management of the federal fisheries off Alaska. 16 U.S.C. §§ 1852-53. The Council prepared the FMP for Groundfish of the BSAI Management Area (the "Groundfish FMP"). Section 3.5.3 of the Groundfish FMP provides that regulations implementing the FMP may include special groundfish management measures intended to afford species of marine mammals additional protection other than that

provided by other legislation. 75 Fed. Reg. at 77,537; 79 Fed. Reg. at 37,490.

The Secretary of Commerce, acting through NMFS, reviews the Council's proposals to determine whether they are consistent with the MSA "and other applicable law" and then publishes them for public comment. 16 U.S.C. § 1854(b)(1); *id.* § 1852(h)(1). At the end of the public comment period, the Secretary may approve or disapprove, in whole or in part, the Council's proposal, *id.* § 1854(a)(3), but may not "make changes to the proposals or take action based on a policy disagreement with the Councils' recommendations." *Greenpeace*, 55 F. Supp. 2d at 1255.

The decision analyzed in the EIS was whether to maintain the sea lion mitigation measures in the Aleutian Islands fisheries implemented by the 2010 IFR, or to implement a new suite of measures. 79 Fed. Reg. at 70,287. The Council and NMFS considered six alternatives in the draft EIS ("DEIS"), ranging from retaining the 2010 IFR (Alternative 1) to the reinstatement of the Pre-2010 Rule with minor modifications (Alternative 4). *Id.* Alternatives 2, 3, and 5 provided more fishing opportunities than Alternative 1, but included more protection measures than Alternative 4. *Id.* Alternative 5 also included authorization for certain fishery research on groundfish abundance and movement of mackerel in the BSAI. *Id.* Alternative 6, which was added to the FEIS in response to public comment, would have closed Areas 541-543 to all fishing. 79 Fed. Reg. at 37,491-92.

The Council recommended Alternative 5 as its preferred alternative, based on "the analysis in the draft EIS, public comments, advice from its Steller Sea Lion Mitigation Committee, input from the Council's Advisory Panel and Scientific and Statistical Committee, and the best available scientific information." 79 Fed. Reg. at 70,287; Int. Ex. 28 at 1-2 (4003802-03). The Council and its expert committees reviewed and fully considered the two

independent scientific reviews. 79 Fed. Reg. at 70,287. Furthermore, the Council understood that a preferred alternative could only be implemented if NMFS could insure that the action was not likely to jeopardize Steller sea lions or adversely modify their designated critical habitat. 79 Fed. Reg. at 37,491; 79 Fed. Reg. at 70,287.

In May 2013, NMFS reinitiated consultation in light of new information and the changes in the Council's proposed action compared to continuation of the 2010 IFR. Pl. Ex. 28 at 6 (2014 BiOp. at 1027557); Int. Ex. 6 at 1 (1025821). The ESA mandates a new consultation in circumstances where new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not previously considered, or the action is modified in a manner causing effects to listed species or critical habitat not previously considered. 50 C.F.R. § 402.16. NMFS' Protected Resources Division prepared a new project-level biological opinion, challenged in this case, on the proposed modifications to the Aleutian mackerel, cod and pollock fisheries. Int. Ex. 6 at 1 (1025821).

B. The 2014 Biological Opinion re-examines the analyses in the 2010 Biological Opinion

In the 2014 BiOp, NMFS considered both the external scientific reviews and several new studies on Steller sea lion biology, ecology, and fishery data that it prepared in response to the reviewers' recommendations. Int. Ex. 2 at 1 (1006222); Pl. Ex. 28 at 6, 243 (2014 BiOp at 1027557, 1027794); Int. Ex. 1 at 1-2 (1003000-01); Int. Ex. 12 at 1-2 (2010409-10). That new information included: updated Steller sea lion trends with new confidence intervals; vastly improved information on movement of sea lions based on satellite telemetry from tracking collars; an evaluation of WDPS extinction risk; data on juvenile survival; information on contaminants; a killer whale predation study; a decadal comparison of sea lion diet data; telemetry data from more sea lions obtained since 2010; a fishery correlation simulation analysis;

and Atka mackerel tagging research estimating local abundance and movement. Int. Ex. 30 at 1-71 (4004068-138); Int. Ex. 6 at 2 (1025822); Int. Ex. 4 at 1-16 (1013073-88).

In response to the independent reviewers' criticism of the use of pup to non-pup ratios as a proxy for natality in the western Aleutians, NMFS performed a new simulation experiment to test the validity of their use. Int. Ex. 29 at 1 (4003941). The study concluded that pup to non-pup ratios are an imperfect and sometimes erroneous proxy for changes in natality, and its authors cautioned against direct comparisons as was done in the 2010 BiOp. Pl. Ex. 28 at 58-60 (2014 BiOp at 1027609-611). Thus, "NMFS no longer relies on pup to non-pup ratios as a proxy to infer natality in the absence of data on the confounding variables." Pl. Ex. 28 at 59-60 (1027610-11). This is significant because the purported decline in natality in the western Aleutians based on pup to non-pup ratios was the only one of the 14 factors evaluated by NMFS in the 2010 BiOp which showed a positive relationship to nutritional stress. *See supra* section II. C.; *compare* 2011 Steller Sea Lion Litigation, Dkt. 130 at 11.

With the complete absence of any support for the 14 indicators of nutritional stress that it reviewed in the 2010 BiOp, NMFS found in the 2014 BiOp that the "prevalence of nutritional stress in the WDPS today is unknown" and that "[m]ost of the available evidence is either counter to or non-supportive of a nutritional stress mechanism" to explain WDPS population dynamics. Pl. Ex. 28 at 77 (2014 BiOp at 1027628). NMFS concluded that if nutritional stress is acting on the WDPS, "it is likely due to a localized limitation of important prey resources or low diet diversity or a combination of the two." Pl. Ex. 28 at 77 (2014 BiOp at 1027628).

With the 2014 BiOp, NMFS returned to the "zonal approach" to protecting critical habitat established by biological opinions in 2000, 2001 and 2003 that it had abandoned in the 2010 BiOp. Based on its analysis of new and more extensive telemetry data showing that sea lions

spend most of their time inside critical habitat, NMFS determined that it was less concerned about potential interactions between fisheries and sea lions in the portion of critical habitat inside of 10 nm from sea lion sites and even less with activities outside of 20 nm. Int. Ex. 30 at 33 (4004100); Pl. Ex. 28 at 134-43 (2014 BiOp at 1027685-94). NMFS explained that it had revised its opinion based on new telemetry analyses from 51 animals which, combined with data from 17 juveniles tagged from 2002-2004, showed that over 90 percent of winter and summer juvenile and summer adult female locations were within 20 nm of listed rookeries and haulouts, and 80.6 percent of winter adult female locations were within 20 nm.⁷ 79 Fed. Reg. at 37,493; Int. Ex. 30 at 30-31 (4004097-98); Pl. Ex. 28 at 134-43 (2014 BiOp at 1027685-94). From this data, NMFS inferred that habitat from 0-10 nm is more important than 10-20 nm for all ages and seasons, an inference consistent with its earlier opinions. Int. Ex. 30 at 32 (4004099); Pl. Ex. 28 at 142-43 (2014 BiOp at 1027693-94); 79 Fed. Reg. at 37,493.

In general, NMFS employed a “worst case scenario” look at the potential impacts from the proposed changes in fishing opportunities, and concluded that even then the fisheries were sufficiently dispersed both temporally and spatially by the 2015 Rule to avoid jeopardy and adverse modification. *See* Pl. Ex. 28 at 241-50 (2014 BiOp at 1027792-801). The agency ultimately decided that the recalibration of fishing restrictions in the 2015 Rule would simply not have an effect on sea lions one way or another, even with respect to the only declining subpopulation:

Based on our assessment of the available data, NMFS concludes that a decline in numbers of the western Aleutian Islands sub-population is likely to continue for unknown reasons, even apart from any changes in the fisheries, and that the proposed measures are

⁷ In contrast, in 2010 NMFS relied on telemetry data from 3 juvenile animals to close all of Area 543 to fishing. Int. Ex. 11 at 39 (2010 BiOp at 1054388); Pl. Ex. 28 at 139 (2014 BiOp at 1027690).

unlikely to yield population level effects that would appreciably change the likelihood of survival or recovery of the western Aleutian Islands sub-population.

Pl. Ex. 28 at 247 (2014 BiOp at 1027798). However, NMFS continued to restrict fishing in the western Aleutians even though it recognized that there may be other factors affecting this subpopulation.

C. The 2015 fishing regulations continue to restrict fishing in time, place, and amount of harvest.

Alternative 5, implemented by the 2015 Rule, allows more fishing than the IFR, but is by no means a return to the management of the fisheries prior to the IFR. The 2015 Rule again consists of a suite of management measures for the mackerel, cod, and pollock fisheries that continue area closures, harvest limits, seasonal apportionment of harvest limits, and limitations on catch in specific areas in order to mitigate the potential for adverse effects on Steller sea lion prey. *See* Pl. Ex. 28 at 131 (2014 BiOp at 1027682) (Table 4-16, Fishery management measures from 1990-2013); *see also* Int. Ex. 16 at 1-2 (3058672-73). The Rule also continues the established global control rules for the mackerel, cod, and pollock fisheries.⁸

The 2015 Rule perpetuates the closure of thousands of square miles of critical habitat to fishing:⁹

- 90% of critical habitat in the Aleutians is closed to mackerel fishing, resulting in 8% more area open for fishing than under the IFR. 79 Fed. Reg. at 70,288.
- 22% of critical habitat in the Aleutians is closed to cod fishing with non-trawl

⁸ None of these fisheries have ever been closed as a result of the global control rule because the biomass has never fallen to the point that would close directed fishing since the rule was adopted in 2003. 79 Fed. Reg. at 37,492.

⁹ There are approximately 100,286 square kilometers of Steller sea lion critical habitat in the action area. Pl. Ex. 28 at 143 (2014 BiOp at 1027694).

gear, resulting in 23% more open area. *Id.* at 70,289.

- 52% of critical habitat in the Aleutians is closed to cod fishing with trawl gear, resulting in 23% more open area. *Id.*
- 65% of critical habitat is closed to pollock fishing, resulting in 35% more open area. *Id.*

In aggregate across each of the fisheries, the least amount of critical habitat area is open to the fisheries in Area 543, followed by Area 542, with the highest amount of critical habitat open to the fisheries in Area 541, where sea lions are stable and appear to be increasing. Pl. Ex. 28 at 152-55, 248 (2014 BiOp at 1027703-06, 1027799). The 2015 Rule mitigates, but does not eliminate, the economic losses caused by the IFR. *See, e.g.*, Int. Ex. 24 at 37-50 (FEIS at 3162025-38); Int. Ex. 23 at 31-44 (FEIS at 3160415-22, 3160425-28). Int. Ex. 36 at 3, 10 (5001588, 5001595) (estimating that 2015 Rule will restore a little less than half of revenue losses to the Amendment 80 sector); Int. Ex. 31 at 3 (5002433) (opportunities to fish and provide support services, but Adak “teetering on the edge of existence”).

The 2015 Rule makes targeted adjustments to the IFR measures based on the new information and analyses, but “maintains a careful approach to fishing for Steller sea lion prey species in critical habitat by spatially and temporally dispersing catch to prevent localized depletion.” 79 Fed. Reg. at 37,492. In each case where an IFR measure was modified or rescinded, NMFS studied its potential effects in the 2014 BiOp and EIS and provided a specific explanation of its reasoning for the change. *See, e.g.*, 79 Fed. Reg. at 37,492-501 (preamble to proposed rule); Int. Ex. 30 at 1-71 (4004068-138) (NMFS presentation to Council of the findings of the 2014 BiOp); Pl. Ex. 25 at 11-12 (2000505-6); Pl. Ex. 28 at 242-6 (2014 BiOp at 1027793-7).

1. Atka mackerel measures

The 2015 Rule partially reverses the most drastic measure of the IFR—the complete closure of Area 543 to directed fishing for mackerel and cod—but still closes the areas believed to be most heavily used by sea lions. In the 2014 BiOp, NMFS concluded that closures to groundfish fishing are not needed outside of designated sea lion critical habitat in Area 543. Int. Ex. 30 at 52 (4004119); Pl. Ex. 28 at 134-43 (2014 BiOp at 1027685-94). However, due to the patchy distribution of mackerel and potential for localized depletion, NMFS dispersed the catch in time and space and limited fishing inside critical habitat. For example, allowable catch is limited to 65% of ABC in Area 543 and only 60% of that can be harvested in the limited areas of critical habitat that are open to fishing. Pl. Ex. 28 at 227 (2014 BiOp at 1027778). The majority of critical habitat in the Aleutians remains closed to mackerel fishing: 76% in Area 543; 92% in Area 542, and 97% in Area 541. Int. Ex. 30 at 53 (4004120).

Directed fishing for mackerel with trawl gear is prohibited from 0-3 nm from haulouts and from 0-10 nm from rookeries in Areas 543 and 542. 79 Fed. Reg. at 37,493. In addition, the 2015 Rule establishes new monitoring requirements and two new harvest limits for mackerel in Area 543. *Id.* The first provides limited fishing opportunity inside and outside critical habitat that NMFS estimates will result in fishing at a level similar to the IFR limit that applied only inside critical habitat. *Id.* The second continues the IFR's seasonal apportionment of mackerel harvest, but modifies it to apply to Area 543 and the western portion of Area 542 in order to further spatially and temporally disperse catch in critical habitat. *Id.*; *see also* Int. Ex. 30 at 11-12 (4004078-79).

In Area 542, critical habitat is closed to mackerel fishing between 178° E and 180°, which increases protection at 5 rookeries and 6 haulouts relative to the IFR. Int. Ex. 30 at 12 (4004079). The IFR's closures for mackerel fishing with trawl gear in Area 541 are continued,

except for a portion of critical habitat around Seguam Island which was opened to fishing because new research showed that there is very little exchange of Atka mackerel biomass inside and outside of the 0-12 nm zone of critical habitat. 79 Fed. Reg. at 37,497.

2. Pacific cod measures

Fishing for cod in the Aleutians reopened under the 2015 Rule, but significantly less cod will be caught by all gear types in the Aleutians because of an unrelated regulatory change that greatly reduced the TAC for the Aleutian Islands by splitting the cod TAC between the Aleutians and the Bering Sea. 79 Fed. Reg. at 37,494; *see* Int. Ex. 23 at 56 (FEIS at 3160641) (on average 93% of cod biomass in Bering Sea). As a result, the Pacific cod harvest in the Aleutians is predicted to be reduced by 72% in 2014 and 2015 relative to the annual average harvest from 2004 through 2010. Pl. Ex. 28 at 245 (2014 BiOp at 1027796). The Aleutian cod fishery is subject to a new variable annual harvest limit based on abundance. 79 Fed. Reg. at 37,493-94.

Because of the new TAC split, NMFS estimates that the actual amount of cod that will be harvested in Area 543 will be not much more than that caught under the IFR when directed fishing was closed. Therefore it concluded that the Area 543 fishery is not likely to result in localized depletion. *Id.*; *see also* Int. Ex. 30 at 62 (4004129). Nonetheless, the 2015 Rule maintains substantial area closures for the cod fishery in Area 543. Directed fishing for cod with trawl gear is prohibited from 0-3 nm from haulouts and from 0-10 nm from rookeries in Area 543. 79 Fed. Reg. at 37,493-94. When combined with the existing AIHCA closures, 76% of critical habitat in Area 543 is closed to trawling for cod. *Id.*

Given the large reduction in overall Aleutian cod TAC and the small amount of harvest taken historically in Area 542, NMFS also determined that the trawl and non-trawl fisheries are not likely to locally deplete cod stocks in Area 542. Int. Ex. 30 at 63 (4004130).

NMFS predicted that the majority of the limited Aleutian Islands TAC would be taken by trawl gear in Area 541; however those harvests were expected to be less than 50% of the harvests during 2007-2010 because of the TAC split. Int. Ex. 30 at 64 (4004131). NMFS still imposed trawl closures in Area 541 from 0-10 nm from rookeries and 0-3 nm from haulouts, but removed the IFR's seasonal closures from 0-20 nm from all Steller sea lion rookeries and haulouts. 79 Fed. Reg. at 37,499. New area closures were established for non-trawl gear in Area 541. *Id.* at 37,498. The 2015 Rule allows limited directed fishing in critical habitat using hook-and-line gear and pots, based on NMFS' conclusion that the small quantities taken and slower rates of fishing made it less likely that this type of fishing would result in localized depletion. *Id.* at 37,494. Sea lions appear to be increasing in Area 541 and were increasing when the IFR was implemented; consequently, NMFS concluded that the allowed amount of fishing by the trawl and non-trawl fisheries is not likely to limit sea lion recovery or adversely modify critical habitat. Int. Ex. 30 at 64 (4004131).

In summary, NMFS determined that the cod fisheries are not likely to reduce the numbers or reproduction of the western or central Aleutian subpopulations of sea lions based primarily on "the substantial projected reduction in harvest in Areas 543 and 542 and the projected reduction in harvest in Area 541 relative to the Pacific cod fishery analyzed in the 2010 FMP BiOp." Pl. Ex. 28 at 245 (2014 BiOp at 1027796).

3. Pollock measures

The 2015 Rule permits a "very limited" directed pollock fishery in the Aleutians to provide the opportunity for the Aleut Corporation to harvest its Congressional allocation. 79 Fed. Reg. at 37,490, 37,494. The statutory maximum harvest allowed is 19,000 mt. or ABC, whichever is lower. Int. Ex. 23 at 65 (FEIS at 3160659); 79 Fed. Reg. at 37,490; 50 C.F.R. § 679.20. In contrast, the Bering Sea pollock TAC in 2008 was 1 million mt. *See* Int. Ex. 11 at 36

(2010 BiOp at 1054341). By regulation, fifty percent of the Aleut Corporation's pollock must be harvested by vessels less than 60 feet in length, which harvest fish at a slower rate than larger vessels. 50 C.F.R. § 679.20(a)(5)(iii)(B)(5); Pl. Ex. 28 at 245 (2014 BiOp at 1027796).

Pollock in the Aleutians occurs primarily inside critical habitat. 79 Fed. Reg. at 37,490. Prior to the 2014 BiOp, no ESA consultation had been undertaken on measures to allow a commercial Aleutian Island pollock fishery since the Congressional allocation in 2004. The 2010 BiOp was silent on whether a pollock fishery in the Aleutians would have negative impacts on sea lion survival and recovery. The 2014 BiOp undertook the first analysis of the spatial distribution of the historical Aleutian Island pollock fishery in comparison to current telemetry data on sea lion foraging locations, as well as a comparison of sea lion dive profiles with pollock fishing depths. In both cases the BiOp finds the least overlap in depth of any of the three prey species. Pl. Ex. 28 at 184 (2014 BiOp at 1027735). Additionally, scat data presented in the 2010 BiOp showed AI pollock had the lowest Frequency of Occurrence in SSL scat of the three prey species of concern. The 2014 BiOp concludes: "With the statutory constraints on the Aleutian Islands pollock fishery combined with the area limits under the proposed action, NMFS expects substantially lower pollock harvests inside of Steller sea lion critical habitat in Areas 542 and 541 relative to the harvests in 1996 and 1997 when the ABC was lower than projected for 2015." Pl. Ex. 28 at 208 (2014 BiOp at 1027759); Int. Ex. 15 at 1-3 (3028737-39).

The 2015 Rule allows the least amount of fishing in the western Aleutians, the area with the greatest apparent decline in sea lion population. 79 Fed. Reg. at 37,494. The 2015 Rule will open small portions of critical habitat in Areas 543 and 542, subject to low seasonal harvest limits ranging from 5-15% of Aleutian pollock ABC. Int. Ex. 30 at 14 (4004081). The agency predicted very little spatial overlap between sea lions and the fishery because the vast majority of

critical habitat in the Aleutians is still closed to fishing. 79 Fed. Reg. at 37,494; Pl. Ex. 28 at 150-51 (2014 BiOp at 1027701-02); *see also* Int. Ex. 35 at 1-13 (5000506-18).

In Area 541, areas outside of critical habitat and from 3 to 20 nm from haulouts are open, but are subject to a seasonal harvest limit of 30% of ABC. Int. Ex. 30 at 15 (4004082). The seasonal limits are designed to constrain the harvest during the winter when pollock appears to be an important part of Steller sea lion diet. 79 Fed. Reg. at 37,499. The impact of the proposed pollock and cod fisheries combined in Area 541 is expected to be similar to the impact of the cod fishery alone prior to 2014. During 2004-2010, sea lions increased in Area 541 despite a temporally compressed cod fishery; thus, NMFS does not expect the combined but limited fisheries to reduce the survival or recovery of sea lions. *Id.*; Pl. Ex. 28 at 245-46 (2014 BiOp at 1027797-98).

IV. ARGUMENT

A. Standard of Review

Under the APA, the court must “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” 5 U.S.C. § 706(2)(A). A court must uphold an agency’s decision when “there is a rational connection between the facts found and the conclusions made in support of the agency’s action.” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2011) (internal quotations and citation omitted). This review is “deferential”; a court should uphold an agency’s decision unless the agency has:

relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Butte Env'tl. Council v. U.S. Army Corps of Eng'rs, 620 F.3d 936, 945 (9th Cir. 2010)

(internal quotation and omitted).

Contrary to Oceana's assertion, this standard of review is not heightened when an agency changes its position. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009). A change in position must be upheld where the agency displays an awareness of the change in position, "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action." *Id.* (citation omitted). An agency "need not demonstrate . . . that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.* at 515, *see Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1273 (9th Cir. 2015).

Courts apply this standard equally in the context of the ESA, fisheries management, and review of the methodology an agency applies in making a determination. When an agency changes its position or the methodology underlying its position in a subsequent biological opinion, an agency "is not held to a heightened standard in providing an explanation for changing its analysis." *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 1005 n.19 (D. Ariz. 2011) (citation omitted). It is sufficient that an agency expressly identify deficiencies in an earlier methodology and provide a "reasoned basis and explanation" for the use of the new methodology. *Id.* at 1006; *see Modesto Irrigation District v. Gutierrez*, 619 F.3d 1024, 1033-36 (9th Cir. 2010); *Natural Res. Defense Council v. NMFS*, 2014 WL 5148407, *17 (D.D.C. Oct. 14, 2014); *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 17 (D.D.C. 2013).

B. NMFS' decision comports with ESA standards for precautionary action.

The picture Oceana paints of unlawful agency action is not supported by the record or the law. Far from placing the burden on the endangered species, NMFS acted in a precautionary manner by continuing to restrict fishing to protect Steller sea lions even though it has repeatedly

agreed that there is no direct evidence that fishing is impacting Steller sea lions at all, let alone in an adverse manner. Indeed, based on the record before the agency, there is a strong argument that NMFS acted in an overly protective manner by not allowing *more* fishing. Oceana’s black-and-white narrative ignores NMFS’ careful consideration of limited data, inability to identify the causes of either the decline or movement toward recovery of the WDPS, and conservative decision to limit fishing to avoid what it admits is only a theoretical possibility.

The ESA requires NMFS to “insure” that any proposed agency action, such as implementation of fishery management regulations, is not likely to “jeopardize” the continued existence of any threatened or endangered species or destroy or adversely modify such species’ designated critical habitat. 16 U.S.C. § 1536(a)(2). The ESA regulations frame the jeopardy and adverse modification inquiries narrowly and in the negative—*i.e.*, whether the proposed action will “*reduce appreciably* the likelihood of both the survival and recovery of a listed species,” and whether the proposed action will “*appreciably diminish* the value of critical habitat for both the survival and recovery of a listed species.” 50 C.F.R. § 402.02 (emphases added).

The Ninth Circuit has interpreted the “appreciable” reduction and diminishment standards as necessitating that the proposed action causes “some deterioration in the species’ pre-action condition” or “some new jeopardy.” *Nat’l Wildlife Fed’n v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2007). A species may be declining in certain areas of its range (or even across its entire range), and yet a proposed action will not jeopardize the species or adversely modify critical habitat so long as it does not make the species’ current status appreciably worse than its pre-action condition. *See id.* In short, section 7(a)(2) requires federal agencies to insure that specific actions will not worsen the status of listed species. *See* 16 U.S.C. §§ 1536(a)(2), 1536(b)(3)(A); *see also* 50 C.F.R. §§ 402.02, 402.14(h)(3).

Section 7 also requires consideration of recovery. *Nat'l Wildlife Fed'n*, 524 F.3d at 936. But recovery is not the only consideration to be addressed in a section 7(a)(2) consultation. *See id.* at 932 (only “in exceptional circumstances” would “injury to recovery prospects alone . . . result in a jeopardy finding”) (quoting 51 Fed. Reg. 19,934 (June 3, 1986)).¹⁰ Although the ESA is intended to conserve endangered species, *see, e.g., Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174-75 (1978), Congress also intended it 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).

Oceana’s assertions that “NMFS has turned the protective standard of the ESA on its head” and “upset[] nearly 15 years of agency analysis” in the 2014 consultation are simply wrong. Pl. Br. at 31. Oceana misleadingly implies that because the steepest declines in the WDPS occurred during the same time as the fishery growth in the North Pacific during the 1980s and 1990s, there must be an adverse relationship between the two trends, that adverse relationship must be continuing unless fisheries are severely restricted, and NMFS suddenly decided to ignore this pattern in 2014. *Id.* at 5-6, 12. NMFS did not endorse this simplistic view of sea lion population dynamics in 2010 and does not do so now.¹¹ To the contrary, the 2010 BiOp explains that “no one factor accounts for the dynamic trends in Steller sea lion abundance in the western population, and that factors responsible for the period of steep decline (*e.g.*, 1980s), slow decline (*e.g.*, 1990s) and slow recovery (*e.g.*, 2000s) differ.” Int. Ex. 11 at 40

¹⁰ The administrative record contains no finding, and Oceana has not argued, that “exceptional circumstances” were present in the consultation at issue.

¹¹ NMFS has never concluded, in any of its biological opinions, that the total amount of fishery removals are impeding recovery of the WDPS; rather, the long-standing issue is the possibility of localized depletion of prey resources. *See, e.g.*, Pl. Ex. 28 at 72-77, 242 (2014 BiOp at 1027623-28, 1027793); Int. Ex. 11 at 37-38 (2010 BiOp at 1054362-63); 79 Fed. Reg. at 70,307.

(2010 BiOp at 1054423). The 2008 Recovery Plan elaborates that “incidental take in fishing gear and the shooting of sea lions by fishermen and others were factors in the decline [of the WDPS] during the 1970s and 1980s,” but “it is unknown whether fishery conservation measures have been effective in reducing threats to Steller sea lions.” Int. Ex. 34 at 12 (6014598). The 2010 BiOp concludes that “[c]orrelations between recent trends in abundance for the western DPS of Steller sea lions and catches of commercial groundfish are highly varied, with no clear findings of significant positive relationships.” Int. Ex. 11 at 44 (2010 BiOp at 1054507); *see also* Int. Ex. 11 at 47 (2010 BiOp at 1054538) (acknowledging that NMFS’ experimental design to confirm effects of 2003 conservation measures was never implemented).

The 2014 BiOp does not overturn this key assessment, explaining that “there was evidence for nutritional stress in the early part of the decline, but no such comparable evidence during the continued decline in the 1990s, and the current period of overall recovery (recognizing continued declines in the western Aleutian Islands).” Pl. Ex. 28 at 73 (2014 BiOp at 1027624). After reviewing the available and conflicting studies in 2014, NMFS “did not find any direct evidence” that is consistent with “the hypothesis that inadequate prey quantity is affecting the population dynamics of the WDPS” and “[m]ost of the available evidence is either counter to or non-supportive of a nutritional stress mechanism to explain the apparent population dynamics for the WDPS.” Pl. Ex. 28 at 75, 77 (2014 BiOp at 1027626, 1027628); *see also* Pl. Ex. 28 at 215 (2014 BiOp at 1027766). “Given the complexity of the dynamic marine environment in the Aleutian Islands, we may never have a firm grasp on the contribution of anthropogenic versus natural causes for population fluctuation in Steller sea lions, including the consequences of variations in prey availability.” Pl. Ex. 28 at 246 (2014 BiOp. at 1027797).

In arriving at its no jeopardy conclusion in the 2014 BiOp, NMFS did not “resolve[] uncertainty against endangered Steller sea lions rather than giving them the benefit of the doubt.” Pl. Br. at 31. NMFS stated, “[a]s explained in the [2010] BiOp, the cause of the continued declines [in the western and central Aleutians] is unknown, and reduced reproduction due to local depletion of prey (chronic nutritional stress) is a *hypothesis* to explain the decline.” Pl. Ex. 28 at 242 (2014 BiOp at 1027793) (emphasis added). Other hypotheses include environmental regime change, killer whale and other predation and mercury contamination. Pl. Ex. 28 at 242-43 (2014 BiOp at 1027793-94). After analyzing new information not available to it in 2010, NMFS acknowledged that “our understanding of the prevalence of the various threats . . . remains incomplete” and that different factors may be in play in different locations. Pl. Ex. 28 at 243 (2014 BiOp at 1027794). Further, “there are extensive gaps in the available information which prevent understanding the causal relationships affecting Steller sea lions in the western and central Aleutians.” Pl. Ex. 28 at 244 (2014 BiOp at 1027795). But “[i]n cases where the data are equivocal, to avoid underestimating the potential risk to the survival and recovery of Steller sea lions, NMFS assumes the groundfish fisheries may compete with sea lions for prey and assumes the most extreme physiological consequences would result.” 79 Fed. Reg. at 70,301. But even employing these extreme assumptions, NMFS concluded that any adverse impacts to locate populations would not be of a magnitude sufficient to affect the WDPS. *Id.*

Nevertheless, even though chronic nutritional stress is merely a hypothesis—and one that the independent scientific reviewers criticized as weak and unsupported at that—*NMFS continues to restrict fishing*. In the 2014 BiOp, NMFS reasoned that available data “suggest that if nutritional stress is acting on the WDPS it is likely due to localized limitation of important prey resources or low-diet diversity or a combination of the two.” Pl. Ex. 28 at 244 (2014 BiOp

at 1027795). Therefore, NMFS insisted that “a cautionary approach to fishing for prey species in Steller sea lion critical habitat is warranted, especially in winter when we have the least information about groundfish biomass” and recommended that “catch be dispersed in time and space to prevent localized depletion—at least until such time as we have better local biomass and exploitation rate estimates.” Pl. Ex. 28 at 244 (2014 BiOp at 1027795). The 2015 Rule does so by tailoring the restrictions in accordance with NMFS’ assessment of the potential for each gear type in each fishery to cause localized depletion in each fishery management area. Pl. Ex. 28 at 244-49 (2014 BiOp at 1027795-800) (summarizing analyses and conclusions as to mackerel, cod and pollock fisheries in Areas 543, 542 and 541). For example, a new agency mackerel tagging study showed concerns for prey availability around Amchitka Island, and NMFS imposed stricter restrictions on the mackerel fishery in response. Pl. Ex. 28 at 21, 272-73 (2014 BiOp at 1027572, 1027773-74).

In this consultation, NMFS more than met the ESA’s requirements for precautionary action in the face of uncertainty. In *Greenpeace Action v. Franklin*, 14 F.3d 1324 (9th Cir. 1993), the Ninth Circuit affirmed a prior Steller sea lion BiOp over objections from the plaintiffs that NMFS ignored data showing the effects of the GOA fishery on sea lions. The court held that NMFS’ decision to “go ahead with the 1991 fishery under the proposed restrictions, despite some uncertainty about the effects of commercial pollock fishing on the Steller sea lion, was not a clear error of judgment.” *Id.* at 1337. NMFS fulfilled its procedural obligations under section 7 of the ESA—along with substantive obligations to rest its decision on the best available science—because it “supported its conclusions with ample data and analysis,” despite the existence of scientific uncertainty. *Id.* Here, NMFS continues severe restrictions on the fishery even though “the preponderance of available data do not support a conclusion that the groundfish

fisheries and groundfish abundance are limiting Steller sea lion population growth rates. NMFS has no direct evidence that Steller sea lions are experiencing nutritional stress in the western and central Aleutian Islands” Pl. Ex. 28 at 227 (2014 BiOp at 1027778). This is an exceedingly cautious course.

Moreover, NMFS may choose among protective RPAs on the basis of social and economic factors, as it did here. It determined that the IFR was more restrictive than necessary to insure that the federal groundfish fisheries are not likely to jeopardize Steller sea lions or adversely modify critical habitat. 79 Fed. Reg. at 70,303; Pl. Ex. 25 at 3 (2000495) (“The protection measures currently in place insure that jeopardy is not likely, but they are more protective than necessary to avoid the likelihood of jeopardy, resulting in more economic costs to the fishing industry than necessary to comply with the ESA.”). The IFR (Alternative 1) “resulted in adverse economic impacts to fishery participants and fishery dependent communities. The Council considered alternatives that would alleviate the economic impacts while still providing the required protections for Steller sea lion prey necessary to comply with the ESA.” Pl. Ex. 25 at 13 (2000505). The challenge for the Council and NMFS was to meet ESA requirements while also providing opportunities for fishing and not unnecessarily restricting fishing opportunities. “Maintaining the ability for fisheries to occur is a fundamental statutory requirement under the Magnuson-Stevens Act.” Pl. Ex. 25 at 14 (2000506); *see* Int. Ex. 23 at 29, 46 (FEIS at 3160369, 3160437); *see also* Int. Ex. 24 at 52 (FEIS at 3162161) (“[T]he only community for which sustained participation in the directly affected fisheries is potentially at risk is Adak.”).

As this Court has observed, the Ninth Circuit has explained that the agency is not “required to pick the best alternative or the one that would most effectively protect” the species from jeopardy or adverse modification. The agency need only adopt an RPA that complies with

the § 7(a)(2) standards and can be implemented. Thus, the consulting agency is “not required to explain why [it] chose one RPA over another” so long as it “gave at least minimal consideration to the relevant facts contained in the record.” 2011 Steller Sea Lion Litigation, Dkt. 130 at 40 (quoting *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998)).

NMFS explained in the 2010 BiOp that “indisputably the measures that are more conservative” than the IFR would also have avoided jeopardy, but “NMFS must design RPAs to be consistent with the intended purpose of the action”—e.g., the reauthorization of the federal groundfish fisheries. Int. Ex. 11 at 22 (2010 BiOp at 1054159). Even Oceana admitted during the NEPA process that “measures other than those currently in place [under the IFR] may satisfy NMFS’ obligations under the” ESA. Int. Ex. 22 at 3 (3150314). Here, NMFS did explain why the management of each fishery would be protective of sea lions while still meeting its mandate under the MSA to consider such factors when adopting fishery management measures. Pl. Ex. 28 at 241-50 (2014 BiOp at 1027792-801); Pl. Ex. 25 at 14 (2000506). “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*, 55 F. Supp. 2d at 1268 (citation omitted); *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 n.5 (9th Cir. 1998) (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.”).

C. NMFS refined but did not abandon the analytical approaches of previous consultations.

Oceana’s central argument is that NMFS abandoned a prior approach by adopting a new framework in the 2014 BiOp without explanation or rational justification. Pl. Br. at 32. Oceana

inaccurately portrays the agency's 2014 overlap analysis as the linchpin of the 2014 biological opinion, and implies that NMFS summarily abandoned a prior definitive test for adverse modification. Oceana misrepresents the record. First, the "analytical framework" for the 2014 BiOp is the continuation of the "weight of evidence" approach of the 2010 BiOp. *See, e.g.*, Pl. Ex. 28 at 227, 242-50 (2014 BiOp at 1027778, 1027793-801); Int. Ex. 11 at 18-21, 47 (2010 BiOp at 1054149-52, 1054538). Second, as discussed below, the updated overlap analysis was just one piece of evidence considered by the agency in a complex exposure analysis that responded to the findings of the peer reviewers and integrated information not considered in the 2010 BiOp.

The record shows that in this instance NMFS offered a reasoned explanation for its conclusions regarding the reliability of prior analytical approaches and their refinement in the 2014 BiOp. It is not the province of courts to "act as a panel of scientists that instructs" NMFS how to navigate competing scientific views. *League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1131 (9th Cir. 2010) (internal quotations and citation omitted). Courts are "'at [their] most deferential' when reviewing scientific judgments and technical analyses within the agency's expertise." *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010) (quoting *Balt. Gas & Elec. Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 103 (1983)). It is not the court's place to "instruct[] the agency, choos[e] among scientific studies, and order[] the agency to explain every possible scientific uncertainty." *Id.* (internal quotations and citation omitted).

1. NMFS appropriately re-evaluated the 2010 exposure analysis in response to peer review and new information.

NMFS did not suddenly re-think the reasoning of the 2010 BiOp without explanation. As NMFS disclosed in section 1.1 of the 2014 BiOp, the independent reviews of the 2010 BiOp

“were critical of every aspect of the [2010] BiOp that they reviewed” and those critiques “are highly relevant for our analysis in this biological opinion.” Pl. Ex. 28 at 8-13 (2014 BiOp at 1027559-64); *see also* Int. Ex. 21 at 1 (3146514) (request by Council’s Science and Statistical Committee (“SSC”) for NMFS to respond to external reviews).¹² NMFS detailed the results of the independent reviews, in the 2014 BiOp, including the assertion by Drs. Stokes and Bowen that “the exposure analysis, necessary to show spatial and temporal overlap of Steller sea lions, was inadequate and not transparent.” Pl. Ex. 28 at 11 (2014 BiOp at 1027562). NMFS incorporated its responses to the external reviews throughout the 2014 BiOp but did not always agree with the reviews. Pl. Ex. 28 at 13 (2014 BiOp at 1027564) (“We point out where we agreed with the reviewers and /or conducted new analyses as a result of the external reviews”); *see also* Pl. Ex. 28 at 81 (2014 BiOp at 1027632) (explaining why agency did not agree with reviewers’ criticism of the use of frequency of occurrence data).

As NMFS acknowledged, Dr. Bowen was particularly critical of the 2010 BiOp’s conceptual model and its overlap analysis, the same analysis that Oceana now accuses NMFS of abandoning without reason. He stated:

Figure 4.24 of the BiOp summarizes the decision framework that NMFS used to determine if SSL were exposed to the Action (i.e., effects of commercial fishing), whereas Figure 4.25 summarizes the potential responses of SSL and critical habitat exposed to the effects of commercial fishing. These two decision trees appear to serve as the basis for constructing the weight-of-evidence for JAM. I found this framework incomplete, ambiguous, and also rarely referred to in the BiOp.

The first decision point is to determine if there is direct interaction with the fisheries of concern. This is determined on the basis that the fished species accounts for >10% FO of the SSL diet. Thus, the first decision is made from an unreliable estimate of the

¹² The SSC is composed of scientists in biology, economics, statistics, and social science. The SSC advises the Council on scientific and other technical matters, including the development of FMPs and management measures. Int. Ex. 11 at 23 (2010 BiOp at 1054188). The SSC was included by Congress a statutory element of the MSA process. 16 U.S.C. § 1852(g).

contribution of prey species to the energy requirements of SSL. The next decision points evaluate exposure of SSL habitat (food) to the fisheries based on overlap. The BiOp evaluates overlap qualitatively (yes, no), however, quantitative analyses to support decisions about exposure overlap of SSL habitat to fisheries would have been more informative.

Int. Ex. 26 at 7 (4002028). Dr. Bowen concluded that “the weight of evidence for competitive interactions with fisheries amounts to little more than a series of weakly supported speculations about what is likely or possible,” and that, therefore, “the weight of evidence would suggest that fisheries do not compete with SSL for food. If competitive interactions do occur, they have been too weak to be detected.” Int. Ex. 26 at 36 (4002057).

Like Dr. Bowen, Dr. Stokes was highly critical of the 2010 BiOp’s use of overlap criteria:

In fact, all of the overlap criteria applied in the BiOp are unclear; no specific standard is developed for any of the criteria to trigger the “yes” response and no rationale is provided for the use of three such responses to trigger the next level of analysis. It appears exceptionally difficult under the scheme used, but not justified, to escape a conclusion that selected fish stocks (by area) might constitute critical habitat. This part of the exposure analysis does not form a robust and credible basis to measure exposure.

Int. Ex. 27 at 22 (4002110). Dr. Stokes observed that “[a]s used in the BiOp, the nature (overlap) part of the equation is poorly constructed and leads almost inevitably to a conclusion in all cases of sufficient overlap potentially to create risk.” Int. Ex. 27 at 23 (4002111). He concluded that whether the fishing exposure result combined with the nutritional stress hypothesis suggests a possible risk “is a matter of interpretation and depends on the form of logic applied. The nutritional stress hypothesis relies on conjecture and weak evidential support.” Int. Ex. 27 at 23 (4002111).

The state panelists were also troubled by the “arbitrary, ambiguous and incomplete” exposure analysis in the BiOp and its overlap discussion. Int. Ex. 32 at 46 (6001563). The panelists observed that the final decision in the exposure analysis:

concerns the degree to which fisheries compete in time and space for [sea lion prey] species (*i.e.*, the overlap and compression of competing fisheries). An answer of ‘yes’ for three or more of these decision points resulted in a conclusion that the fishery was potentially affecting sea lions. There is no explanation in the BiOp for why three yeses were required, or for why NMFS gave equal weight to all decision points. Nor is there any discussion of how much overlap was too much, or too little, or sufficient for concluding there was some significant degree of overlap.

Int. Ex. 32 at 48 (6001565); *see also* Int. Ex. 32 at 46-50 (6001563-69) (detailed criticism of spatial and size overlap discussion in 2010 BiOp). The panelists noted that there was “nothing definitive” in the BiOp “relative to how decisions on exposure can be based on size of prey or the depth at which they are taken.” Int. Ex. 32 at 48 (6001565).

2. NMFS adequately explained its reasoning in the 2014 exposure analysis.

NMFS provided a detailed and rational explanation for its revised exposure analysis in the 2014 BiOp. Oceana’s argument ignores NMFS’ extended explanation of its reasoning in the 2014 BiOp, and seeks to have the Court improperly elevate the views of a few individuals in the agency. Judicial deference is owed to the agency decision-maker, not to the views of individual agency scientists or other agency staff. *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998) (it is well established that “deference is owed to the decisionmaker authorized to speak on behalf of the agency, not to each individual agency employee” (citations omitted)). Oceana repeatedly challenges the validity of NMFS’ conclusion in the 2014 BiOp by pointing to technical disagreement within the agency. But courts reject requests to invalidate agency decision-making in technically complex areas simply because experts within an agency disagree regarding the reliability of evidence or the weight it should be afforded. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) (upholding agency action under the APA because “the fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process

arbitrary and capricious”). The fact remains that an agency is entitled to reject the views of some of its experts, “no matter how vigorously expressed,” so long as it has a reasoned basis for its decision-making. *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 718 (10th Cir. 2010) (agency decision under the ESA upheld despite scholarly articles and opinions of biologists reaching conclusion contrary to agency). NMFS provided such a reasoned basis in the 2014 BiOp.

NMFS began by summarizing its changing approaches to analyses of telemetry data over the course of previous consultations. Pl. Ex. 28 at 134-43 (1027685-94). The agency next reported the conclusions of the study that it undertook in response to Dr. Bowen’s recommendations. Pl. Ex. 28 at 139 (2014 BiOp at 1027690). In Lander et al (2013), NMFS looked in more detail at data collected specifically from sea lions in the Aleutians from 2000 to 2013, including data that was not available for the 2010 BiOp. Int. Ex. 33 at 1-19 (6012667-85). By also looking at bathymetry, this new study showed that a significant percentage of sea lion telemetry locations outside critical habitat are well off the continental shelf in areas where the fishery does not take place. Pl. Ex. 28 at 139-43 (1027690-94). In addition, Table 5-6 in the 2014 BiOp shows that over 95% of the locations for juveniles in winter are within the 0 to 3 mile portion of critical habitat, which is all closed to trawling for the three prey species of concern by the 2015 Rule. Pl. Ex. 28 at 141 (2014 BiOp at 1027692).

The agency presented its exposure analysis in section 5.3. The agency evaluated the potential overlap between each of the three fisheries, taking into account the impact of AIHCA closures. Pl. Ex. 28 at 143-55 (2014 BiOp at 1027694-706). The BiOp documents that well over three-quarters of critical habitat is closed to cod and mackerel trawl fisheries. Pl. Ex. 28 at 145-53 (2014 BiOp at 1027696-704). The percentage of closed critical habitat increases to 80 to 90%

or more between 3 to 10 nm and is 100% inside 3 nm. Pl. Ex. 28 at 145-153 (2014 BiOp at 1027696-704). Figure 5-6 provides an integrated graphic presentation of the area open to fishing for one or more of the 3 prey species of concern. It shows that in many cases the 2015 Rule's area restrictions serve to minimize fishing for more than one species in a given open area, which further limits the potential for competition for prey. Pl. Ex. 28 at 155 (2014 BiOp at 1027706).

The agency next synthesized bathymetry, telemetry locations, observed sea lion locations (Platform of Opportunity data), historic fishing locations, and the open/closed areas by fishery. Pl. Ex. 28 at 156-73 (2014 BiOp at 1027707-24). This is a new, and much more sophisticated, finer scale evaluation of the exposure of sea lions to potential overlap.¹³ The agency specifically noted in response to internal criticism that the observed sea lion locations are opportunistic and do not provide information about where animals do not occur. Pl. Ex. 28 at 156 (2014 BiOp at 1027707); Int. Ex. 10 at 1 (1044536). The agency carefully qualified the available data: "this exercise is a presence-only look at where sea lions have been seen (Platform) or tracked (telemetry). If an area has few or no sea lion locations or sightings, we cannot infer that the area is not used by sea lions. However, the fishery data may be used to infer historic presence or absence of fishing." Pl. Ex. 28 at 156 (2014 BiOp at 1027707). While the telemetry data set is limited, this is the best available information, and NMFS' reliance on it comports with the ESA's mandate to use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2). The measures in the 2015 Rule minimize the potential for overlap (whether or not overlap would result in constraining competition between fisheries and sea lions.) *See supra* section III. C.

¹³ Oceana's repeated assertions that NMFS created a new test in the 2014 BiOp that requires overlap in all four dimensions before the agency will find jeopardy are just wrong. Figure 5-42, upon which Oceana relies for this premise, is a generalized concept diagram that does not speak to whether all four dimensions of overlap must be present. *See* Pl. Ex. 28 at 212 (2014 BiOp at 1027763).

Last, NMFS provided a quantitative analysis of available data on depth overlap between fisheries and sea lions in the Aleutians. Pl. Ex. 28 at 173-86 (2014 BiOp at 1027724-37). The dive data is provided not just as maximum dive ranges, but as the proportion of dives by depth bins. Pl. Ex. 28 at 175 (1027726). Likewise, fishing depths are presented as both ranges and averages by fishery (Table 5-30) and are presented by depth bins by fishery (Figures 5-23 to 5-28). Pl. Ex. 28 at 178, 180, 182-85 (1027729, 1027731, 1027733-36). The analysis goes beyond the simple binary “yes/no” evaluation of the question “do fisheries overlap in depth with SSL foraging depths?” presented in the 2010 BiOp that the peer reviewers found to be ambiguous and incomplete. NMFS’ approach in the 2014 BiOp is rational because it allows for a clear comparison of the modes of sea lion and fishery depths. That comparison shows a limited degree of overlap for each of the fisheries. Pl. Ex. 28 at 173-86 (2014 BiOp at 1027724-37). Importantly, NMFS has never stated that Steller sea lion protection requires absolutely no overlap between the fisheries and sea lion foraging; rather, NMFS’ consistent concern has been preventing potential competition and the possibility of localized depletion of important prey resources. 79 Fed. Reg. at 70,307. The 2014 BiOp, as with previous opinions, looks at the relative degree of overlap to assess the potential for localized depletion—which it is not sure is even occurring. *Compare* Pl. Ex. 28 at 209-11 (2014 BiOp at 1027760-62), *with* Pl. Ex. 37 at 59 (2000 BiOp at 6013823).

Oceana’s argument also ignores the results of the combined elements (geospatial location, depth and size) of the exposure analysis summarized in section 5.3.8 of the 2014 BiOp. This analysis supports NMFS’ conclusion that the 2015 Rule would result in minimal overlap in the areas where fishing would be allowed inside critical habitat. Pl. Ex. 28 at 209-11 (2014 BiOp at 1027760-62). Moreover, the analysis continues NMFS’ long standing zonal approach, which

provides more fishing restrictions inside critical habitat in areas where the available data shows more use by sea lions. Pl. Ex. 28 at 135-42 (2014 BiOp at 1027686-93). NMFS provided a reasoned explanation of its methodology in the 2014 BiOp, including identifying the criticism of and deficiencies in the 2010 BiOp's exposure analysis. *See Ctr. for Biological Diversity*, 804 F. Supp. 2d at 1005-06 (D. Ariz. 2011).

Moreover, in this case, the authors of the 2014 BiOp and agency managers took the critical comments of the dissenting scientists seriously, attempted to respond to them, and modified the draft documents as a result of the comments. Int. Ex. 5 at 1-3 (1025693-95); Int. Ex. 7 (1026032); Int. Ex. 8 (1026767); Int. Ex. 9 (1041985); Int. Ex. 14 at 1-2 (3027686-87); Int. Ex. 15 at 1-3 (3028737-39); Int. Ex. 17 at 1-3 (3083398-400); Int. Ex. 18 at 1 (1025808). The record shows that NMFS revised the biological opinion, including the spatial overlap analysis, in response to the comments by scientists in the National Marine Mammal Lab, upon which Ocean relies. *See* Int. Ex. 10 at 1-2 (1044536-37) (Balsiger memo to the record). Among other changes, NMFS revised the analysis to consist of a "presence only" analysis and removed any inferences about the absence of observed sea lion locations. *Id.* All conclusions about the anticipated spatial overlap between sea lions and fisheries were based "solely on areas proposed to be open to fishing rather on inferences from the telemetry information from a sample of the population." Int. Ex. 10 at 1 (1044536). The record in this case shows nothing more than the disagreement of a few agency scientists with the conclusions of agency decision-makers faced with complex and uncertain issues, not unlawful agency action.

Oceana's arbitrary and capricious argument really amounts to the contention that an agency cannot modify existing mitigation measures on the basis of new information and refined analyses while also fulfilling other statutory mandates. That argument is not supported by the

ESA, which mandates reconsideration when confronted with new information. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16. Indeed, the very purpose of the ESA—recovery of endangered species and removal from the list of such species—requires a continual re-evaluation of a species’ status and the threats to it and designated critical habitat. *See* 16 U.S.C. §§ 1533(a)(2)(B), 1533(a)(3)(A)(ii), 1533(c)(2); 50 C.F.R. §§ 424.14(c)(1), 424.21.

Oceana’s “tipping point” argument is yet another variation of Oceana’s criticism of NMFS’ overlap analysis. NMFS explained its reasoning and provided a rational basis for its revised and updated analysis. The cases that Oceana relies upon do not address the unique factual circumstances of this case, where the agency is continuing to severely restrict an activity in the action area even though it admits (and was made plain in the reviews by seven independent scientific experts) that it has absolutely no evidence that the activity is causing any harm to the species. The 2014 BiOp was not arbitrary and capricious.

D. The FEIS meets NEPA’s requirements for disclosing scientific controversies.

Oceana argues that the FEIS fails to comply with NEPA, because it does not disclose scientific controversies underlying the 2014 BiOp. This argument is, at bottom, yet another attack on NMFS’ resolution of scientific uncertainty regarding the overlap analysis in the 2014 BiOp and the adequacy of NMFS’ conclusions in that document. This argument fails because Oceana fundamentally misstates the level of detail that NMFS was obligated to and actually did disclose and evaluate in the FEIS.

NEPA requires agencies to take a “hard look” at environmental impacts. Courts apply a “rule of reason” to determine whether an agency’s environmental analysis contains a sufficient discussion of the significant aspects of probable environmental consequences. *Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1177 (9th Cir. 2000). The EIS “review standard is

limited and decidedly deferential to the agency’s expertise.” *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1356 (9th Cir. 1994) (citation omitted).

In evaluating the potential environmental impacts of a proposed action, the agency must disclose and discuss “all major points of view on the environmental impacts of the alternatives” in the DEIS and address dissenting comments in a FEIS. 40 C.F.R § 1502.9(a); *see id.* § 1503.4. However, the NEPA regulations do not direct an agency to regurgitate all relevant data and analyses underlying an EIS in the final document. *See id.* § 1500.1(b) (agencies must avoid “amassing needless detail”); *id.* § 1500.4(b) (EIS should be “analytic rather than encyclopedic”); *id.* § 1502.1 (“Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data”). Instead, the NEPA regulations explicitly authorize an agency to “incorporate material into an [EIS] by reference when the effect will be to cut down on bulk without impeding agency and public review of the action,” so long as the incorporated material is available for public review, as the 2014 BiOp was here. *Id.* § 1502.21; *see Jones v. NMFS*, 741 F.3d 989, 998 (9th Cir. 2013) (upholding environmental assessment over objection that it failed to include underlying scientific data where the environmental assessment incorporated the data by reference).

Oceana acknowledges that the BiOp includes a “population-level analysis of the preferred alternative’s effects on Steller sea lions and their designated critical habitat” and that NMFS “relies on the overlap analysis in the 2014 BiOp in order to evaluate the impacts of alternatives and select its preferred alternative.” Pl. Br. at 45-46. But Oceana insists that the FEIS itself should have included this detail and evaluated anew “the scientific concerns surrounding the 2014 BiOp.” *Id.* at 45-46. This is not what NEPA requires. The FEIS states at the outset that it incorporates the 2014 BiOp by reference, as NEPA authorizes. Int. Ex. 23 at 48

(FEIS at 3160445). Further, the FEIS specifies the “[a]reas of controversy and uncertainty for Steller sea lions and potential fishery interactions” with an index of the FEIS sections describing these issues. Int. Ex. 23 at 44 (FEIS at 3160432). Nearly 100 pages of the FEIS are devoted to discussing the precise areas of concern that Oceana raises: “Fisheries’ effects on Steller sea lion prey, including overlap between fisheries harvesting and Steller sea lion foraging, including importance of Pacific cod in the diet of Steller sea lions.” Int. Ex. 23 at 44, 93-186 (FEIS at 3160432, 3160804-97). NMFS was not required to take the further step of using the NEPA process to second-guess whether the 2014 BiOp appropriately resolved the scientific uncertainty that the agency faced in developing that document. *Envtl. Prot. Info Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1012 (9th Cir. 2006) (NEPA does not require agencies “to disregard the findings made . . . in connection with formal consultation mandated by the ESA” and action agencies may rely “on all of the analysis contained in [a] BiOp”).

Moreover, to comply with NEPA “an agency need not respond to every single scientific study or comment.” *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 668 (9th Cir. 2009) (citation omitted). Indeed, “agencies have broad discretion in choosing how to respond to opposing scientific evidence,” and the Ninth Circuit has rejected challenges that an agency responded “in an impermissibly generalized manner.” *Earth Island Inst. v. Carlton*, 626 F.3d 462, 472 (9th Cir. 2010). In *Earth Island Institute*, the Ninth Circuit dismissed the plaintiff’s assertion that the Forest Service failed to respond adequately to comments raised by two experts, noting that an expert’s disagreement “does not render the [agency’s] review and comment process improper,” because NEPA does not require agencies “to affirmatively present every uncertainty in its EIS,” where doing so “would be an onerous requirement, given that experts in every scientific field routinely disagree.” *Id.* at 473 (internal quotations and citation omitted). The existence of a

“battle of the experts” does “not establish a violation of NEPA.” *Id.*

Here, NMFS acknowledged and addressed multiple areas of controversy consistently with NEPA. First, NMFS disclosed that it had reviewed the conclusions underlying the 2010 BiOp based on criticism from an independent panel of scientists and reinitiated consultation to incorporate new information. Int. Ex. 23 at 30, 45, 47 (FEIS at 3160370, 3160434, 3160439). Second, NMFS called out and described uncertainty within the FEIS, including in its responses to comments, and candidly disclosed that substantial controversy exists regarding the agency’s science. Int. Ex. 23 at 44, 93-186 (FEIS at 3160432, 3160804-97). Third, NMFS addressed the uncertainty in a precautionary manner by “assum[ing] that fishery removals of prey may adversely affect the WDPS of Steller sea lions,” despite no evidence to substantiate this assumption, and compares the alternatives within that presumption. Int. Ex. 24 at 53 (FEIS at 3162319); *see* Int. Ex. 23 at 43 (FEIS at 3160431).

Tellingly, the record shows that several of the agency scientists with the strongest concerns regarding the 2014 BiOp were actively involved in developing the FEIS, including Lowell Fritz who is listed as a preparer for the FEIS. Int. Ex. 19 at 1-8 (3103590-97); Int. Ex. 20 at 1-5 (3103598-602); Int. Ex. 23 at 238-40 (FEIS at 3160969-71). The record also shows that the role of those scientists was to provide opinions regarding Steller sea lion data, but that those opinions were only one aspect of the agency’s obligation to interpret the science as a whole. Int. Ex. 13 at 1 (2011028).

None of the cases that Oceana relies on involve this level of transparency. *See, e.g., Ctr. for Biol. Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1168-69 (9th Cir. 2003) (responses made in draft documents but not in FEIS); *W. Watersheds*, 632 F.3d at 492-93 (agency “offered no reasoned analysis whatsoever in support of its conclusion” and “gave short shrift to a deluge of

concerns from its own experts, FWS, the [Environmental Protection Agency], and state agencies” by “neither respond[ing] to their considered comments ‘objectively and in good faith’ nor [making] responsive changes to the proposed regulations” (internal quotations and citations omitted)); *Pac. Coast Fed’n of Fishermen’s Ass’ns v. NMFS*, 482 F. Supp. 2d 1248, 1253-55 (W.D. Wash. 2007) (scientific debate not acknowledged anywhere in EIS and one-sentence response to comment addressing debate provided non-substantive response); *Seattle Audubon Soc’y v. Moseley*, 798 F. Supp. 1473, 1482-83 (W.D. Wash. 1992) (dismissing need to address or consider alternative views in cursory statement).

The issue of whether fisheries have an effect on Steller sea lions has been controversial for two decades, and the FEIS makes no effort to hide this fact. The hundreds of studies listed in the FEIS and 2014 BiOp alone make it clear that there is no scientific consensus on the causes of sea lion decline and recovery. Int. Ex. 23 at 205-37 (FEIS at 3160936-68); Plaintiff Ex. 28 at 253-78 (2014 BiOp at 1027804-29). NMFS details data gaps in the FEIS, but rationally concludes that the information available “provides the decision makers with the ability to compare and contrast the effects of the alternatives on the human environment by disclosing information on fishery removals of prey and critical habitat closures under the alternatives within the action area.” Int. Ex. 23 at 43 (FEIS at 3160431). NMFS met the Court’s 2012 directive to “involve the public in its decision-making process and give the environmental consequences full consideration.” 2011 Steller Sea Lion Litigation, Dkt. 142 at 6. NMFS complied with NEPA.

E. The Court should not vacate the 2015 Rule.

For the reasons described above, the Court should uphold the 2014 BiOp and the 2015 Rule. However, if the Court finds error, it should allow the parties the opportunity to provide further briefing regarding the appropriate remedy based on the specific errors identified by the Court.

Intervenors do not dispute that vacatur is the presumptive remedy when a court invalidates an agency rule and that courts provide this remedy in the ESA context. However, vacatur is not the only or automatic remedy—“when equity demands, the regulation can be left in place while the agency follows the necessary procedures.” *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (citation omitted); *see also Cal. Communities Against Toxics v. U.S. Env’tl. Prot. Agency*, 688 F.3d 989, 993-94 (9th Cir. 2012). “Whether agency action should be vacated depends on how serious the agency’s errors are and the disruptive consequences of an interim change that may itself be changed.” *Cal. Communities*, 688 F.3d at 992 (internal quotations and citation omitted).

Depending on the nature of a court’s ruling, leaving the rule in place during remand may well be the most equitable remedy. In this case, NMFS exercised an abundance of caution by restricting fishing based solely on the unsupported hypothesis that the fisheries impact Steller sea lions, and the majority of critical habitat remains closed to fishing. The modest expansion of areas open to fishing under the 2014 BiOp remains more restrictive than under the pre-2010 regime and local communities, Natives, and businesses continue to be negatively impacted by NMFS’ overly cautious approach. An appropriate course in this situation, as in the 2011 Sea Lion Litigation, is to defer remedy briefing. 2011 Steller Sea Lion Litigation, Dkt. 130 at 54-55.

V. CONCLUSION

For the reasons set forth above, NMFS did not violate the ESA by adopting the 2015 Rule. Taking to heart the criticisms from the independent scientific review that NMFS itself commissioned, and after considering information not available to it in 2010, NMFS determined that the restrictions in the IFR went farther than was necessary to avoid jeopardy and adverse modification. NMFS’ recalibration was carefully explained in the record as required by the

APA, and areas of scientific controversy were disclosed and discussed as required by NEPA.

The Court should deny Oceana's motion for summary judgment, and grant Intervenors' motion for summary judgment of dismissal of all claims in Oceana's complaint.

Dated this 14th day of May, 2015.

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Certificate of Service

I hereby certify that on May 14, 2015, I electronically filed the document to which this Certificate of Service is attached with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to all counsel of record.

s/Linda R. Larson
Linda R. Larson

Table of Exhibits

Ex. No.	Description	AR Bates Nos.
1	Merrill, Glenn, National Marine Fisheries Service (NMFS), Memorandum Re: Review of March 2014 Draft Biological Opinion (Mar. 10, 2014)	1003000-1003001
2	NMFS Alaska Fisheries Science Center (AFSC) studies in response to CIE reviewers comments (Sept. 12, 2012)	1006222
3	Draft Summary of the CIE Reviewers' Comments on the November 2010 Biological Opinion (Sept. 26, 2012)	1007861-1007870
4	Synthesis of movement data in the Aleutian Islands sub-regions (Apr. 24, 2013)	1013073-1013088
5	Gerke, Brandee, NMFS Sustainable Fisheries Division (SFD), Email to Jon Kurland, NMFS Protected Resources Division (PRD), Re: ai gf s7 draft (Mar. 4, 2014)	1025693-1025695
6	Merrill, Glenn, NMFS, Memorandum Re: Review of March 2014 Draft Biological Opinion (Mar. 10, 2014)	1025821-1025822
7	Demaster, Douglas, AFSC, Email to Brandee Gerke, SFD, Re: Endangered Species Act Section 7 Consultation edits (Mar. 8, 2014)	1026032
8	Gerke, Brandee, SFD, Email to Jon Kurland, PRD, Re: Edits (Mar. 26, 2014)	1026767
9	Gerke, Brandee, SFD, Email to Brad Smith, PRD, Re: BiOp (Mar. 18, 2014)	1041985
10	Balsiger, James, NMFS, Memorandum Re: Responses to Internal Review Comments in the April 2, 2014 BSAI Groundfish (Nov. 24, 2014)	1044536-1044537
11	NMFS, Endangered Species Act – Section 7 Consultation Biological Opinion on the Authorization of Groundfish Fisheries under the Fishery Management Plans for the Bering Sea and Aleutian Islands Management Area and the Gulf of Alaska (Nov. 24, 2010) (excerpts)	1054121-1055008
12	Sobeck, Eileen, NMFS, Memorandum Re: Proposed Rule	2010409-2010411

Ex. No.	Description	AR Bates Nos.
13	Mecum, Doug, NMFS, Email to Douglas Demaster, AFSC, Re: Docs (June 27, 2014)	2011028-2011029
14	Fritz, Lowell, AFSC National Marine Mammal Laboratory (NMML), Email to Melanie Brown, SFD, Re: Response to the Horning paper (Aug. 21, 2012)	3027686-3027687
15	Brown, Melanie, SFD, Email to Glenn Merrill, NMFS, Re: pollock realities per Dana (Oct. 11, 2013)	3028737-3028739
16	Kurland, Jon, PRD, Email to Samuel Rauch, NMFS, Re: Alternative summary tables and Oceana letter (Mar. 4, 2014)	3058672-3058673
17	Demaster, Douglas, AFSC, Email to Robyn Angliss, NMML, Re: status on review of SSL draft EIS comments and coordination with PRD and AFSC (Aug. 7, 2013)	3083398-3083400
18	Demaster, Douglas, AFSC, Email to Brandee Gerke, SFD, Re: AEP memo review ai gf s7 draft (Mar. 10, 2014)	1025808-1025810
19	Steller Sea Lion Protection Measures Environmental Impact Statement Team Charter	3103590-3103597
20	SSL EIS Analytical Matrix from SSL EIS Team Meeting 5/1/12	3103598-3103602
21	Scientific and Statistical Committee, Draft Report to the North Pacific Fishery Management Council (May 31, 2014)	3146514-3146530
22	Murray, Susan, Deputy Vice President, Oceana, Letter to James Balsiger, NMFS (Feb. 25, 2013)	3150312-3150315
23	NMFS, Final Environmental Impact Statement, Steller Sea Lion Protection Measures for Groundfish Fisheries in the Bering Sea and Aleutian Islands Management Area, Vol. I (May 2014) (excerpts)	3160341 - 3160971
24	NMFS, Final Environmental Impact Statement, Steller Sea Lion Protection Measures for Groundfish Fisheries in the Bering Sea and Aleutian Islands Management Area, Vol. II (May 2014) (excerpts)	3161713-3162335
25	Stewart, Brent, Center for Independent Experts External Independent Peer Review on the 2010 Biological Opinion (Sept. 5, 2012)	4001960-4002000

Ex. No.	Description	AR Bates Nos.
26	Bowen, W.D., Center for Independent Experts Independent Peer Review of the November 2010 North Pacific Groundfish Fishery Biological Opinion, CIE Independent Peer Review Report (Sept. 5, 2012)	4002022-4002088
27	Stokes, Kevin, Center for Independent Experts Independent Peer Review, Biological Opinion on the Effects of the Federal Groundfish Fisheries and State Parallel Fisheries on listed species in Alaska, including Steller sea lions	4002089-4002147
28	C-2 Steller Sea Lion EIS Final Action, North Pacific Fishery Management Council (Oct. 2013)	4003802-4003803
29	Johnson, Devin, NMML, Memorandum Re: Pup/Nonpup ratios in WDPS Steller sea lion population (Nov. 27, 2013)	4003941-4003959
30	NOAA Fisheries, 2014 Biological Opinion on proposed AI Groundfish Fishery Steller Sea Lion Protection Measures (Apr. 2014)	4004068-4004138
31	Tsukada, Rudy, Aleut Enterprise, LLC, Public Submission Letter to James Balsiger Re: DEIS sea lion comments (July 15, 2013)	5002431-5002433
32	Bernard, David, An Independent, Scientific Review of the Biological Opinion (2010) of the Fisheries Management Plan for the Bering Sea/Aleutian Islands Management Areas (Oct. 8, 2011)	6001518-6001645
33	Lander, Michelle, At-sea distribution of Steller sea lions in the western-central Aleutian Islands (Aug. 1, 2013)	6012667-6012685
34	NMFS, Recovery Plan for the Steller Sea Lion - Eastern and Western Distinct Population Segments (<i>Eumetopias jubatus</i>) Revision (Mar. 2008) (excerpts)	6014514-3014598
35	Fraser, Dave, Adak Community Development Corporation, Public Submission Letter to James Balsiger Re: Comments SSL DEIS (July 16, 2013)	5000506-5000518
36	Fina, Mark, Alaska Seafood Cooperative, Public Submission Letter to James Balsiger Re: SSL Protection Measures (Aug. 11, 2014)	5001586-5001599