UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA AQUARIUM, INC., **Plaintiff,** **v.** **PENNY PRITZKER,** ***in her Official Capacity as Secretary of Commerce,*** **NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, and NATIONAL MARINE FISHERIES SERVICE,** **Defendants.**	**)** **)** **)** **)** **)** **)** **)** **)** **)** **)** **)** **)** **)**	**Civil Action No. 1:13-cv-3241-AT**

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. STATEMENT OF FACTS

On June 15, 2012, Plaintiff Georgia Aquarium, Inc. (the "Aquarium") applied for a permit under the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §1361, *et seq.*, to import 18 beluga whales collected from the Sakhalin-Amur area in Russia's Sea of Okhotsk. Administrative Record ("A.R.") Doc. 8927 at 14279-14666. Defendants denied the permit on August 5, 2013, asserting the Aquarium met only 9 of the 12 criteria that must be met for such applications to be approved. A.R. Doc. 8998 at 17421-27. Specifically, Defendants found that: (1) importing 18 beluga whales already removed from the wild would likely have a significant adverse effect on those remaining in the wild in violation of 50 C.F.R. §216.34(a)(4); (2) the import would likely result in the collection of additional belugas in Russia for export to other nations in violation of 50 C.F.R. §216.34(a)(7); and (3) importing five juvenile whales would violate 16 U.S.C. §1372(b)(2) which prohibits importing animals that were nursing when collected. A.R. Doc. 8997 at 17414-15.

During Defendants' review of the Aquarium's permit application, the U.S. Marine Mammal Commission, an independent agency overseeing implementation of the MMPA, 16 U.S.C. §§1401-1403, applied the 12 criteria for approving an import permit and recommended approval. A.R. Doc. 8730 at 10092-99.

Significantly, Defendants had also reviewed all the data, including approximately 9,000 public comments on the permit application, and decided the permit should be issued. Defendants then wrote the permit and a 49-page environmental assessment explaining why issuing the permit is fully consistent with the MMPA. A.R. Doc. 9048 at 18576-84; A.R. Doc. 9070 at 18951-19000. Defendants later reversed their position and denied the permit. The Aquarium is challenging the permit denial as arbitrary, capricious, and not in accordance with law.

II. SUMMARY OF ARGUMENT

Defendants' denial of the permit rests on at least ten major errors:

- Defendants arbitrarily created a new legal standard to measure the sustainability of removals from the wild – a standard that was applied only to the Aquarium's permit application. Defendants' newly-contrived standard was not applied before the permit application and has not been applied since.
- Defendants made findings about the number of whales removed from the Sakhalin-Amur region without any supporting evidence. Defendants admit the paucity of their evidence by finding that the number of unproven, theoretically possible removals *could* have exceeded the sustainable level rather than finding that the actual level of removals was, in fact, not sustainable.
- Defendants improperly relied on certain data that Defendants admit are incorrect.
- Defendants erroneously based the permit denial in part on a finding that the Sakhalin-Amur beluga population is declining and, therefore, removals are harmful. Defendants, however, admit they have no actual evidence of a

population decline, stating instead that any such decline is only theoretically possible and "undetected."

- Defendants incorrectly theorize the Sakhalin-Amur beluga population might be declining based on an improper comparison of (1) historic population estimates derived from multiplying the number of whales sighted on the surface during an aerial population survey by a correction factor of 12 (to account for unseen and submerged animals) with (2) current population estimates derived from multiplying the number of sighted whales by only 2. Such an apples-to-oranges analysis could never survive unbiased scientific review, particularly when application of the same correction factor to both aerial surveys shows the population is increasing.

- To further create the illusion of a possible declining beluga whale population, Defendants improperly compared the maximum possible historic population to the current minimum possible population, and otherwise manipulated the statistics. Comparing maximums to minimums and similar statistical manipulations violates common sense and basic scientific method.

- Despite finding it "extremely unlikely" that approving the import would lead to more imports of belugas into the U.S., Defendants concluded, without any evidentiary basis, that this import could create a demand in other nations to remove belugas from the Sea of Okhotsk in violation of the MMPA.

- Defendants incorrectly decided the MMPA applies extraterritorially and demanded that Russia and its citizens cease collecting and then exporting beluga whales to other nations, an action unsupported by applicable legal precedent.

- Defendants erroneously concluded 5 of the 18 belugas were nursing when collected, even though no mother-calf pairs or lactating females were collected and even though Defendants have no evidence of any nursing behavior.

- Through the totality of their errors and denial of the permit, Defendants' decision ignores the public policy that the prudent, properly regulated public display of marine mammals is an important aspect of public education and public support for conservation, and also allows for critically important

conservation research. This public policy is integral to the MMPA as articulated in its provisions and in 40 years of Congressional intent.

Each of Defendants' reasons for denying the permit is the result of an unsupportable tortured analysis in search of a rationale to deny the permit. Defendants' permit denial has no basis in law or fact, is inconsistent with Defendants' normal practices for evaluating MMPA permits, and is contrary to the MMPA's public policy. Defendants' three bases for denying the Aquarium's permit should be declared arbitrary, capricious, and not in accordance with law and the Court should direct the Defendants to issue the import permit to the Aquarium.

III. STANDARD OF REVIEW

The MMPA provides for judicial review pursuant to the Administrative Procedure Act ("APA"). 16 U.S.C. §1374(d)(6). Under the APA, an agency action is set aside if it exceeds statutory authority, or is arbitrary, capricious, or otherwise not in accordance with law. 5 U.S.C. §706. An action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Miami-Dade Cnty. v. U.S. EPA*, 529 F.3d 1049, 1064 (11th Cir. 2008) (*quoting Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm*

Mut. Auto. Inc. Co., 463 U.S. 29, 43 (1983)). While agency actions are granted deference, *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87 (1983), they are not spared a "thorough, probing, in-depth review." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). Further, deference is not due when the agency's decision is without a substantial basis in fact. *Fed. Power Comm'n v. Fla. Power & Light Co.*, 404 U.S. 453, 463 (1972). Thus, the APA requires that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including 'a rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43 (*quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). "The reviewing court should not attempt itself to make up for [an agency's] deficiencies: 'we may not supply a reasoned basis for the agency's action that the agency itself has not given.'" *Id.* (*quoting SEC v. Chenery Corp.*, 332 U.S. 194 (1947)).

Summary judgment is the appropriate mechanism for the Court to address the agency's decision. *See, e.g.*, *Sierra Club v. Mainella*, 459 F.Supp.2d 76, 90 (D.D.C. 2006) ("Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review."); *Ogeechee-Canoochee Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 559 F.Supp.2d 1336,

1347 (S.D. Ga. 2008) (granting plaintiff's motion for summary judgment after finding the defendant acted arbitrarily and capriciously).

IV. THE MMPA AND 40 YEARS OF CONGRESSIONAL INTENT SUPPORT APPROVAL OF THE IMPORT PERMIT

The Congressional policy behind the MMPA is central to this case. When passed in 1972, the MMPA prohibited the taking (*i.e.,* removal from the wild) and import of marine mammals. Congress, however, created special exceptions allowing the take and import of marine mammals for scientific research, public display, and enhancing the survival or recovery of a species. *See* 16 U.S.C. §§1371(a), 1374(c).

The special exception for public display has had Congressional support for over 40 years. *See, e.g.*, 61 Fed. Reg. 21926, 21927-28 (May 10, 1996) ("Since the passage of the MMPA in 1972, Congress has recognized the public display of marine mammals as an exception to the moratorium on taking."). *See also* (1) Ocean Mammal Protection Hearings, Senate Commerce Committee, 92nd Cong., 2d Sess., 266 (1972), where Senator Hollings, the Chairman of the Subcommittee that wrote the Senate version of the MMPA, explained that without the public display of marine mammals the "magnificent interest" in these animals will be lost and "none will ever see them and none will care about them"; (2) H.R. Rep. No. 100-970, at 33-34 (1988), reprinted in 1988 U.S.C.C.A.N. 6154:

"Education is an important tool that can be used to teach the public that marine mammals are resources of great aesthetic, recreational and economic significance, as well as an important part of the marine ecosystem. It is important, therefore, that public display permits be issued to entities that help inform the public about marine mammals as well as perform other functions"; (3) S. Rep. No. 103-220, at 4 (1994), reprinted in 1994 U.S.C.C.A.N. 518: "The MMPA recognizes that [public] display provides an important educational opportunity to inform the public about the esthetic, recreational, and economic significance of marine mammals and their role in the ocean ecosystem"; and (4) H.R. Rep. No. 108-464, at 21 (2004):

> Activities sponsored by public display facilities—research, educational programs, and presentations, animal husbandry, breeding, and rescue and rehabilitation—are important aspects to the conservation of marine mammals. . . . These public display facilities are the only place for many Americans to view marine mammals and learn about the conservation needs of these animals. The . . . interactions provided at these facilities generate the general public's good will toward marine mammals and develop their support for conservation and management measures for these and many other ocean creatures.

Defendants' permit denial is inconsistent with Congressional policy to further the public display of marine mammals. It is also a setback to marine mammal conservation, research, and education. Through this import, public display facilities will be able to expand the public education about marine mammals that Congress found so important when passing the MMPA. Through

this import, public display facilities will also add significantly to our scientific knowledge of beluga whales. Non-invasive research regarding the thermoregulatory mechanics of these animals, their nutrition conversion capabilities, and their sound reception abilities will greatly advance the ability of scientists and managers to understand the effects of climate change on beluga whales as well as the effects of activities that occur in the belugas' environment, including natural resource extraction, infrastructure construction, and maritime trade. Moreover, the addition of 18 beluga whales to the current population in the United States will likely result in a self-sustaining population of beluga whales without the need for other import or collection permit applications in the foreseeable future. Rejecting this import will require more imports later, or will result in the loss of the beluga whale population in human care over time.

V. APPROVING THE IMPORT PERMIT WILL NOT ADVERSELY IMPACT WILD STOCKS OF BELUGA WHALES

Defendants' first basis for denying the Aquarium's permit is the assertion that issuing the permit would violate 50 C.F.R. §216.34(a)(4), which requires that the proposed activity will not likely have a significant adverse impact on the species remaining in the wild. A.R. Doc. 8997 at 17414. Defendants state that the

test under 50 C.F.R. §216.34(a)(4) is whether the number of removals[1] from the wild is "sustainable." A.R. Doc. 8998 at 17443.

To measure sustainability, the MMPA employs the concept of potential biological removal ("PBR"). As Defendants explain: "PBR is an MMPA calculation which defines the number of animals, excluding natural mortality, which may be removed from a population while still allowing that population to grow or recover. *See* MMPA section 3(20)." *Id.* Thus, removals below PBR are sustainable and satisfy 50 C.F.R. §216.34(a)(4). The Aquarium meets this standard because the total number of whales collected was below PBR.

Nonetheless, Defendants claim 50 C.F.R. §216.34(a)(4) was violated because: (1) PBR analysis cannot be used to assess the sustainability of removals from a declining marine mammal population; (2) the population of Sakhalin-Amur belugas is declining; and (3) in any event, the total number of removals exceeded PBR. *Id.* Defendants are wrong on each point.

[1] Defendants use the word "removal" in the permit decision and this brief will generally follow that form. However, the actual term in the MMPA is "take" which is defined as an action to harass, hunt, capture or kill a marine mammal or to attempt to do such things. 16 U.S.C. §1362(13).

A. Defendants' Theory That PBR Cannot Be Used To Assess The Sustainability Of Takes Is A Newly-Contrived Standard Not Applied Before The Permit Denial And Not Applied Since.

In submitting its permit application, the Aquarium used PBR to assess the sustainability of removals. *Id.* at 17423, 17443. Defendants now claim this was improper because, according to Defendants, PBR can be used to assess the sustainability of removals "only" if the marine mammal population is increasing. *Id.* at 17443. Defendants then claimed the Sakhalin-Amur beluga population is declining. *Id.* Defendants' new interpretation regarding when PBR can be used appears to have been developed for, and applied only to, the Aquarium. When PBR is applied per Defendants' usual practice, the Administrative Record plainly demonstrates that removals did not exceed PBR and that the proposed import of 18 beluga whales will not adversely impact the wild stock.

1. Defendants Rejected The Use Of PBR Analysis Only For The Denial Of The Aquarium's Permit Application.

Prior to denying the Aquarium's permit application, Defendants' position was that PBR is appropriate to assess the sustainability of removals from declining populations. That remained Defendants' position after the permit denial. Only when Defendants sought to deny the Aquarium's permit application did Defendants declare that PBR can be used to assess the sustainability of takes "only" if the marine mammal population is increasing. A.R. Doc. 8998 at 17443.

Defendants cannot selectively change the rules for one permit applicant. Such conduct highlights and proves the arbitrary and capricious nature of their decision. *See, e.g., Sierra Club v. Johnson*, 436 F.3d 1269, 1282 (11th Cir. 2006) ("[W]hen an agency has interpreted one of its regulations in a consistent manner, that interpretation is 'controlling unless plainly erroneous or inconsistent with the regulation.'") (citation omitted); *Manhattan Ctr. Studios, Inc. v. NLRB*, 452 F.3d 813, 816 (D.C. Cir. 2006) (when an agency departs from precedent without reason, its decision will be vacated); *Mendez-Barrera v. Holder,* 602 F.3d 21, 26 (1st Cir. 2010) (agencies must apply the same basic rules to all similarly situated applicants); *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996) (an administrative agency must respect its own precedent, and cannot change it without explanation); *Fred Beverages, Inc. v. Fred's Capital Mgmt. Co.*, 605 F.3d 963, 967 (Fed. Cir. 2010) ("Where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.").

2. Defendants Have For Years Repeatedly Used PBR To Assess The Sustainability Of Takes From Declining Populations.

Prior to the Aquarium's permit application, Defendants' practice and policy was to use PBR to assess the sustainability of takes from declining marine mammal populations. For example, in 2003, Defendants issued scientific research permits

authorizing the lethal taking of 20 Steller sea lions from the endangered and declining western population. Permit opponents asserted that these mortalities, when added to other mortalities, would exceed PBR and, therefore, issuing the permit would violate the MMPA. *See* 2003 Environmental Assessment, Appendix B, at 9.[2] To support their decision, Defendants relied on PBR analysis despite the fact that this population was declining and, since the level of takes would not exceed PBR, concluded that the takes would not have a significant adverse effect on the species. *Id.* at 14.

Again, in 2005, after determining the depleted Alaska northern fur seal population was declining based on the declining count of fur seal pups, Defendants used PBR to evaluate whether the subsistence takes of these marine mammals was sustainable. Defendants stated:

> The biological criteria used to measure the direct effects of the harvest on the northern fur seal resource for significance was a comparison of the total number of takes (level of harvest) to the [PBR] level of the northern fur seal stock. A PBR calculation is the most applicable measure of significance for the direct effects of [the harvest on northern fur seals].[3]

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[2] The applicable pages of the 2003 Environmental Assessment are attached in Exhibit 1. The 2003 document incorporates a 2002 Environmental Assessment that documents the endangered and declining status of this marine mammal population. The applicable pages of the 2002 assessment are attached in Exhibit 2.

[3] National Marine Fisheries Services ("NMFS"), Setting the Annual Subsistence Harvest of Northern Fur Seals on the Pribilof Islands, Final

More recently, in 2007 and 2012, Defendants applied PBR to declining populations. Before issuing a scientific research permit in 2007 that would result in the lethal taking of northern fur seals from the eastern Pacific stock, Defendants used PBR to assess the impact of the takings on this declining marine mammal population.[4] In its Final Programmatic Environmental Impact Statement, Defendants stated the various species subject to the research permits had "different population trends" – meaning that some populations were increasing while others were declining – but, nonetheless, Defendants "decided to compare the number of [mortalities] with . . . the calculated value for [PBR]" for each of these populations. Defendants "concluded that the PBR approach was an appropriately conservative mechanism to evaluate the effects of human-caused mortality on a stock, even for

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Environmental Impact Statement, 51, (May 2005), *available at* http://alaskafisheries.noaa.gov/protectedresources/seals/fur/eis/final0505.pdf.

[4] NMFS, Steller Sea Lion and Northern Fur Seal Research Final Programmatic Environmental Impact Statement, 3-47, 3-48, 4-4, 4-5 (May 2007), *available at* http://www.nmfs.noaa.gov/pr/pdfs/permits/eis/fpeis.pdf; NMFS, Draft Programmatic Environmental Assessment for Fisheries Research Conducted and Funded by the Southwest Fisheries Science Center, 3-43, 4-3, 4-4, 4-63, 5-30, 5-31 (April 2013), *available at* http://www.nmfs.noaa.gov/pr/pdfs/permits/swfsc_ea_draft2013.pdf; and NMFS, Record of Decision Steller Sea Lion and Northern Fur Seal Research Final Programmatic Environmental Impact Statement, 6, *available at* http://www.nmfs.noaa.gov/pr/pdfs/permits/eis_decision.pdf.

many declining populations."[5] Similarly, in 2012, ten months before denying the Aquarium's permit, Defendants calculated PBR and used it to assess the impact of commercial fishing takes on the declining stock of the Hawaiian insular stock false killer whale population.[6]

3. Defendants Continued To Use PBR To Assess The Sustainability Of Takes In Declining Populations *After* The Permit Denial.

On September 2, 2014, a year after denying the Aquarium's permit, Defendants issued a scientific research permit to themselves authorizing the lethal taking by NMFS scientists of 22 northern fur seals from the declining eastern Pacific stock.[7] 79 Fed. Reg. 51963 (Sept. 2, 2014). The Environmental Assessment justifying the permit adopts a prior environmental analysis[8] that states "to assess the potential effects of research . . . [the National Marine Fisheries

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[5] NMFS, Steller Sea Lion and Northern Fur Seal Research Final Programmatic Environmental Impact Statement, 2-21, 2-22 (May 2007).

[6] 77 Fed. Reg. 71260, 71261 (Nov. 29, 2012); NMFS, Final Environmental Assessment, Regulatory Impact Review, and Final Regulatory Flexibility Analysis for the False Killer Whale Take Reduction Plan, 2, 5-6 (Nov. 2012), *available at* http://www.nmfs.noaa.gov/pr/pdfs/interactions/fkwtrp_ea_rir_frfa_fonsi.pdf.

[7] NMFS, Environmental Assessment for Issuance of Permits to Take Steller Sea Lions by Harassment Using Unmanned Aerial Systems, Permit No. 14327, 9 (June 2014), attached as Exhibit 3.

[8] NMFS, Environmental Assessment for Issuance of Permits to Take Steller Sea Lions by Harassment Using Unmanned Aerial Systems, 6 (June 2014), attached as Exhibit 3.

Service] has decided to compare the number of potential research-related mortalities . . . with the calculated [PBR]. PBR is used in this [EIS] ... for gauging various levels of accepted 'mortality and serious injury risk.'"[9]

Defendants also used PBR analysis to examine the effects of a subsistence harvest on the declining northern fur seal population. The final supplemental EIS supporting the 2014-2016 subsistence harvest states:

> To measure the direct and indirect effects of harvest alternatives, analysts compared the total number of harvested seals to the [PBR] of the northern fur seal population. . . . The rationale for using PBR as a metric for mortality effects on northern fur seals is based on 1994 amendments to the MMPA. . . . PBR was intended to serve as an upper limit guideline for fishery-related mortality . . . and it is appropriate to use for other human-caused sources of mortality.[10]

This quotation is followed immediately by the explanation that Defendants had previously "used PBR as a threshold for evaluating the effects of . . . northern fur seal research (NMFS 2007)."[11] Thus, Defendants acknowledge their longstanding policy, consistent with the MMPA, is to use PBR to assess the sustainability of takes from declining marine mammal populations.

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[9] NMFS, Steller Sea Lion and Northern Fur Seal Research Final Programmatic Environmental Impact Statement, 2-21 (May 2007).

[10] NMFS, Final Supplemental Environmental Impact Statement: Management of the Subsistence Harvest of Northern Fur Seal on St. George Island, Alaska, 33, 34 (August 2014) *available at* http://alaskafisheries.noaa.gov/protectedresources/seals/fur/seis/fseis.pdf.

[11] *Id.* at 45, 46.

4. Defendants' Representation To Other Courts Contradicts What Defendants Said In The Permit Denial.

Defendants' new rule that PBR can be used "only" for populations that are increasing flies in the face of their representations to at least one other court. In *Humane Society of the U.S. v. Department of Commerce*, 432 F.Supp.2d 4 (D.D.C. 2006), plaintiffs challenged MMPA scientific research permits issued in 2005 authorizing the lethal taking of 20 animals from the declining Steller sea lion ("SSL") population. Plaintiffs argued the proposed taking would significantly impact the species because the takes exceeded PBR. *Id.* at 17. Plaintiffs argued PBR is "an undeniable litmus test" for judging the significance of a removal from the wild. *Id.* Plaintiffs' complaint alleged the takes allowed under the permit would exceed PBR in violation of 50 C.F.R. §216.34(a)(4), the same regulation at issue in the instant case. Amended Complaint at 37, ¶114, *Humane Soc'y of the U.S. v. Gutierrez*, No. 1:05-cv-1392, 2005 WL 2861375 (D.D.C. Sept. 14, 2005), attached as Exhibit 4.

The government's brief defending permit issuance admitted there was an "alarming decline" in the SSL population. Nevertheless, Defendants stated the "plain language" of the MMPA provides that "PBR analysis may be used to analyze" the impact of removing these marine mammals from the wild. Federal Defs' Combined Mem. in Opp. to Pls' MSJ and in Supp. of Cross MSJ at 7-8, 15,

Humane Soc'y of the U.S. v. Gutierrez, No. 05-1392, 2006 WL 543954 (D.D.C. Jan. 27, 2006), attached as Exhibit 5. Although Defendants disagreed with plaintiffs about the number of mortalities the research would cause, Defendants used PBR to defend the impact of the mortalities on the declining SSL population because the "plain language" of the MMPA allows the use of PBR as to declining populations. *Id.* at 15-16, 21; *see also* Federal Defs' Reply In Support of Cross-Motion For Summary Judgment at 10-13, *Humane Soc'y of the U.S. v. Gutierrez*, No. 05-1392, 2006 WL 1032558 (D.D.C. Mar. 10, 2006), attached as Exhibit 6.

Defendants' newly-contrived claim that PBR can be used to determine if removal levels are sustainable "only" if the population is increasing has been selectively applied to the Aquarium and is contradicted by the MMPA, Defendants' practices before and after they denied the Aquarium's permit, and Defendants' admissions to another court.

B. Defendants Incorrectly Attempted To Rely On Another Population Analysis Model To Justify Not Using PBR.

Attempting to rescue their claim that PBR may be used to assess the sustainability of takes "only" if the population is increasing, Defendants cite "a decision-making framework established by the International Council for the Exploration of the Seas [ICES.]" A.R. Doc. 8998 at 17450. Defendants state ICES allows PBR to be used only "if the current [population] abundance is greater

than 30% of the historical maximum." *Id.* Defendants then conclude: "The minimum population estimate (N_{min}) as of 2010 [for Sakhalin-Amur belugas] was in the range of 2,891-2,972 whales [citations omitted]. Using the existing [historical] estimate of 10,000 whales, this is below the ICES reference point of 30%." *Id.*

There are numerous problems with this statement beginning with the fact that the ICES model has not been adopted by regulation as the U.S. standard. Moreover, only by comparing the *maximum possible* value in a 7,000-10,000 population range to a *minimum possible* current population level (2,891-2,972) can Defendants squeeze a value below 30%, 29.72% (2,972 ÷ 10,000) or 28.91% (2,891 ÷ 10,000), and thereby claim the ICES model precludes the use of PBR. *Id.* Comparing a maximum possible population to a minimum possible population is a methodology that could never survive scientific peer review. It is inherently arbitrary and capricious and, by itself, shows that Defendants' attempt to rely on the ICES model is inappropriate.[12] In addition, as discussed in the next section, Defendants' estimate of the historic maximum population is wrong.

[12] If Defendants had truly compared apples to apples, *i.e.,* comparing maximum possible populations, or even actual populations, Defendants' argument fails.

Finally, even if the facts showed a population decline of 70% or more, the ICES model cannot support Defendants' theory limiting the use of PBR. Defendants' legal theory is that PBR may be used to assess the sustainability of takes only if the population is increasing, *i.e.,* the population is not declining. Even if Defendants' contrived statistical analysis showed the Sakhalin-Amur beluga population has *historically* declined by 70%, that does not provide any evidence that the *current* population is still declining. There are numerous examples of populations that once declined but are now increasing. And Defendants offer no proof that the Sakhalin-Amur population is currently declining.[13] Defendants assert only that the population has declined from its historic level. Even then, Defendants' comparison of the historic and present population levels is statistical alchemy that violates basic scientific principles and common sense.

1. The Historic Population Estimate Used By Defendants To Support Their Attempted Use Of The ICES Model Is Invalid And Defendants Admit It.

Defendants' theory that the Sakhalin-Amur beluga population[14] has declined by 70% is based principally on the claim that the historic Sakhalin-Amur

[13] In fact, as shown on page 30 below, Defendants themselves provide the evidence that the Sakhalin-Amur beluga population is presently increasing.

[14] At various points in this memorandum, the Aquarium refers to the Sakhalin-Amur population, group, or stock. This choice of words is for ease of reference

population was 10,000 and the actual current population is 3,961 with a minimum possible population of 2,891-2,972. A.R. Doc. 8998 at 17450-51. Not only does this comparison suffer from the problem discussed above of comparing a maximum possible population to a minimum possible population, but Defendants reliance on the 10,000 number is wrong.

As background, the 10,000 number comes from an estimate by Berzin and Vladimirov (1989). *Id.* at 17451. That estimate was derived by multiplying the number of whales sighted on the surface during an aerial survey, about 700, by 12 to account for unseen and submerged whales. A.R. Doc. 8920 at 13878.[15]

In stark contrast to the methodology used to derive historic population estimates, the estimate of the current Sakhalin-Amur population used by Defendants accounts for unseen and submerged whales by multiplying the whales sighted on the surface by 2. A.R. Doc. 8915 at 13783, A.R. Doc. 8998 at 17451. Comparing historic population estimates derived from a 12x correction factor to

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only and is not an admission or agreement that the beluga whales in the Sakhalin-Amur area are a separate population from the whales found in the Shantar region of the Sea of Okhotsk.

[15] Berzin and Vladimirov's actual statement was that the population was somewhere between 7,000-10,000. A.R. Doc. 8998 at 17451. To make their declining population theory look better, Defendants cherry picked the data, choosing to not use the mid-point of the range, which would be customary, but instead choosing to use the maximum possible value of 10,000.

account for unseen and submerged whales with current population estimates that use a 2x correction factor is prejudicial, illogical, and analytically incorrect. Indeed, if the number of beluga whales sighted on the surface in the 2009 survey in the Sakhalin-Amur area conducted by the A.N. Severtsov Institute of the Russian Academy of Science is multiplied by a correction factor of 12 to get a legitimate apples-to-apples comparison of data, the *actual* Sakhalin-Amur population is 16,404, a significant increase from the *maximum possible* 10,000 historic number used by Defendants.[16] Defendants' comparison of a population level derived from using a 12x correction factor with a population level derived from using a 2x correction factor is not a scientifically valid apples-to-apples comparison.

Errors, like those made by Defendants, render a decision arbitrary and capricious. For example, in *Native Village of Chickaloon v. Nat'l Marine Fisheries Service*, 947 F.Supp.2d 1031 (D. Alaska 2013), plaintiffs challenged an MMPA permit to take beluga whales in Cook Inlet, Alaska. *Id.* at 1036. Plaintiffs asserted Defendants had incorrectly calculated the take level and improperly found it constituted a "small number" of takes under the applicable MMPA provisions.

[16] Defendants included A.R. Doc. 8924 in the A.R. Index but elected to exclude parts of the report. One excluded part shows the September population of belugas in the Sakhalin-Amur area was 16,404 if one applies a 12x correction factor (Sakhalin-Amur area plus Baikal Bay which is also in the Sakhalin-Amur region). The excluded pages (48-49) are included in Exhibit 7.

Id. at 1050. The court found Defendants' calculation of the take level was "clearly erroneous because [Defendants] inexplicably mix corrected population abundance figures with uncorrected" numbers. *Id.* at 1056. The court stated: "Significant mathematical errors can render an agency decision arbitrary and capricious." *Id.* Finding "clear error[s] of judgment," the court held the agency action arbitrary and capricious. *Id.*; *see also Alabama Power Co. v. F.C.C.*, 773 F.2d 362, 367, 370, 372 (D.C. Cir. 1985) (concluding the agency had made several calculation errors, including applying inappropriate percentage figures and erroneously excluding certain items from the relevant calculations).

Curiously, Defendants admit they have "little confidence in the estimate of 10,000 whales in the Sakhalin-Amur population stock by Berzin and Vladimirov (1989) because of the high correction factor used" and because "[w]e cannot know the abundance of the Sakhalin-Amur stock in 1990," the year after the 1989 Berzin and Vladimirov paper. A.R. Doc. 8998 at 17451-52, 17448; *see also id.* at 17451 ("[T]here is no reliable estimate of a historical maximum [Sakhalin-Amur population].") In other words, Defendants' apples-to-oranges comparison of past and present Sakhalin-Amur populations so as to invent a declined population theory in order to justify reference to the ICES model has no merit and is nothing more than unfounded speculation without any evidentiary basis.

C. PBR Analysis Is The Correct Analytical Standard And The Number Of Whales Collected Was Sustainable Because It Did Not Exceed PBR.

Defendants' newly-contrived theory that PBR can be used only if the population is increasing has no merit and, as described above, is inconsistent with established agency practice. Therefore, when applying for the permit, the Aquarium reasonably relied on Defendants' established practice of using PBR to assess the sustainability of removals. As a result of that reliance, and prior to seeking the import permit, the Aquarium joined others in funding a five-year independent research study to determine if the number of belugas being removed from the Sakhalin-Amur area was below PBR and, therefore, sustainable. The total number of animals removed included the 18 whales at issue, of which 2 were collected in 2006, 11 in 2010, and 5 in 2011.

The research was conducted by scientists with the A.N. Severtsov Institute of Ecology and Evolution of the Russian Academy of Science ("Severtsov Institute"). This research and its conclusions, completed in consultation with beluga experts from Canada and the U.S. National Marine Fisheries Service ("NMFS"), were peer reviewed by six beluga whale experts chosen by the International Union for the Conservation of Nature and Natural Resources

("IUCN").[17] A.R. Doc. 8915 at 13775, 13778-79. Like the Severtsov Institute scientists, the IUCN expert panel applied the MMPA's PBR analysis to assess the sustainability of the collections, stating that PBR is the sustainable removal level. *Id.* at 13787-90. The IUCN panel compared removals of beluga whales from the Sakhalin-Amur area with the PBR for that area and found removals were below PBR. *Id.* at 13784-87, 13790.[18]

The IUCN panel initially calculated the PBR for beluga whales in the Sakhalin-Amur area as 29 animals per year, the same number calculated by the Severtsov Institute. *Id.* at 13790. That number was later raised to 30 based on additional analysis recommended by the IUCN panel. *Id.* at 13790-91, A.R. Doc. 8911 at 13708, A.R. Doc. 8998 at 17444. The number of all removals for public

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[17] IUCN is a global conservation network comprised of experts in their field. *See* www.iucn.org. One of the six IUCN experts, Dr. Brownell, is a senior NMFS scientist. Another, Dr. Taylor, is the head of the NMFS Marine Mammal Genetics Group. A third expert, Dr. Reeves, is the Chairman of the U.S. Marine Mammal Commission Committee of Scientific Advisors. *See* http://www.mmc.gov/commission/welcome.shtml. Another senior NMFS scientist attended the IUCN peer review as an expert consultant and the IUCN panel reviewed a population assessment model he developed. A.R. Doc. 8915 at 13800. The IUCN report is titled "Report of an Independent Scientific Review Panel."

[18] The Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") also requires for certain listed species, including belugas, that the exporting country determine that an export "will not be detrimental to the survival of the species." CITES, Article IV.2.a. The Russian Federation made that finding in issuing the required CITES export permits. A.R. Doc. 8998 at 17437.

display in the 11 years 2000-2011 in the Sakhalin-Amur area averaged 21.3 per year, well below the PBR of 30. A.R. Doc. 8998 at 17444.[19] The IUCN panel then found there were no additional sources of removal that would cause PBR to be exceeded. A.R. Doc. 8915 at 13785, 13790. Based on the Severtsov Institute study and the IUCN expert panel, the Aquarium's permit application stated that collections were below PBR and sustainable. A.R. Doc. 8927 at 14296-97.[20] Despite the unanimous conclusion of these experts, Defendants concluded that PBR could be exceeded due to removals from sources other than public display and, therefore, denied the Aquarium's permit. A.R. Doc. 8998 at 17443-47. As discussed below, there is no evidence to support Defendants' conclusion that PBR could have been exceeded. Moreover, Defendants actually used PBR as the basis for claiming that granting a permit to import whales from an allegedly declining population violates 50 C.F.R. §216.34(a)(4).

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[19] In determining sustainability, Defendants compare the annual PBR with the five-year average of removals. The Aquarium calculated the applicable five-year average of removals as 22 animals and compared that to the annual PBR. With respect to using a five-year average of collections, Defendants acknowledge "This 5-year average is consistent with how NMFS calculates PBR for U.S. stocks." A.R. Doc. 8998 at 17444. *See also* A.R. Doc. 8915 at 13790.

[20] The average annual removal of belugas from the Sakhalin-Amur area is only 0.6% of the population. A.R. Doc. 8933 at 14724.

If Defendants are correct that PBR cannot be used to assess the effect on the wild population of importing 18 beluga whales, then conspicuously absent from Defendants' permit denial is any identification of what is the correct standard and how Defendants applied it to deny the Aquarium's permit. A.R. Doc. 8998 at 17423. As noted above, PBR was, and is, the standard Defendants apply to themselves and to everyone but the Aquarium. If PBR is suddenly not the correct standard, Defendants have an obligation to tell the public, and permit applicants, what is the standard. Defendants' failure to articulate what standard they applied further evidences the arbitrary and capricious nature of the permit denial.

1. No Evidence Supports Defendants' Claim That There Are Removals In Addition To Public Display.

Defendants claim there are six additional sources of removal of Sakhalin-Amur beluga whales that, when added to public display collections, could cause PBR to be exceeded. A.R. Doc. 8998 at 17443. Significantly, Defendants never conclude PBR was, in fact, exceeded. Defendants also never provide the number of these alleged additional removals so that this number could actually be compared to PBR. Instead, Defendants simply conclude, without any evidence, that PBR may have been exceeded. There is absolutely no evidence to support

Defendants' claim of additional removals.[21]

Defendants' first source of alleged additional mortality is subsistence takings. Defendants cite a paragraph in the Severtsov Institute study recounting anecdotal reports of possible annual subsistence harvests between one and three animals per village. A.R. Doc. 8998 at 17445-46. However, the study also identifies the villages from which these anecdotal reports emanate and these villages are in the remote Shantar region of the Sea of Okhotsk, not in the Sakhalin-Amur area.[22] Defendants cite no other evidence to support their claim of subsistence takes in the Sakhalin-Amur area. Instead, Defendants state it can be assumed there is some level of subsistence taking in Sakhalin-Amur. A.R. Doc. 8998 at 17446. Notably, the IUCN expert panel examined the Severtsov Institute study, as well as all the other evidence, and never identified subsistence as a source

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[21] Significantly, Defendants' draft Environmental Assessment ("EA") for the Aquarium's permit application cites the IUCN report as the basis for concluding "There is no indication of any additional human-caused incidental mortality" above public display collections. A.R. Doc. 9096 at 19481. Yet, in the permit denial, Defendants state they "relied heavily" on the very same IUCN report to conclude the exact opposite, A.R. Doc. 8998 at 17443, 17445, without offering any new evidence to justify the reversal – and despite the fact that the IUCN report found there are no other sources of removal that would cause PBR to be exceeded.

[22] As noted above, Defendants included A.R. Doc. 8994 in the A.R. Index but chose to include only part of the study in the AR. *See* A.R. Doc. 8924 at 13917-53. Defendants excluded the part they cite and on which they rely in the permit denial to support their claim of subsistence takings in the Sakhalin-Amur area. The excluded page (55) is included in Exhibit 7.

of removal in the Sakhalin-Amur area. A.R. Doc. 8915 at 13785-87. Defendants have no data to support these assumed subsistence takings.[23]

The second possible source of additional mortality alleged by Defendants is deaths associated with captures for public display, but Defendants cite only one such death over the four years for which any data are available. A.R. Doc. 8998 at 17446. Defendants' third source of alleged additional mortality is entanglement in fishing nets. However, Defendants admit that since 1915, 100 years ago, only "a few cases have been reported," and Defendants do not say when in the last 100 years those few cases occurred. *Id.* Defendants' fourth source of additional mortality is vessel strikes, except Defendants admit "[t]here have been no reports of vessel strikes or evidence of vessel strikes." *Id.* The fifth alleged source of additional mortality is climate change, but Defendants admit "there are insufficient data to make reliable predictions on the effects of Arctic climate change on beluga whales." *Id.* The final source of possible mortality on which Defendants rely is

[23] While Defendants may want to try rescuing their case by relying on alleged subsistence takes from the Shantar area, the facts are that the PBR calculation by the Severtsov Institute and the IUCN used by Defendants related to belugas found in the Sakhalin-Amur area. If Defendants want to consider takes in the Shantar area when determining the sustainability of removals, then Defendants will need to use a PBR that includes the whales in the Shantar region. If Defendants did so, the PBR for the combined Sakhalin-Amur/Shantar population would approximate 86. A.R. Doc. 8998 at 17444, A.R. Doc. 8933 at 15689.

pollution, except Defendants admit "[t]he effects of pollution on beluga whales are difficult to determine and there is no basis for integrating pollution into an assessment of biological removal." *Id.* at 17447.

In reality, there is no factual support for Defendants' assertion that removals of beluga whales from the Sakhalin-Amur area from six alleged sources are such that PBR may have been exceeded, let alone that it was exceeded. Therefore, to justify a decision to deny the Aquarium's permit, Defendants claimed there is a "possibility" of an "undetected" population decline and invented a legal theory that PBR cannot be used to assess the sustainability of removals. A.R. Doc. 8998 at 17423.

Even assuming Defendants' theory about when PBR analysis can be used is correct, Defendants' speculation about a theoretically possible, but undetected, population decline is undermined by Defendants' own conclusions. In Defendants' words: "If the removal of beluga whales for public display were the only source of mortality from this stock, then it would be increasing at a slow rate." *Id.* at 17449. As seen above, there are no other sources of removal.[24] Defendants also admit:

[24] Further undermining Defendants' speculative population decline theory is Defendants' statement that for a population decline to have occurred there must have been between 145-165 beluga whales removed in the Sakhalin-Amur area

"The removals for live-capture [*i.e.,* for public display] of beluga whales from the Sea of Okhotsk at the levels reported from 2000-2011 should not impede the stock's growth or recovery." *Id.* In other words, not only is the Sakhalin-Amur population not declining, but there is no adverse effect on the wild population caused by the removal of the whales at issue. Defendants' denial of the Aquarium's permit application based on an alleged violation of 50 C.F.R. §216.34(a)(4) has no merit.[25]

2. Defendants Improperly Departed From Existing Practice Under The MMPA By Using An Artificially Low PBR Number Against Which To Compare The Alleged Takes.

Even assuming there were takes in addition to public display, Defendants departed from their normal practice when computing the PBR against which to measure these alleged takes. The departure from agency practice further demonstrates the arbitrary and capricious nature of Defendants' decision.

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each year 1990-2010 in addition to collections for public display. A.R. Doc. 8998 at 17448. There is absolutely no evidence to support such a number.

[25] Defendants' evidentiary standard of "possibility" regarding a population decline is also contrary to law. While courts have recognized that "a 'finding' of significant adverse impact does not require 'conclusive evidence,' 'proof,' or 'scientific certainty' of such an impact," something more than an undetected, theoretical possibility is required. *Brower v. Daley*, 93 F.Supp.2d 1071, 1087 (N.D. Cal. 2000), *aff'd sub nom. Brower v. Evans*, 257 F.3d 1058 (9th Cir. 2001) (citations omitted).

The Aquarium's permit application presented the very conservative PBR calculated by the IUCN panel (30) rather than the higher PBR that would normally be calculated by Defendants under the MMPA for the Sakhalin-Amur beluga population (46). A.R. Doc. 8934 at 15790.[26] The Aquarium assumed and was entitled to rely on the presumption that Defendants would follow their customary MMPA practice when calculating the PBR number against which to compare removals. A.R. Doc. 8933 at 14724-25. But that expectation was dashed when Defendants again departed from their established practice. If Defendants had used

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[26] There are three elements in the PBR equation: the species' minimum population estimate; the species' productivity rate; and a recovery factor. 16 U.S.C. §1362(20). Only the first of these factors is relevant here. The minimum population estimate is the bottom end of a possible population range of which the actual population is the mid-point. The minimum population number is derived after first calculating the actual population estimate. To calculate the actual population level, scientists "correct" the number of whales sighted on the surface to account for whales that are submerged and cannot be seen. Employing this correction technique to determine the actual beluga population level, the IUCN panel multiplied the number of whales seen on the surface by two. A.R. Doc. 8915 at 13783. Using that number, the IUCN panel derived the actual, and then the minimum, population and calculated an annual PBR of 29. That number was later raised to 30. However, when Defendants calculate actual population levels under the MMPA for non-endangered beluga whale populations in Alaska's Chukchi and Bering Seas, Defendants multiply the number of whales sighted on the surface by 2.62 to account for unseen, submerged whales and by 1.18 to account for difficult to see dark-colored juveniles. A.R. Doc. 8933 at 15686. If Defendants had followed their practice under the MMPA and used these correction factors to calculate the actual, and then the minimum, population number for the PBR formula, the annual PBR for the Sakhalin-Amur area would be 46.

the PBR calculation methodology they employ under the MMPA, the PBR would have been 46, not 30. A.R. Doc. 8933 at 15686. Regardless of whether Defendants used a PBR of 30 or 46, the fact remains that PBR was not exceeded and 50 C.F.R. §216.34(a)(4) would not be violated by granting the Aquarium's permit.

An agency's failure to follow its prior precedent or to treat like cases alike requires justification. 32 Charles A. Wright, *et al.*, Practice and Procedure §8248 (1st ed. 2006); *see also, e.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41-42 (an agency changing its course from a prior practice must supply a reasoned analysis for the change); *McHenry v. Bond*, 668 F.2d 1185, 1192 (11th Cir. 1982) ("An agency must either conform to its prior norms and decisions or explain the reason for its departure from such precedent"). Defendants' departure from established MMPA practice is yet another example of Defendants inventing a rationale to justify denying the Aquarium's permit. Defendants offer no explanation for not following their normal MMPA process.

PBR can be used to assess the sustainability of removals and, here, the removals were sustainable because PBR was not exceeded. That should end the analysis necessary to grant the Aquarium's permit.

VI. THE IMPORT WILL NOT RESULT IN ADDITIONAL COLLECTIONS OF BELUGA WHALES FROM THE WILD

Defendants second basis for denying the permit is an alleged violation of 50 C.F.R. §216.34(a)(7) which requires that "the requested import or export will not likely result in the taking of marine mammals or marine mammal parts beyond those authorized by the permit." The Aquarium meets this standard because the proposed import will actually prevent future collections from the wild. Indeed, Defendants admit "it is *extremely unlikely*, but not impossible, for other [U.S.] marine mammal facilities to request a similar permit in the future." A.R. Doc. 9096 at 19484. (emphasis added). And even if such an application were filed, Defendants admit a future application would be "evaluated on its own merits" because granting the Aquarium's permit would not constitute a precedent requiring approval of another application. *Id.*

These acknowledgements by Defendants raise the obvious question as to how Defendants could then contradict themselves in reaching an opposite conclusion in order to deny the permit application. The analysis under 50 C.F.R. §216.34(a)(7) is whether the import will "likely" result in additional MMPA permits to take animals from the wild. Defendants admit not only that it is "extremely unlikely" anyone will submit a future application but that it is far from certain any such application would be granted. In other words, the Aquarium

meets the regulatory standard. Defendants' claim that issuing the permit violates 50 C.F.R. §216.34(a)(7) is arbitrary, capricious, and not in accordance with law.

Future permit applications to import belugas into the U.S. are "extremely unlikely" because the current beluga population in U.S. facilities cannot be sustained because of its age and demographic, but the import of 18 whales likely allows for a captive self-sustaining population, thus eliminating the need for future collections from the wild. A.R. Doc. 8927 at 14294, 14527-39; *see also* Defendants' Final Environmental Assessment, A.R. Doc. 8999 at 17479 ("If a self-sustaining population results from the import, presumably there would be no further need for import of beluga whales into the U.S."). Defendants admit there are no other pending or issued U.S. permits authorizing beluga whale collections or imports for public display and that U.S. facilities "will be participating in the collective management" of the imported whales. A.R. Doc. 9096 at 19484. Given this collective breeding management to establish a captive self-sustaining population, Defendants determined it is "extremely unlikely" that other applicants will seek MMPA import or collection permits.

Although Defendants agree that no one subject to the MMPA will likely be seeking a permit to collect or import beluga whales, Defendants make the quantum leap that granting the Aquarium's permit would somehow contribute to a

worldwide demand to capture belugas for public display "resulting in the future taking of additional beluga whales" by and for foreign nationals not subject to the MMPA. A.R. Doc. 8998 at 17440. Based on what foreign nationals not subject to the MMPA might do, Defendants erroneously conclude that granting the permit would violate 50 C.F.R. §216.34(a)(7).

A. There Is No Factual Basis For Defendants' Claim That Importing Whales Into The U.S. Will Create A Foreign Market For Beluga Whales.

As discussed below, the MMPA does not apply extraterritorially so there is no merit to Defendants' speculation about what other countries may or may not do. But even if there is some validity to Defendants' contention of extraterritorial authority, 50 C.F.R. §216.34(a)(7) still requires a causal connection between granting the permit and future collections. Here, there is none. Indeed, Defendants admit Russia's beluga whale collection and export program began before the Aquarium's permit application and will continue regardless of whether the permit is granted. *See* A.R. Doc. 9070 at 18976, 18979, 18991 (comments on the permit application "have shown" Sea of Okhotsk collections have been ongoing for 30 years and, because "the demand for beluga whales is global in nature" Russian collections will continue "whatever the outcome" of the Aquarium's permit application); A.R. Doc. 8998 (permit denial) at 17424 ("ongoing" collections in

Russia are "expected to continue"); A.R. Doc. 8999 (Final Environmental Assessment) at 17479 (same); A.R. Doc. 8730 at 10098 (Marine Mammal Commission comments that "the demand [for belugas] is global in nature and the removal of beluga whales from the wild will almost certainly continue"). Defendants offer no proof whatsoever of any causal connection between the import and what foreign sovereigns or nationals may or may not do.

B. Defendants' Position Is Based, Improperly, On A Proposed Rule That Was Never Adopted.

Defendants state their authority to apply the MMPA extraterritorially and to deny the Aquarium's permit based on an alleged increase in foreign demand for beluga whales for public display derives from language in a 1993 proposed rule that "was not included in the Final Rule." A.R. Doc. 8998 at 17424.[27] Not only did the proposed rule say nothing about the MMPA governing the conduct of foreign sovereigns or their nationals, the Defendants cannot rely on a proposed rule that was never promulgated. *Commodity Futures Trading Comm'n v. Schor*, 478

[27] The 1993 proposed rule stated that to issue an import or export permit, Defendants must find that "Granting [the permit] is not likely to result in a take of protected species or protected species parts other than that authorized by the permit (*e.g.,* the import or export is not likely to result in replacement takes or otherwise increase demand for protected species or protected species parts resulting in takes to meet such anticipated demand)." 58 Fed. Reg. 53320, 53342 (Oct. 14, 1993). Here, Defendants rely on the *e.g.* parenthetical excluded from the final rule.

U.S. 833, 845 (1986) ("It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute . . . ."); *Clay v. Johnson*, 264 F.3d 744, 750 (7th Cir. 2001) ("[A] proposed regulation does not represent an agency's considered interpretation of its statute, and is not entitled to deference . . . .") (*citing Schor*, 478 U.S. at 845); *Cal. Rural Legal Assistance, Inc. v. Legal Servs. Corp.*, 917 F.2d 1171, 1173 n. 5 (9th Cir. 1990) (stating that, although the final regulation was contrary to an earlier proposed regulation, the court "decline[d] to take cognizance of the proposed regulation").

Indeed, the final rule states it "implements only a part of that proposed rule" because Congress made "substantial changes to the public display provisions of the [MMPA], eliminating the basis for many of the provisions that had been included in the proposed rule." 61 Fed. Reg. 21926, 21926-27 (May 10, 1996). Beyond that statement, there is no explanation regarding why the proposed regulatory language now relied on by Defendants was deleted.

Nevertheless, Defendants chose to rely on the never-adopted language to argue the MMPA applies extraterritorially in this case and that granting the Aquarium's permit would improperly contribute to the foreign demand for belugas. A.R. Doc. 8998 at 17440. However, even if Defendants can rely on never-adopted

language, that language was never intended to address the possible creation of future demand for public display animals in foreign nations.

The intent of the deleted regulatory text was explained in an on-the-record, transcribed discussion between agency officials and representatives of the public display community. The relevant pages of that transcript are attached as Exhibit 8. Therein, Defendants explained the proposed rule's prohibition on "replacement takes" was designed principally to address takes supplying a market in marine mammal parts and, in any event, would require a showing of a direct causal link between granting the permit and additional takes. It was not intended to address takes of live animals for public display that might create a generalized interest in exhibited marine mammals that might theoretically create an interest in additional takings. *Id.* Defendants' statement that granting the permit runs afoul of the proposed rule because it could create a generalized worldwide demand for belugas, A.R. Doc. 8998 at 17424, is contrary to Defendants' own contemporaneous statements about the purpose of the never-adopted language.

Even if the proposed rule somehow provides actual legal authority for Defendants to deny the permit based on the creation of additional demand for live captures for public display in a foreign nation, Defendants offer absolutely no

proof of any cause and effect relationship in this case. Absent such evidence, there cannot be a violation of 50 C.F.R. §216.34(a)(7).

C. Defendants Applied An Incorrect Evidentiary Standard To The Aquarium's Permit Application.

50 C.F.R. §216.34(a)(7) requires that the "requested import or export will not *likely* result in the taking of marine mammals or marine mammal parts beyond those authorized by the permit." (emphasis added). Yet, Defendants state: "If the 18 whales . . . in Russia were imported to U.S. public display facilities, it is *possible* an additional 18 whales would be captured and removed from the same wild population to meet demands of public display facilities outside the U.S." A.R. Doc. 8999 at 17479 (emphasis added). By applying the wrong evidentiary standard to deny the Aquarium's permit, Defendants acted arbitrarily and capriciously.

The United States Supreme Court has held that "likely" and "possible" are materially different. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008). In *Winter*, plaintiffs sought to enjoin activities allegedly violating the MMPA by asserting irreparable harm was "possible." 555 U.S. at 22. Rejecting this position, the Court held the "'possibility' standard is too lenient" and instead required a showing that irreparable harm was "likely." *Id.* The Court expressly recognized the evidentiary difference between the two standards, with the "likely" standard

requiring a more rigorous showing than the "possible" standard. *Id.*; *see also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) ("[P]laintiffs must establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction."); *United States v. Jenkins*, 714 F.Supp.2d 1213, 1216 (S.D. Ga. 2008) (a court cannot issue an injunction unless a plaintiff shows "that [it] is likely to suffer irreparable harm") (*citing Winter*, 555 U.S. at 22) (brackets in original). While the Supreme Court addressed the differences between "possible" and "likely" in the context of a preliminary injunction, the evidentiary standards at issue in *Winter* apply equally here. Defendants acted arbitrarily and capriciously by employing an erroneous evidentiary standard. Application of the correct standard, *i.e.,* "likely," results in the approval of the Aquarium's permit for the reasons stated above.[28]

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[28] Defendants similarly misapplied the evidentiary standard with respect to 50 C.F.R. §216.34(a)(4) which requires that the proposed activity will not likely have a significant adverse impact on the species. Specifically, Defendants found there is a possibility that PBR could be exceeded and a possibility of an "undetected" population decline. From that, Defendants concluded the proposed import is "likely" to have a significant adverse impact on the wild beluga population. A.R. Doc. 8998 at 17423. Defendants' attempt to apply an evidentiary standard based on a possible circumstance fails for the reasons set forth above.

D. Because The MMPA Does Not Apply Outside The U.S., Defendants Arbitrarily And Capriciously Denied The Permit Based On What Foreign Nations And Their Citizens Might Do.

Having determined without any evidence that granting the permit will create a demand for beluga whales and result in additional collections by and for foreign nationals, Defendants argue the MMPA allows them to regulate those actions of foreign sovereigns and their citizens. Defendants assert "the ongoing, legal marine mammal capture operations in Russia [are] expected to continue" and denied the permit because the Aquarium did not provide Defendants with "the assurance that an additional 18 whales would not be captured in the future" for export to foreign display facilities with whom the Aquarium has no relationship. A.R. Doc. 8998 at 17424, A.R. Doc. 8999 at 17479. Thus, according to Defendants, before they can allow the import of animals collected in a foreign nation, that nation and its citizens must agree to not collect or export other animals of that species.

Defendants' position violates the MMPA because the MMPA does not apply to foreign citizens. Indeed, Defendants admit "[The U.S. National Marine Fisheries Service] does not have the jurisdiction to regulate capture activities in Russia." A.R. Doc. 8998 at 17437. This is consistent with *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977), which held the MMPA "did not make conduct in foreign territory unlawful." *Id.* at 1004. As the *Mitchell* court stated:

> [S]ection 1378 [of the MMPA] establishes the United States approach to international protection of marine mammals by directing the Secretary of State to initiate negotiations for both bilateral and multilateral agreements on the subject. The basic purpose of the moratorium, prohibitions, and permit system therefore appears to be the protection of marine mammals only within the territory of the United States and on the high seas.

Id. at 1002-03. Conservation in other nations is left to diplomacy.

Moreover, Defendants' demand that Russia and its nationals cease collecting and exporting beluga whales effectively precludes U.S. facilities from seeking to import such animals in the future.[29] This violates the MMPA because the MMPA allows for the *continuing* import of marine mammals for public display in the United States. Given the language and legislative history of the MMPA discussed above, it defies logic to assert Congress intended to prevent public display facilities from importing animals by requiring that a country with a live capture program for public display terminate its program upon exporting an animal(s) to the United States. Yet, this is precisely what Defendants contend must be done. Defendants' demand in the permit denial that Russia and its citizens cease collections for public display illegally repeals statutory language allowing for the continued collection and import into the U.S. of marine mammals for public display.

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[29] Russia has been the only source of wild belugas for public display since 1992. A.R. Doc. 8998 at 17444.

E. The Proposed Import Will Not Result In Additional Removals.

The permit application complied with 50 C.F.R. §216.34(a)(7). The import will not result in additional removals of marine mammals from the wild. To the contrary, the import will likely eliminate the need for future collections because the import allows for a captive, self-sustaining U.S. population. Defendants admit that granting the permit means "it is extremely unlikely" that facilities required to have a permit under the MMPA will "request a similar permit in the future." Defendants: (1) offer no evidence that importing 18 whales into the U.S. will create an international demand to collect belugas from the wild; (2) rely on never adopted regulatory language as the foundation for their legal position; (3) apply improper evidentiary standards; and (4) exceed their statutory authority by demanding that the Aquarium somehow persuade the Russian Federation to change its laws and regulations or otherwise dissuade Russian nationals from exercising their rights under Russian law.

VII. NO NURSING JUVENILES WERE COLLECTED

Defendants third basis for denying the permit applies to only 5 of the 18 whales and is based on an alleged violation of 16 U.S.C. §1372 (b)(2) and 50 C.F.R. §216.12(c) which prohibit the import of marine mammals that were nursing at the time of their collection. The Aquarium meets this standard because no

mother-calf pairs and no lactating females were collected. Absent a mother-calf pair and a lactating female, there can be no nursing juvenile. The absence of a mother-calf pair, a lactating female, and a nursing juvenile was verified by two visual inspections before collection and by veterinary examination after collection. A.R. Doc. 8999 at 17466; *see also* A.R. Doc. 8730 at 10096 (Marine Mammal Commission comment: "it does not appear that any of the animals that would be imported was nursing . . . at the time of taking").

Nevertheless, Defendants allege five of the belugas proposed for import "were potentially still nursing and not yet independent." A.R. Doc. 8997 at 17415. But Defendants offer no evidence the five animals were nursing. Instead, Defendants assert it is theoretically possible the five were nursing because the animals might have been as young as 1.5 years when collected and animals that age might still be nursing. A.R. Doc. 8998 at 17426. This conclusion is yet another example of Defendants' arbitrary speculation that is belied by the actual facts; no mother-calf pairs and no lactating females were collected.

Even if Defendants had evidence other than a theoretical possibility that some nursing was occurring, the proper standard is whether that nursing was obligatory, *i.e.,* necessary for the animal's survival. Contemporaneously with passage of the MMPA, Defendants adopted a policy regarding permit issuance

stating that the term "nursing" means obligatory nursing. Defendants determined, after notice and opportunity for public comment that this interpretation of the term "nursing" was consistent with "the purposes and policies of the [MMPA]" to protect animals in the wild. 40 Fed. Reg. 17845 (April 23, 1975). Defendants stated "Congressional guidance to date indicates that there should be a distinction. The distinction that was intended was that nursing be obligatory for sustenance and not for psychological purposes." *Id.* at 17486. Consequently, Defendants promulgated a final policy that nursing "means nursing which is obligatory for the physical health and survival of the nursing animal." *Id.*; *see also* 41 Fed. Reg. 30152, 30155 (July 22, 1976) restating and applying this policy. That policy has never been rescinded.[30]

Defendants offer no evidence the five belugas at issue were "nursing" for sustenance purposes, or that they were nursing for any purpose. Indeed, all the

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[30] The Aquarium recognizes this policy was challenged in a case involving the import of seal skins from animals that were nursing at the time they were killed. *Animal Welfare Ins. v. Kreps*, 561 F.2d 1002 (D.C. Cir. 1977). After concluding that Congress was reacting to an "emotional" desire to preclude the killing of nursing animals, the court held there was no distinction in the MMPA between obligatory nursing and any other form of nursing. *Id.* at 1011-1012. This holding is of limited application here, as that case arose in the context of lethal takings of nursing animals, which is not at issue here. Moreover, as noted above, Defendants have never changed their final rule regarding the definition of nursing as it applies to imports of live animals.

belugas took food almost immediately after collection and none sought to nurse, A.R. Doc. 8927 at 14380, demonstrates no nursing was occurring. Even if some "convenience" nursing was occurring prior to the animals' collection, the fact that the animals took food from the animal care team immediately after collection shows such nursing was not necessary for the animals' survival.

VIII. CONCLUSION

Defendants' claims that granting the permit violates the MMPA have no foundation. The permit denial was based on newly-contrived standards that depart from past and present practice, and that violate the MMPA, and on findings that have no basis in fact.

During the lengthy notice and comment period associated with the Aquarium's permit application, Defendants received almost 9,000 public comments. Some of those comments argued that permit issuance would violate the three standards cited by Defendants in denying the permit. Defendants, however, considered and rejected all of those arguments, instead determining that issuing the permit complied with the law. Defendants went so far as to write a permit allowing the import. A.R. Doc. 9048 at 18576-84. Defendants even prepared an Environmental Assessment stating why issuing the permit complied with the MMPA. A.R. Doc. 9070 at 18951-19000. Then, to reverse course, Defendants:

- arbitrarily created a new legal standard that PBR can be used to assess the sustainability of takes "only" if the marine mammal population is increasing – a standard not applied before the permit application and not applied since;
- incorrectly claimed that removals from the Sakhalin-Amur area exceeded PBR based on a claim about the number of whales that were removed for which Defendants have no supporting evidence;
- incorrectly asserted the Sakhalin-Amur beluga population is declining without presenting any evidence of a currently declining population and after admitting any such decline is only "possible" and has been "undetected";
- created the illusion of a declining population by improperly comparing a historic population number derived by multiplying the number of whales sighted on the surface by 12 with a current population number based on multiplying the number sighted on the surface by only 2, a methodology that could never survive peer review and that says nothing about the current population trend;
- improperly engaged in other statistical machinations to find a declining population such as comparing the maximum possible historic population with the minimum possible current population, another methodology that could not survive "statistics 101," let alone peer review, and that says nothing about the current population trend;
- found it is "extremely unlikely" that granting the permit would result in additional collections or imports by persons subject to the MMPA but then improperly found a violation of MMPA based on the possible actions of foreign sovereigns and foreign citizens not subject to the MMPA;
- incorrectly asserted that importing 18 whales into the U.S. will create an international demand for the removal of belugas from the wild without a shred of evidence to support that claim;
- incorrectly decided the MMPA applies extraterritorially and gives Defendants the authority to regulate actions exclusively between foreign nations and foreign citizens;

- erroneously determined that nursing animals were collected when no mother-calf pairs and no lactating females were collected and when Defendants have no evidence of any nursing behavior; and
- frustrated the purposes and policies of the MMPA to allow the prudent public display of marine mammals.

Defendants' actions are arbitrary, capricious, and not in accordance with law. Only by inventing new standards and selectively ignoring facts can Defendants justify their decision to deny the permit application. Accordingly, the Court should grant this Motion for Summary Judgment and rule that each of the three stated bases for the denial of the Aquarium's permit for importation of 18 beluga whales was arbitrary, capricious, and not in accordance with the law.

Further, Defendants' manipulation of the facts and the law to reach unsupported conclusions in order to reverse their original decision to grant the permit makes it clear that a remand in this case would be unproductive. The facts clearly support Defendants' original decision to grant the permit and, as such, there is no need for a remand to the agency for further decision-making in this case. *See McElmurray v. U.S. Dept. Agric.*, 535 F.Supp.2d 1318, 1336 (S.D. Ga. 2008) (order directing the USDA to grant an application for prevented planning credits because remand was inappropriate as the "record was inadequate to support the agency's decision, it was adequate to support Plaintiff's applications.") Moreover, an agency is not entitled to a "second bite of the apple" just because it made a poor

decision. If that were the case, administrative law would be a "never ending loop from which aggrieved parties would never receive justice." *See id.* (citing *McDonnell Douglas Corp. v. Nat'l Aeronautics and Space Admin.*, 895 F. Supp. 316, 319 (D.D.C. 1995)). And where an administrative record is inadequate to support the agency's erroneous decision, an order requiring an agency to issue a particular permit is appropriate. *See id.; see also Sierra Club v. U.S. EPA*, 346 F.3d 955, 963 (9th Cir. 2003).

Accordingly, the Court should find the legal standards for issuing the permit have been met and, therefore, the permit must be issued. Remanding for further consideration to an agency that has contrived new and inconsistent legal theories and fact findings to set aside its original decision granting the permit can only lead to more litigation and a waste of the parties' and the Court's resources. This Court should grant Plaintiff's Motion and order Defendants to issue the permit because all the statutory and regulatory requirements for granting the permit have been met.

[Signatures appear on the following page]

Dated: January 14, 2015

/s/ Daniel F. Diffley

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CERTIFICATE OF COMPLIANCE

Pursuant to local Rule 5.1, I hereby certify that the foregoing was prepared in Times New Roman 14 point font, double-spaced, with a top margin of not less than 1.5 inches and a left margin of not less than 1 inch.

This 14th day of January, 2015.

/s/ Daniel F. Diffley
Daniel F. Diffley

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing *Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment* with the Clerk of Court using the CM/ECF system, which will automatically send email notification to the following attorneys of record:

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This 14th day of January, 2015.

/s/ Daniel F. Diffley
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Exhibit 1

SUPPLEMENTAL ENVIRONMENTAL ASSESSMENT

ON THE EFFECTS OF NMFS PERMITTED SCIENTIFIC RESEARCH ACTIVITIES ON THREATENED AND ENDANGERED STELLER SEA LIONS

June 2003

Lead Agency: USDC National Oceanic and Atmospheric Administration
National Marine Fisheries Service

Responsible Official Dr. William Hogarth, Assistant Administrator for Fisheries

For Further Information Contact: Office of Protected Resources
National Marine Fisheries Service
1315 East West Highway
Silver Spring, MD 20910
(301) 713-2332

Abstract: The National Marine Fisheries Service (NOAA Fisheries) proposes to issue major amendments to two existing scientific research permits for takes of Steller sea lions (*Eumetopias jubatus*) in the wild, pursuant to the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 et seq.), and the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 et seq.). Because the two existing permits were analyzed in a previous environmental assessment, that assessment is being supplemented in order to address the potential environmental impacts of the requested amendments. The objective of the proposed action is to collect information on the ecology and biology of threatened and endangered Steller sea lions that would improve understanding of management needs for recovering the species to the point that it can be removed from ESA listing. Scientific research permits are generally categorically excluded from the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 et seq.) requirements to prepare an environmental assessment (EA) or environmental impact statement (EIS) (NAO 216-6). However, when the activities that would be authorized in a scientific research permit would have uncertain environmental impacts or unique or unknown risks, would establish a precedent or decision in principle about future proposals, may result in cumulatively significant impacts, or may have any adverse effects upon endangered or threatened species and their habitats, the preparation of an EA or EIS is required. Because some of the research in the proposed action is new and innovative, likely to be adopted by others, involves unique or unknown risks to an endangered species, and because of the present intensity and magnitude of research on Steller sea lions throughout their range, NOAA Fisheries determined that further environmental review was warranted to determine whether significant environmental impacts could result from issuance of the proposed permit amendments. Therefore, this document evaluates the relevant effects of a variety of scientific research activities on Steller sea lions under several alternative permitting options.

blubber to confirm the sampling of the animal's full blubber depth. Dr. VanBlaricom has also requested authorization to collect the biopsy samples from shoulder and back of animals in addition to the current target site – the animal's rump.

Permit No. 881-1668-01 currently authorizes the ASLC to remotely monitor, capture, hot-brand, flipper tag, collect blood and tissue samples from, and attach external scientific instruments to pups and juvenile Steller sea lions throughout their range in Alaska. The ASLC requests authorization to implant scientific instruments in, hold in captivity for up to three months, and conduct controlled feeding and endocrinology experiments on juvenile Steller sea lions captured throughout their range in Alaska. The ASLC also requests authorization to capture, tag, hot-brand and collect blood and tissue samples from pups less than six weeks old. The overall purpose of the research proposed by the ASLC is to collect information on the health status (*e.g.*, morphometrics, body composition, immunology, epidemiology, endocrinology, viral serology), physiology (*e.g.*, vitamin requirements, stress responses to capture, handling, and captivity), life history (*e.g.*, ontogenetic and annual cycles, population dynamics), foraging behavior and habitat use of Steller sea lions. The results of these studies would be used to address various objectives in the Final Recovery Plan and assist in the recovery of Steller sea lions.

Because the two existing permits were analyzed in a previous Environmental Assessment (EA), that assessment is being supplemented in order to address the potential environmental impacts of the requested amendments. The previous EA (NMFS 2002) is attached.

1.1.1 Background

Steller sea lions were listed as threatened under the ESA in 1990[3] under an emergency rule, because the numbers of Steller sea lions observed on rookeries in Alaska had declined by 63% since 1985 and by 82% since 1960. A final rule was published on November 26, 1990 and the final listing became effective on December 4, 1990. In 1997, Steller sea lions were classified as two distinct population segments under the ESA. The segment of the population of Steller sea lions west of 144°W longitude was listed as endangered, while the threatened listing was maintained for the remainder of the population in the United States.[4] The reclassifications were primarily due to information that indicated two genetically differentiated population segments, a continued decline in abundance trends, and population viability analysis models that predicted a 65-100% probability of extinction for the population from Kenai Peninsula to Kiska Island within 100 years if the trends continued. The cause of the continued decline is unknown, but the prevalent theory is that it is related to nutritional stress resulting from a change in the abundance and/or distribution of prey species caused by some combination of commercial fisheries activities and environmental changes (Alaska Sea Grant 1993; Loughlin 1998).

There has been no change in the population status and trends for either the eastern or western population of Steller sea lions since the preparation of the Environmental Assessment on the Effects of NMFS Permitted Scientific Research on Threatened and Endangered Steller Sea Lions in 2002 (NMFS 2002). Please refer to this attached 2000 EA for additional background information.

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[3] 55 FR 12645, April 5, 1990
[4] 62 FR 24345, May 5, 1997

on Steller sea lions because they do not involve additional direct takes of sea lions in the wild, but rather rely on captive animals and blood and tissue samples collected in the field by other permit holders during their permitted activities. Table 2 illustrates the numbers of sea lions authorized to be taken by various activities under these permits. A description of the methods for each activity can be found in Section 2.1.1 of the attached 2002 EA. Details of the various protocols can also be found in the applications submitted by the permit holders.[7]

No permits authorize intentional lethal takes of Steller sea lions. However, in acknowledgement of the fact that there is an inherent risk of serious injury and mortality associated with certain research activities on wild animals, all permits allow for a limited number of research-related unintentional, or incidental, mortalities. A total of 50 incidental mortalities per year (all age and sex categories) are authorized, with not more than 20 from the western population. Consistent with the broad definitions of "take" under the MMPA, ESA, and the implementing regulations of these acts, this permit condition has been interpreted by the Office of Protected Resources to include any mortality resulting from the actions or presence of the researchers while conducting permit-authorized activities. This has included, but is not limited to: deaths of pinniped pups by starvation following abandonment resulting from disturbance to a rookery or the research-related death of a lactating female; deaths of marine mammals due to adverse reactions to anesthetics or other chemical agents; deaths of marine mammals caused or precipitated by infections resulting from intrusive research procedures; deaths of animals due to capture myopathy resulting from the stress of capture and handling; and deaths of animals due to serious injuries sustained in attempts to escape or evade capture or in response to stampedes or aggressive social interactions caused by research activities.

The number of incidental mortalities allowed is based on the permit holders' estimate of the potential for such mortalities. As a mitigation measure for the Finding of No Significant Impact for the 2002 EA, not more than 20 incidental mortalities per year can be from the western, or endangered, population under any combination of permits. To further ensure that research-related mortalities do not rise to a level that could be significant, research under all permits authorizing takes of Steller sea lions must cease, pending review by NOAA Fisheries, if the total number of mortalities from the western population reaches 10, under any combination of permits. To date, no mortalities have been reported for research conducted under the permits and permits amendments issued following the 2002 EA.

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[7] The applications are available upon request from the NMFS Office of Protected Resources, Division of Permits, Conservation and Education, 1315 East-West Highway, Silver Spring, MD 20910.

APPENDIX B: DECISION MEMO REGARDING ISSUANCE OF PERMITS

NOV 12 2002

MEMORANDUM FOR: F/PR - Donald R. Knowles

FROM: F/PR1 - Eugene T. Nitta

SUBJECT: Report on the Applications for Scientific Research Permits and Amendments to Scientific Research Permits to take Steller Sea Lions [Permit Numbers 358-1564 and 782-1532; File Numbers 1016-1651, 1010-1641, 800-1664, 881-1668, and 434-1669]: Recommendation for Issuance

Abstract: Permit No. 358-1564

The Alaska Department of Fish & Game (ADF&G), Juneau, Alaska 99802-5526 (PI: Dr. Thomas Gelatt) requests a major amendment to scientific research Permit No. 358-1564. Permit No. 358-1564 authorizes the permit holder to take Steller sea lions of all ages and both sexes over a 5-year period in Alaska and British Columbia by aerial/boat surveys, capturing, handling, tagging, blood/biopsy sampling, branding, and accidental mortality. The permit holder requests authorization to administer Evans blue dye, collect additional blood and tissue samples from, and attach additional/different scientific instruments to Steller sea lions already authorized to be captured and handled, increase the frequency of aerial surveys and recaptures for purposes of scientific research, and increase the number of accidental mortalities.

Chronology

May 21, 2001	Date of application - Part 1
June 15, 2001	Application - Part 1 received complete
July 5, 2001	Application - Part 1 distributed
July 5, 2001	Application - Part 1 published in the Federal Register
July 30, 2001	Marine Mammal Commission comments received on application - Part 1
August 6, 2001	Close of public comment period
December 18, 2001	Date of application - Part 2
December 28, 2001	Application - Part 2 received complete
February 21, 2002	Date of application - Part 3
March 5, 2002	Application - Part 3 received complete
June 21, 2002	FONSI for Environmental Assessment on the Effects of NMFS Permitted Scientific Research Activities on Threatened and Endangered Steller Sea Lions signed by Assistant Administrator for Fisheries
June 27, 2002	Application - Parts 2 & 3 published in the Federal Register
June 28, 2002	Application - Parts 2 & 3 distributed
July 3, 2002	Section 7 consultation requested
July 29, 2002	Close of public comment period

August 2, 2002	Additional Marine Mammal Commission comments received
November 7, 2002	Biological Opinion issued

Abstract: Permit No. 782-1532

The National Marine Mammal Laboratory (NMML), National Marine Fisheries Service, NOAA, Seattle, WA 98115-0070 (PI: Dr. Thomas Loughlin) requests a major amendment to scientific research Permit No. 782-1532. Permit No. 782-1532 authorizes the permit holder to take Steller sea lions of all ages and both sexes over a 5-year period in Alaska, California, Washington, and Oregon by aerial/boat surveys, capturing, handling, tagging, blood/biopsy sampling, branding, and accidental mortality. The permit holder requests authorization to increase the frequency of takes by aerial surveys, include Southeast Alaska in monthly surveys, increase the number of animals to be incidentally harassed during scat collection, and increase the number of accidental mortalities. Additional procedures for animals already authorized for capture, including using gas anesthesia, branding of any animal captured, injecting Evans blue dye and deuterated water, collecting additional blood and tissue samples, and using bioelectric impedance analysis are also requested.

Chronology

May 4, 2001	Date of application - Part 1
May 23, 2001	Application - Part 1 received complete
June 7, 2001	Application - Part 1 distributed
June 8, 2001	Application - Part 1 published in the Federal Register
July 9, 2001	Close of public comment period
July 30, 2001	Marine Mammal Commission comments received on application - Part 1
December 14, 2001	Date of application - Part 2
December 21, 2001	Application - Part 2 received complete
June 21, 2002	FONSI for Environmental Assessment on the Effects of NMFS Permitted Scientific Research Activities on Threatened and Endangered Steller Sea Lions signed by Assistant Administrator for Fisheries
June 27, 2002	Application - Part 2 published in the Federal Register
June 28, 2002	Application - Part 2 distributed
July 3, 2002	Section 7 consultation requested
July 29, 2002	Close of public comment period
August 2, 2002	Additional Marine Mammal Commission comments received
November 7, 2002	Biological Opinion issued

Abstract: File No. 1010-1641

The Aleutians East Borough, Juneau, Alaska 99801 (PI: Kate Wynne) requests a scientific research permit to take Steller sea lions by harassment during aerial surveys, vessel-based behavioral observations, and scat collection. The purpose of the research is to provide additional information on seasonal prey consumption by Steller sea lions through scat collection at rookeries and haulouts along the Alaska Peninsula and Eastern Aleutian Islands and to improve

- APHIS remains concerned about any protocol that calls for fasting of an animal. Such experiments are noncompliant with the AWA requirements for animals to be provided full ration of food and water daily, unless there is an approved protocol with definite endpoints.

- APHIS remains concerned about the use of anesthesia when doing hormonal studies because the risk to the animal is usually greater than the potentially flawed data obtained.

- APHIS remains concerned about blood collection techniques in light of the past necropsy report of peri-puncture hemorrhage that contributed to the death of a marine mammal.

- The proposed transportation arrangements for the animals is not currently compliant with the AWA.

Applicant response: The activities of primary concern to APHIS relate to temporary captivity and associated studies. These activities are not being considered for authorization at this time, as noted above. The applicant for File No. 881-1668 has provided responses to the comments from the APHIS (see attached). The NMFS is satisfied with the applicant's responses. In addition, the permit contains conditions to address many of these concerns, including proper IACUC reviews and space requirements.

Public Comments: Substantial comments were received from the Humane Society of the United States (HSUS), the Trustees for Alaska (representing Greenpeace, Oceana, Sierra Club, and The Ocean Conservancy), and a qualified veterinarian, regarding the applications for permits and permit amendments. Their complete comments are attached; the following is a summary of the main issues and concerns raised.

HSUS Comments: The HSUS agrees that it is critical to develop a better understanding of the causative factors in the declines of Steller sea lions; however, it is not clear that there has been adequate coordination of the various research proposals, nor is it clear that the proposals meet all of the conditions stipulated in the MMPA. Of the three alternatives provided in the EA, HSUS favors Alternative 3, reallocating intrusive research so that only the eastern portion of the stock would be affected unless a project was directly related to conservation and management needs for that stock. The HSUS does not agree that the finding of negligible impacts, particularly for the western stock, is well founded. The HSUS general and specific comments are summarized as follows:

(1) <u>Compliance with issuance criteria</u>: While individual permit applications may comply with some or all of the permit issuance criteria specified at 50 CFR 216.34, it is not clear that these proposals, in sum, can comply with all of them, particularly regarding ensuring humaneness and avoiding significant adverse impacts on marine mammal species or stocks. The HSUS recommended that at least all or part of two of the seven permit applications be denied based on these issuance criteria..

(2) <u>Monitoring and Coordination</u>: There is apparent duplication in sampling, and it is not clear how NMFS can ensure compliance with permit issuance criteria given that it will only develop a monitoring plan after the permits have been issued and research is underway. The time for developing a plan to monitor potential effects is before the research is undertaken.

It is not clear whether or how a 5-year permit will be halted to allow evaluation of longer-term effects. It is clear that a plan to monitor lethal and sub-lethal effects is not in place at this time. The number of animals that will be harassed/disturbed by the various projects is enormous; harassing this large a number of endangered or threatened species should not be taken lightly. The proposed monitoring plan described in the EA does not appear to consider the stress of the cumulative effects of being captured multiple times, and of being harassed during survey activities and scat collection on rookeries.

(3) Research related mortality: There appears to be an unacceptably high level of stress and mortality allowed for a stock that is already declining in many parts of its range. It is not clear whether NMFS' proposal to force consultation among researchers to assure that not more than 20 animals are incidentally killed will be time-sensitive or whether consultation will take place before the number is exceeded given that a monitoring plan does not appear to be in place. NMFS' argument that these 20 mortalities per year from the western stock represent less than 10% of the PBR and are therefore negligible, does not appear to account for the other potential sources of mortality for that stock (i.e., native harvest and fisheries related mortality). The MMPA did not intend for each user to have access to the entire PBR (nor one assumes the entire number defining the uppermost bound of negligible impact) such that the cumulative impact is well over PBR. The most conservative estimate for mortality from harvest and fisheries interactions is 199 animals per year from the western stock, which is only 9 less than the entire PBR. If scientific permit-related mortalities for this stock can reach 10 (the number that merely triggers consultation among permit holders), then the entire PBR will have been exceeded. The HSUS feels that insufficient attention was given to consideration of post-capture myopathy in the EA.

(4) Specific comments on application to amend Permit No. 358-1564 (ADF&G): The activities under this permit are Alaska-wide and therefore likely to overlap with other proposed permitees, allowing multiple sampling of animals unless there is strict coordination. The HSUS suggests that the ADF&G spend more effort trying to re-sight branded animals and analyze the information from re-sighting, rather then continuing to brand animals. If continued or additional branding is authorized, the applicant must be required to monitor post-branding effects and provide evidence of little or no effects of their various activities on rookeries.

(5) Specific comments on application to amend Permit No. 782-1532 (NMML): The HSUS reiterates their concern, expressed in the specific comments on Permit No. 358-1564, about the effects of hot branding, specifically on pups. The HSUS points out that the recovery time for animals immobilized using gas anesthesia (fully recovered within 8 hours) is longer than the period of time that animals will be observed under this permit. Without post-release monitoring, the fate of these animals, if released prior to 8 hours, will apparently be unknown. The HSUS reiterates that the applicant should institute a post-capture monitoring program and assessment of condition.

(6) Specific comments on application File No. 1016-1651 (Dr. VanBlaricom): The HSUS states that it should be mandatory that the proposed collection of biopsy samples under this permit be done in conjunction with NMML and ADF&G to avoid duplicative sampling of animals.

(7) Specific comments on application File No. 800-1664 (Dr. Davis): It is not entirely clear why Dr. Davis, who is receiving funding from two other permit applicants (NMFS and ASLC) cannot conduct his activities under the auspices of their permits rather than seeking

lacerated, the animal may die days later. If the dart penetrates or injures an artery within a muscle belly or a large superficial vessel such as the jugular vein, a fatal exsanguination [loss of blood] could occur within several hours. The application does not address this possibility.

(3) Accidental lethal takes are requested but there is no description of how animals will be monitored or assessed after darting or for how long. In the event of death, there is no indication that a necropsy will be performed to determine what occurred and how it might be prevented in the future, nor is there mention of tissue sampling/archiving.

(4) The risk of how a misplaced firing might impact the pup of a lactating female is not addressed, nor is the possibility of inadvertently hitting and injuring a young pup addressed. If the dart penetrates the mammary gland, the milk pouring from the wound and leaking into the underlying tissues could create a serious inflammatory reaction that would not only affect the health of the female but also the survival of the pup if the female develops mastitis [inflammation of the mammary gland].

Response to public comments:

- Note that the ASLC is not proposing to begin the controversial tag implant studies at this time, pending completion of a tag validation study to be conducted on California sea lions under another permit. In addition, NOAA Fisheries has deferred authorization of the tag implantation, as well as the proposed temporary captivity and associated studies pending further environmental analyses.

- NMFS Response to comments on Finding of No Significant Impact and compliance with issuance criteria: NMFS has assessed the effects of the increased scope of the research activities on Steller sea lions and, based on this assessment, and as indicated in Sections 2 and 4 of the Environmental Assessment, believes the activities to be conducted under the Proposed Action neither result in a significant increase in the level of take over the status quo such that an EIS is required, nor does the proposed action increase the level of takes such that the categorical exclusion made in previous determinations under NEPA should be altered (Sections 2.2, 4.1-4.6). The measures contained in this action may be controversial because some sectors of the public oppose some of the methodologies used in the proposed action. However, the most controversial of the methodologies [hot branding] is a minor component of the proposed action (See Chapter 4 of EA). Due to the recent jeopardy determination on the effects of the Bering Sea/Gulf of Alaska groundfish fisheries and the FY2001 congressional appropriations for the implementation of Steller sea lion protective measures, there is a heightened expectancy that the results from permitting research under the Proposed Action will provide information necessary such that the conservation and management of Steller sea lions might eventually result in a reduced impact on the commercial fisheries. In this regard the "Steller Sea Lion" issue, including the release of these permits, might be considered controversial. However, the need for the research outlined in the proposed action are recognized by all public sectors as being essential. In that regard, while the issue may be controversial, the issuance of these permits is not.

  Further, a Biological Opinion analyzing the impacts of proposed action - the issuance of scientific research permits as identified in the EA - on Steller sea lions was issued by NMFS. NMFS has determined that the status quo alternative would not pose

harm to a listed species, nor would it result in jeopardy or adverse modification of critical habitat for Steller sea lions.

- NMFS response to comments on mortality: Although the definition of PBR is included in the MMPA, NMFS implemented the definition of PBR for endangered species in a more conservative manner. NMFS used a default value for a recovery factor of 0.1 for endangered species of marine mammals in calculating a PBR. This default value in the PBR calculation would reserve 90% of annual net production for recovery of endangered species and allow only 10% of annual net production to be authorized for taking incidental to human activities. NMFS concluded that keeping human-caused mortality at or below PBR calculated with a recovery factor of 0.1 would increase the recovery time of endangered marine mammals by no more than 10%, and this conclusion was supported by extensive simulation modeling at a later date (Wade, P.R. 1998. Calculating limits to the allowable human-caused mortality of cetaceans and pinnipeds. Marine Mammal Science 14:1-37). Research-related mortality at a level of 20 sea lions per year or less would not have an appreciable impact on the trend of the western stock and would not appreciably affect its prospects for recovery. Therefore, allowing a research accidental mortality limit of up to 20 sea lions per year would have a negligible impact on the western stock of Steller sea lions regardless of other human-caused mortality affecting the stock.

- NMFS response to comments on research coordination and need for monitoring: The permits contain a condition requiring development of a plan for coordinating research among permit holders and for monitoring the effects of such research within six months of permit issuance. This plan would be submitted to PR for review and final approval, and the plan would be implemented by amending the permits to include any additional conditions, as appropriate. In addition, the term of all new permits is limited to the duration of the two existing permits. In other words, no takes of Steller sea lions for scientific research have been authorized beyond June 30, 2005.

- Applicant responses to public comments: The responses of applicants for File Nos. 1016-1651, 800-1664, and 881-1668 to the comments from the public are attached. The applicants have responded to the satisfaction of the NMFS. In addition, the permits contain conditions regarding research coordination and monitoring, as well as measures intended to minimize the potential for adverse impacts and unnecessary duplication. The applicant for File No. 434-1669 did not respond, however, the permit has been conditioned to address the concerns expressed regarding activities in that application. There were no comments specific to Permit Nos. 358-1564 and 782-1532 that required responses from the Permit Holders.

Exhibit 2

ENVIRONMENTAL ASSESSMENT

ON THE EFFECTS OF NMFS PERMITTED SCIENTIFIC RESEARCH ACTIVITIES ON THREATENED AND ENDANGERED STELLER SEA LIONS

June 2002

Lead Agency:	National Oceanic and Atmospheric Administration National Marine Fisheries Service
Responsible Official	Dr. William Hogarth Assistant Administrator for Fisheries
For Further Information Contact:	Office of Protected Resources National Marine Fisheries Service 1315 East West Highway Silver Spring, MD 20910 (301) 713-2332

Abstract: The National Marine Fisheries Service (NMFS), Office of Protected Resources, proposes to issue five new scientific research permits, and major amendments to two existing scientific research permits for takes of Steller sea lions (*Eumetopias jubatus*) in the wild, pursuant to the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 et seq.), and the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 et seq.). The objective of the proposed action is to collect information on the ecology and biology of threatened and endangered Steller sea lions that would improve understanding of management needs for recovering the species to the point that it can be removed from ESA listing. The permitted research under the preferred action alternative would exceed the categorical exclusion (National Environmental Policy Act (NEPA); 42 U.S.C. 4321 et seq.) from the need to prepare an EA or EIS in that 1) it involves controversial techniques; 2) the proposed activities involve unknown or highly uncertain risks; 3) and the potential for an adverse effect on an endangered and threatened species because of the significant increase in research activity in recent years, which is largely related to recent funding opportunities, warranted a further environmental review to determine whether significant environmental impacts could result from issuance of the proposed scientific research permits and permit amendments. Therefore, this document evaluates the relevant effects of a variety of scientific research activities on Steller sea lions under several permitting alternatives. The analyses considered special mitigation measures addressing duration of research, developing a monitoring plan, limiting accidental mortality, and ensuring research coordination. With these mitigation measures in place, issuing the permits as requested would not have a significant effect on the human environment.

Steller sea lions (*Eumetopias jubatus*) were listed as threatened under the Endangered Species Act (ESA) in 1990 under an emergency rule, because the numbers of Steller sea lions observed on rookeries in Alaska had declined by 63% since 1985 and by 82% since 1960. A final rule was published on November 26, 1990 and the final listing became effective on December 4, 1990. Steller sea lions were determined to be threatened, i.e., likely to become an endangered species within the forseeable future throughout all or a significant portion of their range (where endangered is defined as in danger of extinction throughout all or a significant portion of their range) and in immediate need of implementation of the protective measures of the ESA, due to the large and precipitous nature of the population decline. Management actions included monitoring of incidental take in fisheries and establishment of a Recovery Team to provide recommendations on conservation measures that would promote recovery of the species to a level appropriate to justify removal from ESA listing (a Recovery Plan was published in 1992). Protective regulations promulgated at the time of the listing have included prohibiting shooting at or near sea lions, establishing buffer zones of three nautical miles around principal Steller sea lion rookeries where no vessels are allowed to operate (except by special permission), and establishing an incidental kill quota. In 1997, Steller sea lions were reclassified as two distinct population segments under the ESA, and the segment of the population of Steller sea lions west of 144°W longitude was reclassified as endangered, while the threatened listing was maintained for the remainder of the population in the United States. The reclassifications were primarily due to information that indicated two genetically differentiated population segments, a continued decline in abundance trends of the western population segment, and population viability analysis models that predicted a 65-100% probability of extinction for the western population from Kenai Peninsula to Kiska Island within 100 years if the trends in the western population continued. The cause of the continued decline is unknown, but the prevalent theory is that considerable evidence from studies in the 1970s and 1980s supports the hypothesis that nutritional stress resulting from a change in the abundance and/or distribution of prey species caused by some combination of commercial fisheries activities and environmental changes (Alaska Sea Grant 1993; Loughlin 1998) resulted in reductions in the rate of recruitment or reproductive success. This theory still cannot be rule out although recent behavioral and physiological research in the 1990s does not directly support the hypothesis (Alaska Sea Grant 2001). Because commercial fisheries may compete with Steller sea lions for prey, either directly or indirectly, fishery management plans and federal regulations have recently been designed to reduce the potential for adverse effects of fisheries on Steller sea lion populations. However, the effectiveness of these plans and regulations is uncertain, as is the exact nature of the effect of fisheries on sea lions.

The Final Recovery Plan for Steller Sea Lions recognized that the factors that caused the decline were poorly understood and indicated an urgent need to identify actions that are most likely to stop the population decline, while continuing ongoing research and developing new programs designed to improve understanding of Steller sea lion management needs. The Final Recovery Plan identified administrative, management and research priorities needed to promote conservation of the Steller sea lion. Among the highest priority management actions were monitoring the status and trends of sea lions of sea lion abundance throughout their range, and monitoring incidental and subsistence takes. The highest priority administrative actions were focused on regulating fisheries (i.e., areas, seasons, operations, catches), identifying and designating critical habitat, recommending a maximum allowable take and reducing incidental take. Research needs considered most critical to conservation and management were to develop survey procedures, determine food requirements, and determine feeding areas and strategies. Somewhat lower priority was given to such things as determining stock identity, determining seasonal use patterns, collecting and sampling animals, determining pup production and mortality, marking and monitoring pups and females, measuring and modeling the effects of

CHAPTER 2 ALTERNATIVES INCLUDING THE PROPOSED ACTION

This chapter describes the range of potential actions (alternatives) determined reasonable with respect to achieving the stated objective, as well as alternatives eliminated from detailed study. This chapter also summarizes the expected outputs of, and any related mitigation for, each alternative.

2.1 General Considerations

Steller sea lions are listed as threatened (eastern population) and endangered (western population) under the ESA; more specific information on the status of both populations and the life history of Steller sea lions in general is provided in Section 3.1. Although evidence suggests the eastern population of Steller sea lions is either stable or increasing throughout its range in Alaska, the western population is declining in most of its range, and the population abundance is at approximately 25% of the size in the 1970s. As discussed in Chapter 1, substantial resources have recently been dedicated to investigating the cause of the continued decline and identifying conservation measures that can be taken to recover the species to a level where it can be removed from listing under the ESA. These investigations can be split into two general categories for the purposes of research permitting criteria: (1) research based on data that can be collected without need of a permit because it does not involve intrusive procedures or disturbance (i.e., takes), and (2) research based on data that can only be obtained by disturbance or intrusive research procedures, which require a permit because they involve handling or otherwise disturbing (taking) animals. For example, details of the distribution and behavior (e.g. diving patterns, diet composition) of Steller sea lions at sea are important in understanding the potential effects of fisheries on the population. The utility of simple, observational studies for discerning foraging patterns in marine mammals is limited, but telemetry instruments attached to sea lions can provide details on location, dive depth and duration, and, in some cases, prey ingestion events. Similarly, observational studies can provide information on the presence or absence of lactating females on a rookery (and on the amount of time a pup spends suckling), which can be used to infer foraging intervals and durations. However, only telemetry studies can provide details on habitat use (where the animals go to feed and how long they spend diving to capture prey) that can be used in making management decisions about where to allow fisheries activity. Further, observational studies cannot reveal detailed information on the health and body condition of animals, which may be related to nutritional stress. Physical examination by a qualified expert, and blood and tissue samples, are needed for collection of these data. Information about population structure (degree of genetic mixing or isolation) and dispersal rates requires genetic analyses of tissue samples.

An important consideration in determining whether to authorize these proposed research activities by permit, is whether the information expected to be gained will contribute to fulfilling a research need or objective identified in the Final Recovery Plan for Steller sea lions or will contribute significantly to identifying, evaluating, or resolving conservation problems for Steller sea lions. The primary purpose of the Final Recovery Plan for Steller Sea Lions, written in 1992, was to propose a set of actions that would minimize any human-induced activities that may be detrimental to the survival or recovery of the population. The immediate objectives of the Plan were to identify factors that are limiting the population, actions necessary to stop the population decline, and actions necessary to allow the population to increase. The Plan identifies the specific management actions that must be taken to ensure that the species recovers to the point that it can be removed from ESA listing, and recommends general and specific research programs intended to collect data that would improve understanding of management needs for recovering Steller sea lions. These recommendations include research to identify habitat

CHAPTER 3 AFFECTED ENVIRONMENT

This chapter presents baseline information necessary for consideration of the alternatives, and describes the resources that would be affected by the alternatives, as well as environmental components that would affect the alternatives if they were to be implemented. The effects of the alternatives are discussed in Chapter 4.

The action area being considered encompasses the entire range of Steller sea lions in California, Washington, Oregon, and Alaska, including the eastern (threatened) and western (endangered) populations. This area includes both state waters and the United States Exclusive Economic Zone off the coasts of California, Washington, Oregon, and Alaska. However, as most of the proposed action would focus on animals located on or near rookeries and haulouts, the action area could be further defined as all known rookeries, haulouts, and waters immediately surrounding these areas. Some of the proposed research would occur within the Alaska Maritime National Wildlife Refuge, which includes over 3,000 islands, islets, rocks, pinnacles, and headlands from northwest Alaska into the Bering Sea and along 4,800 miles of Alaska's coastline and the Aleutian chain. Most of the refuge (2.64 million acres) is designated as wilderness and has the most diverse wildlife species of all the refuges in Alaska, including between 15 to 30 million birds (80% of all Alaska seabirds, including species of puffins, kittiwakes, murres, petrels, auklets, murrelets, and gulls) representing about 55 species. In addition to Steller sea lions, marine mammals such as harbor seals, walrus, sea otters, polar bears, and whales are also common within the refuge. Other animals within the refuge include bald eagles, peregrine falcons, bears, caribou, musk oxen, river otters, and foxes. Further, the refuge contains many Aleut archeological sites as well as remnants of the only World War II battles fought on U.S. soil. Military clearance is required to visit some islands of the Aleutian Chain (Adak, Shemya, Amchitka, and Attu).

A detailed description of the distribution, population status and trends, and life history of Steller sea lions is contained within the Final Supplemental Environmental Impact Statement on Steller Sea Lion Protective Measures in the Federal Groundfish Fisheries Off Alaska (NMFS 2001) and in the Fisheries Management Plan Biological Opinion (NMFS 2000). The following is a brief summary of the relevant details.

The estimated minimum population of Steller sea lions is 69,434, which includes animals in California, Washington, Oregon, and British Columbia. This represents a total of 30,403 sea lions in the eastern population, of which 5,991 are pups, and 39,031 sea lions in the western population, of which 9,373 are pups (NMML 2000). The rate of decline in the western stock averages 5% per year but has not been uniform: in the eastern Gulf of Alaska the rate of decline is 10.52% per year while in the eastern Aleutian Islands, the rate is 1.75% per year (Loughlin and York, in press). Conversely, trend counts indicate the size of the eastern stock has increased at an average rate of 5.9% per year between 1979 and 1997 (Calkins et al. 1999).

Steller sea lion males are typically sexually mature at three to seven years, but are not usually large enough to compete for females until they are nine to 11 years old (Pitcher and Calkins 1981; Gisiner 1985). Females, which tend to be less than one-third the size of males at maturity, are sexually mature at three to six years. Male Steller sea lions rarely live beyond their mid-teens, while females may live up to 30 years old. Adult males and females congregate at rookeries in the spring of each year, where most adult females will give birth and be mated. Females give birth to a single pup between mid-May and mid-July, with the highest frequency of births occurring during mid-June (Calkins and Pitcher 1982; Merrick 1987; Chumbley et al.

rookeries (Kenyon and Rice, 1961).

In the Bering Sea and GOA, the Steller sea lion diet consists of a variety of schooling fishes (e.g., pollock, Atka mackerel, Pacific cod, flatfish, sculpin, capelin, Pacific sand lance, rockfish, Pacific herring, and salmon), as well as cephalopods, such as octopus and squid (Calkins and Goodwin 1988, Lowry et al. 1982, Merrick and Calkins 1995, Perez 1990). Additional information on the diet and foraging habitats of the Steller sea lion is presented in Section 3.1.1 of this document.

The U.S. western stock has continuously declined since the 1960s, from around 177,000 (excluding pups) in the 1960s to 33,600 (excluding pups) in 1994. The U.S eastern stock has remained relatively stable (Loughlin et al. 1992, Merrick et al. 1987). In 1990, the Steller sea lion was listed as threatened under the Endangered Species Act (ESA) throughout its range (see Section 3.4 of this document). A recovery plan was completed in 1992. In 1997, the National Marine Fisheries Service (NMFS) reclassified Steller sea lions as two distinct population segments, with the population segment west of 144°W, or approximately at Cape Suckling reclassified as endangered. The eastern stock remains listed as threatened.

External Factors and Consequences : It was not until after the 1950s that large numbers of Steller sea lions were taken in the commercial fisheries in the regions (Alverson 1992). The take of Steller sea lions was substantial during this period with over 20,000 animals believed to have been incidentally killed in the foreign JV fisheries from 1966 to 1988, although data from this period is not complete (Perez and Loughlin 1991). Other fisheries such as state-managed salmon drift and set gill net fisheries contributed to the overall take of Steller sea lions in the past. Intentional shooting of Steller sea lions also occurred in several near shore fisheries and this continued to some extent after the enactment of the Marine Mammal Protection Act (MMPA) in 1972 until the early 1990s when they were listed as threatened under the Endangered Species Act (ESA) and a ban on shooting at Steller sea lions was enacted (Hill and DeMaster 1999).

Little information is available on the fluctuations of Steller sea lion population prior to the 1960s but it is suspected that decreases in population numbers were likely due to human exploitation. Direct take of Steller sea lions during this early period has been estimated to range between about 300–500 animals annually (Hayes and Mishler 1991, Trites and Larkin 1992). Take of Steller sea lions in commercial fisheries after this period was considerable, with approximately 1,500 per year from 1966 to 1977 and 650 per year from 1978 to 1988. However, take of Steller sea lions had dropped dramatically to an average of 26 per year in the 1990s (Perez and Loughlin 1998, NMFS 2000c).

It is likely that historic commercial harvests of Steller sea lions for pelts also have had residual effects on the present day population levels of Steller sea lions in certain areas. However, a drastic decline in Steller sea lion numbers has still occurred in some North Pacific regions since protection for the species was instituted.

Foreign/joint venture fisheries and other fisheries were considered to had have negative effects on Steller seal lion populations and were rated as "-" for all effects category. Past subsistence and commercial harvest were also rated as "-" for incidental take and disturbance. Residual past influences were identified for all effects categories.

Exhibit 3

Environmental Assessment for Issuance of Permits to take Steller Sea Lions by harassment during surveys using unmanned aerial systems

June 2014

Lead Agency:	USDC National Oceanic and Atmospheric Administration National Marine Fisheries Service, Office of Protected Resources
Responsible Official:	Donna Wieting, Director, Office of Protected Resources
For Further Information Contact:	Office of Protected Resources National Marine Fisheries Service 1315 East West Highway Silver Spring, MD 20910 (301) 427-8400
Location:	Coastal waters of Alaska, Washington, Oregon and California

Abstract: The National Marine Fisheries Service (NMFS) proposes to issue permits to take Steller sea lions for research, including during surveys using unmanned aerial systems (UAS). The effects of various research methods on Steller sea lions were evaluated in a Programmatic Environmental Impact Statement on the Steller Sea Lion and Northern Fur Seal Research Programs (PEIS; NMFS 2007). That PEIS included analysis of the effects of aerial surveys using manned aircraft and did not consider the effects of UAS because they were not a proposed survey method at the time the PEIS was prepared. This EA supplements the analysis in that PEIS to evaluate the effects of takes by surveys using UAS. It also evaluates new information on the status of the species as it relates to the effects of permit issuance.

review the request, determine whether the proposed activities meet issuance criteria, and make a decision regarding permit issuance.

The applicants' specific needs to take marine mammals and endangered species (which prompted their permit requests) are outlined in their applications on file with NMFS. Under the MMPA, applicants must demonstrate that taking a marine mammal is necessary to further a bona fide scientific purpose. The MMPA defines bona fide as scientific research on marine mammals, the results of which: likely would be accepted for publication in a refereed scientific journal; are likely to contribute to the basic knowledge of marine mammal biology or ecology; or are likely to identify, evaluate, or resolve conservation problems.

1.4. Scope of Environmental Assessment

The decision before NMFS is whether the takes as proposed by the permit applicants satisfy statutory and regulatory issuance criteria. In deciding to issue a permit, NMFS may impose mitigation, monitoring, and reporting requirements deemed necessary to ensure the permitted taking of marine mammals and ESA-listed species is consistent with the purposes and policies of the MMPA and ESA.

This EA evaluates potential impacts from issuance of the permits proposed by the applicants, and a reasonable range of alternatives. NMFS decision regarding permit issuance is in direct response to an application for the activities as proposed by the applicant. It is not reasonable to consider issuance of permits for activities other than those proposed in the applications, or to consider issuance of permits to entities that did not submit applications.

The action area for the PEIS included the entire ranges of Steller sea lions and northern fur seals in United States (US) waters and on the high seas, including coastal Alaska, Washington, Oregon, and California. The PEIS describes affected resources in the action area, including the status of Steller sea lions, northern fur seals, and other marine life potentially affected by permit issuance. The PEIS description of the action area and affected environment are hereby incorporated by reference. This EA updates information on the status of the species that is relevant to potential impacts of the proposed action.

NMFS concluded that issuance of permits under the preferred alternative in the PEIS in general, and at the proposed levels of taking in the initial 11 permits in 2007, and the 12 new permits in 2009, would not result in significant adverse impacts on any component of the human environment. In most cases, the effects were limited to adverse impacts on the marine mammals that were the subject of the taking. With the exception of specified numbers of incidental mortality, the effects on marine mammals were found likely to be minor, transitory, and recoverable with no significant impact on the populations or species. The taking of marine mammals during permitted research was not likely to adversely affect any other component of the human environment. The PEIS description of research methods and analysis of potential impacts are hereby incorporated by reference.

The 2007 PEIS evaluated impacts on the human environment from issuance of permits for takes resulting from a broad range of research methods, including everything proposed in the six pending applications except harassment from UAS. This EA describes use of UAS for aerial surveys of Steller sea lions and evaluates potential impacts from permitting the takes of marine mammals that would result from those surveys.

hot-branded flipper-tagged, swabbed, and skin biopsied, with 50 also having blood and hair samples collected. Non-target species that may be taken incidentally include northern fur seals (*Callorhinus ursinus*) in Alaska, California sea lions (*Zalophus californianus*) and northern elephant seals (*Mirounga angustirostris*) in Washington, Oregon, and California, and harbor seals (*Phoca vitulina*) in all states. Samples may be exported and re-imported. Authorization for annual unintentional mortality of 5 SSL from the Western DPS and 9 SSL from the Eastern DPS is requested.

File No. 18537 (ADFG). This application supports continuation of ADFG's long-term Steller sea lion (SSL) research program. The applicant requests takes during research activities that incorporate improved methodology based on previous work authorized under permit no. 14325 and subsequent modifications, including: incidental disturbance during aerial, skiff- and ground-based count and brand resight surveys; captures supporting marking, external instrument attachment, and physiology, toxicology, feeding ecology and health sampling; and permanent marking of pups and older age classes for describing vital rates and intra-/inter-Discrete Population Segment (DPS) movement. The applicant also requests takes by incidental disturbance of northern fur seals (*Callorhinus ursinus*), California sea lions (*Zalophus californianus*), and harbor (*Phoca vitulina*), spotted (*Phoca largha*), ribbon (*Histriophoca fasciata*), ringed (*Pusa hispida*) and bearded seals (*Erignathus barbatus*) are also requested due to proximity of isolated individuals to the study area. Authorization for annual unintentional mortality of 5 SSL from the Western DPS and 10 SSL from the Eastern DPS is requested.

File No. 14327 (NMML). The applicant is requesting a five-year amendment to permit no. 14327. The permit was issued on August 17, 2009, for takes related to investigating population status and trends, demographic parameters, health and condition, and foraging ecology of northern fur seals (Callorhinus ursinus) in U.S. waters, including rookeries and haulouts in California and Alaska. Research on the San Miguel Island stock involves: capture, restraint, sampling, and incidental disturbance. Research on the Eastern Pacific stock involves: capture, restraint, sampling, and incidental disturbance. The permit also authorizes research-related mortality of fur seals from the San Miguel Island Stock and the Eastern Pacific stock. Western DPS Steller sea lions and California sea lions may be harassed annually incidental to the research.

A five-year amendment is requested to continue the long term monitoring and assessment of Northern fur seal population and demographic parameters; health and disease trends; and foraging habits and ecology. Specifically, the requested amendment will: add new methods (aerial surveys) and authorize associated incidental disturbance; edit methods (tag resighting observations) and authorize increased associated incidental disturbance; authorize existing procedures (nasal, vaginal, and fecal swab sampling) for/at other existing projects/locations; authorize new procedures (ocular swab and vibrissae sampling); add new species (harbor seals) and authorize their disturbance incidental to northern fur seal research activities; and, modify protocols (tooth extraction, pup production estimates). The permit amendment would allow 22 research-related mortalities per year from the Eastern Pacific Stock and 14 from the San Miguel Island stock.

File No. 18438. The Alaska SeaLife Center (ASLC) requests a five-year permit to conduct Steller sea lion population monitoring and health, nutrition, and foraging studies to provide data on pup and juvenile survival, reproductive rates, diet, epidemiology, endocrinology,

Exhibit 4

2005 WL 2861375 (D.D.C.) (Trial Pleading)
United States District Court, District of Columbia.

THE HUMANE SOCIETY OF THE UNITED STATES, 2100 L Street, N.W. Washington, DC 20039 will Anderson 2122 8th Avenue North, #201 Seattle, WA 98109 and Sharon Young 22 Washburn Street Sagamore Beach, MA 02562, Plaintiffs,

v.

DEPARTMENT OF COMMERCE, 14th & Constitution Avenue, N.W. Washington, DC 20230 Carlos M. Gutierrez, Secretary of the United States Department of Commerce 14th & Constitution Avenue, N.W. Washinton, DC 20230 Conrad C. Lautenbacher, Jr., Administrator, National Oceanic and Atmospheric Administration 14th & Constitution Avenue, N.W. Washinton, DC 20230 William T. Hogarth, Assistant Administrator, National Marine Fisheries Service 1315 East-West Highway Silver Spring, MD 20910 and National Marine Fisheries Service, 1315 East-West Highway Silver Spring, MD 20910, Defendants.

No. 1:05CV01392.
September 14, 2005.

Amended Complaint

Latham & Watkins, David J. Hayes (DC Bar #252130), James R. Barren (DC Bar #441674), Kimberly McCormick, Sara K. Orr, 555 Eleventh Street, N.W. Washington, DC 20004 (202) 637-2200, Attorneys for Plaintiffs the Humane, Society of the United States, will Anderson, and Sharon Young

1. Plaintiffs, The Humane Society of the United States ("HSUS"), Mr. will Anderson, and Ms. Sharon Young, bring this action to challenge the issuance by the Secretary of Commerce ("Secretary"), via the National Marine Fisheries Service ("NMFS"), of multiple scientific research permits authorizing intrusive research activities involving, and the associated killing of, endangered and threatened Steller sea lions. The government has approved reseach activities that will result in Steller sea lion mortality that exceeds the very threshold established by Coungress in determining whether a given impact to an endangered or threatened marine mammal species could have irreversible effects (namely, the Potential Biological Removal Level or "PBR Level"). In other words, the secretary has approved activities that, by definition, could have a significant, irreversible impact on the ability of this protected species to survive.

2. The government has also approved these questionable research activities without the required environmental review. By law, when a federal agency undertakes actions that could result in a significant impact to the environment (here, the Steller sea lion species), it must prepare an Environmental Imapact Statement ("EIS") evaluating the impacts of its proposed action. In this case, the government has conceded that it, too, is concerned by the research activities on the Steller sea lions and has expressed its plan to prepare an EIS that will evaluate the impacts to the species resulting from research and other activities that threaten the sea lions' existence. The government's expression of concern, however, is too little, too late. An EIS was mandated by law in connection with the proposed action *before NMFS took final action, not after the action when the impacts giving rise to the EIS will have already occurred.*

3. The government has no legal basis for taking a "kill first, study later" approach, particularly where, as here, the species suffering the impact is protected by law precisely because any further decline in its number could result in its extinction. In short, the Secretary has violated the law by issuing multiple research permits to a wide variety of entities that allow intrusive, duplicative, uncoordinated, and unnecessary research on Steller sea lions - marine mammals protected by the Marine Mammal Protection Act and the Endangered Species Act because of their rapidly declining populations. By (i) issuing scientific research permits allowing so many incidental mortalities that the research actually threatens the survival of this species, (ii) failing to

conduct an adequate cumulative effects analysis of the effects of its proposed action, (iii) ignoring the cumulative effects of the authorized research activities in the Final Environmental Assessment ("EA"), (iv) failing to adequately evaluate alternative actions; (v) issuing a legally indefensible Biological Opinion ("BO"), (vi) failing to prepare an EIS before issuing the permits, (vii) refusing to suspend the effectiveness of the research permits prior to the completion and issuance of an EIS, and (viii) failing to comply with its own regulations implementing the Endangered Species Act, the Secretary has violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seo. the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1374, et seq. the Endangered Species Act ("ESA"), 16 U.S.C § 1531, et sefl., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, et seq.

Jurisdiction and Venue

4. The Court has jurisdiction to hear this matter pursuant to 29 U.S.C. § 1331 relating to its original jurisdiction to hear civil actions arising under the Constitution, laws or treaties of the United States.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. § 1374(d)(6).

Parties

6. Plaintiff, The Humane Society of the United States ("HSUS"), is a non profit organization headquartered in Washington, D.C. The HSUS is the largest animal protection organization in the United States, with over nine million members and constituents, 178,647 of whom reside in the State of Washington and 14,813 of whom reside in the State of Alaska. The HSUS is committed to the goals of protecting, conserving, and enhancing the nation's wildlife and wildlands, and fostering the humane treatment of all animals. In furtherance of its goals and objectives, HSUS and its members have demonstrated a strong interest in the preservation, enhancement, and humane treatment of marine mammals.

7. In recent years, HSUS has invested considerable organizational resources in the protection of Steller sea lions. In addition to participating in numerous comment periods concerning the issuance of scientific research permits, HSUS has also regularly submitted comments on proposed revisions of the Steller sea lion stock assessments and has engaged in public education and advocacy on behalf of the species.

8. HSUS's ability to protect Steller sea lions, and to participate in administrative processes, education, and outreach on Steller sea lion matters, has been and continues to be injured by Defendants' failure to comply with the MMPA, NEPA, ESA and APA because, by violating these statutes and their implementing regulations, the Defendants are threatening the very existence of the species.

9. HSUS brings this action on its own organizational behalf and also on behalf of its members, who regularly have engaged in and will continue to engage in educational, recreational, and scientific activities in areas of Steller sea lion habitat and who enjoy observing Steller sea lions in this area of the country. These members; interests in observing, studying, and appreciating Steller sea lions are injured by Defendants' failure to comply with the MMPA, NEPA, ESA and APA because, by violating these statutes and their implementing regulations, the Defendants are creating a threat to the sea lion population in the area and hastening the extinction of the species.

10. Plaintiff, Will Anderson, resides in Seattle, Washington, in King County. For years, Mr. Anderson has been heavily involved in marine mammal issues. For example, from 2001-2003, Mr. Anderson was employed by the Earth Island Institute's Orca Recovery Campaign, which was dedicated to the protection and recovery of the orca population in Northwestern Washington. Mr. Anderson continues to do related projects on a volunteer basis for Earth Island Institute. Additionally, from 1994-2000, Mr. Anderson worked for the Progressive Animal Welfare Society ("PAWS' ") in Lynnwood, Washington, where he was responsible

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for alerting the public to the Makah Tribe's intention to resume its gray whale hunt. Mr. Anderson also served as a member of the Ballard Locks Pinniped-Fishery Interaction Task Force.

11. Mr. Anderson has been observing Steller sea lions in their natural habitat for nearly 40 years. During this time, he has observed Steller sea lions in a variety of coastal locations throughout Oregon, Washington, and Alaska. Since Mr. Anderson moved to Seattle, Washington in the mid-1990s, he has continued to observe Steller sea lions, including those off the coast of Northwest Washington. Mr. Anderson derives great enjoyment and satisfaction from viewing Steller sea lions in their natural habitat and has developed a unique and personal interest in ensuring the protection and recovery of this species. Mr. Anderson regularly seeks out opportunities to observe Steller sea lions in their natural habitat and intends to continue to do so in the very near future. In particular, Mr. Anderson plans to travel to the coast of Washington and Oregon sometime this summer or early fall in order to try and observe Steller sea lions, potentially including a visit to the Sea Lion Caves near Florence, Oregon.

12. Mr. Anderson's interests in observing and studying Steller sea lions are harmed by NMFS's decision to authorize research permits and amendments without properly taking into account the direct and cumulative effects of the permitted activities may have on an already endangered and threatened stock. Mr. Anderson believes that Defendants' actions may reduce the already depleted number of Steller sea lions that he is able to observe, and that he may observe injury to or the suffering of Steller sea lions, who will be disturbed, harassed, injured or killed as a consequence of the activities authorized under the NMFS-approved permits.

13. The interests of Mr. Anderson in observing Steller sea lions free from harm, in protecting his own interest in viewing them in their natural habitat, in doing his part to halt the further decline of the species, and in preventing unnecessary pain and suffering of Stellcr sea lions, are harmed by NMFS's authorization of the scientific research permits and applicable amendments. Mr. Anderson is concerned that the permitted widespread, invasive research may cause an unacceptable level of mortality, pain, and suffering to these threatened and endangered species. By authorizing research permits and permit amendments - without adequately considering alternatives or the direct and cumulative impacts of the permitted activities - NMFS has deprived Mr. Anderson of his procedural right under NEPA to receive adequate information concerning the environmental impacts of the agencies' decision to authorize the research permits and related amendments.

14. Plaintiff, Sharon Young, resides in Sagamore Beach, Massachusetts, in Barnstable County. For many years, Ms. Young has been actively involved in studying and observing marine mammals, conducting field research, and engaging in advocacy concerning conservation issues. For example, Ms. Young was employed as a naturalist on whale watch vessels in the 1980s and studied marine mammals in the U.S. and Canada in the 1980s and 1990s in association with research organizations such as the Mingan Islands Cetacean Study and Plymouth Marine Mammal Research Center. She has also been employed by marine mammal advocacy organizations such as the International Wildlife Coalition and The Humane Society of the United States since the 1990s.

15. Ms. Young regularly attends and presents research at the Society for Marine Mammalogist's biennial conferences. In addition to her research on cetacean feeding and foraging behavior and on the conservation status of marine mammals, she has published papers on pinniped conservation issues including *Killing Pinnipeds to Save Fish-Science or Sophistry?* which was published as part of a workshop convened by the American Fisheries Society. Ms. Young is also an appointed member of the Atlantic Scientific Review Group, a Congressionally mandated body which reviews and comments on stock assessments and research programs of the National Marine Fisheries Service relating to marine mammals. She has also attended meetings of the Alaska Scientific Review Group and the Pacific Scientific Review Group at which stock assessments for Steller sea lions are discussed.

16. Ms. Young also has an active avocational interest in observing wildlife in its natural habitat. She has been an active birder for decades and makes a point of observing local flora and fauna whenever she travels, with a particular interest in rare or unique species. She has observed Steller sea lions in their natural habitat since 1985, when she attended the biennial Conference of the Society of Marine Mammalogists. While attending the conference, she toured the coastaJ areas around Vancouver, Canada for the express purpose of seeing Steller sea lions, a species she had not seen before. She well remembers the thrill of scanning rocky

habitats looking for the particular pelage color, size, and facial shape that would distinguish Steller sea lions from California sea lions. Subsequent to that time she has made a point to look for them whenever she attends meetings on the west coast and has observed them approximately once each year while attending meetings in California, Washington, British Columbia, and Alaska. Because other species of sea lions are often more abundant, she is always delighted when she spots the less-frequently sighted Steller sea lions. She thoroughly enjoys observing their behaviors while hauled out and listening to their calls. Ms. Young intends to continue to seek out Steller sea lions in their natural habitat in the future as she attends west coast meetings and vacations along the west coast. The 2005 Marine Mammal Commission annual meeting will be held in Alaska in October, and Ms. Young plans to attend and observe Alaska wildlife in this locale as well, including, she hopes, Steller sea lions.

17. Ms. Young's interests in observing and conserving Steller sea lions are harmed by NMFS's decision to authorize research permits and amendments without properly taking into account the individual and cumulative effects of the permitted activities on an already endangered or threatened stock. Ms. Young believes, based on her knowledge and years of study of sea lions, that the defendant's actions are likely to reduce this depleted stock, which is already somewhat difficult to observe in the wild. Furthermore, knowing of the procedures to which individuals will be subjected, Ms. Young is distressed at the thought that animals that she will observe may have suffered injuries and pain, will have been disturbed and harassed, or may die as a result of activities allowed under the NMFS-approved permits.

18. The interests of Ms. Young in observing Steller sea lions free from harm, in protecting her own interest in viewing them in their natural habitat, in doing her part to halt the further decline of the species, and in preventing unnecessary pain and suffering of Steller sea lions, are harmed by NMFS's authorization of the scientific research permits and applicable amendments. Ms. Young is concerned that the permitted, widespread invasive research may cause an unacceptable level of mortality, pain, and suffering to these threatened and endangered species. By authorizing research permits and permit amendments - without adequately considering alternatives or the direct and cumulative impacts of the permitted activities - NMFS has deprived Ms. Young of her procedural right under NEPA to receive adequate information concerning the environmental impacts of the agencies' decision to authorize the research permits and related amendments.

19. Defendant, the U.S. Department of Commerce, is a federal agency organized and existing pursuant to the Department of Commerce and Labor Act, codified at 15 U.S.C. § 1501 *et seq.*, and is responsible for, among other things, regulating marine resources and fisheries through the National Marine Fisheries Service ("NMFS").

20. Defendant, Carlos M. Gutierrez, is the Secretary of the United States Department of Commerce. The National Oceanic and Atmospheric Administration ("NOAA") and NMFS are part of the Department of Commerce. The office of the Secretary of the Department of Commerce is located at 14th & Constitution Avenue, N.W., in the District of Columbia. By this Complaint, the Secretary is sued in his capacity as the Secretary of the Department of Commerce.

21. Defendant, Conrad C. Lautenbacher, Jr., is the Administrator of NOAA, the parent agency of NMFS. The office of the Administrator of NOAA is located at 14th & Constitution Avenue, N.W., in the District of Columbia. By this Complaint, the Administrator is sued in his capacity as the Administrator of NOAA.

22. Defendant, William T. Hogarth, is the Assistant Administrator for Fisheries at NMFS and signed the permits at issue in this case. The office of the Assistant Administrator for Fisheries is located at 1315 East-West Highway, Silver Spring, Maryland. By this Complaint, the Assistant Administrator is sued in his capacity as the Assistant Administrator for Fisheries at NMFS.

23. Defendant, the National Marine Fisheries Service, is the federal agency charged with administration of the MMPA, including the issuance of scientific research permits for marine mammals.

24. Collectively, those Defendants named in paragraphs 19-23 above shall be herein referred to as "Defendants" or "NMFS".

Relevant Statutes and Facts Giving Rise to Plaintiffs' Claims for Relief

I. The Statutory and Regulatory Scheme

A. The Marine Mammal Protection Act and Implementing Regulations

25. The MMPA represents Congress' most expansive explication of the nation's commitment to the "protection and conservation" of Steller sea lions and other marine mammals. 16 U.S.C. § 1361(5). Its primary purpose is to remedy "man's... malign, neglect, and virtual genocide" of marine mammals and to promote "solicitous and decent treatment" of marine mammals that "have been shot, blown up, clubbed to death, run down by boats, poisoned, and exposed to a multitude of other indignities, all in the interest of profit or recreation." H.R. Rep. No. 92-707 (1971).

26. The MMPA's primary objective is to prevent marine mammals such as Steller sea lions from extinction caused by man's activities. 16 U.S.C. § 1361(2). Consistent with this objective, the MMPA states that marine mammal populations "should not be permitted to diminish below their optimum sustainable population." 16 U.S.C. § 1361.

27. "Optimum sustainable population" means the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element. 16 U.S.C. § 1362(9).

28. To keep track of declining populations of marine mammals, particularly those like Steller sea lions that are negatively affected by commercial fisheries, the MMPA requires the Secretary of Commerce to develop stock assessments for marine mammals. Stock assessments provide minimum population estimates, evaluate the number of human-caused mortalities, and estimate levels of population decline that will affect the recovery of the species. 16 U.S.C. § 1386. Most importantly, the stock assessment includes the Potential Biological Removal Level ("PBR Level") for the species. The PBR Level is the maximum number of animals that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population. 16 U.S.C. § 1362(20).

29. Because Steller sea lions are protected by the Endangered Species Act, the Secretary also must develop a plan that assists in the recovery of the Steller sea lion population, including a plan to reduce "takes*' of sea lions below the PBR Level. 16 U.S.C. § 1387(f). A "take" means "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(13).

30. The centerpiece of the MMPA's protection efforts is a strict moratorium on the taking and importation of all marine mammals and marine mammal products. 16 U.S.C. § 1371(a). Recognizing that takings for research purposes may be warranted under very controlled circumstances, Congress established in Section 104 of the MMPA a framework under which all such takings must be evaluated before they are authorized. 16 U.S.C. § 1374. Any taking must be approved by the Secretary of Commerce and be consistent with the statute's goalof protecting marine mammals. 16 U.S.C. § 1374(a).

31. To eliminate the opportunity for abuse by private parties who seek to take marine mammals for research purposes, the MMPA provides that a permit may be issued "for scientific research purposes to an applicant which submits with its permit application information indicating that the taking is required to further a *bonafide* scientific purpose." 16 U.S.C. § 1374(c)(3)(A).

32. In order to protect endangered or threatened marine mammals, the MMPA further mandates that "the Secretary shall not issue a permit for research which involves the lethal taking of a marine mammal from a species or stock that is depleted, unless the Secretary determines that the results of such research will directly benefit that species or stock, or that such research fulfills a critically important research need." 16 U.S.C. § 1374(c)(3XB).

33. In addition to the MMPA itself, the permit process is guided by Defendants' regulations implementing the MMPA. These regulations require, among other provisions, that (1) the research furthers a *bonafide* scientific purpose under 50 C.F.R. § 216.41; (2) the research is humane and does not present any unnecessary risks to the health and welfare of marine mammals under 50 C.F.R. § 216.34; and (3) the research permits as a whole will not have an adverse impact to the species under 50 C.F.R. § 216.34.

34. As a further safeguard on the permitting process, NMFS is required to submit permit applications to the Marine Mammal Commission ("MMC") for review and comment prior to approval. In enacting the MMPA, Congress recognized that those federal agencies charged with primary regulatory responsibility for marine mammal programs often had potentially conflicting missions and had, in some instances, failed to prevent the overharvesting and endangerment of stocks. Thus, the MMC was created to provide independent oversight of the marine mammal conservation policies and programs being carried out by the federal regulatory agencies. After receiving a copy from NMFS of permit applications for scientific research on marine mammals, the MMC has forty-five days in which to raise any objections to the issuance of scientific research permits. 50 C.F.R. § 216.33(d)(2).

35. The MMPA further requires that treatment of animals subjected to research be humane. Under the MMPA, "humane" is defined as "that method of taking which involves the least possible degree of pain and suffering practicable to the mammal involved." 16 U.S.C. § 1362. To ensure humane treatment, MMPA regulations require that when a live animal is held captive or transported, "the applicant's qualifications, facilities, and resources are adequate for the proper care and maintenance of the marine mammal." 50 C.F.R. § 216.34(a)(6).

B. The Endangered Species Act and Defendants* Implementing Regulations

36. Recognizing that certain species of plants and animals "have been so depleted in numbers that they are in danger of or threatened with extinction," 16 U.S.C. § 1531(a)(2), Congress enacted the ESA with the express purpose of providing both "a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b).

37. The ESA protects plant and animal species which are listed as "endangered" or "threatened." A species is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A species is "threatened" if the species is likely to become endangered within the foreseeable future. 16 U.S.C. § 1532(20). Once listed as endangered or threatened, an animal receives a number of critical and mandatory protections under the Act. The Stellar sea lion was listed as "threatened" under the ESA in 1990. 55 Fed. Reg. 12645 (April 5, 1990). In 1997, NMFS reclassified the western population as "endangered." 62 Fed. Reg. 24345 (May 5, 1997). The eastern population remains classified as "threatened."

38. Under Section 7 of the ESA, when a federal agency undertakes or permits actions that may affect a listed species, such as the issuance of scientific research permits, the agency must consult with the Secretary to insure that its activities are "not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). Section 7 requires the Secretary to issue a Biological Opinion ("BiOp") which sets forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. 16 U.S.C. § 1536(b)(3XA).

39. When preparing a BiOp, the agency must (1) review all relevant information, (2) evaluate the current status of the listed species, (3) and evaluate the effects of the action and cumulative effects on the listed species. 50 C.F.R. § 402.14(g)(3).

40. The regulations governing the consultation process define "cumulative effects" as "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. § 402.02.

41. Defendants also must consider the cumulative impacts on the species or stocks and habitat as a result of the proposed activity in determining whether to issue a scientific research permit. 50 C.F.R. § 222.307(cKO(ii).

42. The ESA provides that the Secretary of Commerce may permit "any act otherwise prohibited by [ESA] for scientific purposes or to enhance the propagation or survival of the affected species..." 16 U.S. C. 1539(a)(l)(A).

43. Defendants' regulations governing the issuance of scientific research permits implement both MMPA and ESA requirements. See paragraphs 25-35 above (MMPA); see 50 C.F.R. Part 222 (ESA). Defendants are required to satisfy *all* applicable sections of the ESA and MMPA regulations. 50 C.F.R. § 222.301.

44. Defendants' regulations implementing the ESA require Defendants to specifically consider the following when issuing scientific research permits: (1) whether the permit, if granted and exercised, will not operate to the disadvantage of the endangered species; (2) whether the permit would be consistent with the purposes and policy of the ESA; (3) the status of the Steller sea lion population and the effect of the proposed action on the population, both direct and indirect; (4) whether alternative non-endangered species or population stocks can and should be used; (5) how the applicant's needs, program, and facilities compare and relate to proposed and ongoing projects and programs; and (6) opinions or views of scientists or other persons or organizations knowledgeable about the species which is the subject of the application or of other matters germane to the application. 50 C.F.R. § 222.308(c).

C. The National Environmental Policy Act and Implementing Regulations

45. The National Environmental Policy Act ("NEPA") is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1. NEPA requires all agencies of the federal government to prepare a "detailed statement" regarding all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). NEPA's broad procedural scope is intended to ensure that federal agencies engage in accurate and high quality scientific analysis before any decisions affecting the environment are made. 40 C.F.R. § 1500.1.

46. The Council on Environmental Quality ("CEQ") - an agency within the Executive Office of the President - has promulgated regulations implementing NEPA that are "binding on all Federal agencies.'* 40 C.F.R. § 1500.3. These regulations are binding on NOAA and NMFS.

47. NOAA also has issued its own NEPA procedures with which NOAA and NMFS must comply. *See Environmental Review Procedures for Implementing the National Environmental Policy Act*, NOAA Administrative Order 216-6, May 20, 1999.

48. Under NEPA, an agency is required to first prepare an Environmental Assessment ("EA") to determine whether the agency should prepare an Environmental Impact Statement ("EIS") or a "finding of no significant impact" ("FONSI"). 40 C.F.R. § 1508.13.

49. As part of its analysis, an agency must "study, develop, and describe appropriate alternatives to recommended courses of action," 42 U.S.C. § 4332(2)(E), and discuss alternatives it has considered. *See* 40 C.F.R. § 1508.9. Alternatives are considered the "heart of the NEPA process" in that the public and decision makers are informed of the options and likely consequences of a proposed action to meet a particular purpose and need. 40C.F.R. § 1502.14.

50. If an agency determines on the basis of its EA that an EIS is not required because its action will not have a significant impact on the environment, the agency will then issue a FONSI. 40 C.F.R. § 1501.4. However, federal agencies *must* prepare an EIS for every major federal action that could significantly affect the environment.

51. To determine whether an agency action is "significant" under NEPA, requiring preparation of an EIS, an agency must consider both the context and intensity of the proposed action. 40 C.F.R. § 1508.27.

52. In evaluating the impacts of a proposed action, the agency must consider "the degree to which the action is related to other actions with... cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). Such cumulative impacts include "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) undertakes such other actions." 40 C.F.R. § 1508.7. The regulations further describe cumulative impacts to include "individually minor but collectively significant actions taking place over a period of time." *Id.*

53. When preparing an EIS, NEPA mandates that "agencies shall not commit resources prejudicing selection of alternatives before making a final decision." 40 C.F.R. § 1506.2.

II. Facts

A. Introduction

54. Steller sea lions (*Eumetopias jubatus*) are members of the sub-order pinnipedia, which means "winged foot." The name "sea lion" originated because early explorers believed that the heavy ruff of fur around the male's neck resembled the mane of a lion. Their large eyes help them see in the dim light that filters through the rich, cold ocean water in which they live. They are able to hold their breath and dive to depths of over 1,000 feet.

55. Female Steller sea lions can live as long as 30 years. The males, which are larger and can weigh over half a ton, generally do not live as long. Males vigorously compete for territory along the rocky coast and maintain a harem that consists of all the females in their territory. Pups are born in the late spring and early summer, weighing approximately 35-50 pounds at birth. The female fasts for the first nine days of her pup's life, nursing and protecting her pup. After that time, she begins a cycle alternating one to three days at sea feeding, followed by one to two days of nursing her pup on land. Pups remain with their mother for up to a year, and females are able to give birth to a single pup each year.

56. Steller sea lions arc divided into two populations, or stocks, and both stocks are protected under the ESA and the MMPA. The western stock, located in the Gulf of Alaska and the Bering Sea/Aleutian Islands, declined by 82% between 1960 and 1990. In 1997, the western stock was listed as endangered under the ESA. The eastern stock, found throughout the northern Pacific basin and the coasts of Washington, Oregon, and California, was listed as threatened under the ESA in 1990.

57. The cause of the rapid decline of the western stock of Steller sea lions is unknown at this time. Over the past 30 years, studies have observed that the body mass of the sea lions has shrunk significantly, potentially due to the inability of the sea lions to obtain enough nutrients. The lack of adequate nutrition leads to reproductive failure among female sea lions, higher mortality of pups and juveniles, and behavioral modifications. The prevailing theory explaining the rapid decline of the species is that commercial fisheries are competing with Steller sea lions for the types of fish the sea lions historically have eaten.

58. Because scientists do not know why the endangered Steller sea lion population is plummeting, research has been and is being performed to study the cause(s) of decline and formulate a plan to restore the population to a sustainable level. However, because Steller sea lions are protected under the MMPA and ESA, permits for scientific research cannot be issued unless and until the permitting agency can demonstrate that the effects of the research will not harm the animals in any way or cause or contribute to the very decline it is intended to prevent.

B. Steller Sea Lion Research

59. Research has been conducted on Steller sea lions since a sharp population decline was identified in the late 1980s. Research funding for federal agencies during the 1990s was less than $1 million annually, with half of this money dedicated to the monitoring of populations, i.e. non-intrusive research. During the late 1990s, research efforts were intensified as public attention grew increasingly more focused on the ongoing decline and possible impacts by commercial fisheries in Alaskan waters. In

2001 and 2002, Congress appropriated approximately $80 million for Steller sea lion research. This Congressional appropriation created the largest research effort on a single species in the history of the United States.

60. In response to this flood of funding, multiple research entities applied in both 2001 and, more recently, April 2005 for permits or permit amendments to take Steller sea lions during scientific activities. After the $80 million appropriations in 2001, five new research entities applied for permits and the two original permit holders requested major modifications to their permits. In 2005, a total of nine entities representing government agencies, universities, and private research institutions have applied for permits or major amendments to existing permits.

61. NMFS is the federal agency charged with the issuance of scientific research permits for research on marine mammals. On April 4, 2005, NMFS published notice of its receipt of permit applications and its issuance of a Draft EA evaluating NMFS's proposed issuance of the permits. 70 Fed. Reg. 17,072 (Apr. 4, 2005). Four of the 2005 applications were for new five-year permits, while five applications were for "major amendments" to existing permits, extending many of the authorized takes through 2009.[1] The proposed scientific research spans the entire population of Steller sea lions.

62. NMFS prepared a Draft EA for the scientific research permits at issue in this matter and concluded that an EIS was not necessary. Yet NMFS failed to evaluate the cumulative effects of the issuance of a multitude of permits that authorized a significant increase in the amount of take, over a longer period of time, and ignored the fact that its proposed action would result in Steller sea lion mortality exceeding the very threshold that NMFS has established in determining whether a given impact to an endangered or threatened species could have irreversible effects - the PBR Level. *See* U.S. National Oceanic and Atmospheric Administration & National Marine Fisheries Service, *Draft Environmental Assessment of the Effects of Permit Issuance for Research and Recovery Activities on Steller Sea Lions* (issued on or around April 4, 2005) (hereinafter "Draft EA").

63. A number of commenters, including HSUS, strongly protested the issuance of these permits, stating concerns about unnecessary, duplicative, inhumane and uncoordinated research, and stressing the scientific and legal importance of performing an EIS for this magnitude of research activities.

64. Before approving the scientific research permits, NMFS is required to consult with the MMC, an independent agency created to provide impartial oversight of marine mammal conservation policies and programs implemented by federal regulatory agencies. The MMC received copies of the permit applications on April 22, 2005. *See Letter from David Cottingham, Executive Director, Marine Mammal Commission to Steven Leathery, Chief, Permits Division, National Marine Fisheries Service* (May 19, 2005) (hereinafter "MMC Preliminary Comments"). The MMC submitted its preliminary comments on May 19, 2005, 17 days short of the required 45-day comment period, stating that its comments were submitted in response to NMFS's request for an expedited review due to a pressing need to issue the permits. See *MMC Preliminary Comments.* The preliminary comments protested the issuance of the permits and contended that an EIS was required. *Id.* The MMC further requested that NMFS delay its final decision until the MMC submitted its formal comments within its allotted 45-day comment period. *Id.*

65. Without waiting for the MMC's official comments, NMFS rushed to issue the permits. It completed its internal ESA Section 7 consultation and issued its ESA Section 7 BiOp and EA on or about May 24, 2005.

66. The BiOp did not evaluate the cumulative effects of other agency actions nor Defendants' own actions of issuing permits that authorized mortalities in excess of the PBR Level for the western endangered stock of Steller sea lions. *See* Memo from Laurie Allen, Director, Office of Protected Resources, *Biological Opinion on Proposed Marine Mammal Permits Which Would Authorize Various Research Activities on Steiler Sea Lions* (issued on or about May 24, 2005) (hereinafter "BiOp").

67. The EA also did not evaluate the impact of an exceedance of the PBR Level in its analysis of the cumulative effects, nor did it evaluate reasonable alternatives to issuance of the permits as submitted. *See* U.S. National Oceanic and Atmospheric Administration & National Marine Fisheries Service, *Environmental Assessment of the Effects of Permit Issuance for Research and Recovery Activities on Steller Sea Lions* (April 2005) (hereinafter "EA").

68. Disregarding the MMC recommendations, NMFS issued a Finding of No Significant Impact ("FONSI") on or about May 24, 2005.

69. NMFS approved the first research permit on or about May 27, 2005.

70. The MMC submitted its formal comments on June 10, 2005, again reiterating that NMFS should perform an EIS. *See Letter from David Cottingham, Executive Director, Marine Mammal Commission to Steven Leathery, Chief, Permits Division, National Marine Fisheries Service* (June 10, 2005) (hereinafter "MMC Comments").

71. NMFS issued additional permits on or about June 16, 2005. 70 Fed. Reg. 35,065 (June 16, 2005). [2]

72. After issuing the permits, NMFS conceded that it has concerns over the scope of research performed on Steller sea lions and decided to prepare an EIS on the effects of the research. Letter from William T. Hogarth to David J. Hayes, June 27, 2005. Despite this concession, NMFS did not suspend the permits and the research has moved forward.

73. Research currently is underway in the Gulf of Alaska, including many of the intrusive and inhumane activities described in this Complaint.

C Authorized Research Activities Will Contribute to the Decline of Steller Sea Lions

74. The levels of research activity allowed by the recently authorized permits will contribute to the very decline of the species to be studied. The permitted research activities are extraordinarily inhumane and intrusive. If the activities are not stopped, the research activities will kill sea lions in numbers that will exceed the PBR for this species, i.e., the number above which the impact to the species is *per se* significant and potentially irreversible.

1. NMFS Failed To Analyze the Cumulative Effects of its Actions, Including the Total Incidental Mortalities Authorized By the Permits, Which Will Exceed the PBR Level.

75. In preparing the BiOp and the EA, which address the issuance of the research permits, NMFS disregarded cumulative effects and ignored the fact that the total incidental lethal takes authorized by the current permits exceeds the PBR Level for the endangered western stock. This ironic and catastrophic consequence of the increased magnitude of research activities must be analyzed by NMFS, yet nowhere in its BiOp or EA does NMFS address the cumulative impact of allowing this level of lethal take.

a. *The PBR Level Will Be Exceeded By the Incidental Lethal Takes Allowed By the Research Permits<.*

76. The PBR Level, as defined by the MMPA, is the maximum number of animals that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population - the main objective of the MMPA. Killing animals above this level will thus accelerate the decline of a sustainable population and vitiate the purpose of the MMPA.

77. For the endangered western stock, the lethal takes allowed by the research frustrate the very purpose of the research in the first place - i.e., to conserve the species by maintaining the optimum sustainable population. According to NMFS's most recent final stock assessment for the endangered western stock of Steller sea lions, a minimum of 176 deaths are caused each year by subsistence hunting by Alaska Natives. Commercial fisheries cause a minimum of 31.5 deaths each year. Over 85 Steller sea lion deaths may occur as a result of the authorized scientific research *per year*, including 17 sea lions per year from the endangered western stock. The incidental mortalities permitted by the research, when added

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to the minimum numbers of other authorized lethal takes, actually *exceeds* the PBR Level of 209 for the western stock. *Alaska Marine Mammal Stock Assessments*, 2003, NOAA Tech. Memo. NMFS AFSC-144 (August 2004).

78. Moreover, lethal takes that will occur as a result of the research activities are likely to be under-reported, if reported at all, as NMFS and the MMC both recognize. NMFS has admitted that "the number of observed and reported mortalities may or may not represent the number of actual mortalities" due to mortalities resulting from stampedes or capture-related myopathy caused by the research activities. *EA* at 42. The MMC warns that the number of direct, known deaths, including the killing of up to 292 animals over the duration of the research (in both the western and eastern stock), is dangerously high; in conjunction with the deaths that will not be counted due to inadequate monitoring protocols, the actual number of animals killed will be considerably higher. *MMC Comments* at 2.

79. Although NMFS requires, as a condition of the permits, that permits be modified and, if necessary, research suspended when 10 endangered sea lions are documented to have been killed, this permit condition still does not prevent an exceedance of the PBR Level.

80. Regardless of whether the PBR Level is exceeded by one animal or hundreds of animals, the exceedance of the PBR Level, by definition, causes a direct impact on the survival of the endangered species. NMFS is allowing research permittees to kill so many Stellar sea lions that they will cause, in conjunction with other forms of authorized killings, the decline of the very animals the research seeks to help conserve.

81. Moreover, the PBR Level establishes a bright line threshold of significance under NEPA - and thus triggers the need to prepare an EIS - because the PBR Level is used to calculate the optimum sustainable population in fulfillment of the MMPA's purpose. Exceeding this level goes to the very heart of the MMPA, as the PBR Level's primary purpose is to act as a safeguard for marine mammals nearing extinction.

82. Neither the EA nor the BiOp address the exceedance of the PBR Level as a result of the cumulative effects of the permitted incidental killing. The law governing the issuance of scientific research permits provides two safeguards that require agencies to evaluate the cumulative effects of their actions: (1) in the BiOp issued as part of the ESA Section 7 consultation process, and (2) in the NEPA document. A federal agency must evaluate the cumulative effects of not only its *own* actions, but also those of other federal, State, tribal, local and private actors. NMFS wholly failed to analyze the cumulative effects of issuing the research permits in both of these documents.

b. *The BiOp Fails to Analyze Cumulative Effects*.

83. While NMFS is required to analyze cumulative effects in its BiOp, the BiOp simply states that *"cumulative effects have not been considered in this biological opinion." BiOp* at 66-67.

84. Based on the *prima facie* language of the BiOp, there is absolutely no evidence that NMFS endeavored to look into any State, tribal, local or private actions that were reasonably certain to take place, as required under the ESA. *BiOp* at 66-67. Most importantly, NMFS failed to look at the cumulative effects of its own actions. There is no discussion in the BiOp of the cumulative effects of authorizing this magnitude and intensity of research, and no discussion of the actions' effects on the PBR Level for the species.

c. *The EA Fails to Address the Exceedance of the PBR Level*.

85. While the EA purports to discuss the cumulative impacts of subsistence takes, commercial fisheries takes and scientific research, its conclusion that "there are no individually significant but cumulatively significant impacts of the proposed action" is inherently flawed and misleading. *EA* at 59.

86. The EA ignores the combined total number of approved deaths, thus skirting the entire issue of whether the multitude of lethal takes will exceed the PBR Level. No comparison is made between the total number of approved new takes and current levels of approved takes, nor is an estimate provided for the number of potential takes or activities that would be considered significant. The EA itself states that intensified contact with Steller sea lion populations and habitat could have adverse effects on the endangered species and that the magnitude of those effects is unknown, but provides no explanation for the agency's decision to forgo additional investigation and analysis of the cumulative effect of increased research.

87. Even though research on Steller sea lions has been performed since the 1970s, NMFS has never analyzed the cumulative effects of all of these surveys and research activities, either within a research season or across years of research. NMFS acknowledges that "there have been no studies dedicated to documenting and assessing the effects of research on Steller sea lions or other marine mammals at a population level, nor on the synergistic or cumulative effects of various research activities." *EA* at 41.

2. The Research is Intrusive and Inhumane, in Violation of the MM PA and its Implementing Regulations.

88. Not only has NMFS failed to evaluate the cumulative effects of the research activities, it also has allowed inhumane and intrusive research to be executed upon this rapidly declining marine mammal species.

89. Activities allowed under the approved research permits include hot-branding of adults, juveniles, and sea lion pups less than one week old; collection of blood; biopsies of muscle, blubber, and tissue; extractions of teeth; the marking with bleach or paint; surgical implantation of data loggers; insertion of stomach temperature transmitters; performance of enema or stomach intubations; and placement of adults and pups in captivity.

90. Of great concern is the capture and hot-branding of Steller sea lions, including sea lion pups as young as six days old. Hot branding involves a cold-rolled steel branding iron heated to "red-hot" (about 500 degrees Fahrenheit). *EA* at 100. This iron produces burns that penetrate the entire outer layer of skin and burn into the inner skin. *Id*. The burns are characterized by the formation of blisters, swelling and fluids seeping from the burned area and, as noted by NMFS, are accompanied by severe pain. *Id*. Hot-branding often occurs while the mammal is restrained in a "squeeze cage," which functions as the name implies - the cage is cranked smaller and smaller to squeeze the animal in order to restrain it while samples are being collected. The sea lions are then hot-branded while trapped in the squeeze cage, a very painful procedure that is often performed without the benefit of anesthetic.

91. NMFS admits in the EA that researchers have not adequately studied the effects of hot-branding and have not determined whether hot-branding leads to an increase in sea lion deaths, *EA* at 16, yet NMFS has capriciously allowed hot-branding to take place on animals whose species is in rapid decline. As the MMC warns, hot-branding sea lion pups has not been determined to be safe and effective. *MMC Comments* at 2. Furthermore, the MMC notes that "none of the applicants provide explicit monitoring protocols. This is of particular concern with respect to the proposed hot branding activities, which pose risks associated with capture, handling, [and] the infliction of burn wounds that may become infected." *MMC Comments* at 3. It is thus confounding that NMFS has nonetheless authorized hot-branding as a research activity in contravention of the MMPA's requirement that research directly benefit Steller sea lions or fulfill a critically important research need.

92. Not only are endangered sea lion pups branded with hot irons, but sea lions' coats are caustically burned with bleach for marking purposes even when other less painful methods of marking exist. Hundreds of animals will also be subjected to muscle biopsies, insertion of fecal sampling tools, and sampling of stomach contents with stomach tubes on a repeated basis each year.

93. Sea lion pups may be separated from their mothers in the flurry of research activities and may eventually die of starvation if not reunited. Pups can even die during capture by aspirating milk.

94. Many of these intrusive and inhumane procedures are conducted without regard for alternative methods of research which do not contribute to the harm of the animal and avoid the potential to contribute to the incidental mortality of the animals being studied. Researchers have uniformly ignored those methods and NMFS has made no effort to protect these special marine mammals from the battery of intrusive procedures.

95. Displaying even further disregard for humane treatment, NMFS has issued permits to applicants that are not required to have their studies approved by an institutional animal care and use committee ("IACUC"), which provides oversight to ensure the implementation of the most humane, effective methods of data collection. Nor have the permittees demonstrated that they will take adequate steps for the proper care of the animals as required by MMPA regulations. 50 C.F.R. § 216.34(a)(6).

3. Uncoordinated and Duplicative Research Does Not Benefit Steller Sea Lions and Does Not Fulfill a Critically Important Need.

96. The MMC warns that "based on the information presented in the applications and [NMFS's] environmental assessment, the Commission cannot determine that the proposed research meets the standards of the Marine Mammal Protection Act, that all aspects of the projects constitute *bonafide* research." *MMC Comments* at 1. Neither has NMFS determined that this suite of research activities will directly benefit Steller sea lions, or that such research fulfills a critically important research need, two standards the MMPA requires when authorizing scientific research permits for the study of endangered or threatened species.

97. The repetitiveness and lack of coordination of the research serves only to further harass Steller sea lions with little scientific benefit. In some cases, the same sea lion may be captured up to five times in a single year, subjected over and over again to intrusive procedures and general distress, which can lead to reproductive failure or even death. Multiple researchers will be simultaneously pulling teeth, taking skin and muscle biopsies, and performing other intrusive procedures on hundreds of sea lions - without coordination and without ensuring that the research is not duplicative.

98. Further, NMFS cannot establish the parameters of all of the research for purposes of coordination because the permittees are constantly requesting permit modifications and amendments. For example, NMFS recognized in its EA that one entity, the Alaska SeaLife Center, submitted six separate requests within eighteen (18) months of the issuance of its permit to add new procedures, modify protocols or objectives, and increase the number of animals taken by existing activities. *EA* at 57. Since issuance of the permits in late May and early June 2005, at least three entities have already requested permit amendments. Thus, this moving target of research activities and modifications to the amount of takes makes it nearly impossible to coordinate research because the types of activities and takes allowed are constantly evolving.

99. NMFS's attempt to require coordination as a permit condition is also unacceptable. NMFS required permit holders to coordinate with other researchers and submit a coordination plan to NMFS by November 1, 2005 - five months *after* the permits are issued, thus providing no assurance of coordination during the height of the summer research season in 2005. Furthermore, the coordination permit condition is limited to researchers working at the same locations at the same times, thus arbitrarily avoiding the fact that research activities will be affecting nearly the entire population of Steller sea lions.

4. The NEPA Analysis in the EA is Flawed.

100. NEPA requires federal agencies to evaluate different alternatives to the proposed agency action. Through identification and comparison of the impacts of "reasonable alternatives," the public and decision-makers are informed of the options and likely consequences of each proposed action to meet a particular purpose and need.

101. NMFS's EA identifies five different courses of action for evaluation. The first alternative is for NMFS to undertake no action, i.e., issue no new permits or amendments. The second alternative is the action NMFS ultimately undertook: issue the proposed permits and amendments with limited exceptions.

102. NMFS also mentioned three other alternatives, but eliminated them from detailed study, even though all three alternatives were "identified as likely to result in reduced impacts from research compared to both the No Action and the Proposed Action." *EA* at 30. The first eliminated alternative was the establishment of a temporary moratorium on all research affecting Steller sea lions. *Id*. at 31. This moratorium would prevent takes of Steller sea lions for research purposes by suspending any existing permits that authorize takes and denying future applications for such takes for a given time.

103. The second eliminated alternative was to allow only non-intrusive population monitoring for all Steller sea lion research. *EA* at 31-32. This alternative would suspend intrusive research and new permits or permit amendments would not authorize intrusive research. *Id*. Non-intrusive activities, such as those from aerial and vessel monitoring, would still be allowed. *Id*.

104. The final eliminated alternative was to redirect "experimental" intrusive research to surrogate species. *EA* at 32-33. Under this alternative, the only research of an intrusive nature that would be permitted for the western population would be that directly related to conservation and management needs. *Id*. All other intrusive research would be restricted to the eastern (threatened) population or a non-ESA listed surrogate species, such as California sea lions. *Id*.

105. Instead of conducting a detailed study on the eliminated alternatives, all of which would eliminate intrusive research on this protected species, NMFS selected alternative two, as described above, in making its permit decisions. NMFS did not evaluate the common sense alternative of withholding research permits and amendments until NMFS sufficiently coordinated the activities of the permittees. Its failure to consider this alternative results in NMFS's failure to consider the full spectrum of alternatives necessary to produce a reasoned choice.

106. Further, NMFS inappropriately dismissed two of the alternatives by referencing self-serving, unsupported assertions made by the permittees. Specifically, NMFS rejected the alternative of allowing only non-intrusive population monitoring because "permit holders and applicants have indicated it is important for them to conduct the intrusive activities to obtain information." *EA* at 31-32. NMFS also rejected the alternative redirecting intrusive research to surrogate species, because "various permit holders and applicants" believe it would make research impractical or because they must pursue invasive studies on the exact population experiencing a decline. *EA* at 32-33.

107. Relying on conclusory and unsupported statements of permit applicants to make a decision that affects protected marine mammals frustrates the very purpose of the MMPA and the NEPA. Despite public comments that questioned NMFS's reliance on these comments, NMFS failed to adequately "study, develop, and describe" reasonable alternatives in its EA.

5. NMFS Was Required to Prepare an EIS Before Issuing the Permits.

108. NMFS now concedes that it has strong concerns about the research activities and will prepare an EIS. However, NMFS's offer is too late; it has already issued seven of the nine permits and the duplicative and inhumane activities are currently ongoing. To continue to allow numerous researchers, who are not coordinating their research species-wide, to perform a variety of intrusive research activities only contributes to the decline of the very species the research is supposed to help. Most importantly, it has not been shown that this research will directly benefit Steller sea lions, nor does it fulfill a critically important research need - the cornerstone of the MMPA's scientific permit program for endangered and threatened species.

109. NMFS's last minute decision to prepare an EIS after the issuance of the permits and its failure to suspend the authorized permits pending the preparation of the EIS violates NEPA's prohibition of the commitment of resources prejudicing selection of alternatives before a final decision based on the EIS has been made. While the EIS process has yet to begin, the permits are still effective and the inhumane and intrusive research as detailed above is ongoing. Regardless of what NMFS concludes in its EIS, its failure to suspend the permits demonstrates that it has already made up its mind and is allowing these continuing violations. Defendants' refusal to suspend the effectiveness of the research permits prior to the completion and issuance of the EIS demonstrates a prejudicial predectsional selection of the final alternative in violation of NEPA and its implementing

regulations. Moreover, Defendants' refusal to suspend the effectiveness of the research permits prior to the completion and issuance of the EIS promotes the continuing violations of NEPA and the MMPA.

PLAINTIFFS' CLAIMS FOR RELIEF

Claim One - Violations of the Administrative Procedure Act, the Marine Mammal Protection Act, and Implementing Regulations (MMPA)

110. Plaintiffs reallege and incorporate by reference herein paragraphs 1-109 above.

111. Defendants have violated Section 104 of the Marine Mammal Protection Act. 16 U.S.C. § 1389. Defendants additionally have violated the Act by failing to comply with their regulations governing the issuance of permits under Section 104 of the Marine Mammal Protection Act.

112. Defendants acted arbitrarily and capriciously by not complying with MMPA Section 104 and its implementing regulations, including its approval of permits wherein the permittees did not demonstrate that the research furthers a *bonafide* scientific purpose, nor prove that the research directly benefits Steller sea lions or fulfills a critically important need.

113. By permitting the hot-branding of Steller sea lions while crushed between the bars of a squeeze cage, and without the benefit of anesthesia, among other inhumane and intrusive activities, Defendants additionally have disregarded their own regulations under the MMPA requiring that scientific research be humane and present no unnecessary risks to the health and welfare of marine mammals. 16 U.S.C. § 1362; 50 C.F.R. § 216.34.

114. By authorizing lethal takings that will exceed the PBR Level, Defendants contravened NMFS's regulations that mandate that "the proposed activity, by itself or in combination with other activities will not have a long-term direct or indirect adverse impact on the species or stock." 50 C.F.R. § 216.34.

115. Several of the research permits violate the MMPA regulations' requirement that when a live animal is held captive or transported, "the applicant's qualifications, facilities, and resources are adequate for the proper care and maintenance of the marine mammal." 50 C.F.R. § 216.34(a)(6).

116. Defendants thus have violated Section 104 of the MMPA as well as its implementing regulations by issuing permits in a manner that is arbitrary, capricious, an abuse of discretion, and contrary to law within the meaning of the MMPA and the APA by determining that (1) the research directly benefits Steller sea lions or fulfills a critically important need under MMPA Section 104(c)(3); (2) the research furthers a *bonafide* scientific purpose under 16 U.S.C. 1374(c)(3)(A); (3) the research is humane and does not present any unnecessary risks to the health and welfare of marine mammals under 50 C.F.R. § 216.34; (4) the research permits as a whole will not have an adverse impact to the species under 50 C.F.R. § 216.34; and (5) the applicants will take adequate steps for the proper care of the animals under 50 C.F.R. § 216.34(a)(6). 16 U.S.C. § 1389 and 5 U.S.C. § 706(2)(A), (C) and (D).

Claim Twe - Violations of the Administrative Procedure Act, the National

Environmental Policy Act, and Implementing Regulations (EIS)

117. Plaintiffs rcallege and incorporate by reference herein paragraphs 1-116 above.

118. Defendants failed to perform an EIS before issuing the permits as required by NEPA because issuance of the seven scientific research permits was a major federal action that significantly affects the environment by, among other things, allowing lethal takes that will exceed the PBR Level for the endangered western stock of Steller sea lions.

119. Defendants' refusal to suspend the effectiveness of the research permits prior to the completion and issuance of the EIS demonstrates a prejudicial predecisional selection of the final alternative in violation of NEPA and its implementing regulations. Moreover, Defendants' refusal to suspend the effectiveness of the research permits prior to the completion and issuance of the EIS promotes the continuing violations of NEPA and the MMPA.

120. Defendants' failure to prepare an EIS, their commitment of resources prejudicing the selection of alternatives before making a final decision in its EIS, and their promotion of continuing violations is arbitrary, capricious, an abuse of discretion, and contrary to law within the meaning of NEPA and the APA. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1506.2; 5 U.S.C. § 706(2)(A), (C) and (D).

Claim Three - Violations of the Administrative Procedure Act, the National

Environmental Policy Act, and Implementing Regulations (NEPA Alternatives)

121. Plaintiffs reallcgc and incorporate by reference herein paragraphs 1-120 above.

122. Defendants' consideration of alternatives in its EA does not satisfy NEPA because (I) Defendants do not address the non-speculative alternative of withholding all new permits and amendments until it can ensure the various research activities will not be unnecessarily duplicative; and (2) Defendants unreasonably dismisses two of the secondary alternatives by relying on permittees' conclusory statements instead of its own analysis.

123. Defendants have violated NEPA by (a) failing to address the full spectrum of alternatives to its proposed action of granting and amending permits for the study of western endangered Steller sea lions and the threatened eastern stock; and (b) failing to adequately “study, develop, and describe” the alternatives it did identify in its EA in contravention of NEPA, 42 U.S.C. § 4332(2)(E), and its implementing regulations, 40 C.F.R. § 1508.9.

Claim Four-Violations of the Administrative Procedure Act, the National

Environmental Policy Act, and Implementing Regulations (Cumulative Imp)

124. Plaintiffs reallege and incorporate by reference herein paragraphs 1-123 above.

125. The cumulative impact analysis in the EA is inadequate as a matter of law under NEPA because the EA does not provide aggregate quantitative information, such as the combined total number of takes approved, a comparison of the total number of approved new takes with current levels or other mainstream endangered species benchmarks such as the PBR Level, or an estimate for the number of potential takes or activities that would be considered significant, instead relying on conclusory statements with little or no analysis as required by law.

126. Defendants failed to evaluate cumulative impacts in the EA. Such failure is arbitrary, capricious, an abuse of discretion, and contrary to law under NEPA and the APA. 40 C.F.R. § 1501.4(e)(2) and 5 U.S.C. § 706(2)(A), (C) and (D).

Claim Five - Violations of the Administrative Procedure Act (Biological Opinion<)

127. Plaintiffs reallege and incorporate by reference herein paragraphs 1-126 above.

128. Defendants' Biological Opinion fails to evaluate the cumulative effects of other agency actions or its own actions.

129. In making their decision to issue the scientific research permits, Defendants issued a Biological Opinion which was arbitrary, capricious, an abuse of discretion, and contrary to law under the APA and Defendants' regulations. 5 U.S.C. § 706(2)(A), (C) and (D) and 50 C.F.R. § 402.14(g)(3).

Claim Six - Violations of the Endangered Species Act and Administrative Procedure Act (ESA Regulations)

130. Plaintiffs reallege and incorporate by reference herein paragraphs 1-129 above.

131. Defendants' decision to issue the scientific research permits was made without compliance with Defendants' regulations implementing the ESA, including their duty to specifically consider: (1) whether the scientific research permits, if granted and exercised, will not operate to the disadvantage of the endangered species; (2) whether the permits would be consistent with the purposes and policy of the ESA; (3) the status of the population of Steller sea lions and the effect of the proposed action on the population, both direct and indirect; (4) whether alternative non-endangered species or population stocks can and should be used; (5) how the applicant's needs, program, and facilities compare and relate to proposed and ongoing projects and programs; and (6) opinions or views of scientists or other persons or organizations knowledgeable about the species which is the subject of the application or of other matters germane to the application. 50 C.F.R. § 222.308(c).

132. Defendants' decision to issue the scientific research permits without complying with its regulations implementing the ESA is arbitrary, capricious, an abuse of discretion, and contrary to law under the ESA and the APA. 16 U.S.C. 1539(a)(l)(A) and 5 U.S.C. § 706(2)(A), (C) and (D).

WHEREFORE, Plaintiffs respectfully request that this Court enter a judgment:

1. Declaring that Defendants have violated MMPA, NEPA, ESA and APA;

2. Vacating all research permits or permit amendments issued in 2005 for activities involving Steller sea lions;

3. Ordering the Secretary of Commerce to perform an EIS;

4. Enjoining the Secretary of Commerce from issuing any more research permits or amendments or modifications to the existing permits until an EIS is complete;

5. Ordering the Secretary of Commerce to conduct a workshop to accomplish the following: identification of the key recovery plan goals that require additional research; establishment of an appropriate sampling design for survey, behavioral and physiological research; development of a strategic plan and study design to ensure a cohesive approach to research; and development of quantitative models of energetics, life history, and population dynamics of Steller sea lions;

7. Retaining jurisdiction of this matter until Defendants have fulfilled all of their legal obligations, including completion of an EIS which fully evaluates cumulative effects and analysis of an adequate range of alternatives to the proposed action;

8. Awarding Plaintiffs their reasonable attorneys' fess and costs for this action, as may be authorized under applicable law; and

9. Granting such other and further relief as the Court may deem just and

Footnotes

1 **New permit applications were received from the North Pacific Universities Marine Mammal Research Consortium, University of British Columbia, Vancouver, British Columbia (File No. 715-1784); Dr. Markus Homing, Texas A&M University, Galveston, TX (File No 1034-1773); the National Marine Mammal Laboratory, Alaska Fisheries Science Center, Seattle, WA**

(File No 782-1768); and Alaska Department of Fish and Game, Anchorage, AK (File No. 358-1769). Applications for major amendments to existing permits were received from the Alaska SeaLife Center, Seward, AK (Permit No. 881-1668); Aleutians East Borough, Juneau, AK (Permit No. 1010-1641); Oregon Department of Fish and Wildlife. Corvallis, OR (Permit No. 434-1669); and Dr. Randall Davis, Texas A&M University, Galveston, TX (Permit No. 800-1664). Additionally, the National Marine Mammal Laboratory had submitted an earlier request for a permit amendment (Permit No. 782-1708). The Draft Environmental Assessment discusses this amendment request in addition to those listed in the Federal Register Notice.

2 **Permit applications for the National Marine Mammal Laboratory, Alaska Fisheries Science Center**; Alaska Dept. of Fish and Game; North Pacific Universily Marine Mammal Research Consortium, University of British Columbia; Oregon Department of Fish and Wildlife; Aleutians East Borough; and Alaska Sea Life Center, Seward, Alaska have been granted by NMFS. To the best of our knowledge, the applications for Dr. Marcus Horning, Texas A&M University, (File No. 1034-1773) and Dr. Davis, Texas A&M University (Permit No. 800-1664) are still outstanding.

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Exhibit 5

2006 WL 543954 (D.D.C.) (Trial Motion, Memorandum and Affidavit)
United States District Court, District of Columbia.

THE HUMANE SOCIETY OF THE UNITED STATES, et al., Plaintiffs,

v.

Carlos M. GUTIERREZ, et al., Defendants.

No. 05-1392.
January 27, 2006.

Federal Defendants' Combined Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment

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I. INTRODUCTION

Defendants hereby oppose plaintiffs' motion for summary judgment, and move for summary judgment on plaintiffs' claims for relief. The crux of plaintiffs' claims is that, by following Congress's direction to increase the scope and comprehensiveness of the Steller sea lion ("sea lion") research that Congress has specifically authorized since 2000, federal defendants (collectively "NMFS") violated the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. ("NEPA"), the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seg., and the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §§ 1371-1389. Relying on the expert opinion of its scientists, NMFS has determined that unless future scientific research ascertains the cause or causes of an alarming decline in the sea lions' western population,

[e]xtinction rates for rookeries or clusters of rookeries could increase sharply in 40 or 50 years and Steller sea lions could become extinct throughout the entire Kenai-to-Kiska [Alaska] region in the next 100-120 years.

AR 407 at 45-46. [1] / Notably, plaintiffs do not contest this premise for the research they challenge.

Plaintiffs claim that a 2005 environmental assessment ("EA") and a corresponding finding of no significant impact ("FONSI") are arbitrary and capricious, and therefore contrary to NEPA, because NMFS did not properly analyze three environmental issues: the environmental effect of increasing the number of sea lions that skilled scientists monitor or touch during research from the levels established in 2002; alleged "highly controversial," "highly uncertain," and "cumulative" impacts of research methodologies for studying the sea lions' population, diet, physiology, and movement; and an appropriate range of programmatic alternatives to this research.

However, NMFS thoroughly and sensibly analyzed all these environmental factors in its EA and FONSI. Because plaintiffs never controvert this analysis, they cannot meet NEPA's elementary burden of establishing that NMFS acted arbitrarily and capriciously by not (1) considering "the relevant factors" in its EA and FONSI and (2) articulating "a rational connection between the facts found and the choice made" in those documents. Baltimore Gas & Electric Co. v. NRDC. 462 U.S. 87, 105 (1983).

Nor can plaintiffs meet their burden with respect to their ESA and MMPA claims. Plaintiffs allege that the consideration of effects of the action and cumulative effects in NMFS' biological opinion ("BiOp") were arbitrary and capricious, but fail to cite any effects that NMFS failed to consider, or any harm resulting from the alleged errors. Moreover, as will be discussed infra, NMFS has decided voluntarily to reconsider and clarify the effects analysis in the 2005 BiOp and issue a new BiOp by March 1, 2006. Under these circumstances, the Court should dismiss plaintiffs' ESA claim. Similarly, NMFS is entitled to summary judgment on plaintiffs' MMPA claim because the record shows that NMFS acted reasonably in relying on preliminary comments of the Marine Mammal Commission ("MMC") in light of the pressing need to issue the permits, and

reasonably determined that the total amount of take authorized under the permits would not significantly reduce the ability of the species to recover.

II.LITIGATION BACKGROUND

A. STATUS OF THE SPECIES

The research at issue in this case is designed to provide data that will aid scientists in solving a decades-old question: what is causing the drastic decline in the population of Steller sea lions? Steller sea lions are distributed around the rim of the North Pacific Ocean from Southern California to Hokkaido, Japan. The species was first listed as threatened under the ESA in 1990 in response to a severe decline in the number of Steller sea lions observed in Alaska (reductions of 63% since 1985 and 82% since 1960). AR 406 at 7. In 1997, Steller sea lions were classified into two "distinct population segments" under the ESA [2] / The segment of the population west of 144° W longitude (western stock) was listed as endangered, while the population east of 144° W longitude (eastern stock) was listed as threatened. Id

The rate of decline in the western stock averages 5% per year. Id at 38. By contrast, the eastern stock increased at an average rate of 5.9% per year between 1979 and 1997. Id. A prevailing theory regarding the cause of the western stock's decline is a decrease in juvenile (ages 1 year to 4 years) survival rates, most likely because juveniles are less adept at obtaining prey and avoiding predators. AR 407 at 32. Some scientists believe that the overall decline in the population is due to a 10-20% annual decrease in juvenile survival. AR 406 at 38. Other factors that may be influencing the depletion of the western stock are decline in reproductive success and changes in adult survival. Id. at 33.

B. RELATED FEDERAL RESEARCH

As shown above, although the "ultimate cause" of the recent declines in the sea lions' western population "remains unknown," many scientists believe that, when the least likely of this decline's possible causes are excluded, "[w]hat remains as a cause of the recent decline appears to be a decline in the prey base available to young sea lions." AR 202 at 9 (NMFS excerpt attached hereto as Exhibit 1). Recent research has (1) "shown a strong positive correlation between a reduction in the diversity of the diet and [the western sea lion's] population decline" and (2) concluded that "nutritional stress is the most likely cause" of this decline. AR 259 at 338, 339 (map distinguishing between eastern and western sea lion populations (NMFS excerpt attached hereto as Exhibit 2); AR 407 at 42.

To establish "ultimate" or primary causes of the western sea lion's decline, NMFS' 1992 Final Recovery Plan for Steller Sea Lions prioritized different research needs for potential causes, including research methodologies that would

monitor status and trends of sea lion abundance and distribution, monitor health, condition, and vital parameters, assess and minimize causes of mortality, and investigate feeding ecology and factors affecting energetic status.

AR 390 at 5, 10 (NMFS excerpt attached hereto as Exhibit 3). Beginning in 2000 and 2001, Congress responded to this recovery plan, existing research, and the western sea lion's continued population declines by disbursing substantial public monies for more comprehensive research.

In the Fiscal Year 2001 Consolidated Appropriations Act, for example, Congress appropriated $43.2 million for sea lion research needs designated by it, including "juvenile and pup survival rates," "population counts," and "nutritional stress." Compare AR 406 at 7-8 with Pub. L. 106-554, 114 Stat. 2763, 2763A-175 to 179. Congress disbursed this money both directly to NMFS and also to several non-federal scientists and research institutes, including the Alaska Department of Fish and Game, the University of Alaska's Sea Life Center, and the North Pacific University's Marine Mammal Research Consortium. In 2002, Congress appropriated another $40.15 million to these entities to address the same designated sea lion research needs. Id; see also AR 406 at 53.

In its 2002 EA and FONSI, NMFS analyzed the environmental effects of issuing both ESA and MMPA permits allowing these scientists and research institutions to conduct the particular sea lion research that Congress authorized and designated. After considering this environmental analysis, NMFS allowed these and other institutions to conduct this research, including (1) aerial surveys of sea lion numbers; (2) surveys of these numbers by boat or "vessel;" (3) surveys on the ground by authorized individuals; (4) scat (sea lion feces) collection and analysis; (5) carcass analysis of any sea lions found dead; (6) tissue analysis from sea lions harvested by aboriginal peoples; (6) behavioral and other observations of rookeries by remote means; (7) tracking and monitoring sea lions swimming at sea; and (8) the temporary capture or recapture and subsequent release of sea lions for blood collection, population tracking (by tagging or hot branding), and physiological analysis. AR 406 at 22-23, 79-83.

NMFS analyzed the effects of extending or expanding this research in its 2005 EA and FONSI. It also studied two research methodologies not previously analyzed: (1) inserting tiny transmitters to monitor stomach temperature and (2) data loggers in juvenile sea lions. After completing this analysis, NMFS determined that this additional research also met the research needs designated by Congress. Id. at 7-8, 27-30, 53.

C. SEA LION RESEARCH CHALLENGED BY PLAINTIFFS

Plaintiffs challenge the 2005 EA, FONSI, and corresponding permits, not the 2002 EA and FONSI. Therefore, plaintiffs ask this Court to enjoin NMFS from continuing to allow increases or changes from the scientific research first authorized by federal permit in 2002. Amended Complaint, p. 41 (plaintiffs request Court to vacate "all research permits or permit amendments issued in 2005").

NMFS determined that it would not authorize "intentional lethal mortality of Steller sea lions" in either its 2002 research permits or the 2005 research permits that plaintiffs challenge. AR 406 at 53-54. Instead, NMFS authorized research behavior or

protocols necessary to accurately study the population and physiology of virtually any elusive, intelligent wild animal. NMFS noted that, under the ESA and MMPA, this basic research was defined as "a take" because scientific research "(1) attempting to harass a marine animal is considered a take and (2) any act that has the potential to disturb a marine mammal is considered harassment." AR 384 at 57 (emphasis supplied) (NMFS excerpt attached hereto as Exhibit 4); AR 406 at 65 (NMFS notes MMPA's definition of "harass" includes acts of "annoyance [having] the potential to disturb a marine mammal"). Thus, NMFS reiterated that, under this "broad definition of 'take,'" its research permits would not authorize killing for research purposes, but only strictly limited "accidental mortality ... resulting from the actions or presence of researchers while conducting permit-authorized activities." AR 246 (NMFS excerpt attached hereto as Exhibit 2).

In the context of both widespread sea lion population monitoring and physiology studies, and under this broad definition of "take," NMFS' 2002 research permits authorized the taking during aerial surveys, scientific monitoring, and physiological study of up to 331, 174 western and eastern sea lions. AR 406 at 79-83. In 2005, NMFS increased the maximum number of animals that could be studied during this research to 527, 690 western and eastern sea lions, an increase of approximately 59 percent. Compare id. with AR 406 at 103-107.

NMFS did not change the amount of accidental or "incidental mortality" both regulated and limited under the 2005 research permits. NMFS' 2002 permits authorized the accidental deaths of no more than 20 western sea lions. AR 406 at 82; Exh. 4 (AR 384) at 113. Similarly, in 2005, NMFS decided that its Permits Division and Alaska Region would ensure that sea lion mortality would "not exceed 20 animals per year in the western stock." AR 407 at 65. Further, NMFS determined that it would suspend all research under all 2002 and 2005 permits, pending additional scientific review, "if the total number of research-related mortalities of endangered [western] sea lions reaches 10 animals under any combination of permits." AR 406 at 50, 106 (emphasis supplied).

III. STATUTORY AND REGULATORY BACKGROUND

A. NEPA

NEPA generally requires a federal agency to prepare an environmental impact statement ("EIS") when a proposed governmental action significantly affects "the quality of the human environment." However, where the proposed action would not significantly affect the environment, NEPA does not require an EIS. See 43 U.S.C. 4332 (2); 40 C.F.R. § 1508.9; see also Marsh v. Oregon Natural Resources Council 490 U.S. 360, 372, 375-376, 377 n. 23, 378 (1989); Kleppe v. Sierra Club. 427 U.S. 390, 394 (1976)(EIS required if proposed action "would be environmentally 'significant' ")(emphasis supplied).

The Council on Environmental Quality ("CEQ") has issued regulations governing agency compliance with NEPA. 40 C.F.R. § 1500.1. The CEQ regulations provide that agencies may prepare an environmental assessment ("EA") to determine whether their proposed actions would precipitate a significant impact on the environment necessitating an EIS. 40 C.F.R. § 1501.4.

CEQ regulations define an EA as "a concise public document ... that serves to [b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a). Under this standard, an agency need not prepare an EIS if, on the basis of "sufficient evidence" and related analysis, it concludes in an EA and corresponding finding of no significant impact ("FONSI") that its proposed action would not significantly affect the environment. Id.; 40 C.F.R. § 1508.13.

These NEPA provisions impose procedural, not substantive, constraints on the government. Thus, NEPA does not dictate a federal agency's particular programmatic objectives or a particular level of environmental protection or economic development per se. Instead, NEPA governs the manner in which an agency reaches its decisions. Its dominant purpose is to ensure that federal agencies consider the environmental consequences of their proposed actions in advance of a final decision to proceed. Robertson v. Methow Valley Citizens Council. 490 U.S. 332, 349-350 (1989).

The Supreme Court has emphasized NEPA's procedural purpose.

NEPA's mandate to the agencies is essentially procedural ... It is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency. Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute ... not simply because the court is unhappy with the result reached.

Vermont Yankee Nuclear Power Corp. v. NRDC. 435 U.S. 519, 558 (1978).

Judicial review of NEPA decisions is the same as judicial review of other informal agency decisions under the Administrative Procedure Act ("APA"): this Court must decide whether NMFS' determination in the 2005 EA and FONSI that the scientific research would not have significant environmental consequences was arbitrary and capricious. Dep't of Transportation v. Public Citizen. 541 U.S. 752, 763 (2004); Marsh v. Oregon Natural Resources Council 490 U.S. 360, 375-376, 377 n. 23, 378;Greenpeace Action v. Franklin. 14 F.3d 1324, 1331-1333, 1335 (9th cir. 1992)(upholding EA and FONSI analyzing threatened sea lions); Sierra Club v. U.S. Dep't of Transportation. 753 F.2d 120, 126-127 (D.C. Cir. 1985)(EA and FONSI may be overturned only if they are "arbitrary, capricious, or an abuse of discretion").

The Supreme Court has defined the type of reasoning that reviewing courts must uphold under NEPA. The Court has concluded that NEPA documents must be upheld if an agency conducts a "reasoned evaluation" of environmental factors in them. Marsh. 490 U.S. at 377, 385. The Supreme Court defines a "reasoned evaluation" under NEPA as having two components: an agency must (1) consider "the relevant factors" and (2) articulate "a rational connection between the facts found and the choice made." Baltimore Gas & Electric Co. v. NRDC. 462 U.S. 87. 105; see also Tourus Records v. Drug Enforcement Admin., 259 F.3 d. 731, 736 (D.C. Cir. 2001).

Under this standard, once an agency adequately identifies and evaluates the relevant environmental factors, it "is not constrained by NEPA from deciding that other values outweigh the environmental costs." Robertson v. Methow Valley Citizens Council. 490 U.S. 332, 350. Under the same standard, plaintiffs cannot prevail unless they meet their burden of showing that NMFS acted arbitrarily. To meet this burden, plaintiff must supply persuasive and palpable evidence, not speculation or conjecture, to clearly controvert the analysis underlying an agency's NEPA document. Kleppe v. Sierra Club. 427 U.S. at 412-414;Sierra Club v. Marita. 46 F.3d 606, 619 (7th cir. 1995)(plaintiffs cannot meet NEPA burden where they do not show agency "offered an explanation for its decision that runs counter to the evidence ... or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"); Lower Alloways Creek Tp. v. Public Service Elec. 687 F.2d 732, 740-741, 743, 747-748 (3rd Cir. 1982); Sierra Club v. U.S. Dep't of Transportation. 753 F.2d 120, 128-129.

Where agencies analyze conflicting or uncertain scientific data in their NEPA documents within their areas of special expertise, reviewing courts are highly deferential. Marsh. 490 U.S. at 378;Baltimore Gas. 462 U.S. at 93, 103, 105;Greenpeace Action v. Franklin. 14 F.3d 1324, 1331-1333, 1335;Sierra Club. 753 F.2d at 128-129.

B. ESA

The ESA contains both substantive and procedural requirements designed to conserve endangered and threatened species, and the ecosystems on which they depend. 16 U.S.C. § 153l(b). The starting point for species preservation is Section 4 of the ESA, 16 U.S.C. § 1533, which empowers the Secretary of Commerce to designate species as "threatened" or "endangered," and to designate "critical habitat" for listed species. See 16 U.S.C. § 1532(6) (defining "endangered species"); 16 U.S.C. § 1532(20) (defining "threatened species"); 16 U.S.C. § 1532(5)(A)(ii) (defining "critical habitat").

Once a species is listed, Section 7(a)(2) of the ESA requires each federal agency ("action agency") to ensure, in consultation with the consulting agency, that any action authorized, funded or carried out by the agency "is not likely to jeopardize the

continued existence" of an endangered or threatened species, or "result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S. C. § 1536(a)(2).[3] -/ If the agency action will have no effect on a listed species or critical habitat, the consultation requirements are not triggered and the action agency need not take any further steps to consult. 50 C.F.R. 402.12(d)(l).

If the action agency determines that its action "may affect" listed species, it must pursue either informal or formal consultation with NMFS. 50 C.F.R. §§ 402.13, 402.14. Informal consultation is an optional process comprised of all discussions and correspondence between NMFS and an action agency in order to determine whether formal consultation is necessary. 50 C.F.R. § 402.13(a). If an action agency determines, with the written concurrence of NMFS, that the action "is not likely to adversely affect" the listed species or critical habitat, the consultation process is terminated, and formal consultation is not necessary. 50 C.F.R. § 402.13(a).

If either the action agency or NMFS determines that the proposed action is "likely to adversely affect" listed species or designated critical habitat, the agencies must engage in formal consultation. 50 C.F.R. §§ 402.13(a), 402.14(a)-(b). Formal consultation typically begins with a written request by the action agency, 50 C.F.R. § 402.14(c), and may include the preparation of a biological assessment ("BA") by the action agency that evaluates "the potential effects of the action on listed and proposed species and designated and proposed critical habitat" and "whether any such species or habitat are

likely to be adversely affected by the action___" 50 C.F.R. § 402.12(a). Formal

consultation concludes with the issuance of a biological opinion ("BiOp") by the consulting agency. 50 C.F.R. § 402.14(l)(l). The BiOp assesses the likelihood of jeopardy to the species and whether the proposed action will result in destruction or adverse modification of critical habitat. See 50 C.F.R. §§ 402.14(g), (h). In preparing its BiOp, NMFS must evaluate the current status of the listed species and critical habitat and the effects of the action and cumulative effects on the listed species and any designated critical habitat in the action area. Id- If NMFS determines that the action is likely to jeopardize the continued existence of the species or result in an adverse modification of critical habitat, it must determine whether any "reasonable and prudent alternatives" exist for the action that will not violate section 7(a)(2). 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). "Following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and NMFS' biological opinion." 50 C.F.R. § 402.15(a).

C. MMPA

Congress enacted the MMPA in 1972 to address concerns over the decline of marine mammal populations. The MMPA, among other things, establishes a general "moratorium" prohibiting the taking or importation of marine mammals or marine mammal products. Id § 137***l***(a); see also id § 1362(8) (defining "moratorium"); id § 1371(a)(l) - (a)(6) (describing exceptions); id § 1373(aut)orizing regulations on take and importation). The term "take" means "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(13); 50 C.F.R. § 216.3.[4] *-I* Like the ESA, administration of the MMPA is divided between NMFS and FWS. NMFS has jurisdiction over sea lions, whales, porpoises, and seals and FWS has jurisdiction over all other marine mammals (sea otters, walruses, polar bears, and dugongs). 16 U.S.C. § 1362(12)(A).

The MMPA provides a mechanism for limited waiver of the moratorium's prohibition on take. 16 U.S.C. §§ 1371, 1374. The Secretary of Commerce or Interior may issue permits authorizing the take of marine mammals for, inter alia, scientific research purposes, provided that the taking "is required to further a bona fide scientific purpose." 16 U.S.C. § 1374(c)(3)(A). If the research will involve lethal taking from a stock that is depleted, the Secretary must determine that the results of the research "will directly benefit that species or stock, or that such research fulfills a critically important research need." 16U.S.C. § 1374(c)(3)(B).[5] /

IV. STANDARD OF REVIEW

Granting summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Anderson v. Liberty Lobby. Inc. 477 U.S. 242 (1986); White v. Fraternal Order of Police. 909 F.2d 512 (D.C. Cir. 1990). Because there are generally no facts in dispute in administrative record cases, and the court need not - and, indeed, may not - "find" underlying facts, there are no material facts essential to the court's resolution of this action, and a motion for summary judgment is appropriate. See, e.g. Celotex Corp. v. Catrett. 477 U.S. 317, 322 (1986); Luian v. Nat'l Wildlife Fed'n. 497 U.S. 871, 883 (1990); San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n. 789 F.2d 26, 37 (D.C. Cir. 1986) (en bane). See also American Bioscience v. Thompson. 269 F.3d 1077, 1083 (D.C. Cir. 2001) ("[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The 'entire case' on review is a question of law") (footnote omitted).

Challenges to final agency actions under NEPA, the ESA, and the MMPA are subject to the review provisions of the APA. See Nat'l Audubon Soc'y v. Hester. 801 F.2d 405, 407 (D.C. Cir. 1986) (NEPA and ESA); Natural Res. Def. Council v. Evans. 364 F. Supp. 2d 1083, 1091 (N.D. Cal. 2003) (MMPA). Under the APA, the Court may set aside a regulatory decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); Marsh v. Oregon Natural Res. Council. 490 U.S. 360 (1989); Nat'l Trust for Historic Pres. v. Dole. 828 F.2d 776, 781 (D.C. Cir. 1987). This standard of review is narrow, and the Court is only empowered to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park. Inc. v. Volpe. 401 U.S. 402. 415-16 (1971). See also Baltimore Gas. 462 U.S. at 103;Marsh. 490 U.S. at 377.

V. ARGUMENT

A. THIS COURT LACKS JURISDICTION TO REVIEW PLAINTIFFS' CLAIMS.

The Supreme Court has held that a court should not review the merits of a claim until it determines that it has jurisdiction to do so. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93-94 (1998). A federal court "presumptively lacks jurisdiction in a proceeding until a party demonstrates that jurisdiction exists." Commodity Futures Trading Comm'n v. Nahas. 738 F.2d 487, 492 n.9 (D.C. Cir. 1984); Kokkonen v. Guardian Life Ins. Co. 511 U.S. 375, 377 (1994). A party invoking federal jurisdiction, once challenged, has the burden of proving its existence. Georgiades v. Martin-Trigona. 729 F.2d 831, 833 n.4 (D.C. Cir. 1984); see also La. Envtl. Action Network v. Browner. a litigant unless that party has demonstrated constitutional and prudential standing.").

In this case, plaintiffs lack standing because they have not established an actual or imminent "injury in fact" fairly traceable to Defendants' actions. Further, their MMPA claim is not reviewable under the APA because they fail to challenge a final agency action.

1. Plaintiffs Lack Article III Standing To Bring Their Claims.

To establish standing under Article III of the Constitution, a plaintiff must demonstrate that: (1) he has personally "suffered an 'injury in fact,' - an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) 'actual or imminent, not conjectural or hypothetical' "; (2) the injury complained of is fairly traceable to the challenged action of the defendant; and (3) it is likely that the injury will be redressed by a favorable decision. Defenders of Wildlife. 504 U.S. at 560-61 (internal citations omitted). The burden of proof on this issue falls squarely on the plaintiff. Steel Co. 523 U.S. at 103-104. In the context of a motion for summary judgment, a plaintiff may not rest on mere allegations of injury, but must provide affidavits or other evidence showing, through specific facts, that he himself is among the injured, as opposed to simply possessing an interest in the subject matter at issue. Defenders of Wildlife. 504 U.S. at 560-62 (standing is a threshold jurisdictional requirement that

must be affirmatively demonstrated "in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.").

Plaintiffs have not demonstrated injury in fact fairly traceable to Defendants' actions. The conclusory allegations in plaintiffs' complaint are insufficient to establish standing, and plaintiffs have failed to provide affidavits or other evidence demonstrating that they have suffered actual injury. Plaintiffs speculate that Defendants' actions "may" reduce the number of Steller sea lions, or that they "may observe injury" to sea lions, and fail to demonstrate actual, imminent harm to their alleged interests in observing and studying the species. See Am. Cmplt. at ,,,, 12, 18. Even if plaintiffs are correct that individual sea lions will suffer harm, that is not the focus of the standing inquiry: plaintiffs must establish that they are themselves subject to present or imminent injury. See ASPCA v. Ringling Bros. & Barnum & Bailey Circus. 317 F.3d 334, 336 (D.C. Cir. 2003). Here, plaintiffs rely on broad allegations that Defendants are "creating a threat to the sea lion population" and "hastening the extinction of the species," and wholly fail to back these allegations with specific instances of actual injury. Id at ,,]9. Because plaintiffs have failed to establish that they have standing to bring any of their claims, the Court lacks jurisdiction over this matter.

2. Plaintiffs' MMPA Claim Fails To Challenge Final Agency Action.

Plaintiffs' MMPA claim is further barred by their failure to challenge a "final agency action," a fundamental requirement for judicial review under the APA. The APA provides a waiver of sovereign immunity and cause of action for judicial review of final agency action, 5 U.S.C. § 702; however, only final agency action may be reviewed. 5 U.S.C. § 704; see also Nat'l Wildlife Fed'n. 497 U.S. at 882. Plaintiffs may only challenge "a specific 'final agency action' [that] has an actual or immediately threatened effect." Id at 894 (emphasis added) (citation omitted); see also Indep. Petroleum Ass'n v. Babbitt. 235 F.3d 588, 594 (D.C. Cir. 2001); Sierra Club v. Peterson. 228 F.3d 559, 565 (5th Cir. 2000). Thus, federal courts lack jurisdiction to adjudicate "programmatic" challenges that seek wholesale review of an agency's policies or practices. See Nat'l Wildlife Fed'n. 497 U.S. at 890-91. The principal purpose of this limitation is "to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." Norton v. S. Utah Wilderness Alliance. 542 U.S. 55, 66 (2004).

In the instant case, plaintiffs mount an impermissible attack on the entire permitting program for Steller sea lion research, asking this Court to grant injunctive relief that would affect not only outstanding permits, but also future permits. Plaintiffs ask the Court to "vacat[e] all research permits or permit amendments issued in 2005 for activities involving Steller sea lions." Rather than identifying specific weaknesses in individual permits, plaintiffs discuss the permits globally. See, eg., Am. Cmplt. at 3 (alleging that NMFS violated the law by "issuing multiple research permits to a wide variety of entities"); Id at ,,,, 89-95 (discussing activities that allegedly violate MMPA without distinguishing between permits); Id. at ,, 96 (alleging that NMFS has not determined that "this suite of research activities" will directly benefit Steller sea lions). Moreover, plaintiffs not only challenge existing permits, but also ask the Court to enjoin the Secretary of Commerce from "issuing any more research permits or amendments or modifications to the existing permits until an EIS is complete." Am. Cmplt. at 41 (emphasis added). Plaintiffs clearly seek "wholesale correction" of alleged flaws, which is prohibited under Nat'l Wildlife Fed'n. 497 U.S. at 892-93. This Court lacks jurisdiction to review plaintiffs' general challenge to NMFS' permitting program, couched as an MMPA claim. See Comtys. for a Great Nw., Ltd. v. Clinton, 112 F. Supp. 2d 29, 37-38 (D.D.C. 2000) (APA does not confer jurisdiction to review "generalized grievance").

B. NMFS PREDICATED ITS 2005 EA AND FONSI ON REASONED, SENSIBLE ANALYSIS.

1. NMFS Did Not Admit the 2005 EA and FONSI Were Unlawful.

Plaintiffs contend the 2005 EA and FONSI are arbitrary and capricious because NMFS supposedly conceded that the 2005 EA and FONSI were unlawful. Proffering a letter that NMFS wrote to them, plaintiffs posit that NMFS "candidly admitted" that the 2005 EA and FONSI are erroneous. See Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment ("P1. Mem.") at 12-16.

Plaintiffs are wrong. Although NMFS stated it would prepare an EIS in the future for its entire program of both administering future sea lion research grants and issuing corresponding permits because it shared “your concerns about the scope” of that research, the letter to which plaintiffs refer postdates the 2005 EA and FONSI. Id.; PL Exh. 3 (letter dated 27 June 2005). Thus, this letter is inadmissible because it is outside the authenticated administrative record.

By limiting judicial review to the administrative record, NEPA and the APA prohibit plaintiffs from merely disagreeing with that record by attempting to change the quantum of evidence in it. Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985), quoting Camp v. Pitts. 411 U.S. 138, 142 (1973); Citizens to Preserve Overton Park. Inc. v. Volpe. 401 U.S. 402, 416, 420 (1971); Coal, on Sensible Transp. v. Dole. 826 F.2d 60, 72 (D.C. Cir. 1987). [6] /

Even if arguendo this extra-record letter were admissible [7] /, NMFS did not state or hint in it (1) that the 2005 sea lion research permits preceding that letter would precipitate “significant” environmental impacts under NEPA or (2) that the 2005 EA and FONSI were arbitrary, capricious, or otherwise wrong. Instead, NMFS properly notified plaintiffs of its policy decision to prepare an EIS not merely to analyze either research permits that NMFS had issued previously or congressional research grants that NMFS had administered previously, but to analyze its entire program of “administering grants and issuing permits associated with [sea lion] research” now and in the future. P1. Exh. 4.

Therefore, far from showing NMFS “candidly admitted” the 2005 EA and FONSI are unlawful, plaintiffs celebrate a letter and notice that actually establish NMFS' diligent compliance with NEPA's CEQ regulations. 40 C.F.R. §§ 1501.3(a) (where agency “has decided to prepare an environmental impact statement” in the future, a future EA “is not necessary”); 1502.4(b) (“[environmental impact statements may be prepared [for] broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking”)(emphasis supplied).

2. NMFS Properly Analyzed PBR Numbers.

Plaintiffs also theorize that the 2005 EA and FONSI were arbitrary and capricious because NMFS did not properly analyze the sea lion's “potential biological removal” (“PBR”) level. P1. Mem. at 10, 19-20. PBR analysis is a regulatory methodology defined and authorized in the Marine Mammal Protection Act (“MMPA”). The MMPA defines PBR as the “maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.” 16 U.S.C. § 1362(20). Id (emphasis supplied). [8] -/

Under this plain language, the MMPA provides that PBR analysis may be used to analyze situations in which, as a result of federal or private harvesting or other removal plans, a given species will be necessarily and permanently “removed” from a given “marine mammal stock.” Id. (emphasis supplied) Here, as shown supra at 8-9, the 2005 research permits challenged by plaintiffs do not authorize anyone or any entity to necessarily and permanently remove a single sea lion. Exh. 2 (AR 246); AR 406 at 53. Instead, these permits strictly limit hypothetical sea lion “mortality” or permanent removal that may or may not occur and that, even if it did occur, would occur solely by accident. AR 406 at 50, 106; AR 407 at 65. Thus, even if plaintiffs' PBR numbers were accurate, which they are not, their PBR methodology is inapplicable because it assumes the removal of sea lions is certain, unlike the case here.

Further, after reviewing all available studies of or data about the extent to which intrusive scientific study of sea lions may or may not affect sea lion numbers, NMFS concluded that even a limit of “up to 20” accidental western sea lion deaths (more than double the amount that NMFS would allow before suspending every activity authorized by its 2005 permits) “would have a negligible impact on the western stock of Steller sea lions.” Compare Exh. 3 (AR 390), Appendix B at 14 and AR 407 at 65, 69 with AR 406 at 50, 106.

Although NMFS acknowledged that more data was needed, it also determined that every known study of intrusive scientific analysis of sea lions has established that this research does not appreciably or measurably affect their numbers. For example, NMFS noted that, within a group of 7,500 sea lions disturbed during similar research in 1995, "no mortalities were reported." Similarly, NMFS determined that, within a larger group of 31,150 and 48,000 sea lions that it studied in 1997 and 1998 respectively, "no mortalities were detected or reported," even though these animals were approached, disturbed, captured, tagged, or branded. AR 407 at 43. Finally, NMFS determined that of the 331,174 western and eastern sea lions that were monitored by air, counted on foot, or otherwise touched by scientists under the 2002 permits, supra at 8, (1) no mortalities were reported in 2002 and (2) no more than 10 mortalities were reported in 2003 and 2004. Exh. 3 (AR 390) at 12; AR 406 at 42.

Plaintiffs do not controvert NMFS' specialized analysis of this data with a scintilla of evidence, analysis, or studies of their own. Therefore, this Court must defer to NMFS' expertise because it analyzed the effects of scientific research within the specialized jurisdiction that Congress has conferred on it. Marsh, 490 U.S. at 377-378;Sierra Club, 753 F.2d at 126-129.

Even if arguendo plaintiffs could supplant NMFS' specialized analysis with their preferred PBR numbers, which they cannot, plaintiffs' PBR analysis is internally and mathematically flawed. Because plaintiffs erroneously assert that NMFS rested its PBR analysis on a presumed maximum "annual mortality of approximately 50 [western] sea lions," plaintiffs predicate their PBR theories on a stark misreading of the record. P1. Mem. at 19. As shown above, NMFS actually determined that (1) accidental mortality during research would "not exceed 20 animals per year in the western stock" and (2) all research under the 2002 and 2005 permits would be suspended "if the total number of research-related mortalities of endangered [western] sea lions reaches 10 animals under any combination of permits." AR 406 at 50, 106; AR 407 at 65 (emphasis supplied).

Plaintiffs' PBR computations collapse under the weight of the correct PBR numbers. They begin their figures, for example, by urging a PBR limit of 208. P1. Mem. at 19. Adding NMFS' maximum number of 10 sea lions accidently killed before all 2002 and 2005 research would be suspended to both NMFS' estimated PBR numbers for aboriginal or subsistence harvests (171) and incidental kills during commercial fishing (26) yields a PBR number of 207. This number is one less than plaintiffs' preferred PBR maximum of 208. Compare P1. Mem. at 19 with Exh. 4 (AR 384) at 40; AR 407 at 39.

Even if plaintiffs had established that NMFS exceeded an applicable PBR level, they still cannot show that NMFS' limit of 10 accidental sea lion deaths before suspending permit activity would significantly affect the western sea lion population. The MMPA provides that PBR must be a cautious, conservative methodology erring on the side of biological sustainability, not maximum harvesting. Thus, it authorizes agencies to predicate their PBR analysis on a species' "minimum population estimate," not its observed maximum populations, increased by only "one-half the maximum theoretical or estimated net productivity rate of the stock at small populations." Id.

However, NMFS predicated its own analysis on an even "more conservative" PBR approach: instead of assuming the sea lion population would increase at 50 percent of its projected rate, as allowed by the MMPA, NMFS assumed the sea lion population's "net productivity rate" would increase at only 10 percent of the projected rate. This calculation will "reserve 90% of annual net production for recovery of endangered species and allow only 10% of annual net production to be authorized for taking incidental to human activities." Exh. 3 (AR 390), Appendix B at 14.

Finally, in addition to its decision to suspend all 2002 and 2005 permit activity in the event accidental mortality ever exceeds 10 western sea lions, NMFS adopted detailed ameliorative measures designed to minimize this sea lion mortality, however problematic. These measures include the (1) required attendance of a "veterinarian" or trained "biologists" during intrusive physiological study and (2) aerial flight restrictions ensuring that sea lions would only hear plane noise for "1-2 minutes." AR 406 at 45-50.

Plaintiffs do not mention these mitigation measures, let alone allege they have been inadequately analyzed. Because plaintiffs have not established that these protective measures are arbitrary and capricious, they cannot challenge the 2005 EA and FONSI's analysis of the discrete environmental impacts ameliorated by these measures. Mitigation measures need not eliminate all

adverse impacts or the possibility thereof. Preserve Endangered Areas of Cobb v. U.S. Army Corps of Engineers. 87 F3d 1242, 1248-1249 (11th Qr. 1996); Friends of the Pavette v. Horseshoe Bend Hydroelectric Co. 988 F.2d 989, 993 (9th cir. 1993); Greenpeace Action. 14 F.3d at 1331-1333, 1335;Friends of Endangered Species v. Jantzen. 760 F.2d 976, 987 (9th cir. 1985); Steamboaters v. FERC. 759 F.2d 1382, 1394 (9th Qr 1985); Sierra Club. 753 F.2d at 126-129.

In sum, one searches plaintiffs' papers in vain for a plausible reason why this Court should not defer to NMFS' specialized finding that, unless more comprehensive scientific research establishes the cause or causes of the western sea lion's serious decline, and unless such research precipitates the proper corrective action, authoritative "population viability models predict ... a 65-100% probability of extinction for the [sea lion] population from Kenai Peninsula to Kiska Island within 100 years." Exh. 3 (AR 390) at 4. Therefore, plaintiffs cannot show, as they must, that NMFS acted arbitrarily and capriciously by not (1) considering "the relevant factors" in its EA and FONSI and (2) articulating "a rational connection between the facts found and the choice made" in those documents. Baltimore Gas, 462 U.S. 87, 105 (1983); American Iron and Steel v. EPA. 115 F.3d 979, 1004 (D.C. Cir. 1997) (courts defer to agency's chosen scientific model unless "there is simply no rational relationship between the model chosen and the situation to which it is applied").

3. NMFS Properly Analyzed the Impacts that Plaintiffs UUAllege are "Highly Controversial" and "Highly Uncertain."/UU

Plaintiffs posit that the 2005 permits would have "highly controversial" and "highly uncertain" environmental effects that NMFS did not properly consider or analyze. P1. Mem. at 21-23. The extent to which a factual, scientific, or other dispute implicates "highly controversial" and "highly uncertain" environmental effects constitutes two factors, among many, that are relevant to whether a given agency action would or would not "[significantly" affect the natural environment and, therefore, require an EIS. 40 C.F.R. § 1508.27(b). Plaintiffs predicate their claim that the NMFS did not properly analyze alleged "highly controversial" environmental effects on a Marine Mammal Commission ("MMC") letter, dated 10 June 2005. Under settled NEPA and APA tenets, supra at 11-12, this letter is inadmissible because the MMC wrote it after the administrative record closed.

Even if arguendo plaintiffs' extra-record letter were admissible, the letter does not refer to a single highly controversial environmental impact. To establish that NMFS improperly analyzed such an impact, plaintiffs must meet a two-part analytical and evidentiary burden. First, they must show the disputed environmental effects implicated a "substantial dispute concerning the size, nature, or effect" of the proposed action rather than the mere "existence of opposition to a use." Second, in the event they establish such a "substantial dispute," plaintiffs must also show that the agency was "off-base" because it did not take a "'hard look' at the relevant issues" implicated by it and that, therefore, the agency's decision to "proceed [in the face of disagreement] is arbitrary or capricious." Heartwood v. Forest Service. 380 F.3d 428, 432-433 (8th Cir. 2004); Town of Cave Creek v.FAA. 325 F.3d 320, 331-332 (D.C. Cir. 2003); Indiana Forest Alliance v. U.S. Forest Service. 325 F.3d 851, 859, 857-861 (7th Cir. 2003); Northwest Environmental Defense Center v. Bonneville Power. 117 F.3d 1520, 1536 (9th Cir. 1997): North Carolina v. FAA. 957 F.2d 1125, 1133-1134 (4th cir. 1992)(equating even widespread opposition by itself with "controversial" action improper under NEPA because it would allow agency action to be "governed by a 'heckler's veto' ").

Plaintiffs do not meet either part of this two-part burden. First, they fail to establish that their extra-record MMC letter implicates a "substantial dispute" different from mere "opposition" or mere public criticism. Id.; see also Forest Alliance, 325 F.3d at 857-858. Instead, they simply stress an unremarkable fact usually true for all NEPA documents: different members of the public often criticize or oppose different aspects of a proposed agency action at different times. Notably, plaintiffs do not show that NMFS' disagreement with the MMC was so pervasive within the relevant scientific or other communities that it impaired or could impair rational environmental analysis. Therefore, the effects to which plaintiffs refer cannot be highly controversial because traditional case law deems mere opposition or mere criticism during the NEPA process diametrically different from the "substantial dispute" required for "highly controversial impacts." Id.

Second, even if arguendo plaintiffs had established that the mere MMC criticism to which they refer implicated a "substantial dispute" about specific environmental impacts, plaintiffs must also show that the 2005 EA and FONSI were "arbitrary or

capricious" because NMFS failed to take a "hard look" at these impacts. Id. Otherwise, where an agency properly analyzes all applicable environmental factors, "NEPA does not demand technical or "scientific unanimity in order to support a FONSI." Forest Alliance. 325 F.3d at 857-859, 861; see also Sierra Club. 753 F.2d at 128-129. Thus, the criticism or opposition to which plaintiffs refer cannot be "highly controversial" because, as shown above, NMFS properly analyzed every environmental effect identified by plaintiffs. Id. at

Finally, plaintiffs complain that NMFS improperly analyzed "highly uncertain" environmental impacts. However, as shown above, supra at 28, agencies may adopt mitigation measures to ameliorate environmental effects, including uncertain impacts. See also Greenpeace Action. 14 F.3d at 1331-1333, 1335. Because plaintiffs have not shown that NMFS' analysis of scientific uncertainty is arbitrary and capricious, controlling Supreme Court and other case law require this Court to defer to NMFS' specialized expertise. Marsh. 490 U.S. at 378;Baltimore Gas. 462 U.S. at 93, 103, 105;Greenpeace Action. 14 F.3d at 1331-1333, 1335;Sierra Club. 753 F.2d at 128-129.

4. NMFS Properly Considered Cumulative Impacts.

To meet their burden of showing that NMFS' analysis of cumulative impacts was arbitrary and capricious, plaintiffs must show that NMFS did not consider an environmental impact or impacts that would be "cumulatively significant." either alone o by themselves. 40 C.F.R. §§ 1508.7, 1508.25 (a)(2) (emphasis added). Thus, plaintiffs' cumulative impact claims necessarily fail because they have not shown a cumulative impact that (1) NMFS did not consider and (2) would or even could be environmentally "significant." Id.; compare PI. Mem. at 23-24 with AR 406 at 51-59. Unable to meet thi burden, plaintiffs theorize instead that an unidentified part of NMFS' cumulative impact analysis must be wrong because NMFS' PBR numbers are wrong. However, as shown above, supra at 24-27, it is plaintiffs' PBR analysis that is internally flawed, not NMFS'.

5. NMFS' Range of Programmatic Alternatives Was Proper.

Plaintiffs claim that NMFS erred in analyzing alternatives fails on two grounds. First, plaintiffs did not raise this claim in the administrative proceedings underlying the 2005 EA and FONSI. Thus, both NEPA and the APA prohibit plaintiffs from raising their alternatives claim for the first time now. [Administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'

Vermont Yankee Nuclear Power Corp. v. NRDC. 435 U.S. 519, 553-554; see also Dep't of Transportation v. Public Citizen. 541 U.S. 752, 764-765.

Second, even if arguendo plaintiffs had raised their alternatives claim, NMFS analyzed alternatives in detail. AR 406 at 20-33 and 40-50. Plaintiffs neither show that these alternatives are arbitrary and capricious nor describe another alternative consistent with both the programmatic goals and research directed by Congress. Thus, their claim fails because a range of alternatives cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved.

Vermont Yankee. 435 U.S. 519, 551.

C. PLAINTIFFS' ESA CLAIM MUST FAIL ON THE MERITS OR, ALTERNATIVELY, THE COURT SHOULD DECLINE TO EXERCISE JURISDICTION OVER THE CLAIM.

For purposes of issuing research permits for Steller sea lions, NMFS' Permits, Conservation, and Education Division is the "action agency," and the Endangered Species Division is the "consulting agency." In this case, the Endangered Species Division issued a BiOp, dated May 24, 2005, on the issuance of the permits and amendments that plaintiffs challenge in this case ("2005 BiOp"), concluding that issuance of the permits and permit amendments was not likely to jeopardize the continued existence of the endangered western population or threatened eastern population of Steller sea lions, or result in adverse modification of designated critical habitat. AR 407 at 1, 69.

1. NMFS Analyzed The Effects Of The Action When Added To The Environmental Baseline.

NMFS adequately considered the effects of the proposed research when added to the environmental baseline.[9]/ The 2005 BiOp sets forth in detail the status of the species (id. at 29-33, 43-44), separately considering the status of the endangered western population and the threatened eastern population, and concluding that, while the eastern population is stable or slightly increasing, the western population could become extinct in the next 100-120 years. Id at 46. NMFS also considered the past and present impacts of other ongoing activities in the action area, including: commercial and subsistence harvest (id. at 34); oil and gas or mineral development (id at 35-36); incidental and intentional take in fisheries (id at 39-40); and research (id. at 42-43).

NMFS analyzed the effects of the proposed action, as well as mitigating measures to minimize such effects. See id. at 3-18 (detailing anticipated takes from each proposed activity); id at 46-61 (explaining in detail effects of each type of activity); id at 61-66 (mitigating measures). NMFS then considered how the proposed action, when added to the baseline, would affect the species. Id at 67-69 ("Integration and Synthesis of Effects"). NMFS took into account the additional mortality expected to result from the proposed permits - approximately ten Steller sea lions per year - and expressly found that the "total number of accidental mortalities per year that would be authorized under all permits" would not be likely to contribute significantly to the decline of the species. Id at 68 (emphasis added). Although conceding that there is "limited information available on the short- and long-term effects of [the permitted] activities on Steller sea lions," NMFS concluded that the additional research was not likely to result in "population-level adverse effects." AR 407 at 69. The 2005 BiOp "'takes the baseline seriously and makes a concerted effort to evaluate the impact of [the agency's] proposed action against that backdrop.'" Oceana. Inc. v. Evans. 384 F. Supp. 2d 203, 230 (D.D.C. 2005) (quoting Defenders of Wildlife v. Norton. Civ. No. 99-927, 2003 U.S. Dist. LEXIS 26558, at *4 (D.D.C. Jan. 7, 2003)).

As plaintiffs note, Pl. Memo, at 29, n.8, NMFS modeled the narrative portion of the 2005 BiOp after the corresponding discussion in the 2002 BiOp. Plaintiffs criticize NMFS' analysis of the environmental baseline, alleging that the agency should have used updated data. See id However, plaintiffs fail to point to specific data affecting the baseline that NMFS failed to consider, and do not offer any evidence to show that there has been a significant change in the status of the species since 2002. Because the types of research activities to be undertaken under the new permits and the amendments were not significantly different from those activities that had been ongoing for a number of years under the existing permits, see AR 406 at 44, NMFS relied on the analysis in the 2002 BiOp. Whether to rely on old data in assessing threats to a species is a complicated inquiry, requiring specialized knowledge and reconciliation of conflicting data, which is the province of the agency. See Oceana. 384 F. Supp. 2d at 223-24. It is not "the Court's role to substitute its evaluation of the data for that of the agency." Id at 224 (citation omitted).

Plaintiffs correctly note that the narrative portion of the 2005 BiOp, because it was based on the 2002 BiOp, reflects a different number of takes than those quantified in Tables 1 and 2 of the 2005 BiOp. Pl. Memo, at 29, n.8. Thus, plaintiffs allege that it is impossible to determine whether NMFS based its no jeopardy finding on the outdated take data reflected in the narrative portion. Id Plaintiffs' assertions are incorrect. NMFS based its determinations on the updated data, reflected in the tables that appear prominently at the beginning of the 2005 BiOp. Although the analysis in the narrative portion of the BiOp is at times

lacking in clarity, the basis for the agency's determination is reasonably discernible: the agency relied on the information in the tables, which provide a comprehensive list of the activities and corresponding number of takes. AR 407 at 2 ("Tables 1 and 2 summarize the types of activities that would be authorized by the permits."). Thus, the Court should not disturb NMFS' no jeopardy determination on this basis. See Alaska Dep't of Envtl. Conservation v. EPA. 540 U.S. 461, 497 (2004) ("Even when an agency explains its decision with 'less than ideal clarity,' a reviewing court will not upset the decision on that account 'if the agency's path may reasonably be discerned.' ") (quoting Bowman Transp., Inc. v. Arkansas Best Freight Sys., 410 U.S. 281, 286 (1974), affd. 425 U.S. 901 (1976)).

However, NMFS recognizes that the internal inconsistency in the BiOp may frustrate judicial review and, as discussed below, NMFS proposes to revise the 2005 BiOp, in part to clarify its analysis of the effects of the action.

2. Plaintiffs Have Not Identified Any Cumulative Effects That NMFS Failed To Consider.

Plaintiffs take out of context and overstate the significance of the statement in the 2005 BiOp that "cumulative effects have not been considered in this opinion." When considered in its entirety, the "Cumulative Effects" section of the BiOp explains why such effects were not considered:
NMFS has no information on future State, tribal, local, or private actions in the action area that would not be subject to section 7 consultation.

AR 407 at 67 (emphasis added). Under the regulatory definition of "cumulative effects," the agency need only consider effects of future activities "that are reasonably certain to occur within the action area." 50 C.F.R. § 402.02 (emphasis added). If NMFS is aware of no specific, non-federal activities that would be considered cumulative impacts under the regulatory definition, it is not required to analyze cumulative effects in the BiOp. In issuing its BiOp, NMFS is required to use the "best scientific and commercial data available." not to speculate about possible future effects. See 50 C.F.R. § 402.14 (g)(8) (emphasis added).

Plaintiffs point to no specific State, tribal, local, or private actions that NMFS should have considered. Thus, plaintiffs have failed to meet their burden to prove that NMFS overlooked cumulative effects which, if considered, would have affected the agency's "no jeopardy" determination. Even if plaintiffs are correct that NMFS failed to undertake a sufficient investigation of cumulative effects, in the absence of any relevant activities in the action area, any error would be harmless. The APA requires that upon review of final actions, such as NMFS' decision at issue here, the Court is to take "due account" of "the rule of prejudicial error." 5 U.S.C. § 706. "As incorporated into the APA, the harmless error rule requires the party asserting error to demonstrate prejudice from the error." Air Canada v. DOT. 148 F.3d 1142, 1156 (D.C. Cir. 1998) (citing 5 U.S.C. § 706). Plaintiffs' claim must fail because they have failed to demonstrate any harm resulting from NMFS' alleged failure to consider cumulative effects.

Because plaintiffs have failed to carry their burden of proving that NMFS' consideration of the effects of the action when added to the environmental baseline and cumulative effects was arbitrary and capricious, NMFS is entitled to summary judgment on the ESA claim. See Cook Inlet Beluga Whale v. Daley. 156 F. Supp. 2d 16, 18 (D.D.C. 2001). [10] / However, as explained infra. NMFS has decided to voluntarily revisit the 2005 BiOp and issue a revised biological opinion. Thus, the Court need not reach the merits of plaintiffs' ESA claim.

3. NMFS Will Revisit The 2005 BiOp And Issue A New Biological Opinion.

In light of the internal inconsistencies and lack of clarity in the agency's analysis noted supra, NMFS intends to revisit the 2005 BiOp. NMFS will remedy the inconsistencies and clarify its analysis of the effects of the action. See Decl. of James H. Lecky at If 2 (attached hereto as Exh. 5). NMFS will also reconsider the cumulative effects of the action. Id at „ 3. NMFS will issue the revised BiOp by March 1, 2006, id at „ 4, before the commencement of the majority of permitted research activities planned

for 2006. Id at „ 5 ("the majority of research under the permits, in terms of field effort and number of takes, will not occur until after March 1, 2006, with the bulk of the permitted research occurring after May 1, 2006").

In light of NMFS' decision to revisit the 2005 BiOp, the Court should exercise its discretion to decline to address plaintiffs' ESA claim. The exercise of that discretion, referred to as prudential mootness, is well-established in this Circuit, and grounded on "considerations of prudence and comity" in dealing with governmental defendants such as NMFS. Chamber of Commerce v. U.S. Dep't of Energy. 627 F.2d 289, 291 (D.C. Cir. 1980). Even where a controversy is not actually moot the court may, based on prudential considerations, "stay its hand" and "withhold relief it has the power to grant. Id See also Cmty. for Creative Non-Violence v. Hess. 745 F.2d 697, 700 (D.C. Cir. 1984) ("[C]ourts have developed principles, which are closely related to the Article III mootness doctrine, guiding their discretion to forego decision on the merits in some circumstances actually leaving them with power to act.") (footnotes omitted). The court may withhold relief "where it appears that a challenged 'continuing practice' is, at the moment adjudication is sought, undergoing significant modifications so that its ultimate form cannot be confidently predicted." Id at 701 (citing A.L. Mechling Barge Lines v. United States, 368 U.S. 324, 331 (1961)).

It is appropriate in this case for the Court to withhold relief with respect to plaintiffs' ESA claim. Plaintiffs' ESA claim relates solely to the 2005 BiOp, which will be superseded by the new opinion to be issued on March 1, 2006. When the new opinion is issued, plaintiffs ESA claim will be jurisdictionally (as distinguished from prudentially) moot. See Am. Rivers v. NMFS. 126 F.3d 1118, 1124 (9th Cir. 1997); Forest Guardians v. U.S. Forest Serv. 329 F.3d 1089 (9th Cir. 2003). Under these circumstances, the Court should forego deciding plaintiffs' ESA claim on the merits.

D. THE CHALLENGED PERMITS WERE ISSUED IN COMPLIANCE WITH THE MMPA.

Even if the Court determines that it has jurisdiction to review plaintiffs' MMPA claim, see supra Section V.A.2., the Court should dismiss the claim because plaintiffs' challenges to the permits are baseless.

1. NMFS Acted Reasonably In Issuing The Permits After Receiving the MMC's Draft Comments.

The MMPA imposes a requirement that the Marine Mammal Commission ("MMC") review any permits issued for purposes of scientific research. 16 U.S.C. § 1371(a)(l). NMFS' implementing regulations provide for a 45-day time period for MMC review, after which it will be assumed that the MMC has no comments. 50 C.F.R. § 216.33 (d)(2). In this case NMFS provided an opportunity for the MMC to comment on the permits. NMFS specifically requested that the MMC expedite its review of the permit applications due to a pressing need to issue the permits. See Declaration of James Barrett ("Barrett Decl."), Exh. 1 at 1. On May 19, 2005, prior to issuance of the permits, the MMC provided comments to NMFS. Id. Thus, although the MMC characterized its comments as "preliminary," it did have an opportunity to comment on the permits, as required by the regulations.

Moreover, the overall recommendations of the MMC in its June 10, 2005, final comment letter were substantially the same as the general comments in its May 19, 2005, letter, which NMFS reviewed prior to issuing the permits. Compare Barrett Decl. Exhibit 2 at 1-6 with Barrett Decl. Exhibit 1 at 1-5. [11] / Although the June 10 letter contained more detailed analysis of the individual permits, the overall recommendations with respect to the proposed permit requests and the EA were the same. See Barrett Decl. Exh. 1 at 5; Exh. 2 at 2. Thus, even if plaintiffs are correct that NMFS was required to await the final comments of the MMC, any error was harmless because the final comments were not substantially different from the draft comments. See Air Canada. 148 F.3d at 1156 (plaintiff must demonstrate prejudice resulting from alleged error).

2. The Level Of Potential Take Under The Subject Permits Will Have A Negligible Impact On The Species' Recovery.

NMFS is required to estimate the PBR level (discussed supra at Section V.B.2.) for all marine mammals in the context of preparing stock assessments. 16 U.S.C. § 1386(a)(6). Plaintiffs argue that PBR is a "line in the sand," such that authorizing

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activities under the permits "that will exceed the PBR level for Steller sea lions" is per se arbitrary and capricious. PI. Memo, at 37-38 (emphasis added). As explained above, plaintiffs may not assume that mortality from the permitted activities will necessarily exceed the PBR level, because the challenged permits authorize accidental - not intentional - mortality, and that level of mortality may never be realized. See supra at 24- 25. Moreover, even under the conservative PBR calculation that NMFS uses for Steller sea lions, NMFS has concluded that even if as many as twenty accidental mortalities were to result from research, there would be a "negligible impact on the western stock of Steller sea lions regardless of other human-caused mortality affecting the stock." Id. [12] / Thus, NMFS reasonably determined that the permitted level of mortality would not significantly impair the ability of the endangered western stock to recover.

Contrary to plaintiffs' allegations, NMFS determined that the permitted research fulfills a "critically important research need." See PI. Memo, at 38. NMFS fully explained the purpose and need for the research in the 2005 EA. See, e.g., AR 406 at 8 (research is necessary to allow NMFS to manage Steller sea lions in a manner that will replenish population); id at 21 (there is a need for better information on effects of human activities on Steller sea lions to inform management decisions on modifications to human activities to promote recovery of species); id at 32 (intrusive research activities are necessary to obtain information on physiology, foraging behavior, health and reproductive status). NMFS reasonably determined that the proposed research would address the areas of study specifically identified by Congress. See AR 406 at 8.

CONCLUSION

For the foregoing reasons, the Court lacks jurisdiction to consider plaintiffs' claims in this case. In the alternative, if the Court determines that it is appropriate to consider the merits of plaintiffs' claims, NMFS' decision to issue the Steller sea lion research permits and amendments should be upheld based on the administrative record before the Court.

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Footnotes

1 *I* This citation denotes Document 407, internal pages 45-46, of NMFS' administrative record, previously submitted to the Court. Unless otherwise indicated, citations are from the excerpts of the administrative record previously submitted by plaintiffs in support of their motion for summary judgment.

2 / The term "species" is defined under the ESA as any subspecies and any "distinct population segment" of the species "which interbreeds when mature." 16 U.S.C. § 1532(16). "Distinct population segment" is not a defined term under the Act.

3 -/ The Secretary of Commerce jointly administers the ESA with the Secretary of the Interior, with authority over marine species delegated to NMFS and authority over all other species delegated to the U.S. Fish and Wildlife Service ("FWS"). See 16 U.S.C. §

1532; Luian v. Defenders of Wildlife. 504 U.S. 555, 586 n.3 (1992). NMFS has authority over the species at issue in this litigation, and NMFS is both the action agency and the consulting agency in this case.

4 / Congress has defined the term “harassment” under the MMPA as follows: The term “harassment” means any act of pursuit, torment, or annoyance which

i has the potential to injure a marine mammal or marine mammal stock in the wild; or

ii has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.
FN16 U.S.C. § 1362(18)(A).

5 Species listed as endangered or threatened under the ESA, such as the Steller sea lion, are considered “depleted” for purposes of the MMPA. 16 U.S.C. § 1362(1)(C).

6 / See also Preserve Endangered Areas of Cobb's History. Inc. v. U.S. Army Corps. of Engineers. 87 F.3d 1242, 1246-1247, 1247 n. 1 (11th Cir. 1996); First National Bank & Trust v. Department of the Treasury. 63 F.3d 894, 898 (9th Cir. 1995); National Audubon Society v. U.S. Forest Service. 46 F.3d 1437, 1447 n. 9 (9th Cir. 1992); Animal Defense Council v. Hodel. 840 F.2d 1432, 1435-1438 (9th Cir. 1988); Asarco. Inc. v. U.S.E.P.A. 616 F.2d 1153, 1160 (9th Cir. 1980).

7 / Plaintiffs also attempt to proffer additional extra-record documents. See P1. Mem., Declaration of James Barrett. For the same reasons discussed above, these documents are also inadmissible under NEPA and the APA.

8 /The “optimum sustainable population” is “the number of animals which will result in the maximum productivity of the population or the species,” taking into account the carrying capacity of the habitat and the health of the ecosystem. Id at § 1362(9).

9 / “The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.” 50 C.F.R. § 402.02.

10 / Plaintiffs also allege that NMFS violated the ESA by “taking actions that foreclosed formulation or implementation of reasonable and prudent alternatives prior to issuance of the permits,” Pl. Memo, at 28, but fail to elaborate on the referenced “actions.” Thus plaintiffs have similarly failed to meet their burden of proof with respect to this issue.

11 / This is not part of the administrative for NMFS' determination, because, as plaintiffs note, it post-dates the decision. See supra at 23, n.7.

12 / NMFS calculates PBR for marine mammals listed as endangered under the ESA using a default value for the recovery factor (an element in the calculation of PBR) of 0.1. Exh. 3 (AR 390), Appendix B at 14. This default reserves 90% of annual net production for recovery of the species, and allows only 10% of annual net production to be authorized for taking incidental to human activities. Id NMFS concluded that calculating PBR in this manner, and limiting human-caused mortality to PBR, would increase the recovery time of endangered marine mammals by no more than 10%, and this conclusion has been supported by extensive simulation modeling. Id

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Exhibit 6

2006 WL 1032558 (D.D.C.) (Trial Motion, Memorandum and Affidavit)
United States District Court, District of Columbia.

The HUMANE SOCIETY OF THE UNITED STATES, et al., Plaintiffs,

v.

Carlos M. GUTIERREZ., et al., Defendants.

No. 05-1392.
March 10, 2006.

Federal Defendants' Reply in Support of Cross-Motion for Summary Judgment

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INTRODUCTION

As NMFS established in its Combined Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment ("Def. Mem.") (Doc. No. 14), plaintiffs have failed to meet their heavy burden to prove that NMFS acted arbitrarily and capriciously in issuing the challenged permits and amendments, in violation of the National Environmental Policy Act ("NEPA"), Endangered Species Act ("ESA") or Marine Mammal Protection Act ("MMPA").

The thrust of plaintiffs' NEPA claim regarding that the 2005 environmental assessment ("EA") and Finding of No Significant Impact ("FONSI") are arbitrary and capricious is the following: the potential for up to ten accidental sea lion deaths - which may or may not occur during scientific research - is more harmful to the western Steller sea lion population than the status quo that began indisputably harming this species well before Congress and NMFS attempted to ameliorate the harm by mandating and regulating the challenged research. Notably, plaintiffs fail to show a study, paper, or writing that establishes or even states that this scientific research (1) is not necessary to ascertain the cause or causes of the western sea lion stock's decline or (2) would significantly affect this species by authorizing hypothetical sea lion mortality of up to ten accidental deaths before NMFS would suspend all of the challenged research. Lacking this evidence, plaintiffs rely on mere policy preferences and stark speculation, which wholly fail to meet their burden of showing NMFS acted arbitrarily and capriciously under NEPA by not (1) considering "the relevant factors" in its EA and FONSI and (2) articulating "a rational connection between the facts found and the choice made." [1]

Further, plaintiffs' ESA claim challenging the 2005 BiOp must be dismissed as moot because that BiOp has been superseded, and plaintiffs' MMPA claim must be dismissed because NMFS fulfilled its statutory duty to set a protective PBR level, and considered PBR in analyzing the impacts of the permitted activities on the Steller sea lion. Thus, the Court should grant summary judgment in favor of NMFS and dismiss plaintiffs' complaint in its entirety.

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFFS' MMPA CLAIM

Plaintiffs' opposition fails to counter NMFS' showing that their MMPA claim amounts to a programmatic challenge, and thus fail to articulate how their Complaint challenges final agency action. See Def. Mem. at 18-20. Plaintiffs' reliance on "a discrete set of research permits and permit amendments" as the basis for their MMPA claim highlights this weakness in their claim. See Plaintiffs' Combined Memorandum in Reply to Federal Defendants' Opposition to Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Cross-Motion for Summary Judgment ("Pl. Opp.") (Doc. No. 18), at 8 (emphasis added). Plaintiffs challenge the permits globally, seeking broad injunctive relief that would not only enjoin current permits, but also prevent NMFS from issuing future permits. See Amended Complaint at 41. Yet plaintiffs claim deny that they seek "wholesale correction" of the permitting scheme.

NMFS does not dispute that the FONSI is a final agency action for purposes of jurisdiction over plaintiffs' NEPA claims, or that the 2005 BiOp is a final agency action for purposes of jurisdiction over their ESA claims. Nor does NMFS dispute that each individual permit constitutes a final agency action. However, plaintiffs have elected to challenge the permits globally, and seek relief that would affect all existing and future permits, resulting in an impermissible programmatic challenge.

This case is distinguishable from Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846 (9th Cir. 2005). There, the plaintiff challenged the issuance by the U.S. Army Corps of Engineers ("Corps") of a permit for construction of a dock at a

refinery facility, and subsequent extension of the permit. LI at 854-55. The plaintiff sought injunctive relief only with respect to the challenged permit, asking the court to freeze vessel traffic at the level that existed prior to the permit extension pending completion of a new NEPA analysis. LI at 871.[2] By contrast, here plaintiffs ask the Court not only to vacate all Steller sea lion permits and permit amendments issued in 2005, but also to prevent NMFS from issuing unspecified future research permits.

Instead, this case is more like Sierra Club v. Peterson. 228 F.3d 559, 563 (5th Cir. 2000), where plaintiffs cited a number of allegedly improper timber sales, but did not limit their challenge to those individual sales. Rather, plaintiffs "requested broad injunctive relief blocking further timber sales" and the use of timber management techniques. LI Here, plaintiffs claim to limit their challenge to "permits that were approved by NMFS," Pl. Opp. at 8, but also seek sweeping relief that would affect future permits. Because such future permits do not constitute "an identifiable action or event," plaintiffs' MMPA claim does not challenge a discrete "final agency action," and is not reviewable by this Court. See id. at 566.

II. NMFS IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' ESA CLAIM

NMFS does not "concede error" with respect to the 2005 BiOp, or fail to dispute plaintiffs' ESA claim. NMFS argued in its opening memorandum that plaintiffs failed to meet their APA burden of proving that the 2005 BiOp was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Def Mem. at 36; see also 5 U.S.C. § 706(2)(A); Marsh v. Oregon Natural Res. Council 490 U.S. 360 (1989). However, because NMFS had decided to revisit the 2005 BiOp, NMFS asked the Court to exercise its discretion to decline to consider plaintiffs' ESA claim because it was prudentially moot. Def. Mem. at 37-38.

Plaintiffs' ESA claim is now constitutionally moot. NMFS has revisited the 2005 BiOp in response to plaintiffs' concerns, issuing a revised BiOp reaching the same conclusion: the permitted activities covered by the BiOp are not likely to jeopardize the continued existence of Steller sea lions or adversely affect designated critical habitat. See Revised biological opinion on the Permits, Conservation and Education Division's proposal to issue eight permits pursuant to section 10(a)(1) of the Endangered Species Act of 1973, as amended, for studies on Steller sea lions ("Revised BiOp") (attached hereto as Exhibit 6), at 2. Because NMFS has completed the Revised BiOp, plaintiffs' ESA claim challenging the 2005 BiOp is moot and must be dismissed.

A. NMFS' Reconsideration Of The Analysis In The 2005 BiOp Is Appropriate

There is nothing preventing NMFS from revisiting a biological opinion, even if it has not been declared legally invalid. Just as an agency may, pursuant to court order, undertake additional investigation absent circumstances that would require reinitiation of consultation, the agency may also undertake such additional investigation on its own initiative.

There is no question that the Court could remand the 2005 BiOp to NMFS absent circumstances that would require reinitiation of formal consultation. See 50 C.F.R. § 402.16 (setting forth circumstances requiring reinitiation, including, inter alia, modification of the action in such a manner as to cause an effect to the listed species that was not considered in the BiOp). In challenges to actions by federal agencies, if the agency action is not supported by the record, the agency has not considered all relevant factors, or the reviewing court is unable to evaluate the challenged action on the basis of the record, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Fla. Power & Light Co. v. Lorion. 470 U.S. 729, 744 (1985). See also Pueblo of Sandia v. Babbitt. 231 F.3d 878, 881 (D.C. Cir. 2000). For example, a court may remand to the agency to remedy specific shortcomings in the analysis, such as reconsideration of the effects of the action when added to the environmental baseline. See Defenders of Wildlife v. Babbitt, 130 F. Supp. 2d 121, 126 (D.D.C. 2001).

In this case, NMFS has already voluntarily undertaken "additional investigation or explanation," as would be required if the Court were to find that the 2005 BiOp was deficient. The Revised BiOp is not a post hoc rationalization offered by NMFS or counsel to bolster the analysis in the 2005 BiOp. Here NMFS not only clarified the existing analysis in the 2005 BiOp, but also undertook additional investigation and revised the analysis. NMFS has corrected internal inconsistencies and clarified that

the finding is based on the data submitted in the 2005 permit applications, as summarized in Tables A-l through A-3 of the Revised BiOp. See Revised BiOp at 72-93. [3] NMFS has also considered recent information that had been omitted from the analysis in the 2005 BiOp, including the number of Steller sea lions reported as harassed or killed during research activities in 2003 and 2004. See Revised BiOp at 31-32. NMFS updated the "Effects of the Proposed Actions" section, relying on recent literature. See, e.g. id. at 34-36 (relying in part on studies from 2005 to determine effects of aerial and vessel surveys). In a revised "Integration and Synthesis of Effects" section, NMFS concluded that, although the permitted activities would reduce the numbers of Steller sea lions, "there would not be any appreciable reduction in the likelihood of the survival and recovery of either the western or eastern DPS of Steller sea lion." LI at 58. Finally, NMFS reconsidered cumulative effects and revised that section of the BiOp, setting forth in detail the effects of future actions. See id. at 52-54. The scope of NMFS' reconsideration was appropriate and, as described infra at Section II.C, the Revised BiOp renders moot plaintiffs' challenge to the 2005 BiOp.

B. NMFS Did Not Violate ESA Section 7(d) By Allowing The Permitted Activities To Proceed During Its Reconsideration Of The 2005 BiOp

There is no legal basis for plaintiffs' claim that allowing the research permits to continue in force is a "per se violation" of ESA Section 7(d). While consultation is ongoing, Section 7(d) prohibits action agencies from making any "irreversible or irretrievable" commitment of resources "which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures" to the agency action. See 16 USC § 1536(d). The section 7(d) prohibition becomes applicable after the initiation of consultation and continues until consultation is concluded. Id; 50 C.F.R. § 402.09.

Congress enacted section 7(d) in response to the Supreme Court's decision in Tennessee Valley Authority v. Hill 437 U.S. 153 (1978). See Pacific Rivers Council v. Thomas. 936 F. Supp. 738, 745 (D. Idaho 1996). The purpose of section 7(d) is to ensure that agencies do not undertake irrevocable activities during the consultation process. Conner v. Burford, 848 F.2d 1441, 1455 n. 34 (9th Cir. 1988); Lane County Audubon Soc'y v. Jamison. 958 F.2d 290, 294 (9th Cir. 1992). Section 7(d) has not been interpreted to mean "that no agency can ever proceed with proposed action until consultation is complete." Pacific Rivers Council 936 F. Supp. at 746. Rather, Section 7(d) requires the action agency to avoid making "significant investments into a project that cannot be recovered, or would be wasted, if it were determined that the project jeopardized the continued existence of an endangered species," and taking actions that would "preclude the formulation and implementation of alternative measures that could be taken" with respect to the agency action. Nat'l Wilderness Institute v. U.S. Army Corps of Eng'rs, Civ. No. 01-0273, 2005 WL 691775, at *16 (D.D.C. Mar. 23, 2005). In this case, NMFS did not take any actions in the interim period that would preclude alternative measures that could be taken, such as modifying the permits and/or amendments in the event the Revised BiOp concluded that the permitted activities would jeopardize the species. Thus, allowing the permitted activities to proceed pending issuance of the Revised BiOp did not violate ESA Section 7(d).

C. Plaintiffs' ESA Claim is Moot

Plaintiffs' ESA claim, based on the 2005 BiOp, is clearly moot in light of the Revised BiOp, which supersedes the 2005 BiOp. See Am. Rivers v. NMFS. 126 F.3d 1118, 1124 (9th Cir. 1997) ("the biological opinion in the present case has been superseded by the [new] Biological Opinion ... [t]herefore, any challenge to the [prior] Biological Opinion is moot); Forest Guardians v. U.S. Forest Serv. 329 F.3d 1089, 1096 (9th Cir. 2003) ("when one [BiOp] supersedes another, a challenge to the superseded [BiOp] is moot"). Because the superseded 2005 BiOp has no continuing adverse impact and there is no effective relief that this Court may grant, plaintiffs' request for judicial review of the 2005 BiOp is moot. See Southwestern Bell Tel, v. Fed. Communications Comm'n. 168 F.3d 1344, 1350 (D.C. Cir. 1999).

Plaintiffs cannot escape this consequence by relying on the "capable of repetition, yet evading review" exception to the mootness doctrine. First, the challenged action is not too short in duration to be fully litigated. By its terms, the Revised BiOp does not expire on any particular date. Thus, plaintiffs will have an opportunity to litigate at a later date any claims that may arise from the analysis in the Revised BiOp. See Am. Rivers, 126 F.3d at 1123. Plaintiffs' reliance on the fact that the 2005 BiOp was in

effect for less than one year is unavailing. See Pl. Opp. at 28. n.10; See also Idaho Dept. of Fish and Game v. NMFS. 56 F.3d 1071. 1075 (9th Cir. 1995) ("capable of repetition, yet evading review" exception not applicable where challenged BiOp was in effect for less than one year, but plaintiffs would have ample opportunity to obtain review of superseding BiOp). If plaintiffs are dissatisfied with the substance of the revised BiOp, they have a recourse: assuming that they satisfy the jurisdictional prerequisites, they may pursue an ESA claim based on the Revised BiOp.

Second, there is no reasonable expectation that the plaintiffs would be subjected to the same action again. Because the 2005 BiOp has been superseded, and NMFS will rely on the Revised BiOp in the future, there is no reasonable expectation of repetition. See id. The allegedly deficient 2005 BiOp has been replaced and, as explained supra. NMFS has clarified and revised the specific analyses that plaintiffs challenged. NMFS has (a) updated and revised the "Effects of the Action" and "Integration and Synthesis of Effects" sections, see PI. Mem. at 29-33; and (b) reconsidered cumulative effects and revised that section of the BiOp, see Pl. Mem. at 33-36. Plaintiffs correctly identify the flaw with their argument: they are "critiquing NMFS for doing precisely what plaintiffs have asked the Court to order NMFS to do ..." Pl. Opp. at 27, n.9. There is no ongoing controversy with respect to the superseded 2005 BiOp, and deciding plaintiffs' ESA claim would require the Court to render a prohibited advisory opinion. See Nat'l Black Police Ass'n v. District of Columbia. 108 F.3d 346, 349 (D.C. Cir. 1997).

III. PLAINTIFFS' CHARACTERIZATION OF PBR AND RELIANCE THEREON AS A BASIS FOR THEIR NEPA, ESA, AND MMPA CLAIMS IS FLAWED

As an initial matter, plaintiffs' argument that NMFS violated NEPA, the ESA, and the MMPA by failing to analyze the significance of exceeding the potential biological removal ("PBR") level must fail as a legal matter. PBR is a regulatory tool applicable in the context of the MMPA, and it does not have any independent meaning or applicability under the ESA. Further the record shows that NMFS properly considered PBR in connection with its NEPA analysis. See infra at Section IV.B. Finally, although PBR is relevant to NMFS' analysis under the MMPA, as explained below, NMFS fulfilled its statutory duty to set a protective PBR level, and considered PBR in analyzing the impacts of the permitted activities on the Steller sea lion.

Plaintiffs' argument also fails as a factual matter because: (1) the PBR levels for the western and eastern stocks of Steller sea lions are protective of the species; and (2) NMFS did consider PBR in the context of its decision to approve the permitted research. Throughout their opening and reply briefs, plaintiffs consistently blur the line between the endangered western stock and the threatened eastern stock of Steller sea lions. Each stock is listed as a distinct population segment ("DPS") under the ESA. See AR 406 at 7. They are also separate population stocks under the MMPA. See 16 U.S.C. § 1362(11). Thus, each stock is managed separately. This distinction is particularly important with respect to the issue of PBR, because, as explained below, there are two distinct PBR levels for the stocks. Each PBR level was determined in accordance with the MMPA, and is appropriately protective of the species.

A. NMFS Considered The Steller Sea Lion PBR In The Context Of Issuing The Permits

NMFS did not, as plaintiffs allege, "ignore[] the PBR level issue when approving the permits." Pl. Opp. at 9. As NMFS explained in its opening memorandum, the agency specifically addressed PBR in its 2003 supplemental EA, determining that research-related mortality of up to 20 sea lions per year would have a negligible effect on the recovery of the western Steller sea lion stock. See Def. Mem. at 23; AR 390. A review of the 2002 EA reflects that the mitigation measure for accidental mortality, pursuant to which research will be suspended if the total number of mortalities in the western stock reaches ten animals, see AR 406 at 50, was derived based on the PBR of the western stock. See AR 385 (excerpt attached hereto as Exhibit 7), at 33-34 ("If accidental mortality in the western stock reached 10 sea lions (about 5% of the stock's PBR) then researchers would be required to consult with one another to identify research practices that would prevent accidental mortality in the western stock to exceed 20 sea lions (10% of the stock's PBR)."). In addition, the 2005 EA incorporates by reference the 2000 and 2001 annual stock assessment reports for Steller sea lions, which discuss the methodology used to determine PBR and set forth the PBR levels

for the western and eastern stocks. [4] Thus, the record reflects that NMFS expressly considered the PBR levels for the species in the context of approving the permits.

B. The PBR Level Set By NMFS Is Conservative

In accordance with the MMPA, NMFS has set the PBR levels and managed anthropogenic removals for the western and eastern stocks at conservative levels, such that the current level of removals expected to occur on an annual basis - including removals associated with research - will not significantly increase the expected recovery time for either stock, or cause either stock to decline in abundance. As explained in NMFS' opening memorandum, the MMPA defines PBR as “the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.” 16 U.S.C. § 1362(20). However, as noted below, NMFS has implemented the PBR management scheme in such a way that the PBR for a population listed as endangered is much more conservative than the statutory definition. NMFS uses the following formula to calculate PBR for marine mammals: PBR = Nmin * 1/2 Rmax * Fr, where Nmin is the minimum population estimate, Rmax is the “maximum theoretical or estimated net productivity rate of the stock at a small population size,” and Fr is the recovery factor. See id. [5]

The PBR level for the endangered western stock is calculated using a default value for the recovery factor (Fr) of 0.1 (Le, 10%), which is the lowest possible recovery factor pursuant to the statutory formula. See Def Mem. at 42, n. 12; 16 U.S.C. § 1362(20)(C). This allows only 10% of the maximum allowable removal level to be authorized for taking incidental to human activities, and the remaining 90% is conserved as a buffer to allow the species to recover. See Def. Mem. at 42, n. 12. [6] The PBR levels for the western and eastern stocks of Steller sea lions set forth in the 2001 stock assessments are 208 and 1,395, respectively. See 2001 Stock Assessment for Western Stock (attached hereto as Exhibit 9), at 3; Exh. 8 at 12. [7]

Plaintiffs dispute that the PBR level used by NMFS is conservative, alleging that any human-caused mortality will further the species' decline. Pl. Opp. at 11. Plaintiffs misconstrue the intent of PBR in arguing that the PBR level should be set at zero, such that no human-caused mortality is permitted. Due to the nature of the calculation set forth above, the PBR level increases and decreases as the stock's population increases and decreases. However, even if the population is decreasing (a negative population trajectory), the PBR level is not automatically equal to zero. The PBR level takes into account that a stock's population fluctuates over time. In light of the buffer built into the PBR calculation for an endangered species - with a recovery factor (Fr) of 0.1 - even if the number of mortalities exceeds the present PBR level for the western stock by a factor of five it would not necessarily cause the stock to decline. Rather, it would merely slow the recovery of the stock, but over time the stock would be expected to return to a healthy level as defined under the MMPA. NMFS has satisfied its MMPA obligations by using the formula explained above to set a conservative PBR, and authorizing the permits based on a determination that the expected take of one animal per year - or even the maximum 20 animals per year - from the western stock is unlikely to significantly alter the current trajectory of the population, or increase recovery time.

C. NMFS Can Effectively Track Mortality And Enforce The Suspension Authority

As NMFS explained in its opening memorandum, all research under the permits would be suspended pending review by NMFS if the total number of research-related mortalities in the western stock reaches ten animals (under any combination of permits), and, if research is continued, would be halted completely should mortality reach 20 animals within a year in the western stock. See Def Mem. at 8, 24-25. Plaintiffs dismiss this significant mitigation measure based on their unfounded belief that NMFS is not capable of enforcing these limitations.

Plaintiffs' suggestion that Steller sea lion mortality is not observed or reported is without merit. The reason that plaintiffs cannot locate each report of an individual mortality in the administrative record is straightforward: only those reports that were before the agency decisionmaker responsible for issuing the permits are properly part of the administrative record. The record reflects

that NMFS receives initial notice of individual incidents from permittees at or near the time of the mortality, and permittees subsequently summarize those incidents in their annual reports. See, e.g., AR 345 (attached hereto as Exhibit 10) at 4 (reporting accidental mortality of three animals lost during branding operations, and referencing email report to Tammy Adams of NOAA in July 2002). It is the annual reports, not the correspondence regarding individual incidents, which were reviewed by the decisionmaker and are thus part of the administrative record.

In overseeing the research activities, NMFS requires its researchers to fulfill all permit obligations, including reporting requirements. [8] The administrative record reflects that researchers not only report mortalities, but also take affirmative steps to reduce such mortality even absent NMFS enforcement. For example, after the Alaska Department of Fish and Game experienced six mortalities during the first day of a pup branding trip, it contacted NMFS that same day to report the takes and a NMFS staff member advised the permittee that it could continue the branding activities as long as there were fewer than ten mortalities. AR 348 (attached hereto as Exhibit 11) (Letter from T. Gelatt to S. Leathery) at 1. In response, the permittee immediately altered the branding method in a manner that required more effort on the part of researchers, but was safer for the pups. Id; see also 14. (Trip Report) at 4. This record evidence directly controverts the scenario that plaintiffs paint for the Court, depicting NMFS as wholly unaware of mortalities resulting from the permitted activities.

Plaintiffs also make much of an isolated incident where a U.S. Fish and Wildlife Service refuge manager contacted NMFS to report mortalities that the manager believed had occurred in connection with a permit issued to the National Marine Mammal Lab. See PL. Reply at 15. The record shows that there was a genuine dispute between the refuge manager and the permittee regarding whether the permitted activity contributed to the mortalities. See AR 236 at 1; AR 243. Plaintiffs omit from their reply brief the stated reason that the mortalities were not reported as accidental mortalities: the National Marine Mammal Laboratory determined that the mortalities "were not directly caused by the branding/handling activity." AR 236 at 1. [9]

The record reflects that permittees are reporting their research activities to NMFS, and that the Permits Division carefully reviews such annual reports and refers permit violations to the NMFS Office of Law Enforcement as appropriate. See, e.g. AR 130 at 2 (attached hereto as Exhibit 12) (notifying permittee of referral to Office of Law Enforcement where annual report indicated that permitee undertook activities not authorized in permit). NMFS is able to effectively monitor compliance with permit conditions, including accidental mortality restrictions, and enforce the suspension provisions to ensure that accidental mortality in the endangered western stock is limited to no more than 20 animals per year.

IV. NMFS PREDICATED ITS 2005 EA AND FONSI ON REASONED, SENSIBLE ANALYSIS

A. NMFS Did Not Admit the 2005 EA and FONSI Were Unlawful

Proffering a document not in the authenticated administrative record (styled plaintiffs' "Exh. 3" or the "Hogarth letter"), plaintiffs theorize that NMFS admitted approximately one month after preparing the 2005 EA and FONSI ("EA and FONSI") that these NEPA documents are unlawful. On two independent grounds, plaintiffs are wrong.

First, NMFS demonstrated in its opening brief that the Hogarth letter is inadmissible under Supreme Court, D.C. Circuit, and other case law because (1) it was written after NMFS prepared the 2005 EA and FONSI and (2) plaintiffs have not met their burden under the APA of showing that this exhibit either transmits or documents a specific environmental factor that NMFS failed to consider under federal law. Def Mem at 21, 21 n. 6; Federal Defendants' Opposition to Plaintiffs' Motion to Supplement the Record (Doc. No. 21) at 1-8. Notably, plaintiffs do not distinguish or even disagree with these traditional APA cases. Compare id. with Pl. Opp. at 1, 29-30 and Plaintiffs' Motion to Supplement the Record. Therefore, plaintiffs' claim that NMFS "admitted" in the Hogarth letter that the 2005 EA and FONSI were unlawful necessarily fails because this letter is inadmissible.

Even if arguendo the Hogarth letter were admissible, NMFS did not admit anything of substance in it except NMFS' decision to prepare a future EIS to analyze its entire program of both administering congressional sea lion research grants and issuing related research permits. Disagreeing, plaintiffs assert that NMFS' decision to analyze its research program in a future EIS (because it

shared plaintiffs' "concerns over the scope of the research on Steller sea lions") is the same thing as admitting NMFS's analysis of its preceding 2002 and 2005 permits in the EA and FONSI violated NEPA. Pl. Opp. at 29-30; Pl. Exh. 3.

This assertion is defective because plaintiffs premise it on the presumed existence of legal and factual authority that does not exist: authority that NMFS' future EIS and its EA and FONSI are mutually exclusive NEPA documents because NMFS cannot prepare (1) a lawful future EIS unless its 2005 EA and FONSI, analyzing similar permits, are illegal or (2) a lawful EA and FONSI in 2005 followed by a lawful EIS analyzing a broader category of future agency actions.

No applicable authority demonstrates that NMFS' future EIS and its previous EA and FONSI are mutually exclusive NEPA documents. Instead, where agencies decide to analyze a broader category of future agency actions in a future EIS, that EIS is a discretionary NEPA duty, not a mandatory NEPA requirement, regardless of a valid EA's presence or absence. 40 C.F.R. §§ 1501.3(a) (where agency "has decided to prepare an environmental impact statement" in the future, another EA "is not necessary"); 1502.4(b) ("[environmental impact statements may be prepared [for] broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking") (emphasis added).

Disagreeing with these regulations, plaintiffs assert that NMFS' future EIS and its EA and FONSI analyze the same universe of research permits and that, therefore, NMFS erred by (1) determining in the EA and FONSI that an EIS was not required and (2) then determining in the Hogarth letter that these 2005 permits could only be analyzed in an "after the fact" EIS. Pl. Opp. at 1, 29. However, plaintiffs' own exhibits establish that NMFS' future EIS and its previous EA and FONSI are not mutually exclusive because these documents analyze materially different universes of research monies and permitting decisions. Although the 2005 EA and FONSI are indisputably limited to 2005 research monies and corresponding permits, plaintiffs concede in their exhibit that NMFS broadened its future EIS by including (1) the "cumulative impacts of continuing to fund and permit [sea lion] research activities" and (2) the related effects of "administering grants and issuing permits associated with research" for its entire sea lion research program. Pl. Exh. 4 (emphasis added).

In sum, NMFS did not admit that the EA and FONSI violated NEPA because (1) the Hogarth letter is inadmissible and (2) NMFS' future EIS and its EA and FONSI are not mutually exclusive NEPA documents because they analyzed or will analyze categories of permits and research monies that are materially quite different.

B. NMFS Properly Analyzed the Uncertain Effects of Expanding Sea Lion Research

Plaintiffs' claim that NMFS did not properly analyze the uncertain scientific and other effects of the challenged research on western sea lion numbers is mistaken on two grounds. Pl. Opp. at 9-16, 37-41. First, plaintiffs erroneously presume that the EA and FONSI are arbitrary and capricious because uncertainty about the precise effect of more research on sea lion numbers is environmentally "significant" under NEPA by itself. Pl. Opp. at 39. However, the Supreme Court has reiterated that mere uncertainty or related environmental risk by themselves, absent a foreseeable chain of causation or context, "is not an effect on the physical environment [because a] risk is, by definition, unrealized in the physical world." Metropolitan Edison v. People Against Nuclear Energy. 460 U.S. 766, 774-775(1983); see also Robertson v. Methow Valley Citizens Council 490 U.S. 332, 349-350, 356 (1989) ("Robertson").

Therefore, the salient NEPA issue is not whether the effect of the challenged research on sea lion numbers is uncertain and therefore difficult to quantify, as plaintiffs urge, but whether NMFS considered this uncertainty rationally by (1) considering all applicable environmental factors "relevant" to it and (2) evaluating both uncertain effects and these environmental factors with "reasoned" analysis that, therefore, is "not 'arbitrary or capricious'." [10]

Under these tenets, plaintiffs' claim that the EA and FONSI are defective because the challenged research would have an uncertain effect on western sea lion numbers fails for a fundamental reason: plaintiffs do not show a single aspect of this uncertain effect or effects that NMFS did not analyze rationally. Id. For example, plaintiffs state that, because uncertain and unidentified environmental impacts by definition "may" or may not cause significant environmental impacts, the EA and

FONSI are defective because NEPA requires an EIS for all effects that "may" be significant. Pl. Opp. at 37-38. Plaintiffs are wrong. NEPA does not require an EIS for effects that might be significant, but for environmental impacts that "would be environmentally 'significant.'" Kleppe v. Sierra Club. 427 U.S. 390, 394 (1976) (emphasis added); see also Dep't of Transportation v. Public Citizen. 541 U.S. 752, 763 (2004).

Plaintiffs also contend that the EA's and FONSI's analysis of uncertain effects is arbitrary and capricious because NMFS determined "there are no studies dedicated to documenting and assessing the effects of research on Steller sea lion stock or population." Pl. Opp. at 39. Although NMFS certainly admits this is true, it is true because of a fact fatal to plaintiffs' uncertainty claim: it is scientifically impossible now for either NMFS or anyone else to quantify the precise effect of the challenged scientific research on sea lion numbers because this research itself is needed to ascertain the cause or causes of the western sea lion's declining population that, to date, are indisputably and scientifically unknown. See Def Mem. at 3-8.

Thus, lacking a recognized study establishing a certain causal relationship between any known environmental factor and the western sea lion stock's declining population trend, NMFS properly analyzed all known studies of accidental sea lion mortality during scientific research. NMFS noted that, within a group of 7,500 sea lions disturbed during similar research in 1995, "no mortalities were reported." NMFS also determined that, within a larger group of 31,150 and 48,000 sea lions it studied in 1997 and 1998 respectively, "no mortalities were detected or reported," even though these animals were approached, disturbed, captured, tagged, or branded. AR 407 at 43. Finally, NMFS determined that of the 331,174 western and eastern sea lions that were monitored by air, counted on foot, or otherwise touched by scientists under the 2002 permits, (1) no western stock mortalities were reported in 2002 and (2) no more than 10 mortalities were reported in 2003 and 2004. Exh. 3 (AR 390) at 12; AR 406 at 42. Thus, by rationally analyzing these studies of accidental sea lion mortality in the EA, FONSI, and elsewhere in the administrative record, NMFS did precisely what NEPA requires it to do: sensibly analyze all relevant studies in that record. Marsh 490 U.S. at 373, 376-378, 385; Baltimore Gas. 462 U.S. at 96, 105-106; Vermont Yankee Nuclear Power Corp. v. NRDC. 435 U.S. 519, 553, 555; Walton. 655 F.2d., 346, 369, 377.

Plaintiffs also claim that NMFS improperly analyzed the challenged research's uncertain effect on sea lion numbers by erroneously considering PBR analysis. As shown above, supra at Section III.A., both plaintiffs' and NMFS's citations to the record demonstrate that NMFS properly considered PBR analysis in that record. Thus, plaintiffs do not dispute that their preferred PBR maximum for the western sea lion, gleaned from this record, is 208. Pl. Opp. at 13. Instead, they complain NMFS erred in demonstrating, on the basis of the most recent studies in the record, that the challenged research would not exceed plaintiffs' urged PBR maximum. Def. Mem. at 24-25.

Notably, plaintiffs do not show how or why NMFS supposedly erred. Instead, they confine their attempted arithmetic or statistical rebuttal to a footnote and argue on the basis of a 1995 estimate that the "mean annual" subsistence or aboriginal take of western sea lions in or after 2005 could be as high as 448. See Pl. Opp. at 13 n. 6. However, the record reflects that NMFS did not consider plaintiffs' 1995 figures to be as reliable as more recent studies in predicting either existing or future aboriginal harvests because

> the mean annual subsistence takes of Steller sea lions have declined to approximately one-third between 1996-1998, and have been estimated [in 1999] at 171 animals per year. [The same 1999 study indicates] that subsistence harvest levels have declined sharply between 1992 and 1998, due largely to a decline in the number of hunters harvesting sea lions.

Def. Exh. 4 (AR 384) at 40; compare id. with Pl Mem. at 13 n. 6 (relying on 1995 figures only). Therefore, on the basis of the most recent studies of both aboriginal and other takes, NMFS properly demonstrated that the western sea lions' combined annual mortality will not exceed plaintiffs' urged PBR maximum of 208. Compare Def. Mem. at 24-25 (estimating a total annual removal of 207 western sea lions) with Def. Exh. 4 (AR 384) at 40 (1999 study of subsistence takes); AR 406 at 51 (1999 study of subsistence harvest); and AR 407 at 39 (1996 study of incidental takes during commercial fishing).

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For all of these reasons, plaintiffs have not shown a single environmental factor relevant to the challenged research's uncertain effect on sea lion numbers that NMFS did not rationally analyze in the EA and FONSI. Therefore, Supreme Court and other case law require this Court to defer to NMFS' specialized expertise in analyzing uncertain scientific and other environmental effects within its specialized jurisdiction. [11]

Plaintiffs' claim that the EA and FONSI are inadequate because NMFS did not properly analyze uncertain environmental effects also fails on a second ground: plaintiffs have not rebutted the effectiveness of the protective mitigation measures which NMFS imposed to compensate for uncertainty. First, as mentioned above, NMFS determined that it would suspend all research under the 2002 and 2005 permits, pending additional scientific review, "if the total number of research-related mortalities of endangered [western] sea lions reaches 10 animals under any combination of permits." AR 406 at 50, 106 (emphasis added). Rather than pointing to evidence that this mitigation measure would be ineffective, plaintiffs speculate that "NMFS has left open the possibility" that, despite a future suspension, it would (1) needlessly revoke it and (2) thereby harm the western sea lion stock by allowing accidental mortality to reach a maximum number of 20. Pl. Opp. at 13; AR 406 at 50, 106; AR 407 at 65.

Plaintiffs' criticism of mitigation measures fails. In the event that NMFS' removal of this suspension would either harm or significantly affect western sea lion numbers, NEPA requires NMFS to prepare new or supplemental NEPA document before revoking it. Therefore, plaintiffs' speculation is defective because it presupposes NMFS would contravene NEPA in the future by both revoking a needed suspension and thereby harming the western sea lion before preparing new NEPA documents. [12]

NMFS adopted two additional mitigation measures designed to minimize the possibility that western sea lion mortality would ever reach the level of ten accidental deaths that would suspend all research permits. NMFS (1) requires the attendance of a "veterinarian" or trained "biologists" during intrusive physiological study and (2) has adopted aerial flight restrictions ensuring that sea lions would only hear plane noise for "1-2 minutes." AR 406 at 45-50. These three mitigation measures are fatal to plaintiffs' claim that NMFS improperly analyzed the challenged research's uncertain effects. The law is plain that agencies may respond constructively to uncertain environmental effects by adopting such measures, even where they do not eliminate all adverse impacts or the possibility thereof. [13]

In sum, plaintiffs' claim that NMFS erred in the EA and FONSI because it did not properly consider the challenged research's uncertain effect on sea lion numbers fails for two independent reasons: plaintiffs do not (1) show a single aspect of this uncertainty that NMFS did not rationally analyze and (2) controvert the effectiveness of the different mitigation measures by which NMFS responded properly and conservatively to these uncertain effects.

C. NMFS Properly Analyzed the Impacts that Plaintiffs Allege are "Highly Controversial"

Plaintiffs also posit that the EA and FONSI are defective because the 2005 permits would have "highly controversial" environmental effects. Pl. Opp. at 38-39. In its opening brief, NMFS demonstrated that this claim fails because plaintiffs cannot meet a two-part burden established by controlling case law. Under this traditional precedent, plaintiffs have not demonstrated that (1) the MMC criticism on which they predicate their claim implicates a "substantial dispute" different from mere "opposition" or criticism per se and (2) NMFS's response to this MMC criticism was "arbitrary or capricious" because it failed to take a "hard look" at the unidentified environmental factors allegedly implicated by it. Def. Mem. at 27-29.

In their opposition, plaintiffs merely repeat their opening brief, which apparently rests on a decision to neither distinguish nor even mention this case law. Compare id. with Pl. Opp. at 38-39. Therefore, plaintiffs' claim that the unidentified environmental factors supposedly implicated by the MMC criticism are "highly controversial" necessarily fails.

D. NMFS' Range of Programmatic Alternatives Was Proper

Plaintiffs claim that NMFS erred in analyzing alternatives fails for an elementary reason: plaintiffs do not show or describe an alternative that NMFS should have considered under NEPA but did not consider. Pl. Opp. at 35-36. Therefore, plaintiffs' alternatives claim fails because NMFS analyzed a reasonable range of alternatives in detail. Compare AR 406 at 20-33 and 40-50 with Vermont Yankee. 435 U.S. at 551.

The closest plaintiffs get to even disagreeing with NMFS's evaluation of a known alternative is their allegation that it erred by both "briefly" considering and then rejecting the alternative of a "temporary moratorium on all [scientific] research" without lengthier analysis. Pl. Opp. at 35. However, NMFS explained that it rejected this alternative because it contravened the research mandated by Congress. The alternative that plaintiffs desire

> was not considered further because it would not allow collection of information on population distribution and abundance trends ... or vital rates. This information is important in monitoring the status of the species and may be used in identifying conservation problems.

AR 406 at 31; see also Def. Mem. at 4-6 (discussing research mandated by Congress). This explanation was more than proper under NEPA. Traditionally, NEPA allows agencies to both develop and evaluate their range of alternatives according to the purposes of the same laws and regulations that required them to propose the agency action in the first place. [14]

E. NMFS Properly Considered Cumulative Impacts

In the EA and FONSI, NMFS analyzed the cumulative impacts of the challenged research in detail. AR 406 at 51-59. Although plaintiffs contend this analysis is arbitrary and capricious, they do not adduce either evidence or analysis to show how or why this supposedly is so. Thus, in its opening brief, NMFS invited plaintiffs to demonstrate that NMFS did not consider an environmental impact or impacts that would be "cumulatively significant" either alone or by themselves. 40 C.F.R. §§ 1508.7, 1508.25(a)(2) (emphasis added). In their opposition, plaintiffs specifically decline to identify a significant or potentially significant cumulative impact that NMFS did not consider. Instead, they complain that, by placing the burden of proof on plaintiffs, NMFS tries to "turn NEPA on its head." Pl. Opp. at 42. However, this burden is elementary under NEPA, not novel. [15] Therefore, plaintiffs' cumulative impact claims necessarily fail.

CONCLUSION

For the foregoing reasons, plaintiffs' Complaint must be dismissed in its entirety.

Respectfully submitted this 10th day of March, 2006
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Footnotes

1 Baltimore Gas & Electric Co. v. NRDC. 462 U.S. 87, 105 (1983) ("Baltimore Gas"): Tourus Records v. Drug Enforcement Admin. 259 F.3d. 731, 736 (D.C. Cir. 2001).

2 The Ninth Circuit remanded the injunctive relief issue to the district court, instructing that court to consider "whether [plaintiff] has made the requisite showing for injunctive relief, what harm [the permitee] may suffer under an injunction, and the impact of such an injunction on the public." Ocean Advocates. 402 F.3d at 871-72.

3 These tables are identical to Tables 1 and 2 in the 2005 BiOp, see AR 407 at 3-20, with one exception. NMFS concluded that the category "Incidental disturbance during studies of other marine mammal species," ijl at 5, is inapplicable to the covered permits. However, harassment of Steller sea lions during research on other marine mammals is discussed generally in the Revised BiOp at pages 31-32.

4 See Index to Administrative Record, Section S; See also Steller Sea Lion 2000 and 2001 Stock Assessments, available at http://www.nmfs.noaa.gov/prot_res/PR2/Stock_Assessment_ Program/individual_sars.html # pinniped.

5 The product of Nmin and 1/2 Rmax is the maximum allowable removal level of a population, meaning that, in theory, if annual removals are equal to or less than this amount, the population will not decline below its "optimum sustainable population" size. See 16 U.S.C. § 1362(9) (defining "optimum sustainable population").

6 For the threatened eastern stock, NMFS uses a value for the recovery factor of 0.75 (i.e., 75%), which allows 75% of the maximum allowable removal rate to be authorized for incidental take, conserving the other 25% to aid recovery. See 2001 Stock Assessment for Eastern Stock (attached hereto as Exhibit 8), at 12. This recovery factor takes into account the fact that "total population estimates for the eastern U.S. stock have remained stable or increased over the last twenty years ..." LI

7 Plaintiffs' attempt to call into question NMFS' estimate of subsistence harvest in the western stock is irrelevant. See Pl. Opp. at 13, n. 6. As shown above, the PBR level incorporates a buffer of 90% of the maximum allowable removal level, thus even if subsistence mortality slightly exceeds NMFS' estimate of 171, there will be a minimal impact on the overall status of the western stock.

8 Significantly, the MMPA authorizes penalties for permit violations, including civil penalties of up to $10,000 for any violation, and fines of up to $20,000 and/or imprisonment for up to one year for knowing violations. 16 U.S.C. § 1375.

9 See also AR 246 at 1 (accidental mortality includes "any mortality resulting from the actions or presence of the researchers while conducting permit-authorized activities") (emphasis added). Plaintiffs are correct that NMFS issued a permit amendment on November 12, 2002, permitting up to ten accidental mortalities; however, the amendment specified that mortalities were not to exceed five in the western stock. See AR 250 at 7.

10 Marsh. 490 U.S. at 373, 376-378, 385; Robertson. 490 U.S. 332, 350-351; Baltimore Gas. 462 U.S. 87, 96, 105-106 (NEPA requires agencies to "consider and disclose" uncertainty, not resolve it); Vermont Yankee Nuclear Power Corp. v. NRDC. 435 U.S. 519, 553, 555 (1978) (because all "administrative consideration of evidence creates gaps between the time that the record is closed and the decision is made," the correct standard of judicial review judges agency action "by the information then available to it"); Isaak Walton League v. Marsh. 655 F.2d., 346, 369, 377 (D.C. Cir. 1981) (agency may properly evaluate uncertain environmental effects under NEPA on the basis of record before it at time of the decision, provided agency adequately "identifies areas of uncertainty") ("Walton").

11 Marsh. 490 U.S. at 378; Baltimore Gas. 462 U.S. at 93, 96, 103, 105-106; Greenpeace Action v. Franklin. 14 F.3d 1324, 1331-1333, 1335 (9th Cir. 1992); Sierra Club v. U.S. Dep't of Transportation. 753 F.2d 120, 127-129 (D.C. Cir. 1985).

12 See Marsh. 490 U.S. 360, 374, 385 (where intervening environmental effect or factor implicates "significant" effect on the physical environment after a NEPA document's publication date, agencies must prepare a new or supplemental NEPA document); 40 C.F.R. § 1502.9; see also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971) (agencies entitled to presumption of integrity and regularity).

13 See Preserve Endangered Areas of Cobb v. U.S. Army Corps of Engineers, 87 F 3d 1242, 1248-1249 (11th Cir. 1996); Friends of the Payette v. Horseshoe Bend Hydroelectric Co. 988 F.2d 989, 993 (9th Cir. 1993); Greenpeace Action v. Franklin. 14 F.3d 1324, 1331-1333, 1335 (upholding EA, FONSI, and related mitigation measures analyzing the uncertain effect of commercial fishing on threatened sea lions); Friends of Endangered Species v. Jantzen, 760 F.2d 976, 987 (9th Cir. 1985); Steamboaters v. FERC. 759 F.2d 1382, 1394 (9th Cir 1985); Sierra Club. 753 F.2d at 126-129.

14 See Vermont Yankee. 435 U.S. at 551-553 (1978): City of Carmel-bv-the-Sea v. Dept. Of Transportation. 123 F.3d 1142, 1155 (9th Cir. 1997): Headwaters. Inc. v. Bureau of Land Management, 914 F.2d 1174, 1180 (9th Cir. 1990): City of Angoon v. Hodel. 803 F.2d 1016. 1021 (9th Cir. 1986); Friends of the River v. FERC. 720 F.2d 93, 105 (D.C. Cir. 1983); North Slope Borough v. Andrus. 642 F.2d 589, 602 (D.C. Cir. 1980).

15 See Baltimore Gas. 462 U.S. 87, 105: Kleppe. 427 U.S. at 412-414: Tourus Records v. Drug Enforcement Admin. 259 F.3d. 731, 736 (D.C. Cir. 2001); Sierra Club v. Marita. 46 F.3d 606, 619 (7th Cir. 1995).

End of Document

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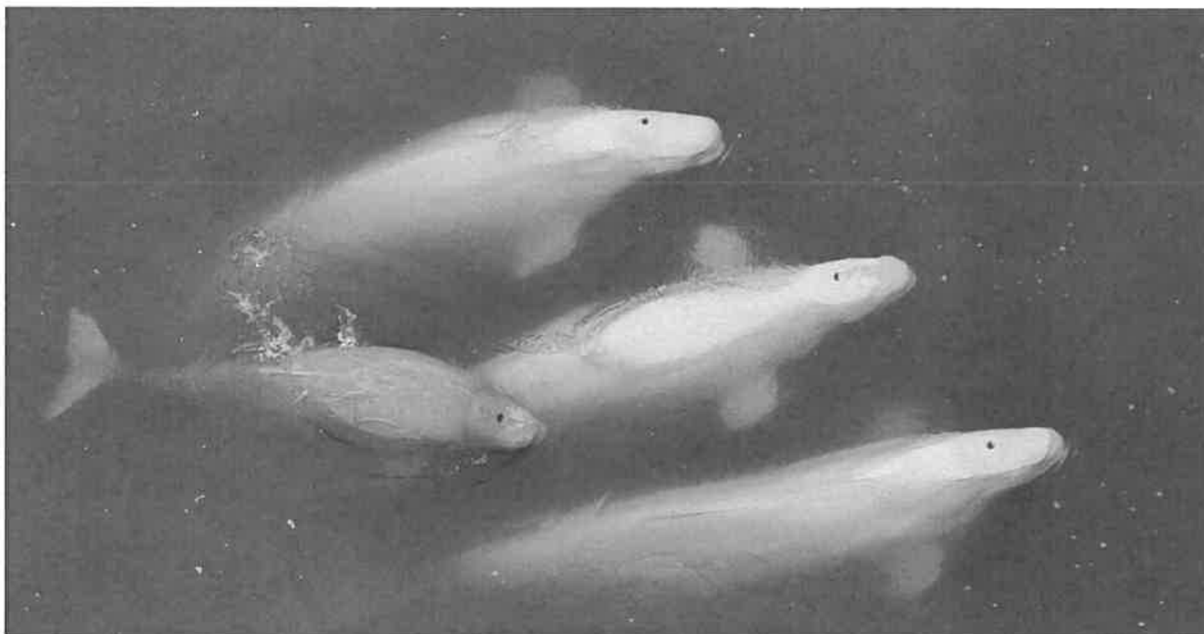
Exhibit 7

PROJECT TITLE:

Current status of the Sakhalin-Amur beluga aggregation (The Okhotsk Sea, Russia): sustainability assessment

Project Period:

August, 2007 - May, 2012



REPORT FOR 2007-2010 STAGES:

Results of 4 years of study and preliminary conclusions

Compiled by Olga Shpak

for the Expert Group meeting

IUCN

CHICAGO, 6-7 MARCH, 2011

A comparison of results of 2009 and 2010 abundance surveys

Shantar region

The first decade of August. The directly observed number of belugas in this region was significantly lower in 2009 comparing to 2010 (1588 vs. 3206). Whales weren't as highly concentrated in 2009 as in 2010. Some animals were located outside the main stocks in the estuarine areas. For example, a few animals were spotted at the north-western part of Tugursky Bay or at the north-eastern part of Nikolaya Bay, while in 2010 all belugas were detected in the apical parts of the Bays near the mouths of the big rivers. Estimated abundance came out to be very similar between 2 years: 3407 and 3254 belugas in 2009 and 2010, respectively.

In the last decade of August 2010 the number of belugas in the region was appr.30% lower than in the first decade. The abundances in early and late August could not be compared due to exclusion of Udskaya Bay from the second survey. Concentration was very high in the apical parts of the bays. One big aggregation of belugas was detected along the south-western coast of Ulbansky Bay.

In the middle of September 2009 the number of animals in the Bays was very low. The estimated abundance was 10 times lower than a month earlier, in the first decade of August 2009. The belugas were located in the apical parts of the Bays but weren't very concentrated. Weather conditions and, possibly, the tide state (low) may have influenced the survey result.

Sakhalin-Amur region

The number of belugas in the region was considerably higher in the first decade of August 2010 relative to the same period of 2009 (estimated 1577 vs.675 in 2010 and 2009 respectively). Density of whales on the border between Sakalinsky Bay and Amursky estuary was also higher in 2010. It seemed that belugas were dispersed more chaotically in 2009. The same situation was discovered in the mouth of Baikal Bay.

In the end of August 2010 and in the middle of September of 2009 belugas' distribution was similar, but we didn't spot any belugas in Baikal Bay in 2010. Although the visually observed number of whales was considerably higher in 2009, the estimated numbers for both years were very similar: 2301 and 2064 belugas in 2009 and 2010 respectively.

5.4.5. Aerial Photography: calculating correction factor and birth rate

In addition to the estimate calculated with BELUKHA-2, we decided to compare our survey results to the older ones (1970-1990s, see background information chapter 3). To do so, we multiplied

our visually observed beluga numbers by 12 (coefficient suggested by Belkovich, 1960, and extensively used in surveys up to 1990s). The corresponding numbers are presented in **table 14**.

In **table 14**, we also present the abundance estimate obtained by dividing the visually observed beluga number on 0.44, the coefficient we calculated experimentally on Chkalov Island in 2009. The information on how many captured belugas were kept in the enclosure on Chkalov Island in August and in September, 2009 was available from the catching team. Twice in both months, we flew over the enclosure with observers counting the belugas and photographers taking the photos (**Pic. 34, Appendix 1**). We divided observed/appeared on photos numbers by the true numbers for each month and obtained the coefficient for visual observation = 0.44, and the coefficient for aimed photography = 0.51. Our pilot study data appeared to be surprisingly close to the proportion of visible St Lawrence belugas when counted from a helicopter (44.3%, Kingsley and Gauthier, 2002).

Table 14. Beluga abundance estimate based on coefficient-corrected visual observation numbers.

August			
region	visually observed beluga number	x12	/0.44
Tugursky Bay	135	1620	307
Nikolaya Bay	34	408	77
Ulbansky Bay	465	5580	1057
Udskaya Bay	954	11448	2168
Baikal Bay	33	396	75
Baydukov Island	163	1956	370
Sakhalin-Amur region	69	828	157
All	**1853**	**22236**	**4211**
September			
region	visually observed beluga number	x12	/0,44
Tugursky Bay	18	216	41
Nikolaya Bay	6	72	14
Ulbansky Bay	36	432	82
Udskaya Bay	140	1680	318
Baikal Bay	89	1068	202
Sakhalin-Amur region	1278	15336	2905
All	**1567**	**18804**	**3561**

Using the coefficient that we calculated for Chkalov Island water, probably, still gives an underestimated number of belugas. The main reason for that is that animals in the pans were not naturally dispersed, but rather constrained in movement, which increased our observation success.

5.5.3. Human-caused mortality

Beluga whaling in Sakhalinsky Bay started in 1915, reached its peak in 1933, when 2,500 belugas were taken from the region, and ceased in 1950s. A review of published data on whaling in the Okhotsk Sea is available as **Appendix 4**. Since late 1980s, with a several-year break in mid1990s, a beluga live-capture for dolphinaria has been being conducted from the south-western part of the Bay (Chkalov and Baydukov Islands).

There are very limited data on current (illegal) whaling by villagers. Although hunting quotas are available, no licenses are requested from the Fisheries Control Service, except by dolphinaria and institutes. How many beluga are being shot by locals or die due to bycatch is unknown, but from our communication with locals, the numbers of beluga shot are low: 1 to 3 belugas per town per year – information from Chumikan and Tugur, Udskaya and Tugursky Bays respectively. For bycatch data, we do not have numbers; local residents describe it as "rare".

5.5.4. How we treated our aerial results

We excluded from analysis 2 pieces of survey- August 2009 in Sakhalinsky Bay and September 2009 in Shantar area – as the estimates from questionable surveys. A possible reason for low Sakhalin estimate (675 belugas) in August 2009 was the design of the track-lines. This survey was a parallel track-line survey with the track-lines drawn at appr. 20km distance from each other which assumes tha the beluga are randomly distributed. Later surveys indicate that the beluga distribution in the area is highly clumped and associated with specific feature in the region, thus there was a significant possibility that a large portion of the population was missed due to the survey design. The data from Shantar survey (11 September 2009, 324 belugas) was excluded due to low estimate (times less than in other surveys). Survey conditions were compromised by low tides in Ulbansky, Tugursky and Udskaya Bays, and poor visibility in many places due to winds (high Beaufort, 4-5). The last survey in Shantar region (late August 2010) was also not included in analysis, because due to logistics obstacles we did not cover Udskaya Bay where a significant portion of Shantar belugas is located. This survey, though, may be used in the future for bay-to-bay analysis for Nikolaya, Ulbansky and Tugursky Bays.

The estimated numbers N_{est} with relative statistic errors for each survey sector were obtained through Belukha-2 program analysis of counts of visually detected belugas (N_{vis}) estimating the density in the survey strip and extrapolation to the area represented by the trackline depending on the design of the survey in each sector (**Table 18, Appendix 1**). We applied an availability correction factor (x2) for the animals missed to both N_{est} and N_{vis} (please see chapter Aerial survey, sub-chapter Aerial photography above).

Exhibit 8

DISCUSSION OF LEGAL ISSUES

NATIONAL MARINE FISHERIES SERVICE

PROPOSED RULE

Thursday, November 18, 1993

9:30 a.m.

Taken by Frances M. Freeman

1 P R O C E E D I N G S

2 MR. MANNINA: My name is George Mannina. I am with
3 the law firm of O'Connor & Hannan, representing the
4 Alliance of Marine Parks and Aquariums.

5 First let me thank Bill Fox, in his absence, and the
6 rest of you for your kind offer, when you briefed us
7 originally on these proposed regulations, to meet with us
8 and answer any questions we might have. Before going on
9 the tape, will everyone introduce themselves for purposes
10 of the record?

11 The purpose of this meeting is simply to review some
12 of the technical aspects of the regulations. We have all
13 been through them and had a number of questions as to how
14 it works. We thought it might be useful, before we begin
15 the process of writing and filing comments, to have your
16 input to guide us as to where we may have misunderstood
17 either intent or content.

18 Having said that, unless one of you folks want to
19 say something, just go around and identify yourselves for
20 the record.

21 MR. HODGES: John Hodges, with the law firm of
22 Wiley, Rein and Fielding, representing the Marine Mammal
23 Coalition.

1 MR. COLLINS: Kevin Collins, NOAA Office of General
2 Counsel.
3 MR. JEFFERS: Art Jeffers, National Marine Fisheries
4 Service.
5 MS. VEHRS: Kris Vehrs, American Association of
6 Zoological Parks and Aquariums.
7 MR. KASDAN: Ira Kasden, with Ginsburg, Feldman and
8 Bress, representing Sea World.
9 MR. MANNINA: I thought that what we could do today
10 is just go through, start with the regulations, and if we
11 could just kind of ask you guys questions, and then we
12 will cross into the preamble where necessary.
13 MR. JEFFERS: All right, George. We can probably
14 -- what I was thinking is that if there are any major
15 issues, you know, cross-cutting, overall questions or
16 misunderstandings that you want to clear up, that whether
17 they are addressed in the preamble or otherwise, we can
18 probably try to address those either as we get into them,
19 but if you have got them, got any major ones laid out,
20 maybe we can address those first, rather than getting
21 into the detailed language.
22 MR. MANNINA: Well, we would actually prefer to go
23 into the detailed language, I think, just as -- and we

1 MR. COLLINS: Okay.
2 MR. HODGES: There was one other provision, and that
3 related to -- and I don't know the particular page here -
4 - but a provision that said that, the thrust of it was
5 that despite the fact that the animals, there may be a
6 bunch of animals out there, we are not going to grab a
7 permit if grabbing the permit might stimulate the
8 possibility that somebody might want to get additional
9 animals.
10 And it stuck me that that was problematical, or have
11 you conceded the fact that public display of -- when
12 people visit a facility, they become interested and might
13 say, "Gee, this is wonderful. Wouldn't it be a good
14 thing to have our own public display?" As a result of
15 that, we would be sort of locked into a situation where
16 we have only a limited number of animals that are
17 available for viewing, if replacement takes would
18 otherwise increase the demand for protected species.
19 And it strikes me that I just think this does -- do
20 you think this creates a problem here, that you could end
21 up really banning anything, almost anything, because of
22 the fact that people would become more and more
23 interested in marine mammals and would like to see them,

1 and of course that stimulates the demand? I think you're
2 sort of looking at the idea of the turtle issue, how the
3 raising of captive turtles was somehow stimulated by the
4 desire to eat turtle soup.
5 But I just think that this looks to me to be sort of
6 a potential knock-out punch for public display in
7 general.
8 MR. JEFFERS: I don't think so. I mean, I just
9 don't see it that way. The provision was written and was
10 proposed to try to avoid and prevent what amounts to
11 creating an incentive for greater than would otherwise be
12 the case take from the wild.
13 MR. MANNINA: So you're talking replacement takes as
14 opposed to -- John spoke to them as for otherwise
15 increased demand, as a generalized demand in which people
16 say or institutions say, "Golly, the public wants to see
17 more of species X." That's not what you're trying to
18 address. You're trying to deal with replacement animals.
19 MR. JEFFERS: Yes, I mean, replacement takes. Part
20 of it is, the increased demand is much more oriented
21 toward the parts issue. I mean, if we get into a parts
22 trade, if you will, I mean, you know, we allow it for a
23 number of purposes, but if we get into a situation where

1 in effect what we are doing is, we are creating a
2 significant foreign market for the take of animals for a
3 certain purpose because we're authorizing the import,
4 then we really need to be careful about that.
5 MR. MANNINA: I understand. Our concern is that the
6 way that it is drafted, the "cause or otherwise increase
7 demand," lends itself to an interpretation of generalized
8 demand. And if that is not what you intend, we think
9 nevertheless that is a practical or a possible effect.
10 MS. VEHRS: The public demands that there should be
11 two or three more --
12 MR. MANNINA: And therefore --
13 MR. JEFFERS: Okay. Well, go ahead and make a
14 comment on that one. That is not the general intent
15 here.
16 MS. VEHRS: I didn't think it was.
17 MR. HODGES: I'm afraid I'm going to have to
18 withdraw, but I certainly appreciate your time, and you
19 gentlemen will continue to talk on other issues, I'm
20 sure. Thanks.
21 MR. MANNINA: Can we ask, going back to page 102 for
22 a second, you stated, "The applicant must be a public
23 display facility." We were confused as to the statutory

VOLUME II

DISCUSSION OF LEGAL ISSUES:

NATIONAL MARINE FISHERIES SERVICES

PROPOSED RULE

November 22, 1993

9:00 A.M. - 12:30 P.M.

NATIONAL MARINE FISHERIES SERVICE

Conference Room 13817

1315 East West Highway

Silver Spring, Maryland 20910

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For
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1 things that they thought might be permit or MMPA
2 violations to NMFS.
3 MR. KASDAN: Okay, but you are not aware
4 of any cases that have gone forward beyond that initial
5 reporting?
6 MR. COLLINS: No, I am not; but, again,
7 I'm not in the -- I mean, we have regional attorneys
8 around the country who enforce various things, and they
9 may be aware of some of those. And we also have an
10 office in Washington, General Counsel for Enforcement of
11 Litigation, and they may have seen some of these things.
12
13 I mean, agents will prepare an
14 investigative report and forward that to the office, the
15 General Counsel's offices, and they'll either decline
16 prosecution or go ahead with an enforcement action.
17 MR. KASDAN: Thanks.
18 MR. MANNINA: If we're ready to go back,
19 on page 115, paragraph (4), we touched on this last
20 Thursday. And the issue is on this second line from the
21 bottom, you talk about increasing demand. Would you
22 consider the situation in which you want import a species
23 which is not broadly held in captivity in the United

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1 States?

2 A possible scenario is that other

3 institutions would like to also have such facilities, and

4 the presence of one or two or ten in the United States

5 will result in a generalized demand for additional

6 members of those species in zoological institutions.

7 Looking forward to X litigation, do you

8 perceive this language as providing a basis for people to

9 argue that you should not bring a new species into a

10 zoological environment, because once you introduce one,

11 other people will want it, and, therefore, you have a

12 generalized demand consisting with the newest

13 regulations. This will increase demand, therefore the

14 permit for import should not be allowed.

15 MR. JEFFERS: Well, you may be looking

16 forward to litigation, but we're not.

17 MR. MANNINA: We're not looking forward

18 to it. We're worried that this might in fact create a

19 problem.

20 MR. JEFFERS: I'm sorry, George. It was

21 just to o good of an opportunity to pass up.

22 We indeed are hoping to avoid as much as

23 possible and minimize the litigation. And the intent

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1 clearly of this provision is that we're hoping to avoid,
2 consistent with the purposes, policies, et cetera of the
3 MMPA, and for that matter the ESA, we're hoping to avoid,
4 where possible, situations where the issuance of a permit
5 indeed promotes or in some way results in -- and again,
6 this is going to be a judgment call. This is going to be
7 an application of this criteria where if there is a -- it
8 can be reasonably seen that there is some type of direct
9 outcome of the issuance of the permit and the take or
10 import allowed by the permit, or, in this case, it's
11 import or export, that would likely result in the
12 replacement takes or otherwise increase demand.
13 We want to avoid that wherever possible,
14 because indeed while permits are for certain purposes and
15 will be issued for certain purposes, we're not interested
16 in an outcome of those permits to involve increased take,
17 increased import/export, taking it off of that.
18 MR. KASDAN: I have a couple of
19 questions on that. First of all, where in the MMPA do
20 you see your authority to govern exports?
21 MR. JEFFERS: Keeping in mind, that
22 these provisions and these issuance criteria are
23 underneath both the MMPA and the ESA. The MMPA export