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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

OCEANA, INC. and GREENPEACE, INC., *Plaintiffs*, v. NATIONAL MARINE FISHERIES SERVICE; UNITED STATES DEPARTMENT OF COMMERCE; PENNY PRITZKER, in her official capacity as Secretary of the United States Department of Commerce; EILEEN SOBECK, in her official capacity as Assistant Administrator for Fisheries, National Marine Fisheries Service; and JAMES W. BALSIGER, in his official capacity as Regional Administrator, National Marine Fisheries Service, Alaska Region, *Defendants*.	)	Case No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(16 U.S.C. § 1536; 42 U.S.C. § 4332; 5 U.S.C. §§ 701-706; 16 U.S.C. § 1855(f))

INTRODUCTION

1. This action challenges defendants' recent decision to authorize increased industrial fishing in the western and central Aleutian Islands, including in critical habitat for the endangered western population of Steller sea lions (Final Rule), and associated actions taken in support thereof, including issuance of a biological opinion and a final environmental impact statement that attempt to justify this decision. Defendants' actions violate the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA). Defendants promulgated the Final Rule pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSA).

2. The Final Rule removes significant protections deemed necessary by defendants four years earlier to ensure compliance with the ESA. Those protections were intended to reduce competition between large-scale commercial fisheries and endangered Steller sea lions for prey species in the western and central Aleutian Islands, where sea lion populations continue to decline. For more than two decades, the best available science has supported the need for and adoption of protective measures to limit intensive fishing within important Steller sea lion foraging areas.

3. Defendants' recent decision to substantially scale back Steller sea lion protections in the western and central Aleutian Islands is based on a novel scientific approach. The approach and data used in the new analysis—along with defendants' ultimate conclusion—are inconsistent with defendants' analysis just four years before and with analyses in biological opinions going back more than a decade. The new scientific approach and data on which it relied also were criticized heavily by experts within and outside the government. These criticisms, in significant part, were not accounted for in the biological opinion and environmental impact statement upon

which the defendants relied in promulgating the Final Rule. As a result, the biological opinion, environmental impact statement, and Final Rule all are arbitrary and capricious and adopted in violation of the law.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action by virtue of 16 U.S.C. § 1855(f) (providing review of regulations promulgated under the MSA); 28 U.S.C. § 1331 (granting district courts original jurisdiction over civil actions under the laws of the United States); and 5 U.S.C. §§ 702-706 (providing review of agency actions).

5. This complaint is timely under 16 U.S.C. § 1855(f) because it has been brought within 30 days after promulgation of the Final Rule, which was published in the *Federal Register* on November 25, 2014. *See* 79 Fed. Reg. 70,286 (Nov. 25, 2014).

6. This Court has the authority to grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202 (the Declaratory Judgment Act) and 5 U.S.C. §§ 701-706 (APA).

7. Venue is proper in this district under 28 U.S.C. § 1391(e).

PARTIES

8. Plaintiff Oceana, Inc. ("Oceana") is a non-profit, international conservation organization dedicated to maintaining and protecting the world's oceans, including the North Pacific. Oceana's mission includes making oceans as rich, healthy, and abundant as they once were, including by obtaining protection and conservation for North Pacific marine ecosystems and wildlife, including marine mammals. Oceana has for many years been involved in advocacy before responsible authorities concerning measures needed to protect endangered Steller sea lions from the impacts of large-scale industrial fishing. Oceana's headquarters are located in Washington, D.C., and it has U.S. offices or staff in Alaska, California, Oregon, Massachusetts,

Florida, New York, North Carolina, South Carolina, Virginia, and Louisiana. Oceana has more than 600,000 members and supporters in the United States and worldwide.

9. Plaintiff Greenpeace, Inc. ("Greenpeace") is an independent campaigning organization that seeks to expose global environmental problems and to find solutions for a peaceful and lasting future. Greenpeace seeks to ensure the earth's ability to nurture life in all its diversity, including protecting biodiversity in all its forms and ending the abuse of the oceans and fresh water. Greenpeace has been working to protect Alaska's environment since the organization was founded in 1971, beginning with an effort to prevent nuclear testing in the Aleutian Islands. Since then, Greenpeace has campaigned to protect Alaska's marine and terrestrial habitats from unsustainable mining, timber, drilling, and fishing operations. Greenpeace has for many years been involved in advocacy before responsible authorities concerning measures needed to protect endangered Steller sea lions from the impacts of large-scale industrial trawl fishing. Greenpeace is an active stakeholder in ongoing discussions at the North Pacific Fishery Management Council about the need to take a more precautionary, ecosystem-based approach to stewardship of the Bering Sea. Greenpeace is a California non-profit corporation with offices throughout the United States, including in San Francisco and Washington, D.C. There are over 320,000 current Greenpeace members in the United States.

10. Defendant National Marine Fisheries Service ("NMFS") is an agency of the National Oceanic and Atmospheric Administration ("NOAA") of the United States Department of Commerce. NMFS performs two distinct functions relevant to this lawsuit, through two separate offices, and these functions are governed by distinct legal obligations. NMFS's Office of Protected Resources ("NMFS Protected Resources") is charged with conserving, protecting, and recovering species, and is responsible for implementing and enforcing the ESA. NMFS's

Office of Sustainable Fisheries ("NMFS Sustainable Fisheries") is responsible for managing the United States' commercial fisheries, including the North Pacific groundfish fishery.

11. When NMFS Sustainable Fisheries proposes to take an action that may affect threatened or endangered marine species, it is known as the "action agency." Section 7(a)(2) of the ESA requires that, as such, it must first consult with NMFS Protected Resources—known in this circumstance as the "consulting agency"—to assess the risks such action may present to the survival and recovery of those species and to "insure" that the proposed action is not likely to jeopardize them. *See* 16 U.S.C. § 1536(a).

12. NMFS Sustainable Fisheries promulgated the Final Rule and prepared and approved a Final Environmental Impact Statement (FEIS), which was released on May 13, 2014. As the action agency, NMFS Sustainable Fisheries also consulted with NMFS Protected Resources to assess the risks the Final Rule presented to the survival and recovery of endangered Steller sea lions. NMFS Protected Resources prepared and approved the Biological Opinion (2014 BiOp), which was issued on April 2, 2014.

13. Defendant United States Department of Commerce is the federal agency with ultimate responsibility for implementing and enforcing compliance with the law, including the provisions for violations of which plaintiffs bring this suit.

14. Defendant Penny Pritzker is sued in her official capacity as Secretary of the United States Department of Commerce.

15. Defendant Eileen Sobeck is sued in her official capacity as NMFS's Assistant Administrator for Fisheries. Ms. Sobeck is the responsible official who signed the Record of Decision for the FEIS.

16. Defendant James W. Balsiger is being sued in his official capacity as the NMFS Alaska Region Administrator. Dr. Balsiger is the signatory official for the 2014 BiOp and listed as the responsible official for the FEIS.

STATUTORY BACKGROUND

Endangered Species Act

17. Recognizing that certain species of plants and animals "have been so depleted in numbers that they are in danger of or threatened with extinction," 16 U.S.C. § 1531(a)(2), Congress enacted the ESA to provide both "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," and "a program for the conservation of such endangered species and threatened species," *id.* § 1531(b). The ESA affords first priority to the preservation of endangered and threatened species. The ESA therefore establishes that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." *Id.* § 1531(c)(1).

18. Under the ESA, a species is listed as "endangered" where it is "in danger of extinction throughout all or a significant portion of its range," 16 U.S.C. § 1532(6), and listed as "threatened" where it is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range," *id.* § 1532(20). Once listed, a species is entitled to a number of protections, including both prohibitions on harm and affirmative duties to promote the species' conservation and recovery.

19. Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), is a critical component of the ESA's statutory and regulatory scheme to conserve endangered and threatened species. Section 7(a)(2) requires each federal agency, in consultation with NMFS (or, depending on the species

involved, the U.S. Fish and Wildlife Service ("FWS")) to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species" or adversely modify its designated critical habitat. *Id.* § 1536(a)(2). Agency "action" is defined in the ESA's implementing regulations to include "(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02.

20. Section 7(a)(2) requires that every federal agency must determine whether its actions "may affect" any endangered or threatened species. If the agency proposing the action determines that its action "may affect" a listed species, the agency must engage in "formal consultation" with NMFS or FWS. 50 C.F.R. § 402.14(a). Where the action agency and the consulting agency are the same, as in this case, the agency must engage in internal or intra-agency consultation. Here, NMFS Sustainable Fisheries, which is taking the action of authorizing additional commercial fishing within designated critical habitat and other important areas for endangered Steller sea lions in the western and central Aleutian Islands, must consult with NMFS Protected Resources as part of its duty to "insure that [its] action is . . . not likely to jeopardize the continued existence" of that species or adversely modify its designated critical habitat. 16 U.S.C. § 1536(a)(1), (2); 50 C.F.R. § 402.14.

21. The result of this consultation process is the preparation of a biological opinion by NMFS Protected Resources that evaluates impacts to Steller sea lions to insure that the action is not likely to jeopardize or adversely modify critical habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. The law requires NMFS Protected Resources to be responsible for all aspects of the biological opinion. The biological opinion must include a summary of the information on which

the opinion is based, an evaluation of "the current status of the listed species or critical habitat," the "effects of the action," and "cumulative effects." 50 C.F.R. § 402.14(g)(2)-(3). "Effects of the action" include both direct and indirect effects of an action "that will be added to the environmental baseline." *Id.* § 402.02. "The environmental baseline includes the past and present impacts of all Federal, State or private actions and other human activities in the action area" and "the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation." *Id.* NMFS Protected Resources must therefore consider not just the proportional share of responsibility for impacts to the species traceable to the particular activity that is the subject of the biological opinion, but also the effects of that action when added to all other activities and influences in the action area that affect the status of that species.

22. After NMFS Protected Resources, as the consulting agency, has added the direct and indirect effects of the action to the environmental baseline, it must determine "whether the action is likely to jeopardize the continued existence of a listed species" or adversely modify its critical habitat," 50 C.F.R. § 402.14(h)(3); 16 U.S.C. § 1536(b)(3)-(4). The term "jeopardize" is defined as "an action that reasonably would be expected . . . to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02.

23. When evaluating whether a proposed action is likely to result in jeopardy or adverse modification under Section 7(a)(2), the consulting agency must account for a species' prospects for recovery as well as the likelihood of a species' survival. Survival and recovery are intertwined and are complementary goals of the consultation process.

24. "[W]here baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm." *Nat'l Wildlife Found. v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2007). A consulting agency must "know roughly at what point survival and recovery will be placed at risk before it may conclude that no harm will result" from an action that will adversely affect an already imperiled species or its critical habitat. *Id.* at 936.

25. NMFS Protected Resources must base its determination of whether an activity is likely to jeopardize the continued existence of a species or adversely modify critical habitat solely on "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). The ESA does not permit the agency to base its determination on other factors, such as economic costs that may be incurred as a result of protecting the species.

26. If NMFS Protected Resources determines that the action is likely to jeopardize a species or adversely modify critical habitat, the biological opinion must outline "reasonable and prudent alternatives" to the action, if any exist, that will avoid jeopardy and adverse modification and "which [the Secretary] believes would not violate [Section 7(a)(2)]." 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3).

27. An action agency—in this case, NMFS Sustainable Fisheries—does not satisfy its independent substantive duty under ESA Section 7(a)(2) to insure against jeopardy or adverse modification merely by carrying out its procedural duty under that section to consult with the consulting agency, NMFS Protected Resources. The action agency's reliance on the consulting agency's biological opinion must not be arbitrary, capricious, an abuse of discretion, or contrary to law.

28. Independent of the ESA Section 7(a)(2) consultation process, ESA Section 4(f) requires NMFS, acting on behalf of the Secretary, to develop "recovery plans" for "the conservation and survival" of endangered and threatened species. 16 U.S.C. § 1533(f). A recovery plan includes objective, measurable criteria against which the agency may assess an endangered species' progress toward recovery and potential for eventual de-listing. *See id.*

National Environmental Policy Act

29. NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a).

30. Congress enacted NEPA to require federal agencies to incorporate environmental concerns into the decision-making process. 42 U.S.C. § 4331(a)-(b). In furtherance of this goal, NEPA compels federal agencies to evaluate prospectively the environmental impacts of proposed actions that they carry out, fund, or authorize and to ensure that the public is given a meaningful opportunity to participate in the decision making process.

31. NEPA requires federal agencies to prepare an environmental impact statement (EIS) for any major federal action that may significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). An EIS must include the environmental impacts of, and alternatives to, the proposed action. *Id*. The EIS "shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. It "is more than a disclosure document" and "shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions." *Id.*

32. The Council on Environmental Quality, an agency within the Executive Office of the President, has promulgated regulations implementing NEPA that are "binding on all Federal agencies[.]" 40 C.F.R. § 1500.3. These regulations specify that "high quality" environmental information must be made available to public officials and citizens before decisions are made and before actions are taken, including "[a]ccurate scientific analysis, expert agency comments, and public scrutiny." 40 C.F.R. § 1500.1(b). They also require that an EIS "shall discuss at appropriate points . . . any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised." 40 C.F.R. § 1502.9(b). An agency must also "insure the professional integrity, including scientific integrity, of the discussions and analyses" included in its EIS. 40 C.F.R. § 1502.24.

The Magnuson-Stevens Fishery Conservation and Management Act

33. The MSA governs management of commercial fishing within the U.S. Exclusive Economic Zone. The MSA accomplishes this, in part, through Regional Fishery Management Councils, which propose Fishery Management Plans to regulate fishing within their regions. The fishery councils submit proposed fishery management plans and plan amendments to the Secretary of Commerce for review and ultimate approval. 15 U.S.C. §§ 1853, 1854.

34. The North Pacific Fishery Management Council advises NMFS about management of fisheries in the Exclusive Economic Zone off Alaska's coast. Fishery management plans adopted by the Council and approved by NMFS govern the management of groundfish fisheries in the Bering Sea, Aleutian Islands, and Gulf of Alaska.

35. The Secretary, acting through NMFS Sustainable Fisheries, may only approve a fishery management plan or fishery management plan amendment, adopt regulations, or allow

any other fishing activity to occur or continue if such action does not violate applicable laws, including the ESA. *Id.* §§ 1853(a)(1)(C), 1854(a)(1).

36. Approvals of fishery management plans, fishery management plan amendments, and implementing regulations are subject to the procedural requirements of NEPA, 42 U.S.C. § 4331 *et seq.*; 16 U.S.C. § 1854(i).

37. The MSA provides for judicial review of regulations promulgated by NMFS under the MSA. 16 U.S.C. § 1855(f). The MSA further provides that the court shall set aside any such regulation under the APA standard of review, 5 U.S.C. § 706(2), if it is arbitrary, capricious, not in accordance with law, or an abuse of discretion.

FACTUAL BACKGROUND

Steller sea lions and the North Pacific Ecosystem

38. The North Pacific, including the Bering Sea, Aleutian Islands, and Gulf of Alaska, contains some of the most productive waters on Earth and supports rich and diverse marine life. The Aleutian Islands provide important habitat within the North Pacific marine ecosystem; they are home or seasonal habitat to Steller sea lions, northern fur and harbor seals, many whale and porpoise species, sea otters, and numerous species of seabirds.

39. The Steller sea lion (*Eumetopias jubatus*) is the largest member of the family *otariidae*, the "eared seals," and a top predator within the North Pacific ecosystem. Steller sea lions rely upon fish for prey, including pollock, Atka mackerel, and Pacific cod.

40. The Steller sea lion's range extends around the North Pacific Ocean rim from northern Japan to California. NMFS separates the U.S. population of Steller sea lions into a Western Distinct Population Segment consisting of animals located in the Gulf of Alaska and the

Bering Sea/Aleutian Islands ("Western Population"), and an Eastern Distinct Population Segment, consisting of animals east of Cape Suckling ("Eastern Population").

41. The worldwide abundance of Steller sea lions was estimated to be approximately 240,000 to 300,000 animals from the 1950s through the late 1970s, with the vast majority of the species located within the range of what is now recognized as the Western Population. The Western Population subsequently experienced a marked decline of almost 90 percent. The Western Population was at its smallest size, an estimated 42,500 animals, in 2000.

42. The initial, steepest decline of the Western Population coincided with two significant human impacts in the North Pacific: the shooting of large numbers of sea lions and the rise of industrial fishing. Tens of thousands of Steller sea lions are believed to have been shot prior to the species' listing as endangered in 1990. The development of large-scale industrial fisheries in Alaskan waters also occurred concurrently with the decline of the Western Population of Steller sea lions. Between the 1950s and the 1990s alone, the total annual removal of groundfish in Alaska waters increased over 7,500 percent. Even after intentional killing of Steller sea lions stopped in 1990, Steller sea lion population declines persisted. The average rate of decline for the Western Population between 1990 and 2000 was more than 5 percent per year. Recent evidence indicates that, since heightened protection measures limiting commercial fishing in many areas important for sea lion foraging were adopted in 2000, the overall decline has been largely abated. However, since 2000, there have been strong differences in population trends observed across the Western Population's range in Alaska, with modest improvements in several areas but declines persisting in others. The population trends correspond to the strength of fishing limits imposed in various areas.

43. Severe declines have been observed, and continue, in the western Aleutian Islands. Steller sea lion counts there decreased by 65 percent in the 1990s, with an additional 45 percent decline observed from 2000 to 2008. Counts of adults and juveniles in the western Aleutian Islands from 2000 through 2012 indicate a population that is declining steadily at over 7 percent per year, with an even steeper decline estimated for pups.

44. Declines have been observed in the central Aleutian Islands as well. The most recent count of adults and juveniles there, in 2008, was lower than the previous count in 2004. From 2000 through 2012, pup counts in the central Aleutian Islands reflected a slow decline.

45. The ongoing decline in the western Aleutian Islands, by itself, prevents the Western Population overall from meeting established criteria for recovery. Until that decline is stopped or reduced, the Western Population cannot meet current benchmarks for recovery.

Large-Scale Industrial Fisheries in the North Pacific

46. The area inhabited by the Western Population of Steller sea lions is a "fished ecosystem" from which huge quantities of fish have been, and continue to be, caught. Pollock, Atka mackerel, and Pacific cod are the focus of a massive groundfish fishery that catches more than four billion pounds of fish each year. These fisheries are among the largest in the world.

47. Fishery removals can have significant effects on the marine ecosystem. By design, fishing reduces the available biomass of target species from an "unfished" level to a "fished" level, meaning that fish populations are maintained at a level well below the historic or pristine norm. Large-scale removals of fish can reduce substantially the available stocks of target species, changing the relative abundance of different fish species in the ecosystem, and altering the prey base that is available for animals such as sea lions that feed on those same species of fish.

48. Fishing also may result in localized depletions of the stock, meaning that fishing substantially lowers the density of fish in a specific area. Trawling and other intensive fishing may disadvantage Steller sea lions not only by removing potential prey within their foraging areas, but also by disrupting the normal schooling behavior of the prey species. The survival of Steller sea lions is dependent on the availability of abundant, high quality prey in key foraging areas. As a result, factors that substantially influence prey availability in important areas, particularly during critical life history stages (*e.g.*, pregnant females with a nursing pup, or recently weaned juveniles), have the potential to affect Steller sea lion vital rates and impede their survival and recovery.

49. The North Pacific groundfish fisheries are prosecuted by a wide variety of fishing vessels, including giant factory trawlers up to 344 feet in length fishing for pollock in the Bering Sea. In the Aleutian Islands, Atka mackerel are targeted by large vessels using bottom trawls, which capture huge quantities of fish by towing large nets for 3 to 16 miles in a 150-foot wide or greater swath along the ocean floor. On average, the trawl boats remove more than 120 million pounds of Atka mackerel and more than 20 million pounds of Pacific cod each year. The vessels targeting Atka mackerel generally are home ported in the State of Washington.

50. Management measures to split the Aleutian Islands into three fishery management zones—*i.e.*, areas 541, 542, and 543—were first enacted in 1993. 58 Fed. Reg. 37,660 (July 13, 1993). This subdivision was adopted to address concerns that concentrated fishing, particularly for Atka mackerel, could cause localized depletion of the fishery resources.

51. The North Pacific fisheries are managed on a single-species basis, meaning that annual catch limits are premised on assumptions about maximizing catches of targeted fish species while minimizing the risk of overfishing those species. The management scheme does

not explicitly account for other consumers of targeted fish (*e.g.*, sea lions) in the ecosystem. NMFS managers generally seek to allow enough fish to be removed to maintain the spawning fish biomass of each targeted species, on average, at 40 percent of historic levels. The target level, therefore, means that there is 60 percent less fish by weight than historically was available to predators like Steller sea lions.

Initial Conservation Measures

52. The early decline of Steller sea lions led a coalition of environmental organizations to petition NMFS to protect the population. In 1990, the agency issued an emergency interim rule listing the Steller sea lion as threatened pursuant to the ESA. 55 Fed. Reg. 12,645 (Apr. 5, 1990). NMFS issued a final rule to the same effect later that year. 55 Fed. Reg. 49,204 (Nov. 26, 1990). At the time, NMFS did not distinguish between the Western Population and Eastern Population; the entire U.S. population was covered by the listing. In the final listing rule, NMFS cited data indicating that increasing catch of pollock correlated with declines in Steller sea lion abundance. 55 Fed. Reg. at 49,203.

53. Following the species' listing, NMFS undertook consultation pursuant to ESA Section 7, 16 U.S.C. § 1536. NMFS concluded that the North Pacific pollock fishery, as managed at the time, was likely to jeopardize the continued existence or recovery of the threatened Steller sea lion population and consequently implemented emergency protections. *See* 56 Fed. Reg. 28,112, 28,112, 28,114-15 (June 19, 1991). Among those emergency protections was a ban on pollock trawls near fourteen sea lion rookeries and a provision intended to disperse the fishery geographically. *Id.* at 28,113. NMFS cited data indicating that sea lions at the four major rookeries showing the steepest population declines fed near locations accounting for the majority of the commercial pollock catch. These emergency measures were

followed by additional regulations intended to limit or disperse pollock trawl fishing. 57 Fed. Reg. 2,683 (Jan. 23, 1992).

54. In 1993, NMFS designated Steller sea lion "critical habitat"—*i.e.*, the physical and biological features of the habitat that are essential to the conservation of the species and that may require special management consideration or protection. *See* 16 U.S.C. §§ 1532(5), 1533(a)(3); 58 Fed. Reg. 45,269 (Aug. 27, 1993). Critical habitat for the Western Population includes a 20 nautical mile (nm) area around all haulouts and rookeries, as well as associated terrestrial, air, and aquatic zones, and three large offshore foraging areas. 50 C.F.R. § 226.202. The core function of critical habitat for sea lions is to ensure adequate prey can be found near important rookeries and haulouts. 58 Fed. Reg. at 45,270.

55. The listing of Steller sea lions as threatened, designation of critical habitat, and institution of modest restrictions on pollock trawls appeared to slow, but not halt, the decline of the Western Population. In 1997, NMFS reclassified Steller sea lions as two distinct population segments under the ESA and changed the listing status of the Western Population from threatened to endangered due to its continuing decline. 62 Fed. Reg. 24, 345, 24,354 (May 5, 1997).

Litigation and Additional Conservation Measures

56. In December 1998, NMFS issued a biological opinion (1998 BiOp) analyzing the 1999-2002 Atka mackerel and pollock fisheries in the North Pacific. The 1998 BiOp discussed new evidence that the Atka mackerel fishery caused localized depletions of available prey in Steller sea lion critical habitat but concluded that newly proposed changes to disperse the fishery were sufficient to avoid jeopardy or adverse modification. The 1998 BiOp concluded that the North Pacific pollock fisheries were likely to result in jeopardy to the Steller sea lion populations

and adverse modification of designated critical habitat. The 1998 BiOp based its conclusion on the "importance" of the Bering Sea and Aleutian Islands to the survival and recovery of the Western Population and the possibility that, due to coincidence with Steller sea lion foraging, the pollock fishery "might seriously diminish the foraging success of sea lions."

57. Several conservation groups challenged the 1998 BiOp in an action filed in the U.S. District Court for the Western District of Washington, alleging the measures imposed to protect the sea lion were insufficient. Over industry objections, the court upheld NMFS's conclusions on jeopardy and adverse modification, including the 1998 BiOp's finding that the pollock fishery violated the ESA. The court also declared that the "reasonable and prudent alternative" formulated for pollock was arbitrary and capricious for NMFS's failure to explain how the individual measures that comprised it were sufficient to protect Steller sea lion haulouts and rookeries. *See Greenpeace v. NMFS*, 55 F. Supp. 2d 1248, 1252-53, 1256-57, 1260-69 (W.D. Wash. 1999).

58. In 2000, in related litigation, the court concluded that because the 1998 BiOp exclusively assessed the Atka mackerel and pollock fisheries, NMFS lacked a more comprehensive biological opinion assessing the overall effects of all of the groundfish fisheries authorized annually in the North Pacific. The court enjoined all groundfish trawl fishing in designated Steller sea lion critical habitat until the agency finally completed "a comprehensive opinion adequately addressing the full impact" of ongoing fishing authorizations in the North Pacific. *Greenpeace v. NMFS*, 80 F. Supp. 2d 1137, 1142-43, 1150 (W.D. Wash. 2000) (addressing merits); *Greenpeace v. NMFS*, 106 F. Supp. 2d 1066, 1080 (W.D. Wash. 2000) (granting injunction).

59. The court's injunction remained in effect for several months until NMFS issued a fishery management plan-wide biological opinion. The 2000 biological opinion (2000 BiOp) concluded that NMFS's annual authorization of the groundfish fisheries pursuant to the North Pacific fishery management plans was likely to jeopardize endangered Steller sea lions and adversely modify their designated critical habitat. The 2000 BiOp based its conclusion, in part, on a finding that the concentration of fisheries for pollock, Atka mackerel, and Pacific cod could result in high local fishing rates and therefore localized depletions of prey that reduce the quality of habitat for Steller sea lions. NMFS developed a reasonable and prudent alternative to the then-existing North Pacific fishery management plans, including the complete closure of two-thirds of Steller sea lion critical habitat to all fishing for pollock, Atka mackerel, and Pacific cod as well as other measures intended to distribute fishing spatially and temporally, including for fisheries in the western and central Aleutian Islands.

60. The protective measures recommended by the 2000 BiOp were never fully implemented. A rider to a congressional appropriations bill delayed their implementation, and the North Pacific Fishery Management Council subsequently adopted more lenient measures that reopened areas within sea lion critical habitat in the western and central Aleutian Islands to fishing for both Atka mackerel and Pacific cod.

61. In a biological opinion issued in 2001 (2001 BiOp), NMFS concluded that the more lenient fishery restrictions adopted by the Council were sufficient to mitigate the threat of jeopardy and adverse modification from the fisheries. Conservation groups challenged the 2001 BiOp, and the court found that NMFS ignored important limitations on available Steller sea lion telemetry data and analyses—limitations identified by agency scientists—rendering the 2001 BiOp arbitrary and capricious. *Greenpeace v. NMFS*, 237 F. Supp. 2d 1181, 1196-1199 (W.D.

Wash. 2002). The court also concluded that the 2001 BiOp failed to perform an adequate analysis to demonstrate that the more lenient measures adopted by the Council were sufficient to avoid jeopardy and adverse modification. *Id.* at 1200-04.

62. In 2003, NMFS issued a supplement to the 2001 BiOp that purported to address the shortcomings identified by the court but left in place the less protective measures. The 2003 supplement was never subject to judicial review.

Re-Initiation of Consultation and Recovery Planning

63. In October 2005, the North Pacific Fishery Management Council recommended that NMFS Sustainable Fisheries request reinitiation of ESA consultation on the effects of the federal authorization of groundfish fisheries on listed species. Consultation was formally reinitiated by NMFS Protected Resources in June 2006.

64. Contemporaneous with the renewed consultation process, a team of scientific experts and community members developed a recovery plan for Steller sea lions, updating an earlier analysis and issuing a revised plan in March 2008. *See* 73 Fed. Reg. 11,872 (Mar. 5, 2008). As required by the ESA, a recovery plan must include objective, measurable criteria against which the agency may assess an endangered species' progress toward recovery and potential for eventual de-listing. *See* 16 U.S.C. § 1533(f)(1)(B). According to the 2008 Recovery Plan, Steller sea lion recovery depends upon both long-term, sustained growth in the overall Western Population and the avoidance of localized declines in the individual sub-regions comprising the larger stock. The 2008 Recovery Plan identifies significant declines in adjacent sub-regions, or a particularly sharp decline in just one sub-region, as threats to recovery.

65. Following the reinitiation of consultation and issuance of the 2008 Recovery Plan, NMFS issued a biological opinion for the Bering Sea/Aleutian Island and Gulf of Alaska Fishery

Management Plans (2010 BiOp) in November 2010. The 2010 BiOp concluded that ongoing federal authorization of the North Pacific groundfish fisheries was likely to jeopardize the continued existence and recovery of the Western Population of Steller sea lions and adversely modify the species' designated critical habitat.

66. The 2010 BiOp expressed a heightened concern for the western and central Aleutian Islands, where population declines persist and fishing restrictions were limited. It noted particularly severe ongoing declines in the western Aleutian Islands and the risk of local extirpation if demographic trends continued unabated. Consistent with the analysis in the 2008 Recovery Plan, the 2010 BiOp found that the extirpation of Steller sea lions in the western Aleutian Islands would be significant to the Western Population as a whole, and would be expected to appreciably reduce the likelihood of the Western Population's survival and recovery in the wild.

67. The 2010 BiOp found that fishing has the potential to affect Steller sea lions in several ways, including overall ecosystem-wide reductions in prey biomass, local and temporal depletions of prey, and reduced quality (size, age, and caloric value) of individual prey by selective removal of larger, older individuals. According to the 2010 BiOp, fisheries may negatively affect prey availability over both the short- and long-term, with disproportionately severe impacts possible at a local scale.

68. According to the 2010 BiOp, ongoing low numbers in the Western Population are associated with decreased reproductive success in some areas. Consistent with the fact that the Western Population inhabits a heavily fished ecosystem, the 2010 BiOp identified nutritional stress as the most reasonable explanation for the observed pattern of reduced natality (or birth

rate). In turn, the 2010 BiOp identified reduced natality as "a primary driver" of the Western Population's ongoing endangered status.

69. The 2010 BiOp's ultimate conclusion was based, in part, on an analysis of the potential for competitive interactions between Steller sea lions and the fisheries for pollock, Atka mackerel, and Pacific cod. The 2010 BiOp observed that "[t]he overlap between groundfish fisheries and Steller sea lions and their designated critical habitat [has been] well established through the extensive formal consultation history on these fisheries." According to the 2010 BiOp, a "high degree" of overlap exists between the pollock, Atka mackerel, and Pacific cod fisheries and the foraging needs of Steller sea lions.

70. The 2010 BiOp also found that Steller sea lion sub-populations have fared better in some regions than others, and the areas of improvement coincide with areas where more protective measures have been implemented in the form of restrictions on fishing. Conversely, in those areas where there are fewer fishing restrictions and where a high proportion of the total catch is removed within critical habitat—particularly the western and central Aleutians—population numbers continue to decline.

71. Ultimately, the 2010 BiOp concluded that the weight of scientific evidence supports a connection between fisheries and Steller sea lion declines and concluded that the ESA requires a "precautionary and measured approach" necessitating changes to fishing harvests in the western and central Aleutian Islands, where restrictions on fishing have lagged behind those adopted in other areas. As a result of this jeopardy and adverse modification conclusion, NMFS developed a "reasonable and prudent alternative" to the then-current fishery management regime in the North Pacific. Reflecting NMFS's finding that the greatest threats to the Western Population exist in the western and central Aleutian Islands, the reasonable and prudent

alternative focused on changes necessary to limit fishery competition there. The adopted measures restricted fishing for Atka mackerel and Pacific cod, two of the Steller sea lions' primary prey species within that portion of their range, closing the western part of the Aleutian Islands to fishing for those species and imposing limits on the allowable catch of Atka mackerel in the central and eastern Aleutian Islands.

72. NMFS concluded in the 2010 BiOp that the reasonable and prudent alternative "must be implemented quickly in order to halt the immediate effects of the fisheries on the acute population decline" in the western and central Aleutian Islands. NMFS therefore implemented it by issuing an interim final rule that took effect on January 1, 2011. 75 Fed. Reg. 77,535 (Dec. 13, 2010) ("Interim Final Rule").

73. In response to a challenge by the State of Alaska and commercial fishing interests, the U.S. District Court for the District of Alaska found that NMFS complied with all substantive requirements in preparing the 2010 BiOp and implementing the accompanying sea lion protection measures. The court found that the 2010 BiOp was premised on application of the proper ESA standards. The court upheld the 2010 BiOp and Interim Final Rule in all respects. *See* Order, Doc. 130, *Alaska v. Lubchenco,* No. 3:10-cv-00271-TMB (D. Alaska Jan. 19, 2012) at 3. The district court's opinion was affirmed by the Ninth Circuit Court of Appeals. *Alaska v. Lubchenco,* 723 F.3d 1043, 1056 (9th Cir. 2013).

74. The district court separately ruled that NMFS violated NEPA by preparing an environmental assessment in lieu of an EIS and ordered NMFS to prepare an EIS for the Interim Final Rule. Order, Doc 130, *Alaska v. Lubchenco,* No. 3:10-cv-00271-TMB (D. Alaska Jan. 19, 2012) at 49-50. The court provided a schedule for completion of the EIS by March 2, 2014. Order, Doc. 142, *Alaska v. Lubchenco,* No. 3:10-cv-00271-TMB (D. Alaska Mar. 5, 2012) at 12.

NMFS's NEPA Analysis and 2014 BiOp

75. Following the schedule adopted by the district court, in May 2013, NMFS Sustainable Fisheries issued a draft EIS in which it evaluated the environmental impacts of five alternative sets of Steller sea lion protection measures for the western and central Aleutian Islands. NMFS developed four of the alternatives in conjunction with the North Pacific Fishery Management Council and its Steller Sea Lion Mitigation Committee. The fifth, Alternative 5, was developed by North Pacific Fishery Management Council.

76. The draft EIS assessed the protection measures set forth as the "reasonable and prudent alternative" in the 2010 BiOp and implemented by the Interim Final Rule as a "no action" alternative, or Alternative 1. The other four alternatives all were designed to allow more fishing within and adjacent to Steller sea lion critical habitat than what would take place under the 2010 BiOp and Interim Final Rule. The action alternatives allowed for increasing levels of fishing, with Alternative 2 allowing for the least amount of increased fishing and Alternative 4 amounting to the biggest increase in fishing levels within critical habitat.

77. Alternative 5, created by the North Pacific Fishery Management Council upon review of the initial alternatives, was a combination of Alternatives 3 and 4. It allows for pollock fishing within critical habitat in the Aleutian Islands for the first time since the directed pollock fishery was closed there in 1999. It also allows for substantially more directed fishing for both Atka mackerel and Pacific cod within and adjacent to critical habitat as compared to the Interim Final Rule. For example, it reverses the 2010 BiOp's and the Interim Final Rule's complete ban on retention of Atka mackerel and Pacific cod anywhere in Area 543, authorizing fishing inside and outside of habitat there. Alternative 5 also opens critical habitat in Areas 541

and 542 to directed fishing for Atka mackerel and Pacific cod in areas that were off limits under the 2010 BiOp and Interim Final Rule.

78. The draft EIS identified Alternative 5 as the preliminary preferred alternative, based on the North Pacific Fishery Management Council's recommendation.

79. In a memorandum dated May 28, 2013, NMFS Protected Resources provided initial feedback on Alternative 5 and advised that "the Council may wish to consider modifications to the proposed action to protect the conservation value of critical habitat."

80. Oceana and Greenpeace submitted comments on the draft EIS during the 60-day public comment period. The comment letter argued, *inter alia*, that the only scientifically defensible and lawful alternative proposed in the draft EIS was Alternative 1—*i.e.*, maintenance of the protection measures adopted by NMFS in the Interim Final Rule after the 2010 BiOp.

81. On January 10, 2014, NMFS requested that the district court amend its earlier scheduling order and extend the court-ordered dates established for publication of the required EIS and for issuance of a new final rule—with the goal of better coordinating the decision to be made by NMFS Sustainable Fisheries and the ESA Section 7 consultation underway by NMFS Protected Resources. *See* Defs.' Mot. to Extend, Doc. 171, *Alaska v. Lubchenco*, No. 3:10-cv-00271-TMB (D. Alaska Jan. 10, 2014). As the basis for its request, NMFS indicated that the forthcoming biological opinion might conclude that the preliminary preferred alternative jeopardized Steller sea lions, in which case an extension of the court-ordered deadlines would better allow NMFS to involve the North Pacific Fishery Management Council in the formulation of a "reasonable and prudent alternative" to the proposal. In its motion, NMFS quoted defendant Dr. Balsiger as stating that "the agency is not optimistic that [reasonable and prudent alternatives] will not be needed, and has determined that it would be prudent to plan for needing

time to develop such measures." *Id.* at 5. The court granted NMFS's motion to extend the deadlines. Joint Order on Defs.' Mot. to Extend Time, Doc. 193, *Alaska v. Lubchenco*, No. 3:10-cv-00271-TMB (D. Alaska Feb. 20, 2014).

82. NMFS Protected Resources issued the 2014 BiOp on April 2, 2014. Unlike the 2010 BiOp, which analyzed the ongoing authorization of the groundfish fisheries under the fishery management plans and overall management framework for the Bering Sea, Aleutian Islands, and Gulf of Alaska, the 2014 BiOp focuses narrowly on the western and central Aleutian Islands and the effects there of Alternative 5, the preliminary preferred alternative. Because of the differences in the scope of the 2010 and 2014 BiOps, NMFS has stated that the analysis contained in the 2010 BiOp "remains valid." 79 Fed. Reg. at 70,296.

83. The 2014 BiOp describes "the dire situation for the western Aleutian Islands sub-region." The 2014 BiOp acknowledges uncertainty but does not rule out the possibility of chronic nutritional stress in the western and central Aleutian Islands. The 2014 BiOp also acknowledges data gaps that hinder NMFS's ability to rule out fishing effects as contributing to the ongoing decline in the western and central Aleutian Islands. Further, it acknowledges that NMFS cannot rule out the potential for additional fishing authorized by Alternative 5 (described as the "proposed action") to create a localized depletion, in a "critical" time and place for Steller sea lions. Nonetheless, the 2014 BiOp concludes that the proposed action is unlikely to change the likelihood of survival or recovery of the sub-population in the western Aleutian Islands.

84. In evaluating the effects of the proposed action, the 2014 BiOp focuses on an assessment of the potential overlap of the additional fishing authorized by Alternative 5 and Steller sea lion foraging behavior within critical habitat. Unlike the 2010 BiOp, the 2014 BiOp assumes that competition for prey resources is only likely if Steller sea lion foraging activity and

fishing activity overlap in all four of four potential dimensions: time, space, depth, and size of prey. Scientists within NMFS criticized this analysis, particularly the determination that overlap to such a degree was necessary to conclude that the fisheries present a risk of competition. For example, one scientist commented that "[t]here may be NO coincident temporal/spatial overlap but still there may be exposure. If fisheries prevent sea lions from using an area (by depleting it), there's no overlap." Another analyst, discussing depth overlap, observed that because fish "may move in the water column during the day, . . . the same aggregation could be accessed [at] different depth[s] on the same day, feeding both [Steller sea lions] and the fishery."

85. The 2014 BiOp acknowledges at least some overlap in all four dimensions for all of the fisheries assessed, with the potential for reduced prey resources for Steller sea lions.

86. To analyze the extent of potential spatial overlap between the fisheries and Steller sea lion foraging, the 2014 BiOp compares Steller sea lion telemetry data and data on sea lion sightings to the presumed locations of fishing under the proposed action. This spatial analysis is constrained by serious data limitations, however. The 2014 BiOp cautions that "the sample size of telemetered animals is small and may not be representative" 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." Despite these acknowledged data limitations, the 2014 BiOp makes conclusions about the potential for spatial overlap with each fishery. The 2014 BiOp relies on this limited data to infer that sea lions do not forage in certain locations.

87. Scientists within NMFS, prior to the 2014 BiOp's issuance, were critical of NMFS Protected Resources' use of data and methodology for assessing spatial overlap. For example, scientists with NMFS's National Marine Mammal Laboratory stated that "telemetry data from such a limited data set should not be used in this form for this type of analysis." They

also stated that the 2014 BiOp's use of sightings data "is not defensible and is a misuse of this type of data." They concluded that the use of such limited telemetry data and data on sightings "is fundamentally flawed[,] does not provide an appropriate basis to evaluate spatial overlap between fisheries and Steller sea lions or to assess whether jeopardy or adverse modification to critical habitat may or may not be expected to occur," and "would never pass scientific peer review." The 2014 BiOp relies on these data without accounting for all of these flaws.

88. Another agency scientist who reviewed the 2014 BiOp in draft form cautioned that "the estimates of spatial overlap using the available [Steller sea lion] telemetry may be very sensitive to sample size" and suggested that "a simulation analysis" be performed "to look at how robust the conclusions are with the available number of tagged animals prior to finalizing" the BiOp. NMFS did not perform the recommended analysis to assess robustness.

89. The 2014 BiOp concludes that, under the proposed action, the Atka mackerel fishery is expected to have a "qualitatively high degree" of time and space overlap but a "low" amount of direct spatial overlap with foraging sea lions. For the Pacific cod fisheries, the BiOp finds a "qualitatively high degree" of time overlap and the "greatest extent" of direct spatial and depth overlap among the fisheries, but "the least amount of size overlap." For the pollock fishery, the 2014 BiOp finds a "qualitatively high degree" of time and size overlap, along with an "an apparent low degree of depth overlap in Area 543, with more potential depth overlap in Areas 542 and 541."

90. Despite the acknowledged data limitations and in the face of criticism from its own scientists, the 2014 BiOp's no jeopardy finding is based, in part, on NMFS's finding that "some amount of partitioning" (*i.e.*, some lack of overlap) is expected between each fishery and Steller sea lions, although "some amount of overlap also is expected." The 2014 BiOp does not

explain the degree of overlap that corresponds to designations such as "low" or "high" nor does it explain how much overlap would require a finding that the fisheries are likely to cause jeopardy or adverse modification.

91. The 2014 BiOp does not discuss the correlation identified in the 2010 BiOp between fishing restrictions adopted in the 2000s and positive demographic trends in other Western Population sub-populations that benefitted from such measures.

92. The 2014 BiOp states that "no data are available to infer natality for the western and central Aleutian Islands." In so finding, NMFS elected not to use certain pup/non-pup ratios that were used in the 2010 BiOp as a "proxy" for natality. These data were used by the 2010 BiOp as evidence of the impact of fishing, in the form of nutritional stress, on Steller sea lions. Subsequent to the 2010 BiOp, and in response to external reviews, the Alaska Fisheries Science Center conducted an analysis of the utility of trends in pup/non-pup ratios as an indicator of trends in natality. The analysis identified scenarios in which the ratios perform well as an indicator of natality—commending use of the ratios with appropriate caveats when no other information on natality is available—as well as certain scenarios where they do not. Further, NMFS's analysis found that the ratios perform the best where there is a conservation concern due to declining abundance, such as the current circumstance in the western and central Aleutian Islands.

93. NMFS issued the FEIS on May 13, 2014. A notice of availability was published in the *Federal Register* on May 23, 2014. 79 Fed. Reg. 29,759 (May 23, 2014).

94. Oceana and Greenpeace submitted comments to NMFS on the FEIS.

95. In the FEIS, NMFS incorporated analysis from the 2014 BiOp—including its overlap analysis—to evaluate the environmental effects that each alternative might have on Steller sea lions with regard to competition from the fisheries.

96. The FEIS does not disclose or discuss the reasonable opposing views of agency scientists and the significant dissent that existed regarding the usefulness and scientific integrity of the 2014 BiOp's overlap analysis for evaluating the environmental impacts of more intensive fishing in the western and central Aleutian Islands and heightened competition with Steller sea lions for prey.

97. On July 1, 2014, NMFS proposed to adopt regulations to implement Alternative 5 from the FEIS, the proposed action discussed in the 2014 BiOp. 79 Fed. Reg. 37,486, 37,491-92 (July 1, 2014).

98. Oceana and Greenpeace submitted timely comments on NMFS's proposed rule. Those comments critiqued the proposed rule as well as the 2014 BiOp, which evaluated the proposed rule (as Alternative 5).

99. Timothy Ragen, Ph.D., also submitted timely comments on the proposed rule, including his evaluation of the 2014 BiOp. Dr. Ragen formerly served as the Steller Sea Lion Recovery Coordinator for the NMFS Alaska Region and as the Executive Director for the U.S. Marine Mammal Commission. Dr. Ragen stated that the 2014 BiOp's analysis and conclusions regarding size overlap for the Pacific cod fishery "are misguided and wrong." He also identified "serious shortcomings" in 2014 BiOp's analysis of depth overlap, including a failure to account for information that "prey species move up and down in the water column." With respect to spatial overlap, Dr. Ragen stated that the 2014's BiOp's analysis makes "unsupported assumptions about the distribution and movements of target stocks" and that "the analysis of

telemetry data . . . is woefully incomplete and misleading." He concluded that the 2014 BiOp "fails to provide a sound, scientific basis for concluding no jeopardy or adverse modification and, therefore, it does not provide an objective foundation for the proposed rule."

100. The Final Rule was issued on November 25, 2014, adopting Alternative 5 with only minor changes. 79 Fed. Reg. 70,286, 70,291-92 (Nov. 25, 2014).

FIRST CLAIM FOR RELIEF

(VIOLATION OF ENDANGERED SPECIES ACT SECTION 7 AND ADMINISTRATIVE PROCEDURE ACT)

101. Plaintiffs re-allege, as if fully set forth herein, each and every allegation in paragraphs 1 through 100.

102. The 2014 BiOp prepared by defendant NMFS to assess the Final Rule's impacts upon the endangered Western Population of Steller sea lions is arbitrary, capricious, and unlawful, in violation of the ESA and APA, for at least the following reasons, among others:

A. The 2014 BiOp is premised on an assumption that competition between the fisheries and Steller sea lions is only likely if Steller sea lion foraging activity and fishing activity overlap to a high degree in all four of four potential respects—time, space, depth, and size of prey—and a conclusion that there is not sufficient overlap in the Aleutian Islands fisheries to jeopardize Steller sea lions or adversely modify their critical habitat. The BiOp's key assumptions and conclusions on overlap are unsupported, disputed by agency and other scientists, and reverse previous analyses by NMFS without adequate explanation or justification. The 2014 BiOp therefore is arbitrary, capricious, and contrary to law because it fails to consider relevant factors, offers an explanation that runs counter to the evidence before the agency, and fails to use the best available science as required by 16 U.S.C. § 1536(a)(2).

B. The 2014 BiOp relies on limited telemetry data and data on Steller sea lion sightings. These data are used despite the 2014 BiOp's acknowledgement that the telemetry data may not be representative of Steller sea lion behavior and the 2014 BiOp's admission that sighting data cannot be used to infer the absence of Steller sea lions from a particular area. Scientists within NMFS and outside the agency also advised that the data used for the 2014 BiOp's spatial overlap analysis were "fundamentally flawed" and not "an appropriate basis" to evaluate spatial overlap or to assess whether jeopardy or adverse modification may be expected to occur. Nonetheless, the 2014 BiOp uses the telemetry and sighting data to reach conclusions about the degree of spatial overlap between the commercial fisheries and Steller sea lions—and, in turn, the potential for competition and jeopardy or adverse modification. The 2014 BiOp therefore is arbitrary, capricious, and contrary to law because it offers an explanation that runs counter to the evidence before the agency, fails to articulate a rational connection between the facts found and the choice made, and fails to use the best available science as required by 16 U.S.C. § 1536(a)(2).

C. The 2014 BiOp concludes that the additional fishing authorized under the Final Rule would not jeopardize Steller sea lions or adversely modify their critical habitat based, in part, on its determination that "some amount of partitioning" (*i.e.*, lack of overlap) is expected between the fisheries and Steller sea lion foraging behavior. The 2014 BiOp acknowledges, however, that "some amount of overlap is also expected," and identifies a "high" degree of overlap for each of the fisheries in one or more of the dimensions assessed. The 2014 BiOp does not identify what degree of overlap would appreciably reduce the species' prospects for survival or recovery or adversely modify its critical habitat. Lacking an assessment of roughly at what point survival and recovery will be placed at risk to justify its no jeopardy conclusion, the 2014

BiOp is arbitrary, capricious, and contrary to law because it fails to consider relevant factors, fails to articulate a rational connection between the facts found and the choice made, and fails to insure that the proposed action is not likely to jeopardize Steller sea lion survival or recovery or adversely modify the species' critical habitat, as required by 16 U.S.C. § 1536(a)(2).

D. The 2014 BiOp concludes that the preponderance of available data do not support a conclusion that the groundfish fisheries are limiting Steller sea lion population growth rates. In reaching this conclusion, the 2014 BiOp does not acknowledge or discuss the correlation identified in the 2010 BiOp between fishing restrictions adopted in the 2000s and positive demographic trends in those areas that, unlike the western and central Aleutian Islands, have been protected with significant restrictions on fishing within critical habitat. The 2014 BiOp therefore is arbitrary, capricious, and contrary to law in that it fails to consider relevant factors, offers an explanation that runs counter to the evidence before the agency, and fails to use the best available science as required by 16 U.S.C. §1536(a)(2).

E. The 2014 BiOp asserts that no data are available to infer natality for the western and central Aleutian Islands. In so finding, NMFS elected not to use at all certain pup/non-pup ratios that were used in the 2010 BiOp as a proxy for natality—despite a scientific analysis by NMFS which indicated that the ratios work well when there is a conservation concern. The 2014 BiOp therefore is arbitrary, capricious, and contrary to law in that it fails to consider relevant factors, offers an explanation that runs counter to the evidence before the agency, and fails to use the best available science as required by 16 U.S.C. § 1536(a)(2).

SECOND CLAIM FOR RELIEF

(VIOLATION OF ENDANGERED SPECIES ACT SECTION 7 AND ADMINISTRATIVE PROCEDURE ACT)

103. Plaintiffs re-allege, as if fully set forth herein, each and every allegation in paragraphs 1 through 100.

104. Section 7(a)(2) of the ESA requires NMFS Sustainable Fisheries, as the action agency implementing the Final Rule, to insure that its actions are not likely to jeopardize the survival or recovery of endangered Steller sea lions or adversely modify the species' critical habitat.

105. NMFS Sustainable Fisheries issued its Final Rule in reliance on NMFS Protected Resources' inadequate 2014 BiOp. The decision to issue the Final Rule was therefore arbitrary, capricious, and contrary to law in violation of NMFS Sustainable Fisheries' duty under 16 U.S.C. § 1536(a)(2) to insure against jeopardy and adverse modification for the reasons articulated in the First Claim for Relief.

THIRD CLAIM FOR RELIEF

(VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT AND ADMINISTRATIVE PROCEDURE ACT)

106. Plaintiffs re-allege, as if fully set forth herein, each and every allegation in paragraphs 1 through 100.

107. Under NEPA, an EIS is required to detail the environmental impacts of the proposed action. 42 U.S.C. § 4332(2)(C). The implementing regulations specify that an EIS shall: make available "[a]ccurate scientific analysis [and] expert agency comments," 40 C.F.R. § 1500.1(b); "discuss at appropriate points . . . any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues

raised," 40 C.F.R. § 1502.9(b); and "insure the professional integrity, including scientific integrity," of the document's discussions and analyses. 40 C.F.R. § 1502.24.

108. The FEIS prepared by NMFS Sustainable Fisheries relies on the inadequate 2014 BiOp prepared by NMFS Protected Resources and fails to acknowledge or respond to the scientific criticisms expressed over the 2014 BiOp's assumptions, methodologies, and conclusion. The analysis of impacts in the FEIS is, therefore, arbitrary, capricious, and contrary to law in violation of 42 U.S.C. § 4332(2)(C) and 40 C.F.R. §§ 1500.1(b), 1502.9(b), and 1502.24.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

A. Enter a declaratory judgment that defendants have violated and are violating Section 7 of the Endangered Species Act and the Administrative Procedure Act by issuing an inadequate biological opinion purporting to analyze the Final Rule's impacts on endangered Steller sea lions and the species' critical habitat;

B. Enter a declaratory judgment that defendants have violated and are violating Section 7 of the Endangered Species Act by failing to insure against jeopardizing endangered Steller sea lions and adversely modifying the species' critical habitat;

C. Enter a declaratory judgment that defendants have violated and are violating the National Environmental Policy Act by failing to fully assess the impacts of the Final Rule, including by failing to disclose or respond to scientific criticisms;

D. Vacate the 2014 BiOp, the FEIS, and the Final Rule;

E. Issue appropriate injunctive or other equitable relief;

F. Award plaintiffs the costs of this litigation, including reasonable attorneys' fees; and

G. Provide such other relief as may be just and proper.

Respectfully submitted this 23rd day of December, 2014.

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