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

ALASKA SEAFOOD COOPERATIVE; THE
 GROUND FISH FORUM; ALASKA
 GROUND FISH COOPERATIVE; CASCADE
 FISHING, INC.; M/V SAVAGE INC.; OCEAN
 PEACE, INC.; THE FISHING COMPANY OF
 ALASKA, INC.; ALASKA JURIS, INC.;
 ALASKA SPIRIT, INC.; and AK VICTORY,
 INC.; all Washington corporations; UNITED
 STATES SEAFOODS, LLC; ALASKA
 ALLIANCE, LLC; ALASKA LEGACY, LLC;
 SEAFREEZE ALASKA 1, LLC; ALASKA
 VAERDAL, LLC; IQUIQUE U.S., LLC;
 UNIMAK VESSEL, LLC; CAPE HORN
 VESSEL, LLC; REBECCA IRENE VESSEL,
 LLC; TREMONT VESSEL, LLC and ARICA
 VESSEL, LLC; all Washington limited liability
 companies; FCA HOLDINGS, INC., an Alaska
 corporation; and O'HARA CORPORATION, a
 Maine corporation,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
 SERVICE; GARY LOCKE, in his official
 capacity as the United States Secretary of
 Commerce; JANE LUBCHENCO, in her
 official capacity as Administrator of the
 National Oceanic and Atmospheric

CIVIL ACTION NO.:

**COMPLAINT FOR DECLARATORY
 JUDGMENT AND INJUNCTIVE
 RELIEF, AND PETITION FOR
 REVIEW** (16 U.S.C. § 1536; 16 U.S.C.
 §§ 1801-1891d; 42 U.S.C. § 4332;
 5 U.S.C. §§ 553, 701-706; 5 U.S.C.
 §§ 601-612)

Administration; and JAMES W. BALSIGER,)
in his official capacity as Administrator,)
Alaska Region, National Marine Fisheries)
Service,)

Defendants. _____

INTRODUCTION

1. Plaintiffs, who fish for groundfish including Atka mackerel and Pacific cod in the federal fisheries off of the coast of Alaska, bring this action against Defendants the National Marine Fisheries Service (“NMFS”); Gary Locke, the United States Secretary of Commerce; Jane Lubchenco, the Administrator of the National Oceanic and Atmospheric Administration (“NOAA”); and James W. Balsiger, the Administrator of the Alaska Region of NMFS (collectively, “Service” or “Defendants”). Plaintiffs challenge a final Biological Opinion, including its Reasonable and Prudent Alternative (“RPA”), prepared by NMFS under the Endangered Species Act (“ESA”) and signed on November 21, 2010 by Dr. Balsiger, which considered the potential effects of “authorization of groundfish fisheries under the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area; authorization of groundfish fisheries under the Fishery Management Plan for Groundfish of the Gulf of Alaska; and State of Alaska parallel groundfish fisheries” on certain endangered species (“BiOp”).¹ Among other things, the BiOp contains NMFS’ evaluation of the potential effects of the Bering Sea and Aleutian Islands (“BSAI”) and Gulf of Alaska (“GOA”) groundfish fisheries on the Western Distinct Population Segment (“western DPS”) of Steller sea lions and its designated critical habitat. Plaintiffs also challenge the accompanying final Environmental Assessment and Regulatory Impact Review (“EA/RIR”) and Finding of No Significant Impact

¹ The BiOp is available at <http://www.fakr.noaa.gov/protectedresources/stellers/esa/biop/final/1210.htm>.

("FONSI") prepared under the National Environmental Policy Act ("NEPA"), and the Interim Final Rule which implements the RPA in the BiOp *See* NOAA, Interim Final Rule, Fisheries of the Exclusive Economic Zone Off Alaska; Steller Sea Lion Protection Measures for the Bering Sea and Aleutian Islands, Groundfish Fisheries Off Alaska, 75 Fed. Reg. 77,535 (Dec. 13, 2010) ("Interim Final Rule")

2. Plaintiffs bring this action to address the Service's failure, in formulating and approving the BiOp, RPA, EA/RIR, FONSI, and the Interim Final Rule, to comply with its legal obligations under (1) the ESA, 16 U.S.C. §§ 1531-1544; (2) the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. §§ 1801-1891d; (3) the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h; (4) the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601-612; and (5) the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 505, 551-559, 701-706.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331; 28 U.S.C. §§ 2201-2202; 16 U.S.C. §§ 1855(f), 1861(d); and 5 U.S.C. §§ 702, 706.

4. Defendants have waived sovereign immunity in this action pursuant to 5 U.S.C. § 702 and 16 U.S.C. § 1855(f).

5. This complaint is timely under 16 U.S.C. § 1855(f) because it has been brought within 30 days after the promulgation of the Interim Final Rule. The Interim Final Rule was published in the Federal Register on December 13, 2010. *See* 75 Fed. Reg. 77,535 (Dec. 13, 2010).

6. Plaintiffs have exhausted all administrative remedies.

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because this action

is brought against officers of agencies of the United States in their official capacities and against the Service. A substantial part of the events or omissions giving rise to the claims made here occurred in this District, and the consequences of these acts and omissions will substantially impact lands, waters, and communities situated within this District. The NMFS Alaska Region was the lead agency for the EA/RIR and its Administrator is the signatory official for the BiOp and the listed responsible official for the EA/RIR.

PARTIES

Plaintiffs

8. Plaintiff the Alaska Seafood Cooperative (“AKSC”) is a corporation formed in 2007 (originally under the name “Best Use Cooperative”) as a fish marketing association under the Washington Fish Marketing Act, Chapter 24.36 RCW. As an umbrella group for individual fishing companies, including the vessel owners listed in paragraphs 11-15, AKSC was formed to allow those companies to operate under the fisheries management structure created by Amendment 80 to the FMP for Groundfish of the BSAI Management Area, 72 Fed. Reg. 52,668-52,743 (Sept. 14, 2007) (“A80”).

9. The North Pacific Fishery Management Council (“NPFMC” or “Council”) and NMFS intended A80 to reduce bycatch and improve fish resource utilization. To that end, A80 allocated several BSAI non-pollock groundfish species among trawl catcher/processors that were not covered by the American Fisheries Act (i.e., the head-and-gut fleet, or “H&G fleet”). A80 established a framework for future fishing by the fleet and facilitated the formation of harvesting cooperatives (such as AKSC) among the vessels. A80 also established a Limited Access Privilege Program (“LAPP”) for certain trawl catcher/processors (including AKSC members), and limited the ability of those catcher/processors to expand their harvesting capacity into other

fisheries not managed under a LAPP. 72 Fed. Reg. at 52,671.

10. AKSC holds quota shares established by A80 for its member company vessels, including shares for Atka mackerel and Pacific cod in the BSAI. AKSC's principal place of business is in Seattle, Washington.

11. Plaintiff Cascade Fishing, Inc. and M/V Savage Inc. (together, "Cascade Fishing") are Washington corporations with their principal places of business in Seattle, Washington. Cascade Fishing operates one vessel, F/T Seafisher, which fishes year-round in the BSAI for groundfish, including Pacific cod and Atka mackerel. On a per vessel basis, F/T Seafisher is the largest Atka mackerel quota share holder in the A80 sector. The F/T Seafisher earned the largest single vessel quota share of Atka mackerel and as a result holds nearly 19% of the total annual allocation of Atka mackerel. Atka mackerel made up nearly 50% of Cascade Fishing's total allocation of all groundfish species under A80 in 2010. Cascade Fishing has operated in the BSAI for 21 years and has 110 employees.

12. Plaintiffs Iquique U.S., LLC; Unimak Vessel, LLC; Cape Horn Vessel, LLC; Rebecca Irene Vessel, LLC; Tremont Vessel, LLC; and Arica Vessel, LLC (together, "Iquique") are Washington limited liability companies with their principal place of business in Seattle, Washington. Iquique operates five fishing vessels that fish for groundfish, including Pacific cod and Atka mackerel, in the BSAI – F/T Arica, F/T Cape Horn, F/T Rebecca Irene, F/T Tremont, and F/T Unimak. Iquique is a leading A80 company with the second largest A80 holdings in the sector. Its vessels have operated in the Bering Sea for over 25 years, and the company employs more than 325 workers.

13. Plaintiff Ocean Peace, Inc. is a Washington corporation with its principal place of business in Seattle, Washington. It operates one fishing vessel that fishes for groundfish,

including Atka mackerel and Pacific cod, in the BSAI – F/T Ocean Peace. Ocean Peace has operated in the BSAI for 20 years and has 120 employees.

14. Plaintiff O’Hara Corporation (“O’Hara”) is a Maine corporation with its principal place of business in Rockland, Maine and offices in Seattle, Washington. It operates three fishing vessels that fish for groundfish, including Pacific cod and Atka mackerel, in the BSAI – F/T Constellation, F/T Defender, F/T Enterprise, and F/T Harvester Enterprise. O’Hara is a family owned and operated company that has been in the fishing business for over 100 years. O’Hara has operated in the BSAI for more than 20 years and has more than 200 employees in its west coast and Alaska operations.

15. Plaintiffs United States Seafoods, LLC; Alaska Alliance, LLC; Alaska Legacy, LLC; Seafreeze Alaska 1, LLC; and Alaska Vaerdal, LLC (together, “U.S. Seafoods”) are Washington limited liability companies with their principal place of business in Seattle, Washington. U.S. Seafoods operates seven trawl vessels, including five A80 catcher processors that harvest and process a variety of species, including Pacific cod and Atka mackerel, in the BSAI – F/T Alliance, F/T Legacy, F/T Ocean Alaska, F/T Seafreeze Alaska, and F/T Vaerdal. U.S. Seafoods trawl catcher vessels the F/V Alaska Knight and F/V Alaska Beauty also harvest a variety of species including Pacific cod and Atka mackerel in the BSAI and deliver that fish for processing to the F/T Seafreeze Alaska. The F/T Seafreeze Alaska was the nation’s first factory vessel; its construction was authorized by act of Congress. U.S. Seafoods was formed in 2001, and its principals have participated in Alaska groundfish fisheries for nearly 30 years. In 2010, U.S. Seafoods had 455 employees.

16. Plaintiff The Groundfish Forum is a Washington corporation with its principal

place of business in Seattle, Washington. It is a trade association that represents all of the individual trawl catcher/processor fishing companies listed above (referred to collectively as “GFF”). GFF also has over 25 associate members. GFF member trawl companies fish for groundfish such as Atka mackerel and Pacific cod in the BSAI and GOA. They own or manage the majority of the H&G trawl vessels in the North Pacific. GFF was created in order to craft collaborative solutions to problems such as minimizing discards, avoiding unintended incidental catches, and reducing impacts on habitat; to inform government officials of the contributions made by the H&G fleet to the economies of Alaska and the Pacific Northwest; and to conserve resources while keeping the fishing industry economically viable.

17. Plaintiffs FCA Holdings, Inc., an Alaska corporation; The Fishing Company of Alaska, Inc., Alaska Juris, Inc., Alaska Spirit, Inc., and Ak Victory, Inc., all Washington corporations (collectively, “FCA”) have their principal place of business in Seattle, Washington. FCA is the largest holder of A80 quota share for Atka mackerel, as well as the largest holder of quota share for A80 species. It owns or operates five catcher processor vessels that trawl for groundfish, including Pacific cod and Atka mackerel, in the BSAI – F/T Alaska Juris, F/T Alaska Spirit, F/T Alaska Victory, F/T Alaska Voyager and F/T Alaska Warrior. FCA has operated in the BSAI for 26 years and had 458 employees in 2010.

18. Plaintiff Alaska Groundfish Cooperative is a corporation formed in 2010 as a fish marketing association under the Washington Fish Marketing Act, Chapter 24.36 RCW. Members include Alaska Juris, Inc.; The Fishing Company of Alaska, Inc.; Alaska Spirit, Inc.; Ak Victory, Inc.; FCA Holdings, Inc; the F/T Tremont (owned and operated by Iquique U.S., LLC and Tremont Vessel, LLC, described above); F/T Harvester Enterprise (owned and operated by O’Hara, described above); and other entities that are not parties to this lawsuit.

Alaska Groundfish Cooperative holds quota shares established by A80 for its member company vessels, including shares for Atka mackerel and Pacific cod in the BSAI.

19. Plaintiffs' abilities to pursue their traditional fisheries, particularly Atka mackerel and Pacific cod, will be severely and immediately impacted by the Service's decisions to close and restrict federal fisheries in the BSAI pursuant to the Interim Final Rule as of January 1, 2011.

20. Plaintiffs participated to the extent allowed the public in the proceedings leading to the Service's decisions challenged here, including submitting detailed comments on the August 2, 2010 draft NMFS BiOp and accompanying draft EA/RIR, and also through testimony before the NPFMC.

21. Plaintiffs have standing to bring this action, and the challenged agency decisions are final and ripe for review by this Court.

Defendants

22. Defendant Gary Locke is the Secretary of the United States Department of Commerce ("Secretary") and is being sued in his official capacity. The Secretary is the official ultimately responsible for the approval of the BiOp, the RPA, the EA/RIR and FONSI.

23. Defendant Jane Lubchenco is the Administrator of NOAA and is being sued in her official capacity. The Secretary has delegated his responsibility to manage federal fisheries to NOAA, an agency within the Department of Commerce, which in turn has delegated that responsibility to NMFS, another agency within NOAA.

24. Defendant NMFS prepared and approved the BiOp, RPA, EA/RIR and FONSI, and promulgated the Interim Final Rule.

25. Defendant James W. Balsiger is the Administrator of the NMFS Alaska Region

and is being sued in his official capacity. Dr. Balsiger is the signatory official for the BiOp and the listed responsible official for the EA/RIR.

LEGAL BACKGROUND

A. Endangered Species Act

26. Section 7 of the ESA requires federal agencies to ensure that any action they authorize, fund or carry out is not likely to jeopardize a listed species or destroy or adversely modify its designated critical habitat. 16 U.S.C. § 1536(a)(2).

27. NMFS has defined “to jeopardize” the continued existence of a species as “to engage in an action that reasonably would be expected, directly or indirectly, 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.

28. Courts have construed the ESA Section 7 “destruction or adverse modification” of critical habitat standard, 16 U.S.C. § 1536(a)(2), as requiring the Service to consider the value of critical habitat for the recovery of the listed species, and to address whether the loss of conservation function in affected habitat will appreciably diminish the value of the critical habitat overall for the species’ survival or recovery.

29. If a federal agency determines that a proposed federal action may adversely affect a listed marine mammal or its designated habitat, the “action agency” must engage in formal consultation with NMFS, 16 U.S.C. § 1536(b), after which NMFS must issue “a written statement setting forth [NMFS’] opinion, and a summary of the information on which the opinion is based, detailing how the agency action will affect the species or its critical habitat.” 16 U.S.C. § 1536(b)(3)(A). For the consultation at issue in this case, the Office of Sustainable Fisheries within the Alaska Region of NMFS is the “action agency” and the Office of Protected

Resources within the Alaska Region of NMFS is the “consulting agency,” so NMFS is in effect consulting with itself.

30. If NMFS determines in a biological opinion that a proposed action will jeopardize the continued existence of a threatened or endangered species or destroy or adversely modify its designated critical habitat NMFS must suggest, if possible, RPAs that it believes will avoid jeopardy and adverse modification and allow the agency to proceed with the action. *Id.* § 1536(a)(2), -(b)(3)(A).

31. In fulfilling its responsibility under the ESA, “each agency shall use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.” 50 C.F.R. § 402.14(g)(8); 16 U.S.C. § 1536(a)(2).

32. The Service’s March 1998 ESA Consultation Handbook provides that interested parties should be involved in the development of RPAs when the Service finds that an action will jeopardize the continued existence or a species or destroy or adversely modify its critical habitat.

B. Magnuson-Stevens Fishery Conservation and Management Act

33. The MSA is the primary domestic legislation governing management of federal fisheries. 16 U.S.C. §§ 1801-1891d.

34. The MSA created eight regional fishery management councils that are primarily charged with preparing Fishery Management Plans (“FMPs”) and plan amendments for each managed federal fishery. 16 U.S.C. § 1852(a)(1).

35. The NPFMC manages fisheries in the Exclusive Economic Zone off Alaska’s coast. FMPs initiated by the NPFMC govern the management of groundfish fisheries in the BSAI and GOA, including but not limited to the fisheries for Atka mackerel and Pacific cod in

which Plaintiffs participate.

36. Fishery management councils submit proposed FMPs and FMP amendments together with proposed implementing regulations to the Secretary for review and approval. 16 U.S.C. §§ 1853, 1854. The Secretary, acting through NMFS, must disapprove a FMP amendment to the extent it is inconsistent with provisions of the MSA or any other applicable law. *Id.* § 1854. The Secretary must disapprove proposed regulations to the extent they are inconsistent with the FMP, FMP amendments, or other applicable law. *Id.* The Secretary must give notice of proposed rulemaking and provide an opportunity for public comment on proposed regulations. *Id.*

37. Approvals of FMPs, FMP amendments, and implementing regulations are subject to the procedural requirements of NEPA, 42 U.S.C. §§ 4321 *et seq.*; 16 U.S.C. § 1854(i). The federal action that was the subject of this consultation under the ESA and which resulted in the issuance of the BiOp is the continued authorization of the BSAI/GOA groundfish fisheries by the Secretary.

C. National Environmental Protection Act

38. NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a); 42 U.S.C. §§ 4321, 4331.

39. NEPA “is intended to help public officials make decisions that are based on understanding of environmental consequences[.]” *Id.* § 1500.1(c). NEPA’s twin goals are to: (1) foster informed decision making by ensuring that agencies have available and carefully consider detailed information regarding significant environmental impacts, and (2) promote informed public participation by requiring full disclosure of and opportunities for the public to participate in governmental decisions affecting environmental quality.

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40. NEPA requires that a federal agency proposing a major federal action with significant environmental effects prepare a detailed statement, which must include the environmental impacts of and alternatives to the proposed action. 42 U.S.C § 4332(2)(C)(i), -(iii). This detailed written statement is an Environmental Impact Statement (“EIS”). 40 C.F.R. § 1508.11.

41. To determine whether an EIS is necessary, an agency may first prepare an Environmental Assessment (“EA”). *See id.* §§ 1501.4(c), 1508.9. An EA is a “concise public document . . . that serves to . . . [b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a [FONSI].” *Id.* § 1508.9. An EA must contain sufficient information and analysis to determine whether the proposed action is likely to have significant impacts, thus requiring preparation of an EIS. *Id.*

42. If an agency concludes, based on the EA, that an EIS is not required, it must prepare a FONSI, which explains the agency’s reasons for its decision. *Id.* §§ 1501.4(e), 1508.13.

43. The analysis of alternatives to a proposed agency action is “the heart of the NEPA document” and agencies should “[r]igorously explore and objectively evaluate all reasonable alternatives.” *Id.* § 1502.14(a). The analysis must include a “no action” alternative, as well as reasonable alternatives beyond the agency’s jurisdiction. *Id.* § 1502.14(c)-(d). These alternative analysis requirements also apply to EAs. *See* 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b).

44. Whether an action will have “significant” impacts requires consideration of both the context and intensity of effects. 40 C.F.R. § 1508.27. Context refers to the significance of the action to society as a whole, the affected region, the affected interests, and the locality. *Id.*

§ 1508.27(a). Intensity refers to the severity of the impacts. Factors considered in evaluating intensity include impacts that may be both beneficial and adverse, unique characteristics of the geographic area, the degree to which the effects on the quality of the human environment are likely to be controversial, the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks, the degree to which the action may establish a precedent for future actions, whether the action is related to other actions with individually insignificant but cumulatively significant impacts, and the degree to which the action may adversely affect an endangered or threatened species or its critical habitat. *Id.*

§ 1508.27(b).

D. Administrative Procedure Act

45. The APA provides for judicial review of final agency action by persons “aggrieved” by such action. 5 U.S.C. § 702. The actions reviewable under the APA include any “preliminary, procedural, or intermediate agency action or ruling . . . on the review of the final agency action.” *Id.* § 704. The Service’s actions in this case pursuant to the ESA, the MSA and NEPA are reviewable under the APA.

46. Under the APA a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). A reviewing court shall also “hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

47. The APA also provides that federal agencies must give “[g]eneral notice” of any “proposed rule making” to the public through publication in the Federal Register. *Id.* §§ 553, 551(4). That notice must include (1) a statement of the time, place, and nature of the public rule

making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. *Id.* § 553(b). An agency must consider comments received on a proposed rule. *Id.* § 553(c).

E. Regulatory Flexibility Act

48. The RFA requires a federal agency, concurrent with proposing a new rule, to prepare a Regulatory Flexibility Analysis describing the impact of the proposed rule on small businesses and small governments. 5 U.S.C. §§ 601, 603, 604, *amended by* Pub. L. No. 111-203, Title X, Subtitle H, § 1101G, 124 Stat. 1376, 2112-13 (2010). After receiving public comment, the agency then prepares a final Regulatory Flexibility Analysis to be published with the final rule. 5 U.S.C. § 604.

49. The agency is also required to make an extra effort to collect the input of small businesses and small governments on the proposed rule's impact by conducting open hearings, directly notifying small entities of the proposed rules, or publishing notice in trade publications. 5 U.S.C. § 609.

FACTUAL BACKGROUND

A. Steller Sea Lions and Previous Biological Opinions

50. Steller sea lions (*Eumetopias jubatus*) are classified within the Order Carnivora, Suborder Pinnipedia, Family Otariidae and Subfamily Otariinae, and are the largest otariid.

51. Steller sea lions are generalist predators which consume a wide variety of fishes and cephalopods, including occasionally other marine mammals and birds. Prey species are believed to vary seasonally and include herring, Pacific cod, eulachon, capelin, salmon, pollock, Atka mackerel, arrowtooth flounder, rock sole and sand lance.

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52. The range of Steller sea lions extends from northern Japan, the Kuril Islands and the Okhotsk Sea, through the Aleutian Islands and Bering Sea, along Alaska's southern coast and south to California. In 2008 the worldwide population of Steller sea lions was estimated to be over 130,000 animals.

53. In the 1950s, the worldwide population of Steller sea lions was estimated at 240,000 to 300,000 animals. By 1990, the U.S. portion of the population had declined by approximately 80%. In 1990, NMFS listed the Steller sea lion as a threatened species under the ESA. 55 Fed. Reg. 12,645 (April 5, 1990).

54. In 1993, NMFS designated critical habitat for the Steller sea lion based on the location of terrestrial rookery and haul out sites, spatial extent of foraging trips and availability of prey. In the 1993 final rule, NMFS stated that the essential at-sea activity in aquatic habitat areas is presumed to be feeding and access to adequate food resources. 58 Fed. Reg. 45,269 (Aug. 27, 1993).

55. In 1997, NMFS reclassified Steller sea lions into two distinct population segments under the ESA. NMFS then changed the status of the western DPS from threatened to endangered. In 2008, the western DPS was estimated to consist of approximately 70,000 to 75,000 animals (approximately 50,000 animals in the United States and 20,000 to 25,000 in Russia) and the eastern DPS of approximately 63,000 animals.

56. In 1998, NMFS prepared three separate biological opinions related to: 1) the GOA groundfish fisheries; 2) the 1999-2002 BSAI/GOA pollock and BSAI Atka mackerel fisheries; and 3) the effects of the groundfish FMP in its entirety. The biological opinion for the 1999-2002 pollock and Atka mackerel fisheries concluded that the pollock fishery was likely to

result in jeopardy and adverse modification of critical habitat, but the Atka mackerel fishery did not.

57. In 2001, in response to litigation challenging the 1998 biological opinions and their findings related to the pollock fishery, NMFS prepared a biological opinion on the effects of the federal groundfish fisheries on Steller sea lions, which NMFS supplemented in 2003. The 2001 biological opinion and its supplement created new RPAs for the conduct of the BSAI and GOA groundfish fisheries, including the pollock and cod fisheries, but did not change the management of the Atka mackerel fishery. These RPAs, with subsequent modifications, including 2005 modifications “easing the burdens on GOA communities” (69 Fed. Reg. 75,865), are the status quo for the conduct of the BSAI and GOA groundfish fisheries.

58. In March 2008, NMFS released a Revised Recovery Plan for the Steller Sea Lion: Eastern and Western Distinct Population Segments (“Recovery Plan”). The Recovery Plan delineates six regions within the range of the western DPS for Steller sea lion trend status and monitoring (“Recovery Plan Sub-regions”), three of which (eastern, central and western) are within the Aleutian Islands and GOA. The Recovery Plan’s criterion for downlisting the western DPS is a U.S. population of approximately 53,100 animals based on counts of non-pups, or a population growth rate of 1.5% per year beginning in 2000. The Recovery Plan also calls for no two adjacent Recovery Plan Sub-regions to be declining significantly.

59. Recent data on population trends (2000-2008) indicate that the western DPS as a whole has stabilized and overall is increasing. NMFS trend analyses indicate that the western DPS population of adults and juveniles (non-pups) has grown from between 12% to 14% since 2000 when comprehensive fishery restrictions were first put in place. Surveys of Steller sea lion pups show a similar trend, with an overall increase of 14% between 2000-2001 and 2009.

However, certain populations in specific areas of the Aleutian Islands at the western edge of the U.S. population are either declining or not increasing at the rate called for in the Recovery Plan.

60. On December 13, 2010, in response to petitions from the States of Washington, Oregon and Alaska seeking delisting of the eastern DPS, NMFS announced that it would conduct a review of the status of the eastern DPS to determine whether it has recovered sufficiently to be removed from the Endangered Species List. 75 Fed. Reg. 77,603 (Dec. 13, 2010). NMFS stated that, “[b]ased on the information presented and referenced in the petition[s], as well as all other information readily available in our files, we find that the petitions present substantial information indicating that the petitioned action may be warranted.” *Id.* at 77,604.

B. The Atka Mackerel and Cod Fisheries

61. Atka mackerel (*Pleurogrammus monopterygus*) are widely distributed along the continental shelf in the North Pacific Ocean and the Bering Sea. The only directed fishery for Atka mackerel in the BSAI groundfish fisheries takes place in the Aleutian Islands, accounting for approximately sixty percent of all groundfish catch (average yearly amount from 2004 to 2009) in the Aleutian Islands. Atka mackerel is abundant and is not overfished or approaching an overfished condition. The 2010 Stock Assessment Survey prepared by NMFS documents significant increases in the biomass of Atka mackerel in the Aleutian Islands since the last Stock Assessment Survey was conducted in 2006, including an approximately 151% increase in biomass in Fishing Management Area 543.

62. The Atka mackerel fishery operates primarily with bottom trawl gear at depths of less than 200 meters and is highly localized, taking place in the same locations each year. Plaintiffs, who represent the majority of the permit holders for the Atka mackerel fishery, are geographically and legally constrained from moving to locations outside of the Aleutian Islands

to fish for Atka mackerel.

63. Pacific cod (*Gadus macrocephalus*) is distributed widely in the North Pacific, including the eastern Bering Sea and Aleutian Islands, and is managed as a single unit in the two areas. It is the second largest directed fishery in the Aleutian Islands. Pacific cod is neither overfished nor approaching an overfished condition. Pacific cod is caught by vessels in the BSAI and GOA using multiple gear types, including trawl, longline, pot, and jig components.

C. **2010 Biological Opinion and Environmental Assessment/Regulatory Impact Review**

64. In October 2005, the Council recommended that NMFS reinstate an FMP-level formal ESA Section 7 consultation on the effects of the federal groundfish fisheries on ESA-listed species under Department of Commerce jurisdiction. In April 2006, the NMFS Alaska Region's Sustainable Fisheries Division sent a written request to the Protected Resources Division of the Alaska Region to evaluate the possible effects of status quo management practices for groundfish fisheries in the BSAI and GOA on Steller sea lions and other ESA-listed species in light of new information gained and management actions taken since the last biological opinion was supplemented in 2003. The accompanying biological assessment concluded that the eastern and western DPS of the Steller sea lion were likely to be adversely affected by the proposed action. In June 2006, the Protected Resources Division concurred with the request and the findings of the biological assessment and formally initiated consultation pursuant to section 7 of the ESA.

65. On December 26, 2007, NMFS published a notice of intent to prepare a supplemental EIS ("SEIS") on revisions to the Steller sea lion protection measures in the BSAI. 72 Fed. Reg. 72,992. NMFS and the Council had determined that an SEIS might be required for

those measures because they “may result in significant impacts on the human environment not previously analyzed in the Final SEIS for Steller Sea Lion Protection Measures (November 2001).” NMFS identified primary issues to be analyzed as the effects of the proposed action and its alternatives on: Steller sea lions and their critical habitat; other ESA- and MMPA-listed species; target and non-target fish stocks; seabirds; the ecosystem; and social and economic impacts. The Service stated its intention to consider specific social and economic impacts on: “(1) those who participate in harvesting the groundfish resources; (2) those who process and market groundfish and groundfish products; (3) those who consume groundfish products; (4) those who rely on living marine resources in the management area, particularly Steller sea lions, for subsistence needs; (5) those who benefit from nonconsumptive uses of Steller sea lions and other living marine resources; and (6) fishing communities.” *Id.* at 72,994.

66. On August 2, 2010, NMFS released a draft biological opinion (“Draft BiOp”). NMFS concluded in the Draft BiOp that “from a weight of evidence perspective” that current federal management of the groundfish fisheries is likely to jeopardize the continued existence of the western DPS. NMFS further found that “the relative intensity of groundfish fisheries as currently prosecuted in the western and central Aleutian Islands sub-regions, particularly within critical habitat, is negatively associated with Steller sea lion population trends since 2000 and that these adverse effects on the availability of important Steller sea lion prey within critical habitat are exacerbated in areas of low ecosystem productivity and habitat spatial heterogeneity” and therefore the proposed action is likely to adversely modify the designated critical habitat for the western DPS. Draft BiOp at xxvii-xxxii.

67. NMFS included one RPA in the draft BiOp consisting of multiple management measures that it maintained were “designed to ameliorate adverse effects of removing prey

biomass and avoid competition in the short- and long-term.” *Id.* at xxxii. According to NMFS, the RPA was structured to mitigate effects of the fishery in newly created “Rookery Cluster Areas” or “RCAs” in the western and central Aleutian Islands where Steller sea lion abundance continues to decline, by closing Atka mackerel and Pacific cod fisheries in Fishery Management Area 543 in the western Aleutian Islands, and restricting such fisheries in the adjacent Areas 542 and 541 in the central Aleutian Islands. *See id.* at xxxiii-xxxv.

68. On August 2, 2010, NMFS also released an incomplete draft of an EA/RIR under NEPA that evaluated proposed federal action based on the RPA in the Draft BiOp. The EA/RIR considered only three alternatives: (1) the “Status Quo” alternative, under which fisheries would continue to be managed under existing policy; (2) the “Enhanced Conservation Approach,” which would be even more protective of Steller sea lions than the RPA by closing larger areas to fishing; and (3) the “RPA Specific Approach,” which would implement the proposed RPA. *See Revisions to the Steller Sea Lion Protection Measures for the Aleutian Islands Atka Mackerel and Pacific Cod Fisheries, Council Review Draft EA/RIR (Aug. 2010) (“draft EA/RIR”) at ii-iv.*

69. On August 2, 2010, NMFS initiated a 25-day comment period on the draft documents, which collectively consisted of more than 1,000 pages. That period was later extended by seven days.

70. The NPFMC and its Advisory Panel and Scientific and Statistical Committee (“SSC”) met during the week of August 16, 2010, at a special meeting called solely to consider the draft BiOp and its proposed RPA. Despite the limited time for review and the incomplete documents, the NPFMC and its committees received public comment on the Draft BiOp and its proposed RPA. On August 20, 2010, 14 days before the close of NMFS’ extended public comment period on the draft BiOp, the NPFMC passed a motion, a copy of which is attached

hereto as Exhibit 1, which recommended that NMFS consider an alternative RPA described as “SSL protection with sustainable fisheries and communities.”

71. In its motion, the NPFMC noted the SSC’s concerns about the Service’s analyses in the Draft BiOp including, “stating as fact some conclusions that still have a great deal of uncertainty about them”; “assumptions underlying the BiOp analysis including . . . nutritional stress as the causal factor for low [sea lion] natality”; and “the global scale of the RPA [in the Draft BiOp] relative to the current information base and conservation goal.”

72. On September 2, 2010, Plaintiffs provided extensive comments in response to and in disagreement with the draft BiOp, including the proposed RPA, the draft EA/RIR, and the process being followed by the Service. Plaintiffs provided the Service with, among other relevant information, scientific and commercial data supporting a determination that the jeopardy/adverse modification finding based on the current conduct of the Atka mackerel and cod fisheries was not warranted.

73. NMFS received over 10,600 public comments on the Draft BiOp and the draft EA/RIR, approximately 10,000 of which were form letters. It received eight alternatives for proposed RPAs in addition to the RPA in the Council’s August 20 motion. NMFS has not provided written responses to the comments received.

74. During a briefing at the Council’s October 2010 meeting, NMFS stated that it had determined that the Council’s proposed RPA would not eliminate jeopardy and adverse modification, and therefore would not be adopted by the Service.

75. On December 8, 2010, NMFS released the BiOp to the public. The BiOp was signed by James W. Balsiger and dated November 24, 2010.

76. In the BiOp, NMFS again concluded that negative growth rates and counts in

Fishery Management Areas 543, 542 and 541 in the western and central Aleutian Islands (which differ from the Recovery Plan Sub-regions) indicate that Steller sea lions were having difficulty maintaining or increasing their populations and that elimination of the effects of the removal of prey by commercial fisheries in those areas was needed to ensure fisheries activities were not likely to cause jeopardy or adverse modification. *See* BiOp at xxiv-xxxiii. The BiOp concluded that, although Steller sea lions in two of the subareas established in the BiOp were having difficulty maintaining or increasing their populations, no two adjacent Recovery Plan Sub-regions were experiencing significant declines as defined in the Recovery Plan. In fact, using the Recovery Plan Sub-regions, the populations in the central Aleutians appear to be stable.

77. The RPA in the BiOp (“Final RPA”) would severely and substantially modify groundfish management in the Aleutian Islands. The Final RPA, as implemented through the Interim Final Rule, prohibits the retention of Atka mackerel and Pacific cod both inside and outside of Steller sea lion critical habitat in Area 543 in the western Aleutian Islands. Among other measures, the Final RPA prohibits nearly all directed fishing for Atka mackerel in waters 0 nautical miles (“nm”) to 20 nm around Steller sea lion sites in Area 542, and creates new limitations on the participation in, total catch of, and the amount and seasonal apportionment of, the Atka mackerel fishery in critical habitat in Area 542. The Final RPA closes waters 0 nm to 20 nm from Steller sea lion sites to directed fishing for Pacific cod with trawl gear year round in most of Area 542, with new and more restrictive time and area closures for the cod fishery in the remainder of Area 542. The Final RPA prohibits directed fishing for Pacific cod with trawl gear within 10 nm to 20 nm from Steller sea lion sites in Area 541 in the central Aleutian Islands from June 10 to November 1, as well as prohibiting directed fishing for Pacific cod with trawl gear within 0 nm to 10 nm year-round in Area 541. *See* Exhibit 2 for location maps of these areas

(BiOp figures 8.2 and 8.4).

78. On December 8, 2010, the Service issued the final EA/RIR and a FONSI.

79. On December 13, 2010, the Service published an Interim Final Rule to implement the Final RPA commencing on January 1, 2011. The Service also announced that “NMFS must reinitiate ESA consultation” if the amount of fishing for Pacific cod by trawl and non-trawl gear in Areas 541 and 542 increases beyond recent historical amounts, defined as the maximum annual harvest amounts from 2007 to 2009. *See* 75 Fed. Reg. 77,535 (Dec. 13, 2010).

80. In the Interim Final Rule, the Service improperly relied upon 5 U.S.C. § 553(b)(3)(B) to declare that it had “good cause” to find that notice and public comment on the actions taken in the Interim Final Rule “would be impracticable and contrary to the public interest.” The Service also improperly relied upon 5 U.S.C. § 553(d)(3) in declaring that it had “good cause” to waive the standard 30-day delay in effectiveness of a final rule.

81. The Service issued the Interim Final Rule without providing the public with an opportunity to comment on the rule itself, but instead relied upon the public comment period in August 2010 on the draft BiOp and draft EA/RIR.

D. Impacts to Plaintiffs

82. The closure and restriction of groundfish fisheries in the Aleutian Islands under the Interim Final Rule will have serious and far-reaching adverse consequences on the State, multiple industry sectors, and the people of Alaska and the Pacific Northwest states who rely on the fishing industry for employment – particularly those in heavily fishing-dependent communities such as Adak, Atka, Dutch Harbor, Akutan, King Cove, Sand Point, and Chignik. *See, e.g., State of Alaska v. Lubchenco et al.*, No. 3:10-cv-00271 at ¶¶ 75-80 (D. Alaska filed Dec. 14, 2010); Final EA/RIR, Ch. 10.

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83. These adverse consequences will be severe and immediate for Plaintiffs. In its August 2010 Council Review Draft of the EA/RIR, NMFS estimated the present value of fishing and related revenue at risk from implementation of RPAs 2 and 3² as between \$1.8 and \$3.8 billion. NMFS, Revisions to the Steller Sea Lion Protection Measures for the Aleutian Islands Atka Mackerel and Pacific Cod Fisheries, Council Review Draft Environmental Assessment/Regulatory Impact Review at 10-78 to 10-79 (Aug. 2010) (“August 2010 Draft EA/RIR”).

84. In its Final EA/RIR, NMFS admits that implementing the Final RPA will result in massive losses to fishing companies dependent on Aleutian Island fisheries, anticipating a loss of annual gross revenue between \$44 million and \$61 million. Final EA/RIR at 10-147. NMFS also admits that Plaintiffs, which constitute the majority of the trawl catcher/processor sector, would bear “[t]he largest part of th[e] annual gross revenue at risk” under NMFS’ preferred alternative – “\$34 million to \$44 million.” *Id.* Without explanation, NMFS fails to estimate the net present value of fishing and related revenue at risk from implementation of the Final RPA.

85. Plaintiffs cannot make up the losses of their Aleutian mackerel and cod fishing opportunities elsewhere. *See, e.g., id.* at 10-47. Atka mackerel is not open for directed fishing outside the Aleutians. Cod fishing is managed in a completely different manner in the GOA than in the Aleutians, making it impossible for Plaintiffs to recoup their losses by fishing there. It is anticipated that existing restrictions on bycatch of halibut and other prohibited species will limit Plaintiff’s ability to shift directed fishing for cod to the Bering Sea. *See id.* at 10-62 (explaining

² NMFS ultimately adopted a fourth alternative – a version of Alternative 3 that was slightly modified in a manner that does not affect the allegations made herein. *See* Final EA/RIR at 2-28 to 2-34.

that A80's strict sideboards on target and PSC catch and other regulatory restrictions foreclose many of Plaintiffs' options for increasing efforts elsewhere).

86. In addition to losing their directed fisheries, which represent for some vessels over 50 percent of their revenues, and significant quota harvests, Plaintiffs anticipate that jobs and income for their employees and owners will be permanently and significantly diminished. NMFS itself estimates that implementation of the Final RPA will result in job losses in the fishing industry from approximately 250 to 750 positions. *Id.* at 10-148.

87. Implementation of the Final RPA will disrupt established fishing, substantially reduce fishery revenues, significantly reduce the number of jobs in the fishing and processing industries in Alaska, and adversely impact local communities in the Aleutian Islands. Plaintiffs will remain adversely affected to a degree not adequately evaluated or disclosed in the EA/RIR, and they will not be able to mitigate their losses.

FIRST CLAIM FOR RELIEF

(Violation of the ESA - Jeopardy and Adverse Modification Determinations)

88. Plaintiffs incorporate by reference each of the allegations in paragraphs 1 through 87.

89. The BiOp, including its jeopardy and adverse modification determinations, is arbitrary, capricious, and an abuse of discretion, and is in excess of its statutory jurisdiction, authority, or limitations, and in violation of the APA. The Service failed to base its decisions on the best scientific commercial data available, and failed to follow applicable agency guidance and regulations.

90. The BiOp, including but not limited to the effects analysis and jeopardy and adverse modification determinations, violated ESA Section 7, 16 U.S.C. § 1536 in at least the

following ways:

- i) The Service did not accurately assess the current status of Steller sea lions and the groundfish fisheries;
- ii) The Service did not conduct an objective analysis but instead displayed a pervasive bias against commercial fisheries in the Aleutian Islands, which caused Defendants to exclude and dismiss credible analyses which indicate that the western DPS as a whole is not in danger of extirpation and that fisheries removals do not cause a loss of functionality or value for critical habitat in the Aleutian Islands;
- iii) The Service arbitrarily selected the data and information it did rely upon and disregarded relevant data and information without explanation;
- iv) The Service based its analyses on data that were highly uncertain, equivocal, incomplete, or otherwise of poor quality, including analyses that suffered from invalid assumption, lack of peer review, improper transformation of data, and improper exclusion of valid data;
- v) The Service failed to critically analyze and assess the quality (e.g., accuracy, objectivity, reproducibility, and robustness) of the data and reports it relied upon;
- vi) The Service relied upon speculative, untested and conclusory determinations without providing any sufficient foundation linking such determinations to actual data or analyses;
- vii) The Service professed to follow a “weight of evidence” approach to determining whether the Atka mackerel and cod fisheries cause nutritional stress in Steller sea lions but ignored the weight of evidence showing a negative correlation or no correlation at all between the commercial fisheries and Steller sea lion declines;
- viii) The Service illegally and improperly based its jeopardy determination on the status of populations of Steller sea lions and fishery effects analyses in geographical subareas created solely for purposes of the BiOp and not on the status of the western DPS as a whole, and persisted in that approach in the final

BiOp despite the scientifically inappropriate use of fishery data applied to those subareas; and

- ix) The Service does not present an objective analysis of research cited in the BiOp, but instead unevenly treats data and information to build support for the BiOp's conclusions.

91. The Service's failure to use the best scientific and commercial data available in making its jeopardy and adverse modification determinations, as listed in the preceding paragraph, includes, but is not limited to, the following specific examples:

- i) The best scientific and commercial data available does not support the BiOp's hypothesis that Steller sea lions in the western and central Aleutian Islands are declining due to nutritional stress or competition from the Atka mackerel and Pacific cod fisheries;
- ii) The Service ignored or failed to consider data indicating that the Atka mackerel and Pacific cod fisheries do not remove biomass at a rate that compromises the prey field for Steller sea lions, and then persisted in its incorrect assessment of catch rates after being advised of the inappropriateness of its analytical approach;
- iii) The Service ignored or failed to consider new data collected by the Service itself indicating that the biomass of Atka mackerel stocks in the Aleutian Islands is currently at the level that the models in the BiOp predict will result from the area's closure to directed commercial fishing;
- iv) The Service's adverse modification determination is based solely on impacts to specific areas of allegedly affected critical habitat without adequate analyses of whether those effects will cause adverse modification to Steller sea lion critical habitat as a whole;
- v) NMFS' conclusions that areas outside of designated critical habitat in the western Aleutian Islands are essential to Steller sea lion foraging, and that commercial fisheries compete with Steller sea lions for prey outside critical habitat, are not

supported by the best scientific and commercial data available; and

- vi) The best scientific and commercial data does not support the contention that closure of vast areas of the Aleutian Islands to commercial fishing will reverse the existing trend for outlier Steller sea lion populations.

92. The Service's jeopardy and adverse modification determinations and its analyses in the BiOp violate section 7 of the ESA, 16 U.S.C. § 1536, and are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or without observance of procedure required by law. These actions by the Service have caused or threaten serious prejudice and injury to Plaintiffs' rights and interests, are reviewable under the APA, 5 U.S.C. §§ 701-706, and entitle Plaintiffs to the relief requested below.

SECOND CLAIM FOR RELIEF

(Violation of the ESA – Reasonable and Prudent Alternative)

93. Plaintiffs incorporate by reference each of the allegations in paragraphs 1 through 92.

94. The Final RPA is based upon the flawed and unsubstantiated premise that the Atka mackerel and Pacific cod fisheries in the Aleutian Islands cause jeopardy or adverse modification to the western DPS, and a flawed conclusion that the measures in the Final RPA are necessary to avoid jeopardy or adverse modification of critical habitat. The Final RPA is not based upon a proper and lawful analysis of the effects of the proposed federal action that would be added to the environmental baseline, or upon a proper analysis of whether the effects of the proposed federal action would likely jeopardize the continued existence of the western DPS and adversely modify its critical habitat. The BiOp fails to explain how and why the Final RPA will avoid the jeopardy and adverse modification of critical habitat that would otherwise be caused by the proposed federal action. The Final RPA is not based upon, and is contrary to, the best

available scientific data. The Final RPA is therefore arbitrary, capricious, an abuse of discretion, and not in accordance with law.

95. The Service failed to consider important factors relevant to the determination and development of a reasonable and prudent alternative. The BiOp fails to make the necessary findings or undertake necessary analysis of whether the Final RPA “can be implemented in a manner consistent with the intended purpose of the action” including but not limited to:

- i) The BiOp does not analyze or determine how the impacts to the commercial fisheries and Aleutian Island communities compare or relate to the expected benefits to the western DPS;
- ii) The BiOp does not consider whether there are less onerous alternatives that will provide comparable likely benefit to the western DPS while better maintaining the conservation and management of fishery resources;
- iii) The BiOp fails to make findings or undertake any analysis of whether the Final RPA is “economically or technologically feasible”;
- iv) The BiOp fails to contain findings or analysis of the economic cost of undertaking the Final RPA; and
- v) The BiOp fails to adequately explain how and why each component of the RPA it identifies will avoid the jeopardy and adverse modification of critical habitat that allegedly would otherwise be caused by continued fishing in the Aleutian Islands pursuant to the Steller sea lion protection measures are currently in place.

96. The Service’s identification and acceptance of the Final RPA violates section 7 of the ESA, 16 U.S.C. § 1536, and is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or without observance of procedure required by law. These actions have

caused or threaten serious prejudice and injury to Plaintiffs' rights and interests, are reviewable under the APA, 5 U.S.C. §§ 701-706, and entitle Plaintiffs to the relief requested below.

THIRD CLAIM FOR RELIEF

(Violations of the MSA)

97. Plaintiffs incorporate by reference each of the allegations in paragraphs 1 through 96.

98. The Service violated the MSA by ignoring the recommendations and concerns of the NPFMC and by promulgating a fishery management regulation that fails to comply with the requirements of the MSA. The MSA requires, among other things, that any fishery management regulation shall be consistent with ten National Standards for fishery management and conservation. 16 U.S.C. § 1851(a). The Interim Final Rule promulgated by the Service constitutes a "regulation" as that term is used in 16 U.S.C. § 1851(a).

99. The Interim Final Rule is in violation of the National Standards at a minimum because it:

- i) fails to achieve optimum yield of the Atka mackerel and Pacific cod fisheries in the Aleutian Islands, instead leaving huge percentages of TAC unfished (National Standard 1);
- ii) is not based upon the best scientific information available (National Standard 2);
- iii) did not allow for variations among, and contingencies in, fisheries, fishery resources, and catches, because it failed to analyze and avoid the cumulative effects of the potential displacement of fishing effort from the Aleutian Islands into the GOA and Bering Sea (National Standard 6);
- iv) failed to consider the importance of the relevant fishery resources to fishing

- communities as reflected by the best available economic and social data, and instead ignores that data; as a result, the Interim Final Rule will effectively prohibit those communities from continuing their historical participation in the fisheries and related industries, and will maximize rather than minimize the adverse economic impacts on those communities (National Standard 8); and
- v) failed to minimize bycatch; the rule will instead force Plaintiffs' and other vessels into already-congested mixed species fisheries outside the Aleutians, increasing competition, crowding, displacement, sector instability, and bycatch rates (National Standard 9).

100. The Service provided only four summary paragraphs in the final EA/RIR that purport to demonstrate compliance with the National Standards. *See* EA/RIR at 11-1, 11-2. The Service's determination of compliance with the National Standards is unsupported, inadequately explained, and devoid of a rational basis.

101. The Service's promulgation of the Interim Final Rule violated the MSA, and is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, in excess of statutory jurisdiction, authority, or limitations, or short of statutory right or without observance of procedure required by law. This action has caused or threatens serious prejudice and injury to Plaintiffs' rights and interests, is reviewable under the APA, 5 U.S.C. §§ 701-706, and the MSA, 16 U.S.C. § 1855, and entitles Plaintiffs to the relief requested below.

FOURTH CLAIM FOR RELIEF

(NEPA Violations - Failures to Consider Potential Environmental Effects, Prepare an EIS, Analyze Alternatives, or Sufficiently Provide for Public Comment)

102. Plaintiffs incorporate by reference each of the allegations in paragraphs 1 through

101.

103. NMFS did not adequately consider the potential for significant environmental effects from the proposed action. Among other failings, it did not adequately consider the context and intensity of the potential adverse environmental effects; fully consider or properly analyze socioeconomic effects; or comply with NEPA's requirements for addressing incomplete or unavailable information. *See, e.g.*, 40 CF.R. §§ 1502.22, 1502.16, 1508.9, 1508.10.

104. Environmental effects, which term is synonymous with "environmental impacts" under the NEPA regulations, *id.* § 1508.8(b), include "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health [effects], whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial." *Id.*

105. NMFS failed to adequately consider and evaluate the complete scope and effect of the potential direct, indirect, and cumulative effects and their significance here, including potential economic, social, environmental justice, and other environmental effects.

106. NEPA requires NMFS to prepare an EIS where there is a potential for significant environmental effects. As NMFS acknowledged in December 2007, the effects of this action may significantly affect the human environment under NEPA and its regulations; yet NMFS abandoned preparation of an EIS to accompany the BiOp and prepared only an EA.

107. NEPA also requires NMFS to prepare an EIS when there is substantial dispute as to the size, nature, and effect of the action, making the proposed action "controversial." The minor modifications made to the draft RPA as a result of public comment do not make the final agency action "not controversial." *See* Letter from Eric Olson, chair, North Pacific Fishery

Management Council to Dr. James Balsiger, dated December 23, 2010, a copy of which is attached hereto as Exhibit 3.

108. NMFS failed to consider an adequate range of reasonable alternatives in the EA/RIR, including an alternative or alternatives more narrowly tailored to conserve fishery resources for Steller sea lions while providing opportunities for fishing fleets.

109. NMFS failed to adequately consider additional reasonable alternatives including the full scope of the alternative recommended by the NPFMC, which included less restrictive measures still designed to support the survival and recovery of the Steller sea lion and the conservation value of its critical habitat. The Council's proposed alternative was supported by the science available to NMFS and provided a reasonable alternative with less impact to the Aleutian Island fishermen and communities. Further, NMFS' adoption in the final RPA of minor aspects of the Council's proposed RPA did not "satisfy the Council's concerns regarding the need and rationale for the final RPA, and do not make this action any less than highly controversial." Exhibit 3 at 1.

110. NMFS violated NEPA and its implementing regulations by failing to provide the public with an adequate opportunity to comment. NMFS effectively precluded adequate public involvement in the decisionmaking process and the opportunity to comment on the EA by providing an incomplete draft lacking significant information regarding the likely environmental, economic, and social impacts of the proposed action and alternatives. NMFS provided the public with an inadequate period of time within which to provide comments on the draft EA/RIR, and did not provide a comment period on the final EA/RIR and the FONSI before taking final agency action on the Interim Final Rule.

111. NMFS violated NEPA in failing to: (A) adequately consider potential

environmental effects of the action; (B) prepare an EIS on the proposed action, which may significantly affect the human environment; (C) sufficiently analyze alternatives; or (D) sufficiently provide for public comment. These violations of NEPA, 42 U.S.C. § 4332(2)(C), (E), and its implementing regulations are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or without observance of procedure required by law, which has caused or threaten serious prejudice and injury to Plaintiffs' rights and interests. The agency's actions under NEPA are reviewable under the APA, 5 U.S.C. §§ 701-706; and Plaintiffs are entitled to the relief requested below.

FIFTH CLAIM FOR RELIEF

(Violation of the RFA and APA - Failure to Examine Effects on Small Entities)

112. Plaintiffs incorporate by reference each of the allegations in paragraphs 1 through 111.

113. The Service violated the RFA, 5 U.S.C. §§ 603, 604, 609, by failing to prepare a Regulatory Flexibility Analysis that adequately considers the impact of the Interim Final Rule on small businesses and small governments. Specifically, by issuing the new fisheries measures without notice and comment, NMFS failed to satisfy its obligation to examine the effect of its rules on small businesses and governments.

114. In its August 2010 Draft EA/RIR, NMFS explained that the impacts of the RPA on fishing and related businesses will occur over a number of years. NMFS determined that focusing on costs in one year could understate actual impacts, while summing impacts over all years could overstate them. August 2010 Draft EA/RIR at 10-78. NMFS further explained that "the standard approach to dealing with these issues is to estimate the present value of the costs, where the present value is the sum of the costs across all years, where the costs in future years

are suitably discounted.” *Id.* Accordingly, it estimated potential revenue losses to the impacted fisheries as between \$1.8 and \$3.8 billion. August 2010 Draft EA/RIR at 10-78 to 10-79.

115. In its Final EA/RIR, however, NMFS did not provide any estimate of the present value of the revenue at risk from implementation of the preferred RPA. Attempting to justify its decision to reverse its position and diverge from what it previously identified as the standard analytical approach, NMFS stated that:

In the short run, alternative measures may be identified at some time in the future that allow the Secretary to act to authorize more Atka mackerel and Pacific cod fishing in the Aleutian Islands, without creating a risk of jeopardy or adverse modification of habitat. Alternatively, the actions could be in place for many years, pending down-listing or delisting of the western population. Because of the difficulty of identifying an appropriate time frame for this action, this analysis does not include an estimate of the present value of the revenue at risk from this action. . . . The July 2010 draft of this analysis, prepared for the Council’s special August 2010 Council meeting on the draft FMP biop, included an estimate of present value. That has not been included in this draft.

Final EA/RIR at 10-125.

116. These violations of the RFA are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or without observance of procedure required by law, which has caused or threatens serious prejudice and injury to Plaintiffs’ rights and interests, are reviewable under the APA, 5 U.S.C. §§ 701-706, and entitle Plaintiffs to the relief requested below.

SIXTH CLAIM FOR RELIEF

(Violations of the MSA and APA - Failure to Comply with Requirements for Notice-and-Comment Rule Making)

117. Plaintiffs incorporate by reference each of the allegations in paragraphs 1 through 116.

118. The APA and the MSA require the Secretary to give notice of any proposed

rulemaking in the Federal Register and provide an opportunity for public comment. 5 U.S.C. § 553(b); 16 U.S.C. § 1854.

119. The APA, but not the MSA, provides that notice and comment may be waived by an agency when it “for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(B). The Service improperly invoked the good cause exception under the APA in promulgating the Interim Final Rule, and had no statutory basis to waive notice and comment rulemaking under the MSA.

120. Waiver of notice and public comment related to the Interim Final Rule under the APA was without good cause because, among other things, any impracticability to complete normal notice-and-comment as claimed by NMFS is due to the agency’s own delay in a four-year plus ESA consultation process, and not a present need for urgent action. There is no conservation emergency with respect to the western DPS, which has stabilized or increased when taken as a whole during the seven years in which the current mitigation measures under the 2003 BiOp have been in effect. There is no conservation emergency related to management of the groundfish fisheries, and in particular with respect to the Atka mackerel and Pacific cod fisheries, which are conservatively managed by NMFS, are not overfished or in danger of being overfished, and which the 2010 Trawl Survey shows are currently at their highest levels in recent history. Given these circumstances, it was not impracticable for NMFS to comply with the APA and still carry out its mission.

121. These violations of the MSA and APA notice-and-comment requirements for rulemaking are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, or

without observance of procedure required by law. These violations have caused or threaten serious prejudice and injury to Plaintiffs' rights and interests are reviewable under the APA, 5 U.S.C. §§ 701-706, and the MSA, 16 U.S.C. § 1855, and entitle Plaintiffs to the relief requested below.

122. The issuance of the Interim Final Rule is final agency action reviewable pursuant to the APA, 5 U.S.C. §§ 701 *et seq.* A judicial determination is necessary and appropriate at this time under all the circumstances in order that Plaintiffs may ascertain their rights and the Defendants' obligations. Unless such a declaration is issued, Plaintiffs will suffer a loss and/or impairment of their rights and property in violation of law.

123. Plaintiffs have no plain, speedy and adequate remedy in the course of law; absent immediate judicial intervention, Plaintiffs will suffer irreparable harm. Plaintiffs therefore seek declaratory and injunctive relief against the Defendants as set forth below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray as follows:

- A. For expedited consideration of this matter pursuant to 16 U.S.C. § 1855(f)(4);
- B. For injunctive relief directed to the Defendants, including relief prohibiting the Defendants from relying on, enforcing, or applying the BiOp, RPA, EA/RIR, FONSI, and the Interim Final Rule to implement changes to the groundfish fisheries in the BSAI;
- C. For a judicial declaration that the BiOp, and the acceptance and implementation thereof, is arbitrary, capricious, and an abuse of discretion, not in accordance with law, and is in excess of statutory jurisdiction, authority or limitations;
- D. For an order remanding the BiOp to the Defendants so that the Defendants may reconsider it based on the Court's findings and rulings, and for preparation of a new biological

opinion in a manner consistent with law;

E. For a judicial declaration that the EA/RIR and FONSI are arbitrary, capricious, and an abuse of discretion, not in accordance with law, and are in excess of statutory jurisdiction, authority or limitations;

F. For an order remanding the EA/RIR and FONSI to the Defendants so that the Defendants may reconsider them based on the Court's findings and rulings, and for preparation of an EIS in a manner consistent with law;

G. For an order vacating and setting aside the Interim Final Rule;

H. For an award of reasonable attorneys' fees and costs of suit; and

I. For such other and further relief as the Court may deem necessary and appropriate.

Dated this 4th day of January, 2011.

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Applications to participate pending
Attorneys for Plaintiffs

Exhibit 1

**North Pacific Fishery Management Council motion
Steller Sea Lion Biological Opinion and EA/RIR**

The Council recommends that NMFS consider the following as a Reasonable and Prudent Alternative (RPA).

RPA Alternative 4: SSL protection with sustainable fisheries and communities

Unless otherwise stated, the existing protection measures in 50 CFR 679 remain in place.

Atka mackerel

Remove existing 'platoon' system in areas 542 and 543

Area 543:

- No fishing inside critical habitat
- Fishing outside critical habitat east of 174 degrees – 30 minutes East longitude
- TAC not to exceed 65% of ABC
- A season Jan 20 to June 10, B season June 10 to Nov 1
- No more than 50% of TAC harvested in A or B season
- No rollover between A and B seasons

Area 542:

- No fishing inside critical habitat from 178 degrees – 0 minutes East longitude to 180 degrees – 0 minutes longitude.
- TAC not to exceed 65% of ABC
- Catch inside critical habitat (outside Trawl Exclusion Zones) not to exceed 50% of TAC
- A season Jan 20 to June 10, B season June 10 to Nov 1
- No more than 50% of TAC harvested in A or B season
- No rollover between A and B seasons

Area 541:

- Status quo, except A season January 20 to June 10, B season June 10 to November 1

Pacific cod trawl

Area 543:

- No cod trawling in critical habitat east of 174 degrees 30 minutes East longitude
- Cod trawling in critical habitat west of 174 degrees 30 minutes from 10 nm and out from February 15 to March 15
- Cod trawl harvest limited to no more than 2.5% of BS/AI ABC

Area 541 and Area 542 east of 178 degrees West Longitude:

- Trawl cod fishery is A Season only (January 20 to June 10)
- Trawl cod fishery inside critical habitat is only east of 178 degrees W to 541 management border
- No inside critical habitat cod fishing west of 178 degrees W to 177 degrees E

- Increase haulout closures to 10 nm for cod trawl between 170 degrees W to 174 W
- Status quo West of 174 W to 178 W

Pacific cod fixed gear

No additional restrictions on vessels under 60' using fixed gear

Area 543:

- Prohibit directed fishery for Pacific cod.

Areas- 542

- Cod fishery is limited to B season only (June 10 to November 1)
- Critical habitat open outside 3 4 nm-from rookeries and haulouts

Area 541/Bering Sea:

- No new 541 restrictions on fixed gear cod fishing

The Council strongly encourages NMFS to develop a research plan which considers the SSC recommendations to address data and information gaps regarding the decline of Steller sea lions in Area 543 and the slow Steller sea lion recovery in Areas 542 and 541, and to immediately initiate budget and funding discussions within the agency to support the research plan.

The Council notes SSC concerns and recommendations for the analysis including:

- stating as fact some conclusions that still have a great deal of uncertainty about them such as past conservation methods having a "positive impact on reducing the impacts of the fishery exploitation strategy on Steller sea lions";
- assumptions underlying the BiOp analysis including biomass projection methodology, biomass apportionment, and nutritional stress as the causal factor for low natality ;
- the global scale of the RPA relative to the current information base and conservation goal; and
- questions raised in the editorial comments of the SSC

and therefore recommends an independent review of the BiOp.

The Council recommends the agency include a 2-year sunset provision in their rule making. Further, the Council notes the SSC's concerns and recommendations regarding the EA/RIR, and requests strengthening and expanding the document.

Exhibit 2

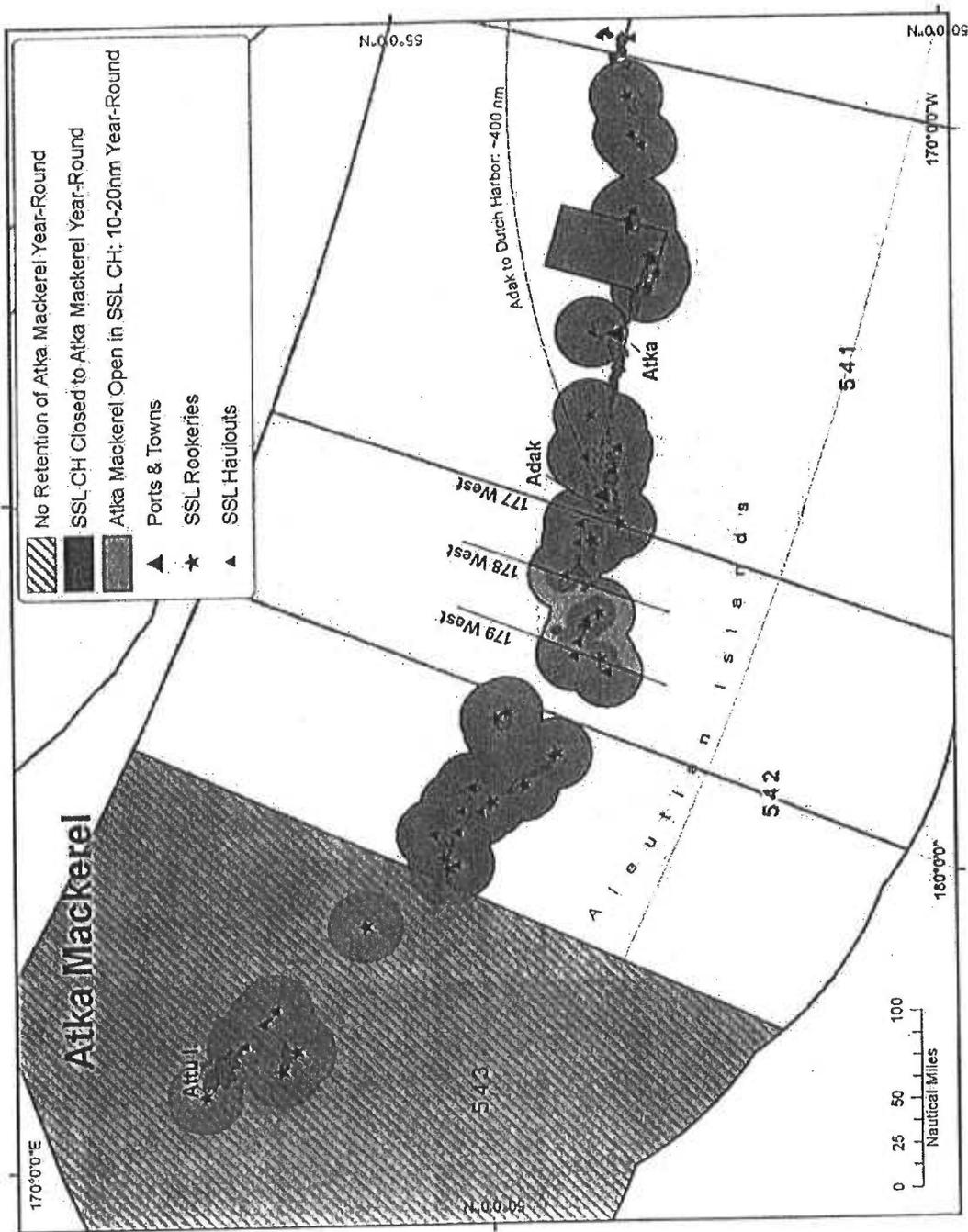


Figure 8.2. Map of the RPA for Atka mackerel fisheries in Areas 543, 542, and 541.

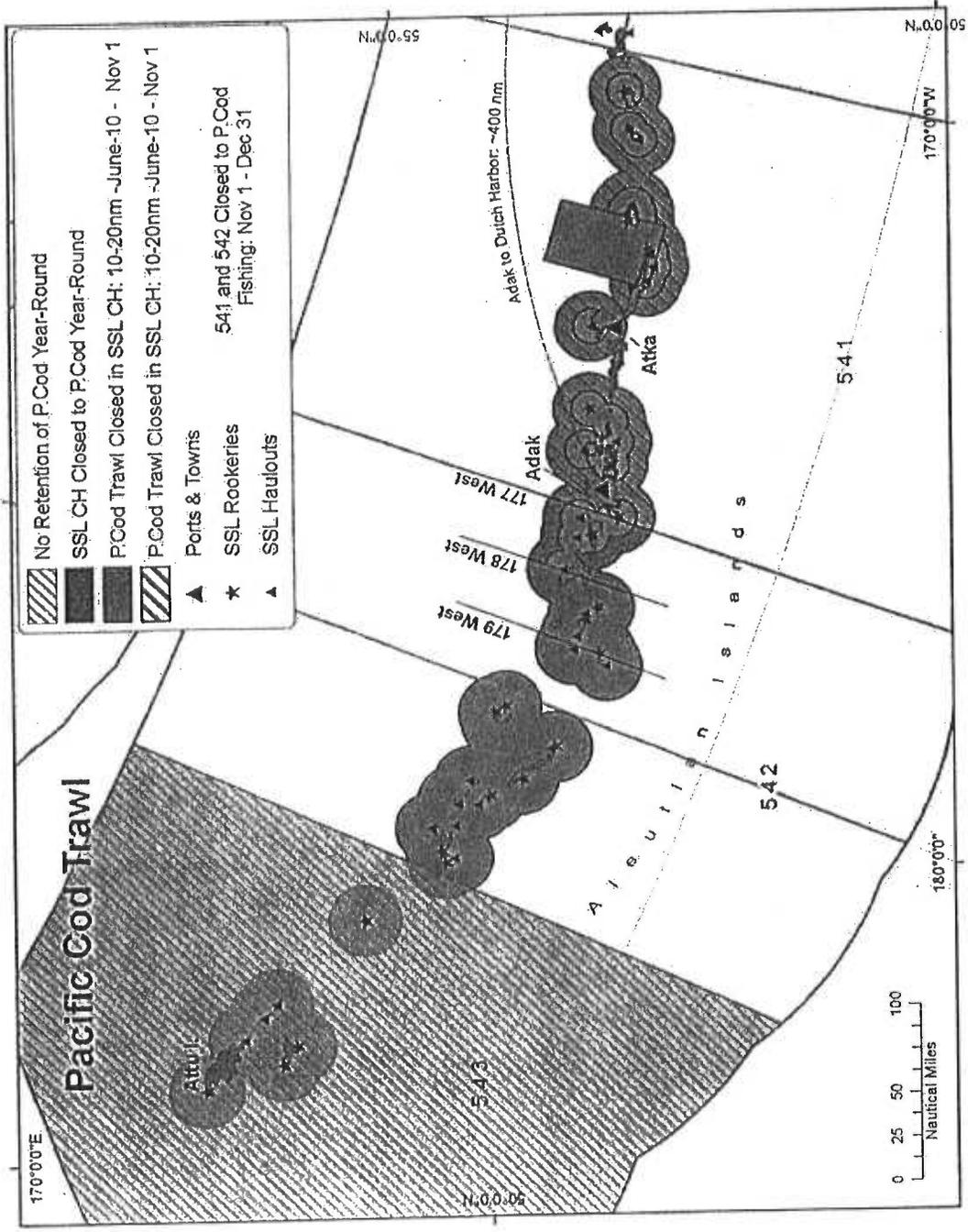


Figure 8.4. Map of the RPA for Pacific cod trawl fisheries in Areas 543, 542, and 541.

Exhibit 3

North Pacific Fishery Management Council

Eric A. Olson, Chairman
Chris Oliver, Executive Director



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December 23, 2010

Dr. James Balsiger
NMFS/NOAA
P.O. Box 21668
Juneau, AK 99802

Dear Dr. Balsiger:

As you know, at its December 2010 meeting, the North Pacific Fishery Management Council (Council) received a report from NMFS on the final Steller Sea Lion Biological Opinion (BiOp) and Reasonable and Prudent Alternative (RPA) which will be implemented in January 2011. We also discussed the schedule and process for implementation of an interim final rule, public comment period on that rule, subsequent publication of a final rule, and process for potential Council involvement in revising the proposed management measures. Based on those discussions, the Council would like to express its extreme disappointment with the lack of clarity in this process, and reiterate several overarching concerns with the current Biological Opinion.

A fundamental flaw with the current BiOp is the disconnect between the concerns it expresses over the adequacy of the prey field in the Aleutian Islands and the 2010 biomass surveys of the three key Steller sea lion prey species (walleye pollock, Pacific cod, and Atka mackerel). We are very concerned that the management measures in the final RPA are not consistent with the most recent biomass estimates, which indicate a level as desired in the BiOp itself, and that the 2010 Aleutian Islands biomass trawl surveys were not considered in the BiOp and RPA analysis. The survey was available before the final BiOp was signed. We are perplexed that NMFS did not appear to consider the 2010 survey in making its final decision, given the implications of that survey information relative to the management measures for Areas 542 and 543.

We are also concerned that the NEPA document (EA/RIR) that evaluates the effects of the action is fundamentally flawed. In Section 9.0, NMFS concludes that the final RPA is 'not controversial' because NMFS made changes to the August 2010 draft RPA in response to public comment. We find this conclusion to be inexplicable. The modifications to the final RPA do not satisfy the Council's concerns regarding the need and rationale for the final RPA, and do not make this action any less than highly controversial. We believe that there continues to be substantial dispute as to the size, nature, and effect of this major Federal action, which in a NEPA context, should define this action as 'controversial'.

We also discussed the possibility of an independent scientific review of the BiOp by the Center for Independent Experts (CIE), or other review panel. The Council reviewed the CIE Statement of Work and Terms of Reference in February 2010, and appreciated the opportunity to provide written comments to NMFS. The Council's comments incorporated comments from its SSC, and were intended to improve the CIE process by enhancing the scope and transparency of the review process. We are disappointed that we have not received a response from NMFS to our comments. At its December meeting the Council determined that it does not support a CIE review at this time, because the Terms of Reference have not been modified in response to Council comments and continue to remain unavailable to the Council. We

believe that there is a very strong role for independent scientific review in this process, but the scope of the review needs to include all available science, not just the scientific information considered in the BiOp.

Finally, the Council has been frustrated by the unpredictable and undefined public process, which has provided the Council with little or no time to prepare, much less participate in the process, and has ultimately minimized the role of the Council. The agency has provided a 30-day comment period that begins on December 13th and extends over the holidays. This ill-timed and truncated comment period does not provide the public or Council with meaningful opportunity to provide substantial comments on the revised RPA. We ask that the agency extend the public comment period, for at least an additional 45 days (i.e. through February), and provide the Council with a clear indication that its recommendations, and comments received from the public, will be seriously considered. Our questions regarding the process and timing of transitioning from the interim final rule to a final rule remain unanswered. For example, it appears that involvement by the Council, and/or its Steller Sea Lion Mitigation Committee, and consideration of 'new' information, could impact the form of the final rule. However, it is not clear that such involvement would take the form of a Council action, versus simple comment on the interim final rule. It also appears that the very same 'new' information could as easily be considered by NMFS in determining the form of the final rule. We are reluctant to engage further in the process until the Council's role, and the process for interim final rule/final rule, are clarified. We welcome clarification of these questions, hopefully prior to our February 2011 Council meeting.

The Council does express its appreciation for the work conducted by NMFS to complete the final BiOp and EA/RIR. We believe that our requests for a more open and transparent process that fully involves the Council would result in a meaningful scientific review of the BiOp and improve the efficacy of the proposed mitigation measures. Please contact me or the Council's Executive Director, Chris Oliver, if you have any questions regarding these comments.

Sincerely,



Eric A. Olson
Chairman

cc: Secretary Gary Locke
Undersecretary Dr. Jane Lubchenco
Governor Sean Parnell
Governor Christine Gregoire
Commissioner Cora Campbell
Senator Lisa Murkowski
Senator Mark Begich
Congressman Don Young
Senator Patty Murray
Senator Maria Cantwell
Dr. Douglas DeMaster