

No. 15-35940

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

OCEANA, INC. AND GREENPEACE, INC.,
Plaintiffs-Appellants,

v.

NATIONAL MARINE FISHERIES SERVICE, ET AL.,
Defendants-Appellees;

ALASKA SEAFOOD COOPERATIVE, ET AL.
Intervenor-Defendants-Appellees.

On Appeal from the U.S. District Court for the District of Alaska,
No. 3:14-cv-00253-TMB (Hon. Timothy M. Burgess)

**RESPONSE BRIEF OF THE
FEDERAL DEFENDANT-APPELLEES**

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GLOSSARY

APA	Administrative Procedure Act
BiOp	Biological Opinion
DPS	Distinct Population Segment
EIS	Environmental Impact Statement
ER	Oceana's Excerpts of Record
ESA	Endangered Species Act
NEPA	National Environmental Policy Act
NMML	National Marine Mammal Laboratory
SER	Federal Defendant-Appellees' Supplemental Excerpts of Record
Service	National Marine Fisheries Service

INTRODUCTION

In 2013, this Court upheld the National Marine Fisheries Service’s “Interim Final Rule,” which authorized commercial fishing in the waters off the Alaskan coast while protecting the endangered Steller sea lion. *See Alaska v. Lubchenco*, 723 F.3d 1043, 1047 (9th Cir. 2013). The Court, like the Service, acknowledged that there was considerable uncertainty in the scientific literature concerning the overlap between commercial fishing and Steller sea lion foraging, and the Court upheld the Service’s analysis of the problem in light of that uncertainty. *Id.* at 1054-55.

In the years since the Interim Final Rule, the Service has reassessed the interaction between fishing and Steller sea lions, reviewing its old analysis and taking into account new studies. Based on that reassessment, the Service promulgated the Protection Measures at issue here. The Protection Measures strike a different, although still permissible, balance between fishing and wildlife than the Interim Final Rule. The Service found that fishing under these revised restrictions is not likely to jeopardize the survival or recovery of the Steller sea lion. The plaintiff group here (“Oceana”) challenges the Protection Measures on the grounds that this finding was improper. But this Court should affirm the district court and uphold the Protection Measures on the same grounds as it upheld the Interim Final Rule in *Alaska v. Lubchenco*: The Service considered the relevant factors and rationally explained the connection between its factual findings and conclusions.

STATEMENT OF JURISDICTION

Oceana alleges violations of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, and the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.* The district court had jurisdiction to review the Service’s regulations under 16 U.S.C. § 1855(f) and the Biological Opinion under 16 U.S.C. § 1540(g). Oceana’s claims also raise federal questions under 28 U.S.C. § 1331.

The district court rendered final judgment on Oceana’s claims on October 5, 2015, and Oceana filed a timely notice of appeal on December 3, 2015. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE CASE AND THE ISSUES

On November 14, 2014, the Service published the “Protection Measures” at issue here. *See* “Fisheries of the Exclusive Economic Zone Off Alaska; Steller Sea Lion Protection Measures,” 79 Fed. Reg. 70,286 (Nov. 25, 2014). The Rule “implement[s] Steller sea lion protection measures to insure that groundfish fisheries in the Bering Sea and Aleutian Island Management Area off Alaska are not likely to jeopardize the continued existence of the western distinct population segment of Steller sea lions or destroy or adversely modify their designated critical habitat.” *Id.* at 70,286.

Plaintiffs challenged the Protection Measures in district court, alleging that the Service had violated the ESA and NEPA in promulgating a rule that was less

restrictive of fishing activity than the previous interim rule. Fishing industry interests intervened in support of the Service. The district court denied Oceana's motion for summary judgment and granted the Service's and the intervenors' cross-motions on all claims. *See Oceana, Inc. v. Nat'l Marine Fisheries Serv.*, No. 3:14-cv-00253-TMB (Docket #63) (Sept. 16, 2015) (ER 3). Oceana's appeal of the district court's judgment raises the following questions under the ESA:

1. Did the Service adequately explain its methodology for the 2014 Biological Opinion, including how it assessed the fisheries' effects on the species?
2. Did the Service adequately take species recovery into account by incorporating the criteria of the Steller sea lion Recovery Plan into its Biological Opinion?
3. Did internal agency comments on the draft 2014 Biological Opinion, which the Service addressed by making changes in the final Biological Opinion, undermine the validity of the Service's conclusions?

Oceana's appeal also raises a question under NEPA:

4. Did the Service adequately disclose and discuss areas of scientific uncertainty and controversy in the final EIS?

LEGAL BACKGROUND AND STATEMENT OF FACTS

The legal background for this appeal is similar to the background that this Court summarized in *Alaska*, 723 F.3d at 1047-48. Like that case, this appeal involves a dispute over the management of the commercial fisheries in the exclusive economic zone off the coast of Alaska.

A. Management of Alaska fisheries under the Magnuson-Stevens Act

The Alaska fisheries are sustainably managed under the Magnuson-Stevens Fishery Conservation and Management Act. *See* 16 U.S.C. §§ 1801 *et seq.* The Magnuson-Stevens Act establishes regional councils that prepare and submit fishery management plans for the Service to consider. *See id.* § 1852(h). Fishery management plans contain measures “necessary and appropriate for the conservation and management of the fishery,” including designated zones where fishing is limited or closed “based on the best scientific information available.” *Id.* § 1853. Such plans must also meet ten “national standards” established by the Act, including: “achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry;” “tak[ing] into account the importance of fishery resources to fishing communities;” and “minimiz[ing] adverse economic impacts” of management measures. *Id.* § 1851; *see also* EIS at 1-9 to 1-11 (SER 235-37). If the Service finds that the regional council’s management plan is consistent with the Magnuson-Stevens

Act's requirements, *see id.* § 1854(a), it must implement it by regulation. 16 U.S.C. § 1855(d).

The fisheries at issue in this case are within the purview of the North Pacific Fishery Management Council (the "Council"). *See* EIS at 1-1 (ER 127). The Council's fishery management plans contain management measures that restrict "location, gear type, timing, and harvest amounts" for three key groundfish species in the waters around the Aleutian Islands: Atka mackerel, pollock, and Pacific cod. *See* 2014 BiOp at 17 (ER 184). Each year, the Service implements harvest specifications for the annual fishing season that incorporate those management measures. *See* 50 C.F.R. part 679; *id.* §§ 679.20-.28.

B. The environmental review framework for fisheries rules

Before it may promulgate regulations to achieve the optimum yield from fisheries under the Magnuson-Stevens Act, the Service must carry out an environmental review process that meets the requirements of the ESA and NEPA.

1. The Endangered Species Act

The ESA provides that the Service shall determine whether to list species as endangered or threatened and to designate listed species' "critical habitat." *See* 16 U.S.C. §§ 1532-33. Once a species is listed, it enjoys a variety of legal protections. *See id.* §§ 1533(d), 1536, 1538; *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Most relevant here, each federal agency must "insure that any action authorized" by

that agency: (a) “is not likely to jeopardize the continued existence of any endangered species or threatened species;” and (b) “is not likely to . . . result in the destruction or adverse modification of [designated critical] habitat of such species.” 16 U.S.C. § 1536(a)(2) (emphasis added); *see generally Alaska*, 723 F.3d at 1048. The ESA also provides for the development of “recovery plans” for the “conservation and survival” of listed species. *Id.* § 1533(f). “Conservation” encompasses “all methods and procedures which are necessary” to bring a listed species to the point at which the protections of the ESA are no longer needed. *Id.* §§ 1532(3), 1533(a).¹

Section 7 of the ESA, 16 U.S.C. § 1536, establishes a consultation process to evaluate whether agency actions are consistent with these statutory protections. If the “action agency” finds that its proposed action is likely to adversely affect a listed species, it must engage in formal consultation with the relevant “consulting agency.” *Id.* § 1536(a)(4); *see* 50 C.F.R. § 402.14. The consulting agency assesses the action under the standard of Section 7(a)(2), determining whether that action is likely to “jeopardize the continued existence” of a listed species or constitute the “destruction or adverse modification” of its critical habitat. The consulting agency must also take species recovery into account when making a jeopardy or adverse modification

¹ As in this case, a “species” may include a “distinct population segment of any species.” 16 U.S.C. § 1532(16).

determination. *See Alaska*, 723 F.3d at 1054; *see also generally* 50 C.F.R. § 402.02 (definition of “jeopardize”). The formal consultation process culminates in a written Biological Opinion (or “BiOp”), in which the consulting agency “detail[s] how the agency action affects the species or its critical habitat.” 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14(h). If the consulting agency concludes in the Biological Opinion that the proposed action is likely to result in jeopardy to the species, it must examine whether there is are “reasonable and prudent alternatives” to the action that would avoid that result. *Id.* § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3).²

Consultation under the ESA must use the “best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2). The purpose of this requirement is “to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise,” and “to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.” *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997).

² The arguments in this case do not require the Court to draw distinctions between jeopardy to the continued existence of the Steller sea lion and the destruction or adverse modification of its critical habitat. Where this brief discusses the Service’s findings concerning “jeopardy,” therefore, it generally encompasses both the jeopardy analysis and the critical habitat analysis.

Within the Service, the Sustainable Fisheries Division (in cooperation with the Council) develops regulations under the Magnuson-Stevens Act and served as the action agency here, while the separate Protected Resources Division served as the consulting agency. *See* 2014 BiOp at 6, 15-17 (ER 173, 182-84).

2. The National Environmental Policy Act

NEPA requires that federal agencies proposing to undertake any “major Federal action[] significantly affecting the quality of the human environment” prepare an environmental impact statement (“EIS”) evaluating the consequences of the proposed action. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.12-16. In contrast to the ESA, NEPA is a procedural statute that does not contain any substantive environmental standards or constrain the agency’s range of policy choices. *See, e.g., Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1131 (9th Cir. 2011). Instead, it requires that an agency take a “hard look” at all the factors that might be relevant to its decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989); *City of Carmel-by-the-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1150-51 (9th Cir. 1997). If the Court concludes that an EIS “contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences,” and that its “form, content and preparation foster both informed decision-making and informed public participation,” then the requirements of NEPA are satisfied. *City of Carmel*, 123 F.3d at 1150-51 (internal citations omitted).

C. The Steller sea lion

The only ESA-listed species at issue in this case is the western distinct population segment of the Steller sea lion.³ Steller sea lions are the largest of the “eared seals,” and the average male weighs over 1200 pounds. Some of their important prey species are the same species that the Alaska fisheries target. *See* 2014 BiOp at 61 (ER 228). The Steller sea lion is a heavily-studied species, and the Service has been striving for several decades to develop a more sophisticated understanding of its ecological role, habitat, and needs.

The Service took emergency action to list the Steller sea lion as a threatened species in 1990, after a decline in the species’ population of over 50 percent in the 1980s. *Id.* at 34 (ER-201). Based on that trend, the Service’s population viability models had projected a 65% chance that the western distinct population would become extinct in the next 100 years, and the Service separately listed the western

³ There are two distinct population segments of the Steller sea lion. The eastern distinct population segment, which primarily occurs from the west coast of the United States to Cape Suckling in Alaska, was formerly listed as “threatened” under the Act but has recovered to the point that it was delisted in 2013. *See* 2014 BiOp at 25 (ER 202). The western distinct population segment, which primarily occurs from Cape Suckling west to Russia, is listed as “endangered” under the Act. *See id.* Fig. 3-1 (ER 201). This case involves only the western distinct population segment, and references to the “species” or the “Steller sea lion” in this brief generally refer only to that population segment.

distinct population segments as endangered in 1997. *Id.* The western distinct population segment continued to decline to less than 50,000 at the decade's end, *id.* at 35 (ER 202), but since then has strongly rebounded. The Service's 2012 population estimate was approximately 79,300 individuals. *Id.* at 39 (ER 206). As a result, the Service's most recent population viability modeling indicated that the 100-year chance of the species crossing the threshold toward extinction was "virtually nil." *Id.* at 49 (ER 216).

This success was not evenly distributed across the Steller sea lion's range, however. The Service's ESA Recovery Plan for the species, most recently updated in 2008, divided the western DPS into seven sub-regions. Of the six sub-regions within the United States, four have shown "significant increases in population growth." *Id.* at 47 (ER 214). But the central Aleutian Islands sub-region has been stagnant (showing a population decline, although not a statistically-significant decline), and the western Aleutian Islands sub-region has shown a statistically-significant decline. *Id.* Given these trends, the Steller sea lion does not yet meet the Recovery Plan's criteria for delisting, which require that the "population trend in any two adjacent sub-regions cannot be declining significantly," and that no single sub-region decline more than 50% compared to its 2000 population. *Id.*

Plaintiffs attempt to draw a clear connection between their own past litigation efforts, subsequent fisheries restrictions, and the positive trends in Steller sea lion

population. *See* Oceana Br. at 10. Even using the most recent studies, however, “the cause of the continued declines in these [sub-regions] is unknown,” and prey depletion due to fisheries activities remains simply one “hypothesis to explain the decline.” 2014 BiOp at 242 (ER 409). Other hypotheses incorporate the effects of climate change and variability (both anthropogenic and natural), environmental contamination by toxic substances such as mercury, and natural killer whale and shark predation. *Id.* at 62-72 (229-39).

D. The Interim Final Rule and *Alaska v. Lubchenco*

Before the 2014 Biological Opinion at issue here, the Service had most recently examined the fishery management plan for Alaska groundfish in a Biological Opinion in 2010. *See* 2014 BiOp at 15-16 (ER 182-83); 2010 BiOp at xxi-xxii (ER 532-33); *Alaska*, 723 F.3d at 1050. That Biological Opinion engaged in a thorough study of the fisheries’ indirect effect on habitat, specifically “the removal of prey species which could alter the animal’s natural foraging patterns and their foraging success rate.” 2010 BiOp at 198 (ER 589). A sustained reduction over large areas may cause impacts referred to as “nutritional stress.” *Id.* at 199 (ER 590). The 2010 Biological Opinion identified a “high degree of overlap” between the fisheries’ removal of fish under then-existing management measures and the Steller sea lion’s foraging habits, which “support[ed] the hypothesis that competitive interactions may be occurring” in the sea lion’s range. *Id.* at 202 (ER 593) (cited in Oceana Br. at 15).

The Service did not conclude in 2010, however, that any given degree of overlap is commensurate with jeopardy. The overlap analysis was only part of assessing “the probable direct and indirect effects of the proposed action,” and the assessment of effects was itself only the first step of a “three-step inquiry” to determine jeopardy. *Id.* at 283 (ER 607). The Service went on to consider whether the fisheries’ effects on Steller sea lion prey were likely to reduce the sea lions’ reproduction, numbers or distribution, and whether any such reductions could be expected to appreciably reduce the species’ likelihood of survival and recovery. *Id.* Although “several analyses failed to show statistically significant impacts of commercial fisheries” on the species, the Service also found that “fisheries cannot be excluded as a factor that affects Steller sea lion population dynamics.” *Id.* at 300 (ER 624).

Ultimately, the agency could not demonstrate that the fisheries were having a statistically significant impact on the species’ productivity or recovery, nor could it demonstrate that the fisheries were not having such an impact. *Id.* at 301 (ER 625). It noted that the interaction between commercial fishing and Steller sea lions is the subject of “an extremely large body of sometimes-contradictory evidence” and studies with “equivocal” results. 2010 BiOp at 344 (ER 632). Based on a “weight of evidence” approach, and despite the fact that “fisheries cannot unequivocally be shown to be a causative factor in continued Steller sea lion declines,” the Service

concluded that continuing the existing fishery management measures were “likely to jeopardize the continued existence of the western DPS of Steller sea lion.” *Id.* at 345 (ER 633). Under the ESA, the Service was therefore required to consider and, if possible, adopt a reasonable and prudent alternative to the existing measures. *See* 2014 BiOp at 16 (ER 183).

The reasonable and prudent alternative that the Service adopted was the Interim Final Rule that became effective on January 1, 2011. *See* “Fisheries of the Exclusive Economic Zone Off Alaska,” 75 Fed. Reg. 77,535 (Dec. 13, 2010). The Interim Final Rule established more restrictive management measures for Areas 541, 542, and 543 in the western and central Aleutian Islands population sub-regions, closing areas that had previously been available to the fisheries.⁴ To make the rule effective before the start of the 2011 fishery season, the Service had to promulgate the Interim Final Rule without notice and comment, with only limited participation by the Council, and with an Environmental Assessment rather than a full, comprehensive EIS. *Id.* at 77,542-43; *see Alaska*, 723 F.3d at 1051.

⁴ The Fishery Management Plan divides the waters off Alaska in to “Areas” where management measures apply. This case primarily concerns Area 541 and Area 542 in the Central Aleutian Islands sub-region, and Area 543 in the Western Aleutian Islands sub-region. *See* 2014 BiOp Fig. 3-2 (ER 204).

Several fishing industry groups (Intervenors here) challenged the Interim Final Rule, arguing that there was not enough evidence supporting the nutritional stress theory to justify additional fishing restrictions. Both the district court and this Court upheld the Service's decision to implement the Interim Final Rule. *See Alaska*, 723 F.3d at 1047. This Court approved the agency's use of the Recovery Plan criteria, and its focus on sub-regions, in conducting its jeopardy analysis. *Id.* at 1052-53. It held that because the Service had identified "evidence of nutritional stress," it could reasonably conclude that the fisheries were likely to jeopardize the species, even without "a direct link between the fisheries and the species' decline." *Id.* at 1055. The Court did not hold that this was the *only* possible finding that the record would support, or that the ESA required the management measures contained in the Interim Final Rule. It merely rejected the plaintiffs' challenges because, based on the record, the Service had "stated a rational connection between its factual findings and conclusions." *Id.* at 1052, 1054-55.

E. Promulgation of the Protection Measures

Meanwhile, as the Magnuson-Stevens Act contemplates, the Service cooperated with the Council to develop several alternative management measures to consider as replacements for the Interim Final Rule. The Service sought to identify a set of protection measures that both "mitigates the Aleutian Island groundfish fisheries' potential impacts on Steller sea lions and minimizes, to the extent practicable,

economic impacts to the groundfish fisheries.” EIS at ES-3 (ER 113). Most relevant here, the proposed Alternative 1 would continue the status quo established under the Interim Final Rule. Alternative 5 was the Council’s preferred alternative, and was eventually adopted as the final regulation. *See* Draft EIS at 2-2 (ER 469).

Alternative 5 authorizes more fishing than the Interim Final Rule, increasing the area open to Atka mackerel fishing by about 8% and open to Pacific cod and pollock fishing by about 23%. 79 Fed. Reg. at 70,289. However, it is still designed to “prevent localized depletion” of prey resources by “spatially and temporally dispersing catch, particularly in critical habitat.” 79 Fed. Reg. at 70,287. It includes substantial restrictions, such as “fishery closures and limitations on catch,” to mitigate the potential effects of fishing on Steller sea lion prey, *id.*, and particularly limits fishing activity near the haulouts and rookeries where Steller sea lions congregate and reproduce. *Id.* at 70,289. Alternative 5 is most protective in Areas 541, 542, and 543 (although it imposes fewer restrictions than the Interim Final Rule), which are the areas of greatest concern for sea lion population trends. *Id.*

Although Oceana claims that Alternative 5 is similar to measures in place before 2010, *see* Oceana Br. at 19, there are some important differences that impose greater limits on the fisheries. For example, changes to management of the Pacific cod fishery after the Interim Final Rule was promulgated were expected to reduce harvest of that species by 72% compared to the average annual harvest from 2004 to

2010. *See* 2014 BiOp at 245 (ER 412). In comparison to the measures studied in 2010, the 2014 Protection Measures also closed the area around a major haulout site in Area 542, *see* EIS at 2-5 to 2-6 (SER 290-91); and set additional catch limits on Atka mackerel and Pacific cod, *see id.* at ES-16 to ES-17 (ER 114-15).

1. The Service's study of the effects of Alternative 5

In 2010, the Service had made its jeopardy determination based on the “weight of evidence” available at that time, even though that evidence was “sometimes contradictory.” 2010 BiOp at 344 (ER 632). By 2013, “[s]o much ha[d] changed” that the alternatives it considered for the Interim Final Rule were “no longer relevant to inform decision-making” for new Steller sea lion protection measures. *Id.* at ES-2 (ER 112). In addition, the district court had ordered the Service to meet its NEPA obligations through a full EIS, rather than the Environmental Assessment that the agency had prepared for the Interim Final Rule. *See Alaska*, 723 F.3d at 1051. The Service therefore conducted a full, new analysis under NEPA and the ESA, taking into account significant new studies and peer review.

The Service began with an “Analytical Approach” document for the Steller sea lion consultation, which it presented to the Council early in the process. *See* 2014 BiOp at 16 (ER 183). As in 2010, the Service began from the premise that there may be some overlap, or competition, between the fisheries and Steller sea lion. The Analytical Approach identified several ways in which it intended to refine its analysis

of the amount of overlap (species “exposure”) and its effect on the sea lion (species “response”). Analytical Approach at 7-8 (SER 147-48). Although the 2010 Biological Opinion had discussed a variety of risks to the species, the Service’s analytical approach to the updated consultation focused on the particular risk that Oceana raises here – the risk of “depletion of prey at a scale important to foraging adult female and juvenile Steller sea lions.” *id.* at 9 (SER 149). The Service proposed to use a similar “weight of evidence” approach as it had in 2010, presenting the evidence consistent with the hypothesis that fisheries cause nutritional stress and the evidence consistent with the opposite hypothesis, and then determining “which hypothesis is more probable given the evidence.” *Id.* at 12 (SER 152).

In evaluating this evidence, the Service benefited from the early involvement of outside experts. First, the States of Alaska and Washington sponsored a review by experts in the fields of marine mammals, fisheries science, and resource management, focusing on the support for the statements and conclusions in the 2010 Biological Opinion. *See* 2014 BiOp at 8-10 (ER 175-77); Bernard, et al. (2011) (SER 1-96). That study concluded that the 2010 Biological Opinion had “misinterpreted crucial evidence from statistical studies of relationships between fishing and sea lion demographics,” and found it “highly likely” that “fisheries are not negatively affecting Steller sea lions.” *Id.* at xii-xiii (SER 12-13).

Second, the Service itself sponsored a peer review of the 2010 Biological Opinion by three experts from the Center for Independent Experts. *See* 2014 BiOp at 10 (ER 177); Bowen (2012) (SER 97-140). The “overall conclusion” of those experts was that “there is no direct evidence that by removing fish, these fisheries compete with [Steller sea lions] in the central and western Aleutians and elsewhere.” *Id.* at 2 (SER 98). The “indirect evidence” of nutritional stress that the Service had relied on in the 2010 Biological Opinion “rests on speculation of what is thought possible rather than what is supported by scientific evidence.” *Id.*

Although there were some differences of opinion between these reviewers, “[a]ll reviewers questioned the reliability of using the ratio of counts of pups to non-pups as proxy for Steller sea lion natality.” 2014 BiOp at 11 (ER 178). This was critical because that ratio had “provided key support for conclusions about the role of nutritional stress” in the 2010 Biological Opinion. *Id.* The external reviewers also “all concluded that the weight-of-evidence suggests that fisheries-induced nutritional stress is unlikely and that [the Service] relied on conjecture and hypotheticals rather than evidence” to support its conclusions in the 2010 Biological Opinion. *Id.*

In response to these external reviews, the Service completed new studies to refine growth rate estimates and characterize uncertainty in the data. The Analytical Approach highlighted 23 new, relevant documents and studies that had become available since its 2010 Biological Opinion, *id.* at 2-3 (SER 142-43), and others that the

Service expected to complete before making a final decision. *See id.* at 3-6 (SER 143-46).

In April 2014, the Service published the Biological Opinion that Plaintiffs challenge here. In its analysis, the Service's Protected Resources Division used the same Recovery Plan criteria that this Court upheld in *Alaska*, 723 F.3d at 1053: “[I]f the proposed action is likely to reduce the survival or recovery of *any sub-population* (sub-region), then we could conclude” that the Sustainable Fisheries Division had not shown that its proposed measures were likely to avoid jeopardy to the Steller sea lion. 2014 BiOp at 246 (ER 413).

Most relevant here, the Biological Opinion devoted more than a hundred pages to a review of whether and to what extent fishing would occur at the same locations, the same times, or the same water depth as Steller sea lion foraging. *See id.* at 134-236 (ER 301-403). As the argument below will discuss in more detail, the Biological Opinion explained its conceptual framework for analyzing both the amount of overlap and the species' likely response to the fisheries' prey removal. *See id.* at 209-217 & Figs. 5-42 to 5-42 (ER 376-84), *see infra* pp. 27-35. The Service recognized that it would not be able to “precisely quantify” the fisheries' effects on species reproduction, numbers, or distribution, but sought to “determine whether appreciable reductions are reasonably expected.” *Id.* at 242 (ER 409).

In the western Aleutian Island sub-region, this analysis led to the conclusion that the Steller sea lion population decline would likely continue “for unknown reasons, even apart from any changes in the fisheries,” and that the proposed management measures were unlikely to change the likelihood of survival or recovery of the sub-regional population. *Id.* at 247 (ER 414). In the central Aleutian Island sub-region, the Service found that the “worst case scenario” would be reduced reproduction at one or two sea lion haulouts, a change “of insufficient magnitude” to affect the sub-regional population as a whole. *Id.* at 247-48 (ER 414-15). Overall, “the available data do not indicate that Steller sea lions in the western and central Aleutian Islands are experiencing acute nutritional stress” due to prey depletion, and the Service “does not have data to evaluate the prevalence of chronic (long term) nutritional stress.” *Id.* at 215 (ER 382).

The Biological Opinion acknowledged that, “[g]iven 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.” *Id.* at 246 (ER 413). But, the Service concluded, the “best available information” supported the conclusion that fishing under the proposed management measures is “not likely to reduce the survival or recovery” of the western distinct population segment of Steller

sea lion. *Id.* at 248 (ER 415) (central Aleutians); *see id.* at 247 (ER 414) (western Aleutians).

2. The final Protection Measures

The Service incorporated the conclusions from the Biological Opinion into its Final EIS for the Protection Measures, which was completed in May 2014 (ER 109). The EIS discussed six different alternative protection measures, including a “no action” alternative that would have left the Interim Final Rule in place. *See* EIS at 2-1 to 2-2 (SER 286-87). The range of alternatives that the Service considered also included an alternative that would have allowed no fishing at all, and one that would have allowed more fishing than Alternative 5. *See* 79 Fed. Reg. at 70,287. While the Biological Opinion had focused on ESA-listed species, the EIS discussed the environmental consequences of the fisheries more broadly, also covering (for example) fish and seabird species and ecosystem effects generally. *See* EIS at ES-i to ES-v (SER 157-61) (Table of Contents). Like the Biological Opinion, the EIS clearly identified where its analysis intersected areas of “controversy and uncertainty,” including the effects of nutritional stress, killer whale predation, disease, ecosystem carrying capacity. *Id.* Table ES-18 (SER 225); *see also id.* at 1-3 (SER 229), 5-5 (SER 327), 13-9 (ER 166).

Based on the EIS, the Service chose Alternative 5 as the suite of protection measures that it would ultimately incorporate into its final regulations. Alternative 5

imposed restrictions on the Atka mackerel, Pacific cod, and pollock fisheries that operate in the western and central Aleutian Islands. *See* EIS at 2-67 to 2-75 (SER 293-301). The agency completed and signed a Record of Decision on November 7, 2014 (ER 92), and published the final Protection Measures on November 14, 2014. *See* 79 Fed. Reg. at 70,286.

F. District court proceedings

Oceana challenged the Protection Measures in district court, alleging violations of the ESA and NEPA. The district court granted summary judgment in the Service's favor, finding that, despite Oceana's understandable "concern for the potential impact of industrial fishing" on the Steller sea lion, "the Defendants complied with their legal obligations" under those statutes. *See* Op. at 2 (ER 4).

On the ESA issues, the district court rejected Oceana's claims that the Service's jeopardy analysis was invalid because it had heightened the standard for finding prey competition, finding that the Service used "the same analytical framework employed in the 2000 and 2010 BiOps." *Id.* at 11 (ER 13). It also held that the Service was not required to identify a "clear tipping point" at which the measures would begin to impair species recovery. *Id.* at 15 (ER 17).

Oceana based its ESA and NEPA claims on areas of scientific uncertainty. The district court noted, however, that the Service had revised its draft Biological Opinion to respond to the comments raised by its internal reviewers, and that Oceana

had failed “to identify any available evidence or studies that [the Service] entirely disregarded or ignored in its assessment.” *Id.* at 14 (ER 16). The Service had adequately addressed internal criticism and scientific uncertainty, informing the public about the controversial issues and taking “a ‘hard look’ at the professional and scientific integrity of its analysis.” *Id.* at 17-18 (ER 19-20).

SUMMARY OF ARGUMENT

In establishing fisheries rules, the Service must consider both the Magnuson-Stevens Act’s directive to maximize the fisheries’ sustainable yield and the ESA’s directive to avoid jeopardizing listed species or adversely modifying their critical habitat. Those two statutory mandates leave a range of reasonable outcomes and regulatory choices that are consistent with the Service’s obligations. As long as it complies with its complementary statutory obligations and justifies its decision in the administrative record, the agency has discretion to reconsider its own past conclusions. Like the Interim Final Rule that resulted from the 2010 Biological Opinion, the Protection Measures at issue here are a valid exercise of the Service’s discretion, given its assessment of the scientific information available at the time. In both cases, the agency studied the relevant factors, relied on facts and studies in the record, and fully explained its conclusions.

In contending that the Service unlawfully changed its methodology for assessing jeopardy between the 2010 and 2014 Biological Opinions, Oceana reduces a

multi-factored analysis down to only one factor – the number of dimensions of overlap between fisheries and sea lion foraging. That argument ignores the Service’s sustained examination of both the effects of the fisheries on sea lion prey and habitat and the species’ response to those effects. The Service concluded in both 2010 and 2014 that there would be some degree of overlap, but also some partitioning. The principal difference between the Service’s conclusions in the two Biological Opinions was its revised analysis of how the population dynamics of Steller sea lions respond to that overlap. That analysis is supported by the record and merits deference from the Court.

The Service was not required to identify any more detailed “tipping point” at which species recovery would no longer be possible. The Service’s Recovery Plan for the endangered Steller sea lion identifies the point at which recovery would no longer be possible in its recovery criteria. Most important here, the “tipping point” under the Recovery Plan would be the failure of two adjacent sub-regional populations. The Service explicitly used those criteria in its 2014 Biological Opinion, finding that fishing under the Protection Measures was not likely to have a significant effect on either the Steller sea lion as a species *or* on its sub-regional populations. It therefore adequately considered recovery under this Court’s case law, and was not required to address the hypothetical question of how much additional effect might preclude recovery.

Finally, Oceana raises both ESA and NEPA claims based on the internal comments that some Service employees made on a draft of the 2014 Biological Opinion. But this is not like the cases that Oceana cites, in which an agency completely ignored its own past findings or the comments of outside agencies. The fact that some agency personnel disagreed with the agency's preliminary drafts does not render its final conclusions arbitrary or capricious, particularly where, as here, the agency had made responsive changes to address that disagreement. In the 2014 Biological Opinion, the Service modified and clarified the inferences that it drew from the available scientific data, acknowledged where the data was incomplete, and identified additional relevant studies. And its final EIS disclosed the areas of controversy, specifically discussing the same uncertainty about depth overlap and spatial overlap raised in the internal comments that Oceana cites. This disclosure of scientific uncertainty and controversy satisfied the ESA and NEPA.

STANDARDS OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. See *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 991 (9th Cir. 2014).

In reviewing the district court's judgment under the ESA, this Court must affirm unless it finds that the Biological Opinion was "arbitrary, capricious, an abuse of discretion," using the familiar standard of the Administrative Procedure Act. *Id.* (quoting 5 U.S.C. § 706(2)(A)); see also *Bennett v. Spear*, 520 U.S. 154, 175 (1997);

Westlands Water Dist. v. U.S. Dep't of Interior, 376 F.3d 853, 865 (9th Cir. 2004). The Court's "review of agency actions, including the promulgation of a BiOp, is narrow." *Alaska*, 723 F.3d at 1052; see *San Luis*, 776 F.3d at 994. A Biological Opinion should be upheld if it articulates a "rational connection between the facts found and the decision made." *Id.* (quoting *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1090 (9th Cir. 2005)).

The standard of review under NEPA is similarly defined by the Administrative Procedure Act. The Court may reverse the agency's decision only if the agency "relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem," or failed to offer a plausible explanation for its action. *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) (internal citations omitted). The Court must ensure that the agency took a "hard look" at the environmental consequences of its actions, *id.* at 1001, but it cannot substitute its judgment for the agency's. *Id.* at 987.

Under both of these statutes, the traditional deference is "at its highest where a court is reviewing an agency action that required a high level of technical expertise." *San Luis*, 776 F.3d at 994 (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989)). In particular, it is not the Court's role to "act as a panel of scientists" that instructs an agency "how to validate its hypotheses" or "chooses among scientific studies." *Lands Council*, 537 F.3d at 988.

ARGUMENT

I. THE 2014 BIOLOGICAL OPINION MEETS THE REQUIREMENTS OF THE ESA.

A. The analytic framework that the Service used is consistent with ESA case law requiring institutionalized caution.

Oceana's fundamental argument is that it is "clear that localized depletion of prey that *could be* caused by competition with industrial fisheries *may be* one of the factors hindering survival and recovery" of the Steller sea lion. Br. at 35 (emphasis added). The caveats in this statement betray the fact that the causation Oceana alleges is not fully clear. A fundamental purpose of the 2014 Biological Opinion was to address this scientific uncertainty and try to resolve, in the context of the specific suite of fishery management measures that the Council and the Service had proposed, the "could be" and the "may be" in Oceana's statement.

To do this, the Service relied on expanded and improved information about the central question of fishery and species interaction, considered the advice of outside experts, identified where the available information could not provide definitive answers, and attempted to address the remaining uncertainties with scientific integrity rather than conjecture. *See supra* pp. 16-20. Through this process, it was able to avoid significant adverse impacts to the species while taking advantage of improved information to ease some fishing restrictions. That is precisely the process that the ESA envisions.

1. The Service used a robust conceptual framework to reach its no-jeopardy conclusion.

Because Oceana argues that the Biological Opinion “does not clearly explain how [the Service] reached its no-jeopardy conclusion,” Br. at 35, the Service’s response will begin by showing that the record does explain that conclusion.

The Biological Opinion rested on a conceptual framework with two parts: the “exposure” analysis, or overlap analysis, of how much competition there might be between fisheries and Steller sea lions for available prey, *see id.* at 212 (ER 379); and the “response” analysis of how that competition might affect Steller sea lions individually and as a species. *See id.* at 217 (ER 384). The Service began from the premise, not disputed here, that “the amount of prey available” across the ecosystem during the course of a year “is more than needed to meet the food requirements” of a Steller sea lion population, even after recovery. *Id.* at 215 (ER 382). The species’ exposure to fishing, therefore, depended in part on whether and to what extent the fisheries cause “localized depletions of prey,” and the species’ response depended in part on whether sea lions could still attain sufficient prey by foraging in a different place, at a different depth, or for other species. *Id.* To determine whether the survival and recovery of the species as a whole was likely to be jeopardized by the fisheries, the Service conducted this analysis with a focus on Areas 541, 542, and 543 – the location

of the two sub-regional populations of most concern under the Recovery Plan criteria.

See id.

The Service’s exposure analysis aimed at identifying overlap between fisheries and sea lion foraging in time, space or location, and water depth. The Service exhaustively compared Steller sea lion locations, as determined through telemetry data and confirmed sightings, and plotted those locations against maps of the area that would be open for fishing under the Protection Measures in both summer and winter. *See id.* at 156 (ER 323). The Service also used telemetry dive data to analyze the depth of sea lion foraging for overlap with fisheries. *Id.* at 173-174, 186, 190 (ER 240-41, 353, 357). This analysis concluded that “some amount of partitioning can be expected” and “[s]ome extent of direct overlap is also expected” for each prey type. *Id.* at 210 (ER 377).⁵ The Service also considered how that overlap or partitioning would affect the overall prey available to the Steller sea lion. Some prey species, notably pollock and Pacific cod, move to new areas more quickly and may therefore have “high replenishment rates.” *Id.* Overall, new research confirmed that “natural fluctuations dominate over fishing effects” for Atka mackerel, and there was evidence of similarly-predominant environmental effects for pollock and Pacific cod. *Id.* at 211

⁵ In the next section, this brief addresses Oceana’s specific arguments about the overlap analysis. *See infra* pp. 44-51.

(ER 378). Ultimately, the Service concluded that the evidence supported “some potential for reduced prey resources.” *Id.*

This exposure analysis was not, however, the final step. As in 2010, the Service also considered the species’ response to a change in prey availability. Birth rate is an important variable for understanding the population dynamics of Steller sea lions, and in the 2010 Biological Opinion, the Service had estimated this rate using the ratio of pups to non-pups. *Id.* at 54, 58 (ER 221, 225). This was one of the choices that independent experts criticized about the 2010 Biological Opinion, and the Service ran a new simulation showing that the pup to non-pup ratio “is an imperfect and in some cases erroneous proxy” for birth rate. *Id.* at 58 (ER 225).

The Service also reviewed whether existing and new evidence supported the theory that prey removal by fisheries was causing nutritional stress in sea lions. The Service took “care to include new, relevant information that may provide insight into the occurrence or absence of chronic nutritional stress.” *Id.* at 74 (ER 241). The Service found no direct evidence of chronic nutritional stress due to an inadequate quantity of prey, and noted that the same evidence supported contrasting theories with respect to prey quality. *Id.* at 75 (ER 242). The weight of evidence “is either counter to or non-supportive of a nutritional stress mechanism to explain the apparent population dynamics for the” western distinct population segment, although

the theory remains “the subject of intense scientific debate” due to the difficulty of conducting a large-scale study. *Id.* at 77 (ER 244).

Independent reviews of the 2010 Biological Opinion had suggested that greater use of statistical models and simulations might be one way to address the gaps in observational data. *Id.* at 218 (ER 385). The 2014 Biological Opinion describes how the Service responded to those concerns, running simulations with different combinations of variables to determine which were predictive and which simply produced statistical “noise.” Those simulations showed that many combinations of variables “resulted in little to no power to detect prey removal effects on Steller sea lion populations,” and that in particular, the type of pup to non-pup ratio studies that the 2010 Biological Opinion had used “performed extremely poorly.” *Id.* at 218-19 (ER 385-86). Two studies (one that was available in 2010, and one that was not) had used variables that performed well in the Service’s analysis, and both of those studies suggested that variations in prey levels did not affect the observed changes in Steller sea lion populations. *Id.* at 219 (ER 386) (interpreting the Dillingham (2006) and Hui (2011) studies). Overall, this analysis appeared to suggest that “local availability of groundfish stocks has a minimal effect on non-pup survival,” although it identified a need for more study of these effects. *Id.*

Applying its weight-of-evidence approach to these findings, the Service concluded that the Protection Measures would be effective in dispersing fishing effort

to avoid localized depletion of prey in Area 543 (the western Aleutian Islands). The Biological Opinion “acknowledges some uncertainty about the potential for the fisheries to reduce prey resources,” and made further research on that question part of the proposed action. *Id.* at 247 (ER 414). But given that the Service’s studies had been unable to demonstrate causation between fishing effort and Steller sea lion population dynamics, it concluded that the proposed fishing management measures “are unlikely to yield population level effects that would appreciably change the likelihood of survival or recovery” of the western Aleutian Islands sub-regional population. *Id.* With respect to Areas 541 and 542 in the central Aleutians, the Service recognized that the new Protection Measures in these areas would have similar effects to the measures in place from 2004 to 2010, when populations were increasing. *Id.* at 248 (ER 415). The measures may allow some local effects on sea lion prey, but overall those effects “would be of insufficient magnitude to appreciably reduce the reproduction” of the sub-regional population. *Id.* at 247 (ER 414).

Throughout the 2014 Biological Opinion, the Service identified areas where data was incomplete or more research would be helpful. But the marine environment that Steller sea lions inhabit is so large, and the ecological interactions there so complex, that “we may never have a firm grasp” on the relative effects of human causes and natural causes on Steller sea lion prey. *Id.* at 246 (ER 413). That does not mean that the Service’s analysis or rationale was unclear. The Court can uphold that

rationale under the APA as long as “the agency’s path may be reasonably discerned.”

San Luis, 776 F.3d at 994.

2. The Service’s analysis was consistent with the “benefit of the doubt” principle under the ESA.

Oceana argues that the Service’s analysis, regardless of its thoroughness, is substantively invalid under the ESA because it violates the statute’s principle of “institutionalized caution,” which requires the agency to give the species “the benefit of the doubt.” *Oceana Br.* at 33-34, 41-42 (citing *Hill*, 437 U.S. at 194, and *Connor v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988)). The “benefit of the doubt” language refers to the structure of the Act itself, which establishes a presumption against agency action by placing the burden on the agency to demonstrate that its action will not cause jeopardy. H.R. Conf. Rep. No. 96-697, 1st Sess. 12, *reprinted in* 1979 U.S.C.C.A.N. 2572, 2576; *see* 16 U.S.C. § 1536(a)(2). This Court has read that language to require agencies, for example, to meet their burden using the “best information available . . . considering all stages of the agency action.” *Connor*, 848 F.2d at 1454.

Although the ESA places the burden on the agency to show that its action is not likely to cause jeopardy, it does not prohibit the agency from making that showing by reviewing the available evidence and drawing a conclusion that the evidence rationally supports. The ESA “accepts agency decisions in the face of uncertainty,”

and does not require that an agency “act only when it can justify its decision with absolute confidence.” *Arizona Cattle Growers Ass’n v. Salazar*, 606 F.3d 1160, 1164 (9th Cir. 2010). This latitude in decisionmaking under the ESA is fully consistent with (and required by) the more general principle that agencies must be given deference in interpreting scientific evidence. *See, e.g., San Luis*, 776 F.3d at 994; *Lands Council*, 537 F.3d at 988. In many of the cases discussing the “benefit of the doubt” principle, the Court has specifically paired it with deference to agency scientific judgments. *See League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 763-64 (9th Cir. 2014); *Brower v. Evans*, 257 F.3d at 1067, 1070-71 (9th Cir. 2001); *NRDC v. Kempthorne*, 506 F. Supp. 2d 322, 360 (E.D. Cal. 2007). The Service, as the expert agency on these issues, is in a better position than the Court to determine whether the available data is adequate to satisfy the statutory burden, especially when that data “is imperfect, weak, and not necessarily dispositive.” *League of Wilderness Defenders*, 752 F.3d at 764.

Oceana does not claim that there is better scientific information that the Service failed to consider. Its claim is that, given the uncertainties in the scientific record, the “benefit of the doubt” required the Service to make a jeopardy finding. *Oceana Br.* at 42. But in the area of “marine mammal conservation,” where scientific findings “are often necessarily made from incomplete or imperfect information,” *Brower*, 257 F.3d at 1070-71, such a rule would effectively always require the Service to make a determination that the agency action is likely to cause jeopardy. Even the

cases Oceana cites have found that neither the ESA nor the case law “support th[at] broader interpretation.” *Kempton*, 506 F. Supp. 2d at 360. Instead, where the agency extensively studies a problem and chooses the “best estimate possible” based on the available evidence, the Court may uphold it even if there is a “more ‘conservative’ estimate that lacked scientific support.” *Id.* at 362 (discussing *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 228 (D.D.C. 2005)); see *League of Wilderness Defenders*, 752 F.3d at 763-64.

That is what happened here. Independent experts criticized the 2010 Biological Opinion as too conservative, given the lack of any clear scientific support for the nutritional stress theory. *See supra* pp. 17-18. The agency therefore engaged in a sustained, thorough study of that problem and reached the conclusion that it believed was most justified based on the evidence available in 2014: that less-stringent protections in some specific areas would not be likely to jeopardize the Steller sea lion. The rule of deference on scientific matters has little meaning if the Court cannot uphold the Service’s conclusion based on the extensive study in this record.

3. The Service did not arbitrarily change its approach to assessing overlap with fisheries.

Oceana argues that the agency’s scientific analysis cannot support its conclusion because the Service failed to justify the differences between its 2010 and 2014 Biological Opinions. *See Oceana Br.* at 36-42. It claims that because the Service

found in 2010 that there was overlap between fishing and Steller sea lion foraging in three dimensions and also found jeopardy, and it found in 2014 that there was overlap in four dimensions but found no jeopardy, the Service unlawfully changed its approach. *Id.* at 14-15, 23-24, 36-38.

This simplistic argument incorrectly reduces a complex, multi-factored analysis to one issue – the number of dimensions of overlap. Viewed fairly, the Service used the same analytical framework for measuring exposure and species response, and applied the same standards for finding overlap, as it had in 2010. But it also conducted a much more nuanced analysis than Oceana portrays, reaching its conclusion about jeopardy based on new information about competition for prey *and* the species' response to that competition.

To characterize the Service's methodology in 2010, Oceana relies principally on a flowchart of the Service's conceptual framework in the 2010 Biological Opinion. 2010 BiOp Fig. 4.24 (ER 646). That flowchart does not establish rigid rules of decision, but only shows the logical and analytical steps that the Service would follow in its overall qualitative analysis. *See id.* at 201, 283 (ER592, 607). Even assuming that the flowchart established mechanical rules for the Service to apply, however, it does not establish the rule that Oceana claims – that if there is overlap between fishing and Steller sea lion foraging in three of the areas the Service studied, then “significant impacts to sea lions were likely.” Oceana Br. at 36. The flowchart shows only that if

the Service did *not* find overlap in three areas, then it would find “no significant impacts likely” and the analysis would end. 2010 BiOp Fig. 4.24 (ER 646). If the Service *did* find overlap in at least three areas, it would not automatically make a jeopardy finding, but would go on to characterize species exposure more fully. *Id.* After that, a separate flowchart showed several more steps to characterize the species’ response to that exposure. *Id.* Fig. 4.25 (ER 647). The conclusions in the 2010 Biological Opinion bear this out: Both the “Threats to Survival and Recovery” and “Summary of Evidence for Risks” section focus on pup counts and reproductive rates, rather than fishery overlap. *See id.* at 339-43 (ER 627-31).

For similar reasons, Oceana is also wrong in claiming that the Service’s 2014 analysis required overlap in all four areas in order to find jeopardy. *See Oceana Br.* at 37-38. The Service again included flowcharts in the 2014 Biological Opinion showing its conceptual framework – one for species exposure, and another for species response. *See* 2014 BiOp at 212, 217 (ER 379, 384). Those charts show that “Size, Place, Time & Depth overlap,” taken together, was one factor in the exposure analysis, and that factor is entirely qualitative – it does not identify any particular amount of overlap necessary to find any particular exposure. *Id.* at 212 (ER 379). This single reference cannot support Oceana’s assertion that overlap findings in all four areas were “*necessary* conditions” for exposure. *See Oceana Br.* at 39 (emphasis in original). The district court correctly found “no indication that [the Service] assumed

significant overlap in all four dimensions was required to make a finding of jeopardy or competition.” Op. at 11 (ER 13).⁶

In any event, the Service made similar overlap findings in 2010 and 2014. In 2010, the Service noted that the “best available scientific and commercial data” shows a “high degree of overlap,” leading the Service to conclude that the fisheries “potentially compete” with Steller sea lions. 2010 BiOp at 202 (ER 593). In 2014, using updated information, the Service said there would be “some amount of partitioning” and “[s]ome extent of direct overlap,” causing “some potential for reduced prey resources.” 2014 BiOp at 210-11 (ER 377-78).

The principal difference between the Service’s jeopardy analysis in 2010 and 2014 was not in its assessment of the extent of overlap, but rather in how the balance of overlap and partitioning would affect population dynamics for the species. The Service based its 2010 jeopardy determination, in large part, on the theory that overlap

⁶ Oceana supports its characterization of the 2014 Biological Opinion by claiming that some scientists “perceived” the Service as finding that “one dimension of partitioning” means “no resource competition.” Oceana Br. at 39; NMML memo at 8 (ER 749). Specifically, the commenter took issue with the draft statement that “sea lions are not likely to be exposed to reduced prey resources.” *Id.* But this Court’s review is based on the agency’s statements, not on commenters’ perceptions. *See, e.g., NRDC v. EPA*, 735 F.3d 873, 877 (9th Cir. 2013). And the Service clarified its finding in the final Biological Opinion, stating instead that “partial overlap” would “result[] in some potential for reduced prey resources.” 2014 BiOp at 211 (ER 378).

between the fisheries and sea lion foraging was causing nutritional stress, and that nutritional stress may be reducing pup counts and contributing (along with other factors) to sub-regional population declines. 2010 BiOp at 300, 345 (ER 624, 633); 2014 BiOp at 242 (ER 409). The Service's external peer reviewers found this conclusion "unsupportable" due to the "lack of any direct evidence for fisheries-induced nutritional stress." *See* 2014 BiOp at 11 (ER 178). In 2014, therefore, the Service continued to seek protection measures that would disperse fishing "in time and space to prevent localized depletion" of prey, but concluded that fishing according to those measures would be "unlikely to yield population level effects." *Id.* at 227, 246-47 (ER 394, 413-14). The Service reached new conclusions based on new information and analysis, not an arbitrary change in methodology.

The Service is entitled to reconsider these questions within the bounds of discretion and expertise that the ESA affords it. *Nat. Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658-59 (2007). Where an agency changes its mind, "[i]t 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." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (emphasis in original). A new policy may "rest[] upon factual findings that contradict those which underlay its prior policy," as long as the agency provides a "reasoned explanation." *Id.* at 515-16; *see also Ariz. Cattle Growers*, 606 F.3d at 1169. Thus, for example, in *Humane Soc'y v. Locke*, 626 F.3d 1040, 1048-50 (9th Cir.

2010) (cited in *Oceana Br.* at 38), this Court held that the agency had not justified its factual findings because it simply failed to address prior findings that were in direct conflict. In *Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 967-68 (9th Cir. 2015) (en banc), the Court held that the agency was not permitted to reverse its key policy conclusion on “*precisely the same record*” by “discard[ing] prior factual findings without a reasoned explanation.”

This case is different. The 2014 Biological Opinion reads as a direct response to the limits of the data and methods that were available to it in 2010, particularly those that were considered questionable by outside experts. It fully disclosed how it would use new data to add to its prior understanding. *See Analytic Approach* at 1-3 (SER 141-43), 2014 BiOp at 10-12 (ER 175-77). It contrasted its 2014 findings with its 2010 findings at key points in the Biological Opinion. *See, e.g., id.* at 74 (ER 241) (nutritional stress); *id.* at 138-39 (ER 305-06)(telemetry foraging data); *id.* at 218-19 (ER 385-86) (population dynamics simulations); *id.* at 242-43 (ER 409-10) (jeopardy conclusion). Here, the Service did not ignore or discard prior factual findings without explanation, but met all of the requirements that the Supreme Court outlined in *Fox* for a rational change of position.⁷

⁷ For this reason, there was no error in the Service’s analysis, and the “harmless error” principles that *Oceana* cites in its brief (at p. 40) are inapposite.

4. The Service was not required to identify a “tipping point” for Steller sea lion recovery.

Oceana next argues that the Service failed to identify a “tipping point” at which point the fisheries’ potential effects on the Steller sea lion will “preclude recovery.” Oceana Br. at 42-45. In a small number of cases, this Court has made use of the “tipping point” concept to emphasize that when an agency takes an action that may have significant effects on a listed species, it must ensure that the action will not “reduce appreciably the likelihood of *both* the survival *and* recovery of a listed species in the wild.” 50 C.F.R. § 402.02. But those cases do not apply here.

Some consideration of a “tipping point” is required where an agency identifies “significant” impairments” from its action and yet “conclude[s] that no harm will result” from those impairments. *Nat. Wildlife Fed’n v. Nat. Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008). Thus, in *National Wildlife Federation*, the Court considered an action that the agency had found would not adversely modify critical habitat, even though it might cause “short-term degradation.” *Id.* at 934. The Court held that the ESA consultation process requires “some attention to recovery,” and specifically, that the agency should consider whether its action will “appreciably reduce the odds of success for future recovery planning, by tipping a listed species too far into danger.” *Id.* at 936. Similarly, in *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 527 (9th Cir. 2010), the Service acknowledged that its action had seriously disrupted

the migration and spawning of the listed bull trout, but had concluded that the species was likely to persist in the area because it had done so over many years. The Court rejected this judgment, noting that “even before a population is extinguished, it may reach a point at which it is no longer recoverable.” *Id.* The Court held that the agency should have identified this “tipping point precluding recovery,” to ensure that its action did not send the species past that tipping point.

These cases are not on point because the Service found that the Protection Measures would *avoid* significant impairment to the Steller sea lion’s habitat and ability to forage by reducing potential prey competition, and would not be likely to appreciably reduce the species’ survival or recovery. *See* 2014 BiOp at 247-48 (ER 414-15). The district court correctly held that “there is no affirmative duty under the ESA to identify a clear tipping point line” in this situation. *Op.* at 15 (ER 17).

Even if this Court chose to extend its precedent to cover cases in which the *plaintiff* alleges that the agency action will have population-level effects, despite the agency’s own contrary finding, the Biological Opinion here would satisfy the requirement of a “tipping point” analysis. The sea lion’s continued survival was not a significant issue in the Biological Opinion because the risk that the species will cross the “quasi-extinction threshold” in the next 100 years is “virtually nil.” 2014 BiOp at

49 (ER 216).⁸ Instead, the central focus of the Biological Opinion was the potential effects of the fisheries on sub-regional populations in the central and western Aleutian Islands, because a continued decline in two adjacent sub-regions or a severe decline in one sub-region would preclude species recovery under the criteria of the 2008 Recovery Plan. *Id.* at 246 (ER 413); *see also Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1067-68 (9th Cir. 2004) (upholding Biological Opinions that implement scientifically sound analysis found in another planning document). The “tipping point” here is “the survival or recovery of any sub-population (sub-region),” and if the Service had found that the fisheries would reduce the likelihood of survival or recovery in just one of those sub-regions, then it would have made a finding of jeopardy for the species as a whole in order to prevent a sub-regional decline that would preclude recovery. 2014 BiOp at 246 (ER 413).

Oceana, in effect, is asking the Court to require the Service to find a tipping point within that tipping point. But the cases it relies on merely serve to ensure that the agency considers both survival *and* recovery when proposing an action that may

⁸ The “quasi-extinction threshold” is “a minimum viable population size,” such that when the population falls below that size, the population is destined for ultimate extinction. *See* 2014 BiOp at 48 (ER 215). The Service calculated this value for the Steller sea lion for the Biological Opinion. *Id.* at 49 (ER 216). This fact would itself satisfy the Court’s “tipping point” concerns even if the Service had not used the more detailed recovery criteria identified in the Recovery Plan.

adversely affect a listed species. Because the Service found that the fisheries would not cause a failure to meet the Recovery Plan criteria, it satisfied its obligation to ensure that the fisheries “will not appreciably reduce the odds of success for future recovery planning.” *Nat. Wildlife Fed’n*, 524 F.3d at 936.

B. The facts that the Service found in the Biological Opinion have a rational basis in the record.

Oceana argues that the evidence that the Service reviewed in the Biological Opinion does not support the conclusion that “low overlap exists in even one dimension” for the pollock and Atka mackerel fisheries. Oceana Br. at 46. The Service found that there would be “some amount of partitioning” between the pollock fishery and Steller sea lion foraging because those activities largely occur at different depths, and between the Atka mackerel fishery and sea lion foraging because those activities largely occur in different places. 2014 BiOp at 210 (ER 377).

The fact that some agency personnel disagree with or critique the agency’s reasoning does not render that reasoning arbitrary or capricious. *Nat’l Ass’n of Home Builders*, 551 U.S. at 659. In reviewing whether the record supports an agency’s conclusion, the Court need not look for “unanimity of opinion.” *City of Carmel-by-the-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1151 (9th Cir. 1997). Internal disagreement is not uncommon as the agency works toward a final decision – particularly in a record, like this one, that contains scientific uncertainties that must be interpreted.

Thus, while the Service may not “ignore reputable scientific criticism,” it may also “rely on its own evidence.” *Id.* (quoting *Seattle Audubon Soc’y v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993)); *see also Trout Unlimited v. Lohn*, 559 F.3d 946, 959 (9th Cir. 2009); *Lands Council*, 537 F.3d at 993. This Court must review the Service’s final action, not the “various statements” made by its employees “during the early stages of consideration.” *Nat. Ass’n of Home Builders*, 551 U.S. at 658-59. The dissenting views that some Service employees expressed here show a robust internal debate (and a hard look at these issues), not that the Service’s decision that was “counter to the evidence before the agency.” *Oceana Br.* at 48 (citing *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The district court rejected Oceana’s argument on these points, *see Op.* at 12-14 (ER 14-16), and this Court should do the same.

1. The pollock fishery

The Service found that the “available data indicate a great extent of depth partitioning between the Aleutian Islands pollock fishery and Steller sea lions,” which would mitigate any localized depletion of prey. 2014 BiOp at 232 (ER 399) (western Aleutian Islands); *see also id.* at 235-36 (ER 402-03) (central Aleutian Islands). Oceana claims that this finding was arbitrary or capricious because some agency scientists disagreed. *Oceana Br.* at 46.

The Service’s depth analysis was based on at least seven different studies, *see id.* at 173-74 (ER 340-41), and Oceana does not cite any other studies the Service failed to consider. The “best available information” on the depth of sea lion foraging came from telemetry data that recorded mean dive depths to about 50 meters. *Id.* at 173-74 (ER 340-41). Only 10% of recorded dives were in the 100-250 meter range, with isolated dives below 250 meters. *Id.* Fig. 5-22 (ER 342). In contrast, the vast majority of pollock trawl depths reported was greater than 250 meters, with an average depth of 315 meters. *See id.* Table 5-30 and Fig. 5-28 (ER 345, 352). This average is “at the upper end of the deepest depths observed for adult females and juvenile sea lions” – the critical population for determining reproductive rates—and the Service therefore “would not expect much depth overlap.” *Id.* at 183 (ER 350).

Comments from individual agency scientists do not undermine this conclusion. Their comments suggested that a high percentage of shallow-water dives may be a misleading proxy for foraging activity, because “it is unknown which depths are successful foraging depths.” NMML memo at 7 (ER 748); *see also* Fritz e-mail at 2 (ER 66). But the Service did not find that most foraging occurred during the recorded shallow-water activity, nor that there was “no potential for ‘overlap’” between the pollock fishery and sea lion foraging. NMML memo at 7 (ER 748). Instead, it acknowledged that a “broad range of behaviors occur at or near the surface” and that such activities may not be fully “indicative of foraging behavior,” 2014 BiOp at 174

(ER 341), while also presenting data showing that most pollock fishing occurs at much greater depth than most sea lion dives. Indeed, the NMML's critique relied on a study suggesting that "the majority of successful foraging dives were between 75-150 m" (ER 748), *see* Draft EIS at 5-41 (ER 510) (cited in *Oceana Br.* at 47), which would support the Service's conclusion of a low potential for overlap.⁹ At most, the comments that *Oceana* cites show areas of uncertainty in the overlap analysis, not that the agency reached conclusions "counter to" the evidence before it. *See* *Oceana Br.* at 48 (citing *State Farm*, 463 U.S. at 43).

Additionally, it is important to note that the Service's finding about depth partitioning was only one factor supporting its overall conclusion about the pollock fishery. The Service also noted the fact that there are already stringent catch limits in place for pollock and that localized depletions would replenish rapidly because pollock have a high movement rate. 2014 BiOp at 233 (ER 400). In Area 543, the area of most concern, pollock fishing is only permitted by smaller vessels that create

⁹ *Oceana* also relies on the "Brown comment," *see* *Oceana Br.* at 47 (citing ER 39), which expresses doubt about a *description* of the overlap analysis that the Service used in the 2010 Biological Opinion. This comment does not show that agency scientists considered the evidence presented in the 2014 Biological Opinion inadequate to support its conclusions. In any event, this comment concerns the movement of fish vertically through the water column, and the Service took that factor into account. *See* 2014 BiOp at 232 (ER 399).

less potential for localized prey depletion, and may not occur at all due to economic considerations. *Id.* at 207-08 (ER 374-75).

This Court has previously reviewed the Service’s similar decisions about pollock fishery overlap and upheld them under the ESA. In *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1337 (9th Cir. 1992), the Court recognized that the Service had “supported its conclusions with ample data and analysis,” that it “consulted with other teams of experts to consider all relevant factors pertaining to the effects of the Gulf fishery on the Steller sea lion,” and that it “did not ignore data.” The Court therefore upheld the Service’s decision to allow the fishery “despite some uncertainty about the effects of commercial pollock fishing on the Steller sea lion.” *Id.* Similarly here, the 2014 Biological Opinion rationally considered all of the available information, finding that the pollock fishery is unlikely “to reduce the prey resources” available to foraging sea lions “to an extent that reduces the reproduction or survival” of sub-regional populations. *Id.* at 233 (ER 400) (for Area 543 in the western Aleutian Islands); *see id.* at 235-36 (ER 402-03) (other areas).

2. The Atka mackerel fishery

Based on the same individual comments on the draft Biological Opinion, Oceana also claims that Service could not reasonably have found a “low amount of direct spatial overlap” between Atka mackerel fishing and sea lion foraging in the final

Biological Opinion, and that its spatial overlap analysis in general should have been “abandoned entirely.” Oceana Br. at 48-50.

The 2014 Biological Opinion presented substantial evidence to support the finding of low spatial overlap. First, it noted that preventing localized depletion of prey was most important in areas around rookeries and haulouts, which had been designated critical habitat in 1993. *See* 2014 BiOp at 135, 227 (ER 302, 394). The Protection Measures would sharply restrict fishing in those areas, allowing fishing in only 24% of critical habitat in Area 543, 8% in Area 542, and 3% in Area 541. *See id.* Table 5-21 (ER 320); *id.* at 227 (ER 394). And the Service did not expect fishing in all of those areas; for example, in Area 543, “a large portion of the habitat . . . is not accessible to bottom-trawl gear,” and such areas are “available to sea lions and not the fishery.” *Id.* at 228 (ER 395). The Service also updated its study of observed sea lion locations using sea lion telemetry data and from a database of sea lion sightings (known as “Platform”) from 1992 through 2012. These two sources were the only “available at-sea observations of Steller sea lions.” *See* 2014 BiOp at 156 (ER 323). The Service plotted that information on maps along with fisheries data and the locations of designated critical habitat. *Id.* at 158-163 (ER 325-30).

Oceana relies on comments that the telemetry data showing where sea lions are present could not be used to infer an *absence* of sea lions in other areas. *See* Oceana Br. at 48-49 (citing NMML memo at 5-6 (ER 746-47); Fritz e-mail at 2 (ER 66));

Rotterman memo at 3 (ER 795)). For example, the NMML specifically criticized a statement in the draft Biological Opinion that inferred “low use by sea lions” based on a lack of observations. NMML memo at 5 (ER 746); *see also* Rotterman memo at 3 (ER 795) (referring to “unsupportable conclusions” about “non-use of areas”). But the Service then revised its Biological Opinion to avoid any such inference. In the final Biological Opinion, it explicitly stated that “the sample size of telemetered animals is small and may not be representative of the whole population,” and that “[i]f an area has few or no sea lion locations or sightings, we cannot infer that the area is not used by sea lions.” 2014 BiOp at 156 (ER 323). The NMML had also pointed out a study that had attempted to compensate for the low sample sizes in the telemetry data. *See* NMML memo at 5-6 (ER 746-47) (citing Himes, Boor and Small (2012)). The Service discussed that study and explained why it may not address the specific issue of breeding-female and juvenile foraging. 2014 BiOp at 172-73 (ER 339-40).

Oceana dismisses the Service’s efforts to revise its initial conclusions by arguing that the agency “did not offer any additional science or analysis supporting the theory of low spatial overlap.” Oceana Br. at 50. That is because there were no additional studies; the Service had already reviewed all relevant information. Its conclusions were based on all of the “substantial – though not dispositive – scientific data, and not on mere speculation.” *Greenpeace Action*, 14 F.3d at 1333. It is therefore not this

Court's role "to ask whether we would have given more or less weight to different evidence." *Trout Unlimited*, 559 F.3d at 959 (citing *Lands Council*, 537 F.3d at 993)).

II. THE EIS ADEQUATELY DISCLOSES SCIENTIFIC UNCERTAINTY, AND IT WAS NOT REQUIRED TO DISCUSS THE SERVICE'S INTERNAL DELIBERATIONS.

Oceana also makes the concerns of a few agency scientists the basis for its NEPA claim, arguing that the Service should have disclosed those comments in its final EIS as "responsible opposing view[s] which [were] not adequately discussed in the draft" EIS. 40 C.F.R. § 1502.9(b); *see* *Oceana Br.* at 50-56. The district court rejected these arguments, finding that the final EIS "highlights important criticisms, considers the limitations of the data used in its analysis, and incorporates reasonable comments that called into question the agency's final conclusion." *Op.* at 18 (ER 20). The district court was correct, and its NEPA judgment should be affirmed.

Under NEPA, the agency's discussion of opposing scientific viewpoints is guided by a "'rule of reason' that asks whether an EIS contains a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences.'" *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 703 (9th Cir. 1993) (quoting *Idaho Cons. League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992)). As part of that "hard look," the Service was required to "acknowledge and respond to comments by outside parties that raise significant scientific uncertainties and reasonably support that such uncertainties exist." *Lands Council*, 537 F.3d at 1001. However, "experts in every

scientific field routinely disagree,” so an agency need not “affirmatively present every uncertainty in its EIS.” *Id.*; see *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1151 (9th Cir. 2010).

To support its argument, Oceana cites two sets of comments from within the Service, one set from an NMML scientist and another from the Sea Lion Coordinator, on a draft Biological Opinion. See *Oceana Br.* at 52-53. Despite intense public interest in the Service’s decision here, Oceana does not rely on any additional scientific studies or expert dissent from outside scientists, other agencies, or the public, nor upon any comments concerning the draft or final EIS or the final Biological Opinion. Instead, Oceana cites *Greater Yellowstone Coalition v. Lewis*, 628 F.3d at 1151-52, for the proposition that an agency must disclose and respond to significant “internal uncertainty.” *Oceana Br.* at 54. That quote, however, describes the *plaintiffs’* argument in *Greater Yellowstone*, which this Court rejected. In contrast, the en banc Court in *Lands Council* focused on “comments by *outside parties* that raise significant scientific uncertainties” as the basis for the agency’s NEPA obligation. 537 F.3d at 1001 (emphasis added). Oceana does not cite any case, and the Service is aware of none, in which this Court has found a violation of NEPA or of 40 C.F.R. § 1502.9(b) on the basis of disagreement solely within an agency at a preliminary stage.

Even if the Court were to hold that internal scientific disagreement triggers the same disclosure and discussion requirements as comments from outside parties, the

Service met its NEPA obligations here. The Service knew from the beginning that competition between fisheries and Steller sea lions is an area of scientific uncertainty. Prompted by the critique of the 2010 Biological Opinion by outside experts, the Service completely reconsidered that issue in the 2014 Biological Opinion and EIS, rather than continuing to rely on the analysis conducted for the Interim Final Rule. That reconsideration included taking into account the concerns of internal agency scientists. As discussed above, the Service addressed those comments in its final Biological Opinion, making changes in response to the comments those scientists made on the draft Biological Opinion. For example, the Service removed any inference that a lack of telemetry data or sightings indicated an absence of sea lion activity. *See supra* pp. 46-47, 49-50.

The agency continued this disclosure and discussion in the EIS, which regularly acknowledges the existence of “scarce or conflicting” information and the fact that experts may reasonably differ. *See, e.g.*, EIS at ES-63 to ES-64 (SER 224-25) (“Areas of Controversy”); *id.* at 5-108 to 5-112 (ER 29-33) (discussing how the Service responded to controversy over the 2010 Biological Opinion); *id.* at 13-53 to 13-63, 13-71 to 13-77 (SER 380-90, 398-404) (responding to various comments relevant to these issues). The EIS identified the overlap between fishing and Steller sea lion prey as one of those areas of controversy. *Id.* at ES-64 (SER 225).

The Service also gave further detail on some of the specific points that Oceana raises in its brief. For example, with respect to depth overlap in the pollock fishery, the Service said that the effectiveness of partitioning “can be difficult to judge using the available information. Scientific studies of Steller sea lion foraging patterns are just beginning to characterize the diving depths and patterns of Steller sea lions.” The Service explicitly said that sea lions may forage in areas “not yet described” (e.g., by telemetry) and that vertical prey movement may be a relevant factor. EIS at 5-105 (SER 370); *see also* 5-41 to 5-42 (SER 363-64) (noting that the frequency of shallow-water observations does not necessarily reflect foraging behavior, and acknowledging dives greater than 300 m).

With respect to spatial overlap, the Service acknowledged that telemetry data was not adequate to make inferences about the movements of breeding females and juveniles. *See id.* at 5-32 to 5-33 (SER 354-55). It noted that “conclusions about habitat use based on telemetry data for the sea lion population as a whole are limited,” due in part to “large gaps in telemetry coverage geographically and for many age-sex groups.” *Id.* at 5-46 (SER 368). In the EIS, the Service addressed the Himes, Boor and Small (2012) study, mentioned in the NMML comments, that had sought to address some of those gaps. *See id.* at 5-46 to 5-47 (SER 368-69).

The Service’s discussion of controversy and uncertainty stand in sharp contrast to the omissions that this Court has found to violate NEPA. For example, in *Center*

for Biological Diversity, 349 F.3d 1157, 1161 (9th Cir. 2003), the U.S. Forest Service proposed to base its northern goshawk management plan on the premise that the species was a “habitat generalist” that occupied a mosaic of forest types. Two state wildlife agencies, the U.S. Fish and Wildlife Service, and independent scientists had submitted formal comments at multiple stages of the administrative process, referring to multiple studies, suggesting the exact opposite – that the goshawk is a “habitat specialist” requiring mature forest. *Id.* at 1161-64. This Court found that the Forest Service’s “failure to disclose and analyze these opposing viewpoints violates NEPA.” *Id.* at 1167. In *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 492 (9th Cir. 2011), the Bureau of Land Management received formal comments on various issues from several other state and federal agencies. Although scientific controversy was not an issue in *Western Watersheds*, this Court held that the agency had violated NEPA because it “gave short shrift to a deluge of concerns from its own experts, FWS, the EPA, and state agencies” and had “neither responded to their considered comments ‘objectively and in good faith’ nor made responsive changes to the proposed regulations.” *Id.* at 493 (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000)).

The facts of this case are very different, and require a different outcome under NEPA’s rule of reason. The Service addressed internal comments on the draft Biological Opinion by making “responsive changes” in the final Biological Opinion. *Western Watersheds*, 632 F.3d at 493. Although the internal commenters did not

“identify scientific evidence and opinions contradicting the Service’s conclusion,” *Center for Biological Diversity*, 349 F.3d at 1167, the Service did identify and discuss in the final EIS the specific additional study that the NMML memo mentioned. The scale of disagreement in this case is therefore more like *Greater Yellowstone*, in which the Court held that “one statement indicating uncertainty within the technical review team” was not a “significant uncertainty” that required NEPA discussion. 628 F.3d at 1152. And the Service’s degree of engagement with that uncertainty, evident in both the Biological Opinion and the EIS itself, far surpasses the “short shrift” that the Court has found to violate NEPA. *Western Watersheds*, 632 F.3d at 493.

III. THE COURT CAN CHOOSE TO REMAND FOR ADDITIONAL EXPLANATION WITHOUT VACATING.

Finally, Oceana argues that if the Court finds a violation of NEPA or the ESA here, it should vacate the Protection Measures and reinstate the Interim Final Rule. This Court has recognized that, while vacatur is the ordinary remedy, “[a] flawed rule need not be vacated” if equitable factors counsel against vacatur. *Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (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.’” *Id.* (quoting *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). For example, if the Court were to identify a deficiency in the Service’s NEPA documentation, such as an

inadequate disclosure of its internal commenters' views, then the Court should leave the Protection Measures in place while the Service corrects that deficiency. Although the ESA gives species conservation great weight in an equitable analysis, it still allows the district court to consider the traditional factors relevant to equitable relief. If the Court were to find that the Service violated its substantive mandate under the ESA to ensure that its actions are not likely to jeopardize listed species, then the most prudent course would be to remand to the district court to consider those factors in the first instance in determining an appropriate remedy.

CONCLUSION

The Service promulgated the Protection Measures at issue here after more than a decade of studying the potential competition between fisheries and Steller sea lions, including thorough external reviews of its 2010 Biological Opinion and the emergence of substantial additional scientific information. Its 2014 Biological Opinion and EIS show that it was fully engaged with the scientific uncertainty surrounding these issues and made a reasoned decision based on the best available data. That decision satisfied the requirements of NEPA and the ESA.

This Court should affirm the judgment of the district court.

Respectfully submitted,
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STATEMENT OF RELATED CASES

The United States is not aware of any cases that meet the definition of “related cases” in Local Rule 28-2.6.

CERTIFICATES

I certify that this brief satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7)(B) and (C).

This brief contains 13,990 words, excluding the portion exempted by Federal Rule of Appellate Procedure 32(a)(7)(b)(iii). It has been prepared in a 14-point Garamond font that meets the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6).

I certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 13, 2016. All participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ J. David Gunter II