

December 11, 2013

Via Email and Hand Delivery

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

RE: *Agenda Item B-8 (Protected Species Report (including SSL EIS and BiOp Update))*

Dear Chairman Olson:

We write on behalf of the plaintiffs in the three partially consolidated cases pending in the U.S. District Court for the District of Alaska regarding Steller sea lion mitigation measures.¹ We thank the Council for its continuing close attention and thoughtful approach to the development of the court-ordered environmental impact statement (“EIS”) on Steller sea lion protection measures for groundfish fisheries in the Bering Sea and Aleutian Islands Management Area. Our understanding, based on the November 27, 2013 letter to you from Dr. Balsiger, is that NMFS may ask the court for an extension of the deadline in the court’s injunction for completion of the EIS, but will only do so if the Council supports such an extension. According to NMFS, a five-month extension is warranted “to engage the Council in the development of fishery management measures to implement a Reasonable and Prudent Alternative (RPA)” in the event that the biological opinion currently under development results in a jeopardy or adverse modification finding (“JAM”) under the Endangered Species Act (“ESA”). Judge Burgess indicated in his injunction order that the court would consider “appropriate” extensions for completion of the EIS only upon a showing by the federal government of “good cause.” Because any request for an extension would also involve the plaintiffs in the action, we wanted to make the Council aware of what the plaintiffs’ position on such a request for an extension would be.

In Plaintiffs’ view, the Council should support a schedule extension only if NMFS commits to meeting the following conditions:

¹ *State of Alaska v. Lubcheno, et al*, U.S. District Court for the District of Alaska No. 3:10-cv-00271; *Alaska Seafood Cooperative et al v. NMFS*, No. 11-cv-00001; *Freezer Longline Coalition v. Lubcheno*, No. 3:11-cv-0004.

1. The draft and final biological opinions must set forth in detail, not in summary fashion, the scientific analyses and metrics that are going to be used to evaluate the effects of the fisheries on Steller sea lions and their critical habitat, including how these analyses and metrics are going to be used to determine whether the fisheries result in JAM.
2. The draft and final biological opinions must specifically incorporate and be responsive to each of the findings and recommendations of the independent scientific reviews conducted by (1) the Independent Scientific Review Panel convened by the States of Alaska and Washington, and (2) the Center for Independent Experts convened by NMFS. This information should be readily available to the reader in the body of the opinion; general statements in the opinion that NMFS “considered” or that the opinion’s analysis was “informed by” the reviews with references to other studies or analyses do not meet this condition.
3. NMFS must confirm that the industry plaintiffs (e.g., Alaska Seafood Cooperative and Freezer Longline Coalition) have “applicant” status under the ESA and timely implement the actions for applicants set forth in the ESA regulations and Section 7 Consultation Handbook in this consultation. This includes providing industry plaintiffs with a copy of the draft opinion and a reasonable opportunity to comment, as well as discussions with NMFS as to NMFS’s review and the basis for any finding in the draft opinion, and the availability of reasonable and prudent alternatives. Industry plaintiffs are committed to working with NMFS as expeditiously as reasonably needed to meet the extended schedule without further delay.
4. The State of Alaska is a participant in the consultation, which includes the State’s parallel groundfish fisheries managed by the State. NMFS must confirm that the process under the extended schedule will timely include the State’s participation consistent with the Sections 2.5 and 4.4 of ESA Section 7 Consultation Handbook and existing interagency policy. This includes the State being involved in discussions with NMFS for NMFS to better understand the direct and indirect effects of the proposed action and the identification of reasonable and prudent alternatives, if necessary, and reasonable and prudent measures. The State is committed to working with NMFS as expeditiously as reasonably needed to meet the extended schedule without further delay.
5. NMFS must ensure that the process for completion of the biological opinion is responsive to stakeholder input through the Council process. The process for finalization of the EIS and the biological opinion must be conducted concurrently so that, even though the deadline for completion of the EIS is extended by five months, any rulemaking stemming from the process is completed in time to be implemented by January 1, 2015. This is the deadline for rulemaking required under the current injunction and there is no good cause for a further delay until the opening of the 2016 season.

Eric Olson
December 11, 2013
Page 3

We hope this information is useful to the Council as it considers whether to support a request to the Court by the agency for a schedule extension. We are available to answer any questions that you or the Council might have about the plaintiffs' position on this issue.

Sincerely,



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Eric Olson
December 11, 2013
Page 4

A handwritten signature in blue ink, reading "Murray D. Feldman". The signature is fluid and cursive, with the first name "Murray" being the most prominent.

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Attorneys for the State of Alaska