

Nos. 12-35201, 12-35203, 12-35204

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ALASKA, et al.,
Plaintiff-Appellants,

v.

JANE LUBCHENCO, et al.,
Defendant-Appellees,

OCEANA, INC., et al.,
Intervenor Defendant-Appellees.

On Appeal from the U.S. District Court for the District of Alaska,
No. 3:10-cv-00271-TMB (Hon. Timothy M. Burgess)

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GLOSSARY

APA	Administrative Procedure Act
BiOp	Biological Opinion
DPS	Distinct Population Segment
EA	Environmental Assessment
EIS	Environmental Impact Statement
ER	Plaintiffs' Excerpts of Record
ESA	Endangered Species Act
IFR	Interim Final Rule
MSA	Magnuson-Stevens Fishery Conservation and Management Act
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
RCA	Rookery Cluster Area
ROD	Record of Decision
RPA	Reasonable and Prudent Alternative
SER	Federal Appellees' Supplemental Excerpts of Record
SSL	Steller sea lion
wDPS	Western Distinct Population Segment

INTRODUCTION

The endangered western population of the Steller sea lion in the northern Pacific Ocean has declined by almost 90% in only 40 years. Between 2000 and 2008, the overall population trend of the western Distinct Population Segment (“DPS”) of the Steller sea lion appears to have stabilized, but steep declines persist in a large area of the sea lion’s range in Alaska. According to the National Marine Fisheries Service (“NMFS”), those declines threaten the continued existence of the western Steller sea lion, and will prevent it from recovering from its endangered status.

In this appeal, Plaintiffs challenge an Interim Final Rule (“IFR”) that NMFS promulgated to protect this endangered species from the effects of commercial fisheries, which harvest several of the fish species that sea lions depend upon for prey. NMFS has acknowledged that, given current scientific data, it is impossible to determine the precise degree of responsibility those fisheries bear for the trends in Steller sea lion population since 2000. NMFS exhaustively reviewed the available evidence, however, and concluded that, on balance, its rule was necessary to insure that the authorization of future fisheries activity is not likely to jeopardize the species.

Plaintiffs’ challenge is primarily a disagreement over how NMFS interpreted complex scientific evidence and applied it in the challenged rule. This Court may ensure that NMFS’s decision was rational, but Plaintiffs are not entitled to second-guess NMFS’s scientific conclusions. The Court should therefore uphold NMFS’s

Biological Opinion, and leave the rule in place while NMFS complies with the district court's injunction addressing other issues.

STATEMENT OF JURISDICTION

NMFS does not dispute the basis for subject matter jurisdiction stated in Plaintiffs' opening brief. *See* Pl. Br. at 3.

In this review of agency proceedings, the district court ordered a partial remand to NMFS for the preparation of an Environmental Impact Statement ("EIS"). *See infra* p. 20. In most cases, a partial remand is not an appealable final order with respect to plaintiffs, who may yet receive the relief they seek in the agency's proceedings on remand. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1174-75 (9th Cir. 2011). The Court has varied this rule in certain circumstances. *Id.* at 1175. Under the specific circumstances of this case, NMFS does not contest the finality of the district court's order. The EIS that NMFS must complete on remand rests in part on the Biological Opinion, and this Court's review of the Biological Opinion may aid the agency in conducting efficient remand proceedings. In addition, the relevant statute here identifies a policy in favor of timely decisions, which Plaintiffs have sought to invoke. *See* 16 U.S.C. § 1855(f)(4).

STATEMENT OF THE ISSUES

1. Does the Biological Opinion challenged in this case comply with the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* ("ESA"), in the following respects:

- a. Did NMFS reasonably conclude that progress toward recovery criteria is relevant to determining whether a proposed action will jeopardize a species' likelihood of survival and recovery?
 - b. May NMFS study the potential effects of a proposed action on sub-regional populations of a species, if risk to those populations indicates risk to the entire species?
 - c. Did NMFS apply the correct standards in concluding that existing fishery management measures were likely to jeopardize the continued survival and recovery of the Steller sea lion and to adversely modify its critical habitat?
 - d. Did the extensive Biological Opinion in this case adequately explain the basis for its proposed "reasonable and prudent alternative?"
2. Did the district court abuse its discretion in ordering NMFS to prepare an EIS, but refusing to otherwise dictate the agency's proceedings on remand?
 3. In the event that the Court finds a flaw in the Biological Opinion, should it vacate the challenged protective measures, or leave them in place during remand?

STATEMENT OF THE CASE

NMFS does not dispute the statement of the case provided in Plaintiffs' opening brief. *See* Pl. Br. at 5.

LEGAL AND FACTUAL BACKGROUND

I. MANAGEMENT OF ALASKA FISHERIES UNDER THE MSA

This case involves a dispute over the management of the commercial fisheries of the Bering Sea, Aleutian Islands, and Gulf of Alaska. These waters support a large and complex commercial fishery that has grown rapidly in recent decades. For example, the Bering Sea harvest alone of the key groundfish species at issue here grew from less than 400,000 metric tons in 1964 to more than 1,700,000 metric tons in 2007. *See* BiOp at 197, Table 2.9 (ER 1133, 1475); *see also Greenpeace v. NMFS*, 106 F. Supp. 2d 1066, 1070 (W.D. Wash. 2000) (describing a 7,500 percent increase in annual groundfish removal in Alaskan waters from the 1950's to the 1990's).

These fisheries are sustainably managed under the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”). *See* 16 U.S.C. §§ 1801 *et seq.* The MSA establishes regional councils that prepare and submit fishery management plans for NMFS to consider. *See id.* § 1852(h). Fishery management plans contain measures “necessary and appropriate for the conservation and management of the fishery,” including designated zones where fishing is limited or closed “based on the best scientific information available.” *Id.* § 1853. If NMFS approves those plans, *see id.* § 1854(a), it must implement them by regulation. *Id.* § 1855(d).

The areas at issue in this case are within the purview of the North Pacific Fishery Management Council (the “Council”). *See* BiOp at 13-14 (ER 944-50); *id.* Fig.

2.2 (ER 1367). The Council's fishery management plans contain management measures that restrict fishing by area, gear and equipment, vessels, species, and time of year. *See* BiOp Tables 2.1(a), (b) (ER 1456-60). Each year, NMFS implements harvest specifications for the annual fishing season that incorporate those management measures. *See* 50 C.F.R. part 679; *id.* §§ 679.20-.28.

II. EVALUATION OF ALASKA FISHERIES UNDER THE ESA

This case arises at the intersection of NMFS's duties under the MSA and the ESA. The challenged IFR in this case grew out of the ESA's consultation process, which insures that NMFS's actions under the MSA are consistent with its obligations to protect endangered species.

A. The ESA's Protections for Listed Species

The ESA provides that NMFS shall publish and maintain a list of those species that are determined to be threatened or endangered. *See* 16 U.S.C. § 1533(c). A listed "species" may include "any subspecies" of wildlife or any "distinct population segment of any species . . . which interbreeds when mature." *Id.* § 1532(16). A species may be listed based on a "danger of extinction" or the likelihood that it may become endangered. *Id.* § 1532(6), (20). The ESA also directs NMFS to designate "critical habitat" for listed species, which includes those areas determined to contain those physical or biological features essential to conservation of the species, and

which may require special management consideration or protection. 16 U.S.C. §§ 1532(5), 1533(a)(3).

Once a species is listed, it enjoys a variety of legal protections. *See id.* §§ 1533(d), 1536, 1538; *see also Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). For example, under Section 4 of the ESA, 16 U.S.C. § 1533(f), the relevant agency must develop “recovery plans” that will provide for the “conservation and survival” of listed species. *Id.* § 1533(f). “Conservation” encompasses “all methods and procedures which are necessary” to bring a listed species to the point at which the protections of the ESA are no longer needed. *Id.* § 1532(3). The ESA demands that recovery plans contain “objective, measurable criteria” for assessing a species’ recovery progress, and allows for public review and comment of those criteria. *Id.* § 1533(f)(1)(B)(ii), (f)(4). Recovery plan criteria are relevant to deciding whether a species is no longer “threatened” or “endangered” within the meaning of 16 U.S.C. § 1533(a)(1), and can therefore be delisted or downlisted as appropriate. *See id.* § 1533(a)(2)(B); 50 C.F.R. § 424.11(d).

Conversely, while a species remains listed, each federal agency must “*insure* that any action authorized” by that agency: (a) “is not likely to jeopardize the continued existence of any endangered species or threatened species;” and (b) “is not likely to . . . result in the destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2) (emphasis added). Section 7 of the ESA, 16 U.S.C.

§ 1536, establishes a consultation process for this purpose. If the “action agency” finds that its proposed action is likely to adversely affect a listed species, it must engage in formal consultation with the “consulting agency,” as designated by the relevant Secretary. *Id.* § 1536(a)(4); *see* 50 C.F.R. § 402.14. The consulting agency assesses the relevant questions under Section 7(a)(2), determining whether the action will “jeopardize the continued existence” of a listed species or constitute the “destruction or adverse modification” of its critical habitat. The consulting agency must also take species recovery into account when making a jeopardy or adverse modification determination. *See National Wildlife Fed. v. NMFS*, 524 F.3d 917, 931-32 (9th Cir. 2007) (citing 50 C.F.R. § 402.02 and *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1069-70 (9th Cir. 2004)).

This consultation process culminates in a written Biological Opinion, in which the consulting agency “detail[s] how the agency action affects the species or its critical habitat.” 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14(h). If the Biological Opinion concludes that the action agency cannot “insure” that the proposed action is not likely to result in jeopardy to the species or adverse modification of its critical habitat, the Biological Opinion must examine whether there is a “reasonable and prudent alternative” to the action that would avoid that result. *Id.* § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3).

B. The Endangered Steller Sea Lion Population

The Steller sea lion is the largest member of the family *otariidae*, the “eared seals.” *See* BiOp at 75 (ER 1101). Steller sea lions are large mammals – the average male weighs more than 1200 pounds – that range around the northern Pacific rim from northern Japan to California. *Id.* Starting in the 1980s, the global population of Steller sea lions declined by more than 50%, reaching a low of approximately 105,000 animals in 2000. *Id.* at 80 (ER 1016).

Recognizing the steep decline in the estimated Steller sea lion population over the previous thirty years, NMFS listed the species as threatened in 1990. *See* “Listing of Steller Sea Lions as Threatened Under the Endangered Species Act,” 55 Fed. Reg. 49,204 (Nov. 26, 1990). NMFS has also designated critical habitat for the species, notably including rookery sites and the surrounding forage area. *See* “Designated Critical Habitat; Steller Sea Lion,” 58 Fed. Reg. 45,269 (Aug. 27, 1993); *see also* BiOp at 119-20, Fig. 3.2 (ER 1055-56, 1385). In 1997, based on new genetic data, NMFS reclassified the Steller sea lion into two distinct population segments. It listed the western DPS, west of 144°W longitude, as endangered, and left the eastern DPS, east of 144°W longitude, as threatened. *See* “Change in Listing Status of Steller Sea Lions,” 62 Fed. Reg. 24,345, 24,346 (May 5, 1997); 62 Fed. Reg. 30,772 (June 5, 1997);

see also BiOp at 76 (ER 1012); *id.* Figure 3.1 (ER 1385). Only the endangered western DPS is relevant to this case.¹

The population of the western DPS declined by 90% between 1950 and 2000. *See* BiOp at xxiii (ER 916). Although the overall population of the species has stabilized since 2000 – it has shown no statistically significant annual increase or decrease – sub-regional populations within the western DPS have continued to decline. *Id.* at 82, 332 (ER 1018, 1268). One key theory that explains this phenomenon is “nutritional stress,” which posits that the species has become less able to meet its energy needs through adequate prey consumption. *See id.* at 112, 118-19 (ER 1048, 1054-55). Most Steller sea lions occupy breeding sites known as “rookeries” from late May to early July. *Id.* at 76 (ER 1012). Adult female and juvenile sea lions do not store large amounts of fat, and therefore require continuous access to food throughout the year. *Id.* at 106 (ER 1042). Food supplies near rookeries are particularly important, due to the energy needs of breeding females and the relatively poor foraging abilities of juveniles. *Id.* at 291 (ER 1227). In the Aleutian Island sea lion sites most relevant to this case, the most prevalent food species are Atka mackerel, pollock, and Pacific cod. *Id.* at 199-201 (ER 1135-37). The fisheries

¹ The western DPS of Steller sea lions is a “species” for purposes of the ESA, and this brief refers to it as both a DPS and a “species.” *See* 16 U.S.C. § 1532(16).

for these three species therefore “stand out as the areas of greatest overlap in fisheries and important prey resources for Steller sea lions.” *Id.* at 201 (ER 1137).

Steller sea lions have been subject to ESA recovery plans for more than two decades. The first, prepared in 1992, helped to stabilize the sea lion population, but it was rendered obsolete with the reclassification of the eastern and western DPS in 1997. *See* Recovery Plan at x, xii (SER 12, 14). A new Recovery Plan was finalized in 2008. It was produced by a Recovery Team made up of experts on marine mammals and endangered species, working with representatives of a wide variety of stakeholders (including the state of Alaska and the Pacific Longline Fishermen’s Association, two plaintiffs here). *See* Recovery Plan (SER 6, 12). The Recovery Team submitted the Plan to NMFS, which approved it after peer review, public comment, and subsequent revision. *Id.* at x (SER 12). In its final form, it outlined a variety of recovery actions, grouped into categories such as “Insur[ing] Adequate Habitat and Range for Recovery” and “Protect[ing] from Over-Utilization for Commercial . . . Purposes,” to meet the recovery criteria. *Id.* (SER 90-92).

To monitor the status of the species, the Recovery Plan divided the western DPS into seven sub-regions. NMFS monitors population trends using the six sub-regions within the United States. *See* BiOp at 82, Fig. 3.4 (ER 1018, 1387). The recovery criteria for reclassifying the species from “endangered” to “threatened” require that (a) its overall population within the United States shows a statistically

significant increase, on average, over fifteen years, (b) such an increase is also present in five of the seven sub-regions, *and* (c) “[t]he population trend in any two adjacent sub-regions cannot be declining significantly.” Recovery Plan (SER 82). To be delisted, the western DPS must maintain a statistically significant average annual growth rate of 3% over 30 years, and no sub-region may decline in population more than 50%. *See id.* (SER 86). Plaintiffs do not challenge the Recovery Plan here or dispute the criteria by which it measures recovery.

The western DPS is not currently meeting these recovery criteria, and if current population trends continue, it will never do so. There was no statistically significant population increase from 2000 to 2008, and “trends in three sub-regions in the western DPS continue to decline.” BiOp at xxiii-iv, 81, 332 (ER 916-17, 1017, 1268).² In particular, the Steller sea lion population in the Western Aleutian Islands sub-region declined by over 40% between 2000 – which was already a low point in the population trend – and 2008. *Id.* at xxvi (ER 919). In the Central Aleutian Islands, NMFS has identified a decline that is not yet statistically significant, but that would become statistically significant “without abatement.” *Id.* at 340 (ER 1276). If these

² In their Statement of Facts, Plaintiffs cite extra-record evidence to suggest that the population of the western DPS is now increasing at a statistically significant rate. *See* Pl. Br. at 12 & n.3. The record before NMFS at the time of its decision did not contain this data, and the Court therefore cannot consider it (or other post-2008 data indicating some negative trends). *See, e.g., Nw. Env’tl Advocates v. NMFS*, 460 F.3d 1125, 1144-45 (9th Cir. 2006).

declines continue, “Steller sea lions may be extirpated from this portion of their range.” *Id.* at 337 (ER 1273).

C. NMFS Consultation Concerning the Steller Sea Lion

In 2005, the North Pacific Fishery Management Council requested that the Sustainable Fisheries Division of NMFS reinstate its ESA consultation for the Bering Sea/Aleutian Islands and the Gulf of Alaska fishery management plans. *See* BiOp at 5 (ER 941). The new information supporting the need for new consultation was the “substantial amount of new research on Steller sea lions” that had been published since the previous biological opinion was prepared in 2000. *Id.* The Sustainable Fisheries Division, as the action agency, contacted NMFS’s Protected Resources Division, which served as the consulting agency. *Id.* at 6 (ER 942).

The consultation process for the fishery management plans took several years, as the Council requested that NMFS wait for the most up-to-date research possible. *Id.* at 6-7 (ER 942-43). NMFS released a draft Biological Opinion in August 2010, providing for concurrent review by the Council and notice and comment by the public. *Id.* at xxi (ER 914). NMFS received comments including scientific reviews, comments from the State of Alaska, and a proposed reasonable and prudent alternative from the Council. *Id.* at xxi, 7 (ER 914, 943).

In November 2010, NMFS released its final Biological Opinion concerning the existing management measures for the relevant fisheries. Two essential elements are

at issue in this case: The jeopardy and adverse modification findings and the reasonable and prudent alternative.

1. The jeopardy and adverse modification findings

NMFS's findings with respect to jeopardy and adverse modification are contained in Chapter 7 of the Biological Opinion (ER 1263-84). NMFS recognized that under *National Wildlife Federation*, it was required to consider the prospects of both survival and recovery for the Steller sea lion. *See* BiOp at 328 (ER 1264) (citing 481 F.3d at 1237). Because the data establish that the western DPS is declining in portions of its range, and that present demographic trends will perpetuate an unacceptably high extinction risk, the question for NMFS was the extent to which those trends may be caused by commercial fishing – and thus, whether NMFS could authorize fishing under existing management measures and still “insure” the species’ survival and recovery. *Id.* at 344-45 (ER 1280-81).

The evidence pertaining to this question is discussed in Chapter 5 of the Biological Opinion (ER 1213-1237). Using “pup to non-pup” ratios, NMFS found that natality rates were lower in the western DPS than in the eastern DPS of the Steller sea lion, and that pup counts had declined in the western and central Aleutian islands between 2001 and 2010 (correlating with the most important sub-regional declines). *See* BiOp at 80-85 (ER 1016-21); *id.* Figs. 3.7, 3.9 (ER 1390-92). The “most reasonable explanation” for this phenomenon is nutritional stress, as “other

hypotheses related to mechanisms associated with decreased natality . . . have for the most part been dismissed as not being significant.” *Id.* at xxix (ER 922); *see also id.* at 198-99 (ER 1134-35). NMFS noted that sub-optimal nutrition in the 1980s probably led to “reproductive failure and reduced rates of body growth,” *id.* at 113 (ER 1049), but that more recent evidence is mixed. Some data “indicate a trend towards improvement in conditions of Steller sea lions in the western DPS,” but other evidence “suggests a lingering chronic impact . . . that could affect the ability of the western DPS to recover.” *Id.* at 115 (ER 1051). A summary of these studies concluded that if high-quality prey is removed from the ecosystem, sea lions (especially juveniles) may not be able to maintain sufficient energy intake, with a complex series of potential effects. *Id.* at 287 (ER 1223).

NMFS was candid that the evidence of the effect of fisheries on the western DPS is not conclusive, and that “opinion varies . . . among experts . . . as to indirect linkages between fishing activities and Steller sea lions.” *Id.* at 282 (ER 1218).

Together with several other types of threats, “chronic nutritional stress resulting from an altered prey field due to commercial fishing and/or natural environmental variability” is one of the “continued threats to the recovery potential” for the western DPS. *Id.* at 278 (ER 1214). Even with existing management measures that disperse fishing, NMFS documented an overlap between key fishing areas and species habitat: For example, between 2000 and 2008, 36% of the Aleutian Island mackerel catch was

made within critical habitat. *Id.* at 285 (ER 1221); *see also* BiOp Fig. 3.2 (ER 1385) (areas of critical habitat).

Ultimately, the Biological Opinion identified a number of factors that “have acted or continue to act individually or together to cause significant declines” within the western DPS. *Id.* at 342 (ER 1278). As one of those factors, NMFS concluded that “commercial fisheries, at least in the western and parts of the central Aleutian Islands, may remove fish that are prey” for Steller sea lions, particularly “in nearshore areas where SSLs prey most heavily.” *Id.* at 343 (ER 1279); *see also id.* at 354 (ER 1290). Although the fisheries “cannot be unequivocally shown to be a causative factor in continued Steller sea lion declines,” NMFS concluded that, based on “the weight of the evidence” and “a precautionary and measured approach,” authorizing fishing under the existing management measures was likely to cause jeopardy within the meaning of the ESA. *Id.* at 345 (ER 1281).

NMFS incorporated its analysis about sea lion nutrition and habitat into its discussion of adverse modification. Adequate food resources are essential to the Steller sea lion, particularly in the designated critical habitat within 20 nautical miles of rookeries. *Id.* at 120 (ER 1056). Significant fishing effort takes place within that critical habitat. *See, e.g.,* Fig. 5.8 (ER 1588). Drawing on its jeopardy analysis, NMFS also found that the proposed authorization would adversely modify the critical habitat of the western DPS. *Id.* at 348 (ER 1284).

2. The reasonable and prudent alternative

As required by the ESA, NMFS proposed a Reasonable and Prudent Alternative (the “RPA”) to authorization of fishing under the existing management practices that, in NMFS’s view, would avoid the jeopardy and adverse modification that it had identified. *See* 16 U.S.C. § 1536(b)(3)(A); *see generally* BiOp Chapter 8 (ER 1292-1312). The RPA proposed to establish new management measures primarily for fishery management areas 541, 542, and 543 in the western and central Aleutian Islands.³ In Area 543, the westernmost management area, NMFS recommended that Atka mackerel and Pacific cod fisheries be closed, “given the evidence available for the potential” for those fisheries “to compete with Steller sea lions in a manner that limits their reproduction or survival.” *See* BiOp at 362 (ER 1298). In Area 542, NMFS recommended the closure of certain critical habitat areas year round, and placed various limits on gear type and season in other areas. NMFS found that these restrictions would “ensure that the groundfish fishery does not continue to appreciably reduce the likelihood of Steller sea lion survival or recovery in the wild.” *Id.* at 364 (ER 1300). Finally, NFMS recommended fewer restrictions, but of a similar

³ Fig. 3.8 (ER 1391) shows the six U.S. sub-regions of the western DPS imposed upon established fishery management areas. The western and central Aleutian Island sub-regions contain management areas 541, 542, and 543, the three areas that are primarily subject to new restrictions in the Interim Final Rule.

type, for Area 541, the closest management area to the Steller sea lion sub-regions that are no longer declining. *Id.* at 370 (ER 1306).

Overall, NMFS proposed an alternative to existing fishery management practices that, in its judgment, is “based on the best scientific and commercial data available” and “will ensure that the fisheries . . . are not likely to jeopardize the continued existence of the Steller sea lion or adversely modify their designated critical habitat.” *Id.* at 375 (ER 1311).

III. THE NEPA PROCESS AND ADOPTION OF THE IFR

As noted above, NMFS has “general responsibility to carry out any fishery management plan or amendment,” including the authority to promulgate regulations. 16 U.S.C. § 1855(d). The fishery management plan for the Bering Sea and Aleutian Islands expressly provides that “[r]egulations may be necessary to prevent interactions between commercial fishing operations and marine mammal populations when information indicates that such interactions may adversely affect marine mammals.” Fishery Management Plan § 3.5.3 (SER 183-84). NMFS undertook to incorporate the RPA into rulemaking pursuant to these authorities.

A. NMFS’s Consideration of Alternatives Under NEPA

Pursuant to the National Environmental Policy Act (“NEPA”), NMFS may use an Environmental Assessment to determine whether a proposed action, such as the RPA here, is a major action “significantly affecting the quality of the human

environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1501.4, 1508.9(a). If NMFS concludes that it is, the agency must prepare an Environmental Impact Statement. *See* 42 U.S.C. § 4332(2)(C). If the EA concludes that the proposed project will not have a significant impact, then NMFS may make a “finding of no significant impact,” 40 C.F.R. 1501.4(e), and need not prepare an EIS.

NMFS prepared a comprehensive EA on the proposed Steller sea lion protection measures to determine whether an EIS was required. *See* ER 529-892. The EA considered the potential environmental impact of the final RPA and three alternatives, including a no-action alternative, a conservation alternative, and a prior draft of the RPA. ER 532-37. NMFS concluded that of the action alternatives, the RPA “disrupts fishing and reduces gross [fishery] revenues the least, reduces the number of jobs the least, and consequently, imposes the least adverse impact on affected communities.” EA at xv (ER 545). Accordingly, NMFS issued a Finding of No Significant Impact, *see* ER 524-528, and determined that an EIS was not necessary.

B. Promulgation of the Interim Final Rule

Upon finding that the RPA would not have a significant effect on the quality of the human environment, NMFS promulgated the IFR to implement the RPA’s recommended measures. *See* “Fisheries of the Exclusive Economic Zone of Alaska; Steller Sea Lion Protection Measures,” 75 Fed. Reg. 77,535 (Dec. 13, 2010) (ER 70-95). NMFS found that implementing the RPA was “necessary to comply with section

7(a)(2) of the ESA [16 U.S.C. § 1536(a)(2)].” *Id.* at 77,537. The RPA, in NMFS’s view, was appropriate because it imposed “more stringent measures in those locations with greater population declines,” and because decreased competition between Steller sea lions and the fisheries “is expected to lead to higher survival and natality rates.” *See id.* at 77,538 (ER ___).

The IFR establishes new management measures for Areas 541, 542, and 543, that govern where, when, and how fishing in those areas is permitted. These management measures supplement NMFS’s annual harvest specifications. The IFR became effective for the fishing season that began on January 1, 2011, and will remain in place for each new fishing season until they are changed.

IV. DISTRICT COURT PROCEEDINGS

Plaintiffs challenged the Biological Opinion and the IFR in the District of Alaska, claiming that NMFS violated the MSA, the ESA, the Administrative Procedure Act (“APA”), and NEPA. The Court rejected Plaintiffs’ claims under the MSA and APA, recognizing NMFS’s authority to protect marine mammals through rulemaking. *Op.* at 16-21 (ER 29-34). Plaintiffs do not appeal those claims here.

The district court also upheld the Biological Opinion against Plaintiffs’ many arguments. *See Op.* at 23-43 (ER 36-56). Most importantly, it applied this Court’s case law in holding that NMFS properly took the species’ recovery into account in its jeopardy and adverse modification analysis. *Id.* at 24-26 (ER 37-39). The court also

correctly recognized that it was required to “defer to the technical expertise of the agency as long as there is a rational connection between the evidence and its conclusions.” Op. at 3 (ER 16). Moreover, “the evidence, although equivocal, was sufficient to support [NMFS’s] conclusions.” *Id.*

Finally, the court granted Plaintiffs summary judgment on one of their NEPA claims, holding that NMFS was required to prepare an EIS because of the controversial nature of NMFS’s findings. *Id.* at 47-50 (ER 60-63). NMFS does not appeal that decision, and intends to prepare an EIS according to the schedule that the district court ordered. Plaintiffs, however, appeal the district court’s refusal to vacate the IFR. Because the Biological Opinion had concluded that the existing fishery management measures would jeopardize the western DPS, the district court held that vacatur of the more protective IFR would be “impermissible under the ESA.” *Id.* at 11 (ER 11). The court also declined to dictate any particular proceedings following completion of the EIS, explaining that the results of the prospective EIS are “unknowable” and that it would “defer[] to the agency’s expertise as to how the process should develop.” *Id.* at 9 (ER 9).

SUMMARY OF ARGUMENT

NMFS must insure that its actions are not likely to jeopardize an endangered species or adversely modify its critical habitat. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. Here, NMFS concluded that authorizing fishing under existing management

measures would result in a continued, unacceptably high risk of extinction for the western DPS. Contrary to Plaintiffs' assertions, NMFS did not substitute recovery criteria for a jeopardy analysis, and it did not take action based on threats that will affect only a sub-region of the entire DPS. Rather, NMFS supported its overall jeopardy conclusion, in part, by explaining that the steep population declines in particular sub-regions would jeopardize the DPS as a whole.

NMFS properly applied its own regulations in making this determination. It could not insure that the authorization of fisheries was not likely to "appreciably reduce" the likelihood of survival and recovery of the western DPS, thus justifying a jeopardy determination, and it correctly assessed the potential for adverse modification of critical habitat. NMFS also properly supported its reliance on the chronic nutritional stress theory, showing how authorizing fishing under the existing management measures would remove prey from Steller sea lion habitat. Finally, it articulated a rational basis for the fisheries restrictions that it proposed in the RPA to mitigate those effects.

NMFS has been ordered to prepare an EIS pursuant to the district court's injunction. Because NMFS will carry out that work according to the applicable regulations, the district court acted within its discretion by declining to dictate any additional terms for the agency's remand. Moreover, it is still unknown whether NMFS's conclusions might change as it evaluates the IFR's environmental impact on

remand in light of the best available scientific information. Therefore, whatever the Court may decide on the ESA issues that Plaintiffs present, it should leave the IFR in place until that process is complete.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. See *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 521 (9th Cir. 2010). This Court must affirm unless it finds that the Biological Opinion and IFR were "arbitrary, capricious, an abuse of discretion," or otherwise contrary to the ESA. *Id.* (quoting 5 U.S.C. § 706(2)(A)); see also *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 865 (9th Cir. 2004). A Biological Opinion should be upheld if it articulates a "rational connection between the facts found and the decision made." *Gifford Pinchot*, 378 F.3d at 1065. In particular, it is not the Court's role to "act as a panel of scientists" that instructs an agency "how to validate its hypotheses" or "chooses among scientific studies." *Lands Council v. McNair*, 537 F.3d 981, 988 (9th Cir. 2008) (en banc); see *Trout Unlimited v. Lohn*, 559 F.3d 946, 956 (9th Cir. 2009).

This Court reviews the district court's grant of an injunction, and the terms of the injunction, for abuse of discretion. "In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). That discretion is not unlimited; "an injunction must be narrowly tailored to give only the relief to which the plaintiffs are

entitled.” *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990); *see Stormans Inc. v. Selecky*, 571 F.3d 960, 990 (9th Cir. 2009).

ARGUMENT

I. IN THE BIOLOGICAL OPINION, NMFS MADE APPROPRIATE USE OF THE RECOVERY PLAN CRITERIA.

Although Plaintiffs’ brief does not begin with this issue, a central question in this case is the role of the Recovery Plan in evaluating jeopardy, adverse modification, and reasonable and prudent alternatives. In the Biological Opinion, NMFS emphasized demographic data that was important to the team that produced the 2008 Recovery Plan. *See, e.g.*, BiOp at xxii-xxvi, 331, 337, 340 (ER 915-19, 1267, 1273, 1276). NMFS referred to the Recovery Plan criteria – criteria that Plaintiffs do not contest – in support of its jeopardy and adverse modification determinations. It will simplify analysis of the remaining issues to discuss, as a threshold matter, why this was appropriate.

NMFS made two relevant determinations here: first, that the existing fishery management measures were likely to jeopardize the continued existence of the western DPS, and second, that they were likely to adversely modify its critical habitat. *See* BiOp at 345, 348 (ER 1281, 1284); *see also id.* at 348 (ER 1284) (noting that because the jeopardy assessment was “habitat-based . . . the two assessments are very similar in this case”). Either of these determinations alone is sufficient to require an RPA and

to support the IFR here. This Court has plainly held that both require consideration of recovery. *See Gifford Pinchot*, 378 F.3d at 1069-70 (discussing an adverse modification determination); *NWF*, 524 F.3d at 932-33 (discussing a jeopardy determination).

“Critical habitat” is that habitat “essential to the conservation” of a species; “conservation” is defined in turn to include the *improvement* of a species’ status to the point that ESA protections are no longer necessary. 16 U.S.C. § 1532. In *Gifford Pinchot*, the consulting agency found that a proposed action would not adversely modify critical habitat on the grounds that the action would not threaten the species’ survival, but it did not consider the effects of the proposed action on recovery prospects. The court held that “the ESA was enacted not merely to forestall the extinction of a species (*i.e.*, promote a species’ survival), but to allow a species to recover to the point where it may be delisted.” *Gifford Pinchot*, 378 F.3d at 1070. Although the ESA’s goals of protecting “conservation and survival” are “distinct,” this court held that the requirement to avoid adverse modification is intended to promote *both* goals. *Id.* The Court in *Gifford Pinchot* faulted the agency for describing an existing recovery plan, but failing to analyze it as part of its adverse modification discussion. *Id.* at 1073.

An action will “jeopardize” a species if it “would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival *and recovery*” of that

species. 50 C.F.R. § 402.02. “Recovery” means “improvement . . . to the point at which listing is no longer appropriate.” 50 C.F.R. § 402.02. In *NWF*, the court described “survival and recovery” as “*intertwined needs* that must both be considered in a jeopardy analysis.” *NWF*, 524 F.3d at 932 (emphasis added). An action may be considered to “jeopardize the survival” of a species, within the meaning of the ESA, even if the action would permit survival but place recovery “far out of reach.” *Id.* at 931.

Referring to the preamble to NMFS’s consultation regulations, the court in *NWF* referred to a “*joint* survival and recovery concept.” *Id.* at 932 (emphasis supplied by the court). That same preamble stated that survival and recovery “are generally considered together in analyzing effects” of a proposed action, and acknowledged that “it is difficult to draw clear-cut distinctions.” *See* “Interagency Cooperation – Endangered Species Act of 1973,” 51 Fed. Reg. 19,926, 19,934 (June 3, 1986). However, “significant impairment of recovery efforts . . . which rise to the level of ‘jeopardizing’ the ‘continued existence’ of a listed species can also be the basis for issuing a ‘jeopardy’ opinion.” *Id.* at 19,934. Further describing this connection, NMFS’s Consultation Handbook describes “survival” as “the condition in which a

species continues to exist into the future *while retaining the potential for recovery.*”

Consultation Handbook at 4-37 (SER 157) (emphasis added).⁴

Although Plaintiffs profess to recognize the concept that NMFS may consider recovery, *see* Pl. Br. at 38, 41, they also attempt to establish a bright line between NMFS’s “broad affirmative duties” to plan for recovery under ESA Section 4 and its narrow, “action-specific” duties to conduct a jeopardy analysis under Section 7. *See* Pl. Br. at 38-39. This view is directly contrary to the “joint concept” of intertwined survival and recovery that this Court has approved. *See Gifford Pinchot*, 378 F.3d at 1070 (interpreting Section 7 obligations in light of Section 4’s conservation purpose). Section 7 requires NMFS to evaluate whether a proposed action will reduce a species’ likelihood of recovery. Nothing in the ESA or the case law prohibits NMFS from doing so with reference to criteria specifically designed to measure whether that species is recovering sufficiently to meet ESA conservation goals, even if those criteria were first developed in a Section 4 recovery plan. Like the Recovery Plan criteria at issue here, recovery criteria may often refer to fundamental demographic trends that,

⁴ The Consultation Handbook, a guidance document jointly prepared by NMFS and the U.S. Fish & Wildlife Service, is a regulatory interpretation of the ESA that is entitled to deference. *See Pacific Coast Fed. of Fishermen’s Assn’s v. Gutierrez*, 606 F. Supp. 2d 1195, 1209 (E.D. Cal. 2008) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)).

as a matter of conservation biology, must be considered as a basic metric of the overall health of a species. *See* BiOp at 334 (ER 1270).

Overall, the case law and applicable regulatory interpretations establish that NMFS may not *ignore* recovery in a jeopardy analysis, and also may not *substitute* recovery for a jeopardy analysis. *See NWF*, 524 F.3d at 932, 936. But between these poles, survival and recovery interact as “distinct, *though complementary*, goals.” *Gifford Pinchot*, 378 F.3d at 1070. The degree to which survival and recovery are related for a particular species is for NMFS to determine based on the administrative record. *See Salmon Spawning & Recovery Alliance v. NMFS*, 342 Fed. Appx. 336, 339 (9th Cir. 2009); *Aluminum Co. of Am. v. Bonneville Power Adm’n*, 175 F.3d 1156, 1162 n.6 (9th Cir. 1999).

The Biological Opinion here satisfies the ESA’s requirements by treating survival and recovery as “intertwined.” Citing the Recovery Plan, the Biological Opinion stated that “significant declines over large areas (two sub-regions or more) could indicate the extinction risk may still be high for the western DPS as a whole.” BiOp at 331 (ER 1267); *see also* Recovery Plan (SER 81). This threat to recovery relates directly to the risk of the species’ survival: “[T]he extirpation of Steller sea lions in the western Aleutians would be significant to the western DPS, and is expected to appreciably reduce the likelihood of both their survival and recovery in the wild.” BiOp at 345 (ER 1281). Put more bluntly in the Recovery Plan, “the

western DPS must increase to a substantially larger population size to avoid significant extinction risk.” Recovery Plan (SER 77).

NMFS did note the “lack of a robust recovery” among the western DPS as a whole, and Plaintiffs claim that this observation betrays NMFS’s true purpose in the Biological Opinion. *See* Pl. Br. at 36, 39-40. But the Biological Opinion shows how the “lack of a robust recovery” coincides with “significant declines in abundance” in key areas, *see* BiOp at 264 (ER 1200), and cites extirpation and extinction risks for the western DPS. *See* BiOp at 340 (ER 1276) (population models that accounted for regional population structure “resulted in extirpated regions while those built as one population resulted in high likelihoods of extinction for the western DPS.”); *see also* Recovery Plan (SER 77) (noting that even if the western DPS maintains steady growth for 20 years, the 100-year extinction risk remains unacceptably high).

The record does not support Plaintiffs’ claims that this analysis used “recovery criteria as a surrogate” for the jeopardy and adverse modification standards. For example, NMFS did not require the fisheries to “insure the recovery of listed species,” *see* Pl. Br. at 38, but only sought to insure “that the fisheries *are not impeding* the ability of Steller sea lions to recover.” BiOp at 332 (ER 1268). This accurately tracks the regulatory standard, which requires a jeopardy finding for actions that “would be expected . . . to reduce appreciably the likelihood of . . . recovery” of that species. 50 C.F.R. § 402.02. It also tracks this Court’s statement in *Gifford Pinchot* that “adverse

modification” could occur “when sufficient critical habitat is lost so as to threaten a species’ recovery.” *See* 378 F.3d at 1070. Plaintiffs highlight another passage in the Biological Opinion to argue that NMFS sought to “ensure future recovery” of the western DPS, *see* Pl. Br. at 39, but this statement immediately followed the observation that “the fisheries, as authorized . . . have a likelihood of negatively impacting the ability of western DPS of Steller sea lions to *survive* and recover.” BiOp at 329-330 (ER 1265-66) (emphasis added).

The problem that NMFS identified is not simply that “downlisting and delisting criteria . . . have not yet been satisfied.” *See* Pl. Br. at 36, *see also id.* at 44. The Recovery Plan criteria are backward-looking, and cannot be met until the western DPS has shown demonstrated sustained, observed progress. In contrast, the jeopardy and adverse modification questions require NMFS to look into the future and make predictions about the possible effects of different measures on the species’ prospective likelihood of survival and recovery. It is reasonable for NMFS to make predictions based on the same fundamental demographic trend data that it will ultimately also use to assess recovery. *See, e.g., National Wildlife Fed. v. U.S. Army Corps of Engineers*, 384 F.3d 1163, 1174 (9th Cir. 2004) (noting that deference to agency expertise is necessary “especially in the context of prediction”). Presently, that data shows a “risk of eventual extirpation of Steller sea lions in the western Aleutians.” BiOp at 345 (ER 1281). To the extent that extirpation risk is exacerbated by existing

management measures, those measures “increase the risk of extinction by their effect on Steller sea lion numbers.” *Id.* NMFS therefore sought to “promote the recovery” of Steller sea lions, *see* Pl. Br. at 40, in order “to eliminate the existing risk of overall extinction.” BiOp at 345 (ER 1281).

This does not mean that every action within the range of a listed species must boost recovery chances. *See* Pl. Br. at 38-39. A neutral action that neither jeopardizes nor assists the recovery of a listed species will not violate Section 7(a)(2).⁵ But each species and each proposed action is different. NMFS must use “a great deal of predictive judgment” to assess the potential impact of an action on recovery, *see Salmon Spawning*, 342 Fed. Appx. at 339, and recovery plan criteria can assist such predictions. Here, NMFS concluded that the western DPS faces active threats to survival and recovery, and predicted that existing fishery management measures would deepen that jeopardy until the species makes some progress toward recovery. The Court should defer to that judgment. *See Trout Unlimited*, 559 F.3d at 959.

⁵ For example, in this Biological Opinion, NMFS concluded that authorizing the existing management measures would not jeopardize the humpback whale, even though it made no findings that the fisheries would assist that species’ recovery. *See* BiOp at 349-51 (ER 1285-87).

II. NMFS USED DATA FROM SUB-REGIONS OF THE WESTERN DPS APPROPRIATELY IN DRAWING CONCLUSIONS ABOUT THE ENTIRE DPS.

Plaintiffs claim that by focusing on the recovery criteria concerning improvement in each sub-region, NMFS “unlawfully premised its jeopardy and adverse modification findings on the status of sea lions in the western and central Aleutian subregions.” Pl. Br. at 27; *see id.* at 23-35. But nothing in the ESA precludes the examination of populations at a sub-regional level to inform those determinations. Here, NMFS correctly evaluated sub-regional populations of the Steller sea lion in light of established criteria for assessing the entire western DPS, and consistently linked its sub-regional analysis to the species as a whole.

A. The Recovery Plan and the Biological Opinion each explained why sub-regional analysis was important.

NMFS agrees that its jeopardy and adverse modification determinations must be made based upon the effects of an action on the listed DPS as a whole. *See* 50 C.F.R. § 402.02 (definition of “jeopardize”); Consultation Handbook at 4-36, 4-41 (SER 157, 162). An action may “jeopardize” a species’ survival or recovery “by reducing the reproduction, numbers, or *distribution*” of that species. 50 C.F.R. § 402.02 (emphasis added). As Plaintiffs concede, NMFS may make a jeopardy determination on that basis as long as it supports its conclusion with appropriate findings in the record. *See Wild Fish Conservancy*, 628 F.3d at 529; Pl. Br. at 29. This Court has also upheld this principle, noting that a focus on the large scale “can mask

multiple site-specific impacts that, when aggregated, do pose a significant risk to a species.” *Gifford Pinchot*, 378 F.3d at 1075 (citing *Pac. Coast Fed. of Fishermen’s Ass’ns v. NMFS*, 265 F.3d 1028, 1035-37 (9th Cir. 2001)). More generally, the Court has consistently deferred to agencies, including NMFS, on questions of scientific methodology and the interpretation of evidence. *See, e.g., Lands Council*, 537 F.3d at 992-94; *Trout Unlimited*, 559 F.3d at 956.⁶

The Recovery Plan made broad recovery throughout the range of the western DPS, including an absence of significant sub-regional declines, a central element of the criteria for downlisting or delisting of the species. *See* Recovery Plan at xiii (SER 15). The interdisciplinary Recovery Team identified at least two important reasons why NMFS must focus on sub-regional populations.

First, based on available scientific data, the Recovery Plan identified “uncertainty about the threats and their impacts.” *See* Recovery Plan (SER 81). Even as some sub-regional populations of the western DPS population were growing, the

⁶ Plaintiffs cite *Rock Creek Alliance v. U.S. Fish & Wildlife Serv.*, 663 F.3d 439, 443 (9th Cir. 2011), to suggest that this Court has limited the use that an agency may make of local population data. In *Rock Creek*, NMFS concluded that impacts to a local population would not jeopardize the species, and the Court upheld NMFS’s judgments about the relationship between site-specific, local impacts and the viability of the species as a whole. *Id.* Here, the administrative record led to a different conclusion: that impacts to local populations would jeopardize the western DPS. As in *Rock Creek*, the Court “should not second-guess” that judgment. *Id.* (citing *Gifford Pinchot*, 378 F.3d at 1075).

Recovery Plan could not rule out underlying threats. *Id.* “[A] substantial decline of any two adjacent sub-areas would indicate an active threat that was not predicted,” but that “could indicate that extinction risk may still be high.” *Id.* Such a threat might not remain contained to a sub-region but might “spread to other areas.” *Id.* This uncertainty is therefore associated with “a high likelihood of extinction” for the western DPS in population models. *Id.*

Second, even if threats are generally known, “principles of conservation biology” also demand consideration of “genetics, demographics, [and] population redundancy.” Recovery Plan (SER 67). Specifically, it is important to maintain “widespread populations that are independently viable because it is less likely that future singular threats will endanger widely separated multiple populations than a single population with the same abundance.” *Id.* This increases a species’ resiliency, allowing it “to persist through normal population variations, as well as through unexpected catastrophic events.” *Id.*

The Biological Opinion cited both of these concerns in connecting the decline of the western Aleutian population to its jeopardy determination for the entire DPS. *See generally* BiOp chapter 7 (ER 1263 *et. seq.*), *id.* at 331, 333-34, 337, 340, 344-45 (ER 1267, 1269-70, 1273, 1276, 1280-81). NMFS’s method was to identify how a particular management regime might cause changes in the viability of populations of animals, and then to draw conclusions about how those changes in population

viability would affect the species as a whole. BiOp at 277 (ER 1213). NMFS clearly followed this approach in reaching its final conclusion about jeopardy to the western DPS, explaining its reasoning at each step. Several of the sub-regions were demonstrating recovery, increasing their long-term viability and diminishing the risk of extinction of the western DPS. *Id.* at 334 (ER 1270). Since declines were still observed in the western and central Aleutian islands, however, NMFS focused its attention (and, ultimately, the IFR) on those areas in order to “diminish *further* the risk of extinction.” *Id.* (emphasis added); *see also id.* at 342 (ER 1278).

B. Plaintiffs cannot show that NMFS’s sub-regional analysis introduced any error into its conclusions about the entire DPS.

Plaintiffs’ most basic attack on this approach is to suggest that the species as a whole is healthy, despite the declining viability of the western Aleutian population. *See* Pl. Br. at 32-33. The record presents a less rosy picture. As Plaintiffs point out, the record shows a statistically significant rate of decline in the western Aleutian sub-region, and a flat trend in the adjacent central Aleutian sub-region. *See* Pl. Br. at 34; BiOp at 332 (ER 1268). These declines caused the western DPS to fail the Recovery Plan criteria for increasing *overall* abundance: “There was no statistically significant increase in the western DPS as a whole between 2000 and 2008, and no increase at all between 2004 and 2008. BiOp at 332 (ER 1268).

Moreover, NMFS must consider “reproduction” and “distribution” of a species in making a jeopardy determination. 50 C.F.R. § 402.02. The overall stable trend in population abundance for the western DPS as a whole masks local variability, even outside the western Aleutian sub-region. *See, e.g., id.* at 81 (ER 1017) (citing BiOp Table 3.1b (ER 1516)). Measured from 2000 to 2008, and also from 2005 to 2009, there was a steep decline in both non-pup and pup populations in the western Aleutian Island sub-region, and some decline in the central Aleutian island sub-region. *See* BiOp Tables 3.2, 5.8 (ER 1518, 1588); *see also id.* at 80-84 (ER 1016-20). The western Aleutian Islands sub-region population declined by 40% from 2000 to 2008. *See id.* at xxvi [RULE 2083]. NMFS attributed those trends to declines in reproduction, relying heavily on natality data among sub-regional populations in its jeopardy determination. *Id.* at 83-84, 288-89 (ER 1019-20, 1224-25). If trends were to “continue at current rates,” Steller sea lions could be extirpated from both the western and central Aleutian Island sub-regions – making it impossible for the species to meet the established recovery criteria. *Id.* at 337 (ER 1273).

Plaintiffs highlight the Biological Opinion’s statement that “if it were not for” this sub-region, “it could be argued that the western DPS of Steller sea lions were moving toward recovery.” BiOp at 337 (ER 1273). But the western Aleutian sub-region is still part of the western DPS, and sub-regional analysis helped NMFS identify *why* the species as a whole was not showing any statistically significant

recovery. By this analysis, NMFS did in fact “predict[] what effect the continuation of the fisheries . . . would have on the wDPS as a whole.” Pl. Br. at 28. As noted above, NMFS clearly stated in its “jeopardy” conclusions: “The proposed action, which is a continuation of past and current Federal and parallel fisheries,” carries “the risk of eventual extirpation of Steller sea lions in the western Aleutians” and “increase[s] the risk of extinction by their effect on Steller sea lion numbers.” BiOp at 345 (ER 1281); *see also id.* at 331 (ER 1267) (“it is not clear to what extent the western DPS could withstand further fragmentation of breeding populations”).

Plaintiffs also claim that a quantitative projection of overall western DPS population was necessary to support NMFS’s conclusion. *See* Pl. Br. at 28. The ESA does not require such a projection, and NMFS does not believe one was necessary to its jeopardy determination. *See* BiOp at 327 (ER 1263).⁷ Instead, NMFS described its reasoning qualitatively, *see supra* pp. 27-28, 33-34, and provided the results of population models intended to predict extinction risk. Those models “indicate[d] that the western Steller sea lions have a high probability of declining to a low level if they are considered as a single homogenous population.” *Id.* at 95 (ER 1031). Models that

⁷ A NMFS expert believed that a quantitative projection would cause “considerable controversy.” Pl. Br. at 28. This was not for any reason that undermines the Biological Opinion, but because “the trend data available through pup counts and non-pup counts appears to be more reliable.” *See* Draft BiOp at 100 (ER 1974). The Court must defer to NMFS’s conclusion about the reliability of scientific evidence. *See Lands Council*, 537 F.3d at 988.

considered sub-regions were “more optimistic,” but “the Recovery Plan was charged with addressing the recovery of the entire species.” *Id.*

NMFS was also under no obligation to provide “detailed explanations showing how the population in a subregion is biologically or ecologically significant.” Pl. Br. at 29-31. That showing may be necessary to identify a distinct population segment that constitutes a separate “species” for ESA purposes. *See Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1143 (9th Cir. 2007). Here, NMFS did not analyze sub-regions and “Rookery Cluster Areas” (RCAs) as distinct population segments, but only as a tool to study population trends “at finer scales than previously considered.” BiOp at 82 (ER 1018). The RCAs were established based on demographic similarities, similarities in trend data, location of existing survey region boundaries, and the location of fishery area management boundaries. *Id.*; *see also* ER 2090 (e-mail proposing RCAs based on “geography, bathymetry, ‘natural’ separation . . . and management zones”).⁸ There is nothing arbitrary or capricious about adopting “geographically convenient” boundaries, based in part upon the boundaries of the

⁸ The record reflects that NMFS employees had internal discussions regarding the use of RCAs, and that drafting an explanation of RCAs was on the “to-do” list for the team preparing the Biological Opinion. *See* ER 1967-71 (cited in Pl. Br. at 30). But there is nothing in the record to suggest that RCAs were “artificially selected” to achieve a certain result, Pl. Br. at 26, or that the team did not understand the RCA concept, *see id.* at 30. The concept was fully explained in the final Biological Opinion, *see* BiOp at 82 (ER 1018); and in the record, *see* “Steller sea lion fishery and oceanographic analysis” (NMFS 2009) at 1 (SER 185).

very fisheries management zones at issue, to support the analysis and comparison of complex population data. This is precisely the type of judgment about methodology that is within the agency's expertise and discretion.

Ultimately, Plaintiffs choose to conclude that because the western DPS has a stable population across its range, the continuation of existing management measures cannot jeopardize it. NMFS was justified, and at the very least was not arbitrary or capricious, in noting the significant variability between different areas, and supporting its conclusions with a more nuanced examination of a variety of spatial scales and time frames.

C. NMFS's precautionary approach is permissible under the ESA.

It is important to recognize here that NMFS took a deliberately precautionary approach, drawing conservative conclusions in favor of species conservation. This precautionary posture is required by the statute, as the Supreme Court has recognized. *See TVA*, 437 U.S. at 194 (describing the ESA as “affording endangered species the highest of priorities,” representing a policy of “institutionalized caution”). Under the ESA, NMFS must utilize the “best scientific and commercial data available,” even if that data still leaves the agency to act “in the face of uncertainty.” *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1164 (9th Cir. 2010); *see also Brower v. Evans*, 257 F.3d 1058, 1070 (9th Cir. 2001); *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988)). The definition of “jeopardy” itself permits a jeopardy finding upon less-than-

definitive causation, requiring an agency to determine whether an action “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood” of survival or recovery. 50 C.F.R. § 402.02. The consulting agency need not prove that a proposed action will harm a listed species; instead, the action agency must “insure” that its proposed action “is *not* likely to jeopardize” the species or adversely modify its habitat. 16 U.S.C. § 1536(a)(2).

These instructions permeate NMFS’s inquiry into the complex ecological risks to the survival of the Steller sea lion. As noted in the Recovery Plan, the degree to which an extinction risk is acceptable “is a policy decision . . . [T]here is no accepted agency policy regarding extinction risk choices.” Recovery Plan (SER 73). In the Biological Opinion, NMFS acknowledged the uncertainty of the scientific evidence both explicitly, *see, e.g.*, BiOp at 345 (ER 1281), and also implicitly through the use of terms that Plaintiffs criticize such as “plausible,” “could indicate,” and “belief.” Because the best available science may not be able to conclusively prove the harm or lack of harm that commercial fisheries pose to the species, *see* BiOp at 300 (ER 1236), NMFS considered it prudent to err on the side of conclusions that would lead to more protection for the endangered Steller sea lion rather than less protection. *See id.* at 278 (ER 1214). In NMFS’s view, this is “consistent with the precautionary approach and purposes of the ESA and similar direction from the U.S. Congress and the courts.” *Id.*

This discussion in the Biological Opinion is important because it helps to explain “why [NMFS] exercised its discretion in a particular manner.” Pl. Br. at 34. Steller sea lions are a long-lived species that responds to multiple, interacting stressors which have changed over time – including several significant changes in recent decades. *See* BiOp at 341-43 (ER 1277-79). These factors increase the complexity of the jeopardy analysis and reduce the certainty with which NMFS can state its conclusions. Scientific uncertainty, however, is not fatal to the Biological Opinion; NMFS’s statutory role is to make its best judgments about the evidence and state a reasonable basis for its conclusions. Where it does so, the Court should support NMFS against Plaintiffs’ second-guessing. *See Trout Unlimited*, 559 F.3d at 956; *Aluminum Co.*, 175 F.3d at 1162.

III. NMFS CORRECTLY APPLIED THE RELEVANT STANDARDS AND REGULATIONS.

A. NMFS reasonably determined that existing management measures would “appreciably reduce” the species’ likelihood of recovery.

Plaintiffs claim that NMFS did not address whether authorization of the fisheries would “appreciably reduce” the western DPS’s likelihood of survival and recovery, because it did not identify a “tipping point” beyond which recovery will be impossible. *See* Pl. Br. at 42-45. As the district court found, this argument rests on a misreading of the applicable precedent. In *Wild Fish Conservancy*, the consulting agency

found “no jeopardy,” even though it was considering an action that would exacerbate a decline in species population. The Court reasoned that unless it identified a “tipping point” at which jeopardy begins, the agency could not know when the adverse effects of the proposed action would drive the species past that point. *See* 628 F.3d at 527. But the Court did not announce a new rule that a “tipping point” is a prerequisite for any jeopardy or adverse modification determination. *Id.*; *see also* Op. at 26 n.132 (ER 39-40) (citing other cases in which no “tipping point” analysis was required); *cf. Home Builders Ass’n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010) (holding that an agency may designate critical habitat for species conservation even “without determining exactly when conservation will be complete”).

In any event, such a rule would not apply to the present case, where NMFS found that western Aleutian, central Aleutian, and species-wide population trends indicate that the western DPS *already* faces jeopardy, with an unacceptably high risk of extinction. If unabated, those trends could result in extirpation of Steller sea lions in two sub-regions⁹ and “reduce the likelihood of [the western DPS’s] survival and recovery in the wild.” *See* BiOp at 345 (ER 1281). In a jeopardy analysis based on the “likelihood” of survival and recovery – that is, the *risk* of extinction – an action that

⁹ Even if a “tipping point” were required, the extirpation of two sub-regional populations plainly satisfies that requirement, as it would put recovery out of reach according to the Recovery Plan criteria.

increases risk to the species may warrant a jeopardy determination, even if it has not yet declined to a “tipping point” at which recovery is no longer possible. *See NWF*, 524 F.3d at 930 (holding that an agency may not “take action that *deepens* the jeopardy” (emphasis added)).

Plaintiffs also dispute the time frame that NMFS used to assess whether the authorization of fishing under existing management measures would “appreciably reduce” the species’ likelihood of survival or recovery. They appear to claim that NMFS was required to use 2003 conditions as a baseline, and compare the 2003-2008 fisheries management measures against that baseline, ignoring the overall history of the sea lion’s decline. *See Pl. Br.* at 44; *see also id.* at 37-38.

This is incorrect for two reasons. First, many factors are relevant to the baseline against which predictions about an action must be assessed. The environmental baseline for jeopardy analysis includes “*past and ongoing* human and natural factors leading to the current status of the species.” Consultation Handbook at 4-22 (SER 143) (emphasis added). This Court has recognized that manipulating the time frame for a baseline can change the jeopardy analysis, allowing a species’ “slow slide into oblivion,” even if “each step on the path to destruction is sufficiently modest.” *NWF*, 524 F.3d at 930. Thus, NMFS does not consider the baseline to be a “line[] defined in time,” but rather a broader analysis of “base conditions . . . within an action area.” BiOp at 141 (ER 1077).

Second, NMFS did examine the 2003-2008 data as one of several relevant time frames. It stated that “the factors that contributed to the [earlier] more rapid declines may not be the most significant stressors now operating,” and it compiled extensive data from population studies conducted from 2000 to 2008. *See id.* at 80-85, 335 (ER 1016-21, 1271); *id.* Figs. 3.1a-c (ER 1515-17). Among other things, that data showed that population growth decreased (or declines increased) in most areas during 2004-2008 as compared to 2000-2004. *See id.* Fig. 3.1a. (ER 1515). In at least some instances, NMFS used pre-2000 data, but adjusted it to account for changed conditions. *See* Recovery Plan (SER 75) (when conducting population modeling, “the population trajectory of previous time periods was modified to reflect the mitigation measures currently in place”). Finally, NMFS recognized the historical decline in Steller sea lion numbers and attempted to place fisheries competition in that historical context. *See, e.g.,* BiOp at 335-39 (ER 1271-75).¹⁰ NMFS used all of this information

¹⁰ Although it discussed the Steller sea lion’s historical decline, NMFS also followed an internal suggestion that it should not overemphasize that decline. *See* Pl. Br. at 44 (citing ER 1985). The final Biological Opinion acknowledges that the overall western DPS population has “stabilized” and lacked any statistically significant trend from 2000 to 2008. *See* BiOp at xxiii, 286, 332 (ER 916, 1222, 1268).

In support of a different argument, Plaintiffs criticize NMFS’s district court brief for suggesting that historical declines “were correlated with fishing effort.” *See* Pl. Br. at 56-57. Although NMFS stands by its statement, review in this Court is not based on district court briefing, but on the Biological Opinion and the administrative record itself.

about the past effects of fisheries to make predictions about the possible future effects that fisheries would have under the same management measures.

Like their sub-region argument, in which Plaintiffs seek to restrict NMFS to one measure of species health, Plaintiffs here would restrict NMFS to one baseline period for evaluating the further potential harm from fisheries authorization. Instead, the Biological Opinion as a whole demonstrates that NMFS looked at a range of time frames and conditions, and weighed the relevance of each, to assess the likely effects of the proposed authorization. This was an appropriate application of the “appreciable reduction” standard.

B. NMFS applied the correct standard to determine that authorizing the fisheries would adversely modify critical habitat.

Plaintiffs next claim that NMFS made its adverse modification determination without finding that fishing under existing management measures would “appreciably diminish” the value of designated Steller sea lion critical habitat, as required by 50 C.F.R. § 402.02. *See* Pl. Br. at 47-48. The flaw in this argument is that the regulatory definition of “destruction or adverse modification,” which contains the “appreciably diminish” standard, is no longer valid.

Plaintiffs concede that an agency is not bound by a regulation “invalidated by a court.” Pl. Br. at 47. In *Gifford Pinchot*, this Court found that NMFS’s definition of “adverse modification” was inconsistent with the ESA because it failed adequately to

consider recovery prospects. 378 F.3d at 1069-71. Although the Court did not directly consider the “appreciably diminish” standard, it did characterize the definition as a “regulation that we now hold was impermissible.” *Id.* at 1071. Deciding the same issue, the Fifth Circuit was even more explicit, holding that “the regulation’s definition of the destruction/adverse modification standard” is “facially invalid.” *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001) (cited in *Gifford Pinchot*, 378 F.3d at 1069).

In 2005, after the *Gifford Pinchot* decision, NMFS issued a memorandum to address these rulings. The memorandum interpreted *Gifford Pinchot* as invalidating the regulatory definition of “destruction or adverse modification,” and required the use of a different standard based directly upon the provisions of the ESA. *See* Memorandum of Nov. 7, 2005 (SER ____-____). Under that standard, the “adverse modification” inquiry asks “how the . . . habitat qualities essential to the conservation of the species are likely to be affected and, in turn, how that will influence the function” of critical habitat. *Id.* This, as Plaintiffs acknowledge, is the standard that NMFS applied in the Biological Opinion. *See, e.g.*, BiOp at 328 (ER 1264) (explaining why this standard was used); *id.* at 346-48 (ER 1282-84) (applying the standard); Pl. Br. at 48.

Even if the Court were to hold that, despite *Gifford Pinchot*, NMFS should have applied the “appreciably diminish” standard, the district court was correct that NMFS’s analysis here “closely resembles” that standard and that the Biological

Opinion satisfied it. *See* Op. at 29-30 (ER 42-43). NMFS concluded that if the fisheries were authorized under existing management measures, “it is unlikely that designated critical habitat within the western DPS of the Steller sea lion will remain functional (or retain the ability to become functional) to serve its intended conservation role.” BiOp at 348 (ER 1284). Clearly, if a functional habitat ceases to be functional – or degrades beyond even the possibility of improvement to a functional level – that constitutes an “appreciable” diminishment in the value of that habitat.

C. NMFS made appropriate use of the “nutritional stress” theory.

In the Biological Opinion, NMFS analyzed nutritional stress as an “indirect effect” of commercial fisheries. *See* BiOp at 197-98 (ER 1133-34). Plaintiffs claim that, if the effects of fisheries are considered “indirect,” NMFS cannot find jeopardy or adverse modification unless it states that the fisheries are “reasonably certain” to cause nutritional stress. Pl. Br. at 45 (citing 50 C.F.R. § 402.02). As this brief has discussed, NMFS did not claim scientific certainty for its conclusion that the fisheries’ removal of prey causes nutritional stress.

This does not undermine the Biological Opinion, because the phrase “reasonably certain” does not apply to this scientific question. The uncertainty inherent in “indirect effects” is not scientific uncertainty – the ecological effect of an action on a species – but rather uncertainty about whether certain *actions* will occur.

The paradigmatic “indirect effect” within the meaning of 50 C.F.R. § 402.02 is a third-party action that is induced by the federal agency action under consideration. For example, indirect effects of highway construction might include the effects “from future private development that would result from construction of the highway.” *See* 51 Fed. Reg. at 19,932; *see also* Consultation Handbook at 4-29 to 4-30 (characterizing changes in private development or water consumption resulting from the agency action as “indirect effects” and considering “species response” separately). The effects of a third party’s activities must therefore be analyzed if “the third-parties at issue [are] *reasonably certain* to take action given the government agency’s action.” *Nat. Wildlife Fed. v. FEMA*, 345 F. Supp. 2d 1151, 1176 n.23 (W.D.Wash. 2004) (emphasis added).

Here, in contrast, there is no question that if NMFS were to authorize fishing under the pre-existing management measures – including fishing within the sea lion’s designated critical habitat – such fishing would occur. Plaintiffs have harvested sea lion prey from critical habitat under those measures, *see, e.g.*, BiOp at 202-212 and Tables (ER 1138-48, 1581-88), and they seek to continue that activity.¹¹ Rather, the

¹¹ In this sense, the effects of fisheries, which would be directly authorized by the proposed federal action, could be considered “direct effects” of that action. The Biological Opinion did not cite the regulatory definition of the term “indirect effects,” and used that phrase in a scientific rather than a legal sense. Because the agency record characterizes nutritional stress as an indirect effect of fishery activity, however, NMFS defends it on that basis here.

question for NMFS was a scientific one: What would the ecological consequences of that activity be?

In answering this question, NMFS must merely “support its conclusions . . . with studies that the agency, in its expertise, deems reliable,” and must “explain the conclusions it has drawn.” *Lands Council*, 537 F.3d at 993-94. The Court has directly applied this standard in assessing jeopardy and adverse modification determinations under the ESA. *See, e.g., Salmon Spanning*, 342 Fed. Appx. at 339. As this court has stated *en banc*, “[w]e are to be ‘most deferential’ when the agency is making predictions, within its area of special expertise, at the frontiers of science.” *Lands Council*, 537 F.3d at 993 (internal quotations omitted); *see also Trout Unlimited*, 559 F.3d at 956 (upholding NMFS’s listing decision despite “no scientific consensus” on a key point). Particularly in light of the precautionary nature of the ESA, *see supra* pp. 38-40, the ESA is satisfied if NMFS concludes, given the weight of the evidence in the record and despite a context of scientific uncertainty, that the fisheries will cause nutritional stress.

Contrary to Plaintiffs’ assertions, *see* Pl. Br. at 46-47, NMFS made such a determination here: It found that “the relative intensity of groundfish fisheries as currently prosecuted within critical habitat is negatively associated with Steller sea lion population response since 2000.” BiOp at 348 (ER 1284). NMFS explained why it connected fishery activity to nutritional stress among at least some sub-regional

populations of Steller sea lions, *see id.* Section 3.1.14; *id.* at 118-19, 264-65 (ER 1054-55, 1200-01); and thus to declining populations in some sub-regions and the lack of robust overall population growth, *see id.* at 265, 337, 342-45 (ER 1201, 1273, 1278-81). This conclusion was based on the “weight of the evidence,” *see id.* at 345 (ER 1281), and is supported by NMFS’s other statements in the record. *See* BiOp at 264 (ER 1200) (“nutritional stress cannot be dismissed as an important factor”); *id.* at 265 (ER 1201) (“it is likely that [chronic nutritional stress] var[ies] geographically and temporally within the range of the western DPS”); *id.* at 337 (ER 1273) (“fisheries removals of prey likely have exacerbated natural changes in carrying capacity, especially in some sub-regions”).¹² There was no need for NMFS to use any magic words in making this determination; the path of its reasoning is evident in the Biological Opinion itself.

IV. THE RPA IS CONSISTENT WITH THE ESA AND THE EVIDENCE IN THE RECORD.

Because NMFS could not insure that authorizing the fisheries under existing management measures was not likely to jeopardize the western DPS and adversely modify its critical habitat, it was required to propose a reasonable and prudent alternative to authorization. NMFS set as its objective in the RPA to “conserve the

¹² According to a NMFS internal e-mail cited in Pl. Br. at 46, some data are not consistent with the nutritional stress theory, but that “natality data” included in the Biological Opinion “supports nutritional stress.” ER 1964.

overall forage availability for Steller sea lions and the value of critical habitat by limiting harvest of important prey species in the times and areas where Steller sea lions forage.” BiOp at 357-58 (ER 1293-94). NMFS reviewed the available evidence for its jeopardy determination and identified “Performance Standards” for the RPA tied to that evidence. *Id.* at 358-59 (ER 1294-95). It then described how the measures for each fishery management area that would meet those performance standards, and explained how those measures would “lead to higher survival and natality rates,” in the sub-regions facing the steepest declines. *Id.* at 360-72, 373-74 (ER 1296-1308, 1309-10). This explanation satisfies the Consultation Handbook’s direction that NMFS explain each component of the RPA and how it will avoid the identified jeopardy. *See* Pl. Br. at 52-53 (citing Consultation Handbook at 4-43).¹³ This RPA was consistent with the ESA and fully supported by the evidence in the record.

A. NMFS reasonably selected an RPA that would help the western DPS make progress toward recovery.

One of the key premises of the Biological Opinion is that population growth for the western DPS as a whole, and the absence of significant declines in sub-regions, are necessary to reduce risks of extirpation and extinction to an acceptable level. *See*,

¹³ Even if the Court were to find that this explanation was inadequate for one of the management zones, Plaintiffs are incorrect that the entire RPA would have to be set aside. In the case they cite, *Pacific Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1095 (9th Cir. 2005), this Court simply identified the flaw in the RPA and remanded to the district court for an appropriate injunctive remedy.

e.g., BiOp at 331-34, 337, 340, 345 (ER 1267-70, 1273, 1276, 1281). Even if the western DPS is not demonstrating any statistically significant growth or decline over the last decade studied, the current historically low overall population of the species decreases genetic diversity and resilience to threats. *Id.* at 334 (ER 1270). Because the westernmost portions of the range of the western DPS are holding back the species' overall growth, and because declines in some areas are reducing the species' survival and recovery prospects, NMFS chose an RPA focused on those sub-regions.

This is consistent with each of the statutory and regulatory authorities governing reasonable and prudent alternatives that Plaintiffs cite. Those authorities require that NMFS propose a reasonable and prudent alternative that would not violate Section 7(a)(2) by causing jeopardy or adverse modification, and that can be carried out by the agency, *see* 16 U.S.C. § 1536(b)(3)(A); that can be implemented in a manner consistent with the scope of the fisheries authorization, that is within NMFS's legal authority, and that would avoid the proposed action's likelihood of jeopardy or adverse modification, *see* 50 C.F.R. § 402.02; and that takes into account any beneficial action that NMFS has already taken, *see* 50 C.F.R. § 402.14(g)(8). *See also* Pl. Br. at 51. Plaintiffs do not claim that the RPA here fails to meet any of these conditions.

Instead, Plaintiffs complain that the RPA does *more* than these conditions require, and that an alternative less favorable to Steller sea lions (and more favorable to fisheries) would also have been acceptable under the ESA. *See* Pl. Br. at 51-52.

Even if this were the case, Plaintiffs cite no requirement, and there is none, that limits NMFS to the most permissive management measures that will avoid jeopardy to the western DPS. NMFS “was not even required to pick the best alternative or the one that would most effectively protect the [relevant species] from jeopardy . . . [NMFS] need only have adopted a final RPA which complied with the jeopardy standard and which could be implemented by the agency.” *Sw. Ctr. for Biological Diversity v. Bureau of Reclamation*, 143 F.3d 515 (9th Cir. 1998); *see also Aluminum Co.*, 175 F.3d at 1162. The RPA here meets that standard.

Additionally, this brief has already established that in both jeopardy and adverse modification determinations, NMFS must at least consider a proposed action’s effect on a species’ recovery prospects. *See supra* pp. 24-25. This is also true of reasonable and prudent alternatives, which are designed to insure that agencies avoid causing jeopardy and adverse modification, and thus to support the likelihood of the species’ survival and recovery in the wild. NMFS, in the passages of the Biological Opinion that Plaintiffs cite, clearly placed the need for recovery within a context of insuring the survival of the western DPS. *See, e.g.*, BiOp at 342 (ER 1278) (focusing on “two sub-areas” as part of the question whether the fisheries “are likely to jeopardize the continued existence of the western DPS”); *id.* at 345 (ER 1281) (concluding that conservation measures are required “that will promote the recovery of SSLs sufficient to eliminate the existing risk of overall extinction”).

B. NMFS did not ignore relevant information in the record, but made reasonable judgments on the basis of uncertain data.

Drawing two isolated discussions from the Biological Opinion, Plaintiffs attempt to argue that NMFS ignored relevant data. First, Plaintiffs claim that NMFS used forage ratios “to determine which areas should . . . be closed to fishing,” but that the areas affected by the IFR have higher forage ratios than other areas. Pl. Br. at 54. This is simply a mischaracterization of the record. The Biological Opinion’s discussion of forage ratios does not suggest that fishing management measures are based exclusively or even primarily on forage ratios, and it explains why “forage ratios are very difficult to interpret.” *See* BiOp at 297-299 (ER 1233-35); *see also id.* at 291 (ER 1227) (“it is clear that a high forage ratio alone is not sufficient for understanding trends in abundance”). NMFS justified restrictions in the western and central Aleutian islands not on the basis of forage ratios, but because those sub-regions have experienced the greatest population declines, and that “sea lion vital rates and existing fishing practices indicate the likelihood of a compromised prey field.” *Id.* at 358 (ER 1294); *see also* 75 Fed. Reg. at 77,538 (ER 73) (“The RPA was developed based on performance standards that address the effects of the groundfish fisheries and *the population status* and foraging behavior of Steller sea lions” (emphasis added)).

NMFS also did not “ignore inter-species predation,” Pl. Br. at 54-55, but rather concluded that attempts to predict multi-species predation are too speculative and

unreliable to justify allowing fisheries to remove more sea lion prey. NMFS reviewed several studies that attempted a dynamic or multi-species food web model, concluding that they were “statistically and methodologically insufficient to either confirm or strengthen particular hypotheses,” and that their effectiveness in making predictions and testing hypotheses is currently “extremely uncertain.” BiOp at 243 (ER 1179). NMFS explicitly noted the trade-off between “the advantage of greater biological realism via multispecies information and the disadvantage of increased uncertainty due to additional model complexity.” *Id.* at 362 (ER 1298). NMFS therefore “relied on the results of the single species models to a greater extent than the multispecies models.” *Id.* Plaintiffs believe NMFS should have weighed these studies differently, but this Court cannot “act as a panel of scientists” that instructs NMFS how to “choose[] among scientific studies.” *Lands Council*, 537 F.3d at 988. NMFS clearly did not ignore the existence of multi-species models and gave a reasoned explanation for why it chose to rely more heavily on simpler models.

C. Plaintiffs’ attack on a single data point, the differential growth rates in two geographic areas, is misplaced.

Among the extensive analysis of critical habitat in the Biological Opinion, Plaintiffs seize upon one data point that NMFS used as an “illustrative” example of the potential impact of fisheries operating in critical habitat. BiOp at 293 (ER 1229). NMFS noted that prior to the IFR, fishing in critical habitat east of 178°W longitude

was prohibited, and populations in those areas “have generally been stable or increasing slightly since 2000.” *Id.* at 293 (ER 1229). Fishing in critical habitat west of that line was permitted, and populations in those areas “have continued to decline.” *Id.* NMFS also highlighted the fact that 178°W longitude is not biologically significant, *see id.*, suggesting that biological factors do not account for this difference.

Plaintiffs admit that a correlation exists between mackerel fishing and Steller sea lion population decline. *See* Pl. Br. at 57-58 (acknowledging that population has continued to decline where some mackerel fishing in habitat is permitted, and that sea lion population has increased in areas where there is no mackerel fishing). NMFS used this correlation as an illustrative example, noting that it is consistent with its overall theory of prey competition. BiOp at 293 (ER 1229). In describing this example, however, NMFS did not claim that it proved “the relative population trends were *caused* by varying fishing restrictions.” Pl. Br. at 58

Finally, NMFS did not ignore evidence of killer whale predation in using this example to illustrate its theory. Plaintiffs’ sole piece of evidence on this issue is an internal NMFS e-mail indicating a difference of opinion between NMFS scientists. *See* Pl. Br. at 58-59 (citing ER 1967). But in the final Biological Opinion, NMFS provided an extensive discussion of the data concerning killer whale predation, *see* BiOp at 166-73 (ER 1102-09), including the killer whale population study that Plaintiffs cite, *see id.* at 171 (ER 1107). Although it concluded that “life-history

changes in the western stock of Steller sea lions through time argue against the hypothesis that killer whale predation alone was responsible for the decline,” *id.* at 173 (ER 1109), NMFS clearly identified killer whale predation as one of the interrelated factors that may have contributed to declines or limited the rate of recovery in different sub-regions of the western DPS. *See id.* at 342 (ER 1278). Plaintiffs’ belief that this factor should have weighed more heavily in the Biological Opinion does not demonstrate that fisheries competition is not also a relevant factor, or that it was arbitrary or capricious for NMFS to conclude that the RPA would reduce the overall extinction risk for the western DPS.

V. IF A REMEDY IS REQUIRED UNDER THE ESA, REMAND WITHOUT VACATUR IS THE MOST APPROPRIATE REMEDY.

For the reasons discussed in the prior sections, this Court should affirm the district court’s holdings that the Biological Opinion and the IFR satisfied the requirements of the ESA. If, however, this Court finds error in the District Court’s holdings, it should leave the IFR in place during any remand to the district court or to NMFS.

Although plaintiffs are correct that vacatur is ordinarily the remedy for an APA violation, it is well established that “when equity demands, the regulation can be left in place while the agency follows the necessary procedures.” *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995); *see California Communities Against Toxics v.*

EPA, ___ F.3d ___, 2012 WL 3038520 (9th Cir., July 26, 2012). In *Idaho Farm Bureau*, for example, this Court found that “saving a snail warrants judicial restraint,” and so declined to vacate the rule pending remand. See *California Communities*, ___ F.3d at ___ (citing *Idaho Farm Bureau*, 58 F.3d at 1406); cf. *TVA v. Hill*, 437 U.S. at 194 (recognizing the precautionary nature of the ESA). A similar concern for the survival of the Steller sea lion warrants the same restraint here.

As this Court recently held in *California Communities Against Toxics*, in determining whether an agency action should be vacated, the Court must consider “how serious the agency’s errors are,” *id.* at *2, and “must balance these errors against the consequences” of imposing vacatur as a remedy. *Id.* at *3. At this point, the agency’s errors, if any, are unknown. Even if the Court finds that the Biological Opinion did not adequately consider certain evidence or make its findings based on the proper standard, it is possible that proceedings on remand could correct those errors but still arrive at the conclusion that the fisheries jeopardize the western DPS and that the IFR is necessary to protect it.

The same considerations apply even if this Court finds that NMFS cannot cure any errors on remand to the agency, and that additional injunctive relief is therefore required. A flawed regulation may still remain in place “when equity demands,” see *Idaho Farm Bureau*, 58 F.3d 1392, and in this case, the Court does not have the necessary briefing before it to weigh those equities. Because the parties have

concentrated on the merits here, Plaintiffs attempt to argue the equities of remedy in two pages. *See* Pl. Br. at 64-66. To accept those arguments, the Court would have to weigh disputed financial information¹⁴ and rule upon the very scientific controversies that are at the heart of the Biological Opinion. Plaintiffs essentially ask the Court, in considering remedy, to directly overrule NMFS's jeopardy determination and find that the existing fisheries management measures will cause no jeopardy to the western DPS. *See* Pl. Br. at 66. If the equities must be weighed to determine an appropriate remedy, that task should be entrusted to the special competency of the district court, on additional briefing and a more developed record, and the IFR should remain in place as a precautionary measure.

¹⁴ On p. 64 of their brief, Plaintiffs overstate their potential losses in several ways. First, the analysis they cite was not based on the final RPA. After that analysis was complete, the RPA was modified in ways that mitigate fishery losses. *See* EA at 10-145 (ER 874). The IFR was based upon the modified RPA.

Second, Plaintiffs state only the worst-case "hypothetical" estimates from the EA as if they were established losses. *See, e.g.,* EA at 10-134 (ER 863) (highest estimates assume a scenario in which fleets are completely unable to shift to other fisheries).

Finally, Plaintiffs present the total potential loss *and* its component parts as if they were separate and cumulative. *Compare* Br. at 64 ("the IFR is resulting in annual losses of: \$83.2 million in total earnings . . . \$61 million in gross fishing revenue . . . *and* \$34-44 million in trawl catcher/processor sector gross revenues") *with* EA at xiii (ER 543) (noting potential gross fishing revenue losses of \$44 to \$61 million, *including* \$34-44 million in the trawl catcher/processor sector); *and id.* at 10-134 (ER 863) (showing a worst-case loss of \$39 million to the trawl catcher/processor sector *as part of* a worst-case total gross earnings loss of \$83.2 million).

VI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY LIMITING ITS INJUNCTIVE REMEDY UNDER NEPA.

Finally, Plaintiffs allege that the district court abused its discretion by declining to order that NMFS “issue a record of decision (‘ROD’)” after completing the court-ordered EIS. Br. at 59-60. Plaintiffs are not entitled to this relief.

An injunction “must be narrowly tailored . . . to remedy only the specific harms shown by the plaintiffs, rather than to enjoin all possible breaches of the law.” *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004) (internal quotation omitted). Here, Plaintiffs showed that NMFS violated NEPA by failing to prepare an EIS, and the district court properly tailored its injunctive relief to that violation, ordering NMFS to do so.

NEPA’s implementing regulations require an agency, when it decides to undertake a major federal action, to prepare a “concise public record of decision.” 40 C.F.R. § 1505.2. That ROD is generally published together with, or within a specified period after, the adoption of an EIS. *See* 40 C.F.R. § 1506.10. NOAA administrative orders also generally require that an EIS contain a ROD. *See* NOAA Administrative Order 216-6 at § 5.04b.1(h) (May 20, 1999) (ER 2158). These regulations explain why the district court was *not* required to issue an injunction requiring NMFS to include a ROD: Given the order that NMFS prepare an EIS, no further injunctive relief is necessary to direct the agency’s proceedings. Agencies are “entitled to a presumption

of regularity,” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), which encompasses the presumption that they will follow their own regulations. *Gifford Pinchot*, 387 F.3d at 1071-72; *see also Conner*, 848 F.2d at 1448 (“We cannot assume that government agencies will not comply with their NEPA obligations in later stages of development.”). Plaintiffs have not shown that NMFS is likely, on remand, to violate the regulations governing the EIS process. By ordering an EIS and no more, the district court tailored the injunction to the violation found.

For the district court, or for this Court, to impose additional requirements would also risk treading on the agency’s prerogative to reach an independent conclusion based upon the new, presently unknown administrative record for the EIS. To the extent Plaintiff’s demand for “a new decision on the Steller sea lion protection measures,” Pl. Br. at 59-60, means anything other than a ROD – for example, if it means a new regulatory action to modify the IFR – that request runs afoul of the rule that NEPA “does not mandate particular substantive results, but instead imposes only procedural requirements.” *Cold Mountain v. Garber*, 375 F.3d 884, 892 (2004) (quoting *Laguna Greenbelt, Inc. v. U.S. Dep’t of Transp.*, 42 F.3d 517, 523 (9th Cir. 1994)).

NMFS must prepare an EIS according to the procedures established by regulation, but NEPA does not require it to reach a different substantive result. The district court properly declined to vacate the IFR pending remand, so that rule remains in effect. The EIS that NMFS prepares on remand may result in changes to

the IFR, but it may not. Until the EIS is completed, it is premature to say whether the IFR should remain in place or be superseded by some new agency decision. The district court therefore properly declined to “predict or otherwise dictate the results” of NMFS’ NEPA analysis on remand. Order at 9 (ER 9).

Finally, Plaintiffs argue that NMFS must be ordered to produce a new rule on remand because they have commissioned a *post hoc* review of the Biological Opinion concluding that NMFS was wrong. Pl. Br. at 61-62. This argument has nothing to do with the relief that the district court ordered based on the existing administrative record for the EA, but instead appears to be an attempt to put before the Court additional opposing scientific views that NMFS has not even had the opportunity to consider yet. The Court may not grant relief on the basis of such information. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971); *see, e.g., Geo-Energy Partners-1983 Ltd. v. Salazar*, 613 F.3d 946, 959 (9th Cir. 2010) (protecting an agency’s interest in “applying its expertise, correcting its own errors, [and] making a proper record” in the first instance). On remand, NMFS intends to carry out its duty to consider the best available scientific information in the record for the new EIS. The existence of new information does not entitle Plaintiffs to a pre-emptive ruling that their proffered new evidence will, at the end of that process, necessitate any particular action.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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90-8-8-07091/1

STATEMENT OF RELATED CASES

To the knowledge of the Federal Appellees, this case is not related to any other case before the Court.

CERTIFICATES

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

This brief contains 15,277 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). The enlargement provision of Circuit Rule 28-4 applies to this brief, as it is the Federal Appellees' single response to a joint brief. It has been prepared in a 14-point Garamond font that meets the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6).

/s/ J. David Gunter II

J. David Gunter II

9th Circuit Case Number(s)

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