Nos. 12-35201, 12-35203, 12-35204
(consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ALASKA, *et al.*

Appellants,

v.

JANE LUBCHENCO, *et al.*,

Appellees,

and

OCEANA, INC. and GREENPEACE, INC.,

Intervenor-Appellees.

On Appeal from the United States District Court
for the District of Alaska

RESPONSE BRIEF OF INTERVENOR-APPELLEES OCEANA, INC. AND GREENPEACE, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Oceana, Inc. and Greenpeace, Inc. hereby state that neither of them has any parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTRODUCTION

In these consolidated cases, Appellants challenge the United States District Court for the District of Alaska's decision upholding (i) the National Marine Fisheries Service's ("NMFS") conclusion that large-scale groundfish fisheries in the North Pacific may cause jeopardy to the endangered Western Population of Steller sea lions and adverse modification of the species' designated critical habitat, and (ii) the agency's adoption of protective measures designed to reduce competition for prey in areas where the Western Population continues to decline substantially. For the reasons discussed below, the Court should affirm the judgment of the district court.

Each year, NMFS authorizes industrial fisheries that remove more than four billion pounds of fish from the Bering Sea/Aleutian Islands and Gulf of Alaska ecosystems. These ecosystems are vibrant places, and large trawl and longline vessels take important prey, including Atka mackerel, Pacific cod, and pollock, that would be available as food for other animals like endangered Steller sea lions. As the Atka mackerel, Pacific cod, and pollock fisheries grew—by 7,500 percent from the 1950s through the 1990s—the populations of prey fish species were reduced by more than 50 percent and the population of Steller sea lions plummeted by nearly 90 percent. *See infra* pp. 6-7, 10-12. This Steller sea lion decline led to protection under the Endangered Species Act ("ESA") and the coincident

obligation for NMFS to "insure" that any fishery authorization is not likely to jeopardize the continued existence of Steller sea lions or result in adverse modification of the species' critical habitat. *See* 16 U.S.C. § 1536(a)(2). Even after initial ESA protections were instituted in the early 1990s, the large industrial fisheries continued and sea lion declines persisted.

Protection measures implemented in the early 2000s appear to have stemmed some of the decline, but the Western Population of Steller sea lions (sometimes also called the "western distinct population segment" or "wDPS") has not recovered and, in fact, continues to decline precipitously in the westernmost areas of its range. From 2000 to 2008, it is estimated that the population in the western Aleutian Islands declined by more than 45 percent. VI-ER-1269, 1296, VII-ER-1588 (BiOp). During that same period, the Atka mackerel and Pacific cod fisheries removed nearly 194 million pounds of fish from the Aleutian Islands each year, 65 percent of which was removed from the western and central Aleutians alone. *See* VII-ER-1582 (Biological Opinion) ("BiOp") (providing annual catch statistics for the western and central Aleutians, areas 542 and 543 respectively, expressed in metric tons ("mt"); 1 mt is equivalent to 2,206.4 pounds).

In addition to the significant problem in the western Aleutian Islands, decline has been observed in the adjacent central Aleutians, and the record also demonstrates a larger problem with low natality, or birth rate, that threatens the

entire Western Population. Reflecting the current science, NMFS appropriately determined in 2010 that the law required changes to the management of the Atka mackerel and Pacific cod fisheries that could be contributing to this continuing decline and failure to recover. Though stronger action to address the larger natality problem and declines in other regions was appropriate, NMFS was required at least to implement new protection measures for the Atka mackerel and Pacific cod fisheries in the western and central Aleutian Islands.

In their zeal to continue the fishing business as usual, Appellants attempt to create controversy where none exists. They argue that NMFS acted arbitrarily in continuing to abide by its longstanding conclusion that removing billions of pounds of fish each year may contribute to the sharp decline and ongoing failure to recover of an endangered species dependent on the same fish for prey. Appellants also argue that clearly established scientific criteria for recovery of the endangered species are inappropriate considerations when identifying necessary protections and that NMFS should simply allow the species to be extirpated from large portions of its range. In fact, the protection measures implemented by the agency target the least-protected regions and appropriately aim to maintain viable sub-populations, which are critical to the survival and recovery of the Western Population as a whole. These actions constitute the minimum steps that the agency could have taken to prevent jeopardy and adverse modification. Accordingly, it

was reasonable for NMFS to conclude both that the North Pacific fisheries were not in compliance with the ESA and that the ESA compelled the fishery management changes instituted by the agency.

BACKGROUND

I. The North Pacific Ocean Ecosystem.

The North Pacific, including the Bering Sea, Aleutian Islands, and the Gulf of Alaska, contains some of the most productive waters on Earth and supports rich and diverse marine life, including marine mammals, marine birds, and fish. I-ISER-212, 215, 217 (Ecosystem Report).[1] The Aleutian Islands are at the heart of this vibrant region.

The Aleutians are a chain of islands extending thousands of miles westward from the Alaska Peninsula. They are characterized by "straits and passes" as well as the "peaks of steep submarine volcanoes . . . surrounded by narrow shelves descending to a steep dropoff." I-ISER-188 (Aleutian Islands Fishery Ecosystem Plan) ("AIFEP"). This particular confluence creates a "highly productive" ecosystem that supports "richness in marine life includ[ing] large concentrations of seabirds, marine mammals, sessile invertebrates, and fish." *Id.* "The Aleutian Island ecosystem is home or seasonal host to Steller sea lions, northern fur and

[1] Citations to Intervenor-Appellees' Supplemental Excerpts of Record are designated as "ISER" and use the format recommended in the Ninth Circuit Court of Appeals Practice Guide. Christopher A. Goelz & Meredith J. Watts, Federal Ninth Circuit Civil Appellate Practice 8:334.1 (2012).

harbor seals, sea otters and many whale and porpoise species" as well as "approximately thirty species of breeding seabirds." I-ISER-190-92 (AIFEP).

As in all ecosystems, this richness and diversity is built on an interconnected food web that sustains the whole. Fish, particularly Atka mackerel, Pacific cod, and pollock, play a vital role in sustaining this food web for other animal species including humans. *See, e.g.*, I-ISER-192b (AIFEP) ("Atka mackerel are commercially and energetically important in the [Aleutian Islands], with food web connections to many other key species."). By removing large quantities of fish, humans are affecting this balance. I-ISER-189 (AIFEP) ("Changes in human populations and their marine-related activities often resulted in direct or indirect changes in marine animal populations."); *see also* I-ISER-193a ("Fishing activities comprise some of the largest sources of human influence on the [Aleutian Island] ecosystem."). Careful management of commercial fisheries in the Aleutian Islands is particularly important because the "ecosystem is complex, and the least predictable of" those in the North Pacific. I-ISER-186 (AIFEP).

A. Steller Sea Lions.

As top predators, Steller sea lions play a particularly important role in the North Pacific ecosystem. Their range "extends around the North Pacific Ocean rim from northern Japan . . . to California." V-ER-1011 (BiOp). Based on DNA analysis and other factors, NMFS separates the U.S. population of Steller sea lions

into a Western Population, consisting of animals located in the Gulf of Alaska and the Bering Sea/Aleutian Islands, and an Eastern Population, consisting of animals east of Cape Suckling—primarily Southeast Alaska and the west coast of North America. V-ER-1012-13 (BiOp).

The worldwide abundance of Steller sea lions was estimated to be approximately 240,000 to 300,000 animals from the 1950s through the late 1970s, with the vast majority located within the range of what is now recognized as the Western Population. V-ER-1014, 1016 (BiOp). Since that time, the Western Population nearly collapsed, with sea lion counts declining by almost 90 percent and some of the largest population declines occurring in the Aleutian Islands. V-ER-1017, VI-ER-1392 (BiOp).

This decline coincided with two significant human impacts in the region: the shooting of large numbers of sea lions and the rise of industrial fishing. "[A]pproximately 45,000 Steller sea lions were intentionally killed in Alaska during state-sanctioned commercial harvest and predator control programs" prior to 1972. IX-ER-2109 (Recovery Plan). After 1972, a "large but unknown number of Steller sea lions are believed to have been shot throughout the state" as a result of an exemption in the Marine Mammal Protection Act allowing fisherman to shoot them to prevent interference "with commercial fishing operations." *Id.* That exemption was eliminated when sea lions were protected under the ESA.

Even after intentional killing stopped in 1990, however, Steller sea lion declines persisted. The ongoing decline and failure to recover has consistently been attributed, at least in part, to competition with newly developed large-scale industrial fisheries. Though these fisheries began in both the Bering Sea/Aleutian Islands and Gulf of Alaska in the 1960s, catches near major sea lion resting areas ("haulouts") and breeding areas ("rookeries") were not common until the 1980s. VI-ER-1199 (BiOp). As fishing intensified within Steller sea lion habitat, the sea lion population declined significantly. V-ER-916 (BiOp). In the early 1990s, Steller sea lions were listed as threatened under the ESA, critical habitat was designated, and modest restrictions on pollock trawls were implemented. Despite these measures, the Western Population continued to decline at an alarming rate of 5 percent annually throughout the 1990s. V-ER-1016 (BiOp).

The Western Population was at its smallest size, an estimated 42,500 animals, in 2000. V-ER-1016; VI-ER-1268 (BiOp). Some sea lion protection measures were adopted in 1999 through 2001 and, in the early 2000s, certain vital characteristics of the Western Population showed temporary signs of improvement. From 2000 to 2004, the overall Western Population grew at a modest 3 percent annually. VI-ER-1223 (BiOp). This brief time from 2000 to 2004 is the "the only increasing period observed since trend information began to be collected in the 1970s." *Id*.

Unfortunately, the small overall uptick in Western Population numbers observed from 2000 to 2004 proved to be temporary. Initial, incomplete data from 2006 to 2007 indicated that the population was at best stable and might be declining overall. VI-ER-1266 (BiOp). Data from 2008 confirmed this conclusion. From 2000 to 2008, the period of population data on which the challenged Biological Opinion in based, the Western Population is estimated to have grown slightly, though this estimate is not statistically significant and not, therefore, different from zero.[2]

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[2] The Biological Opinion states that the Western Population "is growing at a rate of 1.4% per year, although this rate of increase is not statistically significant," VI-ER-1310 (BiOp), meaning the rate is "not significantly different than zero." V-ER-1016 (BiOp). Three independent studies "found the 2000 to 2008 trend to be uncertain and not statistically significant." VI-ER-1268 (BiOp); *see also* I-ISER-47 (Natality Presentation). In the interest of accuracy, this brief identifies when a cited population figure is not statistically significant. Appellants, however, do not indicate consistently when the population growth rate they cite is not statistically significant. *See* Appellants' Br. 12, 33 (citing the population's overall 1.4 percent growth rate from 2000-2008 without noting that the calculated growth rate was not statistically significant, *i.e.*, not different from zero).

Further, without acknowledging it, Appellants cite extra-record population data from 2011 that was not available to NMFS prior to issuance of the Biological Opinion in November of 2010. *See* Appellants' Br. 12, 12 n.3, 61-62, 65 (citing non-record population data from 2011 that post-dates issuance of the Biological Opinion). Such data is relevant only to the issue of relief, *see Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989), because it was not before NMFS at the time of the agency's decision in 2010 and, therefore, has no bearing on the merits of the underlying decisions challenged by Appellants. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, 499 F.3d 1108, 1117 (9th Cir. 2007) ("It is an established rule that 'the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.'"); *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555

Even as the decline in overall population numbers appeared to ease, troubling demographic signs persisted: birth rates remained prohibitively low across the entire Western Population and significant declines continued within sub-regions of the Western Population's range. VI-ER-1392; VII-ER-1522, 1588 (BiOp). The most severe decline was observed in the western Aleutian Islands, where the already greatly diminished non-pup (*i.e.*, juvenile and adult) population declined an additional 45 percent from 2000 to 2008. VI-ER-1269, 1296, VII-ER-1588 (BiOp). The same period also saw an 11 percent decline in the non-pup population of the central Aleutian Islands, VII-ER-1588, although this rate was not deemed to be scientifically significant. VI-ER-1269 (BiOp). These areas had been home to some of the Western Population's largest rookeries and historically supported "very large numbers of Steller sea lions," V-ER-1011 (BiOp); I-ISER-116 (Recovery Plan), and the decline there still shows no signs of abating. I-ISER-123-25 (Recovery Plan).

In stark contrast to the Western Population, the once relatively small Eastern Population of Steller sea lions has doubled since the 1970s and may be at a historical high. I-ISER-122 (Recovery Plan). Like sea lions in the Western Population, eastern sea lions eat groundfish—including pollock and Pacific cod. *Compare* V-ER-1039-40 (BiOp) *with* I-ISER-142 (Recovery Plan). Perhaps the

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(9th Cir. 1989) ("[J]udicial review of agency action is limited to review of the record on which the administrative decision was based.").

most important differences between these two distinct populations are that "[t]here is no directed fishery for the principal groundfish prey species within critical habitat in southeast Alaska" and "fishing with trawl gear in Southeast Alaska has been prohibited since 1995." VI-ER-1238 (BiOp); *see also* V-ER-931 (BiOp).

B. Large-Scale Industrial Fisheries.

The area inhabited by the Western Population is a heavily "fished ecosystem" from which huge quantities of fish—including Atka mackerel, Pacific cod, and walleye pollock—have been, and continue to be, caught. V-ER-921, 954, 956 (BiOp). These fish play important roles in the ecosystem, including as prey for Steller sea lions. V-ER-1039-40 (BiOp).

Atka mackerel, Pacific cod, and pollock are the focus of a massive fishery that, since the 1960s, has caught more than four billion pounds of fish per year. V-ER-1134; VI-ER-1277 (BiOp); I-ISER-41 (NOAA Press Release); *see also Greenpeace v. NMFS* ("*Greenpeace III*"), 106 F. Supp. 2d 1066, 1070 (W.D. Wash. 2000) (noting that from the 1950s to 1990s, "Alaska groundfish fisheries underwent a period of unprecedented growth[,] . . . increas[ing] from about 27,000 metric tons to 2.1 million metric tons, an increase of over 7,500 percent."). These fisheries are among the largest in the world. I-ISER-179 (*Science* article). In just the eastern Bering Sea alone, for example, catches have accounted for as much as

40 percent of all fish landings in the United States in a given year. I-ISER-212 (Ecosystem Report).

Many of the vessels that prosecute these fisheries are enormous, older factory trawlers, several of which operate under a cooperative agreement. IV-ER-740 (Environmental Assessment) ("EA") ("Atka mackerel and Pacific cod are targeted by large trawl catcher/processors . . . in the Aleutian Islands."); *see also* IV-ER-741 (EA) ("The seven [cooperative] vessels that target Atka mackerel and Pacific cod in the Aleutian Islands . . . are larger and older, with larger crews, and larger revenues and costs."). On average, the vessels in the cooperative agreement that target Atka mackerel and Pacific cod are 220 feet long and weigh 1,370 gross tons. IV-ER-741 (EA).[3] At this size, they are capable of removing huge quantities of fish. On average, the trawl boats remove more than 120 million pounds of Atka mackerel and more than 20 million pounds of Pacific cod each year. *See* IV-ER-747 (EA). This estimate does not include Pacific cod caught by longline and other gear types.

Such intense fishing "significantly reduces the spawning stock biomass from an 'unfished' level to a 'fished' level," meaning that fish populations are maintained at a level well below the historic norm. VI-ER-1217 (BiOp) (internal

[3] Most of these large vessels are homeported outside of Alaska, and most of the commercial licenses are held by residents of other states. *See* IV-ER-771-72 (EA). Moreover, much of the catch, especially of Atka mackerel, is exported "to countries around the globe." *See* I-ISER-193 (AIFEP).

references omitted). For example, as of 2009, fishery stocks in the North Pacific were projected to be at the following percentages of their non-fished levels: Aleutian Island Atka mackerel (41 percent), Aleutian Island pollock (30 percent), Gulf of Alaska pollock (33 percent), Bering Sea pollock (27 percent), Bering Sea/Aleutian Islands Pacific cod (36 percent), and Gulf of Alaska Pacific cod (51 percent). VII-ER-1587 (BiOp). In other words, there is 70 percent less pollock, for example, and nearly 60 percent less Atka mackerel in the Aleutian Islands than used to be available for Steller sea lions and other predators.

These removals can have significant effects on the marine ecosystem. "By design, fishing reduces the available biomass of target species[] . . . [and] large-scale removals of fish can reduce substantially the available stocks of target species, changing the relative abundance of different fish species in the ecosystem, and altering the prey base that is available for animals such as sea lions that feed on those same species of fish." I-ISER-77 (March 2010 Draft BiOp). In addition, fishing, especially trawling, can result in localized depletions of the stock, meaning that fishing substantially lowers the density of fish in a specific area, leaving less prey available in particular locations than would be predicted by an overall harvest rate.

Management measures to split the Aleutian Islands into three management zones (areas 541, 542, 543) were first enacted in 1993 over concerns that

concentrated fishing, particularly for Atka mackerel, could cause localized depletion of the fishery resources. V-ER-1131 (BiOp). Even following the broad division and efforts to disperse fishing effort, further analyses showed "a consistent and meaningful pattern of depletion due to fishing." I-ISER-250 (1999 Environmental Assessment). A recent study likewise found that the management measures in place prior to 2010 still allowed for localized depletion. *See* VI-ER-1172 (BiOp) ("[T]he low biomass and high movement rate of Atka mackerel at Amchitka Island suggest that the trawl exclusion is not effective at protecting Atka mackerel for Steller sea lions.").

The North Pacific fisheries are managed on a single-species basis, V-ER-965 (BiOp), meaning that annual catch limits are premised upon assumptions about maximizing catches of targeted fish species with "no explicit accounting for other consumers" of those fish (*e.g.*, sea lions) in the ecosystem. V-ER-972 (BiOp); *see also* I-ISER-225 (Goodman *et al.* 2002) (finding that "the current . . . system for groundfish management . . . makes only a slight adjustment for *possible* ecosystem needs" (emphasis in original)).[4] Widespread application of a single-species fishery management policy "cause[s] severe deterioration in ecosystem structure, in

[4] For this reason, determinations about whether the Atka mackerel and Pacific cod fisheries are "overfished or approaching an overfished condition," *see* Appellants' Br. 7, would be made solely based on the estimates of the fish stock' capacity to maintain maximum commercial catches and do not provide a relevant benchmark for impacts on the ecosystem or Steller sea lions.

particular the loss of top predator species," I-ISER-206 (Walters *et al*. 2005), such as Steller sea lions.

In addition to removing sea lion prey, trawl vessels have other effects on the marine ecosystem. All of the vessels targeting Atka mackerel and some of those targeting Pacific cod are large bottom trawlers. *See supra* p. 11. A bottom trawler catches entire aggregations of fish by dragging nets, which can be hundreds of feet wide, along the seafloor for several miles. In this process, heavy metal doors, cables, rollers, and the net "sweep[] along the seafloor," potentially causing "damage or removal of fragile biota used by fish as habitat and the potential reduction of habitat complexity, benthic biodiversity, and habitat suitability." IV-ER-702 (EA). "[T]he predominant direct effects caused by bottom trawling include smoothing of sediments, moving and turning of rocks and boulders, resuspension and mixing of sediments, removal of seagrasses, damage to corals and sponges, and damage or removal of epibenthic organisms." *Id.* As of the most recent analysis, "[t]he Atka mackerel fishery . . . resulted in greater habitat reductions than other groundfish fisheries in the Aleutian Islands." IV-ER-704-05 (EA). Thus, in addition to removing prey, these trawlers damage habitat for the fish left behind.

II. Initial Conservation Measures.

The early, unabated decline of Steller sea lions led a coalition of environmental organizations to petition NMFS to protect the population. In 1990, the agency issued an emergency interim rule listing the Steller sea lion as threatened pursuant to the ESA; NMFS issued a final rule to the same effect later that year. *See* 55 Fed. Reg. 12,645 (Apr. 5, 1990) (interim); 55 Fed. Reg. 49,204 (Nov. 26, 1990) (final). In its final listing decision, NMFS observed that "[s]ome data show a high negative correlation between the amount of walleye pollock caught and sea lion abundance trends in the eastern Aleutians and central Gulf of Alaska," suggesting that fishing "is a contributing factor in the decline." 55 Fed. Reg. at 49,208. The final listing also imposed limited sea lion protections that included a prohibition on shooting at or near sea lions and the establishment of a buffer zone of three nautical miles ("nm") around rookeries. *Id*. at 49,209.

As a consequence of the listing, NMFS undertook consultation pursuant to ESA section 7, 16 U.S.C. § 1536. Upon concluding that the North Pacific pollock fishery would "jeopardize the continued existence or recovery of the threatened Steller sea lion . . ., NMFS implemented emergency protections. *See* 56 Fed. Reg. 28,112, 28,112, 28,114-15 (June 19, 1991). Among those emergency protections was a ban on pollock trawls within 10 nm of 14 sea lion rookeries and a provision intended to disperse the fishery geographically. *Id*. at 28,113. NMFS premised the

emergency rules on data indicating that "sea lions associated with the four major rookeries . . . that have shown the steepest recent declines feed in or around . . . locations [that] have accounted for the majority of the pollock catch since 1987." *Id*. at 28,114. These emergency measures were followed by additional regulations intended to limit or disperse pollock trawl fishing. 57 Fed. Reg. 2,683 (Jan. 23, 1992).

Consistent with the ESA, NMFS in 1993 designated Steller sea lion "critical habitat"—*i.e.*, the physical and biological features of the habitat that are essential to the conservation of the species and that may require special management consideration or protection. *See* 16 U.S.C. §§ 1532(5), 1533(a)(3); 58 Fed. Reg. 45,269 (Aug. 27, 1993). Critical habitat for the Western Population includes a 20 nm buffer around all haulouts and rookeries, "as well as associated terrestrial, air, and aquatic zones, and three large offshore foraging areas." 50 C.F.R. § 226.202; *see also* VI-ER-1225, 1385 (BiOp). The core function of critical habitat for sea lions is to ensure adequate prey can be found near important rookeries and haulouts

because "[a]dequate food resources are an essential component of the Steller sea lion's aquatic habitat." 58 Fed. Reg. at 45,270.[5]

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

III. Litigation Leads to Important Conservation Measures.

In the face of the continuing loss of Steller sea lions from the Western Population, Greenpeace, American Oceans Campaign (a predecessor of Intervenor-Appellee Oceana), and Sierra Club initiated litigation in 1998 challenging NMFS's ongoing authorization of groundfish fisheries in the North Pacific. In the resulting decisions, the District Court for the Western District of Washington repeatedly found that NMFS was unlawfully authorizing ongoing commercial fishing in violation of the agency's ESA obligation to "insure" that it not authorize any actions likely to jeopardize Steller sea lions or adversely modify their critical

[5] The designation of critical habitat is not associated with automatic protections for such habitat; indeed, significant fishing within sea lion critical habitat continues today. VII-ER-1447-48 (BiOp); I-ISER-50-66 (Natality Presentation); VI-ER-1429 (BiOp). The designation does, however, obligate NMFS to ensure that its actions are not likely to modify that habitat adversely. 16 U.S.C. § 1536(a)(2).

habitat. In its first decision, the court affirmed the agency's conclusion that the fisheries posed a threat of jeopardy, based on evidence of competition between the Steller sea lion and the fisheries. *See Greenpeace v. NMFS*, 55 F. Supp.2d 1248, 1261-62 (W.D. Wash. 1999) ("*Greenpeace I*"). Several times over the course of three years, however, the court remanded decisions to NMFS because the agency had failed to demonstrate that it adopted measures adequate to protect Steller sea lions. *See, e.g.*, *id.* at 1267-69, 1277.

In 2000, the court enjoined all groundfish trawl fishing in designated sea lion critical habitat until the agency finally completed "a comprehensive opinion adequately addressing the full impact" of ongoing fishing authorizations in the North Pacific. *Greenpeace v. NMFS*, 80 F. Supp. 2d 1137, 1142-43, 1150 (W.D. Wash. 2000) ("*Greenpeace II*") (addressing merits); *Greenpeace III*, 106 F. Supp. 2d at 1080 (granting injunction).

The injunction remained in effect for several months until NMFS issued a comprehensive, fishery management plan-wide biological opinion. *Greenpeace v. NMFS*, 237 F. Supp. 2d 1181, 1186 (W.D. Wash. 2002) ("*Greenpeace IV*"). The 2000 biological opinion concluded, again, that NMFS's annual authorization of the groundfish fisheries pursuant to the North Pacific fishery management plans was likely to jeopardize endangered Steller sea lions and adversely modify their designated critical habitat. *Id*. This time, however, NMFS developed a reasonable

and prudent alternative to the existing plans that included substantially more protective measures for the sea lion population, including "the complete closure of two-thirds of Steller sea lion critical habitat to all fishing for pollock, Pacific cod, and Atka mackerel," as well as other measures intended to distribute fishing spatially and temporally. *Id.*

These protective measures were never fully implemented. A rider to a congressional appropriations bill delayed their implementation, *see* Consolidated Appropriations—Fiscal Year 2001, Pub. L. No. 106-554, § 209, 114 Stat 2763 (2000); *see also* I-ISER-179 (*Science* article), and ultimately led to more lenient measures that reopened substantial areas within sea lion critical habitat in the central and western Aleutian Islands to fishing for both Atka mackerel and Pacific cod. *See* I-ISER-231-32 (2001 Final SEIS); I-ISER-244-45 (2001 BiOp); I-ISER-89-90 (Steller Sea Lion Stock Assessment).

In an amended biological opinion, issued in 2001, NMFS concluded the more lenient fishery restrictions were sufficient to mitigate the threat of jeopardy from the fishery. *Greenpeace IV*, 237 F. Supp. 2d at 1186-87. The amended biological opinion was again challenged, and the court found that it arbitrarily failed to demonstrate the adequacy of the more lenient measures to protect sea lions. *Id.* at 1199, 1204. In 2003, NMFS issued a supplemental biological opinion that purported to address the shortcomings identified by *Greenpeace IV* but left in

place the less protective measures. *See* V-ER-941 (BiOp). The 2003 supplemental biological opinion was not subject to renewed challenge.

As a result of this period of judicial review, Steller sea lion conservation measures improved compared to the measures in place in the years before 1998.

IV. Re-Initiation of Consultation and Recovery Planning.

In October 2005, the North Pacific Fishery Management Council recommended that NMFS reinitiate ESA consultation on the effects of the federal authorization of groundfish fisheries on listed species. V-ER-937, 941 (BiOp). Consultation was formally reinitiated by the Protected Resources Division of NMFS in June 2006. V-ER-937 (BiOp).

Contemporaneous with the renewed consultation process, a team of scientific experts and community members developed a recovery plan for Steller sea lions. I-ISER-108 (Recovery Plan). Recovery planning, also required by the ESA, is independent from the consultation process. *See* 16 U.S.C. §§ 1533(f), 1536(a)(2). A recovery plan includes objective, measurable criteria against which the agency may assess an endangered species' progress toward recovery and potential for eventual de-listing. *See* 16 U.S.C. § 1533(f)(1)(B); I-ISER-157, 162 (Recovery Plan). A draft Steller sea lion recovery plan was released in March 2006; following peer and public review, a final Recovery Plan was issued in March

2008. I-ISER-97, 99 (Recovery Plan); *see also* 73 Fed. Reg. 11,872 (March 5, 2008).

According to the analysis underlying the Recovery Plan and based on the best available science, Steller sea lion recovery depends upon both (i) long-term, sustained growth in the overall Western Population and (ii) avoidance of localized declines in the individual sub-regions comprising the larger stock. I-ISER-172 (Recovery Plan). The Recovery Plan analyzes the key relationship between sub-regions and the larger Western Population, explaining that strong, widespread sub-populations counter the effects of deleterious gene mutations from inbreeding and allow the overall stock to persist both through normal population variations and from unexpected catastrophic events. I-ISER-158 (Recovery Plan). Healthy regional populations are also important because sub-region declines may indicate an uncontrolled threat that poses a high extinction risk to the larger Western Population. I-ISER-172 (Recovery Plan). For these reasons, the Recovery Plan identifies significant declines in adjacent sub-regions, or a particularly sharp decline in just one sub-region (50 percent or more), as threats to recovery. *See* I-ISER-173-74 (Recovery Plan); I-ISER-177 (Recovery Plan).

V. 2010 Biological Opinion: Jeopardy and Adverse Modification.

In November 2010, following a period of public review and comment, NMFS issued a Biological Opinion for the Bering Sea/Aleutian Island and Gulf of Alaska Fishery Management Plans. V-ER-893, 914 (BiOp). The final Biological Opinion concludes that ongoing federal authorization of the North Pacific fisheries is likely to "jeopardize the continued existence" of the Western Population of Steller sea lions and "adversely modify the designated critical habitat" of the species. VI-ER-1281, 1284 (BiOp).

The Biological Opinion's conclusion reflects the agency's long-standing and well-documented rationale that commercial fisheries adversely affect sea lions by competing with them for prey. The Biological Opinion observed that fishing has the potential to affect sea lions in several ways, including "overall ecosystem-wide reductions in prey biomass, local and temporal depletions of prey, and reduced quality (size, age and caloric value) of individual prey by selective removal of larger, older individuals." V-ER-1134 (BiOp). According to the Biological Opinion, fisheries may negatively affect prey availability over both the short- and long-term, with disproportionately severe impacts possible at a local scale owing to "localized depletions and spatial heterogeneity of prey habitat." VI-ER-1237 (BiOp).

In reaching these conclusions, NMFS acknowledged that "specific mechanisms related to competitive interactions" between sea lions and commercial fisheries are difficult to verify empirically. V-ER-924 (BiOp); *see also* VI-ER-1236 (BiOp) ("We acknowledge that the elusive cause-effect connection between the catch of fish in 'Boat A' and response of 'Steller sea lion B' will likely never be made."). Nonetheless, the agency considered substantial evidence that such a connection exists. For example, sea lion populations have fared better in some regions than others, and the areas of improvement coincide with areas where more protective measures have been implemented. VI-ER-1218, 1229, 1280, 1283-84 (BiOp). Conversely, in those areas where there are fewer fishing restrictions and where a high proportion of the total catch is removed within critical habitat—particularly the western and central Aleutians—population numbers continue to decline. *See, e.g.*, VI-ER-1229, 1274, 1283 (BiOp).

In addition, though NMFS did not make conclusive findings, it did identify one likely cause of the ongoing decline and failure to recover: nutritional stress leading to low birth rates (or natality). VI-ER-1295 (BiOp). According to the Biological Opinion, ongoing low numbers in the Western Population "are associated with decreased reproductive success[,] at least in some areas." V-ER-1028 (BiOp); *see also* VI-ER-1399, VII-ER-1522 (BiOp). Consistent with the fact that the Western Population inhabits a heavily fished ecosystem,

VI-ER-1277 (BiOp), nutritional stress is "the most reasonable explanation for the pattern of natality in the [Western Population]." V-ER-922 (BiOp).

Nutritional stress is defined as "the result of a species being unable to acquire adequate energy and nutrients from their prey resources." V-ER-1048 (BiOp). Nutritional stress may be manifested with "acute" symptoms ("e.g., emaciation, rapid mortality through starvation, large scale breeding failures") as well as "chronic" symptoms ("e.g., reduction in fecundity, reduced body size, higher juvenile and adult mortality, increased predation risk"). *Id*. These symptoms may not all be present; the body condition of animals can remain high while food resources are nonetheless declining and the animals suffer from chronic symptoms, like reduced natality. *Id*. (citing I-ISER-202-03 (Frid *et al.* 2006)).

The unique susceptibility of adult female Steller sea lions to nutritional stress is a consequence of the high energetic demands associated with reproduction. To take advantage of the small window of favorable weather, sea lions' pupping and mating seasons are both short and nearly contemporaneous: females give birth to a single pup sometime between late May and early July and then breed a mere eleven days later. V-ER-1025 (BiOp); I-ISER-116 (Recovery Plan). Following birth, a female must acquire sufficient fish prey to support both herself and, through lactation, her pup. V-ER-1042 (BiOp). This added demand may persist for as short as nine months or as long as three years. V-ER-1027

(BiOp). The metabolic requirements of a female that has given birth and then becomes pregnant again are increased even further, as such a female must support her young of the year, the developing fetus, and herself. V-ER-1042 (BiOp).

Under conditions of nutritional stress, females are less likely to get pregnant and less likely to have a successful birth. Based on counts of adults and pups, birth rates in the Western Population are estimated to be 36 percent lower than those observed in 1976, prior to the decline of the Western Population. IX-ER-2112 (Holmes *et al.* 2007); *see also* V-ER-1020-21 (BiOp). Thus, while the adult females that do give birth seem to pup healthy young, V-ER-1026 (BiOp), they are doing so much less often. Although the final Biological Opinion largely limits its conclusions on natality to the western and central Aleutians, it nonetheless recognizes reduced natality as "a primary driver" of the Western Population's ongoing endangered status. VI-ER-1276 (BiOp).

Ultimately, the Biological Opinion concluded that competition from the fisheries "is likely one component of an intricate suite of natural and anthropogenic factors affecting Steller sea lion numbers and reproduction." V-ER-930 (BiOp); *see also* I-ISER-49 (Natality Presentation). NMFS found that the weight of scientific evidence continued to support a connection between fisheries and Steller sea lion declines and concluded that the ESA requires a "precautionary and measured approach" necessitating changes to the North Pacific regime for fishing

harvests. VI-ER-1281 (BiOp); *see also* V-ER-930 (BiOp). Consistent with the scientific analysis of the Recovery Plan, the ongoing vulnerability of the less-protected sub-regions was central to NMFS's finding of jeopardy: "extirpation of Steller sea lions in the western Aleutians would be significant to the [Western Population], and is expected to appreciably reduce the likelihood of both their survival and recovery in the wild." VI-ER-1281 (BiOp).

VI. Changes in Management.

As required by its finding that the federally-authorized North Pacific fisheries jeopardize the Western Population of Steller sea lions and adversely modify designated critical habitat, NMFS developed a "reasonable and prudent alternative" to the current fishery management regime in the North Pacific. V-ER-927-31, VI-ER-1292-1312 (BiOp); ESA § 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A). Consistent with the agency's concern that the greatest threats to the Western Population exist in the westernmost portion of its range—*i.e.*, in the western and central Aleutian Islands—the reasonable and prudent alternative focuses on changes necessary to limit fishery competition there. V-ER-927, 930; VII-ER-1449 (BiOp). The measures restrict fishing for Atka mackerel and Pacific cod, two of the Steller sea lions' primary prey species within that portion of their range. V-ER-924 (BiOp) ("Steller sea lions in the western and central [Aleutian Island] region heavily depend on Atka mackerel . . . [and] also require Pacific

cod."). The measures close the western part of the Aleutian Islands to fishing for those species and impose limits on the allowable catch of Atka mackerel in the central and eastern Aleutians. The changes do not affect the amount of Pacific cod that may be caught. *See* V-ER-927-29 (BiOp); VI-ER-1296-1307 (BiOp).

NMFS concluded that the reasonable and prudent alternative "must be implemented quickly in order to halt the immediate effects of the fisheries on the acute population decline in the western portion" of the Western Population's range. V-ER-927 (BiOp). The conservation measures comprising the reasonable and prudent alternative were implemented by an interim final rule that took effect on December 13, 2010. 75 Fed. Reg. 77,535 (the "Interim Final Rule").

These new management measures only address the far western and central Aleutian Islands. Based on the Western Population-wide trend of low natality discussed above, Intervenor-Appellees advocated for measures that would extend beyond the western and central Aleutians and address low natality and competition not just with the Atka mackerel and Pacific cod fisheries, but the pollock fishery as well. *See, e.g.*, I-ISER-17, 29-31, 37 (Oceana comments).

Previous drafts of the Biological Opinion acknowledged that such changes might be warranted: "without … increases in natality, sustained increases in population size appear to be difficult to achieve." I-ISER-199, 200 (2006 Draft BiOp); *see also* I-ISER-75 (March 2010 Draft BiOp) (stating low natality rates

"forecast future declines"). The consequence of ongoing low natality is a "top heavy" population "followed by a drop in population production as mature animals die without replacement through recruitment of young females." I-ISER-195 (2006 Draft BiOp); I-ISER-70 (March 2010 Draft BiOp). The natality data indicate "an unstable population structure that is likely to decline," most acutely in the western and central Aleutian Islands but potentially across the entire Western Population. I-ISER-75 (March 2010 Draft BiOp); *see also* I-ISER-74 (March 2010 Draft BiOp) ("Based on projections using current vital rates, we would expect . . . the western DPS as a whole to become unstable and potentially decline in numbers based on low or declining natality.") (citing I-ISER-68); *see also* I-ISER-48 (Natality Presentation).

Consistent with this concern, at least two earlier versions of the Biological Opinion included reasonable and prudent alternatives that would have closed an area around Kodiak to fishing for pollock and Pacific cod to address the stagnant growth rate of the sea lion population in the central Gulf of Alaska and created a process to address the dietary needs of sea lions and other predators as fishing levels are set. *See*, *e.g.*, I-ISER-84-85 (March 2010 Draft BiOp); I-ISER-45 (May 2010 Draft BiOp). Though NMFS ultimately elected not to adopt these additional protections, the record reflects both that the measures the agency did put in place were less restrictive than those originally contemplated and that there may be a

serious problem with natality that is more widespread than the western and central Aleutians and ultimately threatens the entire Western Population.

VII. Opinion of the District Court.

The United States District Court for the District of Alaska found that NMFS's Biological Opinion and accompanying sea lion protection measures were premised on application of the proper ESA standards. I-ER-16. The district court also found that sufficient evidence supported the Biological Opinion's conclusions that the North Pacific groundfish fisheries were likely to jeopardize the continued existence of the Western Population and adversely modify the species' critical habitat. *Id*. Though the court acknowledged (as did the agency) that the evidence in the 200,000-page administrative record was not wholly unequivocal, I-ER-16, 22 n.46, it determined that NMFS properly resolved disputed issues relying upon its substantial technical expertise and the ESA's requirement that agencies "give the benefit of the doubt to the species." *See* I-ER-45-46, 50-51, 53 (citations omitted).

The district court upheld the Biological Opinion and Interim Final Rule in all respects but found that the agency's analysis of environmental impacts was inadequate under the National Environmental Policy Act ("NEPA"). I-ER-62-65. The court remanded the matter to the agency and entered a narrow injunction

requiring it to prepare a full environmental impact statement. *See* I-ER-67-68; *see also* I-ER-11-13.

SUMMARY OF ARGUMENT

NMFS annually authorizes federal fisheries in the North Pacific that remove large quantities of prey that would otherwise be available for endangered Steller sea lions. The authorizations are made pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, but the agency's fishery management decisions must comply with other statutory obligations established by the ESA. The ESA imposes a significant constraint on the agency's discretion: the agency may allow fishing only when it can "insure" that such fishing is not likely to jeopardize the continued existence or recovery of an endangered species such as the Western Population of Steller sea lions or result in the adverse modification of the species' critical habitat. 16 U.S.C. § 1536(a)(2).

The experience of the last few decades—during which industrial fisheries removed hundreds of millions of pounds of prey from Steller sea lion habitat while the Western Population dwindled—demonstrates that NMFS has done too little to "insure" that its oversight of the fisheries does not cause jeopardy or result in adverse modification of critical habitat. The agency has "experiment[ed] over the last 20 years in an attempt to determine the appropriate level of conservation measures without unnecessarily over-burdening the . . . fisheries." I-ISER-84

(March 2010 Draft BiOp). Evidence from this experiment shows that more aggressive conservation measures are required: while sea lion protection measures adopted in 2000 appear to have stemmed the decline in some sub-regions of the Western Population's range, the overall population has not rebounded and sea lions in the western Aleutians remain on a trajectory toward extirpation. At issue in this case are the limited measures the agency has imposed to address this problem.

Based on the evidence, NMFS had no choice but to find that its ongoing authorization of the North Pacific groundfish fisheries jeopardizes the survival and recovery of Steller sea lions and adversely modifies their critical habitat. From the time of the species' listing more than 20 years ago, the agency has recognized that fisheries compete with Steller sea lions for fish—particularly within critical habitat—and that the competition could contribute to the decline in Steller sea lions numbers. *See* 55 Fed. Reg. at 49,208. The agency's more recent experience affirms this conclusion, as protection measures adopted in certain sub-regions have produced positive (though limited) results while the lesser-protected sub-regions, namely, the western and central Aleutians, exhibit "an alarming decreasing trend." VI-ER-1293 (BiOp). The best available science underscores the importance of healthy regional populations to the survival and recovery of the overall Western Population, I-ISER-158, 172 (Recovery Plan), and, therefore, the declines in the

western and central Aleutians pose a threat to the Western Population as a whole, compelling a finding of jeopardy and adverse modification.

NMFS's focus on the western and central Aleutian Islands and adoption of protective measures for those sub-areas—while necessary—represent the minimum action required by the ESA. Current natality trends indicate that the entire Western Population is in need of relief from the intensive industrial fishing practices that deprive Steller sea lions of adequate prey. *See* I-ISER-74 (March 2010 Draft BiOp). In the face of evidence indicating that even more protection is likely required, the agency's initial steps, which are at issue in this litigation, are justified.

Appellants seek to characterize the Biological Opinion's jeopardy and adverse modification conclusions as overreaching and unsupported, but neither is accurate. Their primary argument is built upon three related and erroneous assertions: the ESA only requires NMFS to conduct a passing review of the Steller sea lions' prospects for recovery in its jeopardy analysis; sharply negative sub-population trends may be ignored in an assessment of the sea lions' overall prospects for survival and recovery; and the ESA allows NMFS to withhold protective measures while sea lions in the western and central Aleutians rapidly decline to the point of non-existence. These positions are wrong as a matter of law. Appellants also focus on isolated parts of the record to contest the conclusions of the Biological Opinion and the agency's development of a

reasonable and prudent alternative. As a factual matter, the dissenting evidence Appellants have identified was addressed by the agency and does not undercut its conclusions.

STANDARD OF REVIEW

Intervenor-Appellees concur in the Appellees' description of the standard of review.

ARGUMENT

I. NMFS'S ACTIONS WERE REQUIRED BY THE ENDANGERED SPECIES ACT.

A. The North Pacific groundfish fisheries pose a threat to Steller sea lion survival and recovery.

The foundation of Appellants' core legal argument is an assertion that recovery is largely inconsequential to a consulting agency's ESA section 7 evaluation of whether a federal action will jeopardize an endangered species or adversely modify its critical habitat. They are wrong as a matter of law.

ESA section 7(a)(2) requires that action agencies consult with the expert agency in order to "insure that any action . . . is not likely to jeopardize the continued existence of any endangered species . . . or result in the destruction or adverse modification of habitat of such species which is determined . . . to be

critical." 16 U.S.C. § 1536(a)(2).[6] In interpreting this obligation, the Ninth Circuit has held that "survival and recovery" are "intertwined needs that must both be considered in a jeopardy analysis." *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 932 (9th Cir. 2008). Accordingly, a consulting agency "must analyze effects on recovery as well as effects on survival." *Id*. at 932. *See also Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1069–70 (9th Cir. 2004); *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 997-1001 (D. Ariz. 2011); *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 623 F. Supp. 2d 1015, 1034-35 (D. Ariz. 2009).

The mandate to assess recovery calls for a "full analysis" considering "the proposed action's impacts on the listed species' chances of recovery." *Nat'l Wildlife Fed'n*, 524 F.3d at 933. The agency must "know roughly at what point survival and recovery will be placed at risk," and "provide[] some reasonable assurance that the agency action in question will not appreciably reduce the odds of success for future recovery planning, by tipping a listed species too far into danger." *Id*. at 936; *see also Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 527 (9th Cir. 2010) (finding agency must account for the fact that "even before a

[6] As it evaluates the North Pacific groundfish fisheries, NMFS is both "action" and "expert" agency: "NMFS's Office of Sustainable Fisheries is the 'Action' Agency and NMFS's Office of Protected Resources is the 'Expert' Agency." *Greenpeace IV*, 237 F. Supp. 2d. at 1185 n.2.

population is extinguished, it may reach a point at which it is no longer recoverable").

Consistent with this obligation, the Biological Opinion addressed whether ongoing authorization of the North Pacific fisheries would jeopardize the Western Population's survival or recovery. NMFS concluded that, should fishing proceed under the then-existing Bering Sea/Aleutian Island and Gulf of Alaska fishery management plans, it would "continue to impede the survival and recovery of the [Western Population]." VI-ER-1280-81 (BiOp). The agency made this determination in light of continued population declines within adjacent sub-regions in the western and central Aleutian Islands, which risked "eventual extirpation of Steller sea lions in the western Aleutians" and, in turn, "would be significant to the [Western Population]" overall, "appreciably reduc[ing] the likelihood of both their survival and recovery." VI-ER-1281 (BiOp).

The Biological Opinion's analysis of the risk to survival and recovery was informed by "literally hundreds of papers on Steller sea lion ecology, marine ecology, and fisheries." VI-ER-1265 (BiOp). Among these "many lines of evidence" considered, *see id.*, was the Steller Sea Lion Recovery Plan. For example, in assessing how the declines in the western and central Aleutians might be expected to affect the overall Western Population, the Biological Opinion cites the analysis of the Recovery Plan on the importance of maintaining healthy

populations within sub-regions. VI-ER-1267 (BiOp) ("[T]he Recovery Team strongly believed that all parts of the range must remain occupied to ensure recovery."). Ultimately, however, the Biological Opinion made independent findings concerning the threat posed to the Western Population by the ongoing North Pacific fisheries. *See* VI-ER-1280-85 (BiOp).

Appellants attack the agency's recovery analysis—and the district court's conclusion that the analysis was lawful—on three grounds, all of which lack merit.

First, Appellants attempt to reduce the agency's legal obligation to conduct a full analysis of the groundfish fisheries' impacts on sea lion recovery to an overly simplistic catchphrase. Citing *Wild Fish Conservancy*—wherein this Court described an agency's obligation to analyze recovery as entailing a determination of "when the tipping point precluding recovery of the . . . population is likely to be reached," 628 F.3d at 527—Appellants protest that the Biological Opinion did not describe its conclusions on recovery using the same terminology. *See* Appellants' Br. 42-43. The district court rejected this semantic argument, concluding that "[t]he fact that [NMFS] did not use the phrase 'tipping point' is inapposite." I-ER-39 n.132. Appellants also assert that the Biological Opinion "offers no indication of the specific point at which the fisheries would appreciably reduce the likelihood of recovery." Appellants' Br. 43. This argument is incorrect and overstates the level of specificity required by the agency's recovery analysis. The

Biological Opinion found that unabated "continuation of past and current . . . fisheries" risks "eventual extirpation of Steller sea lions in the western Aleutians," which "NMFS believes . . . is expected to appreciably reduce the likelihood of [the Western Population's] survival and recovery in the wild." VI-ER-1281 (BiOp).

Second, Appellants parse one particular sentence of the district court's opinion itself, alleging error where there is none. Zeroing in on its statement that "the agency action under review need not boost the . . . chances of recovery so long as those chances are not appreciably diminished by the action," I-ER-38 (internal quotations omitted), Appellants assert that the district court ran afoul of the "the standard described in *Salmon Spawning*," which they take to mean that the ESA "does not require an action to 'boost' a species chance of survival in *any* circumstance." Appellants' Br. 41 (emphasis in original). The district court properly understood and applied *Salmon Spawning* as well as this Court's published authority holding that, while an agency may not have an affirmative obligation to enhance a species' prospects for recovery, the ESA prohibits authorization of ongoing agency actions that risk the very possibility of recovery by "tipping a listed species too far into danger." *Nat'l Wildlife Fed'n*, 524 F.3d at 936.

Finally, Appellants argue that, by paying substantial attention to recovery, including reference to the Recovery Plan, in its assessment of threats to survival

and recovery, NMFS improperly imported requirements from section 4(f) of the ESA (governing recovery plans) into section 7(a)(2) (governing consultation). Appellants' Br. 4, 19, 38-40. The Ninth Circuit has rejected the premise of this argument, holding that "[r]equiring some attention to recovery issues does not improperly import ESA's separate recovery planning provisions into the section 7 consultation process." *Nat'l Wildlife Fed'n*, 524 F.3d at 936.

The district court likewise rejected this argument, noting that Appellants' view of the ESA's recovery obligation "would place [NMFS] in an impossible position." I-ER-39. As the district court recognized, because "NMFS had to consider recovery" it makes no sense to "prohibit[] [it] from discussing what is needed to do so" as described in the Recovery Plan or otherwise "limit its ability to discuss the issue." *Id*. It is both lawful and reasonable for NMFS to draw upon the Recovery Plan in its review of the "best available science," particularly where, as here, Appellants offer "no alternative measure of recovery" that NMFS could utilize to complete "its statutorily-mandated task of evaluating recovery." *Grand Canyon Trust v. U.S. Bureau of Reclamation*, No. CV-0708164-PHX-DGC, 2010 WL 2643537, at *17 (D. Ariz. June 29, 2010).

There is, of course, a distinction between the section 4 recovery planning process and the section 7(a)(2) consultation process. A recovery plan includes a wide variety of measures to promote recovery and de-listing of a species in

fulfillment of the agency's general obligation to "conserve" endangered species. *See, e.g.*, *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 135 (D.D.C. 2001) (Section 7(a)(1) "require[s] that the agencies 'shall . . . utilize their authorities in furtherance of the purposes of th[e ESA] by carrying out programs for the conservation of endangered species . . . .'") (citing 16 U.S.C. § 1536(a)(1)). The Steller Sea Lion Recovery Plan, for example, identified "78 substantive actions needed to achieve recovery of the [Western Population]." I-ISER-112 (Recovery Plan). The Biological Opinion did not require any of these actions to be implemented. NMFS properly paid "some attention to recovery issues" but did not "import ESA's separate recovery planning provisions" into the consultation process or confuse sections 4 and 7 of the ESA. *Nat'l Wildlife Fed'n*, 524 F.3d at 936; *see also* I-ER-39-40 (stating "the Court cannot conclude that NMFS's discussion of recovery standards in the BiOp amounted to the importation of § 4(f) standards into the § 7(a)(2) analysis.").

B. The agency's consideration of declining sub-regions is appropriate because such declines may pose a threat to the entire Western Population.

The Biological Opinion's conclusion that ongoing authorization of the North Pacific groundfish fisheries jeopardizes the continued existence of the Western Population of Steller sea lions and adversely modifies the species' critical habitat is based, in part, "on the continued decline in abundance of Steller sea lions within

the western and central Aleutians." VI-ER-1281 (BiOp). Appellants seize upon this acknowledgement and insist that (i) the ESA does not authorize jeopardy determinations made at the level below "distinct population segment" (*i.e.*, below the level of the overall Western Population); and (ii) the Biological Opinion "did not articulate a rational basis" for its conclusion that declines in the western and central Aleutian sub-regions are consequential for the overall Western Population. *See* Appellants' Br. 24-35. As the district court found, Appellants are wrong on both counts.

Appellants concede that NMFS may consider population trends within a sub-region as a component of the agency's analysis of risk to the survival, recovery, and critical habitat of the larger regulated biological unit (here, the Western Population). *See id*. at 26. Indeed, because the ESA requires that federal agencies "insure" that their actions are not likely to harm the survival or recovery of an endangered species, courts have sometimes *obligated* agencies to account for a declining sub-regional trend if the record suggests that the decline may have species-wide impacts. For example, in *Wild Fish Conservancy*, 628 F.3d 513, the court struck down a no-jeopardy determination because the agency failed to assess rationally whether the decline of one of 500 sub-populations of threatened bull trout would cause jeopardy to the species at a larger scale. Though the agency's ultimate obligation is to the listed species (in this case the Western Population),

"[t]here is no statutory provision that would prohibit NMFS from predicating its species-at-large jeopardy finding on the impact of a threat to a subpopulation, provided that sound science supports its analysis." *Blue Water Fisherman's Association v. NMFS*, 226 F. Supp. 2d 330, 341 (D. Mass 2002).

Here, despite Appellants' protestations to the contrary, NMFS relied upon sound science in determining that the decline in the central and western Aleutians poses a risk to the entire Western Population of Steller sea lions. As described in the Biological Opinion, because the sea lions' decline has been so severe and is not fully understood, a substantial decline in one sub-region—or declines in two adjacent sub-regions—could indicate a threat to recovery that is unaccounted for by current protections and thus poses a threat to recovery and survival of the whole Western Population. VI-ER-1267, 1270 (BiOp). Further, "widely distributed rookeries" serve to maintain populations throughout the species' range, meaning that "all parts of the range must remain occupied to ensure recovery." VI-ER-1267 (BiOp). Such widely distributed rookeries also provide an important source of genetic diversity that exists now but would be threatened by additional fragmentation of the population. *See* I-ISER-253 (Bickham *et al*.). As a result, the "alarming decreasing trend in the western Aleutian Islands and a steadily decreasing trend in the central Aleutian Islands," *see* VI-ER-1293 (BiOp), support

the agency's conclusion that the North Pacific fisheries may cause jeopardy to the entire Western Population and adverse modification of its critical habitat.

Appellants challenge the agency's scientific finding that the western and central Aleutian sub-populations are significant to the Western Population as a whole on several grounds that were rejected by the district court and are no more convincing here.

First, Appellants argue that because the sea lion sub-populations in the western and central Aleutians are small, they must not be significant to the survival or recovery of the Western Population as a whole. Appellants' Br. 27-28. This argument is overly simplistic, unscientific, and contradicted by the record. The Biological Opinion, in some places, may refer to other areas as the "core" of the population's range but these statements are factual assertions about the current distribution of the population, not an assessment of heightened importance. *See, e.g.*, V-ER-1020 (BiOp). Though the sub-populations in the western and central Aleutians *currently* are diminished, the same areas *historically* were home to some of the Western Population's largest rookeries and supported "very large numbers of Steller sea lions." V-ER-1011 (BiOp); I-ISER-116 (Recovery Plan). Moreover, current size is not determinative of biological importance. *See* I-ISER-158 (Recovery Plan) (cautioning against "pitfalls of a purely quantitative approach"

and stating that viable sub-populations preserve genetic diversity and protect against catastrophic losses).

Second, Appellants attempt to impugn NMFS's sub-population analysis by arguing that the sub-regions were developed for geographic convenience only and not for independent reasons of biological or ecological significance. Appellants' Br. 29-31. But NMFS's analysis of the population trends in sub-regions was both necessary and appropriate. As discussed earlier, the management areas were created initially to address concerns about localized depletion of fishery resources. *See* V-ER-1131 (BiOp). Sub-regions have been incorporated into the North Pacific fishery management framework and, as the purpose of the Biological Opinion is to assess the impact of the ongoing authorization of the fisheries, such analysis necessarily entails evaluating fishing practices—and the consequences thereof—as they are currently managed. In any event, the Recovery Plan established that the Western Population's viability requires maintenance of healthy populations throughout its geographic range. I-ISER-157-58, 172 (Recovery Plan). This requires a finer grain analysis than overall population numbers, which may mask localized problems, necessitating an analysis of both the overall population and its distribution. The use of currently delineated sub-regions is a reasonable way to undertake this analysis.

NMFS recognized that sub-regions may themselves be too coarse for an accurate analysis of population trends and further developed "rookery cluster areas." The scientific purpose for this approach was explained by the agency and accepted by the district court, which noted that the rookery cluster areas grouped "rookeries that had similar demographic characteristics in order to . . . account for potentially significant trends taking place at the rookery level which were lost when the data was aggregated for the entire region." I-ER-24 n.62 (citing V-ER-919, 1018).[7]

Third, Appellants mistakenly suggest that sub-region declines are consistent with the Recovery Plan, so long as population growth occurs in other regions. Appellants' Br. 33. They misstate the Recovery Plan, which specifies that significant negative trends within one or more sub-regions may preclude recovery. I-ISER-111 (Recovery Plan) (to be considered for down-listing, "[t]he population trend in any two adjacent sub-regions cannot be declining significantly"); I-ISER-112 (Recovery Plan) (for de-listing, "[t]he population in any sub-region cannot have declined by more than 50%").

[7] Citing a draft section of the Biological Opinion that was not adopted in the document, Appellants also accuse NMFS of foregoing "projections of the future size of the total" population to avoid controversy. Appellants' Br. 28. In fact, NMFS provided a full explanation for the deletion: the authors were concerned about the soundness of the particular methodology used and chose not to rely upon it, based on their assessment that other, more reliable information in the Biological Opinion adequately demonstrated relevant population trends. VIII-ER-1974.

C. The Biological Opinion's jeopardy conclusion is supported by the best available scientific evidence.

In addition to their primary arguments based on incorrect legal and factual assertions about the obligation of NMFS to address recovery in a jeopardy analysis and to account for the fate of critical sub-populations in the western and central Aleutians, Appellants advance several marginal attacks on the sufficiency of the agency's evidential support. These arguments are unavailing.

The Biological Opinion is based on a long-standing conclusion that fishing competes with Steller sea lions for prey, particularly within Steller sea lion critical habitat. *See supra* pp. 7, 12-13, 15-18, 22-26. The implementation of more protective sea lion conservation measures beginning in 2000 has provided additional evidence of this correlation: sea lion populations in protected sub-regions have seen more positive trends while sea lion populations in less-protected areas continue to decline with little or no abatement. V-ER-926 (BiOp), VI-ER-1280 (BiOp). In the western and central Aleutians—where declines are ongoing—fishing intensity is high within critical habitat, and fisheries are targeting prey species that are important to Steller sea lions. VI-ER-1274, VII-ER-1447-48 (BiOp); I-ISER-50-66 (Natality Presentation).

In reaching its jeopardy conclusion, NMFS reviewed a broad array of sometimes equivocal scientific studies and data, and the agency has been forthright about the limits on its analysis: fishing likely is not the only factor affecting sea

lions, *see* VI-ER-1281 (BiOp); the mechanism of fishery and sea lion competition is not wholly understood, *see* V-ER-924; VI-ER-1279 (BiOp); and some of the studies in the record made findings that are contrary to the agency's conclusion. *See, e.g.*, VI-ER-1200 (BiOp).

Invoking the fact that NMFS's conclusions were not unqualified, Appellants cite 50 C.F.R. § 402.02 and claim that NMFS failed to prove that fisheries "cause" Steller sea lions to experience nutritional stress. Appellants' Br. 45-47. The cited definitional provision states that the "effects of the action" includes both "direct" effects and "indirect effects," which are defined as those "caused by the proposed action and are later in time, but still are reasonably certain to occur." 50 C.F.R. § 402.02. Appellants read too much into the regulation's use of the word "caused," implying that a heightened standard of proof must be applied to NMFS's evaluation of indirect effects. The simple purpose of the regulation, however, is to establish that both the immediate (direct) and future (indirect) effects of an action must be addressed during ESA consultation.

Appellants' attempt to create a distinct, heightened causation requirement for "indirect effects" violates the basic premise of regulatory interpretation, namely, that regulations must be "construe[d] . . . in light of the statutes they implement." *Sec'y of Labor, Mine Safety & Health Admin. v. W. Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990) (internal alteration omitted); *see also Pac.*

Coast Med. Enterprises v. Harris, 633 F.2d 123, 131 (9th Cir. 1980) ("Agency regulations must be consistent with and in furtherance of the purposes and policies embodied in the congressional statutes which authorize them.").

This principle applies with equal force to the ESA and, Appellants' gloss on 50 C.F.R. § 402.02 notwithstanding, it is well-established that, in light of the protective purpose of the ESA, the agency need not provide conclusive evidence of its findings. *See Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1164 (9th Cir. 2010) ("[T]he ESA accepts agency decisions in the face of uncertainty."); *Greenpeace I*, 55 F. Supp. 2d at 1261-62 ("[The ESA] only requires that decisions be made on the basis of the best scientific and commercial data available[,] . . . [and] [t]his standard requires far less than conclusive proof.") (citing *Defenders of Wildlife v. Babbitt*, 958 F.Supp. 670, 680 (D.D.C. 1997)) (internal quotation and citation omitted). Where the best available science is equivocal, the agency must respect "Congress' intent to give the benefit of the doubt to the species." *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988) (internal quotation omitted); *see also Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1127 (N.D. Cal. 2006) (same). Here, the agency relied upon its experts to make sense of the best scientific evidence and, unable to rule out fishing as the cause,

determined that ongoing authorization of the North Pacific fisheries jeopardizes Steller sea lions. VI-ER-1281 (BiOp).[8]

The fact that NMFS identified the data gaps, uncertainties, and inconsistent scientific findings relevant to its analysis both highlights the comprehensiveness of the agency's effort and underscores the fact that the agency's decision was not arbitrary and capricious but rather an exercise in reasoned, expert decision-making. Appellants, however, focus only on the qualifications and dissenting views that NMFS acknowledged and misguidedly suggest that the agency has acted arbitrarily. They are mistaken, as the district court rightly found. *See* I-ER-49-50 (stating in response to Appellants' arguments below about the sufficiency of NMFS's scientific findings that "[t]he Court has reviewed the record and finds that [Appellant]s' contentions are without merit.").

[8] Appellants also allege that NMFS's decision is inconsistent with the regulatory definition of "adverse modification," defined as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." Appellants' Br. 45-47 (citing 50 C.F.R. § 402.02). This definition focuses on whether the value of critical habitat is "appreciably diminished" for both survival and recovery. Here, NMFS made findings that: (i) "[p]rey resources are the most essential feature of marine critical habitat for Steller sea lions," VI-ER-1283 (BiOp); (ii) the groundfish fisheries were having "adverse effects on the availability of important Steller sea lion prey within critical habitat," VI-ER-1284 (BiOp); and (iii) this reduction in prey "may reasonably be expected to inhibit recovery." VI-ER-1283 (BiOp). While NMFS did not recite the phrasing of the regulation verbatim, the agency's finding that the groundfish fisheries adversely modify Steller sea lion critical habitat is fully consistent with the regulatory definition.

Take, for example, the Biological Opinion's assessment of low natality in the Western Population. Without context and apparently to imply a lack of relevant, high-quality data, Appellants allege that NMFS's natality findings were made without "actual natality data," Appellants' Br. 16. NMFS's acknowledgement, however, that there is no "direct information" on natality for all portions of the Western sub-population is a reference to a prior methodology whereby sea lion reproductive data was obtained from females that were collected and killed for examination. *See* V-ER-1025 (BiOp). Given the obvious downside to using this methodology with an endangered species (especially in an area experiencing a steep, ongoing population decline), natality is no longer measured using this approach. Rather, the ratio of adults to pups at breeding sites—where females dominate the population—is assessed as a "proxy" that provides insight into the relative birth rates of females. V-ER-1020-21 (BiOp). With data on adult-to-pup counts at breeding sites that dates back to the mid-1970s, NMFS has been able to assess how trends in adult-to-pup ratios at rookeries vary both across the full range and across time. V-ER-1015 (BiOp); *see also* IX-ER-2112 (Holmes *et al*. 2007). Even if this method isn't as precise as inspecting dead females to assess their pregnancy rate, the 30-year time series allowed NMFS to compare present

ratios to past ratios, and those ratios are unfavorably lower now. VII-ER-1522 (BiOp).[9]

Appellants likewise attack the Biological Opinion's finding on nutritional stress in isolation from other relevant information in the Biological Opinion and administrative record. *See* Appellants' Br. 14-17, 46, 65. As explained above, Steller sea lions with inadequate prey resources may become nutritionally stressed, which may be manifested with certain "acute" symptoms (like emaciation) or more "chronic" symptoms (like a reduction in natality). *See supra* p. 24. While acknowledging Appellants' view that "considerable scientific evidence is inconsistent with the nutritional stress hypothesis," NMFS ultimately concluded that due to "information on the pattern of decline in the reproductive rate and size at age of [the Western Population] . . . nutritional stress cannot be dismissed as an important factor" in the overall dynamics of the Western Population. VI-ER-1200 (BiOp).[10]

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[9] Plaintiffs also cite a single study for the proposition that NMFS's proxy approach is not accurate. Appellants' Br. 16 n.4 (citing Maniscalco (2010), VIII-ER-1975-83). Maniscalco only studied a single rookery and this does not undermine NMFS's systematic, population-wide assessment of natality. *See* V-ER-1025-26, 1029 (BiOp).

[10] Appellants attempt to make much of the fact that low natality is the only symptom of nutritional stress that has been observed. Appellants' Br. 15-16. The Biological Opinion points to research demonstrating that the body condition of animals could remain high while food resources are nonetheless declining. V-ER-1048 (BiOp); *see also* I-ISER-202-03 (Frid *et al.* 2006).

D. The record substantiates NMFS's reasonable and prudent alternative.

Once NMFS concluded that the North Pacific fisheries, as currently managed, jeopardize the Western Population of Steller sea lions and adversely modify their designated critical habitat, the ESA mandated development of "reasonable and prudent alternatives" to current fishery practices. 16 U.S.C. § 1536(b)(3)(A). NMFS set forth such a reasonable and prudent alternative in the Biological Opinion, establishing area closures and other restrictions intended to disperse fishing effort for Atka mackerel and Pacific Cod in the western and central Aleutian Islands, where ongoing declines of Steller sea lions have been the most pronounced. VI-ER-1309 (BiOp). Appellants raise several arguments asserting that the measures are not supported by evidence. *See* Appellants' Br. 50-59. They are mistaken.

First, Appellants assert that the reasonable and prudent alternative is faulty because it is merely intended to encourage Steller sea lion population growth within the Aleutian Islands and, therefore, is not properly aimed at avoiding jeopardy or adverse modification. Appellants' Br. 50-52. This argument is nothing more than a repackaging of their earlier arguments attacking NMFS's analysis of sub-areas and use of the Recovery Plan criteria to inform its assessment of the Western Population's overall prospects for survival and recovery. Those arguments, addressed above, are without merit. *See supra* pp. 37-44.

Next, Appellants make several related arguments asserting that, through the calculation of "forage ratios," NMFS has underestimated the productivity of the western and central Aleutian Islands area and the availability prey there. *See* Appellants' Br. 53-54. According to Appellants, forage ratios suggest that critical habitat in the western and central Aleutians possesses more available prey, per sea lion, than other areas within the sea lions' range. NMFS considered the information associated with forage ratios but noted that it was highly uncertain and "very difficult to interpret," owing to "the coarseness of reliable estimates of forage biomass relative to the feeding ecology and movements of Steller sea lions." VI-ER-1234 (BiOp).

Appellants also find fault with the model that NMFS used to predict the amount of additional forage fish that would be made available to Steller sea lions as a result of the fishing restrictions adopted as the reasonable and prudent alternative. Appellants' Br. 54-55. NMFS used a "single-species" model while the Appellants contend that a "multi-species" modeling approach should have been used. *Id*. NMFS was aware of this issue, which presented "[t]radeoffs" between "greater biological realism" and "increased uncertainty." VI-ER-1298 (BiOp). Having "examined the results of both," NMFS elected to utilize the single-species model to reduce uncertainty. *Id*. Though Appellants might have preferred that NMFS use the multi-species model, the district court found that NMFS properly

resolved this "scientific disagreement[]" in adopting the reasonable and prudent alternative. *See* I-ER-53 & n.195.

Finally, Appellants contest NMFS's observation that the population declines correlate with areas that, since the early 2000s, have been subject to fewer fishing restrictions. Appellants' Br. 57-58. Citing some restrictions that have been adopted in the western and central Aleutians, *id*. Appellants jump to the conclusion that these fisheries cannot be regarded as less-regulated. Appellants, however, are mistaken. Numerous record documents demonstrate that the area west of 178°W longitude, from 2001 until the recent imposition of the restrictions set forth in the reasonable and prudent alternative, were subject to fewer restrictions than other areas in the Steller sea lions' range. *See* VI-ER-1383 (BiOp) (figure showing lesser trawling restrictions west of 178°W); I-ISER-235-36 (2001 BiOp) (explaining the different fishery restrictions for Atka mackerel and Pacific cod east and west of 178ºW); I-ISER-244-45 (2001 BiOp) (describing "[f]ishery management" west of 178° as "less conservative than the base case."); I-ISER-232 (Final SEIS) (stating that in exchange for allowing greater fishing within critical

habitat, a system of "platooning" would be adopted to disperse effort).[11] These disparate restrictions correlate with population gains east of 178° and ongoing declines west of that longitude. VI-ER-1393 (BiOp).

Ultimately, the reasonable and prudent alternative is well-supported by the agency's findings that Steller sea lions' most severe decline has occurred in areas where there are fewest prey options and the fishing effort for sea lion prey within sea lion habitat is the most intense. VI-ER-1274, 1279, 1281 (BiOp). Petitioners have failed to raise any claim demonstrating that the reasonable and prudent alternative is not valid.

II. IF THE COURT REMANDS THE BIOLOGICAL OPINION, IT SHOULD NOT VACATE THE INTERIM FINAL RULE.

For the reasons set forth above, Appellants' appeal of the district court's decision upholding the Biological Opinion and accompanying Interim Final Rule should be denied. In the event that the Court finds in Appellants' favor on one or more of Appellants' ESA claims, however, it should remand without granting

[11] Appellants' record citations are unhelpful or inaccurate. For example, they cite figures on the percentage of critical habitat closed across the entire Aleutian Islands, Appellants' Br. 58 (citing VII-ER-1506), but those figures include closures in the more heavily-regulated eastern Aleutian Islands that are east of 178°W. *See* VII-ER-1502-05 (BiOp). Appellants also deny that a closure of the mackerel fishery east of 178°W impacted their operations, alleging the mackerel fleet historically did not fish there. That is not accurate. *See* VII-ER-1712 (showing several years of significant catches within critical habitat in Area 5, which is east of 178°W, prior to 2002).

vacatur. This remedy would be appropriate in light of the requirements of the ESA.

Appellants' request that this Court vacate the Biological Opinion and the Interim Final Rule is premised on an assumption that, as a result, fishing would proceed under previous rules. Appellants' Br. 65-66. This assumption is wrong and makes vacatur an inappropriate remedy here. Before an agency can take action—in this case authorizing fisheries—the ESA requires the agency to "insure" that the action will not jeopardize the species or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1056-57 (9th Cir. 1994) ("Only after [an agency] complies with § 7(a)(2) can any activity that may affect the protected [species] go forward."). If this Court vacates the Biological Opinion and Interim Final Rule, the consultation process is revived and, absent protective measures, the agency would not be able to authorize any fishing pending completion of a revised biological opinion. *See Greenpeace III*, 106 F. Supp. 2d at 1072 ("In the absence of a completed comprehensive biological opinion NMFS [cannot] insure that continued fishing in designated critical habitat will not result in harm . . . [and] continued implementation of the [fishery management plan]s . . . constitutes a continuing violation of the ESA."); *Nat'l Wildlife Fed'n v. NMFS*, 839 F. Supp. 2d 1117, 1129 (D. Or. 2011) ("Vacatur could also compel NOAA Fisheries to halt . . . operations or face severe penalties

under [the ESA]."); *see also Washington Toxics Coal. v. EPA*, 413 F.3d 1024, 1033 (9th Cir. 2005) (ESA duty applies to ongoing authorizations).

Appellants wrongly suggest that ongoing authorization of the fisheries may proceed pursuant to the biological opinion issued by NMFS in 2001 and supplemented in 2003. Appellants' Br. 65-66. Reversion to management measures evaluated in a biological opinion issued more than a decade ago is "legally impossible" owing to management changes and new information. *See Greenpeace II*, 80 F. Supp. 2d at 1146. Since 2003, the two fishery management plans for the North Pacific groundfish fisheries have each been amended more than 20 times, including changes to some of the sea lion protection measures adopted in 2003. *See* I-ISER-2-3 (Council Discussion Paper) (inventory of changes to the fishery management plans); 69 Fed. Reg. 56,384 (Sept. 21, 2004) (rulemaking proposal explaining reduced or eliminated fishery closures within critical habitat at three haulouts); 69 Fed. Reg. 75,865 (Dec. 20, 2004) (adopting proposal). Moreover, the North Pacific ecosystem has since been subject to numerous studies revealing significant new information, including the ongoing failure of the fishery management plans to avert jeopardy of Steller sea lions. V-ER-939; VI-ER-1280-81 (BiOp); *see also* I-ISER-95-96 (Email from Lisa Rotterdam, NOAA, recognizing that 2003 biological opinion no longer meets ESA obligations). A comprehensive Recovery Plan was also developed in the interim, and subsequent

decisions of this Court like *Gifford Pinchot* and *National Wildlife Federation* have clarified the agency's statutory obligation to address recovery. Courts addressing comparable circumstances have recognized the impropriety of reverting to an older, outdated biological opinion even where the superseding one is found to be flawed. *See, e.g.*, *Greenpeace II*, 80 F. Supp. 2d at 1146-47; *Pac. Coast Fed'n of Fishermen's Associations v. Gutierrez*, 606 F. Supp. 2d 1195, 1202-03 & n.5 (E.D. Cal. 2008); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 839 F. Supp. 2d 1117, 1128 (D. Or. 2011).

Without a valid, lawful biological opinion and appropriate protective measures for sea lions, the agency may not authorize any fishing. No party to this litigation, including Oceana and Greenpeace, is advocating that all fishing should be ceased during any remand. Nor would it be consistent with the purposes of a remand or the purposes of the ESA were the agency to rush its response to any remand order just to prevent or limit the unnecessary no-fishing consequence that would result from a vacatur of the Biological Opinion and Interim Final Rule.

Thus, the most appropriate relief in the event the Court finds in favor of the Appellants on any of their claims is a remand without vacatur that leaves the Interim Final Rule and its precautionary measures in place until the agency completes any additional required analysis and addresses any necessary changes to the rule. Such an order would most closely serve the purposes of the ESA and best

avoid potential harm to endangered Steller sea lions or unnecessary disruptions in regulation. *See, e.g., Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

Though vacatur is often the correct remedy for unlawfully adopted agency action, in circumstances like those presented here, courts recognize that vacatur is inappropriate. *See, e.g., W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (declining to vacate where doing so would thwart Clean Air Act and risk environmental harm). In particular, in the ESA context, courts have regularly concluded that even where an agency takes action to protect species arbitrarily or without following proper procedures, it would not be consistent with the ESA to vacate the rules at issue and allow potentially threatening actions to proceed pending remand. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405–06 (9th Cir. 1995) (declining to vacate endangered snail listing despite procedural errors); *Nat'l Wildlife Fed'n*, 839 F. Supp. 2d at 1129-30 (declining to vacate biological opinion to avoid regulatory disruptions and uphold purpose of ESA); *Defenders of Wildlife v. Salazar*, 776 F. Supp. 2d 1178, 1187 (D. Mont. 2011) (leaving ESA protections in effect upon remand "makes sense" given ESA's mandate of institutionalized caution); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 606 F. Supp. 2d 1195, 1202-03 (E.D. Cal. 2008) (where fishing group successfully challenged biological opinion, remand without vacatur most

reasonable because it avoids regulatory disruptions and loss of protections for species); *Nat'l Ass'n of Home Builders v. Norton*, No. CIV 00-0903-PHX-SRB, 2004 WL 3740765, at *3-6 (D. Ariz. June 28, 2004) (remanding without vacatur ESA listing decision and noting Ninth Circuit trend of protecting putatively endangered species); *Natural Res. Def. Council v. U.S. Dept. of Interior*, 275 F. Supp. 2d 1136, 1145-46 (C.D. Cal. 2002) (remanding without vacatur "in light of the purposes underlying the ESA").

Despite this considerable authority to the contrary, Appellants nonetheless argue that vacatur is appropriate in light of "the most current information"—which Appellants insist indicates a positive overall population trend for sea lions—and their economic interests. Appellants' Br. 65. Appellants overlook the fact that the Interim Final Rule and associated fishery restrictions specifically were adopted "in order to halt the immediate effects of the fisheries on the acute population decline in the western portion" of the Steller sea lion's range. V-ER-927 (BiOp). Aerial surveys conducted last summer confirmed that this alarming trend has continued. I-ISER-7 (NMFS Memo re: 2011 Steller sea lion surveys) ("Pup production continues to decline in the western Aleutian Islands and in the eastern Bering Sea, and now appears to be declining throughout the entire central Aleutian Islands as well."); *see also* I-ISER-10 (NMFS Memo re: 2011 Steller sea lion surveys). Conversely, some evidence suggests that Appellants' economic injuries have not

materialized to the degree they were predicted initially. For example, even with the additional Steller sea lion protection measures in place, the total Bering Sea/Aleutian Island catch of Pacific cod actually *increased* from 171,857 metric tons in 2010 to 219,903 metric tons in 2011, an increase of almost 28 percent. *See* I SER 12 (2011 SAFE Report) (showing total 2010 catch of Pacific cod in BS/AI area was 171,857 mt); I SER 15 (NMFS BSAI Catch Report through December 31, 2011) (showing total 2011 catch of Pacific cod of BS/AI, reflected in the summation of 11 Pacific cod accounts in the report, was 219,903 mt).

In any event, the Court should decline Appellants' request to weigh their economic interests more heavily than the interest of endangered Steller sea lions as the ESA instructs that "the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy [of] 'institutionalized caution.'" *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). Accordingly, remand without vacatur is the most appropriate remedy.

CONCLUSION

Appellants' appeal should be denied. The Steller sea lion protection measures imposed by NMFS are required by the ESA and, as the district court concluded, are fully supported by the record. If the Court finds for Appellants on any claims, the appropriate remedy is a remand without vacatur that preserves

during remand the Steller sea lion protection measures adopted in the agency's Interim Final Rule.

Respectfully submitted this 22nd day of August, 2012.

s/ Colin O'Brien

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,740 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Respectfully submitted this 22nd day of August, 2012.

s/ Colin C. O'Brien

Colin C. O'Brien
EARTHJUSTICE

Attorney for Intervenor-Appellees

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Intervenor-Appellees Oceana, Inc. and Greenpeace, Inc. state that there are no related cases.

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2012, I electronically filed the foregoing RESPONSE BRIEF OF INTERVENOR-APPELLEES OCEANA, INC. AND GREENPEACE, INC. with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I also certify that on August 22, 2012, four (4) copies of INTERVENOR-APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD were sent by Priority Mail to the Clerk of the Court, U.S. Court of Appeals for the Ninth Circuit, P.O. Box 193939, 95 Seventh Street, San Francisco, CA 94119-3939. One (1) copy was served by Priority Mail on each of the following:

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ADDENDUM

Except for the following, all applicable statutes, etc., are contained in the Appellants' Addendum.

STATUTES

Endangered Species Act, 16 U.S.C. § 1533(a)

Determination of endangered species and threatened species.

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

> (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
>
> (B) overutilization for commercial, recreational, scientific, or educational purposes;
>
> (C) disease or predation;
>
> (D) the inadequacy of existing regulatory mechanisms; or
>
> (E) other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970--

> (A) in any case in which the Secretary of Commerce determines that such species should--
>
> > (i) be listed as an endangered species or a threatened species, or
> >
> > (ii) be changed in status from a threatened species to an endangered species,
>
> he shall so inform the Secretary of the Interior, who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should--

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species,

he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

(C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable--

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

(B)(i) The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 670a of this title, if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

(ii) Nothing in this paragraph affects the requirement to consult under section 1536(a)(2) of this title with respect to an agency action (as that term is defined in that section).

(iii) Nothing in this paragraph affects the obligation of the Department of Defense to comply with section 1538 of this title, including the prohibition preventing extinction and taking of endangered species and threatened species.

REGULATIONS

50 C.F.R. § 226.202

Critical habitat for Steller sea lions.

Steller Sea Lion (Eumetopias jubatus)

(a) Alaska rookeries, haulouts, and associated areas. In Alaska, all major Steller sea lion rookeries identified in Table 1 and major haulouts identified in Table 2 and associated terrestrial, air, and aquatic zones. Critical habitat includes a terrestrial zone that extends 3,000 feet (0.9 km) landward from the baseline or base point of each major rookery and major haulout in Alaska. Critical habitat includes an air zone that extends 3,000 feet (0.9 km) above the terrestrial zone of each major rookery and major haulout in Alaska, measured vertically from sea level. Critical habitat includes an aquatic zone that extends 3,000 feet (0.9 km) seaward in State and Federally managed waters from the baseline or basepoint of each major rookery and major haulout in Alaska that is east of 144° W. longitude. Critical habitat includes an aquatic zone that extends 20 nm (37 km) seaward in State and Federally managed waters from the baseline or basepoint of each major rookery and major haulout in Alaska that is west of 144° W. longitude.

(b) California and Oregon rookeries and associated areas. In California and Oregon, all major Steller sea lion rookeries identified in Table 1 and associated air and aquatic zones. Critical habitat includes an air zone that extends 3,000 feet (0.9 km) above areas historically occupied by sea lions at each major rookery in California and Oregon, measured vertically from sea level. Critical habitat includes an aquatic zone that extends 3,000 feet (0.9 km) seaward in State and Federally managed waters from the baseline or basepoint of each major rookery in California and Oregon.

(c) Three special aquatic foraging areas in Alaska. Three special aquatic foraging areas in Alaska, including the Shelikof Strait area, the Bogoslof area, and the Seguam Pass area.

> (1) Critical habitat includes the Shelikof Strait area in the Gulf of Alaska and consists of the area between the Alaska Peninsula and Tugidak, Sitkinak, Aiaktilik, Kodiak, Raspberry, Afognak and Shuyak Islands (connected by the shortest lines); bounded on the west by a line connecting Cape Kumlik (56°38″N/157°27′W) and the southwestern tip of Tugidak Island

(56°24′N/154°41′W) and bounded in the east by a line connecting Cape Douglas (58°51′N/153°15′W) and the northernmost tip of Shuyak Island (58°37′N/152°22′W).

(2) Critical habitat includes the Bogoslof area in the Bering Sea shelf and consists of the area between 170°00′W and 164°00′W, south of straight lines connecting 55°00′N/170°00′W and 55°00′N/168°00′W; 55°30′N/168°00′W and 55°30′N/166°00′W; 56°00′N/166°00′W and 56°00′N/164°00′W and north of the Aleutian Islands and straight lines between the islands connecting the following coordinates in the order listed:

52°49.2′N/169°40.4′W

52°49.8′N/169°06.3′W

53°23.8′N/167°50.1′W

53°18.7′N/167°51.4′W

53°59.0′N/166°17.2′W

54°02.9′N/166°03.0′W

54°07.7′N/165°40.6′W

54°08.9′N/165°38.8′W

54°11.9′N/165°23.3′W

54°23.9′N/164°44.0′W

(3) Critical habitat includes the Seguam Pass area and consists of the area between 52°00′N and 53°00′N and between 173°30′W and 172°30′W.