IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

OCEANA, INC. and GREENPEACE, INC., Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE, et al., Defendants.	Case No. 3:14-cv-00253-TMB

I. INTRODUCTION

Plaintiffs Oceana, Inc. and Greenpeace, Inc. filed this action for declaratory and injunctive relief against the National Marine Fisheries Service ("NMFS"), U.S. Department of Commerce, and others (collectively, "Defendants"), challenging recent authorization of increased industrial fishing in the western and central Aleutian Islands.[1] The location of the fisheries includes a critical habitat for the endangered western Distinct Population Segment of Steller sea lions ("WDPS"); Plaintiffs argue that Defendants' determinations and subsequent actions violate the Endangered Species Act ("ESA"), the National Environmental Policy Act ("NEPA"), and the Administrative Procedure Act ("APA").[2] Defendant-Intervenors Alaska Seafood Cooperative, Adak Community Development Corporation, Aleut Corporation, and the Groundfish Forum (collectively, "Intervenors") represent Aleutian Island residents and participants in the federal groundfish fishery who stand to suffer economic and other losses as a result of the fishery restrictions.

[1] Dkt. 1.

[2] *Id.* at 2.

On April 14, 2015, Plaintiffs moved for summary judgment; Defendants and Intervenors each filed responses and cross-motions for summary judgment against the Plaintiffs.[3] The Court understands Plaintiffs' concern for the potential impact of industrial fishing on the WDPS; for the reasons that follow, however, the Court finds that the Defendants complied with their legal obligations under the ESA, NEPA, and APA and grants summary judgment in favor of Defendants and Intervenors.

II. BACKGROUND

A. Agency Obligations Under the ESA and NEPA

NMFS is an agency subject to obligations under the ESA and NEPA. The ESA is designed "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species."[4] The ESA imposes a duty on NMFS to "insure" that any authorized agency action does not "jeopardize" the continued existence of a threatened or endangered species or result in destruction or "adverse modification" of the species' critical habitat.[5] "Jeopardy" occurs when an action "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of the listed species in the wild by reducing the reproduction, numbers, or distribution of that species."[6] Adverse modification occurs when there is "a direct or indirect alteration that appreciably

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[3] Dkt. 51 (Intervenors' response and cross motion for summary judgment); Dkt. 54 (Defendants' response and cross motion for summary judgment).

[4] 16 U.S.C. § 1531(b).

[5] *See* 16 U.S.C. § 1536(a)(2).

[6] 50 C.F.R. § 402.02.

diminishes the value of the critical habitat for both the survival and recovery of a listed species."[7]

Under the ESA, an agency proposing an action that may affect an endangered species must consult with an "expert agency" that has authority over the species.[8] The expert agency then prepares a biological opinion, or BiOp, to evaluate the current status of the endangered species and the effects the proposed action may have on that species and its critical habitat.[9] If the consulting agency makes a finding of jeopardy or adverse modification, it must suggest "reasonable and prudent alternatives" that it believes will avoid the jeopardy or adverse modification while remaining consistent with the intended purpose of the proposed action.[10] These assessments must be made based on the "best scientific and commercial data available."[11]

Related legislation, NEPA, aims to foster protection of the environment and encourage informed public participation by establishing procedures for federal agencies to make environmentally-informed decisions.[12] "In passing NEPA, Congress 'recogniz[ed] the profound impact of man's activity on the interrelations of all components of the natural environment' and set out 'to create and maintain conditions under which man and nature can exist in productive

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[7] *Id.*

[8] 16 U.S.C. § 1536(a)(2); *see* *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008).

[9] 50 C.F.R. §§ 402.12 – 402.14(h)(3).

[10] 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.02, 402.14(h)(3); *Nat'l Wildlife Fed'n*, 524 F.3d at 924-25 (citing, *inter alia*, § 1536(b)(3)(A)).

[11] 16 U.S.C. § 1536(a)(2).

[12] 40 C.F.R. § 1500.1(c) ("The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.").

harmony.'"[13] NEPA requires agencies to take a "hard look" at the environmental consequences of their decisions by "carefully consider[ing] detailed information concerning significant environmental impacts" and ensure "that the relevant information will be made available to the larger [public] audience."[14]

Under NEPA, an agency considering the authorization of an action "significantly affecting the quality of the human environment" is typically required to prepare an environmental impact statement ("EIS").[15] After circulating a draft EIS and receiving comments from cooperating agencies, "[t]he agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised."[16]

B. The 2010 BiOp

NMFS permits annual industrial fishing of North Pacific groundfish. The groundfish in the western and central Aleutian Islands are an important food source for a variety of species, including the endangered population of Steller sea lions. During the 1990's, the fisheries in these areas continued to grow while the Steller sea lion population steadily declined.[17] In 2000, NMFS determined that there was a "high degree of overlap between these fisheries and the

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[13] *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 486 (9th Cir. 2011) (citing 42 U.S.C. § 4331(a)).

[14] *The Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)), *overruled on other grounds by* *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008); *see also* *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 945 (9th Cir. 2005); *Neighbors of Cuddy Mt. v. Alexander*, 303 F.3d 1059, 1071 (9th Cir. 2002).

[15] 42 U.S.C. § 4332(C).

[16] 40 C.F.R. § 1502.9(b).

[17] Dkt. 33 at 50 (WDPS "continued to decline at approximately 5% per year throughout this range.").

foraging needs of Steller sea lions."[18] Based on this determination, NMFS concluded that the Atka mackerel and Pacific cod fisheries were potentially endangering the Steller sea lion population by creating competition for prey resources. In response, NMFS began imposing restrictions upon fisheries in the North Pacific to help ensure adequate prey resources for the sea lions' survival and population recovery. The initial measures taken by NMFS helped Steller sea lion populations in some areas, but the endangered WDPS in the Aleutian Islands continued to decline.

In 2010, NMFS released a biological opinion (2010 BiOp) concluding that even with the existing restrictions on industrial fishing in the area, continued authorization of the North Pacific groundfish fisheries would be "likely to jeopardize the continued existence of the [WDPS]" and "adversely modify [their] designated critical habitat."[19] NMFS stated that it "recognized that competition with fisheries for prey is likely one component of an intricate suite of natural and anthropogenic factors affecting Stellar sea lion numbers and reproduction," but that it must still ensure that the agency's actions "are not likely to appreciably reduce the likelihood of survival and recovery of the" WDPS.[20]

To protect the sea lions, the 2010 BiOp included "reasonable and prudent alternatives" calling for substantial limitations on the fisheries in the western and central Aleutian Islands, including restrictions on when and where the fisheries could operate (i.e., away from sea lion breeding, resting, fishing, or other areas considered critical habitat) and limits on total allowable catch.[21] The NMFS quickly implemented the restrictions and effectively halted sea lion

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[18] Dkt. 45-37 at 39 (2000 BiOp, Plaintiff Ex. 37).

[19] Dkt. 45-33 at 32, 35 (2010 BiOp, Plaintiff Ex. 33).

[20] *Id.* at 130.

[21] *Id.* at 127-132.

population decline in some areas.[22] The sweeping restrictive measures also resulted in significant cost to the fishing industry and associated communities.[23]

C. The 2010 BiOp is Challenged in Federal Court

In December 2010, the State of Alaska and various fishing industry entities brought action in this Court arguing that the 2010 BiOp violated the ESA, NEPA, APA, and Magnuson Stevens Fishery Conservation and Management Act.[24] The Court upheld the 2010 BiOp and the accompanying protective measures, finding that they complied with ESA standards.[25] However, the Court found that NMFS's conclusion that it did not need to produce an EIS was "unreasonable" in light of the significant anticipated impact of the agency action on both Steller sea lions and the local human environment.[26] NMFS thus did not adequately comply with NEPA, and the Court ordered it to prepare an EIS.[27] Before issuing a final EIS, however, the Court ordered NMFS to "prepare and circulate a draft EIS for public comment and provide meaningful responses to comments on the draft EIS."[28]

As part of its subsequent evaluations, NMFS commissioned three independent experts to review the 2010 BiOp; each of the experts criticized the 2010 BiOp for its lack of sufficient

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[22] Dkt. 45 at 10.

[23] Dkt. 54 at 23.

[24] *Alaska v. Lubchenco*, Case No. 3:10-cv-00271-TMB (D. Alaska Jan 18, 2012), *aff'd* 723 F.3d 1043 (9th Cir. 2013).

[25] *Id.* (CM/ECF Dkt. 130 at 54).

[26] *Id.*

[27] *Id.*

[28] *Id.* 55.

scientific evidence, internal inconsistencies, and circular reasoning.[29] The independent experts expressed particular concern over the analysis of whether the fisheries jeopardize the Steller sea lions because the available evidence did not support the conclusion of no jeopardy.[30] A separate set of experts asked to review the 2010 BiOp reached similar conclusions: three expert scientists in mammals and fisheries and one resource economist found a lack of scientific support for the conclusion of no jeopardy or adverse modification. The panel determined:

> The conclusions in the [2010] BiOp regarding the finding of jeopardy and its posited cause (nutritional stress from food competition with fisheries) do not follow logically from scientific, economic, and social information present in the BiOp and attendant documents.[31]

In May 2013, NMFS issued a draft EIS analyzing whether to maintain the protections and restrictions imposed after the 2010 BiOp or to implement new measures.[32] The draft IES proposed and evaluated six alternative sets of protection measures to "mitigate the potential fishery impacts on the [western distinct population segment] of Steller sea lions."[33] Alternative 5 authorized loosening the present restrictions placed on the fisheries and authorized increased industrial fishing in the western and central Aleutian Islands. The North Pacific Fishery Management Council ('the Council") recommended Alternative 5 based on "the analysis in the draft EIS, public comments, advice from its Steller Sea Lion Mitigation Committee, input from the Council's Advisory Panel and Scientific and Statistical Committee, and the best available

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[29] *See* Dkt. 52-7 (Brent S. Stewart, Ph.D., J.D. review of 2010 BiOp, Int. Ex. 25); Dkt. 52-8 (W.D. Bowen review, Int. Ex. 26); Dkt. 52-9 (Kevin Stokes, Ph.D. review, Int. Ex. 27).

[30] Dkt. 51 at 22.

[31] Dkt. 53-3 (Bernard, Jeffries, Knapp, & Trites independent review of 2010 BiOp, Int. Ex. 32 at 112).

[32] Dkt. 51 at 26.

[33] Dkt. 45-30 (Draft EIS, May 2013, Plaintiff Ex. 30).

scientific information."[34] The Council noted, however, that Alternative 5 could only be implemented if NMFS could ensure that the authorized actions were not likely to jeopardize Steller sea lions or adversely modify their critical habitat.[35]

D. The 2014 BiOp

In 2014, NMFS issued a biological opinion (2014 BiOp) addressing Alternative 5 and analyzing how the proposed new measures may impact endangered Steller sea lion populations and sub-populations.[36] The 2014 BiOp includes discussion of the status of several Steller sea lion populations in the western Aleutian Islands and the importance of "ensur[ing] that the proposed action was unlikely to reduce the survival and recovery of the WDPS."[37] In particular, the 2014 BiOp focused on whether the pertinent fisheries caused "prey competition" through "localized depletions," that is, "whether the proposed groundfish fisheries are likely to result in local depletions of prey in times and areas that are important to sea lions, with an emphasis on adult females in winter and spring."[38] After detailed analysis, NMFS concluded that allowing increased fishing in the western and central Aleutian Islands is "not likely to jeopardize the continued existence of the WDPS of Steller sea lions or adversely modify critical habitat."[39]

An important aspect of the 2014 BiOp conclusion is its "overlap" analysis. The overlap analysis (also referred to as the "exposure" analysis) examines the degree to which sea lion

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[34] 79 Fed. Reg. 70286 (Int. Ex. 28 at 1-2).

[35] *Id.* at 70287.

[36] Dkt. 45-28 (2014 BiOp, Plaintiff Ex. 28).

[37] *Id.* at 43, 246.

[38] *Id.* at 244.

[39] *Id.* at 249.

foraging behavior and fisheries overlap in four dimensions: location, time, depth, and prey size.[40] The 2014 BiOp overlap analysis acknowledges varying degrees of overlap in several dimensions for each of the fisheries analyzed, but ultimately concludes that the degree of overlap is insufficient to find that Steller sea lions will likely be exposed to prey competition or localized depletion.[41]

On May 13, 2014, NMFS issued the final EIS, announcing the selection of Alternative 5 and the adoption of a final rule authorizing increased industrial fishing in the western and central Aleutian Islands.[42] The determination relied on the 2014 BiOp's conclusion that the evidence fails to show the pertinent fisheries have a negative impact on the endangered Steller sea lion population or critical habitat. The EIS addressed controversies surrounding the 2010 BiOp, but did not specifically discuss concerns surrounding the 2014 BiOp's overlap analysis.

III. LEGAL STANDARD

Under the APA, the Court may set aside an agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[43] An agency action is arbitrary and capricious and should be vacated when it "relie[s] on factors which Congress has not intended it to consider, entirely fail[s] to consider an important aspect of the problem, offer[s] 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."[44]

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[40] *Id.*

[41] *Id.* at 246-49.

[42] Dkt. 45-25 at 3 (NMFS Record of Decision, Plaintiff Ex. 25).

[43] 5 U.S.C. § 706(2)(A).

[44] *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Court is substantially deferential "when reviewing an agency's technical analyses and judgments involving the evaluation of complex scientific data within the agency's technical expertise."[45] The Court may not substitute its own judgment for that of the agency, should base its determination on the record on which the decision was made,[46] and should not "instruct[] the agency, choose[] among scientific studies, and order[] the agency to explain every possible scientific uncertainty."[47] When confronted with conflicting scientific views, the agency has "discretion to rely on its own qualified experts" even if the Court is more persuaded by an alternative or contrary view.[48] Ultimately, the critical consideration is "whether there is 'a rational connection between the facts found and the conclusions made' in support of the agency's action."[49]

IV. DISCUSSION

A. The 2014 BiOp is Not Arbitrary and Capricious.

1. The 2014 BiOp analysis is not an entirely new framework.

Plaintiffs argue that the 2014 BiOp conclusion indicates that NMFS required a demonstration of significant overlap in *each* of the four dimensions to find competition between the fisheries and the sea lions.[50] Since the overlap analyses in the 2000 and 2010 BiOps did not require

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

[46] *FCC v. Fox Tel. Stations*, 556 U.S. 502, 513-14 (2009); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985).

[47] *Lands Council*, 629 F.3d at 1074 (citation omitted).

[48] *Id.*

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

[50] Dkt. 45 at 39.

overlap in all four dimensions of size, place, time, and depth to support a finding of potential prey resource competition, Plaintiffs claim that the 2014 BiOp utilizes an entirely new analytical framework for assessing overlap that is inadequately explained and inconsistent with the NMFS's obligations under the ESA.[51] Defendants deny that the 2014 BiOp overlap analysis employs a new framework that requires overlap be found in all four dimensions as a prerequisite to finding prey competition.[52] Defendants assert "methodologies in the 2014 BiOp [] were very similar to previous BiOps, but [NMFS] refined them based on the best available information, including much information not available in 2010."[53]

Reviewing the 2014 BiOp, there is no indication that NMFS assumed significant overlap in all four dimensions was required to make a finding of jeopardy or competition. Although the 2014 BiOp reviewed the varying degrees of overlap in each of the four dimensions that could potentially result in reduced prey resources, it never suggested that significant overlap in each was required for a finding of jeopardy. This is the same analytical framework employed in the 2000 and 2010 BiOps. Further, the 2014 BiOp conclusion of no jeopardy did not solely rely upon the overlap analysis; the NMFS also considered a variety of factors and data that may contribute to jeopardy or localized depletions such as fish distribution and movement and new data on sea lion movements.[54] The evidence does not support Plaintiff's contention that the 2014 BiOp employed a new analytical framework requiring overlap in each of the four dimensions.

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[51] *Id.*

[52] Dkt. 54 at 41.

[53] *Id.*

[54] *Id.* at 42.

2. The 2014 BiOp overlap analysis uses the best available data

Plaintiffs claim that the 2014 BiOp does not contain sufficient or reliable information to contradict the finding in the 2010 BiOp that the fisheries had the potential to jeopardize endangered Steller sea lion survival and recovery or adversely modify their critical habitat.[55] In particular, Plaintiffs claim that the overlap analysis relies on inadequate and unreliable data and that this concern was brought to NMFS's attention by reviewing scientists during the drafting phase of the 2014 BiOp.[56] Several agencies and scientists asked by NMFS to comment on the draft 2014 BiOp criticized the report for oversimplifying the overlap assessment and for using insufficient and unreliable data.[57] A primary concern for each reviewer was the 2014 BiOp overlap analysis that led to the conclusion "that the preponderance of available data do[es] not support a conclusion that the groundfish fisheries and groundfish abundance are limiting Steller sea lion population growth rates."[58]

Specifically, the NMFS's Steller Sea Lion Recovery Coordinator, Lisa Rotterman, said the NMFS failed to make "a logical set of arguments" in its overlap analysis to support the conclusion.[59] Rotterman emphasized the scarcity and unreliability of the data collected, the lack of consideration for the limitations and biases in the data collection and analysis, and the failure to sufficiently explain the logic and reasoning behind the inferences drawn.[60] Rotterman called the

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[55] Dkt. 45 at 38.

[56] *Id.* at 46.

[57] Dkt. 45-38 (NMML Memo, Plaintiff Ex. 38); Dkt. 45-44 (Lisa Rotterman, PRD excerpts of comments on draft 2014 BiOp, Plaintiff Ex. 44).

[58] Dkt. 45-28 at 227 (Final 2014 BiOp, Plaintiff Ex. 28).

[59] Dkt. 44 at 10 [Comment LMR186].

[60] *Id.* at 1-16.

2014 BiOp's analysis "faulty," "unsophisticated and not consistent with the best available science," and "fundamentally flawed and garbled logic."[61]

The National Marine Mammal Laboratory (NMML) also expressed concern over the 2014 BiOp's overlap analysis that led to the "dangerously simplistic" conclusion that there is no prey resource competition.[62] The NMML found that the 2014 BiOp's spatial overlap analysis is "fundamentally flawed and does not provide an appropriate basis to evaluate spatial overlap between fisheries and Steller sea lions or to assess whether jeopardy or adverse modification to critical habitat may or may not be expected to occur as a result of the fishery action."[63] Another reviewer, Libby Logerwell from the NMFS's Resource Ecology and Fisheries Management (REFM), also criticized the small sample size used in the overlap analysis. In the final version of the 2014 BiOp, the NMFS acknowledged the "limitations with the available data" in the overlap analysis, but still relied on the analysis in reaching the ultimate conclusion of no jeopardy or adverse modification.

In response to these reviews, NMFS revised the draft 2014 BiOp to address the overlap analysis limitations.[64] The 2014 BiOp's conclusion explains:

> As discussed in the exposure analysis, we lack sufficient information for a comprehensive understanding of many of the base or resulting states in the exposure pathway (i.e., many of the existing conditions and potential changes). Given the complexity of the dynamic marine environment in the Aleutian Islands, we may never have a firm grasp on the contribution of anthropogenic versus natural causes for population fluctuation in Steller sea lions, including the consequences of variations in prey availability. The response conceptual model shows several pathways by which Steller sea lions exposed to reduced prey resources may avoid a nutritional stress response.

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[61] Dkt. 45-44 at 1 [Comment LMR2], 4 [Comment LMR105], 12 [Comment LMR 198], 14 [Comment LMR214].

[62] Dkt. 45-38 at 8.

[63] *Id.* at 1.

[64] Dkt. 54-16 at 2 (Balsiger Memo, Def. Ex. 15).

Based on the limited data available, the NMFS concluded that it is possible the fisheries could impact Steller sea lion prey availability, but there is no evidence that nutritional stress was "sufficiently prevalent to reduce birth rate and/or increase the death rate of the [WDPS] sub-population."[65] In order to find that the fisheries jeopardized the endangered Steller sea lions, NMFS states "that sub-population would have to be of significance to the continued existence of the species."[66] Without such evidence, then, the NMFS could not conclude that the agency action would place the endangered Steller sea lions in jeopardy.

The ESA's requirement that NMFS use the best available data "merely prohibits [the agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on."[67] Although the Court understands Plaintiffs' concern over NMFS's use of limited and uncertain data in its overlap analysis, Plaintiffs fail to identify any available evidence or studies that NMFS entirely disregarded or ignored in its assessment. Even though the data was limited and uncertain, it appears that the NMFS adequately considered all available scientific evidence in compliance with statutory obligations.

In regard to rationality of the 2014 BiOp analysis, the Court typically defers to an agency's interpretation of scientific evidence, but that interpretation must be reasonable and show that the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made."[68] The 2014 BiOp discusses in detail the possible spatial, temporal, depth, and size overlap present at each of the examined fisheries, explaining the scientific

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[65] Dkt. 45-28 at 246.

[66] *Id.*

[67] *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006).

[68] *Resources, Ltd. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1993).

analyses employed for each dimension.[69] The limitations of the data sets, the need to draw inferences from uncertain factors, alternative conclusions to be drawn from the evidence, and the need for further studies on the issue are also mentioned throughout the 2014 BiOp. The determination that competition between the fisheries and the Steller sea lions was unlikely is one rational conclusion that could be drawn from the assessment made in the 2014 BiOp and the Court will defer to NMFS's interpretation of the evidence.

3. The ESA does not impose an affirmative duty to identify a clear "tipping point"

Plaintiffs additionally argue that the 2014 BiOp is arbitrary and capricious because it does not identify a "tipping point." Without citing to the statute or other applicable law, Plaintiffs assert that "NMFS's special obligations under the ESA... require[] that a no jeopardy finding be substantiated by identification of a 'tipping point' against which to measure the action."[70] Precedent in this circuit indicates that there is no affirmative duty under the ESA to identify a clear tipping point line as to when jeopardy or adverse modification would occur; the importance of such identification depends on the circumstances of the case and the degree of risk to the endangered species. The identification of a tipping point is relevant when an agency identifies "significant impairments" to the endangered species' population or critical habitat, but still concludes there is no jeopardy.[71]

Here, the 2014 BiOp explained:

> Based on our assessment of the available data, NMFS concludes that the decline in numbers of the western Aleutian Islands sub-population is likely to continue for unknown reasons, even apart from any changes in the fisheries, and that the proposed measures are

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[69] *See* Dkt. 45-28; Dkt. 54 at 41-47.

[70] Dkt. 45 at 49.

[71] *See* *Nat'l Wildlife Fed'n*, 524 F.3d at 926 ("It is only logical to require that the agency know roughly at what point survival and recovery will be placed at risk before it may conclude that no harm will result from 'significant' impairments to habitat that is already severely degraded."); *Greenpeace, Am. Oceans Campaign v. Nat'l Marine Fisheries Serv.*, 237 F.Supp.2d 1181, 1193 (W.D. Wash. Dec. 18, 2002).

> unlikely to yield population level effects that would appreciably change the likelihood of survival or recovery of the western Aleutian Islands sub-population.[72]

Since the agency determined that the measures were not likely to significantly impair the population of Steller sea lions at all, it is unreasonable to require NMFS to determine at what point the measures would impact the endangered Steller sea lions' population recovery.

B. The Final EIS Satisfies NEPA Requirements

The Ninth Circuit has found an EIS arbitrary when the agency gave little consideration to the concerns of its own experts and other reviewing agencies, stating that the agency "neither responded to nor considered comments 'objectively and in good faith' nor made responsive changes to the proposed regulations" when the agency "was required to 'assess and consider... both individually and collectively' the public comments received during the NEPA process and to respond to such in its [EIS]."[73] Plaintiffs argue that by failing "to inform the public about the responsible scientific analysis from its own experts that showed its new overlap analysis was improper and understated the potential for population-level impacts to sea lions," the EIS is arbitrary.[74] While Plaintiffs concede that the final EIS largely incorporates evaluations of the potential impact that the agency action would have on the environment and Steller sea lion populations, Plaintiffs contend that NMFS "did not address, discuss, or even disclose expert opinions that were directly relevant to its analysis and should have substantially informed its evaluation of environmental effects."[75]

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[72] Dkt. 28 at 247.

[73] *W. Watersheds*, 632 F.3d at 493.

[74] Dkt. 45 at 51-52.

[75] *Id.* at 51.

As explained previously, the primary concerns raised by scientists and agencies before NMFS issued the final EIS concerned the scarcity and unreliability of the data used in the 2014 BiOp and the inferences drawn in the overlap analysis. Specifically, Plaintiffs point to criticism by former NMFS Alaska Region Steller Sea Lion Recovery Coordinator and Executive director of the Marine Mammal Commission, Tim Ragen. After the 2014 BiOp was issued, but before the NMFS release the final EIS, Ragen declared that the 2014 BiOp's analyses used insufficient and unreliable data and contained "serious conceptual errors."[76] Ragen stated that the sample size for assessing overlap was so small that "the power to detect a relationship statistically, and even qualitatively, is very low."[77] Just like the commentators on the draft 2014 BiOp, Ragen emphasized the insufficiency of evidence and explanation in the overlap analysis:

> The exposure analyses in the 2014 biological opinion seek more to dismiss the competition question than to address it. The analyses do not make use of all the data that are available (e.g., data from fish surveys, observations of sea lion feeding on large cod), they lean heavily on datasets that that are woefully inadequate (e.g., sea lions instrumented with satellite transmitters)... [and] fall well short of insuring that fishing in the central and western Aleutian Islands will not jeopardize the western distinct population segment or adversely modify its critical habitat.[78]

Here, the Court finds no evidence that that the NMFS failed to "objectively and in good faith" consider scientific criticisms such as Ragen's or to adequately respond to them in the final EIS. First, an agency is not required to "present every uncertainty in its EIS" or specifically respond to every study or comment that critiques the agency's analysis.[79] Second, and most importantly, NMFS adequately took a "hard look" at the professional and scientific integrity of

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[76] Dkt. 45-42 at 1 (Ragen comments on 2014 BiOp, Plaintiff Ex. 42).

[77] *Id.*

[78] *Id.* at 5.

[79] *See* *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 668 (9th Cir. 2009); *The Lands Council*, 537 F.3d at 1001.

its analysis of the environmental effects of the agency's proposed actions.[80] The evidence before the Court indicates that the final EIS issued by NMFS highlights important criticisms, considers the limitations of the data used in its analysis, and incorporates reasonable comments that called into question the agency's final conclusion.[81] Moreover, many of the concerns raised by various commenters had already been considered and addressed by NMFS during the drafting and issuance of the 2014 BiOp. Thus, the final EIS complies with NEPA by providing a detailed discussion of the potential environmental impact of various alternatives, including the preferred Alternative 5.

V. CONCLUSION

Plaintiffs have failed to meet their burden to show that either the 2014 BiOp or the Final EIS is arbitrary and capricious. Accordingly, Plaintiffs' motion for summary judgment at **Docket 45** is **DENIED**; the cross motions for summary judgment by Defendants (**Docket 50**) and Intervenors (**Docket 47**) are **GRANTED**.

IT IS SO ORDERED.

Dated at Anchorage, Alaska, this 25th day of August, 2015.

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

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[80] 40 C.F.R. § 1502.24.

[81] Dkt. 54-14 (Final EIS, Chapter 13.0 Comment Analysis Report, Defendant Ex. 13).