



# Marine Conservation Alliance

*promoting sustainable fisheries to feed the world*

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July 18, 2007

Ms. Pat Livingston  
Chair  
Scientific and Statistical Committee  
North Pacific Fishery Management Council  
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## Draft Revised Steller Sea Lion Recovery Plan

Dear Ms. Livingston:

The Marine Conservation Alliance (“MCA”) submits the following comments on the Draft Revised Steller Sea Lion Recovery Plan (the “Draft Revised Plan” or the “DRSSLRP”), as made available for public comment on May 21, 2007 (72 *Fed. Reg.* 28473).

MCA is a broad-based coalition of Alaska coastal communities, fixed and mobile gear fishermen, vessel owners, processors, support industries, Western Alaska native villages and related Community Development Quota organizations, fishing organizations, consumers, and others who are directly or indirectly involved in various aspects of the fisheries off the coast of Alaska, including efforts to protect the Steller sea lion (“SSL”). Previously, on August 10, 2006, MCA submitted extensive comments to the North Pacific Fishery Management Council (the “Council”) regarding the May 2006 draft of the SSLRP. MCA believes that its comments of last summer remain valid, and it is disappointed with the failure of the National Marine Fisheries Service (“NMFS”) to adopt many of the changes MCA recommended. It does not intend, however, to repeat all its prior criticisms to the Scientific and Statistical Committee (the “SSC”). Nor does it intend to rehearse in this letter all the deficiencies it believes are found in the Draft Revised Plan. MCA intends to submit more comprehensive comments to NMFS by the August 20 deadline.

Overall, the Draft Revised Plan fails to analyze well the relative importance, going forward, of the historical causes of the SSL decline. That failure makes it extremely difficult to focus on the current and prospective conditions that are likely most relevant to the survival and recovery of the species. The primary objective of a recovery plan must be to provide a “basic road map to recovery,” *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 103 (D.D.C. 1995), based on an analysis of the reasons for the current plight of endangered or threatened species, with an analysis of the relevant importance of all possible

threats, not just a focus on possible threats subject to management. It is within this context that MCA wishes to focus upon four matters which are of particular relevance and importance to the SSC: (1) the failure of the Draft Revised Plan to assess threats to SSL populations in an unbiased, scientifically sound fashion; (2) the elaboration in the Draft Revised Plan of recovery criteria that lack scientific justification and virtually guarantee that down-listing and de-listing will not be achievable; (3) the Draft Revised Plan's call for rigid maintenance of current fishery conservation and management measures as a required recovery action; and (4) the continued specification of an adaptive management program as a required recovery action, even though such a program is likely infeasible.<sup>1</sup>

### **1. The Revised Draft Plan Fails to Assess Threats to SSL Populations in an Unbiased, Scientifically Sound Fashion.**

Under the Endangered Species Act, 16 U.S.C. § 1531, *et seq.* (the "ESA"), NMFS is required to develop and implement a "recovery plan" for each listed species under its jurisdiction, unless it "finds that such a plan will not promote the conservation of the species." ESA, sec. 4(f)(1). NMFS' Recovery Planning Guidelines, dated October, 1992, specify that a central element of any recovery plan must be a discussion of "factors affecting the species." It is elementary that the science that undergirds this discussion must be objective, sound and free of bias, basic criteria that NMFS fails to meet in the Draft Revised Plan.

NMFS' obligations with respect to scientific analysis in its resource management documents, such as the Draft Revised Plan, are spelled out in detail in the Data Quality Act, Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515, Appendix C, 114 Stat. 2763A-153 (2000) (the "DQA"), the implementing Guidelines of the Office of Management and Budget, 67 *Fed. Reg.* 8452 (Feb. 22, 2002) (the "OMB IQ Guidelines") and the Information Quality Guidelines of National Oceanic and Atmospheric Administration, dated November 6, 2006, available at

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<sup>1</sup> In its comments last summer, MCA also stressed the need for the recovery plan to integrate metapopulation considerations into its analysis and questioned the inclusion of the Population Viability Analysis (the "PVA") as an appendix. Without wishing to belabor the point, MCA would note that metapopulation considerations continue to be relevant, especially since it is increasingly apparent that SSLs seem to be migrating eastward, with populations shifting from the Western to the Eastern region. MCA is disappointed that NMFS has not followed the SSC's recommendation last summer that there be a "more thorough evaluation" of SSL population dynamics, including "if it would be more realistic to describe the SSL as a metapopulation." Report of the SSC to the Council, August 15-16, 2006, p. 4 (the "SSC Report"). As far as the PVA is concerned, MCA notes that the SSC identified a number of weaknesses and desirable improvements that should be made to future iterations of the PVA. Even though nearly a year has passed, many of these have not been addressed, including comparing the results of this PVA with the results of other models. MCA appreciates that NMFS now takes the position that the PVA "does not guide management so much as it guided the [Plan Recovery] Team in their weight of evidence approach to deriving recovery criteria;" that the PVA is "only a tool not a deciding factor;" and that the PVA's "results were not used as recovery criteria." See NMFS, "Response to Comments on Draft Steller Sea Lion (SSL) Recovery Plan", pp. 18, 19, 20 (the "Response to Comments"). If this is the case, and given that there has been no further refinement of the PVA, one can question even more why this version of the PVA continues to be attached as an appendix to the DRSSLRP.

[www.cio.noaa.gov/itmanagement/IQ\\_Guidelines\\_110606.htm](http://www.cio.noaa.gov/itmanagement/IQ_Guidelines_110606.htm) (the “NOAA IQ Guidelines”).

The DQA requires that Federal agencies have in place guidelines that ensure the “quality, utility, objectivity and integrity” of the information they disseminate. DQA, § 515b.2.A. The OMB IQ Guidelines stress, in particular, that “objectivity” relates to both presentation and substance. In terms of presentation, it “includes whether disseminated information is being presented in a clear, accurate, complete and unbiased manner” and, in terms of substance, it involves a “focus on ensuring accurate, reliable and unbiased information.” OMB IQ Guidelines, Sec. V.3, 67 *Fed. Reg.* at 8459. The OMB IQ Guidelines apply strict standards to the dissemination of information that is considered “influential,” that is, information which “will have or does have a clear and substantial impact on important public policies or important private sector decisions.” OMB IQ Guidelines, Sec. V.9, 67 *Fed. Reg.* at 8460. Such information must be presented to ensure a high degree of transparency about the data and methods to facilitate its reproducibility by third parties. OMB IQ Guidelines, Sec. V.3.b.ii, 67 *Fed. Reg.* at 8460.

The NOAA IQ Guidelines, for their part, similarly define “objectivity” in terms of both presentation and substance, tracking the language of the OMB IQ Guidelines. They define “influential scientific information” as “scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.” They expressly cover “natural resource plans,” such as the Draft Revised Plan, within this category. In accordance with the OMB IQ Guidelines, for influential information that assesses risks to the environment, such as the DRSSLRP, the NOAA IQ Guidelines call for the use of “(a) the best available scientific and supporting studies (including peer-reviewed science and supporting studies when available) conducted in accordance with sound and objective scientific practices, and (b) data collected by accepted methods or best available methods.” For risk assessments that are quantitative in nature, “to the extent practicable,” agency documents must discuss:

- each ecosystem component, including population, addressed by any estimate of applicable risk effects;
- the expected or central estimate of risk for the specific ecosystem component, including population, affected;
- each appropriate upper-bound and/or lower-bound estimate of risk;
- data gaps and other significant uncertainties identified in the process of the risk assessment and the studies that would assist in reducing the uncertainties; and
- additional studies known to the agency and not used in the risk estimate that support or fail to support the findings of the assessment and the rationale of why they were not used.

With respect to natural resource plans, the NOAA IQ Guidelines stress that such plans “will be based on the best information available,” and “will be presented in an accurate, clear, complete and unbiased manner.” In particular, under the Guidelines, “Clear distinctions will be drawn

between policy choices and the supporting science upon which they are based.” Supporting materials must be properly referenced to ensure “transparency.”

The DRSSLRP does not measure up to these standards. This is reflected particularly in its discussion of killer whale predation and nutritional stress as factors affecting SSL populations -- a discussion which still lacks the “consistency” which the SSC last summer urged NMFS to strive to attain. *See* SSC Report, p. 5.

One of the major changes in the Draft Revised Plan from the Plan released in May 2006 is the downgrading of the threat assessment for killer whale predation from “potentially high” to “medium.” DRSSLRP, p. 114. The Plan states that “[m]ajor limitations in the available data result in substantial uncertainty,” and, while the Recovery Team was unable to reach consensus, NMFS changed the ranking based upon “public review and comment and additional scientific data which was not available to the Team.” *Id.* If the NMFS downgrading of the killer whale threat was based on the Maniscalco paper cited on p. 111 (but not listed in the literature list), the data in the paper was presumably available prior to the preparation of the May 2006 draft since one of its authors was on the Recovery Team. Yet NMFS ranked the killer whale threat as “high” in that earlier draft. The difficulties with the Draft Revised Plan’s analysis of this factor are highlighted in the comments of Dr. Ian Boyd, dated July 14, 2007 (the “Boyd Review”). Dr. Boyd points out that the Draft Revised Plan, without substantial justification, relies upon an unreferenced paper by Maniscalco, *et al.*,<sup>2</sup> to dismiss estimates of killer whale predation in an earlier paper, Williams, *et al.*, “Killer appetites: assessing the role of predators in ecological communities,” *Ecology* 85(12): 3373-3384 (2004). Boyd Review, p. 15. Dr. Boyd also observes that the Draft Revised Plan (at p. 88) appears to understate the impacts of killer whales discussed in the Williams paper, by stating that a population of 170 transient killer whales could account for the decline of the western SSL distinct population segment (“DPS”), whereas, in fact, Williams suggests that fewer than 27 male transient killer whales or 40 female transient killer whales could have caused the decline. *Id.* If anything, the Williams findings would appear to be even more powerful today, since the latest transient killer whale population numbers show a population of about 314 animals. Draft Revised Plan, p. 84. This would appear to indicate that minimally only about 13% of the current transient killer whale population would be sufficient to explain the original decline -- almost double the size of the threat originally ranked as “potentially high.”<sup>3</sup> In short, the Draft Revised Plan’s discussion of killer whale predation does not appear to reflect an objective, unbiased discussion of this factor. Rather, as Dr. Boyd states, “NMFS appears to have gone out its way to counter the killer whale argument put up by Williams,” Boyd Review, p. 16, and NMFS’ treatment of this factor stands in stark contrast to its

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<sup>2</sup> The paper is presumably “Assessing Killer Whale Predation on Steller Sea Lions from Field Observations in Kenai Fjords, Alaska,” *Marine Mammal Science* 23(2): 306-321 (April 2007). Interestingly, this report strongly cautions against using its results to make comparisons to other times, areas or populations of transient killer whales and their effects on prey. The report specifically notes that it would not be appropriate to extrapolate the effect of this group of transient killer whales on Stellar sea lions to other regions of the state. Despite this caution, it appears that NMFS did indeed make such extrapolations.

<sup>3</sup> MCA understands that Dr. Williams has expressed similar concerns regarding the treatment of the predation data in the revised draft.

treatment of another factor, “nutritional stress,” where, in Dr. Boyd’s view, the evidence “is probably weaker than the balance of evidence supporting killer whale predation effects and yet the RRP comes to quite different conclusions about them as threats.” *Id.* All this suggests a “worrying lack of objectivity,” Boyd Review, p. 2, and “the possibility that NMFS is weighting the assessment to support preconceived notions of the underlying mechanisms [of decline].” *Id.*, p. 2. Plainly, this is contrary to NMFS’ obligations under the DQA and its implementing guidelines.

The deficiencies in the Draft Revised Plan become especially apparent in its discussion of nutritional stress. *See* Draft SSLRP, pp. 36-42, 100-106. The DRSSLRP links nutritional stress with “competition with fisheries.” Even while acknowledging that the Recovery Team could not reach “consensus” on this factor and that it is subject to “high uncertainty,” NMFS continues to rank competition with fisheries as posing a “potentially high” threat to SSLs. DRSSLRP, pp. 102-104, 112-114. Again, MCA believes that Dr. Boyd’s critique is on point. Dr. Boyd underscores that, “without exception, no study has found support for this hypothesis.” Boyd Review, p. 9. As Dr. Boyd states, “[T]he extended discussion [of nutritional stress] simply deepens the doubts that exist about the nutritional stress hypothesis.” Boyd Review, p. 13. Dr. Boyd points out that, based upon very limited samples from the 1970s and 1980s, “[t]he new section of the RRP on nutritional stress spins a complex story around nutritional stress involving backdated growth through the lifetime of these animals to critical periods in life-histories of these animals. I simply cannot accept that this is justified. We have no life-history for these individuals and we have no data about the levels of food supply through these periods.” Boyd Review, p. 14. Dr. Boyd goes on to observe, “[H]aving admitted that most retrospective analyses have been of little help, many of these analyses are then used in later parts of the RRP to justify a particular position especially about the effects of nutritional stress and also when assessing the levels of threat.” *Id.* The conclusion is inescapable that the Draft Revised Plan “says more about current internal agendas in NMFS than about what we actually know about the influence of nutritional stress on Steller sea lions.” *Id.*, p. 15.

In its comments to the Council last summer, MCA underscored the difficulties with the nutritional stress hypothesis. MCA continues to question this hypothesis, particularly insofar as it may be deemed to implicate fisheries as a factor affecting recovery. Notwithstanding NMFS’ strenuous efforts to assert the validity of the hypothesis, it remains dubious at best.<sup>4</sup> As Dr. Boyd pointed out in his June 7, 2006 testimony to the Council, “[T]here’s really very little evidence to support the idea that there’s been nutritional stress in this population as a causal factor in the population dynamics.” Dr. Boyd went on to underscore that, even if nutritional stress occurred in the past -- a proposition that, even if dubious, cannot be entirely ruled out -- “the point is it’s probably not happening now, and it’s from now on that we need to manage the population.” In short, nutritional stress, even if it could hypothetically be related to competition

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<sup>4</sup> Dr. Boyd notes NMFS’ reliance on the study by Hennen, “Associations between the Alaska Steller sea lion decline and commercial fisheries,” *Ecological Applications* 16(2): 704-717 (2006), to establish the link between fishing activity and the “local population trajectory,” but cautions, “[T]his study is flawed in the sense that it was an exploration of data to examine the possibility of a correlation between fishery activity and SSL population dynamics. In other words, it was not a fair test . . . [and] must carry relatively little weight in the assessment of evidence.” Boyd Review, p. 10.

from the fisheries, is not a basis for targeting the fisheries as a factor significantly affecting the species from this point forward.

This leads to MCA's final point. The Draft Revised Plan indicates that the causes of recent declines in the Central Gulf of Alaska may be a low birth rate, relying on Holmes, *et al.*, "Natality declines in Steller sea lions suggest new conservation and research priorities," *in review*. Draft Revised Plan, pp. 39, 106. NMFS suggests (though it does not definitively state) that the low birth rate is associated with nutritional stress. Draft Revised Plan, pp. 39, 42. In Dr. Boyd's words, however, "At best, [the new studies] can be viewed as fairly circumstantial evidence supporting low birth rate but they say absolutely nothing about the causes of the low birth rates. They provide no evidence for a nutritional cause of low birth rates." Boyd Review, p. 14. Low birth rates might, for example, be the result of infection or chemical toxicity, and the paper in fact discusses a range of different, potential causative factors. *Id.*, pp. 4, 10, 18. Further, even if nutritional stress were a causative factor in low birth rates, the Draft Revised Plan suggests that such stress would have been chronic rather than acute, Draft SSLRP, p. 37, and the most likely explanation for any such chronic stress may be reduced carrying capacity in the North Pacific ecosystem rather than impacts from commercial fisheries.

Ultimately, what we know today is that the population of the western SSL DPS (WDPS) as a whole is increasing at the rate of about 3% per year since about 2000 and that the current population is about 44,800 animals, up 33% from the population low of 33,600 in 1994. Draft Revised Plan, pp. 1, 13-16.<sup>5</sup> As Dr. Boyd points out, this population size "lies well within the normal range of population sizes for pinnipeds on a global scale." Boyd Review, p. 7. At the same time, there is no current evidence of nutritional stress to adult male SSLs and juveniles. Indeed, we know that the health, survivability and longevity of juveniles and adults are unimpaired by nutritional stress or any other, identified factor. In such circumstances, the absence of evidence of nutritional stress to the western DPS as a whole suggests that one should be cautious in attributing the cause of a low birth rate to this factor. While it may be that the female reproductive rate is what is holding back the population, the causal factors simply remain unknown. In the face of such uncertainty, MCA fails to understand how NMFS can conclude that the fisheries threat is "potentially high," while it discounts such a factor as killer whale predation, which is subject to similar uncertainties. What is needed, as Dr. Boyd states, is for NMFS to "grasp and articulate, in an easily digestible form, the complexity of the knowledge base and to communicate this in a manner that is useful for policy implementation." Boyd Review, p. 3. Only in this way can NMFS meet its obligations to provide objective, unbiased information to the public in its natural resources plans, as required by the NOAA IQ Guidelines.

## **2. The Draft Revised Plan's Recovery Criteria Lack Scientific Justification.**

MCA understands that NMFS is under an obligation to develop recovery plans which set out "objective" and "measurable" criteria for recovery. ESA, Sec. 4(f)(1)(B). The criteria outlined in the Draft Revised Plan, however, lack scientific justification, and they are written in such a way that they will make it difficult, if not impossible, for the Plan to achieve its objectives.

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<sup>5</sup> The number rises to 60,000, if Russian populations, which NMFS deems relevant to recovery, are included.

MCA is pleased that the Draft Revised Plan no longer requires that “vital rates” be consistent with the observed trend of population growth for down-listing or de-listing to be warranted. *See* Response to Comments, p. 28. As expressed in its comments last summer, because of the uncertainties associated with measuring vital rates, using vital rates as a criterion for down-listing and de-listing was simply infeasible. Still, in several other respects -- the requirements that “non-pup trends in at least 5 of the 7 sub-regions are consistent with the [overall U.S.] trend,” Draft Revised Plan, pp. 3, 4, that “the population trend in any two adjacent sub-regions cannot be declining significantly” (which implicates management of SSLs in Russia outside of U.S. jurisdiction), Draft Revised Plan, pp. 3, 4, and the requirement for de-listing that “the population trend in any single sub-region cannot have declined by more than 50 percent,” Draft Revised Plan, p. 4 -- the Draft Revised Plan remains problematic and does not meet the SSC’s recommendations of last summer that the recovery criteria should be grounded in “sound science.” *See* SSC Report, p. 4.

For both down-listing and de-listing, the Draft Revised Plan would not only specify that “non-pup trends in at least 5 of the 7 sub-regions are consistent with the [overall U.S.] trend” -- a trend that shows a “statistically significant” increase over fifteen years and an average growth rate of 3% per year over thirty years -- but also that “the population in any two adjacent sub-regions cannot be declining significantly.” Draft Revised Plan, pp. 3, 4; 72 *Fed. Reg.* at 28474. In Dr. Boyd’s view, the criteria are “overly precautionary,” since, “if the population remained stable at current numbers for the next 15 years, the PVAs as applied in the RRP would almost certainly show an extremely low probability of extinction and would, in effect, take the population well above the ESA criteria.” Boyd Review, p. 7.<sup>6</sup>

MCA previously pointed out that there are at least three problems with NMFS’ approach. It ignores that the distribution of SSLs may be shifting across its range; it assumes congruence between the current definitions of sub-populations and actual, biological sub-populations; and it assumes that some factors, *e.g.*, fisheries competition, were more likely drivers of past population declines than others. It is insufficient in response merely to state, as NMFS does in its “Peer Review Comments on Steller Recovery Plan (the “Peer Review Comments”)” (at p. 2) that “if this situation occurs, it would indicate that a significant portion of its range . . . was still in decline and suggest that NMFS has not fully understood or mitigated the threats to the population.” The point is that declines in a particular region may have nothing to do with the overall health of the population.

The requirement that two adjacent sub-regions can’t both be declining significantly also implicates the problem of management of SSL populations found in Russia. The DRSSLRP specifically references “Russia/Asia” as one of the seven regions it covers. DRSSLRP, pp. 3, 4.

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<sup>6</sup> “Recovery” is defined in NMFS’ regulations to mean “improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in Section 4(a)(1) of the [Endangered Species] Act.” 50 C.F.R. § 402.02. In short, achieving the goal of recovery means just reaching the point where the species is no longer “in danger of extinction throughout all or a significant portion of its range” under current or reasonably foreseeable conditions. *See* ESA, secs. 3(6), (9) (defining the terms “endangered” and “threatened”).

Although the ESA requires NMFS to consider a species' prospects for extinction "throughout its range," and while the status of a species' population outside U.S. jurisdiction, including in foreign nations, as well as foreign nations' conservation efforts, are appropriately taken into account in ESA listing and de-listing decisions,<sup>7</sup> nonetheless it is not sensible to peg recovery criteria so closely to the response of the species to a management regime over which the United States has no control. It might be that recovery efforts in Russia are insufficient, and so declines within Russian jurisdiction might continue. Yet, if they are offset by continued, positive growth in areas further to the east, then such declines may not be valid indicators that the population as a whole has not recovered to the point that down-listing is warranted. NMFS, *Interim Endangered and Threatened Species Recovery Planning Guidance* sec. 2.2.3 (October 2004), available at [www.nmfs.noaa.gov/pr/recovery/guidance.htm](http://www.nmfs.noaa.gov/pr/recovery/guidance.htm), in fact suggests that NMFS has some discretion with respect to the inclusion of the recovery of foreign populations as part of the de-listing criteria in a recovery plan, depending upon the relationship between the status/protections of animals outside U.S. jurisdiction and the achievement of the goals of the recovery plan.

In addition to other factors being met, the Draft Revised Plan would require for de-listing that "the population trend in any single sub-region cannot have declined by more than 50 percent." Draft Revised Plan, p. 4; 72 *Fed. Reg.* at 48474. This criterion implicates some of the same concerns as the criterion requiring that trends be consistent in at least five of seven sub-regions, particularly that (a) there may be natural population shifts, not reflecting a species decline, that lead to a substantially decreased population in some regions, and (b) a major decline in an area outside U.S. control, that is, Russia, may not reflect on the success, for the species as a whole, of the recovery efforts within U.S. jurisdiction. Further, it is unclear what the starting date is for measuring the percentage decline.

In short, these criteria seem to be purely arbitrary with little to do with the health of the population as a whole and are essentially without biological basis. For example, the population in one or two sub-regions could grow such that the WDPS population increases to 60- 70 thousand animals in the U.S. but if one U.S. sub-region coupled with the Russian population decrease because of outmigration, then there is no possibility for downlisting to threatened. Moreover, the population could increase to more than 100,000 animals overall, but if the trend in two sub-regions is a "significant" decline then the population would not meet the delisting criteria.

Finally, the recovery criteria also appear overly stringent in comparison with criteria used in other recovery plans. In a review prepared for the Council, Dr. Thomas Loughlin compared

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<sup>7</sup> The ESA states that all listing decisions shall be made "after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas." ESA, sec. 4(b)(1)(A), 16 U.S.C. § 1533(b)(1)(A). NMFS' regulations, for their part, recognize the role of foreign governments in the listing and delisting process. Thus, 50 C.F.R. § 424.11(e) provides that NMFS "shall give consideration to any species protected . . . by any State or foreign nation, to determine whether the species is endangered or threatened," while 50 C.F.R. § 424.11(f) provides that, in making listing and delisting determinations, NMFS "shall take into account . . . those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species."

the Draft Revised Plan with recovery plans for eleven other species. Loughlin, “Review and Comparison of Recovery Criteria in the 2006 Draft Revised Steller Sea Lion Recovery Plan” (May 14, 2007). Although the Loughlin paper in general suggests that the Draft Revised Plan’s specification of recovery criteria is consistent with what NMFS and the U.S. Fish and Wildlife Service (“FWS”) have done in other plans, nonetheless SSLs have a larger population, which has been stable or growing, rather than declining, than the populations of many of the other endangered or threatened species in the reviewed recovery plans. In these circumstances, regardless of what has been done in other plans, requiring three generations to achieve full recovery, *i.e.*, de-listing, can be viewed requiring more than is justified by reference to the past practice of NMFS and FWS.

### **3. The Draft Revised Plan does not Sufficiently Recognize the Need for Flexibility to Modify Fishery Conservation and Management Measures.**

Section 4(f) of the ESA was not intended to hamstring agencies with a suite of inflexible actions that would have to be taken before a species could be removed from the list. *See, e.g.*, Bean and Rowland, *The Evolution of National Wildlife Law* 211 (3d ed. 1997). As science improves regarding the causes of the SSL decline and the constraints on the species’ recovery, management agencies, such as the Council and NMFS, should be able to modify and/or remove particular fishery management and conservation measures, to the extent that they may not be relevant to achieving the objectives of the Draft Revised Plan.

MCA recognizes that the Draft Revised Plan, by its terms, would not necessarily straightjacket the fisheries with the precise suite of management measures currently in place until the recovery criteria are met. Instead, it would allow for current management measures to be replaced with measures providing “equivalent” protection, and for the current measures to be modified if “substantive evidence demonstrates that these measures can be reduced without limiting recovery.” 72 *Fed. Reg.* at 28474; DRSSLRP, p. 5. NMFS’ Response to Comments also makes it clear that “[the] Council and NMFS have flexibility to modify existing management measures as new information on Steller sea lions and fishery interactions becomes available,” as long as the changes are appropriately evaluated through the ESA Section 7 consultation process. Response to Comments, p. 35. Yet, if, as discussed in Section 1 above, the weight of current scientific evidence would suggest that the fisheries are likely not a significant factor limiting SSL recovery, then the rationale for strict maintenance of current measures as required for recovery of the WDPS is weak.

In any event, MCA wishes to underscore that management flexibility may be appropriate even in the short run. For example, recent science suggests that juvenile SSLs are weaned during the summer instead of during the winter. *See* Trites, *et al.*, “Insights into the Timing of Weaning and the Attendance Patterns of Lactating Steller Sea Lions (*Eumetopias jubatus*) in Alaska During Winter, Spring and Summer,” *Aquatic Mammals* 32(1):85-97 (2006). Winter is the most critical fishing time for the groundfish fleets because fish are aggregated and roe is an important product. Many of the mitigation measures now in place have reduced the winter fisheries in order, in theory, to protect weaning juveniles. With the new information in hand, the Council and NMFS may be able to modify those measures to enhance fishing opportunities without adverse effects on the SSL population. Similarly, current mitigation measures, which do not

seem to discriminate among population segments, might be modified to give priority protection to segments of the population most important to increasing the population trend, such as breeding females, while mitigation measures that don't protect these segments might be reduced. MCA recognizes that any such changes will need to be supported by the appropriate ESA Section 7 analyses.

#### **4. The Continued Specification of a Large-Scale Adaptive Management Program as a Needed Recovery Action is Inappropriate.**

The Draft Revised Plan, rejecting previous comments from both MCA and the SSC continues to specify that designing and implementing an “adaptive management program” is one of three necessary recovery actions. Draft Revised Plan, p. 5; 72 *Fed. Reg.* at 28474. Even while acknowledging that “it will be a challenge to construct an adaptive management program that is statistically sound, meets the requirements of the ESA and can be implemented in a practical manner,” *id.*, NMFS remains committed to what MCA believes to be a chimerical goal. Indeed, in its Response to Comments (at pp. 15-16), ignoring specific criticisms, including those of the SSC, *see* SSC Report, p. 5,<sup>8</sup> NMFS does no more than assert that “development of an adaptive management program would provide another means by which the scientific and management communities can evaluate new information, determine the efficacy of current regulations, and recommend that new actions be taken or regulations be changed.” *See also* Peer Review Comments, p. 5 (asserting only that “without a program of this nature, it will not be possible to distinguish the magnitude of the various threats to recovery”). The insufficiency of this response is manifest.

A “grand experiment” in adaptive management faces innumerable difficulties. Its practicality, costs and outcome are all in doubt. It may run afoul of the “jeopardy” and “no adverse modification” proscriptions of the ESA and so be infeasible as a matter of law. It may well not be able to produce, when the “experiment” is complete, any truly useful results. It is likely to be both complicated and expensive to design. It would raise internal equity questions between those in the fishery who would be able to fish under existing management measures in existing open areas and those who would be forced to move their operations, perhaps at substantial expense, or those who, for economic reasons, might be unable to transfer their operations at all. At the end of the day, there would be an upheaval in management, likely major costs imposed upon the industry, and far from certain benefits in terms of increased understanding of the potential impacts of the fishery on the recovery of SSLs. The bottom line is that, from a cost-benefit perspective, an adaptive management exercise is simply not likely to be worthwhile.

At the same time, the very need for any large-scale, adaptive management program, even if theoretically feasible and cost-effective, is open to question. As Dr. Boyd testified to the Council on June 7, 2006, “I don't think you need to do it. \* \* \* [B]ecause of the highly variable trajectories that you have within the localized populations of the Steller sea lions, you already have enough statistical power there to come to reasonable conclusions about some of the drivers

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<sup>8</sup> The SSC not only opposed inclusion of adaptive management as a required element of a recovery plan, but also indicated that any management experiments undertaken should be “at *small* but meaningful spatial levels.” SSC Report, p. 5 (emphasis added).

for some of those changes overall.” Dr. Boyd pointed out that statistical analyses have in fact already been done for SSLs, citing MRAG Americas, Inc., “Understanding the Decline of the Western Alaska Steller Sea Lion: Assessing the Evidence Concerning Multiple Hypotheses” (NOAA Fisheries, Alaska Fisheries Science Center #AB133F-02-CN-0085, 2005) (usually referred to as the “Wolf and Mangel” study). In short, whether or not the Wolf and Mangel study itself was sufficient, it appears that there may be enough data now available -- and certainly there are likely to be more data available in the future -- to allow the relative strengths of each hypothesis to be assessed through a table-top modeling exercise, essentially making any large-scale adaptive management program unnecessary.

As a final comment, MCA appreciates the time and effort the SSC has put into this issue over the past decade or so. When you reviewed the earlier draft of the recovery plan, you made a number of other recommendations (36 in total), some of which were addressed but many of which were not. MCA encourages the SSC to seek further clarification as to the issues raised in your earlier comments.

Thank you for your consideration of MCA’s views. Please do not hesitate to contact me if you have any questions about this submission or any requests for further information.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David Benton". The signature is fluid and cursive, with a long horizontal stroke at the end.

David Benton  
Executive Director