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

These three partially consolidated actions were filed by the State of Alaska, and various fishing industry entities, including members of the A80 Cooperatives ("A80") and Freezer

Longline Coalition ("FLC").[1] The originally named Defendants consist of various federal officials and agencies (the "Defendants").[2] The Court previously granted a motion by Oceana, Inc. and Greenpeace, Inc. (the "Intervenors") to intervene as of right as defendants.[3] The Court also denied a motion for permissive intervention by Aleut Corporation and Aleut Enterprises, LLC ("Amici Curiae"), but allowed them to participate as amici curiae supporting Plaintiffs' position.[4]

Plaintiffs challenge a biological opinion ("BiOp"), environmental assessment and finding of no significant impact, and an Interim Final Rule ("IFR") issued by the National Marine Fisheries Service ("NMFS").[5] These determinations imposed new restrictions on the Atka mackerel and Pacific cod fisheries in the Bering Sea and Aleutian Islands. The purpose of the restrictions is to protect the food source of the western Distinct Population Segment of the Stellar sea lion ("WDPS"), an endangered species.[6] Plaintiffs contend that the NMFS's determinations

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[1] Dkt. 1; Dkt. 1 in Case No. 3:11-cv-00001-TMB; Dkt. 1 in Case No. 3:11-cv-00004-TMB; Dkt. 36. All of the Plaintiffs sought expedited consideration of their claims. Dkt. 1 at 32 (requesting "immediate injunctive relief, including temporary restraining order(s) and/or preliminary injunction(s)"); Dkt. 39 at 37 (seeking expedited consideration pursuant to 16 U.S.C. § 1855(f)(4)); Dkt. 41 at 3, 37 (same). Although there were several delays necessitated by the efforts needed to compile the large administrative record in this matter, the Court has done its best to accommodate the Parties' request and has endeavored to issue its ruling as quickly as possible.

[2] *See, e.g.*, Dkt. 1 ¶¶ 13-16. As they explain in their reply brief, the "industry" entities actually represent less than 30 total boats that target Atka mackerel and Pacific cod in the Bering Sea and Aleutian Islands. *See* Dkt. 106 at 19.

[3] Dkt. 38.

[4] Dkt. 72.

[5] *See* Dkt. 80 at 18.

[6] *See, e.g.*, Dkt. 1 ¶¶ 47-74.

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").

Plaintiffs, supported by Amici Curiae, have moved for summary judgment.[7] The Defendants and Intervenors oppose the motions.[8] Plaintiffs requested oral argument,[9] which the Court heard on December 21, 2011. At oral argument, counsel for Defendants further requested that the Court construe their opposition as a cross-motion for summary judgment pursuant to the Court's Local Rules.[10]

As discussed in detail below, although the Court sympathizes with the Plaintiffs and Amici Curiae, who stand to suffer large economic and other losses as a result of the fishery restrictions, "judges are not scientists."[11] The Court must defer to the technical expertise of the agency as long as there is a rational connection between the evidence and its conclusions. In this case, the Court finds that NMFS did not apply improper ESA standards and that the evidence, although equivocal, was sufficient to support its conclusions that the fisheries were likely to jeopardize the continued existence of the WDPS and adversely modify its critical habitat. Additionally, although the procedures NMFS employed to comply with its obligations under the APA and MSA were far from ideal, the Court nonetheless concludes that they were adequate under the law. The Court does find, however, that NMFS violated NEPA by failing to prepare

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[7] Dkts. 79, 80, 81, 84, 89.

[8] Dkts. 98, 99.

[9] Dkt. 107.

[10] *See* D.Ak. L.R. 16.3(c)(2).

[11] *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 148 (1997) (Breyer, J., concurring).

an environmental impact statement and provide the public with a sufficient opportunity to weigh in on its decision-making process.

Accordingly, Plaintiffs' motions for summary judgment are GRANTED, in part, and DENIED, in part. As a result of its rulings, the Court is inclined to remand this matter to NMFS to prepare a full environmental impact statement and provide the public with an opportunity to be heard. The Court will, however, provide the Parties with an opportunity to submit further briefing before settling on the proper remedy.

II. BACKGROUND

A. Statutory & Regulatory Overview

The administrative determinations at issue here are subject to a number of statutory and regulatory requirements, including those under the MSA, ESA, and NEPA. The MSA governs the federal management of fisheries in waters adjacent to Alaska, including the Bering Sea/Aleutian Islands region ("BSAI") and the Gulf of Alaska ("GOA"). Under the MSA, the North Pacific Fisheries Management Council ("Council") is charged with preparing and amending Fishery Management Plans ("FMPs") to conserve and manage the BSAI and GOA fisheries.[12] FMPs must be consistent with "national standards" under the MSA.[13] The Council may also propose regulations to implement FMPs.[14] FMPs and regulations are subject to review and approval by the Secretary of Commerce.[15]

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[12] *See* 16 U.S.C. § 1852(a)(G), (h).

[13] § 1851(a).

[14] § 1853(c).

[15] § 1854(a), (b).

The ESA directs the Secretary of Commerce to determine whether to list qualifying species as "endangered" or "threatened" and designate any such species' "critical habitat."[16] The Secretary then has affirmative obligations to develop and implement "recovery plans" under § 4(f), and carry out programs for the conservation of listed species under § 7(a)(1).[17] Additionally, and most significantly for the purposes of this case, § 7(a)(2) requires that each federal agency "insure" that any agency action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of" any listed species' critical habitat.[18] Agencies are required to use "the best scientific and commercial data available" in fulfilling this obligation.[19]

An agency planning an action that may affect an endangered species (referred to as the "action agency") must consult with the agency that has authority over the species (referred to as the "consulting agency").[20] The consulting agency then prepares a biological opinion evaluating whether the proposed action is "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of" the critical habitat of the species.[21] If the consulting agency finds that jeopardy or adverse modification is

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[16] *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 940 (9th Cir. 2010) (citing 16 U.S.C. § 1533(a)(1), (a)(3)(A)(i)).

[17] §§ 1533(f), 1536(a)(1).

[18] § 1536(a)(2).

[19] *Id.*

[20] *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008).

[21] *See id.* ("The biological opinion includes a summary of the information upon which the opinion is based, a discussion of the effects of the action on listed species or critical habitat, and the consulting agency's opinion on 'whether the action is likely to jeopardize the continued

likely, it must suggest "reasonable and prudent alternatives" ("RPAs") that it believes will avoid the jeopardy or adverse modification.[22] The authorization of the fisheries in the BSAI and GOA constitutes qualifying agency action for the purposes of the ESA.[23]

NEPA establishes procedures requiring federal agencies to take a "hard look" at the environmental consequences of their decisions.[24] "Foremost among those procedures is the preparation of an environmental impact statement" ("EIS").[25] "Agencies considering 'major Federal actions significantly affecting the quality of the human environment' are required to prepare an EIS."[26] Where "agency regulations do not categorically require the preparation of an" EIS, an agency may prepare an environmental assessment ("EA") before determining whether to prepare an EIS.[27] If the agency decides not to prepare an EIS, it must prepare a finding of no significant impact ("FONSI").[28] Among other things, an EA must "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a" FONSI.[29] The FONSI

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existence of a listed species or result in the destruction or adverse modification of critical habitat'" (quoting 50 C.F.R. § 402.14(h)(3))).

[22] *See id.* at 924-25 (citing, *inter alia*, § 1536(b)(3)(A)).

[23] *See Greenpeace v. Nat'l Marine Fisheries Serv. ("Greenpeace IV")*, 237 F. Supp. 2d 1181, 1185 (W.D. Wash. 2002).

[24] *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 486 (9th Cir. 2011) (citations omitted).

[25] *Id.*

[26] *Id.* (citing 42 U.S.C. § 4332(C)).

[27] *See Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1356 (9th Cir. 1994) (citation omitted); 40 C.F.R. § 1501.4(b), (c).

[28] § 1501.4(e); § 1508.13.

[29] § 1508.9(a)(1).

must "briefly present[] the reasons why an action . . . will not have a significant impact on the human environment and for which an [EIS] therefore will not be prepared."[30]

B. Prior Agency Actions & Litigation

The BSAI and GOA are home to the largest commercial fishery in the United States.[31] They are also home to the major population center of the Stellar sea lion.[32] In the latter half of the Twentieth Century, the population of Stellar sea lions declined sharply at the same time that commercial fishing in these areas was increasing.[33] This eventually led NMFS to list the Stellar sea lion as a "threatened" species under the ESA.[34] In 1997, based on genetic distinctions, NMFS separated Stellar sea lions into the WDPS and an eastern Distinct Population Segment ("EDPS").[35] It also re-categorized the WDPS as "endangered."[36]

Thereafter, in 1998, the Intervenors in this case filed suit in the Western District of Washington against NMFS challenging a series of FMPs and biological opinions.[37] Various other environmental organizations and industry entities were also involved in the litigation.[38] In

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[30] § 1508.13.

[31] *Greenpeace v. Nat'l Marine Fisheries Serv. ("Greenpeace I")*, 55 F. Supp. 2d 1248, 1252 (W.D. Wash. 1999).

[32] *Greenpeace v. Nat'l Marine Fisheries Serv. ("Greenpeace III")*, 106 F. Supp. 2d 1066, 1070 (W.D. Wash. 2000).

[33] *Id.*

[34] *Greenpeace I*, 55 F. Supp. 2d at 1254.

[35] *Id.*

[36] *Id.*

[37] *See Greenpeace IV*, 237 F. Supp. 2d 1181, 1185-87 (W.D. Wash. 2002).

[38] *See Greenpeace I*, 55 F. Supp. 2d 1248, 1252 (W.D. Wash. 1999).

1999, Judge Zilly upheld a biological opinion finding that the Atka mackerel fishery was not likely to jeopardize the WDPS, but that the Pollock fishery was likely to do so.[39] He also found, however, that the RPA for the Pollock fishery was arbitrary and capricious and remanded to NMFS to prepare a revised RPA.[40] The following year, Judge Zilly found that a second biological opinion analyzing the effects of the entire fishery management scheme on the Stellar sea lion was inadequate because it failed to comprehensively analyze the full scope of the FMP.[41] He subsequently enjoined groundfish trawl fishing in the WDPS critical habitat.[42]

In 2002, Judge Zilly concluded that two biological opinions that found that no jeopardy or adverse modification would occur until prey populations were reduced below target levels were not arbitrary and capricious.[43] At the same time, however, he found that NMFS's reliance on telemetry data without proper acknowledgement of the limitations of that technology was arbitrary and capricious and that NMFS failed to properly analyze the effects of an amended RPA on Stellar sea lions, their prey, and their critical habitat.[44] Accordingly, Judge Zilly remanded the second biological opinion to NMFS for further action in compliance with his order.[45] NMFS subsequently issued a supplement to that biological opinion pursuant to Judge

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[39] *Greenpeace IV*, 237 F. Supp. 2d at 1186.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 1187-93.

[44] *Id.* at 1193-1204.

[45] *Id.* at 1204.

Zilly's order.[46] As required by the ESA, NMFS also completed a revised Recovery Plan for both the WDPS and EDPS in 2008.[47]

C. Summary of Agency Procedures

On October 18, 2005, the Council requested NMFS to initiate a consultation to examine the effects of the fisheries on several ESA-listed species, including the WDPS, in light of new information developed since the consultations in 2000 and 2001.[48] After conducting a biological assessment, on April 19, 2006, NMFS's Sustainable Fisheries Division, acting as the action agency for ESA purposes, requested consultation with NMFS's Protected Resources Division, which was acting as the ESA consulting agency.[49] Because of the complexity of the anticipated analysis, both divisions agreed to an extended timeline for the completion of the consultation process.[50]

NMFS's initial timeline contemplated that, in the event of a jeopardy or adverse modification finding, the Council would have several months to review a draft BiOp and confer with the Center for Independent Experts and the Council's Stellar Sea Lion Mitigation Committee with the goal that the rulemaking process would conclude in time for a final rule to go into effect by January 2010.[51] After delays, NMFS issued a revised schedule which indicated

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[46] RULE002105. The administrative record in this case consists of over 200,000 pages. *See* Dkt. 48 at 3. In this Order, the Court follows the Parties' practice of citing to record materials by their production numbers, which begin with the prefixes "BIOP" and "RULE."

[47] *See* Dkt. 99 Ex. 14.

[48] *See* RULE002101.

[49] *Id.*

[50] RULE002106.

[51] *See* BIOP000547-48.

that, in the event of a jeopardy or adverse modification finding, it still anticipated collaborating with the Council on developing the RPAs, and anticipated any new rule would be effective either in December 2011 or May 2012.[52] In April 2008, the Council requested that NMFS incorporate new information – some of which "had yet to be collected" – into the draft BiOp despite the fact that this might delay the draft BiOp.[53]

After further delays, NMFS released the draft BiOp, as well as a draft EA, on August 2, 2010, and accepted public comment through September 3, 2010.[54] In the draft BiOp, NMFS concluded that reauthorizing the fisheries under the existing restrictions was likely to jeopardize the continued existence of the WDPS and adversely modify the WDPS's critical habitat.[55] NMFS then revised the draft BiOp in response to over 10,000 comments it received, and released the final BiOp on November 24, 2010.[56] It also released the final EA that same month.[57] On December 13, 2010, NMFS issued the IFR implementing the RPA under the final BiOp.[58] In doing so, NMFS found that there was good cause to waive the prior notice and opportunity for public comment period in order to prevent the fisheries commencing on January 1, 2011, from

[52] BIOP009239-40.

[53] RULE002106-07.

[54] RULE002078, BIOP002324.

[55] BIOP001518, BIOP001520.

[56] RULE002078.

[57] RULE000110.

[58] RULE000554-55.

jeopardizing the continued existence of the WDPS or adversely modifying the WDPS critical habitat.[59] It did, however, request "post promulgation comments" through January 12, 2011.[60]

D. The BiOp

In the BiOp, NMFS considered the impacts of the existing fisheries on the WDPS, the EDPS, humpback whales, sperm whales, and fin whales.[61] NMFS found that although the Stellar sea lion population was increasing in four "sub-regions" within the WDPS region, there were "substantial declines" in two sub-regions.[62] Utilizing "pup to non-pup" ratios, NMFS also found that natality rates were lower in the WDPS than the EDPS, and that "the most reasonable explanation" for the disparity was that "portions of" the WDPS "may be nutritionally stressed," as other hypotheses for the low natality in the WDPS were not found to be significant, although NMFS acknowledged that "killer whale predation remains a likely stressor in portions of" the WDPS region.[63] It also found that pup counts had declined significantly in portions the western and central Aleutian Islands sub-regions, while increasing in other parts of the WDPS.[64]

NMFS further explained that "chronic nutritional stress" may have directly (through physiological responses) or indirectly (through increased mortality from predators due to

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[59] RULE000561-62.

[60] RULE000562.

[61] RULE002080-100.

[62] RULE002086. The BiOp also discusses "Rookery Cluster Areas" or "RCAs." NMFS subdivided the Stellar sea lion population into these eleven groups of rookeries that had similar demographic characteristics in order to facilitate its analysis. RULE002083. They were developed in order to account for potentially significant trends taking place at the rookery level which were lost when the data was aggregated for the entire region. RULE002182.

[63] RULE002086.

[64] RULE002557.

increased foraging) contributed to reduced population growth.[65] NMFS acknowledged that the "nutritional stress" hypothesis had been "debated for decades."[66] NMFS also found, however, that the fishery activity in the western and central Aleutian Islands sub-regions was negatively associated with population trends.[67] Consequently, NMFS found that the fisheries were "likely to jeopardize the continued existence of the" WDPS and "likely to adversely modify the designated critical habitat for the" WDPS.[68] NMFS also found that there was no jeopardy or adverse modification with respect to the EDPS, humpback whales, sperm whales, and fin whales.[69]

The BiOp included an RPA which imposed new restrictions on the Atka mackerel and Pacific cod fisheries in three sub-areas in the Aleutian Islands.[70] NMFS made eight

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[65] RULE002088-90.

[66] RULE002087. Indeed, this theory and the fact that it has not been definitively proven, are not new developments. As Judge Zilly explained it over a decade ago:

> Although scientists are unable to precisely determine the impact of the fisheries on Stellar sea lion survival, several important facts are undisputed: 1) the primary scientific hypothesis for the decline in sea lion population is lack of food availability, resulting in "nutritional stress;" 2) the fisheries remove hundreds of millions of pounds of fish every year from the oceans that have traditionally supported the major sea lion population centers; 3) the fisheries operate at times and in areas where sea lions forage for food; and 4) many of the fish species targeted by the fisheries are important sea lion prey. These basic facts have lead NMFS to conclude that the fisheries may negatively impact Stellar sea lions by "competing" for prey resources.

Greenpeace III, 106 F. Supp. 2d. 1066, 1070 (W.D. Wash. 2000).

[67] RULE002090.

[68] RULE002088-91.

[69] RULE002095-100.

[70] *See* RULE002091-93.

modifications to the RPA based on comments on the draft BiOp.[71] It then determined that the RPA had to be "implemented quickly in order to halt the immediate effects of the fisheries" on the "western portion of the range of the" WDPS so as "to support the recovery of" the WDPS "population as a whole."[72] It noted that the WDPS "was not meeting the criteria of a recovering population" as outlined in the Recovery Plan.[73] In doing so, NMFS "recognized that competition with fisheries for prey is likely one component of an intricate suite of natural and anthropogenic factors affecting Stellar sea lion numbers and reproduction."[74] It noted that it must nonetheless "ensure that actions . . . are not likely to appreciably reduce the likelihood of survival and recovery of the" WDPS.[75]

III. LEGAL STANDARD

The Parties agree that the APA governs the Court's review of the agency actions at issue here.[76] Under the APA, the court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."[77] Judicial "review is 'narrow' but 'searching and careful.'"[78] In

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[71] RULE002091.

[72] *Id.*

[73] RULE002094.

[74] *Id.*

[75] *Id.*

[76] *See* Dkt. 80 at 27-28; Dkt. 98 at 36-29.

[77] 5 U.S.C. § 706(2)(A).

[78] *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1065 (9th Cir. 2004) (citations omitted).

other words, the court's review of an agency's procedural compliance "is exacting, yet limited."[79]

Under this standard, the "critical" consideration is "whether there is 'a rational connection between the facts found and the conclusions made' in support of the agency's action."[80] Review is "deferential," and the reviewing court should:

> not vacate the agency's decision unless it has [1] "relied on factors which Congress had not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[81]

Accordingly, the court must "not substitute its [own] judgment for that of the agency," and should uphold even an unclear decision where the agency's path may be reasonably discerned.[82]

The court accords the highest deference "when reviewing an agency's technical analyses and judgments involving the evaluation of complex scientific data within the agency's technical expertise.[83] It is not the court's place to "instruct[] the agency, choos[e] among scientific studies, and order[] the agency to explain every possible scientific uncertainty."[84] The agency has

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[79] *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006) (citations omitted).

[80] *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2011) (citation omitted).

[81] *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 945 (9th Cir. 2010) (citations omitted).

[82] *Id.* (citing *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009)).

[83] *League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010) (citation omitted); *see also Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1066 (9th Cir. 2004) (noting that the court must accord "substantial deference" to the agency's scientific methodology).

[84] *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010) (citation omitted).

"discretion to rely on its own qualified experts" in the face of conflicting views, even where "as an original matter, a court might find [the] contrary views more persuasive."[85] "[S]ummary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did."[86]

IV. DISCUSSION

Plaintiffs argue that they are entitled to summary judgment because NMFS violated various requirements in: (a) the MSA and APA; (b) the ESA; and (c) NEPA. For the reasons discussed below, the Court finds that NMFS did not violate the applicable statutes and regulations when it issued the BiOp and IFR. The Court does find, however, that NMFS violated NEPA when it issued an EA and FONSI instead of a full EIS and failed to provide sufficient information for the public to comment on the agency's decision-making process. Nonetheless, because the Court upholds NMFS's determinations under the ESA and MSA, it is inclined to remand this matter to NMFS to prepare an EIS without vacating the BiOp or IFR.

A. The MSA and APA

Plaintiffs first argue that NMFS violated the MSA and APA when it issued the IFR by: (a) "unlawfully usurp[ing] the Council's role" under the MSA; (b) failing to comply with the

[85] *Id.* (citation omitted).

[86] *City & Cnty. of S.F. v. United States*, 130 F.3d 873, 877 (9th Cir. 1997) (quoting *Occidental Eng'g Co. v. INS*, 753 F.3d 766, 770 (9th Cir. 1985)). Prior to oral argument, the Court issued a series of questions which it requested the Parties to address at the argument. Dkt. 128. Among other things, the Court asked for the Parties' views on resolving this case on summary judgment. None of the Parties objected to resolving the case on summary judgment, and Defendants' counsel affirmatively indicated that Defendants are not arguing that genuine disputes of material fact preclude the Court from granting summary judgment. That is consistent with the Court's understanding of the applicable law.

MSA and APA notice and comment procedures; and (c) failing to assess whether the IFR was consistent with the MSA's national standards.[87] Defendants dispute each of these contentions.

1. *Authority to Issue the IFR*

Plaintiffs contend that NMFS did not have authority under the MSA to issue the IFR. Under the MSA, the Council has the authority to issue and amend FMPs[88] and propose regulations.[89] NMFS, as the Secretary's delegate, may then review and approve the plans and proposed regulations.[90] MSA § 305(d) also gives the Secretary authority to "carry out" any FMP or FMP amendment, as well as "promulgate such regulations, in accordance with [APA rulemaking procedures], as may be necessary to discharge such responsibility or to carry out any other provision of this chapter."[91]

Here, the Council issued FMPs for the BSAI and GOA, which contain the following provision:

> 3.5.3 Marine Mammal Conservation Measures
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> Regulations implementing the FMP may include special groundfish management measures intended to afford species of marine mammals additional protection other than that provided by other legislation. These regulations may be especially necessary when marine mammal species are reduced in abundance. Regulations may be necessary to prevent interactions between commercial fishing operations and marine mammal populations when information indicates that such interactions may adversely affect marine mammals, resulting in reduced abundance and/or reduced use of areas important to marine mammals. These

[87] *See* Dkt. 80 at 28-35.

[88] *See* 16 U.S.C. § 1852(a)(G), (h).

[89] *Id.* § 1853(c).

[90] *Id.* § 1854(a), (b). There are exceptions to this general structure which are not applicable here. *See id.* § 1854(c).

[91] § 1855(d) (citing 5 U.S.C. § 553).

> areas include breeding and nursery grounds, haul out sites, and foraging areas that are important to adult and juvenile marine mammals during sensitive life stages.
>
> Regulations intended to protect marine mammals might include those that would limit fishing effort, both temporarily and spatially, around areas important to marine mammals. Examples of temporal measure are season apportionments of TAC specifications. Examples of spatial measures could be closures around areas important to marine mammals. The purpose of limiting fishing effort would be to prevent harvesting excessive amounts of the available TAC or seasons apportionments thereof at any one time or in any one area.[92]

NMFS cited this provision as authority for the IFR.[93] Plaintiffs essentially contend that the Council could not delegate this authority to NMFS under the statute.[94]

The Court finds Plaintiffs' argument unpersuasive. There was both a statutory basis for NMFS to issue regulations to "carry out" the FMPs and an explicit authorization for "implementing" regulations under the FMP.[95] Moreover, NMFS issued the IFR as a result of a review process requested by the Council. This is not akin to cases where the agency issued a regulation that contradicts the FMP.[96] Additionally, the IFR does not preclude the Council from

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[92] *See, e.g.*, RULE 003326-27.

[93] *See* RULE000556 ("Section 3.5.3 of the FMP for Groundfish of the BSAI, approved by the Secretary of Commerce under the [MSA], specifically authorizes implementation by regulation of special fishery management measures to protect marine mammals, without requiring amendment of the [FMP] itself.").

[94] Dkt. 80 at 29-31.

[95] Because the IFR was consistent with the FMP, the Court also finds that it was consistent with the NMFS Operational Guidelines.

[96] *Cf. Oceana, Inc. v. Evans*, No. Civ. A. 04-0811(ESH), 2005 WL 555416, at *26 (D.D.C. Mar. 9, 2005) (finding that § 305(d) did not provide the Secretary with "independent authority to, sua sponte, add a regulation that is inconsistent with the proposal from the Council"). Most of the authorities cited by the Parties either do not analyze the issue in any substantive detail or are readily distinguishable. *Compare Fisherman's Finest, Inc. v. Gutierrez*, No. C07-1574MJP, 2008 WL 2782909, at *1 (W.D. Wash. July 15, 2008) (stating that "NMFS does not have authority to unilaterally substantively modify or add to the council's proposed plan or the implementing regulations"), *and Associated Fisheries of Me., Inc. v. Evans*, 350 F. Supp. 2d 247,

exercising its authority under the MSA in the future. Accordingly, the Court finds that NMFS did have authority to issue the IFR.

2. *Failure to Comply with Notice & Comment Procedures*

Generally, "NMFS must open a public comment period before it adopts annual management measures."[97] NMFS issued the IFR without prior notice and comment pursuant to the "good cause" exception to the APA.[98] Under that exception, an agency may issue a rule without prior notice and comment where it finds "good cause" that the procedures "are impracticable, unnecessary, or contrary to the public interest."[99]

A court's "inquiry into whether NMFS properly invoked 'good cause' proceeds case-by-case, sensitive to the totality of the factors at play . . . ."[100] However, "notice and comment

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255 (D. Me. 2004) (suggesting that the Secretary's authority under § 305(d) does not permit it to significantly alter an FMP amendment at the same time that it approves it), *with Connecticut v. Daley*, 53 F. Supp. 2d 147, 161 n.13 (D. Conn. 1999) (indicating that § 305(d) represents "independent authority for the Secretary to issue regulations under the" MSA); *Southeastern Fisheries Ass'n v. Mosbacher*, 773 F. Supp. 435, 439 (D.D.C. 1991) (noting that "the Secretary has broad discretion in promulgating regulations to implement" FMPs), *National Fisheries Inst., Inc. v. Mosbacher*, 732 F. Supp. 210, 217 (D.D.C. 1990) (indicating that the MSA "vests the Secretary, on behalf of the federal government, with jurisdiction over fishing activity within all parts of the" exclusive economic zone), *and Louisiana v. Baldridge*, 538 F. Supp. 625, 628 (E.D. La. 1982) (indicating that the Secretary had "broad discretion in promulgating regulations to implement the" FMP). The Court also does not find the legislative history – which both sides claim supports their argument – to be dispositive one way or the other. *See United States v. Mys Profkofyeva*, 536 F. Supp. 793, 798 (D.D.C. 1982) (quoting the legislative history for the predecessor provision).

[97] *Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1123 (9th Cir. 2006) (citing *Natural Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 910 (9th Cir. 2003)).

[98] *See* RULE000561-62 (citing 5 U.S.C. § 553(b)(B), (d)(3)).

[99] § 553(b)(B).

[100] *Natural Res. Def. Council*, 316 F.3d at 911 (citation omitted). *Accord United States v. Valverde*, 628 F.3d 1159, 1164-65 (9th Cir. 2010).

procedures should be waived only when 'delay would do real harm.'"[101] The most common situations constituting "good cause" are legitimate emergencies.[102] "Under the APA, notice and comment is not 'impracticable' unless 'the agency cannot both follow [the rulemaking procedures] and execute its statutory duties.'"[103]

"[G]eneric 'timeliness considerations of rulemaking on an annual basis cannot constitute good cause.'"[104] To the contrary, "[t]he agency must 'demonstrate some exigency apart from generic complexity of data collection and time constraints.'"[105] Thus, the good cause exception may be properly invoked where NMFS articulates "specific fishery-related reasons," such as that delay would require implementing regulations based on out-dated knowledge or before NMFS has an opportunity to collect pertinent information.[106]

Here, NMFS indicated that it was invoking the "good cause" exception because the final BiOp had only recently been issued on November 24, 2010, and it could not complete the notice and comment process before the fisheries opened on January 1, 2011.[107] It further noted that:

> NMFS must insure the prosecution of a fishery is compliant with the ESA, which would not be possible if additional time was used to provide for a public review and comment period and agency processing of additional public comments on this action, as the fishery commences on January 1. These protection measures are necessary to prevent the likelihood that these fisheries will jeopardize the

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[101] *Natural Res. Def. Council*, 316 F.3d at 911 (citation omitted).

[102] *Valverde*, 628 F.3d at 1165 (citing *Natural Res. Def. Council*, 316 F.3d at 911).

[103] *Natural Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 911 (9th Cir. 2003).

[104] *Or. Trollers*, 452 at 1124 (citing *Natural Res. Def. Council*, 316 F.3d at 912).

[105] *Id.* (citing *Natural Res. Def. Council*, 316 F.3d at 912).

[106] *See id.* at 1124-25.

[107] RULE000561.

> continued existence of endangered Stell[a]r sea lions and adversely modify their critical habitat.[108]

Plaintiffs essentially contend that the emergency in this case was of NMFS's own making and that NMFS rushed the process to avoid potential litigation by environmental advocacy groups. Indeed, the review process began in 2005, when the Council requested NMFS to re-examine the effects of the fisheries on ESA-listed species. The process was obviously going to be a time consuming one, and some delay was attributable to the Council's request that NMFS consider additional information. Given the extended timeframe and its repeated failure to meet its own deadlines, however, it also does not appear that NMFS was completely blameless.

Regardless, the bulk of this process preceded the preparation of the BiOp. Once NMFS issued the draft BiOp, the process moved relatively quickly (indeed, arguably too quickly). NMFS received comments on the draft BiOp and issued the final BiOp within a period of four months. It was at that point – November 24, 2010 – that the emergency arose because the BiOp found that the status quo would jeopardize and adversely modify the WDPS and its critical habitat. Once it had made those findings, NMFS could not allow the fisheries to continue under the existing restrictions without violating the ESA.[109] Thus, NMFS could not follow the notice and comment procedures and comply with its statutory duties. This did not involve a simple "timeliness consideration of rulemaking on an annual basis" as the BiOp resulted from many

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[108] RULE000561-62.

[109] As discussed below, the Court finds that NMFS acted within its discretion in determining that the continuation of the fisheries under the existing restrictions would jeopardize the WDPS and adversely modify its critical habitat. At oral argument, Plaintiffs' counsel argued that a delay of a few months to collect pre-promulgation comments would not have "wiped out the species," but that is not the standard under the ESA. Furthermore, the Court must accord significant deference to the agency when it resolves questions predicated on its analysis of scientific and technical data.

years of review. Nor did it involve "generic" time constraints as NMFS had found that the fisheries opening on January 1 would violate the ESA.

Obviously, it would have been preferable for NMFS to have completed the ESA consultation earlier so as to allow for pre-promulgation comments. Based on the totality of factors at play and in light of the "specific fishery-related reasons" articulated by NMFS in this instance, however, the Court finds that NMFS's invocation of the "good cause" exception was permissible.[110]

3. *Compliance with the MSA National Standards*

Plaintiffs argue that NMFS failed to adequately assess whether the IFR was consistent with MSA "national standards" 1 and 9.[111] The MSA provides:

> Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this subchapter shall be consistent with the following national standards for fishery conservation and management:
>
> (1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry. . . .
>
> (9) Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch. . . .[112]

The other standards address such topics as utilizing the "best scientific evidence available," managing stocks of fish and interrelated stocks of fish as units, prohibiting discrimination between residents of different States, consideration of "efficiency in the utilization of fishery resources," allowing for variations among and contingencies in fisheries,

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[110] Because NMFS was entitled to invoke the "good cause" exception, it was also excused from conducting a regulatory flexibility analysis. *Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1125 (9th Cir. 2006).

[111] *See* 16 U.S.C. § 1851(a).

[112] *See id.*

minimization of costs and avoidance of unnecessary duplication, accounting for "the importance of fishery resources to fishing communities by utilizing economic and social data," and "promot[ing] the safety of human life at sea."[113] The national standards do not require any particular outcome; to the contrary, they provide a framework for the agency's analysis.[114]

Here, NMFS indicated in the EA that it had found that the action complied with the national standards, including standards 1 and 9.[115] Plaintiffs argue that the IFR will "force[] the fleet into areas with more bycatch of" prohibited species and accordingly they will reach their limit of prohibited species catch in those areas before achieving optimum yield of their target fisheries.[116] Defendants note that the "optimum" yield under the statute includes "taking into account the protection of marine ecosystems."[117] It also indicates that the yield may be reduced "by any relevant social, economic, or ecological factor."[118]

Under these circumstances, the Court cannot conclude that the IFR is inconsistent with the national standards. Indeed, even if Plaintiff's are correct, it does not appear that bycatch would increase – it would stay constant. Furthermore, given that the "optimum" yield requires consideration of the impact on "marine ecosystems" and "ecological factors," NMFS's conclusion that the action was consistent with Standard 1 was not arbitrary or capricious.

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[113] *Id.*

[114] *Fisherman's Finest Inc. v. Locke*, 593 F.3d 886, 896 (9th Cir. 2010).

[115] RULE000472-73.

[116] Dkt. 80 at 34.

[117] 16 U.S.C. § 1802(33)(A).

[118] *Id.* § 1802(33)(B); *see also C&W Fish Co., Inc. v. Fox, Jr.*, 931 F.2d 1556, 1563 (D.C. Cir. 1991) (noting that agency action "can comply with Standard 1 if there are social, economic or ecological factors that justify the pursuit of a yield less than the maximum sustainable yield").

B. ESA

Plaintiffs contend that NMFS made various errors (primarily, "substantive errors") in its ESA analysis. They argue that NMFS: (1) failed to apply correct ESA § 7(a)(2) standards; (2) improperly predicated its analysis on two sub-regions of the WDPS instead of the entirety of the WDPS; (3) made various scientific findings that are contrary to the evidence; (4) based the RPA on an incorrect standard and made factual errors in the RPA; and (5) failed to cooperate with Alaska as required under ESA § 6. As explained below, the Court finds these arguments unpersuasive.

1. *ESA § 7(a)(2) Standards*

Plaintiffs argue that NMFS failed to apply correct § 7(a)(2) standards by: (a) improperly importing § 4 recovery considerations into its jeopardy and adverse modification determinations; (b) failing to make the necessary findings under the "jeopardy" and "adverse modification" standards; and (c) failing to find that the fisheries will definitively cause deterioration to the WDPS's pre-action condition.

a) Recovery Considerations

Plaintiffs acknowledge that NMFS had to consider recovery in its § 7(a)(2) analysis, but argue that it improperly imported its "conservation" obligation under § 7(a)(1) and "broad section 4 recovery obligation into the narrowly focused section 7(a)(2) consultation."[119] Defendants dispute Plaintiffs' characterization of the law, arguing that conservation is equivalent to recovery and that recovery plays a "central role" in § 7(a)(2) determinations.[120]

[119] Dkt. 80 at 51.

[120] Dkt. 98 at 38-41, 52-54.

Section 7(a)(2) requires agencies to insure that their actions will not jeopardize the continued existence of a listed species or destroy or adversely modify a listed species' critical habitat.[121] The regulations define "jeopardy" and "destruction or adverse modification" as follows:

> Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical. . . .
>
> Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.[122]

The Ninth Circuit has previously found that both inquiries require the consulting agency to consider recovery.[123] In other words, an action that appreciably diminishes the value of the critical habitat for the survival *or* recovery of a species is an "adverse modification."[124] Similarly, an action "jeopardize[s] the continued existence" of the species where it reasonably

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[121] 16 U.S.C. § 1536(a)(2).

[122] 50 C.F.R. § 402.02.

[123] In *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1069-71 (9th Cir. 2004) (citing, *inter alia*, 16 U.S.C. § 1532(3), (5)(A), and § 1533(f)(1)), the court held that the ESA requires a finding of "destruction or adverse modification" where the agency finds that the proposed action will appreciably diminish survival *or* recovery. Similarly, the court subsequently held that the jeopardy definition requires consideration of both survival and recovery. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 931-33 (9th Cir. 2008).

[124] *See Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 947 (9th Cir. 2010) (noting that in *Gifford Pinchot*, the Ninth Circuit "concluded that 'where Congress in its statutory language required 'or,' the agency in its regulatory definition substituted 'and'" (quoting 378 F.3d at 1070)).

would be expected to reduce appreciably the likelihood of the species' "survival and recovery" – constituting an "intertwined" concept.[125]

In *National Wildlife Fed'n v. National Marine Fisheries Serv.*,[126] NMFS found that there was no adverse modification on the critical habitat of listed species from dam operations without determining the "in-river survival levels necessary to support recovery" of the listed species. The Ninth Circuit affirmed the lower court's decision to grant summary judgment against NMFS.[127] It explained:

> It is only logical to require that the agency know roughly at what point survival and recovery will be placed at risk before it may conclude that no harm will result from "significant" impairments to habitat that is already severely degraded. Requiring some attention to recovery issues does not improperly import ESA's separate recovery planning provisions into the section 7 consultation process. Rather, it simply provides some reasonable assurance that the agency action in question will not appreciably reduce the odds of success for future recovery planning, by tipping a listed species too far into danger.[128]

In a subsequent unpublished decision, the court explained that the agency action under review "need not boost the . . . chances of recovery" so long as "those chances are not 'appreciably diminished' by the" action.[129]

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[125] In the context of a jeopardy analysis, "survival and recovery" constitutes a joint concept, involving "intertwined needs," although it is possible that recovery impacts alone may prompt a jeopardy finding in some circumstances. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 932 (9th Cir. 2008). As Defendants note, "conservation" and "recovery" are closely related concepts in the ESA. *See Gifford Pinchot*, 378 F.3d at 1070-71; *see also* 16 U.S.C. § 1533(f)(1) (the purpose of a "recovery plan" is to promote the "conservation and survival" of the species).

[126] 524 F.3d at 936.

[127] *Id.* at 936-37.

[128] *Id.* at 936.

[129] *Salmon Spawning & Recovery Alliance v. Nat'l Oceanic & Atmospheric Admin.*, 342 Fed. App'x 336, 338 (9th Cir. 2009); *see also Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife*

Plaintiffs point to numerous instances in the BiOp where NMFS discussed the "recovery" and "conservation" of the WDPS. They contend that the Ninth Circuit decisions "prohibit" NMFS from ensuring that a species is recovering in the context of a § 7(a)(2) consultation.[130] This overstates the case. An agency may not be obliged to ensure recovery in the context of a § 7(a)(2) consultation, but it is another thing entirely to say that it is prohibited from discussing what is needed to do so. Indeed, under the applicable law, NMFS had to consider recovery to some extent. To hold that NMFS must consider the impact of the action on recovery, but limit its ability to discuss the issue would place it in an impossible position.

In the BiOp, NMFS discussed the applicable legal standards[131] and concluded that the proposed action – operation of the fisheries under the prior restrictions – would "impede the survival and recovery of the" WDPS.[132] On this record, the Court cannot conclude that NMFS's

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Serv., 616 F.3d 983, 989 (9th Cir. 2010) (holding that agency did not need to set out recovery criteria required by § 4(f)(1) when designating a species' critical habitat under § 4(a)(3)). In their reply brief, Plaintiffs' cite passages from one of NMFS's briefs in the *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.* case. *See* Dkt. 106 at 23-24. The Court has reviewed the brief. Although some of the statements could be viewed as inconsistent if considered in isolation, the overall tenor of NMFS's stated position here is not inconsistent with the law or NMFS's position in that case.

[130] Dkt. 80 at 51.

[131] RULE002427-29.

[132] RULE002444-45; *see also* RULE002445 (finding that extirpation of the WDPS in a sub-region would "appreciably reduce the likelihood of both . . . survival and recovery in the wild" and that the declining WDPS population in certain sub-regions was "sufficient to impede recovery"). The Court does not find the fact that NMFS did not specifically find that the proposed action would push the WDPS beyond the "tipping point" from which it could possibly recover when determining that the fisheries would impede the survival and recovery of the WDPS to be dispositive. Courts have rejected agency analyses where they concluded that there was no jeopardy or adverse modification without determining the "tipping point." *See Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 527 (9th Cir. 2010); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008). Here, NMFS did find jeopardy and adverse

discussion of recovery standards in the BiOp amounted to the importation of § 4(f) standards into the § 7(a)(2) analysis. Consequently, NMFS did not misapply the jeopardy and adverse modification standards in the BiOp.

b) Jeopardy & Adverse Modification Findings

Plaintiffs contend that NMFS failed to make the necessary findings under the jeopardy and adverse modification standards. In particular, they point to a passage in the BiOp where NMFS indicates that it did not rely on the regulatory definition of "adverse modification" in light of an allegedly flawed understanding of Ninth Circuit case law.[133] Defendants dispute these claims.

Jeopardy and adverse modification determinations are made by comparing the effects of the proposed action to the species' pre-action condition, which is part of the "environmental baseline."[134] Thus, for continuing actions, "the baseline effectively resets at the beginning of each period" of analysis.[135] The environmental baseline does not include ongoing discretionary operations which should otherwise be the subject of the consultation.[136] Thus, the fact that the prior operation of the fisheries may have degraded the WDPS population in certain sub-regions

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modification and that the proposed action would impede the survival and recovery of the WDPS. The fact that it did not use the phrase "tipping point" is inapposite.

[133] Dkt. 80 at 48 (citing RULE002428).

[134] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008) (citing, *inter alia*, 50 C.F.R. § 402.02).

[135] *Wild Fish*, 628 F.3d at 523.

[136] *Nat'l Wildlife Fed'n*, 524 F.3d at 926-29.

is part of the environmental baseline, but the impact of reauthorizing the fisheries remains a discretionary action subject to the § 7(a)(2) consultation.[137]

Under the applicable regulations, agency action jeopardizes a species where it reasonably would be expected to "reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species."[138] Agency action adversely modifies a species' critical habitat where it "appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species."[139] A direct or indirect impact is sufficient to qualify for either finding.[140]

In *Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.*,[141] the Ninth Circuit found the phrase "survival and recovery" in the "adverse modification" definition invalid as being contrary to the statutory text, which requires an adverse modification finding in the event of an impact on either survival *or* recovery. In a more recent decision, the court found that this "did not alter the rule that an 'adverse modification' occurs only when there is a 'direct or indirect alteration that *appreciably diminishes* the value of the critical habitat.'"[142]

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[137] *Id.* at 930-31.

[138] 50 C.F.R. § 402.02.

[139] *Id.*

[140] *See id.*

[141] 378 F.3d 1059, 1070 (9th Cir. 2004) (noting that "where Congress in its statutory language required 'or,' the agency in its regulatory definition substituted 'and'").

[142] *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 948 (9th Cir. 2010) (quoting 50 C.F.R. § 402.02 (emphasis original)).

In the BiOp, NMFS summarized the jeopardy standard under the regulations.[143] NMFS then indicated that it was relying on the statutory text rather than the regulatory definition of "adverse modification" in light of the *Gifford Pinchot* decision.[144] Consequently, it indicated that, in accordance with a memorandum it issued after *Gifford Pinchot*, it would "determine whether the affected designated critical habitat is likely to remain functional (or retain the ability to become functional) to serve the intended conservation role for the species both in the near and long term under the effects of the action, environmental baseline and any cumulative effects."[145]

NMFS went on to indicate that it was evaluating the impact of the proposed action against the baseline, which included the effects of the ongoing action since the last biological opinion.[146] Then, it set out to determine:

> whether it is reasonable to expect that the proposed action is not likely to: (1) result in appreciable reductions in the likelihood of both survival and recovery of threatened and endangered species in the wild by reducing their numbers, reproduction, or distribution, or (2) reduce the value of the designated critical habitat for the conservation of the species.[147]

Although not identical, this latter statement closely resembles to the regulatory definition without running afoul of *Gifford Pinchot*.

NMFS concluded by accurately summarizing the law and making its findings as follows:

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[143] RULE002427-28.

[144] RULE002428.

[145] RULE002429; *cf.* 50 C.F.R. § 402.02 ("Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.").

[146] RULE002434; *see also* RULE002297-2365 (discussing the effects of commercial fisheries on stellar sea lions as part of the "environmental baseline").

[147] RULE002434-35 (emphasis omitted).

> As the court stated in *National Wildlife Federation*, even if the baseline itself causes jeopardy to the species, only if the action is likely to cause additional harm can it be found to jeopardize the species' continued existence. This determination requires an evaluation of the action's effects, separate from the conditions that would exist if the action were not carried out. Having made such an analysis, and recognizing the baseline condition for the [WDPS] is one in which there exists an unacceptably high probability of extinction, we find that the proposed action, which in this case is the current action continued into the future, is likely to present such "additional harm."[148]

NMFS then went on to find that the proposed action could compromise available food resources for the WDPS sufficiently to jeopardize the WDPS's continued existence and adversely modify its critical habitat.[149] NMFS further found that a continuation of the past action could "risk the eventual extirpation of" the WDPS in one sub-region, with significant consequences for the overall population.[150]

Despite NMFS's failure to explicitly apply the "appreciable diminishment" aspect of the applicable adverse modification standard, its findings did satisfy that standard as well as the jeopardy standard. NMFS did not rely on factors that Congress did not intend it to consider.[151] Consequently, its findings were not arbitrary or capricious.

c) Causation

Plaintiffs argue that NMFS failed to establish the required causal link between the proposed action and jeopardy to the WDPS and adverse modification to its critical habitat because NMFS's findings are stated in probabilistic terms. Defendants respond that NMFS was

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[148] RULE002444.

[149] RULE002445.

[150] *Id.*

[151] *See Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 945 (9th Cir. 2010) (citations omitted).

not required to definitively establish causation and, to the contrary, the prevailing standards required it to protect the species against jeopardy or adverse modification in the face of equivocal evidence. The Court agrees with Defendants that NMFS's causation findings were sufficient here.

Section 7(a)(2) imposes a "substantive duty" on agencies to ensure that their actions are not likely to jeopardize the continued existence of listed species.[152] The ESA further requires agencies to "use the best scientific and commercial data available" in carrying out that duty.[153] "When an agency relies on the analysis and opinions of experts and employs the best evidence available, the fact that the evidence is 'weak,' and thus not dispositive, does not render the agency's determination 'arbitrary and capricious.'"[154]

Plaintiffs rely on *National Wildlife Fed'n*.[155] In that case, the court found that the agency improperly compared the effects of the agency action to a hypothetical reference operation and consequently, failed to consider the actual environmental baseline in its jeopardy analysis.[156] The court explained that its ruling that the agency must consider the actual baseline would not

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[152] *See Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010).

[153] *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336 (9th Cir. 1992) (quoting 16 U.S.C. § 1536(a)(2)).

[154] *Id.* (citation omitted); *see also Wild Fish*, 628 F.3d at 532 (indicating that jeopardy determinations may be upheld even when based on "admittedly weak" information); *Greenpeace I*, 55 F. Supp. 2d 1248, 1262 (W.D. Wash. 1999) (noting that "[t]his standard requires 'far less' than conclusive proof").

[155] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008).

[156] *Id.* at 929-30.

expand all "agency action" to include "all independent or baseline harms" to a listed species because a causal link is required between the action and the harm.[157] It elaborated:

> To 'jeopardize' – the action ESA prohibits – means to 'expose to loss or injury' or to 'imperil.' Either of these implies causation, and thus some new risk of harm. Likewise, the suffix '-ize' in 'jeopardize' indicates some active change of status: an agency may not 'cause a species to be or to become' in a state of jeopardy or 'subject a species to' jeopardy. . . . Agency action can only 'jeopardize' a species' existence if that agency action causes some deterioration in the species' pre-action condition.[158]

This decision does not require definitive proof of causation before an agency makes a jeopardy finding.[159]

ESA consulting agencies are not the equivalent of tort plaintiffs. To the contrary, the ESA requires agencies to "give the benefit of the doubt to the species," not the proposed

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[157] *Id.* at 930.

[158] *Id.* (citation and alteration marks omitted).

[159] Plaintiffs also rely on *Ariz. Cattle Growers Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1246-47 (9th Cir. 2001). In that case, the court held that an agency's decision to issue an "Incidental Take Statement" pursuant to ESA § 7(b)(4) "must be predicated on a finding of an incidental take." *Id.* at 1233. The court then rejected the agency's finding that the proposed action would result in an incidental take under § 7(b)(4) because the agency had "no evidence" (or alternatively, "little factual support for its conclusions") and "the mere potential for harm . . . is insufficient." *Id.* at 1233, 1246-47. That decision appears to provide limited guidance on the standard for jeopardy and adverse modification determinations under § 7(a)(2), which is a separate inquiry from incidental take determinations under § 7(b)(4). In any event, NMFS did have factual support for its conclusions here.

Similarly, *Greenpeace IV*, 237 F. Supp. 2d 1181, 1203 (W.D. Wash. 2002), where the court invalidated a BiOp with an amended RPA for failure to address the cause of the jeopardy and adverse modification, does not support Plaintiffs' position. Indeed, in that case, the court rejected an argument that hook and line fishing did not cause jeopardy or adverse modification, noting that although the evidence was equivocal, "there [wa]s a lack of sufficient scientific evidence to support a conclusion that the hook-and-line fishery d[id] not cause jeopardy or adverse modification." *Id.* This phrasing recognizes the agency's duty to affirmatively prevent jeopardy or adverse modification.

action.[160] In this case, NMFS candidly acknowledged that the evidence is not definitive.[161] However, recognizing its obligation to protect the species against jeopardy or adverse modification, NMFS made reasoned findings sufficient to establish the required causal link between the proposed action and its jeopardy and adverse modification determinations. Plaintiffs' claims to the contrary are without merit.

2. *Analysis of Sub-regions*

Plaintiffs claim that NMFS improperly based its conclusions on analysis of two sub-regions. Defendants contend that this was proper because NMFS found that the impact of the fisheries on the two sub-regions threatened the overall recovery and survival of the WDPS. In their reply brief, Plaintiffs argue that NMFS did not actually make these findings.

Section 7(a)(2) requires agencies to ensure that agency action will not jeopardize a "species" or adversely modify the "habitat of such species."[162] Under the ESA, "species" is defined as "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature."[163] "The ability to designate and list distinct population segments allows the agency to provide different levels of

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[160] *See Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988) (citation omitted).

[161] *See, e.g.*, RULE002445.

[162] 16 U.S.C. § 1536(a)(2).

[163] § 1532(16).

protection to different populations of the same species."[164] "Listing distinctions below that of subspecies or [distinct population segment] of a species are not allowed under the ESA."[165]

In *Wild Fish Conservancy v. Salazar*,[166] the Ninth Circuit recognized that effects of an action on a subset of a species or distinct population segment can potentially jeopardize the survival or recovery of the species or distinct population segment as a whole. In that case, the court found that the biological opinion that found no jeopardy was insufficient because the agency failed to find that the possible extirpation of a local population of bull trout would not jeopardize the survival or recovery of the overall distinct population segment.[167]

NMFS's own *Consultation Handbook*, jointly issued with the Fish and Wildlife Service, provides that a jeopardy or adverse modification determination should be based on the effects of

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[164] *Trout Unlimited v. Lohn*, 559 F.3d 946, 949 (9th Cir. 2009) (citation omitted).

[165] *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1162 (D. Or. 2001) (citation omitted), *appeal dismissed*, 358 F.3d 1181 (9th Cir. 2004).

[166] 628 F.3d 513, 529 (9th Cir. 2010). The court's opinion refers to a "population segment," *id.*, however, the underlying rule clarifies that a "DPS" or "distinct population segment" is actually at issue. *See* Determination of Threatened Status for Bull Trout in the Coterminous United States, 64 Fed. Reg. 58,910, 58,930 (Nov. 1, 1999).

[167] *Id.*; *see also Blue Water Fisherman's Ass'n v. Nat'l Marine Fisheries Serv.*, 226 F. Supp. 2d 330, 341 (D. Mass. 2002) ("There is no statutory provision that would prohibit NMFS from predicating its species-at-large jeopardy finding on the impact of a threat to a subpopulation, provided that sound science supports its analysis."). In an earlier opinion, the Ninth Circuit expressed "no opinion on whether the 'adverse modification' inquiry under section 7 of the ESA properly focuses on the effects of an action on a particular unit of critical habitat or on the total critical habitat nationwide." *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 948 n.1 (9th Cir. 2010). In their reply brief, Plaintiffs do not appear to dispute the legal proposition that that a finding of jeopardy or adverse modification may be based on harm to a sub-unit of a species or critical habitat. *See* Dkt. 106 at 30-31. Instead, they argue that *Wild Fish* and *Blue Water* are distinguishable because NMFS's analysis of the issue was flawed in this case. As discussed below, the Court disagrees.

the proposed action on the continued existence of the entire population.[168] However, it also recognizes that sub-units of the population or critical habitat may serve as the basis for such a determination where the impact on the sub-units "is likely to result in significant adverse effects throughout the species' range, or appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species."[169]

In the BiOp, NMFS recognized that although the overall WDPS population was increasing, it had declined in two sub-regions.[170] Relying on recommendations from the Recovery Plan, NMFS found that it was necessary to consider all parts of the WDPS range to ensure recovery.[171] In doing so, it relied on research indicating that the "sub-population/meta-population dynamics" for the WDPS "could be an important influence on persistence."[172] NMFS noted that although "[r]eproductive isolation of populations has occurred in the past . . . , it is not clear to what extent the [WDPS] could withstand further fragmentation of breeding populations if a portion of the range were extirpated."[173] Thus, "a substantial decline of any two adjacent sub-areas would indicate an active threat" that "could indicate that extinction risk may still be high . . . ."[174] This threat would both require "further research" and "would indicate a lack of

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[168] BIOP071732.

[169] *Id.* This passage was quoted by the Ninth Circuit in *Butte Envtl. Council*, 620 F.3d at 948.

[170] RULE002083, RULE002086.

[171] RULE002430-31.

[172] RULE002434. Significantly, the *Consultation Handbook* defines "survival" as "[t]he species' *persistence* . . . beyond the conditions leading to its endangerment, with sufficient resilience to allow recovery from endangerment." *See* BIOP07132 (emphasis added).

[173] RULE002431.

[174] *Id.*

recovery for the [WDPS] as a whole."[175] These findings demonstrate that NMFS did, in fact, find that harm to the two sub-regions threatened the overall survival and recovery of the WDPS.

3. *Scientific Findings*

Plaintiffs challenge a number of aspects of NMFS's findings based on the scientific and technical data, including the adequacy of the nutritional stress theory and NMFS's alleged failure to consider relevant scientific data.[176] Specifically, they contend that the nutritional stress theory was insufficiently supported because thirteen of fourteen indicators (as shown on a chart in the BiOp) showed no evidence of nutritional stress and NMFS relied on "proxy" natality data.[177] Plaintiffs further claim that NMFS failed to "meaningful[ly]" consider studies and comments from several researchers and failed to adjust its conclusions after removing a nonstandard "footprint analysis" measuring the biomass removed by the fisheries from the draft BiOp.[178] Defendants contend that the nutritional stress theory is adequately supported, that NMFS considered the disputed data, and that there was other support for its conclusions.

As noted above, although an agency may not entirely fail to consider an important aspect of a problem,[179] the courts must accord the highest deference to "an agency's technical analyses and judgments involving the evaluation of complex scientific data within the agency's technical

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[175] *Id.*

[176] *See* Dkt. 80 at 54-60; Dkt. 82 at 8-10, 15-16.

[177] *See* Dkt. 80 at 54-55.

[178] Dkt. 80 at 56-60; Dkt. 90 at 8-9.

[179] *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 945 (9th Cir. 2010) (citations omitted).

expertise.[180] It is not the court's place to "second-guess" the agency's resolution of scientific questions involving "good faith disagreement[s] . . . supported by science on both sides."[181] The court may not "ask whether [it] would have given more or less weight to different evidence" if it were in the agency's place.[182] Moreover, although agencies may not act based on pure speculation, they are permitted to make decisions "in the face of uncertainty."[183] Additionally, a biological opinion need only include a "summary" of the information that it is based upon.[184]

The Court has reviewed the record and finds that Plaintiffs' contentions are without merit. Under the prevailing standards, the nutritional stress theory and related conclusions were adequately supported.[185] NMFS was not required to affirmatively establish a causal link with

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[180] *League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010) (citation omitted).

[181] *Trout Unlimited v. Lohn*, 559 F.3d 946, 956 (9th Cir. 2009) (citation omitted).

[182] *Id.* at 959.

[183] *Ariz. Cattle Growers Ass'n v. Salazar*, 606 F.3d 1160, 1164 (9th Cir. 2010) (citations omitted).

[184] *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008) (quoting 50 C.F.R. § 402.14(h)(3)).

[185] *See, e.g.*, RULE002389 (explaining that direct natality information was unavailable); RULE002218-19 (summarizing nutritional stress findings); RULE002212 (explaining that "[m]any of the biological indicators of past (or current) nutritional stress may . . . no longer be measureable in direct ways"); RULE002364 ("While considerable scientific evidence is inconsistent with the nutritional stress hypothesis as one of the primary factors adversely impacting the recovery of this DPS, information on the pattern of decline in the reproductive rate and size at age of this population relative to the eastern DPS since the mid-1970s is consistent with the nutritional stress hypothesis."); RULE002557 (showing declining rookery production in the western and central Aleutian Islands); RULE002731 (indicating that it is "likely" that the fisheries contributed to the WDPS population decline and the fisheries are "likely" stressors on the WDPS population). Indeed, as Defendants' counsel noted at oral argument, if Plaintiffs are correct and NMFS's reliance on the nutritional stress theory is not adequately supported under the law, any protection measures would be arbitrary or capricious. That result would reach

uncontroverted scientific evidence in order to make its § 7(a)(2) determinations. It was permissible for it to make estimates about the WDPS in certain sub-regions based on data gathered in others. It is not this Court's place to supplant NMFS's scientific judgment with its own regardless of what a simple tally of the number of factors that weighed for or against its determination might indicate. NMFS is uniquely qualified to make that assessment.

Plaintiffs' contentions that NMFS failed to adequately consider relevant data amount to good faith scientific disagreements. Although arguably clumsy and inarticulate at times in explaining why it disagreed, NMFS was aware of and explicitly acknowledged much of this data.[186] Its resolution of such scientific disputes is within its discretion. In any event, the Court cannot conclude that NMFS failed to consider an important aspect of the problem or failed to articulate a rational connection between its findings and conclusions. NMFS's assessment of these issues was not arbitrary or capricious.

4. *The RPA*

Plaintiffs contend that the RPA is flawed in numerous respects and is not necessary to avoid jeopardy or adverse modification. Among their contentions are that NMFS: improperly accounted for recovery considerations in developing the RPA, failed to accept the Council's "surgical" and less burdensome RPA proposal, relied on forage ratios which do not support NMFS's conclusions, relied on flawed data from telemetry studies and the "Platforms of

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beyond what even Plaintiffs advocate here. *See, e.g.*, Dkt. 80 at 79 (arguing that the prior restrictions complied with the ESA and that the Court should reinstate them).

[186] *See, e.g.*, RULE002087 (mis-citing the Calkins study, but nonetheless acknowledging that the Calkins and Trites studies reached different conclusions than NMFS did); BIOP030662 (acknowledging a comment identifying a lack of data to establish a link between a reduction in biomass and reductions in consumption by Stellar sea lions); RULE002177, RULE002195-96 (acknowledging the Boyd study); BIOP030671 (responding to comments that NMFS misinterpreted the Boyd study).

Opportunity" study to justify closing fishery areas outside of the critical habitat, failed to adequately account for information suggesting that Pacific cod is not an important prey species for Stellar sea lions, failed to differentiate restrictions by gear type despite having previously done so, utilized a "single species model" instead of an allegedly more accurate multi-species model to predict the increase in biomass from the restrictions, ignored stock assessment information for Atka mackerel in the draft 2010 SAFE report, and improperly used a "snapshot methodology" instead of a rolling average that underestimated the stock assessment of Atka mackerel.[187] Defendants contend that Plaintiffs have misstated the relevant standards and that, in any event, NMFS appropriately weighed and considered the evidence in developing the RPA.

Where a consulting agency finds jeopardy or adverse modification under § 7(a)(2), it must also "suggest those reasonable and prudent alternatives which [it] believes would not violate [§ 7(a)(2)] and can be taken by the [action agency] in implementing the [proposed] action."[188] The regulations indicate that RPAs are:

> alternative actions identified during formal consultation [1] that can be implemented in a manner consistent with the intended purpose of the action, [2] that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, [3] that is economically and technologically feasible, and [4] that the [consulting agency] believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.[189]

In addition, according to the *Consultation Handbook*, "[w]hen a reasonable and prudent alternative consists of multiple activities, it is imperative that the opinion contain a thorough

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[187] *See* Dkt. 80 at 61-65; Dkt. 82 at 10-15; Dkt. 90 at 7-12; Dkt. 106 at 61-66.

[188] 15 U.S.C. § 1536(b)(3)(A).

[189] 50 C.F.R. § 402.02.

explanation of how each component of the alternative is essential to avoid jeopardy and/or adverse modification."[190]

The Ninth Circuit has explained that the consulting agency is not "required to pick the best alternative or the one that would most effectively protect the" species from jeopardy or adverse modification.[191] The consulting agency need only adopt an RPA that complies with the § 7(a)(2) standards and can be implemented by the action agency.[192] Thus, the consulting agency is "not required to explain why [it] chose one RPA over another" so long as it "gave at least minimal consideration to the relevant facts contained in the record."[193]

Under these standards, Plaintiffs' contentions are inapposite. As explained above, NMFS was permitted to consider recovery in making its § 7(a)(2) determinations. Additionally, NMFS was under no obligation to adopt the Council's more "surgical" RPA as long as its RPA avoided jeopardy and adverse modification.[194] Plaintiffs' other arguments amount to good faith scientific disagreements with NMFS.[195] The Court cannot conclude that NMFS failed to consider

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[190] BIOP071739; *see also San Luis & Delta Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 922 (E.D. Cal. 2010) (quoting the *Consultation Handbook*).

[191] *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998) (citation omitted).

[192] *Id.*

[193] *Id.* (citations omitted).

[194] Moreover, as Defendants note, NMFS did revise the RPA in response to comments from the Council and others. *See* Dkt. 98 at 69.

[195] *See* RULE002398 (indicating that forage ratios "are very difficult to interpret" and showing that ratios within the critical habitat were lower than the "threshold for sufficient forage availability" within the action areas as well as the Eastern Bering Sea and GOA); RULE165915 (indicating that the draft 2010 SAFE report was being "distributed solely for the purpose of pre-dissemination peer review"); RULE003305-06 (indicating that the SAFE reports must go through several rounds of review); RULE002384 (acknowledging that Atka mackerel biomass

important aspects of the problem or failed to explain a rational connection between the available data and its conclusions.

5. *ESA § 6*

Alaska contends that NMFS failed to "meaningfully" cooperate with it as required by ESA § 6(a). Most prominently, Alaska argues that NMFS should have "formally" informed it of the jeopardy and adverse modification findings before releasing the draft BiOp and provided specific responses to its comments on the draft BiOp. Defendants claim that that the cooperation provision is unenforceable because it contains no standard and regardless, that NMFS did cooperate with Alaska.

Section 6(a) provides that agencies carrying out duties under the ESA "shall cooperate to the maximum extent practicable with the States," specifically including consultation "for the purpose of conserving any endangered species or threatened species."[196] Alaska does not cite,

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had been increasing in some areas); RULE 002197 (indicating that Platforms of Opportunity results were "consistent with the limited telemetry information available for the western and central Aleutian Islands"); RULE002324, RULE002341 (explaining the limitations of the telemetry data and rationale for utilizing data from nearby regions to estimate Stellar sea lion behavior in the western Aleutian Islands); RULE002462 (indicating that NMFS had examined both single-species and multi-species models to predict the effects of the RPA, but ultimately relied on the single-species models "to a greater extent" because they have less uncertainty, despite also having less "biological realism" than multi-species models); RULE002137 (noting that both single-species and multi-species models indicated that "fishery impacts on fish species in the BSAI and GOA systems seem to be about the same order of magnitude"); RULE002335 (discussing the limitations of the available data on preferred prey size); RULE002349 (discussing potential impacts of fishing on fish size); *compare* RULE002698 (indicating that Pacific cod was found in 26% of WDPS scat samples overall, despite being found in only 6% of samples in the central and western Aleutian Islands during the summer), *with* RULE002301 (explaining that "[p]rey items which occurred in greater than 10% of the scats . . . by area, season, and DPS-wide were determined to be prey species of importance"); BIOP031133 (responding to comments regarding cod size in the Aleutian Islands); RULE002462 (explaining why NMFS thought that broad closures were required in fishery management area 543).

[196] 16 U.S.C. § 1535(a).

and the Court has not otherwise found, any decision where a court enforced this provision. The remainder of § 6 authorizes agencies to enter into agreements with States to manage and conserve listed species and to fund programs carrying out such agreements.[197]

The *Consultation Handbook* provides that "affected State[s]" should "be involved in" § 7(a)(2) consultation discussions.[198] NMFS and the Fish and Wildlife Service also issued a policy statement "to clarify the role of State agencies" in ESA activities (the "Cooperative Policy").[199] It provides that NMFS must "[i]nform State agencies of any Federal agency action that is likely to adversely affect" listed species, "[r]equest an information update from State agencies prior to preparing the final biological opinion," and "[r]ecommend to Federal agencies that they provide State agencies with copies of the final biological opinion . . . ."[200]

Here, Alaska admits that NMFS invited it to participate in the consultation and requested various types of information from it.[201] There are no specific requirements in the *Consultation Handbook* or the Cooperative Policy that would require NMFS to provide an early notification of § 7(a)(2) determinations or specific responses to comments on a draft BiOp. In any event, NMFS cannot "cooperate" alone. Alaska does not contend that it ever requested a formal notification of a jeopardy or adverse modification finding before the release of the draft BiOp.[202]

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[197] *See id.* § 1535.

[198] BIOP071702-03.

[199] Notice of Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities, 39 Fed. Reg. 34,274, 34,275 (July 1, 1994).

[200] *Id.*

[201] Dkt. 86 at 14-15.

[202] *Cf.* Oxford University Press, *Oxford Online Dictionary*, "cooperate" http://english.oxforddictionaries.com/definition/cooperate?region=us (last visited Dec. 29, 2011)

Nor does it identify any specific requirement that NMFS provide specific responses to comments on a draft BiOp. Even if § 6(a) is judicially enforceable, the Court finds that NMFS did not fail to cooperate with Alaska here.[203]

C. NEPA

NEPA establishes procedures to foster environmentally informed decision-making by federal agencies by requiring them "to take a 'hard look' at environmental consequences."[204] The purpose of the statute is to foster protection of the environment.[205] Here, Plaintiffs claim that NMFS violated NEPA by: (1) preparing an EA and issuing an FONSI in lieu of preparing an EIS; (2) failing to provide a sufficient opportunity for public review and comment on the draft EA; and (3) failing to adequately analyze "a reasonable range of alternatives to its proposed action." Defendants contend that A80 and FLC lack standing to assert these claims[206] and, in any event, that the procedures were sufficient. As discussed below, the Court finds that NMFS was required to prepare an EIS. Additionally, the Court finds that NMFS failed to provide a

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(indicating that the definition of "cooperate" means to "assist someone or comply with their requests").

[203] The Court declines to consider Plaintiffs' contention – raised for the first time in their reply brief – that NMFS failed to request an information update prior to completion of the final BiOp in violation of the Cooperative Policy. *See, e.g., United States v. Rizk*, 660 F.3d 1125, 133 n.4 (9th Cir. 2011) (finding that a party waived an argument developed for the first time in her reply brief). Regardless, Alaska has not identified any information that it would have provided had NMFS requested the update.

[204] *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 486 (9th Cir. 2011) (citations omitted).

[205] *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 945 (9th Cir. 2005) (citations omitted).

[206] Defendants do not appear to argue that Alaska lacks standing to assert these claims. Accordingly, as Plaintiffs note, the Court need not determine whether the other Plaintiffs have standing in order to resolve the substantive issues. *See* Dkt. 106 at 53 (citing *Natural Res. Def. Council v. U.S. Evntl. Prot. Agency*, 526 F.3d 591, 602 (9th Cir. 1994)).

sufficient opportunity for public review and comment on the EA, although it did analyze an appropriate number of alternatives in the EA.

1. *Preparation of an EIS*

Plaintiffs contend that NMFS was required to prepare a full EIS because: (a) the proposed action involves "significant social or economic impacts interrelated with natural or physical environmental effects"; (b) the effects on the human environment are highly controversial; (c) the effects on the human environment are highly uncertain; and (d) it previously indicated that it would do so. Defendants deny that any of these grounds required NMFS to prepare an EIS here.

"NEPA requires federal agencies to prepare an EIS before undertaking 'major Federal actions significantly affecting the quality of the human environment.'"[207] Agencies first prepare EAs in order to determine whether they must prepare an EIS for a given project.[208] After preparing the EA, an agency considering a project either determines to go forward by preparing an EIS or decides to issue "a FONSI . . . which excuses the agency from its obligation to prepare an EIS."[209] EAs must "include brief discussions of the need for the proposal and the environmental impacts of the proposed action and alternatives."[210]

"To trigger the need for an EIS, a plaintiff need not show that significant effects [on the quality of the human environment] will in fact occur; 'raising substantial questions whether a

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[207] *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1131 (9th Cir. 2011) (quoting 42 U.S.C. § 4332(2)(C)).

[208] *Id.* (citing, *inter alia*, 40 C.F.R. § 1500.1-.8).

[209] *Id.*

[210] *Public Citizen v. Nuclear Regulatory Comm'n*, 573 F.3d 916, 928 (9th Cir. 2009) (citation omitted).

project may have a significant effect is sufficient.'"[211] The Ninth Circuit has noted that "this is a low standard."[212] Where the agency does not prepare an EIS, it must provide "a 'convincing statement of reasons' to explain why a project's impacts are insignificant."[213] "No matter how thorough, an EA can never substitute for preparation of an EIS, if the proposed action could significantly affect the environment."[214] Nonetheless, an agency's "decision that a particular project does not require an EIS should be upheld "unless that decision is unreasonable."[215]

The regulations provide that the "human environment" consists of "the natural and physical environment and the relationship of people with that environment."[216] They further indicate that "economic or social effects are not intended by themselves to require preparation of an" EIS, but that where an EIS is prepared and economic or social effects are "interrelated" with natural or physical environmental effects, then the EIS should "discuss all of these effects on the human environment."[217] Accordingly, the Ninth Circuit has held that NEPA generally does not require an agency to consider social and economic effects.[218]

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[211] *Barnes*, 655 F.3d at 1136 (citation omitted).

[212] *See Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1097 (9th Cir. 2011) (alteration marks and citation omitted).

[213] *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (citation omitted).

[214] *Anderson v. Evans*, 371 F.3d 475, 494 (9th Cir. 2004) (citation omitted).

[215] *Connor v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988).

[216] 40 C.F.R. § 1508.14.

[217] *Id.*

[218] *Ass'n of Public Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1186 (9th Cir. 1997) (citing *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772

The Ninth Circuit has not decided whether "beneficial" environmental impacts trigger the EIS requirement, but has noted that the weight of circuit authority and the plain language of the statute support that view,[219] as do the regulations.[220] The Ninth Circuit has also suggested, however, that in light of the purposes of NEPA, the statute does not require agencies to consider the impacts of actions intended to conserve the environment or otherwise prevent human interference with the environment.[221] Nevertheless, in some narrow contexts where human intervention has been part of the environmental "fabric" for a long period of time and the action may arguably have "deleterious natural consequences," a reduction in that human intervention may require preparation of an EIS.[222]

In determining whether an action significantly affects "the quality of the human environment," an agency must consider both "context" and "intensity."[223] "Context" is the "setting" of the agency action and includes society as a whole, the affected region, the affected

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(1983)); *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 943-45 (9th Cir. 2005); *see also Goodman Group, Inc. v. Dishroom*, 679 F.2d 182, 185 (9th Cir. 1982) (citations omitted).

[219] *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1057 (9th Cir. 2010).

[220] *See* 40 C.F.R. § 1508.27(b)(1) (providing that agencies should consider "[i]mpacts that may be both beneficial and adverse" and that a "significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial").

[221] *See, e.g.*, *Douglas Cnty. v. Babbitt*, 48 F.3d 1495, 1505-06 (9th Cir. 1995); *Public Citizen v. Nuclear Regulatory Comm'n*, 573 F.3d 916, 928 (9th Cir. 2009) (citing *Douglas Cnty.*). These decisions stand for the broader proposition that NEPA does not apply to such actions. In any event, the Parties appear to agree that the MSA requires consideration of NEPA procedures. *See* 16 U.S.C. § 1854(i)(1) (requiring the Secretary to "revise and update agency procedures for compliance" with NEPA).

[222] *Kootanai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1114-15 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

[223] *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1139 (9th Cir. 2011) (citing 40 C.F.R. § 1508.27).

interests, and the locality, which vary in importance depending on the scope of the action.[224] "'Intensity' refers to the degree to which the agency action affects the locale and interests identified in the context part of the inquiry."[225] The regulations set out ten "intensity" factors, any one of which "may be sufficient to require preparation of an EIS in appropriate circumstances."[226]

One of the "intensity" factors under the regulations suggests that preparation of an EIS may be required where "the effects on the quality of the human environment are likely to be highly controversial."[227] Under NEPA, "[t]he term 'controversial' refers to cases where a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use."[228] A "substantial dispute," in turn, occurs where there is evidence that "casts serious doubt upon the reasonableness of an agency's conclusion[]" that there is no significant impact.[229] In those instances, the agency must then "come forward with a 'well-reasoned [i.e., convincing] explanation' demonstrating why" that evidence does "not

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[224] *Id.* (citing *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 731 (9th Cir. 2001), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010)).

[225] *Id.* at 1139-40 (citing *Nat'l Parks*, 241 F.3d at 731).

[226] *Id.* at 1140 (citing *Nat'l Parks*, 241 F.3d at 731).

[227] 40 C.F.R. § 1508.27(b)(4).

[228] *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1057 (9th Cir. 2010) (citation omitted).

[229] *Id.* (quoting *Nat'l Parks*, 241 F.3d at 736); *see also Anderson v. Evans*, 371 F.3d 475, 489 (9th Cir. 2004) ("Put another way, a proposal can be considered controversial if 'substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor'" (citation and ellipsis omitted)).

suffice to create a public controversy based on the potential environmental consequences."[230] The question is whether the agency "considered conflicting expert testimony in preparing its FONSI, and whether the agency's methodology indicates that it took a hard look at the proposed action by reasonably and fully informing itself of the appropriate facts."[231]

Another "intensity" factor suggests that agencies should prepare an EIS where "effects on the human environment are highly uncertain or involve unique or unknown risks." "An agency must generally prepare an EIS if the environmental effects of a proposed action are highly uncertain," particularly where that uncertainty "may be resolved by further collection of data . . . ."[232] The mere existence of some uncertainty, however, does not mandate preparation of an EIS.[233] Indeed, some "quotient of uncertainty . . . is always present when making predictions about the natural world."[234]

In addition to invoking the standards discussed above, Plaintiffs contend that NMFS "knew" that it was required to prepare an EIS, pointing to a notice of intent published in late 2007 where NMFS indicated that it would do so.[235] Indeed, as late as March of 2010, NMFS internally appeared to recognize that the level of controversy, "population level impacts" on the

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[230] *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001) (citations omitted), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010).

[231] *Id.* at 736 n.14 (citation omitted).

[232] *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1140 (9th Cir. 2011) (citation omitted).

[233] *See Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir. 2009) (citation omitted); *see also Nat'l Parks*, 241 F.3d at 732 n.9 (citation omitted).

[234] *Kempthorne*, 588 F.3d at 712.

[235] Dkt. 80 at 72-74.

WDPS, and "uncertain[ty]" of the impacts on the human environment and WDPS required preparation of an EIS.[236] Plaintiffs do not appear to argue, however, that these statements were binding.

Based on the record here, and apart from any possible "interrelated" social and economic effects,[237] the Court finds that NMFS's conclusion that an EIS was not required was unreasonable. Although NMFS is entitled to deference in its resolution of scientific questions in its ESA § 7(a)(2) determinations, there were plainly significant disagreements about the impact of the restrictions on the environment here. NMFS, itself, anticipated that the action at issue here would have significant beneficial effects on the WDPS population. Those beneficial impacts, alone, are likely significant enough to require preparation of an EIS here.

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[236] RULE108901.

[237] The Court notes that the effects that primarily concern Plaintiffs are not environmental at all, nor do Plaintiffs contend that the social and economic impacts will, in turn, cause any environmental impacts. *Cf. San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1030 (9th Cir. 2006) (discussing the potential environmental impact of a terrorist attack on a proposed nuclear storage facility). Indeed, even if the social and economic harms are "interrelated" with the environmental impacts, the regulations do not require preparation of an EIS, they merely require discussion of those effects if the agency is already preparing an EIS. *See* 40 C.F.R. § 1508.14 ("*When an environmental impact statement is prepared* and economic or social and natural or physical environmental effects are interrelated, *then* the environmental impact statement will discuss all of these effects on the human environment" (emphasis added)).

Additionally, Alaska and Amici Curiae argue that NMFS failed to consider environmental justice impacts on the minority and low income populations in the Aleutian Islands as required by Executive Order 12898. Defendants correctly note, however, that the Ninth Circuit has held that the Order is not judicially actionable. *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 575 (9th Cir. 1998). In that case, the court indicated that the petitioner asserted that the agency had failed to evaluate alternatives as required by three different authorities, including Executive Order 12898 and NEPA. *Id.* The court noted that the Order specifically states that it does "not create any right to judicial review for alleged noncompliance" and declined to discuss it further, while going on to discuss NEPA's requirements. *Id.* The court did not, as Plaintiffs' suggest, hold that an agency must consider environmental justice impacts in connection with satisfying its obligations under NEPA or that a court may review an agency's failure to do so.

Regardless, NMFS's conclusions about those effects were both highly controversial and uncertain. Plaintiffs primarily rely on evidence suggesting that the effects of the action would be *less* significant on the human environment than NMFS contends (i.e., that the fishery restrictions will not lead to WDPS population growth). There is, however, also evidence in the record to indicate that there might also be some detrimental environmental effects from the restrictions. Notably, in the BiOp, NMFS acknowledged significant uncertainty about the proper modeling to use in order to determine the predicted fishery biomass growth under the RPA.[238] NMFS relied on a single-species model to project significant increases in Atka mackerel and Pacific cod biomass in the affected areas.[239] It also, however, acknowledged that multi-species modeling indicated that Atka mackerel biomass might actually *decrease* due to predation from Pacific cod.[240] This demonstrates significant scientific differences of opinion, controversy, and uncertainty on potentially significant impacts on the natural and physical environment resulting from the removal of long-standing human intervention in the form of commercial fishing in vast areas of the BSAI. Additionally, although NMFS was not bound by its prior statements indicating that it intended to prepare a full EIS, these statements plainly indicate that NMFS, itself, believed that the impacts on the human environment from the action at issue here would be significant. Accordingly, NMFS violated NEPA when it failed to prepare an EIS.

2. *Opportunity for Public Review & Comment*

Plaintiffs next argue that NMFS violated NEPA by "suppress[ing] public scrutiny." Most significantly, Plaintiffs note that the draft EA omitted certain discussions, including the entirety

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[238] RULE002461-62.

[239] *Id.*

[240] RULE002462.

of chapter 9, which discussed NMFS's "Environmental Conclusions."[241] Defendants contend that there was sufficient information in the draft EA for members of the public to weigh in with their views.

The applicable regulations require agencies to involve the public in NEPA procedures.[242] This includes making documents available for public review and holding public hearings.[243] Although there is no set minimum level of public participation that an agency must provide, a complete failure to involve or inform the public is plainly unacceptable.[244] Circulation of a draft EA is not required in every case, although an agency "can never go wrong" by doing so.[245] Moreover, "[a]n agency, when preparing an EA, must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process."[246]

In the totality of the circumstances here, NMFS essentially provided some underlying environmental information for comment, but not its conclusions - omitting large sections of the

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[241] Dkt. 80 at 75-76. The "Environmental Conclusions" section essentially consists of the FONSI.

[242] *Kootanai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1114-15 (9th Cir. 2002) (citing 40 C.F.R. § 1506.6(a)), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011); *see also* 40 C.F.R. §§ 1500.1(b), 1501.4(b).

[243] § 1506.6.

[244] *Citizens for Better Forestry v. U.S. Dep't of Agriculture*, 341 F.3d 961, 970 (9th Cir. 2003).

[245] *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 952, 952 n.8 (9th Cir. 2008).

[246] *Id.* at 953.

final document.[247] As Plaintiffs note, the Council, itself, expressed frustration with the missing information.[248] Moreover, although NMFS did receive thousands of comments on the draft EA, it acknowledged that many of these comments were "form letters."[249] Given that the release of the draft EA with the relatively short[250] accompanying comment period was the primary means of permitting the public to weigh in on the agency decision-making process, the procedures here amounted to a failure to adequately involve the public. Under these circumstances, the Court concludes that NMFS failed to provide sufficient environmental information for the public to weigh in and inform the agency decision-making process.

3. *Consideration of Alternatives*

Plaintiffs also assert that the EA was insufficient because in it, NMFS did not adequately consider a range of alternatives to the RPA – particularly, the Council's alternative RPA. Defendants respond that NMFS considered a total of nine alternatives, including the Council's proposal.

NEPA requires agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning

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[247] The omissions included discussions of the preferred alternative, cumulative effects on non-target species, cumulative effects on the habitat, and cumulative effects on the ecosystem, in addition to the "Environmental Conclusions." BIOP002378, BIOP002401, BIOP002466, BIOP002473, BIOP002475.

[248] BIOP003725.

[249] BIOP003129.

[250] The draft EA and draft BiOp are hundreds of pages long, and the comment period lasted 32 days, *see* BIOP003129. *Cf.* 40 C.F.R. § 1506.10(c) (requiring that agencies provide a minimum 45 day comment period for a draft EIS).

alternative uses of available resources."[251] The statute requires agencies to "give full and meaningful consideration to all reasonable alternatives" regardless of whether an agency prepares an EA or an EIS.[252] "However, 'an agency's obligation to consider alternatives under an EA is a lesser one than under an EIS.'"[253] In an EA, "an agency is only required to include a brief discussion of reasonable alternatives."[254] Additionally, an agency need not consider "every available alternative" – it need only consider "an appropriate range of alternatives."[255] Therefore, "[a]n agency need not . . . discuss alternatives similar to alternatives actually considered, or alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area."[256]

Here, the agency considered four alternatives in detail (including the status quo and its preferred alternative),[257] and a number of other alternatives briefly (including the Council's proposal).[258] NMFS ultimately adopted several features of the Council's proposal in its preferred

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[251] 42 U.S.C. § 4332(E).

[252] *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008) (citation omitted).

[253] *Id.* (citation omitted).

[254] *Id.* (citing 40 C.F.R. § 1508.9(b)).

[255] *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 955 (9th Cir. 2008) (citation omitted).

[256] *Id.* (citation omitted); *Kootanai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1122 (9th Cir. 2002) (noting that NEPA does not require agencies to "conduct in-depth analysis of environmentally damaging alternatives that are inconsistent with . . . conservation policy objectives" (citation omitted)), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

[257] *See* BIOP003135-70.

[258] BIOP003171-75.

alternative, but determined that the remaining features did not meet the performance standards of the BiOp and were otherwise "similar to historical practices" (i.e., the status quo). Accordingly, given that NMFS did consider a number of alternatives including the Council's proposal which it found was "similar" to another alternative that it considered in detail, the Court finds that NMFS considered an adequate range of alternatives in the EA.

D. Remedy

Plaintiffs suggest that the Court should vacate the BiOp and IFR even if it were to find that NMFS's ESA determinations were appropriate because procedural violations "are so significant that they undermine the agency's action to the point that it cannot withstand substantive ESA scrutiny."[259] By way of example, they state that "an inadequate NEPA alternatives analysis would mean that NMFS failed to adequately consider other appropriate RPAs."[260] In contrast, Intervenors suggest that "if the Court upholds the biological opinion and Interim Final Rule on ESA grounds . . . it could not then vacate the rule in light of any violation of NEPA . . . without leading to a direct violation of section 7(a)(2) of the ESA . . . ."[261]

The NEPA violations at issue here do not undermine NMFS's ESA determinations and the Court has found that the IFR complied with the MSA and APA. Accordingly, the Court will not vacate the BiOp or the IFR. It does appear to the Court, however, that some degree of injunctive relief is appropriate to remedy the NEPA violations given that the restrictions at issue

[259] *See* Dkt. 106 at 58.

[260] *Id.*

[261] Dkt. 99 at 36 n.7.

here are expected to continue into the future indefinitely.[262] Accordingly, the Court intends to remand the matter to NMFS to prepare an EIS in compliance with NEPA procedures. This would include requiring NMFS to prepare and circulate a draft EIS for public comment and provide meaningful responses to comments on the draft EIS.[263] The Court also intends to set a reasonable, but definite, deadline for NMFS to complete this process.

Although the Parties do discuss possible remedies in their briefs, they do not discuss the specific result that the Court has reached here other than to the limited extent noted above. Consequently, the Court will give the Parties an opportunity to submit further briefing before entering an injunction.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' motions for summary judgment (Docket Nos. 80, 81, 84, and 89) are GRANTED, in part, and DENIED, in part. Plaintiffs' motions are granted to the extent that they seek a finding that NMFS violated NEPA by failing to prepare an EIS and failing to provide the public with a sufficient information and opportunity to comment on its decision-making process. Plaintiffs' motions are otherwise DENIED. Pursuant to Local Rule 16(c)(2), the Court construes the Defendants' and Intervenors' oppositions to be cross-motions

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[262] *See Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756-57 (2010) (discussing the standards for injunctive relief to remedy a NEPA violation).

[263] *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 492-93 (9th Cir. 2011) (citations omitted); 40 C.F.R. §§ 1502.9(a), (b), 1503.1, 1503.4. The Court further observes that although Executive Order 12898, which requires agencies to consider environmental justice impacts on the minority and low income populations, does not create any right to judicial review for alleged noncompliance, *see Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 575 (9th Cir. 1998), it nonetheless applies to NMFS and NMFS should comply with it in the course of preparing an EIS.

for summary judgment which it DENIES with respect to the NEPA claims as noted above and GRANTS with respect to the remaining claims.

The Parties may file briefs responding the Court's proposed remedy no later than **February 8, 2012**. Each of the three sets of Plaintiffs may file a brief of no more than ten pages. Plaintiffs may alternatively file one joint brief, potentially along with shorter separate briefs for each set of Plaintiffs (for a total of four briefs), as long as the combined page totals of the Plaintiffs' briefs do not exceed 30 pages. Plaintiffs may allocate their collective page allocation as they deem most efficient. The Defendants may file a brief of no more than 25 pages and the Intervenors may file a brief of no more than ten pages. Amici Curiae may file a brief of no more than five pages. The Parties may also submit proposed orders. The Parties are not to use this briefing an opportunity to reargue the merits of the case.

Dated at Anchorage, Alaska, this 18th day of January, 2012.

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