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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

STATE OF ALASKA, Plaintiff, v. JANE LUBCHENCO, *et al.*, Defendants.	Case No.: 3:10-cv-00271-TMB
ALASKA SEAFOOD COOPERATIVE, *et al.*, Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE, *et al.*, Defendants.	Case No. 3:11-cv-00001-TMB

FREEZER LONGLINE COALITION, Plaintiff, v. JANE LUBCHENCO, *et al.*, Defendants.	Case No. 3:11-cv-00004-TMB

THE ALEUT CORPORATION AND ALEUT
ENTERPRISE, LLC'S OPENING AMICUS CURIAE BRIEF

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THE ALEUT CORPORATION AND ALEUT ENTERPRISE, LLC'S OPENING AMICUS CURIAE BRIEF

The Aleut Corporation and Aleut Enterprise, LLC (collectively the "Aleuts" or the "Aleut Entities"), through counsel and pursuant to the Court's May 3, 2011 Order (ECF Doc. No. 72), the Federal Rules of Civil Procedure, and the Local Rules of this Court, hereby submit their opening brief as *amici curiae* in support of Plaintiffs' challenge to the National Marine Fisheries Service ("NMFS") Interim Final Rule published at 75 Fed. Reg. 77,535 *et seq.* (Dec. 13, 2010) (the "Interim Final Rule"). The Aleuts agree with the arguments set forth in the briefs of the State of Alaska, the Freezer Longline Coalition, and the Alaska Seafood Coalition that the Interim Final Rule is legally deficient, not adequately supported by the record or in accordance with applicable law, and should be remanded. Furthermore, the Aleuts submit this brief to highlight (1) the severe and irreparable impacts to the Aleut Entities and the native Aleut communities from the Interim Final Rule and (2) the lack of adequate consideration by NMFS of these impacts, largely due to its decision to promulgate this rule as an interim final rule and forego statutorily-mandated notice and comment rulemaking procedures. Finally, the Aleuts highlight the environmental injustice created by NMFS's arbitrary and capricious decision.

INTRODUCTION AND BACKGROUND

Rather than presenting an extensive background regarding NMFS's action at issue here, the Aleut Entities direct the Court to the Plaintiffs' Joint Memorandum in Support of Motions for Summary Judgment ("Joint Memorandum") in this case, which describes in detail the history of Steller sea lion protection measures and related fisheries regulation. The Aleut Entities further direct the Court to Plaintiffs' Joint Memorandum regarding the extensive legal deficiencies in the Interim Final Rule and the process through which it was promulgated. The Aleut Entities, in

accordance with the Court's May 3, 2011 Order (ECF Doc. No. 72), seek to focus this *amicus curiae* brief on particular impacts to them and the Aleut people they represent, as well as the legal issues most closely related to those impacts.

The native Aleut people have occupied the Aleutian Islands area for thousands of years. Their culture has been heavily influenced by the ocean, and they have traditionally lived off the bounty of the Bering Sea and Gulf of Alaska including fishing for groundfish in nearby waters. In 1972, the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* ("ANCSA"), established thirteen regional Alaska Native Corporations including the Aleut Corporation, to and authorized it to engage in for-profit business to benefit its native Aleut shareholders. 43 U.S.C. § 1606(a)(8), (d), (r). As part of the settlement of native Aleut land claims, the Aleut Corporation received a large portion of the Aleutian Islands from Sand Point in the East to Attu in the West, including the communities of Attu, Atka, and Adak. All of these native Aleut communities continue to depend heavily on the groundfish fishing industry, including Pacific cod and Atka mackerel, in Management Areas 541, 542, and 543.

The Interim Final Rule imposes restrictions and closures that will severely diminish opportunities to benefit from these nearby fisheries. The process that led to the Interim Final Rule began in April 2006, when NMFS requested reinitiation of Endangered Species Act[1] ("ESA") Section 7 consultation regarding the potential impacts of Alaska groundfish fisheries on listed species and designated habitat. *See* 75 Fed. Reg. at 77,536. That consultation started in June 2006, and NMFS published a draft Biological Opinion (the "Draft BiOp")[2] and draft

[1] 16 U.S.C. §§ 1531 *et seq.* ("ESA"). Section 7 of the ESA is codified at 16 U.S.C. § 1536.
[2] The Draft BiOp is available at http://www.fakr.noaa.gov/protectedresources/stellers/esa/biop/draft/draft0810_all.pdf (last checked on June 14, 2011).

Environmental Assessment/Regulatory Impact Review (the "Draft EA/RIR")[3] on August 3, 2010. *See* 75 Fed. Reg. at 77,537. Finally, on December 13, 2010, over five-and-a-half years after beginning the process, NMFS published the Interim Final Rule that was to go into effect on January 1, 2011, without public notice or opportunity for comment, and would close some and restricted access to other Pacific cod and Atka mackerel fisheries in significant portions of the waters surrounding the Aleutian Islands. NMFS's choice not to utilize statutorily-mandated notice and comment procedures, even though the rule had been in the making for over five-and-a-half years, deprived the Aleuts of any meaningful opportunity to comment on the Interim Final Rule's severe and disparate impacts on their business interests and the welfare of the local Aleut communities in the Aleutian Islands. The community of Adak, which is heavily dependent on the nearby groundfish fishing industry, is especially hard hit by NMFS' action.

I. NMFS'S INTERIM FINAL RULE WILL HAVE SEVERE AND IRREPARABLE IMPACTS ON THE ALEUT ENTITIES AND THE NATIVE ALEUT PEOPLE

The Interim Final Rule, in its current form, will impose severe and irreparable harm on the Aleut Entities and the native Aleut people they represent. As discussed in the Aleuts' Memorandum in Support of their Motion to Intervene (ECF Doc. No. 52), the Aleut Corporation and its subsidiaries, including Aleut Enterprise, exist to promote the "health, education, and welfare" of its native Aleut shareholders and their families, 43 U.S.C. § 1606(r), including providing economic and educational opportunities in these local communities where such opportunities would otherwise be scarce. Through subsidiaries like Aleut Enterprise, the Aleut Corporation generates the revenue needed to provide such opportunities. Much of Aleut Enterprise's business relies on commercial fishing industry in Areas 541, 542, and 543. For

[3] The Draft EA/RIR is available at http://www.fakr.noaa.gov/analyses/ssl/ssl_earir_0810.pdf (last checked on June 14, 2011).

example, Aleut Enterprise operates a fueling facility at Adak in the central Aleutian Islands, near the border between areas 541 and 542 that has historically served commercial fishing vessels as its primary customers. In addition, Adak Enterprise and other local businesses at Adak sell various goods and services, including lodging, to commercial fishermen, providing needed revenue to the community. Much of Aleut Enterprise's commercial fishing fleet customer base fishes the Atka mackerel and Pacific cod fisheries in those areas, and therefore Aleut Enterprise, and consequently the Aleut Corporation, stands to lose much of its revenue as a result of the Interim Final Rule. Reduced revenues to the Aleut Corporation will negatively impact its shareholders and their communities throughout the Aleutian Islands, not just in Adak.

Aleut Fisheries, LLC, another wholly-owned subsidiary of the Aleut Corporation, will also be severely impacted by the Interim Final Rule. Aleut Fisheries owns a seafood processing facility at Adak that historically has processed large amounts of catch from the Atka mackerel and Pacific cod fisheries in Areas 541, 542 and 543. The restrictions and closures to those fisheries contained in the Interim Final Rule will drastically reduce the amount of that catch being brought into the Aleut Fisheries facility for processing, severely undercutting the value of that facility to Aleut Fisheries, and consequently reducing its, and therefore the Aleut Corporation's, revenue generated by the facility.[4]

The loss of revenue to Aleut Enterprise, Aleut Fisheries, and the Aleut Corporation caused by the Interim Final Rule will almost certainly result in job losses. The Aleut Entities project that they will immediately be forced to terminate three of their nine employees in Adak,

[4] Currently the facility is owned by Aleut Enterprise and leased through Aleut Fisheries LLC, a wholly-owned subsidiary of Aleut Enterprise, to Western Star Seafoods, Inc., a wholly-owned subsidiary of Icicle Seafoods. Western Star presently has plans to operate the facility at maximum possible capacity beginning in July 2011. The Interim Final Rule's closures and restrictions will reduce the availability of Atka mackerel and Pacific cod for the facility and therefore the value of the facility to Aleut Enterprise.

eliminating the primary means of support for approximately seven residents of Adak, or approximately 4 percent of the Adak community's population. *See* Affidavit of Rudy Tsukada in Support of Aleut Entities' Motion to Intervene (ECF Doc. No. 53) ("Tsukada Aff.") ¶ 7.

In addition to the general revenue-reducing impacts of the Interim Final Rule on the Aleut Corporation, its shareholders, its subsidiaries, and its and its subsidiaries' employees, the Interim Final Rule will have additional harmful impacts on the Aleut community of Adak, its residents, its government, and other local businesses. The loss of local fuel sales by Aleut Enterprise to commercial fishing vessels will drive up fuel costs for the community of Adak and the local utility. Decreased sales volume could cause fuel prices to spike by as much as 90 percent, causing a corresponding spike in electricity prices and imposing severe financial hardship on all residents and businesses in the Adak community, especially during the harsh winters when fuel and electricity are at a premium. *See* Tsukada Aff. ¶ 9.

The Interim Final Rule will also have drastic negative impacts on tax revenues for the City of Adak. The Aleut Corporation and its subsidiaries make up nearly one third of the City of Adak's tax base, and the Aleut Fisheries seafood processing facility provides approximately an additional 30 percent of local tax revenue. *See* Tsukada Aff. ¶ 10. The revenue losses to the Aleut Corporation family of companies will severely undercut the tax revenue available to fund local programs and governmental operations, to a degree that will be difficult, if not impossible, for the Adak community to overcome.

In addition to reducing local tax revenues, the Interim Final Rule will severely reduce the customer base of all local businesses and correspondingly will undercut commercial revenues coming into the community. Historically the commercial fishing fleet has used Adak for crew changes. Those crew changes provided demand for airline services, and as a result Alaska

Airlines has been offering twice weekly flights between Adak and Anchorage. The Interim Final Rule will eliminate most of these crew changes and the corresponding demand for flights, and it is likely that Alaska Airlines will reduce or terminate its air service to Adak, leading to higher costs to get to Adak, fewer visitors, and less outside revenue coming into the community. *See* Tsukada Aff. ¶ 13.

As is clear, the Interim Final Rule's impacts on the Aleuts, native Aleut communities, and Adak in particular will be crippling and felt in a multitude of ways. NMFS's failure to adequately consider these particularized impacts on the Aleuts and native Aleut people, due largely to its decision to forego standard notice and comment rulemaking prior to the Interim Final Rule taking effect, is a significant omission on NMFS's part and, as discussed below, cannot be squared with applicable law.

II. THE SERVICE'S DECISION TO PROMULGATE THIS RULE AS AN INTERIM FINAL RULE WITHOUT NOTICE AND OPPORTUNITY FOR COMMENT IS UNJUSTIFIED

NMFS here chose to promulgate the rule as an "Interim Final Rule," which went into effect on January 1, 2011, prior to any opportunity for public comment. As a result, irreparable harmful impacts are being imposed on the Aleuts and local Aleut communities without any opportunity for those affected parties to comment on the rule itself. This is clearly contrary to the language of and the intention behind the rulemaking requirements in the Administrative Procedure Act ("APA") at 5 U.S.C. § 553.

The APA requires public notice and opportunity for comment prior to a substantive rule taking effect, except where:

> [T]he agency 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). NMFS ostensibly relies on this "good cause" exception for its departure from notice and comment procedures here, stating that notice and comment "would be impracticable and contrary to the public interest[,]" 75 Fed. Reg. at 77,542, because (1) it allowed comments on prior decisional documents (specifically the Draft BiOp and the Draft EA/RIR); and (2) because the final BiOp with the final RPA was not signed until November 24, 2010, and the fisheries were to open on January 1, 2011, leaving too little time before the finalization of the RPA and the beginning of the season to allow for public notice and comment.

As an initial matter, it is questionable how meaningful any opportunity was to comment on the Draft BiOp and Draft EA/RIR. Both documents were released together on August 3, 2010, with an initial comment period of only 25 days, later extended by 7 days for a total of 32 days. The documents together total well over 1,000 pages, and much of their content is not easily understood by the lay person. As such, a mere 32 days (originally intended to be only 25 days) was not an adequate opportunity to review, digest, and prepare comments on these critical decisional documents, much less to comply with the APA's requirement for notice and comment on a proposed rule where these substantive documents did not adequately give notice of the agency's final decision.

Furthermore, in relying on undefined "good cause" as the basis to promulgate a rule in December 2010 that would go into effect on January 1, 2011 – abandon established notice and comment procedures – NMFS fails to address two key concerns. First, NMFS fails to explain why it took so long to arrive at a final RPA when the North Pacific Fisheries Management Council first recommended that NMFS reinitiate ESA Section 7 consultation in October 2005. The process culminating in the Interim Final Rule was ongoing for over five-and-a-half years, finally producing a RPA in late November 2010 and the first version of its rule on December 13,

2010.[5] Given NMFS's failure to act with urgency over extended that time period, the agency's asserted need to have a rule in place by January 1, 2011 does not stand up to scrutiny.

Second, NMFS offers no explanation as to why any rule was required to be in place on January 1, 2011, such that it could not delay implementation of a rule for a few weeks while going through APA-prescribed notice and comment procedures. NMFS claims that "[t]hese protection measures are necessary to prevent the likelihood that these fisheries will jeopardize the continued existence of endangered Steller sea lions and adversely modify their critical habitat[,]" 75 Fed. Reg. at 77,543. However, NMFS fails to explain why, after taking over five years after the initial recommendation for Section 7 consultation to render a final RPA and prepare a rule, spending a few more weeks undergoing APA-prescribed public notice and comment would pose a significant threat to the Western DPS of the Steller sea lion above and beyond what the conditions were on January 1, when the Interim Final Rule went into effect.

Moreover, significant information in the record seriously disputes whether any additional delay to undergo notice and comment would have had any impact, let alone significant impact, on the Western DPS of Steller sea lions. The Final BiOp itself indicates that the Western DPS increased in population from 2000 to 2008, *see* Final BiOp at 81, 83, consistent with recovery criteria in the 2008 Revised Recovery Plan for the Steller Sea Lion (Mar. 2008) ("2008 Recovery

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[5] As highlighted in Plaintiffs' Joint Memorandum, by January 2009 NMFS had decided to abandon consultation with the North Pacific Fisheries Management Council ("NPFMC") and statutorily-mandated notice and comment rulemaking procedures under threat of litigation by environmental groups demanding quick action. However, NMFS kept its decision to abandon these required procedures a secret from the NPFMC, the State of Alaska, and the public, including the Aleuts. NMFS cannot now assert as "good cause" to abandon rulemaking procedures its need to quickly implement fishery closures and restrictions where it made that decision two years prior to issuing the Interim Final Rule and apparently due to litigation threats, not for any legitimate statutory reason.

Plan")[6] at V-21, that no two adjacent western DPS sub-regions have non-pup population trends that are "declining significantly." At the very least, this information indicates that delaying the Interim Final Rule long enough to go through APA-mandated notice and comment procedures would not have been likely to cause significant adverse impacts to the Western DPS of the Steller sea lion.

"[G]ood cause [for foregoing APA notice and comment procedures] requires some showing of exigency beyond generic complexity of data gathering and time constraints; notice and comment must interfere with the agency's ability to fulfill its statutory mandate to manage the fishery." *Natural Resources Defense Council, Inc. v. Evans*, 316 F.3d 904, 906 (9th Cir. 2003). The "good cause" standard for foregoing notice and comment is a "high bar" that should be "narrowly construed and only reluctantly countenanced[,]" and notice and comment should be excused "only in those narrow circumstances in which delay would do real harm." *United States v. Valverde*, 628 F.3d 1159, 1164-65 (9th Cir. 2010) (quotations and citations omitted). In *NRDC v. Evans*, the Ninth Circuit Court of Appeals rejected NMFS's decision to forego notice and comment for fisheries management regulations where the agency alleged that it had "good cause" consisting of the need to analyze fisheries data from the prior year and implement the new rule prior to the January 1 opening of the fisheries. The Court stated, "Under the APA, notice and comment is not 'impracticable' unless the agency cannot both follow section 553 and execute its statutory duties." *NRDC v. Evans*, 316 F.3d at 911 (quotations and citations omitted). Here, NMFS has offered no reason why it is statutorily required to have a rule in place on January 1, 2011, rather than after notice and comment, nor has it offered any plausible "good

[6] The 2008 Steller Sea Lion Recovery Plan is available at http://www.fakr.noaa.gov/protectedresources/stellers/recovery/sslrpfinalrev030408.pdf.

cause" for neglecting notice and comment where the rule in question has been over five years in the making without any significant urgency by NMFS to take action during that time.[7]

The Aleuts, in keeping with the Court's May 3, 2011 Order (ECF Doc. No. 72), are conscious of the need to not retread ground covered by Plaintiffs in their Joint Memorandum, but merely offer this discussion to highlight the particular impacts on them and their native Communities. NMFS's decision to forego notice and comment was not legally justified, and a consequence of that decision was to deprive the Aleuts of an opportunity to address the severe and disparate impacts on them and the local Aleut communities caused by the fisheries restrictions. The Court should not countenance NMFS's abandonment of standard rulemaking procedure and callous disregard for the interests of local native Aleut businesses and communities.

III. NMFS DISREGARDED EXECUTIVE ORDER 12898's REQUIREMENTS TO IDENTIFY AND ADDRESS ENVIRONMENTAL JUSTICE CONCERNS

Executive Order 12898 requires each Federal agency to:

> [M]ake achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands.

Exec. Order 12898 § 1-101 (Feb. 11, 1994), published at 59 Fed. Reg. 7629 *et seq.* (Feb. 16, 1994). Executive Order 12898 by its own terms is not intended to create a private right of action to enforce its requirements, *see id.* at § 6-609; *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 232 (5th Cir. 2006); rather, the agency's consideration of environmental justice concerns is

[7] As Plaintiffs point out in their Joint Memorandum, Ninth Circuit (and other circuit) precedent illustrates the rare nature of the "good cause" exception to notice and comment, and this case bears little resemblance to those cases applying the exception.

reviewed under the APA's "arbitrary and capricious" standard. *See id.* at 232; *Communities Against Runway Expansion, Inc. v. Fed. Aviation Admin.*, 355 F.3d 678, 688 (D.C. Cir. 2004). Executive Order 12898 establishes that environmental justice is intended to be a significant consideration for federal decisionmakers.

In promulgating the Interim Final Rule, NMFS failed to give adequate consideration to the disproportionate impacts of its rule on the Aleut people. The November 2010 EA/RIR summarizes Adak's current dependence on commercial fishing for its economic health, *see* EA/RIR § 10.2.8, but does not address the disparate impacts of the Interim Final Rule on the minority community of ethnic Aleuts at Adak and elsewhere through the Aleutian Islands. Many of the ethnic Aleuts in Adak and throughout the Aleutian Islands are low income as well as minority populations. Their communities depend heavily on the commercial fishing industry for economic opportunities, tax revenues to support social and public health programs, and economic and educational opportunities provided by the Aleut Corporation and its subsidiaries, including shareholder dividend income, community investment, and scholarship awards. All of these factors contribute to the health and welfare of the minority and low-income native Aleuts, and will be disproportionately impacted by the Interim Final Rule. As such, NMFS falls far short of meeting Executive Order 12898's mandate.

NMFS's failure here to give adequate consideration to the disproportionate impacts of the Interim Final Rule on the Aleuts and their local communities renders it arbitrary and capricious and requires that it be remanded to NMFS for further evaluation. An agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem[.]" *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). *See Sierra Forest Legacy v. Sherman*, Nos. 09-17796, 10-15026, 2011 WL 2041149, *9 (9th Cir. May

26, 2011) (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (*en banc*)). (same). Here, NMFS failed to examine the environmental justice aspects of its Interim Final Rule, considerations that Executive Order 12898 establishes as significant. These same considerations constitute aspects of the "human environment" that the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"), and its implementing regulations require NMFS to address in any Environmental Impact Statement. *See* 42 U.S.C. § 4332(2)(c) (requiring agencies to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on[,]" *inter alia*, the environmental impacts and adverse effects of the proposed action); 40 C.F.R. § 1508.14 (defining "human environment . . . comprehensively to include the natural and physical environment and the relationship of people with that environment"). NMFS's failure to give adequate consideration to the dire and disparate impacts on the Aleut Entities and local Aleut communities renders the Interim Final Rule arbitrary and capricious and requires remand to the agency for examination of environmental justice considerations. Furthermore, any promulgation of a future rule (whether similar or different in substance from the Interim Final Rule) must be done through normal notice and comment procedures.

CONCLUSION

In promulgating the Interim Final Rule, NMFS failed to give adequate consideration to the severe and disparately harmful impacts of fisheries restrictions on the Aleut Entities and the native Aleut people and communities of the Aleutian Islands. NMFS's failure to provide public notice and opportunity for comment, as required under the APA, and its failure to give adequate consideration to environmental justice concerns as directed by Executive Order 12898 are both

significant deficiencies in the Interim Final Rule, requiring remand to the agency. Accordingly, the Aleut Entities agree with Plaintiffs of record in this action that the Interim Final Rule should be remanded to NMFS, along with the BiOp, EA/RIR, and Finding of No Significant Impact ("FONSI") for the reasons stated in Plaintiffs' Joint Memorandum, with instructions to correct these deficiencies and a direction to comply with required notice and comment rulemaking procedures in any future action arising from that remand.

Dated this 16th of June, 2011.

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