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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

OCEANA, INC. and GREENPEACE, INC., )  
 )  
 *Plaintiffs,* )  
 )  
 v. ) Case No. 3:14-cv-00253-TMB  
 )  
 NATIONAL MARINE FISHERIES SERVICE, *et al.*, )  
 )  
 *Defendants,* )  
 )  
 and )  
 )  
 ALASKA SEAFOOD COOPERATIVE, *et al.*, )  
 )  
 *Intervenor-Defendants.* )  
 )  
 \_\_\_\_\_ )

**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF SUMMARY JUDGMENT  
PURSUANT TO FED. R. CIV. P. 56 AND D.AK. LR 16.3**

**TABLE OF CONTENTS**

INTRODUCTION ..... 1

ARGUMENT ..... 2

I. THE 2014 BIOP IS ARBITRARY AND CAPRICIOUS AND FAILS TO MEET NMFS’S AFFIRMATIVE DUTY TO PREVENT JEOPARDY AND ADVERSE MODIFICATION..... 2

    A. The new requirement to prove overlap in all four dimensions as a prerequisite to finding that Steller sea lions may be exposed to localized depletions is arbitrary..... 2

        1. NMFS has changed its approach. .... 3

        2. Requiring overlap in all four dimensions is irrational and arbitrary. .... 6

    B. The 2014 BiOp’s analysis of spatial overlap is arbitrary because it relies on telemetry data to reach conclusions the data do not support..... 8

    C. The 2014 BiOp’s analysis of depth overlap arbitrarily relies on data that NMFS scientists advised were inadequate..... 11

    D. The 2014 BiOp is arbitrary because NMFS has not determined “roughly at what point survival and recovery will be placed at risk.” ..... 12

    E. NMFS’s description of the fishing and fishing restrictions does not provide a basis for the 2014 BiOp’s no jeopardy conclusion. .... 16

    F. The external reviews of the 2010 BiOp do not provide a basis for the changes in the 2014 BiOp’s analysis. .... 17

II. THE FEIS UNLAWFULLY FAILS TO DISCLOSE SCIENTIFIC DISSENT..... 19

    A. The Council on Environmental Quality (CEQ) regulations require NMFS to disclose and respond to the reasonable opposing views of its experts..... 20

    B. Alluding to the general areas of controversy and uncertainty surrounding Steller sea lion alternatives was not sufficient under NEPA. .... 21

    C. The reasonable expert dissent was not trivial. .... 22

    D. Discussions in the 2014 BiOp do not meet the agency’s obligations here. .... 24

RELIEF ..... 24

CONCLUSION ..... 25

**FEDERAL CASES**

*Ass’n of Pac. Fisheries v. EPA*,  
615 F.2d 794 (9th Cir. 1980) ..... 11

*Conner v. Burford*,  
848 F.2d 1441 (9th Cir. 1988) ..... 7, 18

*Ctr. for Biological Diversity v. Salazar*,  
804 F. Supp. 2d 987 (D. Ariz. 2011) ..... 13, 24

*Ctr. for Biological Diversity v. U.S. Forest Serv.*,  
349 F.3d 1157 (9th Cir. 2003) ..... 20, 22, 23

*Earth Island Inst. v. Carlton*  
626 F.3d 462 (9th Cir. 2010) ..... 23

*Earth Island Inst. v. U.S. Forest Serv.*,  
697 F.3d 1010 (9th Cir. 2012) ..... 19

*Ecology Center v. Castaneda*,  
574 F.3d 652 (9th Cir. 2009) ..... 23

*FCC v. Fox Television Stations*,  
556 U.S. 502 (2009)..... 17

*Friends of the Earth v. Hall*,  
693 F. Supp. 904 (W.D. Wash. 1988) ..... 24

*Greater Yellowstone Coal. v. Lewis*,  
628 F.3d 1143 (9th Cir. 2010) ..... 19, 21, 23

*Greenpeace v. NMFS*,  
80 F. Supp. 2d 1137 (W.D. Wash. 2000) (*Greenpeace II*)..... 12

*Greenpeace v. NMFS*,  
237 F. Supp. 2d 1181 (W.D. Wash. 2002) (*Greenpeace IV*)..... 11

*Heartland Reg’l Medical Ctr. v. Sebelius*,  
566 F.3d 193 (D.C. Cir. 2009)..... 25

*The Lands Council v. McNair*,  
537 F.3d 981 (9th Cir. 2008) ..... 20, 21, 23

*Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto Ins. Co.*,  
463 U.S. 29 (1985)..... 12

PLAINTIFFS’ REPLY BRIEF

*Oceana, Inc., et al. v. National Marine Fisheries Service, et al.*,

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

<i>Nat'l Wildlife Fed'n v. NMFS</i> , 235 F. Supp. 2d 1143 (W.D. Wash. 2002).....	24
<i>Nat'l Wildlife Fed'n v. NMFS</i> , 524 F.3d 917 (9th Cir. 2007) .....	12, 13, 14, 15, 16
<i>Nw. Env'tl. Advocates v. EPA</i> , 855 F. Supp. 2d 1199 (D. Or. 2012) .....	13
<i>Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin.</i> , 477 F.3d 668 (9th Cir. 2007) .....	3, 4
<i>Oceana v. Pritzker</i> , No. CV 08-1881 (PLF), 2014 WL 7174875 (D.D.C. Dec. 17, 2014) .....	15
<i>Pac. Coast Fed'n of Fishermen's Ass'ns v. NMFS</i> , 482 F. Supp. 2d 1248 (W.D. Wash. 2007).....	21, 22
<i>Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation</i> , 426 F.3d 1082 (9th Cir. 2005) .....	13, 17
<i>Perez v. Mortgage Bankers Ass'n</i> , ___ U.S. ___, 135 S. Ct. 1199 (2015).....	17
<i>Sierra Forest Legacy v. Sherman</i> , 646 F.3d 1161 (9th Cir. 2011) .....	22
<i>Wild Fish Conservancy v. Salazar</i> , 628 F.3d 513 (9th Cir. 2010) .....	12, 15
<i>WildWest Institute v. Bull</i> , 547 F.3d 1162 (9th Cir. 2008) .....	20

**OTHER CASES**

<i>Alaska v. Lubchenco</i> , No. 3:10-cv-00271-TMB, Order, Doc. 130 (D. Alaska, Jan. 19, 2012).....	13, 25
<i>Alaska v. Lubchenco</i> , No. 3:10-cv-00271-TMB, Order, Doc. 142 (D. Alaska, Mar. 5, 2012).....	25

**FEDERAL STATUTES**

16 U.S.C. § 1536(a)(2).....	1, 17
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PLAINTIFFS' REPLY BRIEF

*Oceana, Inc., et al. v. National Marine Fisheries Service, et al.*,

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

**REGULATIONS**

40 C.F.R. § 1502.9(b) ..... 19, 20, 22, 24  
40 C.F.R. § 1503.4(a)..... 20  
62 Fed. Reg. 30,772 (June 5, 1997) ..... 14

## INTRODUCTION

The endangered Western Population of Steller sea lions continues to decline dramatically in important parts of its range. In 2010, the National Marine Fisheries Service (NMFS) determined that these declines, which prevent the population from meeting established criteria for recovery, necessitated management changes to restrict industrial fishing in the western and central Aleutian Islands in order to ensure compliance with the Endangered Species Act (ESA). Less than five years later, the agency has reversed course, lifting most of the restrictions that were adopted on an emergency basis to limit the Atka mackerel and Pacific cod fisheries, and opening new areas inside critical habitat to pollock fishing that have been closed since 1999—all while characterizing the remaining, diminished measures as “precautionary.”

Despite the near complete about-face, NMFS is unable to identify new studies or information that would justify such a dramatic abandonment of the conclusions reached by the agency in its 2010 biological opinion (2010 BiOp). Indeed, consistent with many years of agency findings, the 2014 biological opinion (2014 BiOp) continues to acknowledge both that competition with the fisheries may currently be driving the Steller sea lion decline in the western Aleutian Islands and that increased fishing may further reduce Steller sea lion numbers and reproduction there.

Rather than being driven by new information, the radical change in NMFS’s conclusion from 2010 to 2014 is attributable to new, arbitrary analyses of largely the same information. NMFS adopted a new, agency-declared requirement that proof of overlap in all four dimensions of time, space, depth, and size of prey is needed before it will conclude that Steller sea lions are exposed to the localized depletions of prey caused by fisheries. It is the first time the agency required such complete, demonstrated overlap and NMFS’s scientists directly challenged this irrational approach. The 2014 BiOp also adopts novel analyses for assessing spatial overlap and depth overlap—analyses that likewise were rejected by agency scientists. As the 2014 BiOp fails to provide a rational basis for its conclusions, NMFS has not met its affirmative duty to “insure” that increased commercial fishing in the western and central Aleutian Islands is not likely to jeopardize the survival or recovery of endangered Steller sea lions that continue to struggle there. 16 U.S.C. § 1536(a)(2).

Confronted with these shortcomings and unable defend its flawed analysis, NMFS seeks in its brief to disavow fundamental elements of the 2014 BiOp and to discredit Plaintiffs. These denials and accusations cannot be reconciled with the record. NMFS also repeatedly attempts to draw attention away from the 2014 BiOp’s inadequacies by describing the remaining, weakened fishing

restrictions and asserting in conclusory fashion that the action is protective. Such description and conclusory assertions are no substitute for evaluating and justifying the rollback of protection measures NMFS determined to be essential in 2010. These statements also fail to show how the agency has met the Ninth Circuit’s requirement that—prior to issuing a no jeopardy determination—the agency must first identify “roughly at what point survival and recovery will be placed at risk.”

NMFS’s new approach is highly controversial, and the agency’s foremost experts wrote significant, substantive criticisms. Neither the 2014 BiOp nor the contemporaneously prepared final environmental impact statement (FEIS) disclose or respond to these criticisms. The agency, therefore, also violated the National Environmental Policy Act (NEPA).

## ARGUMENT

### I. THE 2014 BIOP IS ARBITRARY AND CAPRICIOUS AND FAILS TO MEET NMFS’S AFFIRMATIVE DUTY TO PREVENT JEOPARDY AND ADVERSE MODIFICATION.

#### A. The new requirement to prove overlap in all four dimensions as a prerequisite to finding that Steller sea lions may be exposed to localized depletions is arbitrary.

In the “Synthesis and Conclusions” chapter of the 2014 BiOp, NMFS describes its approach to assessing whether the proposed fisheries will reduce appreciably the survival and recovery of the Western Population. In a first, critical step, the agency “developed a conceptual model for how Steller sea lions are likely to be exposed to the effects of prey removal by the fisheries.” Doc. 45-28 at 246 (2014 BiOp at 1027797). That “conceptual model,” set forth in Figure 5-42 of the 2014 BiOp, theorizes that Steller sea lions are *only* exposed to reduced prey resources “if” a fishery for an important Steller sea lion prey species overlaps in “Size, Place, Time & Depth” with foraging Steller sea lions. *Id.* at 212 (2014 BiOp at 1027763). This conceptualization of exposure—i.e., requiring overlap with the fisheries in all four dimensions—plays a determinative role in NMFS’s ultimate jeopardy determination that the new, relaxed fishing restrictions comply with the ESA because the agency assumes that without exposure in all four dimensions, Steller sea lions will be spared the adverse effects of intense fishing. *See id.* at 217 (2014 BiOp at 1027768) (Figure 5-43, showing exposure as a prerequisite to reduced survival or reproduction); *id.* at 246 (2014 BiOp at 1027797) (noting exposure is assessed separately from response); *id.* at 143 (2014 BiOp at 1027694) (“We establish which resources will be exposed . . . to the proposed action and *then* we consider the probable duration, frequency, and severity of this overlap.”) (emphasis added). The 2014 BiOp consistently relies on the absence of overlap in one of the four dimensions to justify a conclusion that

the expanded and intensified groundfish fisheries will not cause jeopardy. *See, e.g., id.* at 247 (2014 BiOp at 1027798) (stating “the Atka mackerel fishery is expected to have a low amount of direct spatial overlap with foraging . . . sea lions”); *id.* (“The potential for competition between the pollock fishery and sea lions may be reduced or eliminated due to the different depths observed between the two . . . .”); *id.* at 249 (2014 BiOp at 1027800) (“Given the low anticipated depth overlap between sea lions and the pollock fishery . . . it is possible that sea lions and the fishery may target different pollock . . . .”); *see also* Pls.’ Br., Doc. 45 at 31-33.

This new requirement to find overlap in all four of the possible dimensions as a prerequisite to a finding that Steller sea lions will be exposed to reduced prey resources is a sharp departure from NMFS’s previous analyses. Pls.’ Br., Doc. 45 at 19, 22, 42. NMFS’s 2000 biological opinion (2000 BiOp) did not require complete overlap in all four dimensions; instead, it recognized that harmful competition increased with each additional dimension of overlap observed. *See* Doc. 45-37 at 37-39, 59 (2000 BiOp at 6013764-66, 6013823) (employing a scoring system that added a point for each additional dimension of overlap and stating that “[t]he greater the degree of overlap . . . the greater the concern that competitive interaction occurred.”); Pls.’ Br., Doc. 45 at 19, 42. Similarly, in the presence of intense or “compressed” fishing, the 2010 BiOp deemed overlap in only two of the four dimensions of size, space, time, and depth to be significant. Doc. 45-33 at 136 (2010 BiOp at 1054852); Pls.’ Br., Doc. 45 at 22, 42. Despite the considerable change from past practice, the agency arbitrarily has not acknowledged or explained the change—not even in its briefing before this Court. *Nw. Env’tl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687–88 (9th Cir. 2007) (stating an agency must “indicat[e] that prior policies and standards are being deliberately changed” and may not “gloss[] over . . . prior precedents without discussion”).

1. *NMFS has changed its approach.*

Recognizing that such a strict test for finding exposure to the adverse consequences of fishing is not defensible, NMFS’s foremost response is to deny that the 2014 BiOp employs a new approach requiring demonstrated overlap in all four dimensions. Defs.’ Br., Doc. 54 at 42. The most NMFS can offer, however, is that like “prior BiOps, NMFS considered four potential dimensions of overlap between fishing and sea lion foraging: spatial location, depth, prey size, and timing.” *Id.* at 41-42. But this defense completely misses the point. The four dimensions are not new. What is new and undefended is the specific requirement that overlap be demonstrated in all four dimensions before the agency will recognize exposure to competition and reduced prey resources. Plaintiffs have described

how the four dimensions were assessed in 2000 and again in 2010—with no requirement of demonstrated overlap in all four dimensions. Pls.’ Br., Doc. 45 at 19, 22, 42. The government does not acknowledge these significant differences in its brief, *see* Defs.’ Br., Doc. 54 at 41-43, which underscores the point that the change in NMFS’s analytical framework is unacknowledged, unexplained, and therefore arbitrary. *See Nw. Envtl. Def. Ctr.*, 477 F.3d at 687–88.

A comparison of the 2010 BiOp to the 2014 BiOp highlights the fact that NMFS’s approach has changed. Both biological opinions include a figure illustrating the role of the four dimensions in assessing Steller sea lions’ exposure to the impacts of fishing: Figure 4.24 in the 2010 BiOp, and Figure 5-42 in the 2014 BiOp. Doc. 45-33 at 136 (2010 BiOp at 1054852); Doc. 45-28 at 212 (2014 BiOp at 1027763). The figures are different, with an obvious change in how the four dimensions of overlap are treated. This change was intentional. Early in the consultation process, NMFS held a staff teleconference specifically to discuss a draft “exposure conceptual model . . . intended to replace 2010 BiOp Figure 4.24.” Ex. 53 (Call Invite at 1033109) (emphasis added). NMFS’s new analytical approach led to a decidedly different outcome. The 2010 BiOp found a “high degree of overlap” and that the fisheries “potentially compete with Steller sea lions for common resources,” and ultimately determined that the fisheries jeopardize Steller sea lions. Doc 45-33 at 83, 32 (2010 BiOp at 1054366, 1054152). The 2014 BiOp, in contrast, emphasizes a single dimension of non- or limited overlap for each fishery (also called “partitioning”), and concludes on that basis that renewed, intensive fishing will not cause jeopardy or adverse modification. Doc. 45-28 at 210, 242-48 (2014 BiOp at 1027761, 1027793-99).

NMFS’s further argument that the 2014 BiOp’s new conceptual model should be regarded more generally as the “progression of steps that occur in the BiOp,” Defs.’ Br., Doc. 54 at 43, n.10, is likewise unavailing. Although NMFS did evaluate other factors depicted in the conceptual model, the 2014 BiOp’s jeopardy determination ultimately turned on the strict requirement to demonstrate overlap in all four dimensions. The first sentence of the 2014 BiOp’s section entitled “Jeopardy Assessment” identifies the prominent role of the agency’s “conceptual model” in evaluating whether the fisheries will affect the survival or recovery of Steller sea lions, citing specifically to Figure 5-42. Doc. 45-28 at 246 (2014 BiOp at 1027797). Figure 5-42, in turn, sets out “Size, Place, Time & Depth Overlap” as preconditions to a finding of reduced prey resources. *Id.* at 212 (2014 BiOp at 1027763). Though NMFS avers that the illustration should not be understood literally as it is written to require overlap in all four dimensions, Defs.’ Br., Doc. 54 at 43 n.10, the lead author of the 2014 BiOp stated the opposite, explaining that NMFS’s revised approach “includes overlap in ‘place’ as

one of the *necessary* conditions for potential competition.” Doc. 45-7 at 1 (Gerke Email at 1025808) (emphasis added). Previously, no single dimension of overlap was considered as a “necessary” condition for a finding of competition, let alone all four.<sup>1</sup>

Plaintiffs’ reading of the 2014 BiOp—including the centrality of the overlap analysis, its requirement that there be overlap in four dimensions, and its reliance on one dimension of non-overlap (or partitioning) to justify a no jeopardy conclusion—is verified in comments by scientists at the National Marine Mammal Laboratory who wrote:

This risk analysis *hinges* on this overlap analysis, and the authors look at overlap in at least 4 dimensions . . . . *with the implicit assumption being that one dimension of partitioning (‘some’) is all that’s necessary to conclude that there is no resource competition* and that the likelihood of reduced prey resources is small. We believe this conclusion is dangerously simplistic.

Doc. 45-38 at 8 (NMML Memo at 1030869) (emphases added).

NMFS contends that these comments only pertain to a draft of the 2014 BiOp and that responsive changes ultimately were made to the final opinion. Defs.’ Br., Doc. 54 at 43, 48-49. This assertion simply is not true. The foregoing critique was aimed at “a key part of Chapter 5 . . . summed up in a couple of sentences” from the draft BiOp that the scientists explicitly excerpted in their comments. Doc. 45-38 at 8 (NMML Memo at 1030869) (quoting passage on “extent of overlap” from Ex. 58 at 6 (Draft BiOp at 1010877)). The final 2014 BiOp contains the same language criticized by the scientists. *Compare* Ex. 58 at 6 (Draft BiOp at 1010877) *with* Doc. 45-28 at 210 (2014 BiOp at 1027761). NMFS does not and cannot point to edits elsewhere in the document responsive to the scientists’ critique that requiring overlap in all four dimensions is “dangerously simplistic.” The final 2014 BiOp retains such overlap as the litmus test for finding jeopardy and adverse modification in violation of the protective requirements of the ESA.<sup>2</sup>

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<sup>1</sup> NMFS also argues that the agency still “considered myriad other factors and data before reaching any conclusions about localized depletions or jeopardy, including area closures, fish distribution and movement, new data on sea lion movements, and management measures to limit harvests and disperse them temporally and spatially.” Defs.’ Br., Doc. 54 at 42. This is no defense, however, as all of the factors listed by NMFS go directly to overlap in one of the four dimensions.

<sup>2</sup> NMFS also cites a memorandum that post-dates the 2014 BiOp by many months for the proposition that scientists’ concerns were incorporated into the final 2014 BiOp. Defs.’ Br., Doc. 54 at 44, 49 (citing Doc. 54-16 at 2 (Balsiger Memo at 1044536)). This memorandum does not address scientists’ criticism of the requirement for demonstrated overlap in four dimensions; rather, it focuses narrowly on criticisms of one section of the 2014 BiOp (5.3.4) addressing a single dimension—spatial overlap.

Lastly, NMFS argues that a statement from the 2014 BiOp finding “partial overlap . . . for all four fisheries, . . . resulting in some potential for reduced prey resources” shows the agency did not require overlap in all four dimensions as prerequisite to finding adverse effects. Defs.’ Br., Doc. 54 at 43 (quoting Doc. 45-28 at 211 (2014 BiOp at 1027762)). This quotation, however, is fully consistent with Plaintiffs’ argument: the agency acknowledges overlap with the fisheries in at least three dimensions, along with the attendant risk that Steller sea lions will be harmed by localized depletions caused by intensive fishing, only to conclude in the end—based on a lack of overlap (or partitioning) in one dimension—that the harm will not rise to the level of jeopardy or adverse modification. *See* Pls.’ Br., Doc. 45 at 31-33, 42; *see also supra* at 2-4. NMFS’s conclusion that the expanded pollock fishery in Area 543 will not will result in jeopardy illustrates this clearly; NMFS admits that it expects the fishery “to be spatially and temporally compressed in the small area of open critical habitat,” but nonetheless concludes Steller sea lions there will not be jeopardized because “[t]he potential for competition between the pollock fishery and sea lions may be reduced or eliminated due to the different depths observed between the two and an expected rapid replenishment of pollock.” Doc. 45-28 at 247 (2014 BiOp at 1027798) (emphasis added).<sup>3</sup>

2. *Requiring overlap in all four dimensions is irrational and arbitrary.*

As described in Plaintiffs’ opening brief, a requirement to demonstrate overlap in all four dimensions is irrational because setting such a high bar might lead to a conclusion that fisheries and Steller sea lions are not competing when, in fact, they are competing for prey resources. Pls.’ Br., Doc. 45 at 43-45. Based on concerns expressed by NMFS experts, Plaintiffs’ opening brief provided four examples to show why a strict test requiring demonstrated overlap in all four dimensions may overlook competition. Those examples illustrated that such an approach may produce erroneous results owing to: horizontal or vertical fish migration; biases in available data on the size of fish consumed by Steller sea lions; and the fact that if the fisheries drive Steller sea lions from an area,

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*See* Doc. 54-16 at 2 (Balsiger Memo at 1044536). In any event, even in that respect, this post hoc memorandum is not consistent with the 2014 BiOp. *See infra* at 11.

<sup>3</sup> In its assessment of pollock in Areas 541 and 542, the 2014 BiOp describes the fishing that will be allowed, and admits that it “may create temporary localized depletion . . . that may reduce the numbers and reproduction of sea lions,” yet concludes in a circular fashion that there will be no “serious consequences” based on the nature of the fishing allowed. Doc. 45-28 at 245-46 (2014 BiOp at 1027796-97). The only other factor described is “some likely depth partitioning.” *Id.* at 245 (2014 BiOp at 1027796); *see also* Ex. 59 at 69 (2014 BiOp Presentation at 1027204) (same). This reveals that NMFS either relied on a lack of overlap in one dimension to reach its no jeopardy conclusion, or relied on no rationale at all. Either way, the conclusion is arbitrary.

the absence of sea lions might be observed as a lack of overlap when, in actuality, harm already has occurred. *Id.*

NMFS does not address these examples for what they are—illustrations of the inherent flaws of a requirement for overlap in all four dimensions. Instead, NMFS’s brief takes each example and mischaracterizes it as a claim that the 2014 BiOp failed, wholesale, to acknowledge these facts. *See* Defs.’ Br., Doc. 54 at 45-47. NMFS then endeavors to dispel these straw men with citations to analyses in the 2014 BiOp to prove that the fact was discussed. In so doing, NMFS ignores Plaintiffs’ actual argument that the agency fails to address, either in the 2014 BiOp or in the record, whether these admitted facts undercut the requirement for overlap in all four dimensions.

Indeed, the information that NMFS cites in its defense actually makes Plaintiffs’ broader point that a requirement for overlap in four dimensions is irrational. For instance, in response to Plaintiffs’ example that data on size of prey may conceal overlap, NMFS quotes the 2014 BiOp declaring “an unknown extent of overlap for larger cod.” *Id.* at 47 (citing Doc. 45-28 at 229 (2014 BiOp at 1027780)). If the extent of overlap in prey size is unknown or unknowable, as the 2014 BiOp finds, then it is irrational to require a showing of overlap in this dimension before a finding of competition with the fisheries can be made. The 2014 BiOp and NMFS’s brief fail to address this.

NMFS also highlights that the 2014 BiOp discusses both horizontal and vertical movement of fish. *Id.* at 45-46. NMFS fails, however, to address the consequences of fish movement for its new overlap approach. With respect to horizontal movement, frequently discussed as “replenishment,” the 2014 BiOp concedes “unknown . . . replenishment rates for all four fisheries.” Doc. 45-28 at 211 (2014 BiOp at 1027762). For the vertical movement of fish species, the 2014 BiOp admits “there are no data for the Aleutian Islands” for Pacific cod and, for pollock, NMFS “lack[s] information about the pattern of these migrations.” *Id.* at 181, 184 (2014 BiOp at 1027732, 107735). In the face of such uncertainty—which confounds NMFS’s ability to assess overlap—it is irrational for NMFS to require demonstrated overlap in all four dimensions as a precondition to finding competition with the fisheries and, ultimately, jeopardy or adverse modification. In other words, NMFS’s requirement for overlap in all four dimensions erects an irrationally and arbitrarily high burden of proof, and fails to “give the benefit of the doubt” to Steller sea lions, as the ESA requires. *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988).<sup>4</sup>

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<sup>4</sup> NMFS separately attack Plaintiffs’ point that a lack of overlap could be a *symptom* of competition with the fisheries, not a reason to conclude that competition is absent, owing to the fact that Steller sea lions leave an area because the fisheries have depleted the prey resources there. Pls.’ Br., Doc.

B. The 2014 BiOp’s analysis of spatial overlap is arbitrary because it relies on telemetry data to reach conclusions the data do not support.

Apart from adopting a new, arbitrary approach to assessing the overall potential for overlap and competition, the 2014 BiOp separately relies on a novel and arbitrary assessment of spatial overlap. NMFS does little to defend its analysis, electing instead to distance itself from what is actually said in the 2014 BiOp. Nonetheless, the 2014 BiOp plainly reaches conclusions about the degree of spatial overlap by drawing unsupported inferences from limited telemetry data that NMFS acknowledges is inadequate for the purpose for which they were used.

The 2014 BiOp evaluated data from 45 Steller sea lions in the western and central Aleutian Islands. Doc. 45-7 at 1 (Gerke Email at 1025808).<sup>5</sup> NMFS employed the data in two distinct ways—despite explicitly acknowledging that the sample size was “deficient” for one of the uses.

NMFS first analyzed the telemetry data to describe generally the distances away from shore that Steller sea lions typically forage. *See generally* Doc. 45-28 at 134-43 (2014 BiOp at 1027685-94). A key focus of this analysis was the relative importance of foraging within designated critical habitat compared to outside of it. *Id.* at 138-42 (2014 BiOp at 1027689-93). The 2014 BiOp concludes that sea lions forage less outside of critical habitat than within, with the caveat that habitat use “can vary substantially among individuals.” *Id.* at 142 (2014 BiOp at 1027693). Plaintiffs do not challenge this broad scale use of the telemetry data, which generally conforms to how NMFS assessed telemetry data in previous biological opinions, *see id.* at 134-43 (2014 BiOp at 1027685-94).

NMFS also used telemetry data, however, for a second, finer-scale assessment of Steller sea lion foraging behavior that agency scientists widely disputed. More specifically, NMFS used the data, along with some limited data on opportunistic sightings (called “Platform” data), “to explore

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45 at 44. NMFS asserts that Plaintiffs “cite no scientific evidence” on this point. Defs.’ Br., Doc. 54 at 47. Plaintiffs quoted a NMFS scientist who stated that “[i]f fisheries prevent sea lions from using an area (by depleting it), there’s no overlap”—to which the 2014 BiOp’s lead author replied, “I agree.” Ex. 57 at 6 (Draft Analytical Approach Memo at 1051610). This admission that observed spatial overlap may not reliably reflect competition cannot be squared with the 2014 BiOp’s analytical requirement that “place,” along with the other three dimensions of overlap, be demonstrated as “*necessary* conditions for potential competition.” Doc. 45-7 at 1 (Gerke Email at 1025808) (emphasis added) (summarizing 2014 BiOp’s “conceptual model” for exposure).

<sup>5</sup> NMFS incorrectly claims that these data for the western and central Aleutian Islands were entirely new. *See* Defs.’ Br., Doc. 54 at 31. This is incorrect, as some additional Steller sea lions were tagged for the 2014 BiOp, but only “17 juveniles and 6 adult females that were not available for the 2010 biop.” Doc. 45-7 at 1 (Gerke Email at 1025808).

the extent of spatial overlap between observed Steller sea lion locations” and the groundfish fisheries. *Id.* at 156 (2014 BiOp at 1027707). Undertaking a completely “novel” analysis, NMFS “generated a grid of areas where directed fishing has occurred” in the past, “plotted this grid over the area proposed to be open to each fishery[,] and then plotted the available telemetry data for the western and central Aleutian Islands.” Doc. 45-7 at 3, 1 (DeMaster Email at 1025810, 1025808); *see also* Doc. 45-28 at 156 (2014 BiOp at 1027707). Explained in plainer terms, NMFS “simply plotted the data” for the 45 tagged animals and the fisheries “and summed overlap.” Doc. 45-7 at 2 (Gerke Email at 1025809). The 2014 BiOp presents the results of this analysis with a series of figures that show the overlay of sea lion and fishing data, followed by observations on the degree of overlap. *See, e.g.*, Doc. 45-28 at 158 (2014 BiOp at 1027709) (stating for Atka mackerel in summer in Area 543 that “[o]nly 7 of the telemetry locations overlapped areas where fishing has occurred historically that would be open to the fishery under the proposed action”); *id.* at 171 (2014 BiOp at 1027722) (noting “[f]ive Platform sightings consisting of a total of 33 sea lions were observed inside critical habitat in the area that would be open to the pollock fishery in Area 541” in winter).

This spatial analysis was roundly criticized by the scientists who reviewed it, including NMFS’s Steller Sea coordinator, the team of scientists at the National Marine Mammal Laboratory, several scientists with NMFS’s Resource Ecology and Fisheries Management Division, and the senior NMFS scientist charged with reviewing the 2014 BiOp for data quality. *Pls.’ Br.*, Doc. 45 at 33-34, 46-47. These scientists showed that the data were misused, that there was too little data to draw conclusions for the entire western and central Aleutian Islands sub-populations, and that the data could not be used to infer the absence of Steller sea lions from areas where they were not observed. *Id.* The opinion’s authors edited the final 2014 BiOp to identify some uncertainty and to disclaim the propriety of using the telemetry data to infer the absences of Steller sea lions. *Id.* at 47. These edits, however, did not change the fact that the 2014 BiOp ultimately relies on the telemetry data to infer the absence of Steller sea lions in reaching its no jeopardy conclusion, particularly for the Atka mackerel fishery. *See* Doc. 45-28 at 247 (2014 BiOp at 1027798). That reliance renders the 2014 BiOp arbitrary.

NMFS’s primary response to Plaintiffs’ claim is to quote twice on the same page (and bold once) text from the 2014 BiOp stating 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.” *Def.’ Br.*, Doc. 54 at 44 (quoting Doc. 45-28 at 156 (2014 BiOp at 127707)). Plaintiffs quoted the same language in the opening brief, however, to emphasize why the 2014 BiOp is arbitrary: despite admitting that the data cannot be used to infer

absence, the 2014 BiOp does exactly that. Pls.' Br., Doc. 45 at 47. The 2014 BiOp makes plain that some of the conclusions on spatial overlap still hinge on inferences of Steller sea lion absence from areas that are being opened to fishing. For example, the 2014 BiOp asserts that "[t]here may be some direct place overlap between the fishery and sea lions in the 24%, 8%, and 3% of critical habitat open to the Atka mackerel fishery in Areas 543, 542, and 541, respectively, and in areas where the two co-occur outside of critical habitat." Doc. 45-28 at 209 (2014 BiOp at 1027760). This statement, averring that only "some" overlap will occur within open areas, necessarily presumes the absence of sea lions from some portions of those open areas. Otherwise, if Steller sea lions truly were presumed to inhabit all of the areas to be fished (i.e., if no absence were inferred), then the 2014 BiOp would have reported that direct overlap is full or complete in the open areas.

Although NMFS attempts to recast the 2014 BiOp's statements on the degree of spatial overlap as merely referring to areas "closed to fishing," Defs.' Br., Doc. 54 at 44, that assertion is unsupported. Consider, for example, the 2014 BiOp's statement that "the Atka mackerel fishery is expected to have a low amount of direct spatial overlap with foraging adult female and juvenile sea lions given [NMFS's] best understanding of habitat use by these age- and sex-classes" and certain, limited closures. Doc. 45-28 at 247 (2014 BiOp at 1027798) (emphasis added). This sentence, from the 2014 BiOp's "Synthesis and Conclusions" chapter, is just another way of saying that, based on telemetry data, NMFS infers that sea lions will remain exclusively within the limited closures and will be absent from the areas of habitat to be opened to fishing. According to the 2014 BiOp, "NMFS uses location data from animals fitted with satellite telemetry tags to infer the foraging behavior . . . of Steller sea lions." *Id.* at 134 (2014 BiOp at 1027685). But to infer that Steller sea lions will remain within the closures and be absent from the areas opened to more fishing is to make precisely the inference from the limited telemetry data that the 2014 BiOp states, agency experts assert, and NMFS's brief implicitly concedes, is unsupported. *See* Defs.' Br., Doc. 54 at 44.<sup>6</sup>

Having relied upon telemetry data in a manner that NMFS admits is not scientifically valid, the 2014 BiOp is both irrational and arbitrary. Similarly, NMFS's 2001 biological opinion (2001

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<sup>6</sup> NMFS highlights a statement by the 2014 BiOp's primary author that the agency's spatial analysis "did not use the telemetry data in a model" but "simply plotted it." Defs.' Br., Doc. 54 at 49. Of course, it does not matter whether the limited telemetry data was plotted or used in a model. The point is NMFS used the data even though it acknowledged that the sample size of telemetered animals is too small to "be used to infer areas of low sea lion use," Doc. 45-28 at 160 (2014 BiOp at 1027711); *see also* Ex. 45-7 at 2 (Gerke Email at 1025809) (noting "the caveat that the sample size is too small to make inferences for the population").

BiOp) was invalidated for reaching a “conclusion that . . . is not rationally related to the data.” *Greenpeace v. NMFS*, 237 F. Supp. 2d 1181, 1198 (W.D. Wash. 2002) (*Greenpeace IV*). There, the court observed that “telemetry data is the ‘best available science’ for tracking where Steller sea lions are located,” but nonetheless found that NMFS had used the data arbitrarily, reaching conclusions “not rationally connected to the data presented.” *Id.* at 1196, 1199.

Because the text of the 2014 BiOp is unavailing, NMFS attempts to bolster its defense by citing to a memorandum issued more than seven months after the 2014 BiOp was issued which discusses edits made to the opinion following the scientists’ critique of the draft. Defs.’ Br., Doc. 54 at 44 (quoting Doc. 54-16 at 2-3 (Balsiger Memo at 1044536-37)). This memorandum, like the 2014 BiOp, acknowledges that the available data “may not be representative of the whole population.” Doc. 54-16 at 2 (Balsiger Memo at 1044536). The memorandum then purports to revise what the 2014 BiOp actually did, claiming that all conclusions regarding spatial overlap in the 2014 BiOp “were based solely on areas proposed to be open to fishing rather than inferences from the telemetry information from a sample of the population.” *Id.* Despite what the memorandum says, the actual text of the 2014 BiOp proves that assertion to be false, as just discussed. Nor should the Court rely on this memorandum, as it was prepared after the 2014 BiOp was finalized and explicitly for litigation, *see* Ex. 54 at 1-2 (Harrington Email Thread at 2011542-43), and therefore constitutes an impermissible post hoc rationalization. *See, e.g., Ass’n of Pac. Fisheries v. EPA*, 615 F.2d 794, 811-12 (9th Cir. 1980) (“We do not think it is appropriate, however, for either party to use post-decision information as a new rationalization either for sustaining or attacking the Agency’s decision.”).

C. The 2014 BiOp’s analysis of depth overlap arbitrarily relies on data that NMFS scientists advised were inadequate.

As with the 2014 BiOp’s analysis of spatial overlap, NMFS scientists rejected the agency’s simplistic comparison of Steller sea lion dive data to the known fishing depths to assess overlap and, ultimately, the potential for competition. Pls.’ Br., Doc. 45 at 34-35, 48-49. Scientists questioned the 2014 BiOp’s “logic that if a sea lion or predator has not been recorded at a specific depth of a fishing net in the past then there is no potential for ‘overlap’ or ‘influence’ of one on the other in the future,” concluding that “[p]artitioning the water column into a 3-dimensional space with all users separate seems like quite a leap.” Doc. 45-38 at 7 (NMML Memo at 1030868). NMFS’s Steller Sea lion coordinator likewise rejected the 2014 BiOp’s analysis of depth overlap, advising its authors to “ditch[] this whole argument, unless the nets are only catching fish well below where adult sea lions can dive.” Doc. 45-44 at 9 (Rotterman Comments at 1009876).

NMFS does not identify any response to these fundamental criticisms of the 2014 BiOp in the record, and the only defense in its brief is an assertion that “differing interpretations” of the depth data do “not render NMFS’s cautious use of it arbitrary and capricious.” Defs.’ Br., Doc. 54 at 46; *see also id.* at 48-51 (no mention of an agency response to the scientists’ critique of the 2014 BiOp’s approach to analyzing depth overlap). But the scientists did not merely offer “differing interpretations” of available information; they rejected wholesale both the manner in which NMFS used the data and the underlying premise of the 2014 BiOp’s depth analysis. Having defied the recommendations of its experts without a response or explanation, the conclusions of the 2014 BiOp arbitrarily run “counter to the evidence before the agency,” *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1985), and fail to reflect a “reasoned” decision. *Greenpeace v. NMFS*, 80 F. Supp. 2d 1137, 1147 (W.D. Wash. 2000) (*Greenpeace II*).<sup>7</sup>

D. The 2014 BiOp is arbitrary because NMFS has not determined “roughly at what point survival and recovery will be placed at risk.”

As established by Ninth Circuit precedent, an agency issuing a “no jeopardy” opinion in the face of potential harm to an endangered species must justify that conclusion by identifying the point at which the action would create too great a risk to survival and recovery—i.e., a “tipping point.” *See Nat’l Wildlife Fed’n v. NMFS*, 524 F.3d 917, 930, 936 (9th Cir. 2007); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 527 (9th Cir. 2010). This requirement derives from the protective, pro-species focus of the ESA: “an agency may not take action that will tip a species from a state of

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<sup>7</sup> Unable to mount a credible defense of its depth overlap analysis, NMFS’s brief attempts to redirect attention with a lesser point regarding whether a certain Russian study (Burkanov et al. 2010 at 6024671), was addressed in the 2014 BiOp. Scientists highlighted the study because it showed that the vast majority of Steller sea lion dives were shallow, but that deeper, less frequent dives accounted for the majority of successful foraging. According to NMFS, the 2014 BiOp “explicitly discussed this study.” Defs.’ Br., Doc. 54 at 46 (citing Doc. 45-28 at 174 (2014 BiOp at 1027725)). This statement is wrong. The single page from the 2014 BiOp that refers to “[d]ive data from 38 females” including some “tagged from Russia,” Doc. 45-28 at 174 (2014 BiOp at 1027725), is not a reference to Burkanov et al. 2010. The cited page points the reader to Figure 5-22 of the 2014 BiOp, which summarizes the data from the 38 females and identifies the source studies by name—which includes a different study of female sea lions from Russia’s Kuril Islands but does not include Burkanov et al. 2010. Doc. 45-28 at 174-75 (2014 BiOp at 1027725-26).

NMFS is also mistaken in its assertion that the 2014 BiOp “cit[es] an even more extensive discussion [of Burkanov et al. 2010] in the FEIS.” Defs.’ Br., Doc. 54 at 46 (citing Doc. 45-28 at 174 (2014 BiOp at 1027725)). The FEIS addresses the study in a single sentence, Doc 54-14 at 393 (FEIS at 3160750), that in no way suggests NMFS has wrestled with the criticisms that the scientists raised with respect to the specific analysis of depth overlap in the 2014 BiOp.

precarious survival into a state of likely extinction.” *Nat’l Wildlife Fed’n*, 524 F.3d at 930. Further, in circumstances like those faced by Steller sea lions in the western Aleutian Islands, “even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm.” *Id.* To insure against causing additional harm, the Ninth Circuit has held that “[i]t is only logical to require that the agency know roughly at what point survival and recovery will be placed at risk before it may conclude that no harm will result from ‘significant’ impairments to habitat that is already severely degraded.” *Id.* at 936. NMFS does not and cannot identify the requisite analysis within the 2014 BiOp, rendering the 2014 BiOp arbitrary in violation of the ESA. Further, the agency’s arguments that the analysis is not required or that it is inapplicable in this instance are mistaken.

Contrary to established precedent, NMFS first argues that there is no such requirement. NMFS relies on *Greenpeace IV* for its assertion that there is no tipping point requirement, *see* Defs.’ Br., Doc. 54 at 52, but that case was decided well before the controlling Ninth Circuit decisions. Indeed, this Court discussed the precedent in its last decision, *see Alaska v. Lubchenco*, No. 3:10-cv-00271-TMB, Order, Doc. 130 at 26 n.132 (D. Alaska, Jan. 19, 2012), and the requirement has been cited by other district courts invalidating biological opinions. *See, e.g., Nw. Envtl. Advocates v. EPA*, 855 F. Supp. 2d 1199, 1224 (D. Or. 2012); *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 998-99 (D. Ariz. 2011).

Unable to identify an analysis that meets its obligation, NMFS unsuccessfully attempts to recast the holding of *National Wildlife Federation*. According to NMFS, the 2014 BiOp is adequate because the agency “insured it will not ‘tip’ the Steller sea lions into jeopardy” by purportedly making conservative assumptions, undertaking careful analysis, and issuing a finding “that significant prey depletions are unlikely.” Defs.’ Br., Doc. 54 at 52. But the *National Wildlife Federation* court rejected such self-serving and conclusory statements, declaring “we cannot simply take the agency’s word that the listed species will be protected under the planned operations: ‘If this were sufficient, the NMFS could simply assert that its decisions were protective and so withstand all scrutiny.’” 524 F.3d at 935 n.16 (quoting *Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1092 (9th Cir. 2005)). NMFS’s argument ignores the key holding of *National Wildlife Federation*, namely, that agency assertions about the protectiveness of an action must be measured against identification of “roughly at what point survival and recovery will be placed at risk” so that there is “some reasonable assurance that the agency action in question will not

appreciably reduce the odds of success for future recovery planning, by tipping a listed species too far into danger.” *Id.* at 936. Here, the 2014 BiOp lacks the reasonable assurances the law requires.

NMFS also argues that the tipping point requirement only applies where there is a severely degraded baseline or the action threatens “significant impairments to survival or recovery,” and asserts that neither circumstance is present in this case. Defs.’ Br., Doc. 54 at 52-53. NMFS is plainly wrong. First, NMFS’s statement that “there is no indication of a severely degraded baseline here,” *id.* at 53, is not credible. The “baseline” refers to “the effects of past and ongoing human-caused and natural factors leading to the current status of the species or its habitat and the ecosystem within the action area.” Doc. 45-28 at 87 (2014 BiOp at 1027638). Here, the Western Population has been classified as endangered since 1996, NMFS has twice issued findings that the fisheries cause jeopardy since the population was afforded this status, and the population remains a mere fraction of its former size. 62 Fed. Reg. 30,772 (June 5, 1997); Doc. 45-28 at 14-16 (2014 BiOp at 1027565-67). Indeed, the 2014 BiOp itself describes “the *dire* situation for the western Aleutian Islands sub-region—a population that is declining steadily at over 7 percent per year with the lowest abundance of all the sub-regions” and faces “a high probability of quasi-extinction . . . in 50 years.” Doc. 45-28 at 43, 49 (2014 BiOp at 1027594, 1027600) (emphasis added). The 2014 BiOp also describes the most recent estimates of biomass for Steller sea lion prey species in the Aleutian Islands, indicating they are all significantly down, with pollock at a “record low.” *Id.* at 97, 110, 119 (2014 BiOp at 1027648, 1027661, 1027670); *see also* Pls.’ Br., Doc. 45 at 14-15.

Second, NMFS’s claim that the action does not have a significant negative impact on Steller sea lion habitat is equally without merit. “Prey resources are the most essential feature of marine critical habitat for Steller sea lions,” *id.* at 248 (2014 BiOp at 1027799), as they are necessary for both “reproduction and survival.” Ex. 60 at 10 (NMFS Presentation at 1052308); Doc. 45-28 at 72, 80 (2014 BiOp at 1027623, 1027631). NMFS rightly assumes that incremental increases in fishing cause incremental increases in harm to Steller sea lions, Doc. 45-26 at 40 (FEIS at 3160431), and the 2014 BiOp acknowledges that significant negative impacts are likely to result from the action, admitting, for example, that the pollock fishery “is expected to be concentrated in the open areas of critical habitat in winter,” and “may create temporary localized depletion[s] . . . that may reduce the numbers and reproduction of Steller sea lions in the immediate vicinity of the fishery.” Doc. 45-28 at 245-46 (2014 BiOp at 1027796-97); *id.* at 247 (2014 BiOp at 1027798) (same). NMFS avers that such an impact is not significant because, according to the 2014 BiOp, the loss of Steller sea lion numbers and reproduction caused by the action “likely” will not be enough to affect the western and

central Aleutian Island sub-populations or the Western Population overall. Defs.’ Br., Doc. 54 at 52-53. This conclusion, of course, is based on the 2014 BiOp’s arbitrary overlap analysis. Moreover, even a small amount of harm is significant given “the dire situation for the western Aleutian Islands sub-region.” Doc. 45-28 at 43 (2014 BiOp at 1027594). See *Oceana v. Pritzker*, No. CV 08-1881 (PLF), 2014 WL 7174875, at \*15 (D.D.C. Dec. 17, 2014) (explaining “if baseline conditions are already dire, then even a small additional impact . . . may require a jeopardy determination.”); see also *Nat’l Wildlife Fed’n*, 524 F.3d at 930 (stating “an agency may not take action that deepens the jeopardy by causing additional harm.”). For this reason, it is absolutely critical that NMFS identify “roughly at what point survival and recovery will be placed at risk” so that it may assure that the tipping point has not been crossed. *Nat’l Wildlife Fed’n*, 524 F.3d at 936.<sup>8</sup>

Further, although NMFS asserts without support that the action is nowhere near the tipping point for the western and central Aleutian Islands or the Western Population overall, see Defs.’ Br., Doc. 54 at 52, the record reveals otherwise. Following a presentation to industry representatives on the completed 2014 BiOp, the lead author relayed that she was “asked . . . if the Council could have gone a little further in relaxing measures and I answered no, that they likely used all of the available ‘room.’” Ex. 52 (Gerke Email at 1026940). In other words, although the 2014 BiOp nowhere admits or explains it, the opinion’s lead author has concluded that the radically weakened fishing restrictions are barely protective enough to avoid jeopardy and adverse modification. NMFS may not draw such a fine line without identifying and justifying a tipping point against which the agency’s conclusion can be assessed. See *Nat’l Wildlife Fed’n*, 524 F.3d at 936; *Wild Fish Conservancy*, 628 F.3d at 527.

Finally, NMFS mischaracterizes Plaintiffs’ argument as demanding more quantification in the 2014 BiOp, something the agency argues would be an “impossibility” given the opinion’s “qualitative, holistic approach.” Defs.’ Br., Doc. 54 at 32-33, 51-52. This response fails. First, Plaintiffs simply do not make this argument but, instead, point to the fact that the 2014 BiOp lacks

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<sup>8</sup> Regarding the risk of harm posed by expanded fishing, NMFS highlights one sentence and one citation from Plaintiffs’ brief and asserts that Plaintiffs have mischaracterized the 2014 BiOp by noting its “findings that the fisheries’ expansion into Steller sea lion critical habitat poses a risk of localized depletion and negative ‘population-level consequences.’” See Defs.’ Br., Doc. 54 at 54 (incorrectly citing Pls.’ Br., Doc. 45 at 21; the quoted sentence appears at 29). NMFS does not address, let alone refute, the entire preceding subsection of Plaintiffs’ opening brief, entitled: “The 2014 BiOp acknowledges the risk of localized depletion and adverse population level effects on Steller sea lions.” Pls.’ Br., Doc. 45 at 27-29; see also Compl., Doc. 1 at 15, ¶ 48; Answer, Doc. 28 at 10, ¶ 48 (admitting that fishing “may result in localized depletions” and that reduced prey availability has “the potential to affect Steller sea lion vital rates and impede their survival and recovery.”).

any analysis—quantitatively or qualitatively—of “roughly at what point survival and recovery will be placed at risk,” as required by *National Wildlife Federation*. 524 F.3d at 936. Second, NMFS does not support its assertion that quantification or development of defined criteria “was a scientific impossibility.” Defs.’ Br., Doc. 54 at 33. NMFS points to one sentence in the 2014 BiOp stating that the document’s “purpose” was “not to precisely quantify” the amount of prey reductions. *Id.* (citing Doc. 45-28 at 17 (2014 BiOp at 1027568)).<sup>9</sup> That statement may describe the intentions of the BiOp’s authors, but it does not support a conclusion that the required analysis was impossible. As the record reveals, no fewer than three scientists independently called on the BiOp’s authors to provide more definitive criteria for assessing overlap and the risk of jeopardy. Pls.’ Br., Doc. 45 at 50-51. In the face of this criticism, the supervisor of the 2014 BiOp responded only “we can’t go there.” Doc. 45-19 (Kurland Email). This response not only fails to establish scientific impossibility, it falls well short of a rational response to the scientists’ concerns and the requirements of the law.

E. NMFS’s description of the fishing and fishing restrictions does not provide a basis for the 2014 BiOp’s no jeopardy conclusion.

NMFS and Intervenors consistently describe at extended length the fishing measures evaluated by the 2014 BiOp, apparently in an effort to create an impression that the measures are protective. *See* Defs.’ Br., Doc. 54 at 33-38; Ints.’ Br., Doc. 51 at 30-36. A mere description of the measures, however, is no substitute for an analysis that demonstrates how these measures are sufficient to meet the requirements of the ESA—particularly given that the new measures constitute a substantial weakening of fishing restrictions adopted by the agency on an emergency basis less than five years ago. Consider, for example, the changes made within Area 543. Following the 2010 BiOp, NMFS determined that it was necessary to ban all directed fishing for Atka mackerel and Pacific cod in the management area, and maintained the longstanding ban on pollock fishing within critical habitat. Doc. 45-33 at 35-36 (2010 BiOp at 1054155-56); Doc. 45-28 at 27 (2014 BiOp at 1027578). Under the new action, not only have the Atka mackerel and Pacific cod fisheries been authorized to return to Area 543, including within critical habitat, but NMFS also authorized pollock trawling in critical habitat for the first time since it was banned in 1999. Doc. 45-28 at 154 (2014 BiOp at 1027705). The 2014 BiOp approves this dramatic increase in fishing despite acknowledging “uncertainty about the potential for the fisheries to reduce prey resources for Steller

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<sup>9</sup> NMFS quotes the same sentence twice: first on page 32 and then again on page 33. Although NMFS provides two different pin citations, the sentence only appears once in the 2014 BiOp at 1027793. The citation to 1027568 is erroneous.

sea lions in Area 543,” where Steller sea lion numbers continue to decline precipitously. *Id.* at 247, 43 (2014 BiOp at 1027798, 1027594). It is impossible to credit the measures approved by the 2014 BiOp as inherently protective.

Similarly, both NMFS and Intervenors paint a false picture by repeatedly citing the percentage of critical habitat that will be closed to fishing under the new fishing regime. Defs.’ Br., Doc. 54 at 27, 33, 35-37; Ints.’ Br. at 11, 30-33, 49-50. Simply stating the percentage of areas to be opened or closed is not a rationale for reopening areas that the agency previously determined must be closed to protect Steller sea lions. Indeed, discussing the absolute percentage of closed critical habitat is itself of limited use, owing to the particular features of marine habitat in the Aleutian Islands. As the 2014 BiOp’s lead author explained: “fish scientists are emphasizing that the extreme patchiness of the physical habitat in the [Aleutian Islands] means that not all square feet of [critical habitat] are created equal in terms of the essential features” for sea lions. Doc. 45-17 (Gerke Email at 1035363). As a result, for the Atka mackerel fishery, NMFS previously stated that it “does not rely much on the percent of critical habitat closed to fishing . . . to inform prey availability and potential competition.” Doc. 45-32 at 16-17 (PRD Initial Feedback at 103387-88).

An agency may not “simply assert that its decisions [a]re protective and so withstand all scrutiny,” *Pac. Coast Fed’n*, 426 F.3d at 1092, and NMFS’s self-serving descriptions of the new fishing measures establish no basis for finding that the agency has met its obligation to “insure” that Steller sea lions will not be jeopardized, as required by the ESA. 16 U.S.C. § 1536(a)(2). Indeed, having reversed course from the findings of the 2010 BiOp, NMFS must “provide a more detailed justification than what would suffice” otherwise because the 2014 BiOp “rests upon factual findings that contradict those which underlay” its previous decision. *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009); *Perez v. Mortgage Bankers Ass’n*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 1199, 1209 (2015) (same).

F. The external reviews of the 2010 BiOp do not provide a basis for the changes in the 2014 BiOp’s analysis.

Despite the near complete reversal of course in the 2014 BiOp, NMFS is unable to identify any particular new study or information that would justify abandonment of the conclusions reached in 2010. Intervenors attempt to supply rationales that NMFS did not, in fact, adopt by describing external reviews of the 2010 BiOp and suggesting that the 2014 BiOp’s ultimate conclusion reflects the reviews. *See* Ints.’ Br., Doc. 51 at 22-25, 27-29, 45-49. NMFS did revise some previous analyses and conduct new analyses in response to the reviews, Doc. 45-28 at 13-14 (2014 BiOp at 1027564-65), but neither those new analyses nor the reviews themselves explain the new conclusions

in the 2014 BiOp. Some of the new analyses conducted by NMFS confirmed information in the 2010 BiOp, such as the development of a new sea lion trend estimation method that confirmed the “dire” situation in the western Aleutian Islands. *Id.* at 42-43 (2014 BiOp at 1027593-94). Other new analyses proved the external reviews to be wrong. For example, the state-sponsored review relied heavily on certain “statistical studies” to argue that the fisheries do not negatively affect Steller sea lion demographics; NMFS subsequently demonstrated that these studies have “little to no power to detect prey removal effects on Steller sea lion population.” *Id.* at 8-10, 218-19 (2014 BiOp at 1027559-61, 1027769-70); *see also* Ex. 55 at 1 (Kurland Notes at 1022013) (same). Upon further study, NMFS also rejected reviewers’ criticism of the agency’s use of a “frequency of occurrence” methodology to identify fish species of importance in the Steller sea lion diet. Doc. 45-28 at 80-82 (2014 BiOp at 1027631-33); *see also* Ex. 51 at 1 (DeMaster Email at 1016083) (stating reviewers “got that wrong”). Despite the reviewers’ pointed criticism of NMFS’s use of pup to non-pup ratios, NMFS scientists determined that such ratios are a “powerful proxy” when the Steller sea lion birth rate is declining steeply and that the ratio works well in six of the seven scenarios “that had the potential to describe the population dynamics in the western Aleutian Islands.” Doc. 45-28 at 58-59 (2014 BiOp at 1027609-10). NMFS decided not to use these ratios in the 2014 BiOp, but the 2014 BiOp still acknowledges the risk of nutritional stress. Doc. 45-28 at 77 (2014 BiOp at 1027628).

In the end, after undertaking new and refined analyses, the 2014 BiOp makes key findings that align with those of the 2010 BiOp: NMFS cannot rule out that fishing is currently driving Steller sea lions’ ongoing decline in the western Aleutian islands, and intensified fishing—particularly within critical habitat—poses a risk of localized depletions of prey resources that could further reduce Steller sea lion numbers and reproduction. *See, e.g., id.* at 243 (2014 BiOp at 1027794) (stating “fishing for Steller sea lion prey may be limiting population growth in the [Western Population] today”); *id.* at 54 (2015 BiOp at 1027605) (stating “fisheries have the potential to reduce the availability of food to Steller sea lions, and thus the potential to indirectly affect the birth rate of Steller sea lions”); *see also* Pls.’ Br., Doc. 45 at 28-29. The available information has not changed meaningfully. What has changed is NMFS’s analysis and resolve, or lack thereof, to comply with the ESA’s requirement to “give the benefit of the doubt to the species.” *Conner*, 848 F.2d at 1454.

Intervenors additionally argue that the 2014 BiOp’s new analytical approach to assessing overlap and competition is supported by the external reviews. *See* Ints.’ Br., Doc. 51 at 44-53. NMFS does not join this argument—denying that its approach has changed at all, *see supra* at 3-6 and, of course, Intervenors cannot supply an acknowledgment of change or a rationale that the

agency does not itself embrace. Moreover, Intervenor's are mistaken in their assertion that NMFS's new analytical approach to assessing overlap is attributable to, or supported by, the external reviews. Despite Intervenor's lengthy excerpts, *see* Ints.' Br., Doc. 51 at 45-48, they can point to no comment or criticism from the reviews which suggests that NMFS should institute a requirement that overlap be demonstrated in all four dimensions as a prerequisite to finding competition between the fisheries and Steller sea lions. The 2014 BiOp's new, irrational framework for assessing Steller sea lions' exposure to fisheries competition is a mistake borne by the agency alone.

## II. THE FEIS UNLAWFULLY FAILS TO DISCLOSE SCIENTIFIC DISSENT.

NMFS's overlap analysis in the 2014 BiOp were met with substantial and substantive scientific criticism. Nonetheless, NMFS did not acknowledge these opposing views in either the FEIS or the 2014 BiOp, even though the controversy called into question the analysis of impacts to sea lions in the FEIS and the jeopardy analysis that was central to the agency's final action. An agency is required to disclose and respond to responsible opposing views in a final environmental impact statement to guarantee that the public is allowed to participate and insure an agency makes informed decisions. Pls.' Br., Doc. 45 at 52-53; *see also Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1020 (9th Cir. 2012) (agency must respond "explicitly and directly to 'responsible opposing view[s]'" (quoting 40 C.F.R. § 1502.9(b)); *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1151-52 (9th Cir. 2010) (an agency must disclose and respond to "internal uncertainty" that rises to the level of "significant uncertainty").

Neither NMFS nor Intervenor's dispute that the concerns raised by the agency's experts represent responsible opposing scientific viewpoints. They are also unable to show that either the FEIS or the 2014 BiOp contain any explicit or direct reference to the specific controversy surrounding the overlap analysis and the underlying data used to support the analysis. Instead, NMFS and Intervenor's attempt to make light of the controversy, categorizing it as merely reflecting the general uncertainty that has always surrounded pinpointing whether and how fishing affects sea lions. These attempts to downplay significant conflict demonstrate the very nature of the problem. Rather than directly internalizing and resolving significant expert controversy, NMFS is attempting to sweep it under the rug. NMFS had a duty to disclose the full nature and extent of the conflict among its own experts in the body of the FEIS, before action was taken, and failed to do so.

A. The Council on Environmental Quality (CEQ) regulations require NMFS to disclose and respond to the reasonable opposing views of its experts.

NMFS mistakenly posits that section 1502.9(b) of the CEQ regulations is not applicable because it only requires NMFS to respond to outside comments received on the draft environmental impact statement (DEIS). Defs.' Br., Doc. 54 at 58. This is wrong as a matter of fact and law. Factually, even if the expert comments were not directed specifically at the DEIS, the scientists' concerns implicated the overlap analysis on which NMFS relied to evaluate the impact of alternatives and select its preferred alternative in the FEIS. NMFS does not dispute that the FEIS directly relied on the overlap analysis.

As a matter of law, 40 C.F.R. § 1502.9(b) establishes two distinct requirements that an agency must meet for any final environmental impact statement. First, an agency "shall respond to comments as required in part 1503." *Id.* Second, an "agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised." *Id.* The Ninth Circuit has recognized that these two obligations are distinct and that 40 C.F.R. § 1502.9(b) establishes an independent obligation to respond to opposing science, apart from an agency's duty to respond to outside comments under section 1503. *WildWest Institute v. Bull*, 547 F.3d 1162, 1171 (9th Cir. 2008) ("In addition to their general obligation to respond to public comments under 40 C.F.R. § 1503.4(a), federal agencies must *specifically* 'discuss at appropriate points in the final [EIS] any responsible opposing view which was not adequately discussed in the draft [EIS] and . . . indicate the agency's response to the issues raised.'") (emphasis added); *see also Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1168 (9th Cir. 2003) (stating that actions to meet obligations under section 1503 to respond to comments would not meet obligations under section 1502.9(b) and "[t]o hold otherwise would render subsection 1502.9(b) superfluous"). This obligation extends to an agency's own experts. *WildWest*, 547 F.3d at 1171 (recognizing that the disclosure obligation applied to the data and opinions of the agency's own expert); *see also* Pls.' Br., Doc. 45 at 53-54.

NMFS cites *Lands Council v. McNair* as holding that an agency's responsibilities are limited to responding to comments from "outside parties." Defs.' Br., Doc. 54 at 58. In doing so, NMFS misinterprets the holding in that case. The issue at stake in *Lands Council* was whether the agency had adequately responded to comments submitted by outside parties, and so the Court in that case was merely reciting an agency's duties when responding to such comments, but never addressed an agency's separate and distinct obligation to disclose and respond to dissenting opinions from its own

experts. *See* 537 F.3d 981, 1001-03 (9th Cir. 2008) (en banc), *overruled in part on other grounds by Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). In fact, the Ninth Circuit has specifically extended the reasoning in *Lands Council* to apply to internal comments and uncertainty that an agency expert submitted outside of the public comment period concerning a model that the agency relied upon to evaluate environmental impacts. *See Greater Yellowstone Coal.*, 628 F.3d at 1151-52.

B. Alluding to the general areas of controversy and uncertainty surrounding Steller sea lion alternatives was not sufficient under NEPA.

NMFS endeavors to escape its NEPA obligations by arguing that the FEIS was sufficient because it mentions the general controversy surrounding whether fisheries have effects on Steller sea lions. *See, e.g.,* Defs.’ Br., Doc. 54 at 56-57; *see also* Ints.’ Br., Doc. 51 at 55-57. In support of this argument, NMFS and Intervenor cite generally to Chapter 5.2.2 of the FEIS and the “Areas of Controversy” section in the FEIS as providing sufficient information.<sup>10</sup> These sections generally describe some controversy regarding whether potential fishing impacts influence sea lions, but they ignore the fundamental concerns of the agency’s own experts that were directly relevant to the manner in which the agency analyzed the environmental impacts the final action would have on Steller sea lions. In other words, the criticism in the expert comments is not about whether there are effects but the manner in which the agency chose to evaluate the potential effects. Aside from offering general citations, the Intervenor makes reference to an entry in the “Areas of Controversy” section that mentions the broad idea that “overlap between fisheries harvesting and Steller sea lion foraging” is controversial, an entry that also was listed in the DEIS.<sup>11</sup> Ints.’ Br., Doc. 51 at 55. NMFS also cites to pages in the FEIS that note there is broad disagreement about the scientific data surrounding interactions between Steller sea lions and fisheries. Defs.’ Br., Doc. 54 at 56-57.<sup>12</sup>

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<sup>10</sup> Intervenor also make indirect reference to the response to comment section as addressing the issue. *See* Ints.’ Br., Doc. 51 at 56 (stating that the response to comments described uncertainty, but citing to the “Areas of Controversy” section and Chapter 5 generally). Yet, nowhere in the response to comments does the agency refer to the expert opinions at issue, and Intervenor fail to even provide a specific reference. Further, any disclosure and response must be contained in the body of the FEIS itself, not just in response to comments. *See, e.g., Pac. Coast Fed’n of Fishermen’s Ass’ns v. NMFS*, 482 F. Supp. 2d 1248, 1255 (W.D. Wash. 2007).

<sup>11</sup> Tellingly, the “Areas of Controversy” section changed minimally from the DEIS to the FEIS. *Compare* Ex. 56 at 4-5 (DEIS at 3187642-43) *with* Doc. 45-26 at 40-41 (FEIS at 3160431-32). NMFS did not add anything on the dissenting opinions of its experts after the DEIS was completed.

<sup>12</sup> Intervenor also make much of the fact that some of the scientists who held opposing views were actively involved in developing the EIS and that their opinions were only one piece of the agency’s duty to interpret the science. *See* Ints.’ Br., Doc. 51 at 56. These arguments are not responsive to

None of these disclosures are sufficient to meet NMFS's NEPA obligations. NMFS was required to specifically and directly disclose, discuss, and respond to the dissenting expert opinions. See 40 C.F.R. § 1502.9(b) (directing agencies to address reasonable opposing views directly and further requiring agencies to analyze and respond to those views). Courts have rejected similar attempts by agencies to sidestep disclosure obligations under NEPA. In *Center for Biological Diversity*, the Forest Service did far more to respond to opposing viewpoints, including modifying an alternative and addressing opposing viewpoints in an appendix to the FEIS. Nevertheless, the Ninth Circuit found these disclosures insufficient because they failed to discuss the nature and substance of the underlying scientific debate. 349 F.3d at 1168; see also *Pac. Coast Fed'n. of Fishermen's Ass'ns v. NMFS*, 482 F. Supp. 2d 1248, 1254 (W.D. Wash. 2007) (rejecting even general references to the dissenting views in question and requiring a more accurate and detailed discussion and response).

The Ninth Circuit has typically found that an agency met disclosure obligations when an agency meaningfully responds to opposing views. For example, in *Sierra Forest Legacy v. Sherman*, the Ninth Circuit held the agency adequately disclosed conflicting opinions when it devoted "over 120 pages to raising and *meaningfully* responding to" critiques. 646 F.3d 1161, 1182-83 (9th Cir. 2011) (emphasis added). In that case, the FEIS not only expressly acknowledged the expert concerns about the reliability of models and scientific evidence, the agency responded specifically and directly to all those concerns in detail. *Id.* Here, in contrast, NMFS neither acknowledged expert controversy existed nor provided the detailed and direct response that NEPA required. References to the general uncertainties surrounding fisheries interactions hardly informed the decision makers or the public of the nature of significant scientific controversy surrounding the overlap analysis and did not provide an adequate response to that controversy.

C. The reasonable expert dissent was not trivial.

NMFS and Intervenor highlight that an agency is not required to address all scientific uncertainty. See, e.g., Defs.' Br., Doc. 54 at 57-58; Ints.' Br., Doc. 51 at 55. This is uncontested. However, NMFS is obligated to respond to significant expert dissent, which existed here. As in *Center for Biological Diversity*, agency experts submitted opinions that "directly challenge the scientific basis upon which the FEIS rests and which is central to it" and so NMFS was "required to

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NMFS's NEPA obligations and Intervenor fail to explain why they are relevant. Whether or not the experts who expressed dissenting opinions made final decisions about the action did not relieve NMFS of its duty to disclose these opinions.

disclose and respond to such viewpoints in the final impact statement itself.” 349 F.3d at 1167. The concerns that numerous experts within the agency presented regarding NMFS’s analysis represented “significant uncertainty” with environmental analysis critical to the agency’s evaluation of environmental impacts. *Greater Yellowstone Coal.*, 628 F.3d at 1151-52.

The reasonable opposing views here directly challenge the reliability of the overlap analysis which was central to NMFS’s evaluation of the type and amount of environmental impacts the fishery measures in the Final Rule would have on Steller sea lions. This analysis addressed the very purpose and need of the FEIS: to mitigate fishery impacts on Steller sea lions. NMFS relied directly upon its overlap analysis to determine the extent and degree of fishery impacts and whether the final action would adequately mitigate those impacts. Reasonable scientific opinions that the overlap analysis was “dangerously simplistic” in some respects and “fundamentally flawed” in others, Pls.’ Br., Doc. 45 at 33, 46, strike to the heart of significant, environmental impacts.

The cases NMFS and the Intervenors cite fail to support their argument. *See* Defs.’ Br., Doc. 54 at 57; Ints.’ Br., Doc. 51 at 55. In *Lands Council*, the Ninth Circuit held an agency does not need to anticipate unnecessary questions or respond to unsupported uncertainties. 537 F.3d at 1001-02. The opposing views here were far from unsupported or unnecessary, but rather represented critical concerns about analysis central to the agency’s decision. In *Lands Council*, the Ninth Circuit ultimately held that the two outside studies cited by the plaintiff were insignificant because they actually supported the government and the government directly addressed any remaining uncertainties. *Id.* at 1002-03. In *Ecology Center v. Castaneda*, the Court held that the study the plaintiffs cited did not actually challenge the agency’s conclusions and that the agency reached similar conclusions to the ones in the study. 574 F.3d 652, 659, 668 (9th Cir. 2009). Here, there is no question that controversy existed and that the opposing experts directly challenged the reliability of the agency’s overlap analysis. Finally, in *Earth Island Institute v. Carlton*, though the Ninth Circuit recognized that “agencies have broad discretion in choosing how to respond to opposing scientific evidence,” the court reiterated that “the EIS must respond *explicitly* and *directly* to conflicting views in order to satisfy NEPA’s procedural requirements.” 626 F.3d 462, 472 (9th Cir. 2010) (emphasis added) (quotation omitted). Here, NMFS has failed entirely to respond in any way to the opposing views, much less in detail or as extensively as the *Earth Island* court noted is required.

D. Discussions in the 2014 BiOp do not meet the agency's obligations here.

NMFS and Intervenor further attempt to confuse the issue by stating that discussions in the 2014 BiOp meet the agency's obligation to provide a "full and fair" discussion of environmental impacts. Defs.' Br., Doc. 54 at 55-56; Ints.' Br., Doc. 51 at 55. This argument does not suffice.

First, the 2014 BiOp is insufficient to meet NMFS's obligations. Nowhere in the 2014 BiOp does NMFS make reference to the significant dissent that existed surrounding the overlap analysis. Like the FEIS, the 2014 BiOp simply includes general discussions of scientific controversy. NMFS remarks that the 2014 BiOp noted the general "limitations and uncertainties" of the overlap analysis. As described above, although the 2014 BiOp inserted a few sentences that mention uncertainty, the 2014 BiOp does not substantively discuss and evaluate the significant criticism from its own experts. *See supra* at 5, 9, 11. This is not enough to meet NEPA obligations.

Second, even if the 2014 BiOp adequately had acknowledged or discussed the expert controversy, NMFS must still meet its disclosure obligations in the body of the final environmental impact statement itself. Section 1502.9 explicitly states that an agency must respond to any reasonable opposing views in the final statement. 40 C.F.R. § 1502.9(b). Although the FEIS generally "incorporates the BiOp by reference," the FEIS never "references" the reasonable opposing views. As a result, the agency did not properly tier to or reference any relevant discussion in the 2014 BiOp. Courts in the Ninth Circuit have held that discussions contained outside the body of the EIS, like in responses to comments or even in an appendix of an environmental impact statement are not sufficient, when the EIS itself does not reference or disclose those significant opposing views. *See, e.g., Ctr. for Biological Diversity*, 349 F.3d at 1169; *Friends of the Earth v. Hall*, 693 F. Supp. 904, 924 (W.D. Wash. 1988); *Nat'l Wildlife Fed'n v. NMFS*, 235 F. Supp. 2d 1143, 1156 n.5 (W.D. Wash. 2002). Likewise, discussions about the opposing views contained in the record are wholly insufficient to meet NMFS's disclosure obligation. *Ctr. for Biological Diversity*, 349 F.3d at 1169 ("The mere presence of the information in the record alone does not cure the deficiency").

### **RELIEF**

Neither NMFS nor Intervenor dispute that vacatur is the normal remedy. Defs.' Br., Doc. 54 at 60; Ints.' Br., Doc. 51 at 58. Intervenor concedes, in fact, that courts normally vacate a rule in the ESA context. Ints.' Br., Doc. 51 at 58. In addition, neither party disagrees that reinstating the Interim Final Rule would be appropriate upon vacatur. Rather than provide any discussion of relief,

both NMFS and the Intervenor ask the court to allow for further briefing on remedy, without providing any reason other than the fact the Final Rule and 2014 BiOp are “complex” and this Court provided for more briefing in the 2011 litigation. Defs.’ Br., Doc. 54 at 60; Ints.’ Br., Doc. 51 at 58.

Further briefing is not appropriate or necessary. In the 2011 litigation, this Court asked for more briefing because it ordered relief that was not contemplated by any party in their summary judgment briefing. *Lubchenco*, No. 3:10-cv-00271-TMB, Order, Doc. 130 at 55. Here, NMFS and Intervenor have had a full opportunity to discuss relief proposed by Plaintiffs in their briefs, but chose to devote all their allotted pages to arguments about the merits.

Although NMFS and Intervenor rightly note that the Court has discretion to remand without vacatur in certain circumstances, neither party directly points to equitable factors that might weigh against vacatur. NMFS briefly mentions that a decision to require “further explanation” might not require vacatur. Defs.’ Br., Doc. 54 at 60 (citing *Heartland Reg’l Medical Ctr. v. Sebelius*, 566 F.3d 193 (D.C. Cir. 2009)). In *Heartland*, the court found that a failure to adequately respond to a reasonable proposed alternative could be readily cured and did not require vacatur. *Id.* at 198. In contrast, the failures here are not just matters that require “further explanation.” They go to the very heart of the agency’s analysis and final decision. As a result, vacatur is the most appropriate remedy.

After further remedy briefing in the 2011 litigation, this Court noted that leaving a rule in place when a challenged action threatens environmental harm is appropriate only in “certain unusual cases,” as in that case, when the action would preserve the environment and vacatur threatened additional harm. *Lubchenco*, No. 3:10-cv-00271-TMB, Order, Doc. 142 at 11 (D. Alaska Mar. 5, 2012). Those circumstances do not exist here. *See* Pls.’ Br., Doc. 45 at 56. The Final Rule will not benefit endangered Steller sea lions, but instead threatens to harm the species. As a result, this Court should vacate the 2014 BiOp and the Final Rule, and reinstate the Interim Final Rule.

Should the Court decide to order further briefing, Plaintiffs ask that the Court ensure that briefing can be completed and relief granted before the start of the 2016 fishing season.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs’ motion for summary judgment and vacate the 2014 BiOp and Final Rule.

Respectfully submitted this 4th day of June, 2015.

*s/ Colin O'Brien*

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 4, 2015, a copy of foregoing PLAINTIFFS' REPLY BRIEF PURSUANT TO FED. R. CIV. P. 56 AND D.AK. LR 16.3 was served electronically on Daniel J. Pollak, Tanya C. Nesbitt, Linda R. Larson, and Svend A. Brandt-Erichsen.

*s/ Colin O'Brien*

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Colin O'Brien

## TABLE OF EXHIBITS

Ex. No.	Description	AR Bates Nos.
51	DeMaster, Douglas, Alaska Fisheries Science Center (AFSC), Email to Chris Oliver, North Pacific Fishery Management Council, Re: Re: transcripts from April council meeting (Apr. 10, 2013) (DeMaster Email)	1016083- 1016085
52	Gerke, Brandee, Sustainable Fisheries Division (SFD), Email to Douglas DeMaster, AFSC, Re: Talk to AP today (Apr. 8, 2014) (Gerke Email)	1026940
53	Google Calendar, Email to Lisa Rotterman, Protected Resources Division (PRD), Re: Reminder: Biop Topic Call: Exposure and Response Conceptual Models @ Wed Sep 18, 2013 1pm - 3pm (Sept. 18, 2013) (Call Invite)	1033109
54	Harrington, Gretchen, SFD, Email Exchange with Brandee Gerke, SFD, and Glenn Merrill, SFD, Re: SSL Final Rule -- Response to Comment Procedures -- FOIA Exempt, Deliberative Process (Aug. 18, 2014) (Harrington Email Thread)	2011542- 2011544
55	Kurland, Jon, PRD, AFSC Analyses – Recap (Dec. 12, 2013) (Kurland Notes)	1022013- 1022014
56	National Marine Fisheries Service (NMFS), Draft Environmental Impact Statement/Regulatory Impact Review/Initial Regulatory Flexibility Analysis, Steller Sea Lion Protection Measures for Groundfish Fisheries in the Bering Sea and Aleutian Islands Management Area, Vol. I (May 2013) (excerpts) (DEIS)	3187555 - 3188294
57	NMFS, Alaska Region (AKR), PRD, Draft Analytical Approach for 2014 Groundfish Biop (March 25, 2013) (Draft Analytical Approach Memo)	1051605- 1051617
58	NMFS, March 4, 2014 Internal Draft Aleutian Islands Groundfish Fishery Biological Opinion (March 4, 2014) (excerpts) (Draft BiOp)	1010621- 1010938
59	NOAA Fisheries, Presentation, 2014 BiOp on Proposed AI Groundfish Fishery Steller Sea Lion Protection Measures: Presented to the North Pacific Fishery Management Council By Brandee Gerke and Jon Kurland, Alaska Region PRD April 8 and 9, 2014 (Apr. 8-9, 2014) (2014 BiOp Presentation)	1027136- 1027206

<b>Ex. No.</b>	<b>Description</b>	<b>AR Bates Nos.</b>
60	NOAA Fisheries, AKR, Presentation, March 28, 2013 Groundfish Biop Topic Call: Draft Analytical Approach for Anticipated 2014 Groundfish Biological Opinion (March 28, 2013) (NMFS Presentation)	1052299- 1052316