

MEMORANDUM

TO: Council, SSC and AP Members
FROM: Chris Oliver *DO for*
Executive Director
DATE: September 12, 2011
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

A. Western DPS Steller sea lions

The states of Washington and Alaska solicited an independent scientific review of the 2010 BSAI Groundfish Biological Opinion, a draft of which was completed on July 21, 2011. A public meeting was held in Anchorage, AK on August 22, 2011 at the Hilton hotel at which the states' review panel received comment on the draft review from NMFS, an industry panel, and the public, and also received written public comments until September 1, 2011. The panel will consider those oral and written comments and is expected to release a final report in late September. The draft report was mailed to you July 26, 2011 and is posted on the Council website for information purposes.

On June 29, 2011 NMFS Alaska Region Administrator, James Balsiger, sent a copy of the Terms of Reference (attached as Item B-7(a)) for the Center for Independent Experts to the Council for review and comment. The subject of the CIE review will be the scientific information and analysis contained in the BiOp. The reviewers will be asked to comment on the adequacy of the best available science and the appropriate use of that science to reach the conclusions required by the Endangered Species Act, but not asked to review agency interpretations of the ESA or the policy-based RPAs implemented by NMFS. NMFS is requesting comment from the Council and will determine how and when to proceed with the CIE review upon receipt of the Council's comments. A minimum of three months of time are required for the CIE to set up the review panel, a completed review would be expected a month after the panel is identified. The agency's previous letter on the CIE Review is attached as Item B-7(b). The Council's prior comments on the Terms of reference are attached as Item B-7(c); the SSC comments are attached as Item B-7(d).

B. Eastern DPS Steller sea lions

On December 13, 2010, NMFS released a 90 day finding on petitions to delist the eastern DPS of Steller sea lions. The petitions from Alaska, and Oregon and Washington (filed jointly) presented scientific and commercial information that indicated delisting may be warranted. The 90 day finding announced that NMFS would continue its status review of the DPS to determine if the petitioned action (delisting) is warranted. A 12 month finding was due on August 30. In the 12 month finding, NMFS must make one

of the following findings: (1) the petitioned action is not warranted, (2) the petitioned action is warranted and proposed regulations promptly published in the Federal Register, or (3) the petitioned action is warranted but the immediate proposal and timely promulgation of a regulation to implement the petitioned action is precluded because of other pending proposals, and that expeditious progress is being made to delist the listed species.

C. Pacific Walrus

The United States Geological Survey (USGS) Alaska Science Center researchers are working in cooperation with the Native village of Point Lay to attach satellite-linked tags to walruses in northwestern Alaska. The USGS has collected data on walrus foraging behavior and movements throughout the Bering and Chukchi Seas since 2004. In July, 2011, USGS scientists attached 40 radio tags on walruses hauled out on ice near the edge of the continental shelf, northwest of Barrow, AK. In August, researchers tagged walruses hauled out onshore near Point Lay. Tracking animations are available at <http://alaska.usgs.gov/science/biology/walrus/index.html>.

D. Northern Fur Seals

NMFS is preparing a new Environmental Assessment evaluating proposed changes to the northern fur seal harvest regulations on St. George Island. An internal review draft is expected in mid-September. NMFS also published a notice of receipt of a petition from St. Paul Island to change harvest regulations for northern fur seals on St. Paul Island.

E. Polar Bears

The Polar Bear Recovery Team met in Anchorage in August to continue work on a draft polar bear recovery plan. The FWS plans to release a draft polar bear recovery plan for public review in January, 2012.

The State of Alaska joined several parties in appealing the June 2011 decision by the US District Court in support of listing the polar bear under the US Endangered Species Act.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668

AGENDA B-7(a)
OCTOBER 2011

June 29, 2011

Mr. Chris Oliver
Executive Director
North Pacific Fisheries Management Council
605 West 4th, Suite 306
Anchorage, AK 99501-02252

Dear Chris:

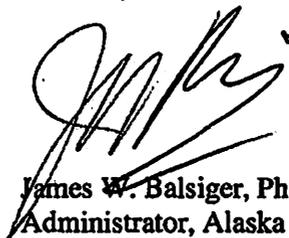
Over the past few months we have continued discussion of the need and process for conducting an independent scientific review of the National Marine Fisheries Service (NMFS) 2010 Final Biological Opinion for the Groundfish Fisheries in Alaska (BiOp). Recently the topic was again raised at the June meeting of the North Pacific Fisheries Management Council (Council) and in following telephone conversations with Council and Senate staff.

The NMFS had planned to contract with the Center for Independent Experts (CIE) to conduct an independent review of the BiOp in early 2011. However, NMFS made a decision to delay this process until the States of Alaska and Washington completed their scientific review.

In keeping with both NMFS and CIE guidance, the subject of this review will be the scientific information and analysis contained in the BiOp. The reviewers will be asked to comment on the adequacy of the best available science and the appropriate use of that science to reach the conclusions required by the Endangered Species Act (ESA). The review will not extend to agency interpretations of the ESA, or the policy-based Reasonable and Prudent Alternatives subsequently implemented by NMFS in an interim final rule (Federal Register 75:81921). The ToR for the CIE peer review is attached here as "Annex 2."

I encourage the Council to review the ToR and I welcome any additional comments you wish to provide at this time.

Sincerely,



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

cc:
Eric Olson, NPFMC
Dr. Jane Lubchenco, NOAA
Eric Schwaab, NMFS
Sam Rauch, NMFS



Annex 2: Terms of Reference

- 1. Read and assess the final Final Biological Opinion (November 24, 2010) on the BSAI and GOA groundfish fisheries; and state waters parallel fisheries for pollock, Atka mackerel, and Pacific cod.**
- 2. The ESA requires that an action agency utilize the best available scientific information in a "weight of evidence approach" to ensure that the federal action does not jeopardize or adversely modify or destroy critical habitat. The ESA excludes consideration of social and economic factors when evaluating the effects of the Federal action.**

With this distinction and approach in mind, does the Biological Opinion appropriately interpret the scientific data and clearly and logically craft its conclusion? We are not requesting evaluation of the specifics of the conclusion and Reasonable and Prudent Alternatives, the details of which constitute agency policy.

- 3. CIE reviewers are requested to specifically focus on and address the following questions in their review reports:**
 - Does the Biological Opinion thoroughly and accurately (i.e. using the best available scientific information) describe what is known about the status of the listed species?**
 - Does the Biological Opinion thoroughly and accurately describe what is known about groundfish fishery practices and catch statistics under the current ongoing "status quo" action, as defined in the Biological Opinion?**
 - While the agency is directed to evaluate the effects of the action on listed species and critical habitat, does the Biological Opinion also adequately address alternative scientific explanations to the apparent population dynamics of the WDPS of Steller sea lion, such as explanations involving, but not limited to, predation, disease, ecosystem/carrying capacity, or emigration?**
 - Does the Biological Opinion thoroughly describe the effects (direct and indirect) of the action on the listed species and its critical habitat?**
 - Does the Biological Opinion accurately evaluate the inter-relationships between Steller sea lion population status and trends, foraging ecology, and groundfish fisheries effects across broad geographic areas (ecosystems to highly localized regions) and temporal scales (years to seasons)?**
 - Is there any additional literature that should have been considered in this Biological Opinion (as of the date the Opinion was issued)?**
 - Can you identify any additional assessments or analyses that should have been considered in drawing the conclusion in this Biological Opinion as of the date the Opinion was issued?**



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

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

**AGENDA B-7(b)
OCTOBER 2011**

January 26, 2011

**Mr. Eric A. Olson, Chairman
North Pacific Fishery Management Council
605 W. 4th Avenue, Suite 306
Anchorage, Alaska 99501-2252**

Dear Mr. Olson:

Thank you for your letter expressing concerns raised by the North Pacific Fishery Management Council during its December 2010 meeting, on the final Steller sea lion biological opinion (BiOp) and reasonable and prudent alternative (RPA) implemented under an interim final rule published in the Federal Register on December 13, 2010.¹ This letter responds to the four general issues addressed in your letter.

You questioned why NOAA Fisheries did not appear to consider the 2010 Aleutian Islands biomass trawl survey for Steller sea lion prey species. NOAA Fisheries used the best scientific information available when it completed its BiOp. Data from NOAA Fisheries' 2010 groundfish survey and the 2010 fishery were not available at the time the analyses in the BiOp were conducted. NOAA Fisheries updated information in the BiOp several times as new information became available over the 4-year consultation period. However, it was not possible for NOAA Fisheries to extend the consultation period to include the 2010 data and maintain its responsibility under the Endangered Species Act to implement an RPA by January 2011. We agree that the 2010 Atka mackerel stock assessment reviewed by the Council in December indicates that Atka mackerel biomass appears to be up. NMFS will consider this and other information in future consultations. However, continued fishery removals in important times and areas for Steller sea lions where they are in continued decline was an important basis for the RPA and will continue to be a prime consideration under the existing BiOp.

You indicated in your letter that you felt that NOAA Fisheries' conclusions in its finding of no significant impact were flawed, particularly its conclusion that the effects of the interim final rule on the quality of the human environment is likely to be less than highly controversial. NOAA Fisheries considered all relevant factors when making its determinations and believes that its finding of no significant impact is supported by the environmental assessment of the interim final rule.

¹ FR 77535, December 13, 2010, corrected 75 FR 81921, December 29, 2010.

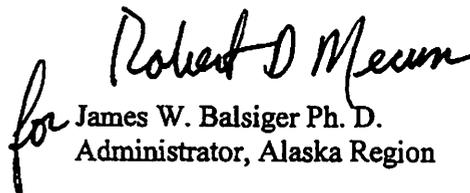


The discussion of how and when to conduct an independent scientific review of the BiOp has been ongoing. At this time, NOAA Fisheries still intends to complete an independent scientific review of the BiOp. In December, the Council declined to support such a review through the Center for Independent Experts (CIE) because NOAA Fisheries has not modified the associated draft statement of work (SOW) and terms of reference (TOR) sufficiently to accommodate Council comments on those documents provided last February. Although we agree the enclosed SOW and TOR do not fully address Council comments, we are providing them to keep you informed about agency efforts toward transparent review of the scientific information contained in the BiOp and the appropriate use of that science to reach the conclusions presented in the BiOp. We appreciate the Council's interest and input concerning an independent scientific review and still are open to working with the Council on an alternative approach for this review. However, lacking formal action by the Council, we will continue to pursue a CIE review using the attached SOW and TOR.

Last, the Council requested an extended public comment period on the interim final rule and clarification on the process and timing of transition from the interim final rule to a final rule. Consistent with your request, the comment period on the interim final rule was extended 45 days, to February 28, 2011 (76 FR 2027, January 12, 2011). NMFS will assess comments received on the interim final rule and proceed to either: (a) develop a final rule, with any potential changes from the interim final rule governed under the Administrative Procedure Act to reflect the same "logical outgrowth" constraints that govern changes from a proposed rule to a final rule; or (b) initiate a new proposed rule and Section 7 consultation to change the RPA based on new information. Research conducted to date by NOAA General Counsel indicates that there is no specific deadline for an agency to publish a final rule superseding an interim final rule. Further action by NOAA Fisheries is dependent on information provided during the comment period and the timeliness of Council process to explore a new RPA. If NMFS and the Council intend to move expeditiously toward a new RPA, we anticipate that the interim final rule would remain in effect during the development of a new proposed rule. Under either option (a) or (b), the Council could initiate separate exploration of an alternative RPA using its Steller Sea Lion Mitigation Committee or some other process. This process could dovetail with the proposed and final rule process under option (b) if that was the Council's intent.

We will be pleased to further discuss these issues with you during the February Council meeting.

Sincerely,


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

Enclosure

Draft Statement of Work

External Independent Peer Review by the Center for Independent Experts Review of the 2010 final National Marine Fisheries (NMFS) Biological Opinion on the Effects of the Bering Sea/Aleutian Islands and Gulf of Alaska Federal Groundfish Fisheries and the State of Alaska Parallel Fisheries on ESA Listed Species and Designated Critical Habitats, Including Steller Sea Lions and Their Designated Critical Habitat

Scope of Work and CIE Process: The National Marine Fisheries Service's (NMFS) Office of Science and Technology coordinates and manages a contract to provide external expertise through the Center for Independent Experts (CIE) to conduct impartial and independent peer reviews of NMFS scientific projects. This Statement of Work (SoW) described herein was established by the NMFS Contracting Officer's Technical Representative (COTR) and CIE based on the peer review requirements submitted by NMFS Project Contact. CIE reviewers are selected by the CIE Coordination Team and Steering Committee to conduct the peer review of NMFS science with project specific Terms of Reference (ToRs). Each CIE reviewer shall produce a CIE independent peer review report with specific format and content requirements (**Annex 1**). This SoW describes the work tasks and deliverables of the CIE reviewers for conducting an independent peer review of the following NMFS project.

Project Description: Under Section 7 of the ESA, NMFS Alaska Region has completed preparation of a programmatic Biological Opinion. A Biological Opinion is the summary document produced by NMFS that includes (1) the opinion of the agency as to whether or not the Federal action is likely to jeopardize the continued existence of a listed species, or result in adverse modification of designated critical habitat; (2) a summary of the information on which that opinion is based; and (3) a detailed discussion of the effects of the action on listed species and designated critical habitat.

In this opinion, NMFS PRD has evaluated the effects of three actions:

- Authorization of groundfish fisheries under the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area;
- Authorization of groundfish fisheries under the Fishery Management Plan for Groundfish of the Gulf of Alaska; and
- State of Alaska parallel groundfish fisheries for pollock, Pacific cod, and Atka mackerel

The objective of the evaluation in this biological opinion was to determine if the aforementioned groundfish fisheries, as implemented under their respective FMPs and State management plans, are likely to jeopardize the continued existence of listed species and/or are likely to destroy or adversely modify designated critical habitat. Based on the directives of the ESA and implementing regulations, as well as Court findings with respect to previous opinions, the scope of this consultation and resulting opinion is comprehensive. Through the consultation which has led to this Biological Opinion, NMFS has considered not only the effects of the fisheries themselves, but also the overall management framework as established under the respective FMPs. It is NMFS' intent to determine if that management framework includes sufficient conservation and management measures to insure the protection of listed species and their critical habitat.

The main listed species of concern is the endangered western distinct population segment of the Steller sea lion. The designated critical habitat of concern is critical habitat designated for Steller sea lions. The document also evaluates the effects of the action on the threatened eastern distinct population segment of Steller sea lion and the effects on three species of ESA-listed whales: fin whales, humpback whales and sperm whales.

The Biological Opinion that is the subject of this review is the result of a reinitiated Section 7 consultation. NMFS has previously consulted on the effect of the Bering Sea/Aleutian Islands groundfish fisheries, the Gulf of Alaska groundfish fisheries, and the State of Alaska parallel groundfish fisheries. On November 30, 2000, NMFS issued a FMP level biological opinion that evaluated the effects of authorization of the BSAI and GOA FMPs on ESA-listed species, as required by section 7(a)(2) of the ESA. Through that consultation and the resulting biological opinion, NMFS found that the FMPs, as proposed, would jeopardize both the western and eastern distinct population segments (DPSs) of Steller sea lion and adversely modify their designated critical habitat. As a result, a reasonable and prudent alternative (RPA) was provided and partially implemented in 2001.

In January 2001, an RPA committee, comprised of members of the fishing community, the conservation community, NMFS, State agencies and the Council's Science and Statistical Committee, was formed to develop an alternative RPA. In July of 2001, the action agency (SFD) proposed this alternative RPA to replace the components of the original FMP action that had resulted in the jeopardy and adverse modification finding in the 2000 FMP-level consultation. In 2001, NMFS prepared a project level biological opinion which reviewed the revised action and determined that it was not likely to jeopardize or adversely modify critical habitat. The Court reviewed the 2001 Biological Opinion and found that it was arbitrary and capricious and remanded the opinion back to NMFS for revision. In response to the Court order, NMFS prepared a supplement (NMFS 2003) to the 2001 biological opinion (NMFS 2001), which affirmed NMFS's conclusions that the revised FMP actions were not likely to jeopardize ESA-listed species or adversely modify critical habitat. In the 2001 Biological Opinion (2001:8) NMFS specified that:

“...the FMP level biological opinion will remain in effect as NMFS' coverage at the plan level, and this opinion” (the 2001 opinion) will address the project level effects on listed species that would be likely to occur if the Council's preferred action were implemented.”

Since the conclusion of the 2000 and the 2001 consultations and the completion of the resulting biological opinions and supplement, all subsequent modifications and proposed modifications to the action have been considered through informal consultations except for a March 9, 2006 Biological Opinion on the issuance of an exempted fishing permit (EFP) to support a feasibility study using commercial fishing vessels for acoustic surveys of pollock in the Aleutian Islands subarea.

On October 18, 2005, the North Pacific Fishery Management Council (Council) requested that NMFS SFD reinitiate consultation on the BSAI and GOA FMPs. The Council's request was based on the recognition that a substantial amount of new research on Steller sea lions had been published since NMFS completed the 2001 Biological Opinion and associated supplement (2003), such that an

evaluation of the FMPs in light of that new information would be prudent. The consultation was formally reinitiated in April of 2006.

Thus, the basis for the reinitiation of consultation is the new information available to the agency as a result of approximately 10 years of intensive research on SSL in Alaska. The new information pertains to the status of the species, the trend and abundance, and the impacts of the existing conservation measures as well as the prosecution of the federal fisheries and the State of Alaska parallel groundfish fisheries. Additionally, since NMFS wrote the last Programmatic Biological opinion in 2000, the subsequent project level biological opinion in 2001, and the 2003 supplement, a considerable amount of information has been collected on topics of relevance to understanding the effects of this action. For example, there is considerable new information on the ways in which fisheries might have effects on various populations and the ecosystems in which they occur, the potential effects that global warming and natural environmental variability might have on the marine ecosystems of the North Pacific, and other topics that are relevant to understanding ways in which listed species and designated critical habitats might be affected by these fisheries.

The subject of review would be the **scientific information** contained in the Biological Opinion and **not the conclusions of the Opinion as per the ESA thresholds**. The reviewers would be asked to comment on the adequacy of the best available science and of the appropriate use of that science to reach the conclusions about potential effects of the actions on listed species and designated critical habitats. The reviewers would be asked to critically evaluate whether NMFS has used the best available science appropriately to consider not only the effects of the fisheries themselves, but also the overall management framework as established under the respective FMPs. The Terms of Reference (ToRs) of the peer review are attached in **Annex 2**.

Requirements for CIE Reviewers:

Three CIE reviewers shall conduct an impartial and independent peer review in accordance with the SoW and ToRs herein. Each CIE reviewer's duties shall not exceed a maximum of 20 days (this may need to be longer) to complete all work tasks of the peer review described herein. CIE reviewers shall have the expertise, background, and experience to complete an independent scientific peer review in accordance with the SoW and ToRs herein. CIE combined reviewer expertise shall include: fishery science; fishery effects on ecosystems and/or ecosystem management of fisheries; marine mammal biology and ecology, with emphasis on otariids, if possible; and familiarity with the standards of the Endangered Species Act Section 7 in relation to conservation biology and marine mammal-fishery interactions.

The CIE reviewers shall have the expertise necessary to complete an impartial peer review and produce the deliverables in accordance with the SoW and ToR as stated herein.

Location of Peer Review:

Each reviewer shall conduct the peer review as desk review, therefore no travel is required.

Statement of Tasks:

Each CIE reviewer shall conduct necessary preparations prior to the peer review, conduct the peer review, and complete the deliverables in accordance with the SoW and milestone dates as specified in the Schedule section.

Prior to the Peer Review: Upon completion of the CIE reviewer selection by the CIE Steering committee, the CIE shall provide the CIE reviewer information (name, affiliation, and contact details) to the COTR, who forwards this information to the NMFS Project Contact no later the date specified in the Schedule of Milestones and Deliverables. The CIE is responsible for providing the SoW and ToRs to the CIE reviewers. The NMFS Project Contact is responsible for providing the CIE reviewers with the background documents, reports, foreign national security clearance, and information concerning other pertinent arrangements.

Pre-review Background Documents: Approximately six weeks before the peer review, the NMFS Project Contact will send all necessary background information and reports for the peer review to the CIE reviewers by electronic mail, shall make this information and these reports available at an FTP site available to the CIE reviewers, or shall provide electronic links to all background documents. In the case where the documents need to be mailed, the NMFS Project Contact will consult with the CIE on where to send documents. The CIE reviewers shall read all documents in preparation for the peer review.

Below is a tentative list of pre-review documents to be sent to the CIE reviewers as background information of the peer review:

1. Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Areas. North Pacific Fishery Management Council. April 2009. <http://alaskafisheries.noaa.gov/npfmc/fmp/bsai/bsai.htm>
2. Fishery Management Plan for Groundfish of the Gulf of Alaska. North Pacific Fishery Management Council. April 2009. Available at: <http://alaskafisheries.noaa.gov/npfmc/fmp/goa/goa.htm>
3. Aleutian Islands Fishery Ecosystem Plan. North Pacific Fishery Management Council. December 2007. Available at: http://www.fakr.noaa.gov/npfmc/current_issues/ecosystem/AIFEPbrochure1207.pdf
4. 2000 Endangered Species Act Section 7 Consultation Biological and Incidental take Statement. Authorization of Bering Sea/Aleutian Islands groundfish fisheries based on the Fishery Management Plan for the Bering Sea/Aleutian Islands Groundfish; and Authorization of Gulf of Alaska groundfish fisheries based on the Fishery Management Plan for Groundfish of the Gulf of Alaska. November 2000. National Marine Fisheries Service. 2000. Available at: <http://fakr.noaa.gov/protectedresources/stellers/section7.htm>

5. 2001 Biological Opinion and Incidental Take Statement. October 2001. Authorization of Bering Sea/Aleutian Islands groundfish fisheries based on the Fishery Management Plan for the Bering Sea/Aleutian Islands Groundfish as modified by amendments 61 and 70; and Authorization of Gulf of Alaska groundfish fisheries based on the Fishery Management Plan for Groundfish of the Gulf of Alaska as modified by amendments 61 and 70. Parallel fisheries for pollock, Pacific cod, and Atka mackerel, as authorized by the State of Alaska within 3 nm of shore, plus selected supporting documents. National Marine Fisheries Service. 2001. Available at: <http://fakr.noaa.gov/protectedresources/stellers/section7.htm>
6. 2003 Supplement to the Endangered Species Action Section 7 Biological Opinion and Incidental take statement of October 2001, plus appendices. National Marine Fisheries Service. 2003. Available at: <http://fakr.noaa.gov/protectedresources/stellers/section7.htm>
7. Background information on the ESA and NMFS' responsibilities for implementing the ESA is available from the NMFS Office of Protected Resources web site at: Available at: <http://www.nmfs.noaa.gov/pr/laws/esa.htm>.
8. Copy of final 2010 Biological Opinion. Available at: http://www.fakr.noaa.gov/protectedresources/stellers/esa/biop/final/biop1210_chapters.pdf
9. Copy of public comments that are responsive to this review (list?).
10. Copy of white papers reference in the Biological Opinion (add url address).
11. Copy of references identified in public comments responsive to this review (list?)

These documents and other background material (or links to them) will be provided to the CIE reviewers by the Project Contact according to the schedule herein.

Documents 1 through XX are available for pre-review at this time. This list of pre-review documents may be updated up to two weeks before the peer review. Furthermore, the CIE reviewers are responsible only for the pre-review documents that are delivered to the reviewer in accordance to the SoW scheduled deadlines specified herein.

Desk Peer Review: The primary role of the CIE reviewers is to conduct an impartial peer review in accordance with the SoW and ToRs to ensure that the best available science is utilized for NMFS evaluations of the potential effects of actions on endangered species and designated critical habitat under Section 7 of the Endangered Species Act. **Modifications to the SoW and ToRs cannot be made during the peer review, and any SoW or ToRs modifications prior to the peer review shall be approved by the COTR and CIE Lead Coordinator.**

Contract Deliverables - Independent CIE Peer Review Reports: Each CIE reviewer shall complete an independent peer review report in accordance with the SoW. Each CIE reviewer shall complete the independent peer review according to the required format and content as described in Annex 1.

Each CIE reviewer shall complete the independent peer review addressing each ToR as described in Annex 2.

Specific Tasks for CIE Reviewers: The following chronological list of tasks shall be completed by each CIE reviewer in a timely manner as specified in the **Schedule of Milestones and Deliverables**.

- 1) Conduct necessary pre-review preparations, including the review of background material and reports provided by the NMFS Project Contact in advance of the peer review;
- 2) Conduct an independent peer review in accordance with the ToRs (Annex 2);
- 3) No later than REPORT SUBMISSION DATE, each CIE reviewer shall submit an independent peer review report addressed to the "Center for Independent Experts," and sent to Mr. Manoj Shivilani, CIE Lead Coordinator, via email to shivlanim@bellsouth.net, and CIE Regional Coordinator, via email to *{CIE will insert email}*. Each CIE report shall be written using the format and content requirements specified in Annex 1, and address each ToR in Annex 2;
- 4) CIE reviewers shall address changes as required by the CIE review in accordance with the schedule of milestones and deliverables.

Schedule of Milestones and Deliverables: CIE shall complete the tasks and deliverables described in this SoW in accordance with the following schedule.

Draft Schedule:

1 March 2011	NMFS Project Contact sends the CIE Reviewers the report and background documents TENTATIVE DATE
1-30 March 2011	Each reviewer conducts an independent peer review as a desk review
15 April 2011	CIE reviewers submit CIE independent peer review reports to the CIE Lead Coordinator and CIE Regional Coordinator
20 April 2011	CIE submits CIE independent peer review reports to the COTR
25 April 2011	The COTR distributes the final CIE reports to the NMFS Project Contact and Regional Administrator

Modifications to the Statement of Work: Requests to modify this SoW must be made through the Contracting Officer's Technical Representative (COTR) who submits the modification for approval to the Contracting Officer at least 15 working days prior to making any permanent substitutions. The Contracting Officer will notify the CIE within 10 working days after receipt of all required information of the decision on substitutions. The COTR can approve changes to the milestone dates, list of pre-review documents, and Terms of Reference (ToR) of the SoW as long as the role and ability of the CIE reviewers to complete the SoW deliverable in accordance with the ToRs and deliverable schedule are not adversely impacted. The SoW and ToRs cannot be changed once the peer review has begun.

Acceptance of Deliverables: Upon review and acceptance of the CIE independent peer review reports by the CIE Lead Coordinator, Regional Coordinator, and Steering Committee, these reports shall be sent to the COTR for final approval as contract deliverables based on compliance with the SoW. As specified in the Schedule of Milestones and Deliverables, the CIE shall send via e-mail the contract deliverables (the CIE independent peer review reports) to the COTR (William Michaels, via William.Michaels@noaa.gov).

Applicable Performance Standards: The contract is successfully completed when the COTR provides final approval of the contract deliverables. The acceptance of the contract deliverables shall be based on three performance standards: (1) each CIE report shall have the format and content in accordance with Annex 1, (2) each CIE report shall address each ToR as specified in Annex 2, (3) the CIE reports shall be delivered in a timely manner as specified in the schedule of milestones and deliverables.

Distribution of Approved Deliverables: Upon notification of acceptance by the COTR, the CIE Lead Coordinator shall send via e-mail the final CIE reports in *.PDF format to the COTR. The COTR will distribute the approved CIE reports to the NMFS Project Contact and regional Center Director.

Key Personnel:

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Contracting Officer's Technical Representative (COTR)
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Kaja Brix
NMFS Project Contact
Assistant Regional Administrator
Protected Resources Division
NMFS, Alaska Region
709 W.9th St., Juneau AK 99802-1668
Phone: 907-586-7824
Kaja.Brix@noaa.gov

Annex 1: Format and Contents of CIE Independent Peer Review Report

1. The CIE independent report shall be prefaced with an Executive Summary providing a concise summary of the findings and recommendations.
2. The main body of the reviewer report shall consist of a Background, Description of the Individual Reviewer's Role in the Review Activities, Summary of Findings for each ToR, and Conclusions and Recommendations in accordance with the Terms of Reference (ToRs).
 - a. Reviewers should discuss their independent views of findings, conclusions, and recommendations for each ToRs.
 - b. The CIE independent report shall be a stand-alone document as an independent peer review.
3. The reviewer report shall include separate appendices as follows:

Appendix 1: Bibliography of materials provided for review

Appendix 2: A copy of the CIE Statement of Work

DRAFT

Annex 2: Terms of Reference

1. **Read and assess the final 201 Biological Opinion on the BSAI and GOA groundfish fisheries; and state waters parallel fisheries for pollock, Atka mackerel, and Pacific cod.**
2. **Make an assessment as to whether the scientific information constitutes a reasonable rationale for measures selected to ensure the operation of the groundfish fishery is not likely to jeopardize the survival or continued existence of the western DPS of Steller sea lions.**
3. **CIE reviewers are requested to specifically focus on and address the following questions in their review reports:**
 - **Does the Biological Opinion thoroughly describe what is known about the status of the listed species?**
 - **Does the Biological Opinion thoroughly describe the effects (direct and indirect) of the action on the listed species and its critical habitat?**
 - **Can you identify any additional literature that should be brought to bear on this Biological Opinion?**
 - **Can you identify any additional assessments or analyses that should contribute to a conclusion in this Biological Opinion?**

North Pacific Fishery Management Council

Eric A. Olson, Chairman
Chris Oliver, Executive Director



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Visit our website: <http://www.alaskafisheries.noaa.gov/npfmc>

February 19, 2010

Mr. Douglas Mecum
Acting Regional Administrator
National Marine Fisheries Service
P.O. Box 21668
Juneau, AK 99802-1668

Dear Mr. Mecum:

At its February 2010 meeting, the North Pacific Fishery Management Council received briefings on the schedule for the upcoming draft *status quo* Biological Opinion (BiOp) and a report from its Steller Sea Lion Mitigation Committee (Committee). We also reviewed NMFS' response to our previous request for input on the Center for Independent Experts' (CIE) terms of reference for their pending review of the draft BiOp. Based on discussions during that February meeting, the Council expressed some overarching perspectives that we believe are critical to the Council's potential involvement in development of RPAs for the 2011 fishing year, depending on the findings in the draft BiOp; i.e., if the BiOp contains a jeopardy and/or adverse modification (JAM) determination.

The Council tasked its Committee with reviewing the draft Biological Opinion at its March 9-12, 2010 meeting in Juneau. The Committee will provide comments on the BiOp to the Council at its April 2010 meeting, which may inform the Council's development of comments on the draft BiOp to NMFS. Further, the Committee is tasked with commenting on the feasibility of the Council developing appropriate SSL mitigation measures (RPAs) given the content and findings of the draft BiOp. Key to this feasibility is the level of definition of any performance standards included in the draft BiOp. If the performance measures are overly prescriptive, it will not be useful to engage the Committee and Council process in the development of potential RPAs. Conversely, any performance measures will need to provide the Council and its Committee enough definition of problem areas to allow us to craft responsive management actions. It is the Council's intent, upon consideration of the Committee comments and recommendations, to decide whether or how to further engage the Committee and the Council process in the development of potential SSL mitigation measures for the 2011 fishing year.

The Council also requests that NMFS prepare a concise white paper that would be made available concurrently with the draft BiOp, which would clearly describe the methodology NMFS is using to determine the current status (total count) of Western Distinct Population Segment (DPS) SSLs relative to the downlisting criteria in the Final Steller Sea Lion Recovery Plan, including:

- The specific methodology used in the Recovery Plan to determine the 42,500 animal baseline found in downlisting criterion 1 (Recovery Plan, p. xiii).

- The specific methodology used to establish the 53,100 animal target set for 2015, described in downlisting criterion 1.
- A clear determination of the current status of the WDPS as gauged against these criteria by applying the specific methodology used to calculate the 42,500 animal baseline.

If this information is clearly discernable in the draft BiOp, a separate white paper may not be necessary. However, the Council believes this information is critical to framing the information and findings in the draft BiOp.

Finally, the Council wishes to express its appreciation for the opportunity to comment on the Center for Independent Experts (CIE) Statement of Work (SOW) and Terms of Reference (TOR). The Council's SSC also provided comments on the SOW and TOR for consideration by the Council. The SSC's comments are incorporated as appropriate in the Council's comments provided here. The Council offers the following comments to improve the CIE process by focusing the review more on the science and its interpretation, and by enhancing the transparency of the review:

- a) The Council reiterates its request of December 23, 2009 to modify the review schedule to allow the public, SSLMC, SSC, and Council the opportunity to review and comment on the draft BiOp prior to the CIE review. The TOR and SOW should be modified to task the reviewers to consider any such comments in their review of the draft BiOp. The intent is not for separate input to the CIE from the various bodies, but that the Council would be the vehicle to synthesize that input and forward to NMFS and the CIE.
- b) The Council recommends that the TOR and SOW be modified to request the CIE to review and consider all of the science relevant to the analysis of factors affecting the status and recovery of the WDPS, not just the science provided in the draft BiOp to support its conclusions. The CIE reviewers should be tasked to assess, among other things, the information provided to the SSLMC at its January 2010 meeting. This information, including the minutes from the recent SSLMC meeting, should be made available to the reviewers prior to the review. Preparation of a comprehensive bibliography of relevant research may be necessary to fulfill this recommendation.
- c) The Council recommends that the TOR and SOW be modified to specifically task the CIE to review the relevant genetic papers, brand re-sight data, survey counts, and other relevant data on EDPS animals that may be found within the range of the WDPS, and WDPS animals that may be found within the range of the EDPS, and to make a recommendation on how these animals be counted when the agency calculates the WDPS population.
- d) The Council recommends that the TOR and SOW be modified to task the CIE to assess the relationship between population trends and downlisting criteria, and whether there are factors (other than fishing) affecting the recovery of the WDPS, including predation, changes in the ecosystem/carrying capacity, emigration, or other factors that should be taken into account.
- e) The Council concurs with the recommendation of the SSC regarding pre-review documents and further recommends that the background materials provided to the CIE reviewers include the studies and reports provided to the SSLMC at its January 2010 meeting, along with the genetic, brand re-sight data, and other scientific information or studies identified above. The

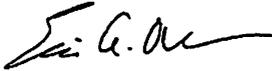
Mr. Doug Mecum
February 19, 2010
Page 3

basic analyses and data should also be provided to the CIE reviewers for studies such as the Fishery Interaction Team (FIT) analysis presented to the SSLMC, not just the Powerpoint presentations. These materials should be provided to the CIE reviewers well before the CIE begins its work in order to provide time for a thorough review.

- f) The Council concurs with the comments by the SSC regarding the requirements for CIE reviewers, pre-review documents, and the SSC's suggestion for revising the second bullet under item 3 in the TOR.
- g) The Council also concurs with the recommendations by the SSC regarding the schedule of milestones and deliverables (although specific dates may need to be adjusted to conform to the schedule), and further recommends that the CIE schedule be modified to provide the CIE reviewers adequate time to perform their reviews. Currently the SOW indicates that the reviewers will have a maximum of 10 days to complete the review.

The Council appreciates the work conducted by NMFS to complete the draft BiOp, and particularly for accommodating our request to comment on the CIE review process. The above information will greatly assist the Council as it reviews the draft BiOp. Moreover, the suggested revisions to the CIE review process, Terms of Reference, and Statement of Work will significantly enhance the transparency and scope of the review process. We believe that accommodation of our requests is critical to the review of the draft BiOp. Please contact me or the Council's Executive Director if you have any questions regarding these requests.

Sincerely,



Eric Olson
Chairman

Cc: Dr. James Balsiger
Dr. Douglas DeMaster
Ms. Kaja Brix

North Pacific Fishery Management Council

Eric A. Olson, Chairman
Chris Oliver, Executive Director



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Excerpt from SSC February 8-10, 2010 meeting.

B-8 CIE Terms of reference review

The SSC was asked to review the Terms of Reference in the Draft Statement of Work for an independent peer review by the Center for Independent Experts (CIE) of the 2010 Draft National Marine Fisheries Biological Opinion on the Effects of the Bering Sea/Aleutian Islands and Gulf of Alaska Federal Groundfish Fisheries and the State of Alaska Parallel Fisheries on ESA Listed Species and Designated Critical Habitats, including Steller Sea Lions and their Designated Critical Habitat. Jon Warrenchuk (Oceana) provided public testimony.

Statement of Work vs. the Terms of Reference

The Statement of Work calls for an evaluation of the scientific information in the Biological Opinion. There are, however, apparent contradictions between the Statement of Work on page 3, which calls for the CIE review to focus on "...the scientific information contained in the Biological Opinion and not on the conclusions of the Opinion as per the ESA thresholds." and the final bullet in the Terms of Reference on page 10, which calls for the review to answer the question "...does the Biological Opinion draw a reasonable conclusion based on the evidence with respect to the standard of "jeopardy" for the listed species...?". The SSC suggests that the two sentences on page 3 following the one quoted above provide a better sense of what is required of the review than the one from page ten, under (3), also quoted above.

Requirements for CIE Reviewers

The SSC suggests that it would be advantageous for the CIE Review Team to include individuals with expertise in population dynamics and predator-prey interactions.

Pre-review Documents

In addition to the documents listed, the SSC recommends sending to the CIE reviewers copies of the SSL Recovery Plan and all substantive orders by Judge Zilly dealing with Alaska groundfish fisheries and Steller sea lions. Additionally, the SSC recommends sending to the CIE reviewers a selection of review articles examining all major hypotheses dealing with the decline and subsequent failure of the SSL to fully recover, as well as bibliographies of recent literature on the SSL (e.g., the Taggart and Loughlin SSL bibliography, the recent update of this bibliography by Council Staff and the URLs of websites (e.g., Alaska SeaLife Center) that could provide copies of recent articles on sea lion demography and ecology). It is essential that the CIE reviewers receive the most recent pup and non-pup counts, if these are not already included in the Biological Opinion.

Schedule of Milestones and Deliverables

The timeline as described on pages 6 and 7 does not appear to provide sufficient time for the CIE reviewers to do their job. It appears that the reviews are to be completed between the 1st and 12th of March. There is then a gap until 26 March when the reviews are due. If the full time for the review is 1-26 March, the time available to complete the reviews is short, but probably manageable. If there are 12 days or less for the reviews, then the time line should be relaxed to give the reviewers 15 to 20 working

days to complete the reading of the background material and the preparation of their reviews. The final date should be 2010 not 20109.

Terms of Reference 3, bullet 2

The SSC suggests the insertion of the words “and apply valid analytical and statistical methods to” after the words “thoroughly describe”.

Steller sea lion BiOp, CIE review TOR

Motion:

1. The Council reaffirms interest in working with NMFS to develop the terms of reference (TOR) for a Center for Independent Experts (CIE) review and the process under which the review would be conducted.
2. The Council adopts the attached draft TOR to facilitate discussion between the Council and NOAA to develop the process and TOR for the review. These discussions would be lead by the Council Chair, Executive Director, and representatives of the State of Alaska and State of Washington.
3. The Council will schedule review of the agreed TOR and process for the December meeting and consider next steps.

DRAFT

Terms of Reference

Center for Independent Experts

Review of the 2010 National Marine Fisheries (NMFS) Biological Opinion on the Effects of the Bering Sea/Aleutian Islands and Gulf of Alaska Federal Groundfish Fisheries and the State of Alaska Parallel Fisheries on ESA Listed Species and Designated Critical Habitats, Including Steller Sea Lions and Their Designated Critical Habitat

Scope of Work and CIE Process: This project is to task the Center for Independent Experts (CIE) with conducting a peer review of this Biological Opinion (BiOp) as it pertains to the Western Distinct Population Segment (WDPS) of Steller sea lions (SSL).

The subject of review would be the entire scientific record (including information contained in the biological opinion and information not included in the biological opinion) relevant to the BiOp analysis. The panel will be asked to comment on the adequacy of the best available science and of the appropriate use of that science in the BiOp. The panel shall be specifically tasked to review and comment on the rationale, and subsequent findings contained in the Biological Opinion regarding factors affecting SSL population status, their critical habitat, and recovery including in particular the findings regarding the effects of fisheries on SSL population status, vital rates, and critical habitat.

The reviewers would be asked to critically evaluate whether NMFS thoroughly analyzed and critically evaluated the potential effects of other factors that may affect SSL population dynamics including predation, environmentally-driven conditions, emigration or movement of SSL within and between the WDPS or subregions identified in the BiOp, or exposure to contaminants.

Pre-review Background Documents: The CIE reviewers shall be given adequate time (not less than 90 days, more if warranted) to review background material and shall read all documents in preparation for the peer review. These pre-review documents may be supplemented by information presented to the panelists during the public sessions of the review process identified below.

Information provide to the reviewers by NMFS prior to the review shall include:

1. Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Areas. North Pacific Fishery Management Council. April 2009.
2. Fishery Management Plan for Groundfish of the Gulf of Alaska. North Pacific Fishery

Management Council. April 2009. Available at:

3. Aleutian Islands Fishery Ecosystem Plan. North Pacific Fishery Management Council. December 2007. Available at:

4. 2000 Endangered Species Act Section 7 Consultation Biological and Incidental take Statement. Authorization of Bering Sea/Aleutian Islands groundfish fisheries based on the Fishery Management Plan for the Bering Sea/Aleutian Islands Groundfish; and Authorization of Gulf of Alaska groundfish fisheries based on the Fishery Management Plan for Groundfish of the Gulf of Alaska. November 2000. National Marine Fisheries Service. 2000. Available at:

5. 2001 Biological Opinion and Incidental Take Statement. October 2001. Authorization of Bering Sea/Aleutian Islands groundfish fisheries based on the Fishery Management Plan for the Bering Sea/Aleutian Islands Groundfish as modified by amendments 61 and 70; and Authorization of Gulf of Alaska groundfish fisheries based on the Fishery Management Plan for Groundfish of the Gulf of Alaska as modified by amendments 61 and 70. Parallel fisheries for pollock, Pacific cod, and Atka mackerel, as authorized by the State of Alaska within 3 nm of shore, plus selected supporting documents. National Marine Fisheries Service. 2001. available at:

6. 2003 Supplement to the Endangered Species Action Section 7 Biological Opinion and Incidental take statement of October 2001, plus appendices. National Marine Fisheries Service. 2003. available at:

7. Historical and current fishery stock assessment data for relevant WDPS SSL prey species including but not limited to pollock, Atka mackerel, and Pacific cod by area; population assessment data for SSL predators by area, particularly Orca data; SSL population data including survey information showing survey results by rookery and haulout by year, with confidence intervals for population estimates by subarea and WDPS as a whole.

8. All of the relevant scientific and commercial information necessary to conduct this review. This shall include both the scientific record contained in the BiOp, the information provided to the North Pacific Fishery Management Council's Steller Sea Lion Mitigation Committee, all comments received by the North Pacific Fishery Management Council and NMFS during the public review of the draft BiOp, and the report prepared by the scientific review conducted by the States of Alaska and Washington, including the comments received as part of that state review process.

A listing of all pre-review background documents and information provided to the reviewers by NMFS shall be made available to the public at the time the documents are made available to the CIE.

Specific Terms of Reference.

In addition to the above, this review will be conducted pursuant to the following Terms of Reference:

1. Three to five (3-5) scientists will be impaneled to review the BiOp and produce a report of results of their review. The CIE Coordination Team and Steering Committee, none of whom shall be employees of NOAA or be contracted by NOAA during the time of the review, shall select the panelists. The panelists will be experienced scientists in one or more fields of fisheries management, fishery stock assessments and biology, animal population dynamics, and marine mammal biology. None of the panelists will be federal employees, receive any funding from NOAA at the time of the review, or have any direct connection with development of biological opinions regarding SSLs under the ESA.
2. The panel is tasked to review and comment on the final BiOp, including information used, rationale developed, and the subsequent findings regarding factors potentially affecting SSL population status, vital rates, critical habitat, risk of extinction, and recovery including in particular the findings regarding the effects of fisheries on SSL population status, vital rates, and critical habitat.
3. The panel shall evaluate the quality and completeness of the scientific and commercial information used in the BiOp analysis, and identify if the BiOp analysis is comprehensive or if there are relevant scientific or commercial data or information that was not used in the BiOp analysis. In conducting this evaluation, the panel shall also consider and report on the use of scientific or commercial information from non-NMFS sources and whether the work of independent scientists was accurately described, analyzed, and incorporated into the BiOp analysis.
4. The panel is specifically tasked to evaluate the scientific basis for the findings of the final 2010 BiOp, that fisheries are causing nutritional stress in SSLs which in turn is causing lower reproductive rates. The panel shall evaluate and comment on whether or not the data indicate a strong link between fishery removals, SSL reproductive rates, and recovery of the WDPS. As part of this consideration, reviewers shall also assess the scientific record to determine whether adequate consideration has been given to the likelihood that factors other than fishing are negatively affecting the population status or recovery of the WDPS including predation, changes in the ecosystem/carrying capacity, emigration, exposure to contaminants, or other factors.
5. In making these evaluations, the panel should consider and address the following questions:
 - a. Are the findings of the BiOp contradicted by any scientific, economic, and social information presented in, or omitted from, the BiOp?

September 20, 2011

Mr. Eric Olson, Chair
North Pacific Fishery Management Council
605 W. Fourth Avenue, Suite 306
Anchorage, AK 99501-2252

Dr. Jim Balsiger, Regional Administrator
NOAA Fisheries, Alaska Region
709 West Ninth Street
Juneau, AK 99802-1668

Re: Agenda item B-7
Protected Species Report; Terms of Reference for CIE Review

Dear Chairman Olson, Dr. Balsiger, and Council Members:

Oceana supports decisions based on sound science and encourages agencies to gather and review basic information at all stages of the decision-making process. We are encouraged that the National Marine Fisheries Service (NMFS) is fulfilling its legal and scientific responsibility by taking steps to recover the endangered Steller sea lion and to reduce the impact of the federal groundfish fisheries. NMFS has prepared a scientifically valid Biological Opinion (BiOp) and implemented the clearly necessary changes to the Atka mackerel and Pacific cod fisheries in the western Aleutian Islands. This BiOp is the culmination of a lengthy process that has included input from the North Pacific Fishery Management Council and public, development of a Recovery Plan, and reviews of the Recovery Plan by both the Center for Independent Experts (CIE) and an North Pacific Research Board-convened panel.

Despite the fact that the Endangered Species Act (ESA) does not require peer review of the BiOp or Reasonable and Prudent Alternative (RPA) chosen, it is our understanding that NMFS has committed to a CIE review of the Steller sea lion BiOp. Oceana supports independent scientific review, and because the CIE has strict standards and can provide the expertise necessary to fulfill such review, we will support that review process and participate to the degree appropriate.

As we have stated previously, an independent review of the Steller sea lion BiOp must meet strict standards for a scientific peer review, including:

1. The review should focus on the scientific information contained in the BiOp and state whether NMFS has used the best available science. In particular, the review should focus on:
 - a. Whether the BiOp thoroughly describes what is known about the status of Steller sea lions;
 - b. Whether the BiOp thoroughly describes the effects (direct and indirect) of the groundfish fisheries on Steller sea lions and their critical habitat;
 - c. Whether there is any additional literature that should be brought to bear on the BiOp; and
 - d. Whether there is any additional assessment/analysis that should contribute to a conclusion in the BiOp.

Mr. Eric Olson, NPFMC
Dr. Jim Balsiger, NOAA Fisheries
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2. The reviewers must have the expertise, background, and experience to complete an independent scientific peer review including: fishery science; fishery effects on ecosystems and/or ecosystem management of fisheries; marine mammal biology and ecology, with emphasis on otariids, if possible.
3. The reviewers must be independent of the various stakeholders in the process, particularly those involved in litigation effort.

Oceana is confident that the planned review by the CIE will meet these standards, which are based, in part, on terms of reference drafted by NMFS for a review by the CIE (*see* January 26, 2011 letter to Eric Olson, NPFMC from James Balsiger, NMFS). We urge the NPFMC during its discussion of the CIE terms of reference to not digress to subjects which are not the purview of the CIE and would compromise the independent or scientific nature of the review. Thank you for your commitment to sustainable fisheries based on sound science and ecosystem-based management. We look forward to working with you on this important issue.

Sincerely,

Susan Murray
Senior Director, Pacific
Oceana