


MEMORANDUM

TO: Council, SSC and AP Members  
FROM: Chris Oliver   
Executive Director  
DATE: March 19, 2012  
SUBJECT: Protected Resources Report

ESTIMATED TIME 4 HOURS All B Items
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**ACTION REQUIRED**

Receive report on Protected Resources issues and take action as necessary.

**BACKGROUND**

Ice Seals

A ringed seal showing the same symptoms that were seen in Arctic ice seals was recently recovered in Yakutat, the first indication that the disease may be spreading beyond the Arctic. The cause or causes of the disease are still not known.

North Pacific Right Whales

The February, 2012 edition of Right Whale News included an update on the status of North Pacific right whales. An expert of the article is included below, the full edition is available from Steve MacLean upon request.

*The range of eastern North Pacific right whales is believed to encompass the Gulf of Alaska (GoA) and the Bering Sea (BS), while the western population inhabits the northwestern Pacific and the Okhotsk Sea (OS). Recent genetic and photo-ID mark-recapture methods gave independent estimates of approximately 30 animals for the eastern population (Wade et al. 2011). Although this may represent a sub-population that inhabits the BS in summer, and could therefore under-represent total abundance, the recent paucity of sightings strongly suggests that the overall eastern population is not much larger; as such, this is the smallest large whale population in the world for which an abundance estimate exists. There is no reliable estimate for the western stock, but sightings suggest that a few hundred animals may remain there, possibly along the eastern coast of Sakhalin Island or in offshore waters to the east and north.*

Migratory Birds

On January 27 2012, NMFS and the USFWS circulated a DRAFT Memorandum of Understanding to promote the conservation of migratory birds, attached as Item B-7(1). The MOU focuses on avoiding or

minimizing adverse impacts on migratory birds and strengthening migratory bird conservation through collaboration between NNMFS and USFWS. The MOU places an emphasis on seabirds because of NMFS' focus on marine resources. NMFS has requested that the Councils review the draft MOU and provide comments to the National Seabird Coordinator by April 12, 2012.

In 2001, the United States finalized its National Plan of Action for Reducing the Incidental Catch of Seabirds in Longline Fisheries (NPOA-Seabirds), resulting in the establishment of NMFS' National Seabird Program (NSP), which focuses on reducing seabird bycatch and understanding the effects of sea bird bycatch on marine ecosystems, and understanding the role of seabirds as valuable ecosystem indicators. The U.S. Fish and Wildlife Service Migratory Bird Program serves as a focal point for U.S. policy development and strategic planning, program implementation, and evaluation of actions designed to conserve migratory birds and their habitats. The MOU will be implemented at national and regional levels through existing agency infrastructure, relying on the Interagency Seabird Working Group (ISWG) to lead the coordination and implementation of migratory bird conservation efforts.

#### Eastern DPS Steller sea lions

The draft status review of the Eastern DPS of Steller sea lions has been transmitted from the Alaska Region to NMFS headquarters. NMFS expects that it will be published in April.

#### Western DPS Steller sea lions

##### a) State of AK et al. vs. Lubchenko et al.

Judge Timothy Burgess has ordered NMFS to prepare an Environmental Impact Statement by March 2, 2014, in accordance with the proposed schedule (reviewed by the Council in February 2012), and complete any additional rulemaking prior to the commencement of the 2015 fishing season, with the opportunity to obtain extensions upon a showing of good cause. The Court also requires NMFS to file quarterly status reports indicating whether it is on schedule and, if it is not, whether it still anticipates that it will complete the EIS by March 2, 2014, and any additional rulemaking prior to the commencement of the 2015 fishing season.

According to the Judge's remand, the 23-month proposal presented by NMFS is both a sufficient and achievable timeline for the completion of an EIS process that will remedy the violations identified in the Court's summary judgment order and allow a fair opportunity for input from the public and the Council. At this meeting the Council may wish to decide whether the Steller Sea Lion Mitigation Committee (SSLMC) will be reconstituted, whether any changes are necessary to the membership of the SSLMC, and how to best utilize the SSLMC in the process.

##### b) Notice of Intent (NOI)

NMFS has prepared a draft NOI to prepare an Environmental Impact Statement and request for comments. NMFS has requested that the Council review and provide comment on the draft NOI, attached here as Item B-7(2).

## Recent Publications

The following publications are available from Steve MacLean upon request:

Call, K.A., and R.R. Ream. 2012. Prey selection of subadult male northern fur seals (*Callorhinus ursinus*) and evidence of dietary niche overlap with adult females during the breeding season. *Marine Mammal Science*. 28(1):1-15.

Wilson, K., L. Fritz, E. Kunisch, K. Chumbley, D. Johnson. 2012. Effects of research disturbance on the behavior and abundance of Steller sea lions (*Eumetopias jubatus*) at two rookeries in Alaska. *Marine Mammal Science*. 28(1):E58-E74.

DRAFT – January 27, 2012 – Council Review Draft – January 26, 2012 – DRAFT

## Memorandum of Understanding

Between the

**U.S. Department of Commerce  
National Marine Fisheries Service**

and

**U.S. Department of the Interior  
Fish and Wildlife Service**



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This Memorandum of Understanding (MOU) is entered into between the U.S. Department of Commerce National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) (hereinafter “the Parties”).

### **I. Purpose and Scope**

The purpose of this MOU, as required by Executive Order 13186 (66 FR 3853, January 17, 2001) (Executive Order), is to promote the conservation of migratory bird populations. This MOU focuses on avoiding, or where impacts cannot be avoided, minimizing to the extent practicable adverse impacts on migratory birds and strengthening migratory bird conservation through enhanced collaboration between NMFS and FWS by identifying general responsibilities of both agencies and specific areas of cooperation. Given NMFS’ focus on marine resources and ecosystems, this MOU places an emphasis on seabirds, but does not exclude other taxonomic groups of migratory birds.

### **II. Authorities**

This MOU is entered under the provisions of the following statutes and other authorities available to the Parties:

- Bald and Golden Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 668-668d) (BGEPA);
- Endangered Species Act of 1973, as amended (16 U.S.C. §§ 1531-1544) (ESA);
- Executive Order 13112, Invasive Species, 1999 (64 FR 6183);
- Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, 2001 (66 FR 3853);

- Fish and Wildlife Act of 1956, amended (16 U.S.C. §§ 791a *et seq.*);
- Fish and Wildlife Conservation Act of 1980, as amended (16 U.S.C. §§ 2901 *et seq.*);
- Fish and Wildlife Coordination Act of 1980, as amended (16 U.S.C. §§ 661 *et seq.*);
- Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. §§ 1801 *et seq.*) (MSA);
- Marine Mammal Protection Act (16 U.S.C. §§ 1361 *et seq.*)
- Migratory Bird Conservation Act of 1929, as amended (16 U.S.C. §§ 715 *et seq.*);
- Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712) (MBTA);
- National Aquaculture Act of 1980 (16 U.S.C. 2801 *et seq.*); and
- National Environmental Policy Act of 1969, as amended (42 U.S.C. §§ 4321-4347).

This MOU does not waive legal requirements under the MBTA, MSA, BGEPA, ESA, or any other statute and does not authorize the take of migratory birds. In addition, this MOU does not create any right or benefit, substantive or procedural, separately enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

### **III. Mission of Both Parties**

#### **NMFS**

The mission of NMFS is the stewardship of living marine resources through science-based conservation and management and the promotion of healthy ecosystems.

NMFS is responsible for the management, conservation, and protection of many living marine resources within Federal waters. NMFS also plays a supportive and advisory role in the management of living marine resources in coastal areas under state jurisdiction, provides scientific and policy leadership in the international arena, and implements international conservation and management measures as appropriate.

Under this mission, the goal is to optimize the benefits of living marine resources to the Nation through sound science and management. This requires a balancing of multiple public needs and interests in the sustainable benefits and use of living marine resources, without compromising the long-term biological integrity of coastal and marine ecosystems.

Many factors, both natural and human-related, affect the status of fish stocks, protected species, and ecosystems. Although these factors cannot all be controlled, available scientific and management tools enable the agency to have a strong influence on many of them. Maintaining and improving the health and productivity of these species and ecosystems is the heart of NMFS' stewardship mission. These activities will maintain and enhance current and future opportunities for the sustainable use of living marine resources as well as the health and biodiversity of their ecosystems.

Seabirds are of interest to and are studied by NMFS. NMFS has a responsibility through various statutory authorities and agency policies to monitor, understand, and minimize the negative impacts of agency actions, including the agency's regulatory actions, on seabird populations, including seabird bycatch, as well as to manage the coastal and marine habitats that seabirds depend on.

In 2001, the United States finalized its National Plan of Action for Reducing the Incidental Catch of Seabirds in Longline Fisheries (NPOA-Seabirds) resulting in the establishment of NMFS' National Seabird Program (NSP). Focus areas for the NPOA-Seabirds and NSP include:

- Seabird Bycatch: Work to minimize the direct take of seabirds by fisheries (e.g., incidental catch or bycatch, gear entanglement) and understand the effects of seabird bycatch on marine ecosystems, including seabird populations, addressing both domestic and international fishery issues.
- Seabirds as Valuable Ecosystem Indicators: Seabird distribution and abundance can reflect physical and biological oceanographic changes, abundance and distribution of mid-trophic-level organisms, and the effects of climate change on apex predators. Further, contaminant levels in seabirds can provide insight into possible pollution events in particular ecosystems. And, unlike so many marine organisms, seabirds are relatively easy to sample. Because the state of the ecosystem directly affects the resources for which NMFS has management responsibility, ecosystem integrators and indicators such as seabirds are critical components of Integrated Ecosystem Assessments, which are developed by NMFS Office of Science Technology in coordination with Science Centers. These Integrated Ecosystem Assessments can advance the science of ecosystem management for NMFS.

The MOU will be implemented at national and regional levels, through existing agency infrastructure. The Parties will call upon the Interagency Seabird Working Group (ISWG) to lead the coordination and implementation of such efforts.

#### FWS

As a Federal agency within the U.S. Department of the Interior, the mission of the FWS is to work with others to conserve, protect, manage, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. The FWS Migratory Bird Program serves as a focal point in the United States for policy development and strategic planning, program implementation, and evaluation of actions designed to conserve migratory birds and their habitats.

The FWS is legally mandated to implement the conservation provisions of the MBTA, which includes responsibilities for managing migratory bird populations, domestic and international coordination, and the development and enforcement of regulations that govern the take of migratory birds. The Migratory Bird Conservation Act and the Fish and Wildlife Coordination

Act mandate migratory bird habitat conservation, protection through acquisition, enhancement, and/or management to avoid and minimize adverse impacts.

FWS programs that involve bird conservation activities include:

1. The Division of Migratory Bird Management and the Migratory Bird Programs in the FWS Regional Offices serve as focal points for policy development and strategic planning. These offices develop and implement monitoring and management initiatives that help maintain healthy populations of migratory birds and their habitats and provide continued opportunities for citizens to enjoy bird-related recreation.
2. The Division of Bird Habitat Conservation is instrumental in supporting habitat conservation partnerships through the administration of bird conservation grant programs and development of Joint Ventures that serve as major vehicles for implementing the various bird conservation plans across the country.
3. Ecological Services Field Offices across the country serve as the primary contacts for technical assistance and environmental reviews involving migratory bird issues. Field Offices work with the Regional Migratory Bird Offices, as necessary, regarding BGEPA or MBTA permits and overall migratory bird conservation.
4. The Office of Law Enforcement is the principal FWS program that enforces the legal provisions of the MBTA, BGEPA, ESA, and other laws pertaining to migratory bird conservation.
5. The Division of Refuges and Wildlife manages National Wildlife Refuges and Waterfowl Production Areas across the country, many of which were established to protect and conserve migratory birds. Refuges not only protect important bird habitat, but also focus on monitoring migratory bird populations and restoring and maintaining native habitats.

#### **IV. Statement of Mutual Benefits**

NMFS and FWS have a well-established history of working collaboratively on seabird conservation activities and believe that the existence of an MOU can further strengthen this work. Although the FWS has primary responsibility for migratory birds in the United States, NMFS manages some human activities that affect migratory birds— primarily fishing activities in U.S. waters and in U.S. fisheries on the high seas. NMFS' activities and policies relate to ensuring the long-term sustainability of fisheries by taking into account habitat conservation issues and by making decisions based upon the best scientific information available. NMFS' policies and activities may therefore affect migratory birds—such as, seabirds and their prey.

FWS and NMFS agree that migratory birds are important components of biological diversity and that their conservation and management will help sustain ecological integrity. Furthermore, both Parties agree that migratory birds are important economically, and recreational activities associated with migratory birds contribute to the economic base of many communities. Both Parties will take this into consideration, to the extent practicable, when taking actions to avoid take or, to the extent take cannot be avoided, to minimize take of seabirds. Two important issues surrounding the conservation of migratory birds are: (1) the interaction between fishery operations and birds, especially seabirds; and (2) the maintenance of healthy habitats and prey populations for foraging and breeding seabirds.

This MOU provides a broad outline of collaborative and proactive ways to promote the conservation of migratory birds and avoid, or where take cannot be avoided, minimize to the extent practicable the potential measurable negative effects that NMFS actions may have on seabird populations.

The FWS and NMFS mutually agree that it is important to: (1) conserve migratory bird populations and their habitats; (2) recognize that actions taken to benefit some migratory bird populations may adversely affect other migratory bird populations; (3) recognize that actions that may provide long-term benefits to migratory bird populations may have short-term negative impacts on individual birds; and (4) recognize that restoration of migratory bird populations and habitats can be a long-term endeavor.

Furthermore, the Parties mutually agree that it is important to contribute to migratory bird conservation through a variety of means, including but not limited to: (1) seabird bycatch reduction; (2) information sharing; (3) international policy and diplomacy; and (4) marine and terrestrial habitat conservation. This MOU highlights examples of general and specific responsibilities related to the areas listed above in which NMFS and FWS may collaboratively engage to further the objectives outlined in Section 3(e) of the Executive Order. It is in the interest of both parties to assess potential direct and indirect impacts, and appropriately minimize those impacts that may have measurable negative effects on migratory bird populations.

## **V. General Responsibilities**

The Parties agree that this MOU shall be implemented to the extent permitted by law and consistent with agency missions, subject to the availability of appropriations.

### **A. Responsibilities of Both Parties**

1. Support the conservation intent of Executive Order 13186.
2. Identify where take reasonably attributable to NMFS actions may negatively affect migratory bird populations, focusing first on Species of Concern, and other regional priority habitats and key risk factors.
3. Identify best practices for: (i) avoiding, or where take cannot be avoided, minimizing to the extent practicable take of migratory birds; (ii) conserving and restoring



- migratory bird habitats; (iii) monitoring demographic parameters of migratory birds; (iv) standardizing data, where appropriate, collection to allow comparison of migratory bird data across studies; and (v) promoting bird conservation.
4. Promote training opportunities (e.g., workshops, outreach materials) for appropriate employees in the methods and techniques to: (i) inventory and monitor migratory birds; (ii) assess population status of migratory birds; (iii) assess temporal and spatial bird use of specific areas; (iv) evaluate impacts of projects on migratory birds; and (v) develop management and operational practices that avoid, or where impacts cannot be avoided, minimize to the extent practicable adverse impacts and promote beneficial proactive approaches to migratory bird conservation.
  5. Develop partnerships to further migratory bird conservation, including prey resources, as practicable. This includes cooperation, coordination, and data sharing with other Federal or State agencies, the fishing industry, universities, and non-governmental organizations involved in monitoring and research studies to provide reliable and comparable information on the distribution and abundance or status and trends of migratory bird populations.
  6. Participate in the interagency Council. The duties of the Council include the following:
    - a. Sharing the latest resource information to assist in the conservation and management of migratory birds.
    - b. Reporting annually on accomplishments and recommendations related to the Executive Order.
    - c. Fostering partnerships to further the goals of the Executive Order.
    - d. Selecting an annual recipient of the Presidential Migratory Bird Federal Stewardship Award for contributions to the protection of migratory birds.
  7. Work cooperatively with other partners to incorporate and implement migratory bird action plans or conservation strategies in management plans for Marine National Monuments that harbor migratory birds.

## B. Responsibilities of NMFS

1. Integrate migratory bird conservation principles, measures, and practices into NMFS activities and science and resource-management plans to outline measures and practices to avoid, or where take cannot be avoided, minimize to the extent practicable the take of migratory birds and adverse impacts on their habitats, where practicable. NMFS will evaluate and revise these principles, measures, and practices to ensure that they are effective in minimizing, to the extent practicable, the negative effect of NMFS actions on migratory bird populations.
2. ensure to the extent practicable, that environmental analyses required by NEPA or other established environmental-review processes evaluate the effects of actions and agency plans on migratory birds (with an emphasis on seabirds) and their habitats, including estimating the level or extent of take of Species of Concern likely to result from the action.

3. Support efforts by FWS to promote the ecological, economic, and recreational values of migratory birds by encouraging outreach and educational activities and materials when appropriate.
4. Minimize or prevent the pollution or detrimental alteration of habitat used by migratory birds.
5. Address as appropriate the potential introduction, establishment, and spread of non-native species that could result from agency actions.
6. Consult with FWS Regional Migratory Bird Offices to determine whether permits for intentional take of migratory birds pursuant to 50 CFR parts 10, 13, 21, and 22 are needed and report numbers taken under any such permits.

#### C. Responsibilities of FWS

1. Inform NMFS of any bird conservation updates or changes in policy that affect agency actions. These include:
  - a. Revisions to the lists of Birds of Conservation Concern, threatened or endangered species, or the birds covered under the MBTA.
  - b. Changes to the MBTA and other acts and associated regulations and procedures affecting management of migratory birds.
  - c. Changes in, updates to, or additions to national and regional bird conservation plans.
2. Provide NMFS with information needed for NEPA or other environmental analyses to assess the effects of NMFS actions on populations of migratory birds.
3. Provide NMFS information regarding migratory bird population status and trends, at-sea-distribution data and observations, colonies, over-wintering areas, migration stopovers, significant changes in condition or availability of key food resources, and any other applicable information as it becomes available and upon request.
4. As information is available, identify important migratory bird areas and habitats (e.g., foraging, wintering, molting areas at sea) that NMFS should evaluate in its environmental reviews.

## VI. Specific Areas of Collaboration and Cooperation

### A. Seabird Bycatch Reduction

Section 316 of the MSA established the Bycatch Reduction Engineering Program. A major portion of this program is dedicated to addressing seabird bycatch issues through fishery management plans. Section 316(b) of the MSA authorizes the Secretary of Commerce and the Regional FMCs to establish through the fishery management plans a series of incentives to reduce total bycatch and seabirds interactions. In addition, Section 316(c) authorizes NMFS and FWS to undertake projects in cooperation with industry to improve information and technology to reduce seabird bycatch.

NMFS and FWS will continue to promote and implement the NPOA-Seabirds to obtain these objectives, and to assess the implementation of the NPOA-Seabirds and the seabird-bycatch-mitigation plans for individual fisheries to determine their effectiveness. This should be accomplished at the regional level through the Fishery Management Council (FMC) process, or the Atlantic Highly Migratory Species management process as appropriate, and by the FWS through research needed to assess and monitor seabird populations and to improve population-assessment methodologies. The ISWG should continue to collaborate on seabird-bycatch issues at both the national and international levels.

**NMFS and FWS will:**

1. As appropriate, use the NPOA-Seabirds and the FAO Best Practice Technical Guidelines for IPOA/NPOA-Seabirds and peer-reviewed results of current research to provide examples of methods that are effective at minimizing the unintentional take of seabirds in longline gear as well as other fishing gear (e.g. trawl and gillnet fisheries)
2. Identify priority areas/fisheries that may require further investigation regarding extent of interaction of fisheries with seabirds.
3. Develop a process to identify and assess seabird interactions with longline and other fishing gear that constitute a bycatch problem. This process will consider those fisheries that negatively affect migratory bird populations, focusing first on Species of Concern or other regional priority habitats and key risk factors.
4. Collaborate with each other and with the fishing industry on research to identify key geographical areas and fisheries with seabird interactions, to determine whether existing seabird bycatch mitigation measures are effective at avoiding or minimizing to the extent practicable seabird interactions, and to assess the need to further refine and improve those mitigation measures.
5. Participate in the FMC process to help develop and encourage incorporation of measures to avoid, or where bycatch cannot be avoided, minimize to the extent practicable seabird bycatch into fishery management plans.
6. Work together to incorporate, as appropriate, measures to avoid, or where bycatch cannot be avoided, minimize to the extent practicable seabird bycatch in Secretarial fishery management plans.
7. Provide training for and information exchange among fishers and observers regarding seabird bycatch and avoidance measures. This includes working together to:
  - a. Develop outreach and education materials to be provided to fishers and gear specialists to increase awareness of seabird take and effective solutions to avoid, or where take cannot be avoided, minimize to the extent practicable such take, including the use of new technologies and methods.
  - b. Design and deliver observer and fisher training and outreach materials to enhance the collection and quality of data regarding at-sea survey and identification of seabirds associated with fishing activities and to improve seabird handling and release techniques for entangled or damaged birds to

maximize the likelihood of survival of seabirds caught incidental to fishing operations and released alive.

- c. Identify ways to improve the public availability of information on seabird-bycatch in fisheries, as well as seabird distribution (e.g., foraging, breeding). Provide recognition to fishermen and organizations that promote seabird-bycatch reduction.
8. Continue timely consultations under ESA Section 7.
9. Continue working through the ISWG to promote and coordinate implementation of the NPOA-Seabirds and the International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries (IPOA-Seabirds) in all relevant international and regional fisheries organizations, and participate in relevant national and international meetings and workshops.

**NMFS will:**

1. Improve the collection of at-sea information and the sharing of biological information to assess the vulnerability of seabird species to fishing operations. This could include enhancement of fishery observer coverage, particularly in areas where coverage is currently low.
2. Conduct seabird bycatch analyses and coordinate with FWS to assess the population level effects of the bycatch.
3. Incorporate information on seabird bycatch occurring in fisheries under NMFS jurisdiction into the NMFS National Bycatch Report. Provide this report to FWS upon availability.
4. Distribute information to NMFS and the FMC offices regarding the need to consider seabird conservation during the development of relevant fishery-management actions. This distribution may include migratory bird population status and trends reports, colony-monitoring reports, or any other applicable information to assist in policy development and decision-making.
5. Avoid, or where take cannot be avoided, minimize to the extent practicable the unintentional take of seabirds in NMFS research operations, such as fishery stock assessment surveys and cruises.
6. Implement habitat restoration programs that restore living marine and coastal resources supporting fisheries and migratory birds. These living marine and coastal resources may include habitats or organisms that provide shelter, food or other ecosystem services characteristic of healthy marine and coastal waters and substrates, intertidal zones, living shorelines, and adjacent coastal habitats.

**FWS will:**

1. As early as practicable and as appropriate, during the development of NMFS and/or regional FMC actions, review and provide comments on the potential effects the action may have on migratory birds and how to avoid, or where impacts cannot be avoided, minimize to the extent practicable adverse impacts resulting from activities

associated with NMFS actions to better ensure appropriate protection for migratory birds.

2. Participate in meetings of the regional FMCs (FWS-designated seat as per 16 U.S.C. 1852(c)), including membership on associated committees, panels or teams, as appropriate, and consult with NMFS regarding the actions of the regional FMC that may affect migratory bird populations. (e.g., meetings when seabird issues are on the agenda).
3. Provide recommendations to NMFS identifying conservation and management objectives for relevant migratory bird populations and for migratory bird habitats, particularly as they relate to the development of fishery management plan actions.

#### **B. Information Sharing and Coordination**

NMFS and FWS agree that the collection and sharing of biological information regarding migratory bird species can assist in a greater understanding of the health of their populations and of marine ecosystems.

#### **NMFS and FWS will:**

1. Promote research and information exchange related to migratory bird conservation including inventorying, monitoring, and conducting studies related to agency decisions and management practices that may affect migratory birds and their habitats.
  - a. Collaborate on studies: (i) of migratory bird species that may be affected by agency actions (e.g., expand migratory bird population surveys and data collection for species commonly subject to bycatch across all fisheries); (ii) of the effects of management activities; (iii) of avoiding degradation of migratory bird habitat (e.g., research focused on evaluating impacts of agency actions on seabird prey populations and foraging habitats,); and (iv) to develop appropriate mitigation measures;
2. Engage in long-term planning to facilitate cooperative efforts in conducting migratory bird surveys, monitoring, and research (e.g., population counts and research cruises) and, to the extent practicable, share resources. Some examples include:
  - a. Collaborate to use existing research cruises to access remote breeding colonies or conduct at-sea surveys.
  - b. Collaborate to design research projects to yield better information about the trophic relationship between seabirds and their marine prey.
  - c. Collaborate to standardize, where appropriate, the type of information collected by each agency, identify parties responsible for data collection, and better correlate and incorporate fishery data with seabird-distribution and ecological data.
3. Share inventory, monitoring, research, data in a timely fashion with other Federal and State agencies as appropriate and practicable. Data should be archived with national or regional repositories, when appropriate.
4. Work together to continue to streamline and improve the permit process for the salvage of birds or bird parts by NMFS employees, contractors, and observers.

**C. International Policy and Diplomacy**

NMFS and FWS agree it is important to build and maintain positive working relationships with foreign entities to further U.S. objectives of migratory bird conservation.

**NMFS and FWS will:**

1. Promote migratory bird conservation internationally, through the implementation of the IPOA-Seabirds and NPOA-Seabirds via participation in Regional Fisheries Management Organizations (RFMOs), meetings of the Agreement on the Conservation of Albatrosses and Petrels (ACAP), other multilateral meetings, and within other international fora, as appropriate.
2. Coordinate the development of priority actions and activities related to ACAP and other multilateral agreements specific to the conservation of seabirds.
3. Coordinate, as appropriate, prospective capacity-building projects to enhance the ability of other nations to conserve seabird populations, including reducing seabird bycatch in fisheries.
4. Coordinate with the U.S. Department of State to explore and implement, as appropriate, international arrangements that advance U.S. policies and practices related to conservation of migratory birds at sea, through technical cooperation, conservation planning, project support, cooperative studies, education, and training.

**NMFS will:**

1. Promote the use of the FAO Best Practices Technical Guidelines for IPOA/NPOA – Seabirds with other nations and with relevant multilateral organizations, such as RFMOs.
2. Coordinate with FWS, as appropriate, in preparation for relevant RFMO and other international meetings to further the goal of reducing seabird interactions in fisheries.

**FWS will:**

1. Coordinate with NMFS, as appropriate, when working with international partners on issues or activities that may affect international fisheries.

**D. Habitat Conservation**

NMFS (Office of Habitat Conservation), in coordination with appropriate NOAA line offices and NMFS Region offices and Science Centers, will work with FWS to minimize impacts to and restore and enhance marine and coastal habitats of migratory birds. This work may include the prevention or abatement of pollution for the benefit of migratory birds, as well as the development and implementation of restoration projects to address the introduction of non-native nest predators to islands with seabird breeding colonies; and public outreach to provide information about these habitat program activities.

**NMFS and FWS, as appropriate, will collaborate with NOAA’s Restoration Center to:**

1. Consider impacts to migratory bird habitat when selecting habitat restoration sites and avoid, or where impacts cannot be avoided, minimize to the extent practicable negative impacts to migratory bird habitat, when possible.
2. Identify habitats needed for successful reproduction, migration, over-wintering, and foraging in conjunction with other comprehensive planning efforts for migratory birds.
3. Identify and avoid activities that may have measurable negative effects on migratory birds, including their nesting, foraging, migration, or over-wintering habitats, and seek to avoid, or where impacts cannot be avoided, minimize to the extent practicable such impacts or the activities causing them.

**FWS will:**

1. Assist NMFS in identifying agency activities that may have measurable negative effects on migratory bird habitat, including their nesting, migration, foraging, or over-wintering habitats, and developing management objectives to avoid, or where impacts cannot be avoided, minimize to the extent practicable such impacts.
2. Provide guidance to NMFS in identifying habitat initiatives and specific projects that can promote protection and restoration of habitats important to migratory birds (e.g., control and eradication of invasive species on islands, construction of ungulate- and predator-proof fences, enhancement of colonies or populations through social attraction or translocation).

**VII. Definitions**

Action – a program, activity, project, official policy, rule, regulation or formal plan directly carried out by the agency.

Birds of Conservation Concern – a list published and periodically updated by the FWS Division of Migratory Bird Management. The overall goal of this list is to identify the migratory and non-migratory bird species that, in addition to species already listed under the ESA, represent the FWS’s highest conservation priorities. The most current version of the list, Birds of Conservation Concern 2008, is available at <http://www.fws.gov/migratorybirds>.

Council for the Conservation of Migratory Birds (Council) – an interagency council established by the Secretary of the Interior to oversee the implementation of Executive Order 13186.

Effects (adverse or beneficial) – “effects” and “impacts,” as used in this MOU are synonymous. Effects may be direct, indirect, or cumulative, and refer to effects from management actions on migratory bird populations, habitats, ecological conditions or significant bird-conservation sites.

FAO – Food and Agriculture Organization of the United Nations.

Fishery Management Plan (FMP) (see MSA Section 302(h)(1) (16 U.S.C. § 1852(h)(1)) - provides authority for regional Fishery Management Council FMPs; Section 304(g)(1) (16 U.S.C. § 1854(g)(1)) provides authority for Atlantic Highly Migratory Species FMPs done by the Secretary of Commerce. Sections 303(a) and 303(b) (16 U.S.C. § 1853(a) and (b)) articulate what the FMP must and can, respectively, contain.

Incidental take – see Take.

Intentional take – see Take.

Interagency Seabird Working Group (ISWG) – Working Group composed of agency staff from NMFS, FWS, and DOS. The ISWG was originally formed to develop the NPOA-Seabirds. The Group's work has continued in some capacities as the NPOA-Seabirds is implemented and when need arises for an interagency approach to seabird conservation. NMFS continues to identify a seabird contact in each of its Region offices, Science Centers, and Headquarter offices.

IPOA – International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries; a plan developed by the Food and Agriculture Organization of the United Nations (FAO) in 1999 ( <http://www.fao.org/fishery/ipoa-seabirds/en>).

Migratory Bird – an individual of any species protected by the Migratory Bird Treaty Act; a list of protected migratory birds can be found in 50 CFR § 10.13, Code of Federal Regulations or at <http://www.fws.gov/migratorybirds>.

NMFS's National Seabird Program (NSP) – NMFS's headquarters-based program that addresses NMFS's responsibilities to protect seabirds under the NPOA-Seabirds and the Executive Order. The NSP is led by a national coordinator and implemented regionally through seabird points of contact at each Regional Office, Science Center, and Headquarters office ( [http://www.fakr.noaa.gov/protectedresources/seabirds/seabird\\_factsheet.pdf](http://www.fakr.noaa.gov/protectedresources/seabirds/seabird_factsheet.pdf)).

NPOA – National Plan of Action for Reducing the Incidental Catch of Seabirds in Longline Fisheries developed by NMFS, FWS, Department of State, and the Interagency Seabird Working Group in 2001.

Regional Fishery Management Council (as established by the MSA under Section 302 (16 U.S.C. § 1852) – Eight committees created for the purpose of managing Federal fisheries off the coast of the United States. Each council is composed of members of the fishing industry, non-governmental organizations, and various Federal and State employees and is responsible for providing recommendations to the Secretary of Commerce on fisheries in the Federal waters of their region. Councils develop fishery management plans and management measures for the fisheries within their region. FMPs are approved and implemented by the Secretary of Commerce through NMFS ([http://www.nmfs.noaa.gov/sfa/reg\\_svcs/councils.htm](http://www.nmfs.noaa.gov/sfa/reg_svcs/councils.htm)).



RFMO – Regional Fishery Management Organization – an international organization established by any bilateral or multilateral treaty, convention, or agreement for the conservation and management of fish

Species of Concern – refers to several categories of birds including: (1) species listed in the periodic report, Birds of Conservation Concern, published by the FWS Division of Migratory Bird Management (<http://www.fws.gov/migratorybirds>); (2) priority migratory bird species documented in the comprehensive bird-conservation plans (North American Waterbird Conservation Plan, United States Shorebird Conservation Plan, Partners in Flight Bird Conservation Plans); (3) species or populations of waterfowl identified as high, or moderately high, continental priority in the North American Waterfowl Management Plan; (4) ESA-listed threatened and endangered bird species in 50 CFR § 17.11; and (5) MBTA-listed gamebirds of management concern (as listed in the Birds of Management Concern list, <http://www.fws.gov/migratorybirds>).

Take – to pursue, hunt, shoot, wound, kill, trap, capture or collect or attempt to pursue, hunt, wound, kill, trap, capture or collect (50 CFR § 10.12). Executive Order 13186 further defines “take” to include intentional take, meaning take that is the purpose of the activity in question, and unintentional (incidental) take, meaning take that results from, but is not the purpose of, the otherwise legal activity in question. Take prohibited by the MBTA includes both intentional and unintentional take. The regulations implementing the BGEPA define “take” to mean pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb bald and golden eagles (50 CFR § 22.3).

Unintentional take – See Take.

### **VIII. Dispute Resolution**

The Parties will attempt to prevent potential conflicts or resolve actual disagreements between the Parties first at the lowest levels, elevating through the respective organizational levels if necessary. The Parties will use conflict prevention or traditional Alternative Dispute Resolution (ADR) processes to achieve consensus. The Parties will use collaborative processes, including informal meetings or negotiations, to avoid or minimize a dispute. If the dispute already has developed, more traditional processes may be appropriate, such as mediation or a negotiation assisted by a neutral third-party.

The Parties must notify each other in writing of potential conflict or a dispute, and attempt to resolve the issue at the Field level within 30 days. If the Parties are unable to resolve the issue at this level within 30 days, either party may elevate the issue to the appropriate officials at NMFS or FWS Regional offices. If the Parties are unable to resolve the issue at the Regional level within 30 days, either party may elevate the issue to the appropriate level of each agency.

Representatives of both agencies shall agree to enter into a conflict-prevention process using collaborative methods or to enter into a traditional ADR process, as appropriate.

## **IX. Agreement**

### **It is Mutually Agreed and Understood That:**

This MOU in no way alters or diminishes the Party's obligations or responsibilities under any statute or other legal authority.

- A. NMFS will advise the public of the availability of this MOU, once finalized, through a notice published in the Federal Register. Any other public notification of this MOU or the relationship therein shall have prior approval of both NMFS and FWS.
- B. Either NMFS or FWS may terminate this MOU, in whole or in part, at any time before the date of expiration by providing the other with a written statement at least 30 calendar days prior to the effective date of termination.
- C. Matters that, on the effective date of termination, remain pending shall proceed to final resolution, and such final resolution shall be binding upon the Parties notwithstanding termination of this MOU. Changes within the scope of this instrument shall be made by the issuance of a bilaterally executed modification.
- D. This MOU in no way restricts either NMFS or FWS from participating in similar activities with other public or private agencies, governments, organizations, or individuals.
- E. Any information furnished to NMFS or FWS under this MOU is subject to the Freedom of Information Act (5 U.S.C. § 552) unless proscribed by agency policy or law relating to confidentiality.
- F. This instrument in no way diminishes any requirement, including under NEPA, MSA, or the ESA, that NMFS or FWS conduct an environmental analysis.
- G. Modifications within the scope of the instrument shall be made by mutual consent of NMFS and FWS, by the issuance of a written modification, signed and dated by both agencies, prior to any changes being performed.
- H. This MOU is neither a fiscal nor a funds-obligation document. Any endeavor involving reimbursement, contribution of funds, or transfer of anything of value between NMFS and FWS will be handled in accordance with applicable laws, regulations, and procedures, including those for government procurement and printing. Such endeavors will be outlined in separate agreements that shall be made in writing by representatives of

NMFS and FWS and shall be independently authorized by appropriate statutory authority. This MOU does not provide such authority. Specifically, this MOU does not establish authority for noncompetitive award of any contract or other agreement. Any contract or agreement for training or other service must fully comply with all applicable requirements for competition.

- I. Meetings will be scheduled at the headquarters level periodically to review implementation, summarize accomplishments, and identify opportunities for advancing the purpose of this MOU. Each party will designate a point of contact to carry out the terms of this MOU.
- J. This MOU does not require changes to current contracts, permits, or other third-party agreements, nor does it create any right or benefit, substantive or procedural, separately enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.
- K. The principal contacts for this instrument are as follows:

National Seabird Coordinator  
National Marine Fisheries Service  
Alaska Region  
P.O. Box 21668  
Juneau, Alaska

Chief, Division of Migratory Bird Management  
U.S. Fish and Wildlife Service  
4401 N. Fairfax Drive, Ste.634  
Arlington, VA 22203

This instrument is executed as of the last date signed below and expires no later than five years from the effective date, at which time it is subject to review and renewal, or expiration.

The Parties hereto have executed this agreement as of the date shown below.

\_\_\_\_\_  
Samuel D. Rauch III  
Acting Assistant Administrator for  
National Marine Fisheries Service

\_\_\_\_\_  
Dan Ashe  
Director  
U.S. Fish and Wildlife Service

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**

*National Marine Fisheries Service*  
P.O. Box 21668  
Juneau, Alaska 99802-1668  
March 16, 2012

**RECEIVED**  
MAR 20 2012

Mr. Chris Oliver, Executive Director  
North Pacific Fishery Management Council  
605 W. 4<sup>th</sup> Avenue #306  
Anchorage, Alaska 99501-2252

Dear Mr. Oliver:

In February 2012, we shared with the North Pacific Fishery Management Council (Council) a timeline for the preparation of an environmental impact statement (EIS) for the Steller sea lion protection measures for the Alaska groundfish fisheries. This timeline included the National Environmental Policy Act (NEPA) process, Endangered Species Act Section 7 consultation, and coordination with the Council on any potential revisions to the protection measures. On March 5, 2012, the U.S. District Court of Alaska ordered NMFS to prepare an EIS with a completion date of March 2, 2014. Enclosed is a new timeline for the EIS based on the Court order.

The first step in the EIS process is to notify the public of the agency's intent to prepare an EIS by publishing a Notice of Intent (NOI) in the Federal Register. The NOI must include a description of the proposed action, possible alternatives to the proposed action, possible issues, possible analysis, and a description of the scoping process. We have prepared the enclosed draft NOI for review by the Council at its April 2012 meeting.

Council participation in developing the EIS is important to ensure a reasonable range of alternatives, ensure the protection measures are adequately analyzed, and to facilitate the public review process. We would appreciate the Council's review of the NOI's description of the proposed action, the preliminary range of alternatives, preliminary identification of issues, and potential impacts to be analyzed.

After consultation with the Council, we will publish the NOI and start the scoping period. The scoping period would end October 15, 2012, to allow maximum time for Council and public participation while meeting the Court-ordered deadline for the final EIS. We look forward to working with the Council as we proceed to develop and analyze potential revisions to the Steller sea lion protection measures.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Balsiger".

James W. Balsiger, Ph.D.  
Administrator, Alaska Region

Enclosures



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XA975

Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish Fisheries in the Bering Sea and Aleutian Islands

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; intent to prepare an environmental impact statement, request for comments.

SUMMARY: NMFS, in consultation with the North Pacific Fishery Management Council (Council), announces its intent to prepare an environmental impact statement (EIS) on Steller sea lion protection measures for the Bering Sea and Aleutian Islands management area (BSAI) groundfish fisheries, in accordance with the National Environmental Policy Act of 1969. The proposed action would restrict groundfish fishing in the BSAI to ensure the groundfish fisheries are not likely to result in jeopardy of continued existence or adverse modification or destruction of designated critical habitat (JAM) for the western distinct population segment (DPS) of Steller sea lions. The western DPS of Steller sea lions is listed as endangered under the Endangered Species Act (ESA) and NMFS must ensure that the groundfish fisheries are not likely to result in JAM for this DPS. NMFS intends to work with stakeholders to develop fisheries restrictions that avoid the likelihood of JAM and minimize the potential economic impact on the fishing industry to the extent practicable while meeting the requirements of the ESA. The analysis in the EIS will determine the impacts to the human environment resulting from this proposed action and the alternatives. In scoping for the EIS, NMFS will accept written comments from the

public to determine the issues of concern; the appropriate range of management alternatives; and the direct, indirect, and cumulative impacts. NMFS, in coordination with the Council, will conduct public meeting(s) to inform the public of this proposed action and alternatives, present issues and potential impacts, and gather public comment.

**DATES:** Written comments must be received by 5 PM Alaska Standard Time (AST), October 15, 2012.

**ADDRESSES:** You may submit comments on this action, identified by NOAA-NMFS-2012-0013, by any of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal [www.regulations.gov](http://www.regulations.gov). To submit comments via the e-Rulemaking Portal, first click the "submit a comment" icon, then enter NOAA-NMFS-2012-0013 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the "Submit a Comment" icon on that line.
- **Mail:** Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802-1668.
- **Fax:** Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Fax comments to 907-586-7557.
- **Hand delivery to the Federal Building:** Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS,

Attn: Ellen Sebastian. Deliver comments to 709 West 9<sup>th</sup> Street, Room 420A, Juneau, AK.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

Electronic copies of the 2010 environmental assessment and biological opinion prepared for the Steller sea lion protection measures are available from <http://www.regulations.gov> or from the NMFS Alaska Region Web site at <http://alaskafisheries.noaa.gov/sustainablefisheries/sslpm/>.  
FOR FURTHER INFORMATION CONTACT: Melanie Brown, (907) 586-7228.

SUPPLEMENTARY INFORMATION: Under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the United States has exclusive fishery management authority over all living marine resources found within the exclusive economic zone. The management of these marine resources, with the exception of certain marine mammals and birds, is vested in the Secretary of Commerce. The Council has the responsibility to prepare fishery management plans for those marine resources off Alaska

requiring conservation and management. Management of the Federal groundfish fishery in the BSAI is carried out under the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP). The FMP, its amendments, and implementing regulations (found at 50 CFR part 679) are developed in accordance with the requirements of the Magnuson-Stevens Act and other applicable Federal laws and executive orders, notably the National Environmental Policy Act (NEPA) and the ESA.

#### Alaska Groundfish Fisheries Steller Sea Lion Protection Measures

Steller sea lion protection measures have been used to manage the groundfish fisheries since 1999 (64 FR 3437, January 22, 1999) and have been annually revised and implemented in 2000 through 2004. Details of these rules are available at the NMFS Alaska Region website at <http://www.alaskafisheries.noaa.gov/sustainablefisheries/sslpm/>. The protection measures have been used to mitigate the potential adverse effects of the groundfish fisheries on Steller sea lions and on their designated critical habitat. Steller sea lions may be incidentally taken in fishing gear, may be disturbed by fishing activities, and may compete with groundfish fisheries for important prey species. Atka mackerel, Pacific cod, and pollock are important Steller sea lion prey species that also are harvested in the groundfish fisheries. The protection measures temporally and spatially disperse Atka mackerel, Pacific cod, and pollock harvest to reduce potential impacts from the groundfish fisheries on Steller sea lions and on their designated critical habitat. Spatial protection measures include closures of areas to groundfish fishing near Steller sea lion haulouts and rookeries, and in foraging areas, to reduce potential interactions with Steller sea lions and fishing vessels and to reduce potential impacts on prey resources in locations important to Steller sea lions. Harvest of pollock, Pacific cod, and Atka mackerel also is temporally dispersed through seasonal apportionments of the annual total allowable catch for



these species. The details of the current Steller sea lion protection measures for the Alaska groundfish fisheries are available on the NMFS Alaska Region website at <http://www.alaskafisheries.noaa.gov/sustainablefisheries/sslpm/>.

In 2010, NMFS completed an ESA section 7 consultation on the effects of the Alaska groundfish fisheries on ESA-listed species, including the western DPS of Steller sea lions, and on designated critical habitat. Based on the best available commercial and scientific information, the consultation resulted in a biological opinion (2010 Biop) that found that the Steller sea lion protection measures implemented in the BSAI since 2003 could not ensure that the groundfish fisheries were not likely to result in JAM for the western DPS of Steller sea lions. A reasonable and prudent alternative (RPA) to the protection measures was included in the 2010 Biop to ensure the groundfish fisheries were not likely to result in JAM. This RPA was implemented by an interim final rule as the 2011 Steller sea lion protection measures (75 FR 77535, December 13, 2010, corrected 75 FR 81921, December 29, 2010).

The 2011 Steller sea lion protection measures primarily affected the Pacific cod and Atka mackerel fisheries in the Aleutian Islands subarea. The 2010 Biop determined that the weight of evidence indicated that fisheries for Steller sea lion prey may be appreciably reducing the reproduction, and thus numbers, of Steller sea lions and adversely modifying the conservation value of their critical habitat in Statistical Areas 543, 542, and 541 by removing large quantities of prey species important to Steller sea lions for basic nutrition and reproductive capacity. Competition with fisheries for prey is likely one component of an intricate suite of natural and anthropogenic factors affecting Steller sea lion numbers and reproduction. While natural factors may be contributing, NMFS must insure that actions authorized by NMFS are not likely to appreciably reduce the likelihood of survival and recovery of the western DPS of Steller sea

lions, which is required to avoid the likelihood of JAM.

The RPA was developed based on performance standards that address the effects of the groundfish fisheries and the population status and foraging behavior of Steller sea lions in the Aleutian Islands subarea. The details of these standards are in the 2010 Biop (see ADDRESSES). The RPA was structured to mitigate effects of the fishery in locations where Steller sea lion abundance continues to decline (Statistical Areas 543, 542, and 541). One of the performance standards requires that the protection measures be commensurate with the rate of Steller sea lion population declines, with more stringent measures in those locations with greater population declines. The RPA meets this standard by applying more fisheries restrictions in Area 543 where Steller sea lions have the highest population decline and applying fewer fisheries restrictions in Areas 542 and 541, where Steller sea lion population decline is less than in Area 543. Implementation of the RPA is expected to eliminate local competition between Steller sea lions and the Atka mackerel and Pacific cod fisheries in Area 543. This is intended to improve foraging success and prey availability for juvenile and adult Steller sea lions, which is expected to lead to higher survival and natality rates. The RPA also reduces the competitive overlap between Steller sea lions and fisheries for Atka mackerel and Pacific cod in Areas 542 and 541. This is intended to improve foraging success and prey availability for Steller sea lions, particularly adult females with dependent young in winter, which is expected to lead to higher natality rates and survival.

#### Litigation on the 2011 Steller Sea Lion Protection Measures

On March 5, 2012, NMFS was ordered by the U.S. District Court of Alaska to prepare an EIS on the Steller sea lion protection measures implemented in January 2011 (75 FR 77535, December 13, 2010, corrected 75 FR 81921, December 29, 2010). The Court's decision and

order for this action are available on the NMFS Alaska Region website at <http://alaskafisheries.noaa.gov/sustainablefisheries/sslpm/eis/>. The Court ordered NMFS to prepare an EIS for the Steller sea lion protection measures because NMFS failed to provide sufficient environmental information for informed public comment to the agency decision-making when it prepared the environmental assessment for this action in 2010 (see ADDRESSES) and failed to provide for adequate public participation. In addition, the Court determined that NMFS' conclusions for this action were highly controversial and uncertain and that the beneficial environmental impacts of the action were likely significant, requiring an EIS. The Court identified scientific controversy for this action being associated with the use of single species rather than multi species models for groundfish fisheries stock assessments and with the effects of the groundfish fisheries on the availability of Steller sea lion prey resources.

The Court ordered the completion of the final EIS by March 2, 2014. The Court also ordered that any subsequent rulemaking for the BSAI groundfish fisheries as a result of the EIS must be completed by January 1, 2015.

#### Proposed Action

The proposed action is a set of protection measures that would restrict groundfish fishing in the BSAI to ensure the groundfish fisheries are not likely to result in JAM for the western DPS of Steller sea lions. Spatial and temporal dispersion of the harvest of Steller sea lion prey species would be included in the protection measures to reduce potential adverse impacts. The protection measures should ensure the groundfish fisheries are not likely to result in JAM while minimizing economic impact on fishery participants to the extent practicable.

#### Alternative Management Measures

The EIS will evaluate a range of alternative management measures for the BSAI

groundfish fisheries. Alternatives may be developed based on the elements identified here, and those developed through the public scoping and Council processes. Possible alternatives could be constructed from one or more of the following alternatives:

1. The status quo alternative to continue implementation of the 2011 Steller sea lion protection measures and management of the groundfish fisheries under the FMP.
2. An alternative recommended by the Council that is intended to maintain protection of Steller sea lions while reducing fishing restrictions imposed by the 2011 Steller sea lion protection measures, particularly for the Pacific cod and Atka mackerel fisheries in the Aleutian Islands subarea.
3. An alternative that provides precautionary, additional protection to Steller sea lions in the Aleutian Islands beyond those provided by the 2011 Steller sea lion protection measures.
4. An alternative that changes the 2011 Steller sea lion protection measures based on information since development of the 2010 biological opinion, and may be more or less restrictive than status quo.

The Council will recommend alternatives for analysis in the EIS. The Council's Steller Sea Lion Mitigation Committee may review the latest scientific information regarding the biology of Steller sea lions and fisheries interaction and may develop alternative Steller sea lion protection measures for the Aleutian Islands groundfish fisheries for the Council's consideration. NMFS may develop additional alternatives to ensure that a reasonable range of alternatives is analyzed.

#### Preliminary Identification of Issues

A principal objective of the scoping and public input process is to identify potentially significant impacts to the human environment that should be analyzed in the EIS. The analysis will evaluate the impacts of the alternatives for all resources, species, and issues that may be

directly or indirectly affected by the Steller sea lion protection measures for the BSAI groundfish fisheries. The following components of the biological and physical environment may be evaluated: (1) target and non-target fish stocks, forage fish, and prohibited species (including Pacific halibut, Pacific salmon, and crab); (2) species listed under the ESA and their critical habitat; (3) seabirds; (4) marine mammals; (5) habitat; and (6) the ecosystem. The target species analysis would include examination of the use of single species and multi species stock assessment models. The latest information regarding interactions between the groundfish fisheries and Steller sea lions for prey resources would be examined in the EIS. The direct, indirect, and cumulative impacts on the environmental components would be based on the environmental assessment prepared for the 2011 Steller sea lion protection measures with revisions based on the alternatives and issues identified in scoping, and the best available information during the development of the EIS.

The baseline used to compare the impacts of the alternatives on the human environment will be the human environment in the BSAI between 2004 and 2010. This time period represents the condition of the environment before the implementation of the 2011 Steller sea lion protection measures and provides a reasonable time period to compare potential effects of all alternatives, including status quo, which has only been implemented for 1 year.

Social and economic impacts also would be considered in terms of the effects that changes to the Steller sea lion protection measures would have on the following groups of individuals: (1) those who participate in harvesting groundfish (particularly Pacific cod and Atka mackerel in the Aleutian Islands subarea); (2) those who process and market Pacific cod and Atka mackerel and their products; (3) those who consume Pacific cod and Atka mackerel products; (4) those who rely on living marine resources caught in the management area, particularly Pacific cod, Atka mackerel

and Steller sea lions; (5) those who benefit from commercial, subsistence, and recreational fisheries and Steller sea lion harvest; and (6) fishing communities, including Adak, Alaska.

#### Public Involvement

Scoping is an early and open process for determining the scope of issues, alternatives, and impacts to be addressed in an EIS and for identifying the significant issues related to the proposed action. A principal objective of the scoping and public involvement process is to identify a range of reasonable management alternatives that, with adequate analysis, will delineate critical issues and provide a clear basis for distinguishing among those alternatives and selecting a preferred alternative. Through this notice, NMFS is notifying the public that an EIS and decision-making process for this proposed action have been initiated so that interested or affected people may participate and contribute to the final decision.

NMFS is seeking written public comments on the scope of issues, potential impacts, and alternatives that should be considered for the Steller sea lion protection measures. Written comments will be accepted at the address above (see ADDRESSES). Written comments should be as specific as possible to be the most helpful. Written comments received during the scoping process, including the names and addresses of those submitting them, will be considered part of the public record for this proposal and will be available for public inspection.

The public is invited to participate at Council and any Steller Sea Lion Mitigation Committee meetings where the latest scientific information regarding Steller sea lions and fisheries interactions with the BSAI groundfish fisheries is reviewed and alternative Steller sea lion protection measures may be developed and evaluated. During the scoping period and concurrent with one or more 2012 Council meetings, public meeting(s) will be held where this proposed action and alternatives, issues, and potential impacts would be discussed. The public

may participate by submitting written comments or by testifying at these public meetings. Notice of future Council and Steller Sea Lion Mitigation Committee meetings, and any other public meetings where these issues will be discussed will be published in the Federal Register and posted on the Internet at <http://alaskafisheries.noaa.gov/sustainablefisheries/sslpm/eis/>. Please visit this website for more information on this EIS and for guidance on submitting effective public comments.

Dated:

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### Development of Environmental Impact Statement for Steller Sea Lion Measures based on Court Order 3/12/12

Project Components	2012												2013					2014									
	Feb	March	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	March	April	May	June	July	Aug	Sept	Oct	Nov	Dec	Jan	Feb		
ESA Documentation	NMFS contracts for CIE review of Biop				Complete CIE Review	CIE Steering Committee review process of compiled document	NMFS releases CIE review of Biop																				
	Develop preliminary draft EIS																										
NEPA	Develop preliminary draft EIS																										
	Develop preliminary draft EIS																										
Rule making																											

Abbreviations  
 NOI=Notice of Intent  
 CIE=Center for Independent Experts  
 SSL=Steller sea lion  
 EIS=environmental impact statement  
 EOP=Environmental Policy Act  
 \* Acknowledges that the published alternative would not result in JAM

CARL Comment and Response Report  
 JAM=reporter discontinued assistance or adverse modification of critical habitat  
 Council=North Pacific Fishery Management Council  
 NMFS=National Marine Fisheries Service  
 EISA=Endangered Species Act

Start rulemaking for 2015 implementation



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

STATE OF ALASKA,

Plaintiff,

v.

JANE LUBCHENCO, et al.,

Defendants.

Case No. 3:10-cv-00271-TMB

ALASKA SEAFOOD COOPERATIVE, et al.,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICE, et al.,

Defendants.

Case No. 3:11-cv-00001-TMB

FREEZER LONGLINE COALITION,

Plaintiff,

v.

JANE LUBCHENCO, et al.,

Defendants.

Case No. 3:11-cv-00004-TMB

**I. INTRODUCTION**

The western Distinct Population Segment of the Stellar Sea Lion (“WDPS”) is an endangered species inhabiting waters adjacent to Alaska. In these three partially consolidated actions, the Plaintiffs challenge a series of agency determinations which imposed restrictions on

the Atka mackerel and Pacific cod fisheries in the Bering Sea and Aleutian Islands to protect the WDPS's food source.<sup>1</sup> On January 18, 2011, the Court granted, in part, and denied, in part, the Plaintiffs' motions for summary judgment.<sup>2</sup> The Court indicated that it intended to enter an injunction requiring the National Marine Fisheries Service ("NMFS") to prepare an environmental impact statement ("EIS") and permitted the Parties to submit further briefing on its proposed remedy.<sup>3</sup> As discussed below, after considering the Parties' submissions, the Court hereby enters an injunction requiring Defendants to prepare an EIS in accord with its proposed schedule and the applicable law.

## II. BACKGROUND

The Court previously set forth the background of these actions in detail in its summary judgment order.<sup>4</sup> Familiarity with that order is assumed, and the Court will only briefly summarize the pertinent facts here.

In these actions, Plaintiffs challenge a biological opinion ("BiOp"), environmental assessment ("EA") and finding of no significant impact ("FONSI"), and an Interim Final Rule ("IFR") issued by NMFS.<sup>5</sup> These determinations imposed the disputed restrictions on the Atka mackerel and Pacific cod fisheries in the Bering Sea and Aleutian Islands.<sup>6</sup> Plaintiffs moved for

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<sup>1</sup> See Dkt. 1; Dkt. 1 in Case No. 3:11-cv-00001-TMB; Dkt. 1 in Case No. 3:11-cv-00004-TMB; Dkt. 36; Dkt. 80 at 18.

<sup>2</sup> Dkt. 130.

<sup>3</sup> *Id.* at 54-56.

<sup>4</sup> *Id.* at 4-13.

<sup>5</sup> See Dkt. 80 at 18.

<sup>6</sup> See, e.g., Dkt. 1 ¶¶ 47-74.

summary judgment, arguing that the NMFS's determinations were substantively and procedurally flawed in violation of the Administrative Procedure Act ("APA"), Magnuson Stevens Fishery Conservation and Management Act ("MSA"), Endangered Species Act ("ESA"), and National Environmental Policy Act ("NEPA").<sup>7</sup>

On January 18, 2011, the Court ruled that NMFS violated NEPA by failing to prepare an EIS and adequately involve the public in the agency's decision-making process.<sup>8</sup> Otherwise, however, the Court found that the BiOp and IFR complied with the ESA, APA, and MSA.<sup>9</sup> Accordingly, the Court indicated that it intended "to remand the matter to NMFS to prepare an EIS in compliance with NEPA procedures" including "requiring NMFS to prepare and circulate a draft EIS for public comment and provide meaningful responses to comments on the draft EIS."<sup>10</sup> The Court further indicated that it intended "to set a reasonable, but definite, deadline for NMFS to complete this process."<sup>11</sup>

The Court also stated that it would "not vacate the BiOp or the IFR" as, contrary to Plaintiffs' arguments, "[t]he NEPA violations . . . do not undermine NMFS's ESA determinations and . . . the IFR complied with the MSA and APA."<sup>12</sup> Although the Parties had briefed the remedy issue generally, the Court permitted them to submit further briefing as they

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<sup>7</sup> Dkts. 79, 80, 81, 84, 89.

<sup>8</sup> Dkt. 130 at 43-52.

<sup>9</sup> *See id.* at 15-43.

<sup>10</sup> *Id.* at 55.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 54.

had not discussed the specific result the Court had reached in detail.<sup>13</sup> All Parties subsequently submitted briefs and in some cases, additional materials.<sup>14</sup>

### III. DISCUSSION

The Parties' briefing generally discusses two possible remedies: (1) the Court's proposal to enter an injunction requiring NMFS to prepare an EIS; and (2) Plaintiffs' argument that the Court should vacate or otherwise enjoin the IFR, EA, and FONSI. For the reasons discussed below, the Court will enter a narrowly-tailored injunction requiring Defendants to prepare an EIS, but declines to vacate or enjoin any of the agency determinations.

#### A. *Preparation of an EIS*

In their briefing in response to the Court's summary judgment order, none of the Parties suggest that the Court should not enter an injunction requiring NMFS to prepare an EIS. Instead, the Parties focus on Defendants' proposed timeline to complete the process and various possible additional requirements. The Court finds that an injunction is appropriate to remedy the NEPA violations and that some Court oversight of the process is necessary in light of the lengthy delays in the past, but the Court otherwise will not dictate how NMFS should go about fulfilling its obligations under NEPA.

#### 1. *Entitlement to Injunctive Relief*

In NEPA cases, there is no presumption that the plaintiff is entitled to injunctive relief.<sup>15</sup> "An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course."<sup>16</sup> As in other cases, in order to obtain a permanent injunction:

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<sup>13</sup> *Id.* at 55.

<sup>14</sup> *See* Dkts. 131-39.

<sup>15</sup> *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010).

A [NEPA] plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.<sup>17</sup>

“The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court . . . .”<sup>18</sup>

NEPA does not dictate particular results; rather, it imposes procedural requirements to ensure that agencies carefully consider environmental impacts when making a decision.<sup>19</sup> Preparation of an EIS, in particular, focuses agency and public attention on those impacts and allows the public to play a role in the agency’s decision-making process.<sup>20</sup> “In the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action.”<sup>21</sup> “Where action is ongoing while the agency complies with NEPA, [the Ninth Circuit] has held that injunctive relief and the ordering of an EIS is an appropriate remedy.”<sup>22</sup>

Here, the Court concludes that an injunction requiring NMFS to prepare an EIS is warranted. In its summary judgment order, the Court concluded that NMFS violated NEPA by

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<sup>16</sup> *Id.* at 2761 (citation omitted).

<sup>17</sup> *Id.* at 2756 (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

<sup>18</sup> *eBay Inc.*, 547 U.S. at 391 (citations omitted).

<sup>19</sup> *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 23 (2008) (citations omitted).

<sup>20</sup> *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 487 (9th Cir. 2011) (citations omitted).

<sup>21</sup> *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004) (citation omitted).

<sup>22</sup> *Id.* at 644 (citations omitted); *see also Winter*, 555 U.S. at 33 (“A court concluding that the Navy is required to prepare an EIS has many remedial tools at its disposal, including declaratory relief or an injunction tailored to the preparation of an EIS rather than the Navy’s training in the interim.” (citation omitted)).

failing to prepare an EIS, as opposed to an EA, and did not provide the public with a sufficient opportunity for review and comment on the EA.<sup>23</sup> Accordingly, NMFS did not take a “hard look” at the environmental consequences of the action or adequately involve the public in its decision-making process as Congress intended. Given that NEPA is a procedural statute, these violations are significant regardless of whether they affected the outcome of NMFS’s decision-making process.

NMFS’s NEPA violations accordingly caused irreparable harm to the Plaintiffs’ and the public’s procedural rights which cannot be remedied through damages. The harm is exacerbated by the fact that the restrictions may continue indefinitely. Furthermore, given the nature of the statutory rights and continuing harm, an injunction requiring NMFS to complete an EIS in compliance with NEPA is warranted despite the significant time, effort, and expense that it will require. The public interest also supports injunctive relief given that NMFS failed to adequately involve the public in its decision-making process and give the environmental consequences full consideration as Congress intended. The Court further observes that if it were to completely excuse NMFS’s violations here, such a lack of compliance might very well become routine, further undermining Congress’s intent in enacting NEPA.

## 2. *Specific Aspects of the Injunction*

Although district courts enjoy broad discretion in determining whether to enter an injunction,<sup>24</sup> the courts must narrowly tailor injunctive relief to address the particular harm at

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<sup>23</sup> Dkt. 130 at 43-52.

<sup>24</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (citations omitted); *see also Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008) (“The district court has broad latitude in fashioning equitable relief when necessary to remedy an established wrong.” (citation omitted)).

issue.<sup>25</sup> “An overbroad injunction is an abuse of discretion.”<sup>26</sup> Accordingly, district courts should generally refrain from dictating “the substance and manner” of the agency’s action on remand.<sup>27</sup> Nonetheless, specific and targeted requirements, such as setting a deadline for compliance with NEPA, may be appropriate in certain cases.<sup>28</sup>

Plaintiffs appear to argue that the Court should require NMFS to not only prepare an EIS, but also to “issue a new final decision that is fully documented in” a record of decision, complete the EIS prior to the start of the 2014 fishing season, file quarterly status reports, analyze new information developed since 2010, and evaluate a broader range of alternatives than NMFS proposed in the EA.<sup>29</sup> Amici Curiae agree with Plaintiffs and also argue that NMFS should be required to consider the impacts of the alternatives on the Aleut people and communities.<sup>30</sup> Defendants propose a 23-month process including full participation from the North Pacific

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<sup>25</sup> See *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (“Injunctive relief must be tailored to remedy the specific harm alleged.” (citation and ellipsis omitted)); see also *id.* at 1142.

<sup>26</sup> *Id.* (citation omitted).

<sup>27</sup> *Nat’l Wildlife Fed’n*, 524 F.3d at 937 (citation omitted); see also *W. Oil & Gas Ass’n v. U.S. E.P.A.*, 633 F.2d 803, 813 (1980) (“Our intervention into the process of environmental regulation, a process of great complexity, should be accomplished with as little intrusiveness as feasible.”); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, No. CV 01-00640-RE, 2011 WL 3322793, at \*10 (D. Or. Aug. 2, 2011) (“In the absence of ‘substantial justification,’ . . . a court should not dictate to an administrative agency ‘the methods, procedures, and time dimension’ of the remand.” (citation omitted)).

<sup>28</sup> See *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 643-45 (9th Cir. 2004) (finding that district court acted within its discretion when it required agency to assess cumulative impacts by a set date); see also *Nat’l Wildlife Fed’n*, 524 F.3d at 937 (noting that the district court had discretionary authority to impose a deadline for remand proceedings).

<sup>29</sup> Dkt. 133 at 12-23.

<sup>30</sup> Dkt. 132.

Fishery Management Council (“Council”), or alternatively, a more abbreviated 15-month process, with the opportunity to request extensions upon a showing of good cause in either case.<sup>31</sup> Otherwise, Defendants argue that any further deadlines or requirements are inappropriate.<sup>32</sup> Intervenors, calling Defendants’ 23-month schedule “aggressive,” argue that the Court should merely require regular reporting in lieu of setting any deadlines or requirements “beyond the minimum legal requirements addressed in the Court’s opinion[.]”<sup>33</sup> The Parties also appear to contemplate that the Court should retain jurisdiction to supervise compliance with the injunction.<sup>34</sup>

Given the extensive delays in the underlying agency process,<sup>35</sup> a deadline for compliance is appropriate here. The Court construes the Defendants’ 23-month proposal as a representation that it is both a sufficient and achievable timeline for the completion of an EIS process that will remedy the violations identified in the Court’s summary judgment order<sup>36</sup> and allow a fair opportunity for input from the public and the Council. Additionally, to the extent that this process indicates that further rulemaking is necessary, Defendants’ proposed schedule suggests

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<sup>31</sup> Dkt. 131 at 2-5. Plaintiffs also appear to contemplate that Defendants should be able to obtain extensions on a showing of good cause. *See* Dkt. 133-4 at 2.

<sup>32</sup> *See* Dkt. 131 at 4.

<sup>33</sup> Dkt. 138 at 6-9.

<sup>34</sup> *See* Dkt. 133-4 at 4; Dkt. 138-5 at 2.

<sup>35</sup> *See* Dkt. 130 at 9-11.

<sup>36</sup> The Court observes that, contrary to Plaintiffs’ suggestion, it did not “specifically criticize[]” NMFS for relying on a single-species model as opposed to a multi-species model to project Atka mackerel and Pacific cod biomass increases. *Cf.* Dkt. 133 at 22. The Court was discussing the issue because it “demonstrate[d] significant scientific differences of opinion, controversy, and uncertainty” requiring preparation of an EIS. *See* Dkt. 130 at 50. The Court did not express a view as to whether multi-species modeling is preferable to single-species modeling.



that there will be ample time to complete it in time for the commencement of the 2015 fishing season. Accordingly, the Court will order Defendants<sup>37</sup> to issue a final EIS by March 2, 2014, in accordance with its proposed schedule, and complete any additional rulemaking prior to the commencement of the 2015 fishing season, with the opportunity to obtain extensions upon a showing of good cause. The Court will also require Defendants to file quarterly status reports indicating whether it is on schedule and, if it is not, whether it still anticipates that it will complete the EIS by March 2, 2014, and any additional rulemaking prior to the commencement of the 2015 fishing season.

The Court, however, declines to impose further requirements on Defendants. Defendants will have to prepare an EIS that complies with the applicable law and addresses the deficiencies identified in the Court's summary judgment order. Depending on the results, Defendants may also have to revisit the IFR, but those results are unknowable at this time. The Court defers to the agency's expertise as to how the process should develop, and declines Plaintiffs' invitation to predict or otherwise dictate the results of that process.

*B. Vacatur*

In addition to the injunctive relief proposed by the Court, Plaintiffs further argue that the Court should vacate the IFR, EA, and FONSI with vacatur either effective immediately or stayed pending remand.<sup>38</sup> Alternatively, Plaintiffs ask the Court to enjoin the IFR pending NMFS's

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<sup>37</sup> Given that these actions were brought against all Defendants, and Defendants own Proposed Order contemplates that the injunction will issue against all Defendants, Dkt. 131-2, the Court will enter the injunction against all Defendants. All Parties appear to contemplate, however, that NMFS will be the agency actually preparing the EIS.

<sup>38</sup> Dkt. 133 at 23-29.

completion of the remand process.<sup>39</sup> Defendants and Intervenors oppose vacatur or any further injunctive relief.<sup>40</sup>

Courts review NEPA compliance under APA standards.<sup>41</sup> The APA provides that a procedurally flawed rule should be “set aside.”<sup>42</sup> Nonetheless, it is well-established that as a matter of equity a court may remand to the agency without vacating a flawed rule under the APA or otherwise.<sup>43</sup> The Ninth Circuit has previously recognized that concerns “regarding the potential extinction of an animal species” may constitute such equitable grounds.<sup>44</sup> Moreover, the proper remedy for a procedural violation under the APA is a reconstruction of the agency’s deliberative process while correcting the shortcomings to protect the procedural rights of the

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<sup>39</sup> *Id.* at 29-38.

<sup>40</sup> Dkt. 131 at 6-8; Dkt. 138 at 9-13.

<sup>41</sup> *See, e.g., Se. Alaska Conserv. Council v. Fed. H’way Admin.*, 649 F.3d 1050, 1056 (9th Cir. 2011) (citation omitted); *W. Oil & Gas Ass’n v. U.S. E.P.A.*, 633 F.2d 803, 813 (1980).

<sup>42</sup> *See* 5 U.S.C. § 706(2)(A).

<sup>43</sup> *United States v. Afshari*, 426 F.3d 1150, 1056 (9th Cir. 2005) (citing *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995), and *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944)); *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (citing *Idaho Farm Bureau Fed’n*, 58 F.3d at 1405-06, and *W. Oil & Gas Ass’n*, 633 F.2d at 813); *Idaho Farm Bureau Fed’n*, 58 F.3d at 1405 (“[W]hen equity demands, the regulation can be left in place while the agency follows the necessary procedures.” (citing, *inter alia*, *W. Oil & Gas Ass’n*, 633 F.2d at 813)); *but cf. Ctr. for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 951 (N.D. Cal. 2010) (suggesting that the better practice is to stay the vacatur pending remand, but recognizing Ninth Circuit precedent permits remand without vacatur when warranted by equity).

<sup>44</sup> *Idaho Farm Bureau Fed’n*, 58 F.3d at 1405-06; *see also Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, No. CV 01-00640-RE, 2011 WL 3322793, at \*9 (D. Or. Aug. 2, 2011) (“Despite the APA’s requirement that an invalid agency action be ‘set aside,’ equity can authorize the district court to keep an invalid biological opinion in place during any remand if it provides protection for listed species within the meaning of the ESA.” (citations omitted)).

plaintiffs and the public.<sup>45</sup> Additionally, even where an EIS is required under NEPA, the regulations do not preclude all agency action during the EIS preparation.<sup>46</sup>

In a typical environmental case where the challenged action allegedly threatens environmental harm, vacatur is a less drastic remedy than an injunction.<sup>47</sup> In certain unusual cases – such as the present one – where the action is intended to preserve the environment, however, leaving the rule in place represents the most narrowly-tailored alternative.<sup>48</sup> Additionally, although the issue here is the appropriate relief to remedy the NEPA violation, there are still significant ESA concerns that impact the analysis.<sup>49</sup> The Court upheld the BiOp which found that the fishing that occurred under the prior restrictions caused jeopardy or adverse modification.<sup>50</sup> A possible reversion to those more lenient restrictions, which Plaintiffs seek, would thus be impermissible under the ESA.

Accordingly, on the facts of this case, the Court concludes that vacatur is not warranted at this time. Instead, the Court will rely on a narrowly-tailored injunction requiring Defendants to

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<sup>45</sup> See *W. Oil & Gas Ass'n*, 633 F.2d at 813.

<sup>46</sup> *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2750 (2010) (quoting, inter alia, 40 C.F.R. § 1506.1 for the proposition that “no action concerning the proposal shall be taken which would: (1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives”).

<sup>47</sup> See, e.g., *Monsanto*, 130 S. Ct. at 2761.

<sup>48</sup> See *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1406 (9th Cir. 1995).

<sup>49</sup> See, e.g., *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 794 (9th Cir. 2005) (“As the Supreme Court has noted, ‘Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities.’” (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978))).

<sup>50</sup> See Dkt. 130 at 23-43.

prepare an EIS to remedy the NEPA violations while preserving the protections dictated by the agency's valid ESA analysis.

#### IV. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. Defendants shall complete an EIS in accordance with the applicable law and addressing the deficiencies identified in the Court's Order dated January 18, 2012 (Docket No. 130). Defendants shall proceed in accordance with the schedule they have proposed (*see* Docket No. 131-1 at 3-4) as follows:

- a. Notice of Intent to prepare an EIS to be issued in April 2012 after consultation with the Council at its April 2012 meeting;
- b. Scoping period: 6 months;
- c. Scoping report: 1 month;
- d. Provide the scoping report to the Council, work on a range of alternatives with the Council, writing a preliminary draft EIS and providing the preliminary draft EIS to the Council for review: 5 months;
- e. Review of the preliminary draft EIS by the Council and the Council's Scientific and Statistical Committee, recommendations by the Council and revision of the preliminary draft EIS: 1 month;
- f. Draft EIS published with 60-day public comment period, review of comments and development of responses: 5 months;
- g. Responses to Council and completion of final EIS: 4 months; and

- h. File the final EIS with the Environmental Protection Agency pursuant to 40 C.F.R. § 1506.9 such that a notice of availability of the final EIS is published in the Federal Register on or before March 2, 2014;
2. If necessary based upon their findings in the EIS, Defendants shall issue a new final rule, or take other lawful action under the MSA, to establish Stellar sea lion protection measures for the Bering Sea and Aleutian Islands Management Area groundfish fisheries by December 31, 2014, or in sufficient time as is required to implement new measures for the 2015 fishing season commencing on January 1, 2015;
3. Commencing on July 2, 2012, Defendants will make periodic status reports on the first business day of January, April, July, and October advising the Court and the Parties as to whether they are proceeding in accordance with the schedule outlined in Paragraph 1 and, if they are not, whether they anticipate that they will file the EIS by March 2, 2014, and complete any additional rulemaking in time for the commencement of the 2015 fishing season; and
4. Defendants may move for and the Court will, upon a showing of good cause, grant appropriate extensions of the deadlines set forth above.

Dated at Anchorage, Alaska, this 5th day of March, 2012.

/s/ Timothy M. Burgess  
TIMOTHY M. BURGESS  
UNITED STATES DISTRICT JUDGE

## Summary of Marine Mammal Commission meeting

24-27 January 2012

Anchorage, Alaska

The Marine Mammal Commission is an independent agency of the U.S. Government, established under Title II of the Marine Mammal Protection Act to provide independent oversight of the marine mammal conservation policies and programs being carried out by federal regulatory agencies. The commission is charged with seven duties:

1. Undertake a review and study of the activities of the U.S. pursuant to existing laws and international conventions;
2. Conduct a continuing review of the condition of the stocks of marine mammals, methods for their protection, human means of take, research programs, and all applications for permits for study, display, or enhancing survival or recovery of a stock;
3. Undertake other studies it deems necessary in connection with its assigned duties;
4. Recommend to the Secretary of State such steps necessary or desirable for the protection and conservation of marine mammals
5. Recommend to Secretary appropriate policies regarding existing international agreements and suggest appropriate international agreements for the protection and conservation of marine mammals;
6. Recommend to the Secretary such revisions of the U.S. endangered species list;
7. Recommend to the Secretary measures necessary or desirable to further the policies of the MMPA.

The Commission consists of three members who are nominated by the President and confirmed by the Senate. The Commission is assisted in its work by a nine-member Committee of Scientific Advisors on Marine Mammals and a Special Advisor on Native Affairs. The Commission also has an Executive Director, appointed by the Chairman with the approval of the Commission. The Commissioners are:

- Dr. Daryl J. Boness, Chairman, Biddeford, Maine
- Dr. Michael F. Tillman, Encinitas, California
- Dr. Frances M.D. Gulland, Vet. M.B., Sausalito, California

The Committee of Scientific Advisors on Marine Mammals are:

- Dr. Douglas C. Biggs, Texas A&M University, College Station TX
- Dr. Patricia E. Rosel, National Marine Fisheries Service, Lafayette, LA
- Dr. Tim Gerrodette, National Marine Fisheries Service, La Jolla, CA
- Dr. Ian Stirling, Canadian Wildlife Service (Ret), Edmonton, Alberta, Canada
- Sue. E. Moore, National Marine Fisheries Service, Seattle, WA

- Dr. Robert Suydam, North Slope Borough, Barrow, AK
- Dr. Randall R. Reeves, Hudson, Quebec, Canada
- Dr. Robin W. Baird, Cascadia Research Collective, Olympia, WA

The Special Advisor on Native Affairs is Vera Metcalf, Alaska Walrus Commission, Nome, AK.

The Commission met in Anchorage, AK from 24-27 January, along with the Committee of Scientific Advisors on Marine Mammals. This meeting was focused on Arctic marine mammals, and specifically on controversies over management in the Alaska Region, primarily management of polar bears and great whales, and their interactions with the tribal governments and consultation requirements. The Commission also considered the rapid changes occurring in the Arctic as a result of global climate change.

This meeting was attended by Lt. Anthony Kenne of the U.S. Coast Guard, 17<sup>th</sup> District, and Steve MacLean (Council staff). This report is a combination of notes from both.

### **Co-Management**

The Commission received two presentations on co-management: one from the U.S. FWS and one from the Indigenous People's Council for Marine Mammals (IPCoMM).

Effective co-management must be equitable, transparent, and each party must be accountable to each other and to congress. Priorities for co-management in Alaska include:

- Collecting and disseminating harvest information
- Assessing impacts of climate change
- Assessing practicability of subsistence harvest monitoring.

Co-management faces many challenges, not the least of which is funding. Additional difficulties include different languages between various Native groups and Federal managers, distances between different user groups, balancing federal trust responsibilities with the needs of Native populations. A consistent (between federal agencies) and realistic definition of co-management is necessary, and until then resource managers will likely have to address several questions before effective co-management can occur.

The Indigenous People's Council for Marine Mammals discussed several co-management issues, priorities, and perspectives of Alaska's indigenous people. The principal concern was the challenge with incorporating "Traditional Knowledge" into marine mammals management. Traditional knowledge is not peer-reviewed science, so the scientific community has difficulty incorporating that knowledge into management decisions. The desire of IPCoMM is recognition that Traditional Knowledge can be part of "best available science" and fully incorporated into management decisions.

## **Climate Change in the Arctic**

Recent studies suggest that the rate of change in the Arctic due to changing climate is faster than predicted, and the Arctic may be seasonally ice-free by as early as 2035. The federal definition of the Arctic includes all waters of the Bering Sea.

### **Species of Special Concern**

#### *Bowhead whales*

Harry Bower, chairman of the Alaska Eskimo Whaling Commission, presented information on the hunting efficiency of the traditional hunt in Alaska. In 2010 poor ice conditions contributed to a poor year with efficiency at 63% (63 % of the whales struck were landed). In 2011, efficiency improved to 75%, which is more typical. The majority of struck and lost whales occur in the spring hunt when ice conditions greatly affect the hunt.

Current political issues within the International Whaling Commission (IWC) may make it difficult to achieve the required  $\frac{3}{4}$  vote necessary to establish aboriginal quotas for the bowhead hunt. If the authorizing vote is not achieved, the U.S. may choose to enact domestic legislation to authorize the bowhead quotas. Should this occur, there is the likelihood that other nations would take similar actions to authorize their hunting, and some of those nations may not consider regulations for sustainability, or regulations against takes of calves or nursing females.

#### *Polar bears*

An international treaty for the management of polar bears in the Bering Sea, Chukchi Sea, and Beaufort Sea has been signed by the U.S. and Russia. This treaty establishes base management levels, and requires a harvest management system which is planned for development over the next year. Questions about enforcement of this treaty and harvest regulations that result must still be considered.

#### *North Pacific right whales*

The population of western North Pacific right whales is estimated to be 30 animals, with fewer than ten females. Despite such critical status, little research funding exists for these whales. Most sightings of western North Pacific right whales occur in designated critical habitat in the southeastern Bering Sea. There is concern that additional vessel traffic in the Bering Sea (e.g., shipping via ice-free northern routes) could put this critically endangered population at additional risk.

#### *Ice seals*

Ice seals are more vulnerable to impacts of climate change than terrestrial pinnipeds because of their reliance on sea ice for breeding and nursing. Peter Boveng, National Marine Mammal Laboratory, presented results of recent surveys for ice seals, which were part of the Bering Ecosystem Study (BEST).



Bearded Seals – Approximately 55,000 animals in the Alaskan population. Bearded seals give birth and nurse pups in April – May, and are an important animal for Alaska Native subsistence harvest. Subsistence hunters have noted no decline in abundance.

Ringed seals – A reliable estimate for the abundance of the Alaskan stock is not available. Ringed seals are the most heavily harvested species in subsistence hunts. Subsistence hunters have noted declines in abundance, but some attribute the decline in abundance to population shifts in response to shifting ice conditions.

Spotted seals – Estimated 146,000 animals, but a reliable estimate for the abundance of the Alaskan stock is not available.

Ribbon seals – Estimated 62,500 animals. A reliable estimate for the abundance of the Alaskan stock is not available. This species is not a high priority for subsistence use.

Lori Quakenbush, Alaska Department of Fish and Game, presented results of their study on ringed and bearded seals. According to their analysis, the population dynamics of ringed seals and bearded seals that they investigated show no signs of a declining population, and they argue that these species should not be considered for listing on the U.S. endangered species list.

NMFS has recently extended the deadline for final decisions on listing four subspecies of ringed seals and two DPS of bearded seals as threatened under the U.S. Endangered Species Act. The final decision is due June 10, 2012.

Alaska Native hunters note that populations that they hunt appear to be numerous, but a few sick seals were noted late last year. Ice conditions and wind patterns are changing, requiring hunters to be ready whenever the weather conditions are right. Subsistence users are concerned over increase vessel traffic and oil and gas exploration. Hunters feel like criminals when they harvest species listed under the U.S. ESA, and the speaker asked that these species of ice seals not be listed. The speaker stated that hunters know the most about the species they hunt, and this knowledge can greatly benefit western science.

#### *Pacific Walrus*

Chadwick Jay, U.S. Geological Survey, presented information about Pacific Walrus research. Several new terrestrial haulouts have formed on the Alaskan Chukchi Sea coast as sea ice recedes over deep water. The haulout at Pt. Lay numbered more than 33,000 animals in 2011. Four new haulouts are also reported on the Russian Chukchi Sea coast. These haulouts are extremely sensitive to human disturbance, and juveniles and calves are at risk of trampling if the haulout is disturbed and animals stampede to the water.

A genetic mark-recapture program has been initiated to develop a population estimation for the Pacific walrus population. The first assessment is expected in 2015 after data have been analyzed.

Subsistence hunting typically results in a 42% struck-and-lost rate. Native groups have been working to address this and have established trip limits and other methods to reduce the struck-and-lost rate.

### *Cook Inlet beluga whales*

The population of Cook Inlet beluga whales in 2011 is estimated at 284, which is consistent with an overall trend of -1.1% per year from 2000 - 2011. Research activities for the coming year for which funding has been secured include aerial surveys in June and August. Research that is funding dependent includes a revised Population Viability Assessment, a Bristol Bay beluga health assessment, and biopsy sampling of Cook Inlet belugas.

### *Northern sea otters- Southeast Alaska*

Varena Gill, USFWS, presented information about sea otters in Southeast Alaska. Otters were reintroduced in SE Alaska in the 1960s. The sea otter population in SE Alaska is growing at approximately 12% per year from 2002 – 2011, and now numbers approximately 20,000 in SE Alaska. Sea Otters are expanding their range throughout SE Alaska. As otters move into areas where they were previously extirpated and have been absent for decades, they begin to feed on benthic bivalves and crustaceans, which results in a shift from a crustacean dominated system to a kelp dominated system. There are conflicts with commercial fisheries for benthic invertebrates, but there may also be positive impacts from the kelp forests support of herring and salmon populations.

The Southeast Alaska Regional Dive Fisheries Association represents all dive fisheries personnel in SE Alaska. There are 586 members and 286 active members. ADF&G reports that 28% of sea cucumber beds, 68% of geoduck beds, and 57% of sea urchin beds are impacted by sea otters.

Alaska Native subsistence users are concerned about the definition of what constitutes a “significantly altered” Native handicraft, as listed in the MMPA and ESA. The uncertainty of classification has caused confusion and reduced the willingness of some to harvest this species.

Doug Vincent-Lang, ADF&G, reported that sea otters are impacting State trust resources, and requested that the SE Alaska population of sea otters be excluded from Marine Mammal Protection Act protections. Mr. Vincent-Lang noted that recovery of sea otters in California requires 3,000 animals, but 50,000 animals for the western Alaska population to be considered recovered. Mr. Vincent-Lang stated that recovery goals should not be focused on population recovery, but on the minimum necessary to remove the risk of extinction. Mr. Vincent-Lang advocated for the management of SE Alaska sea otters to be transferred to the State of Alaska.

### **Health and Disease**

The focus of this discussion was on zoonotic (transferable from animals to human) diseases. An unusual mortality event was declared in the Arctic and northern Bering Sea in 2011 due to the prevalence of sick bearded, ringed, and spotted seals. Between June and November 2011, more than 130 cases of sick seals were noted, and more than 40 carcasses were recovered. The cause of the disease is not yet known, but many viral and bacterial agents have been ruled out, as has radiation poisoning as a result of the Fukushima Daiichi nuclear plant disaster. [NOTE: a recent discovery of a sick ringed seal in Yakutat is the first indication that the disease may be spreading to other parts of Alaska.]

## **Oil and Gas issues**

A lengthy session on Arctic oil and gas development took place. Presentations were given on

- a) 5-10 year plans for leasing/development off Alaska
- b) Impact of O&G exploration, development, and production
- c) Impacts on availability of marine mammals for subsistence
- d) Oil spill contingency planning, worst-case scenarios, and response capacities
- e) Measures to prevent exposure and minimize impacts to marine mammals
- f) A panel discussion on adequacy of response capabilities to minimize impacts on marine mammals

## **International Whaling Commission**

The International Whaling Commission appears to be fairly dysfunctional at this point. The 2012 meeting is in Panama, and there are plans to moving to a biennial meeting, rather than continuing annual meetings. A move to a biennial meeting would change the aboriginal quota to a six-year, rather than five-year quota system. The IWC is currently without a chairman or vice-chairman, and none of the current commissioners are willing to fill these roles, which can only be filled with commissioners. This stalemate and IWC dysfunction cast doubt on the future role of the IWC.

The remainder of the meeting focused on agency budgets and assessment of the MMC's role.

# PUBLIC TESTIMONY SIGN-UP SHEET

Agenda Item: B- items

	NAME (PLEASE PRINT)	TESTIFYING ON BEHALF OF:
1	Linda Behnken / Dan Falvey	ALFA
2	Therl Z. Basargin	Fisherman
3	Michael Laice	AOL
4	KRIS NOROSZ	Leede
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NOTE to persons providing oral or written testimony to the Council: Section 307(1)(I) of the Magnuson-Stevens Fishery Conservation and Management Act prohibits any person "to knowingly and willfully submit to a Council, the Secretary, or the Governor of a State false information (including, but not limited to, false information regarding the capacity and extent to which a United State fish processor, on an annual basis, will process a portion of the optimum yield of a fishery that will be harvested by fishing vessels of the United States) regarding any matter that the Council, Secretary, or Governor is considering in the course of carrying out this Act.