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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

STATE OF ALASKA, Plaintiff, v. JANE LUBCHENCO, *et al.*, Defendants.	Case No.: 3:10-cv-00271-TMB
ALASKA SEAFOOD COOPERATIVE, *et al.*, Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE, *et al.*, Defendants.	Case No. 3:11-cv-00001-TMB

FREEZER LONGLINE COALITION, Plaintiff, v. JANE LUBCHENCO, *et al.*, Defendants.	Case No. 3:11-cv-00004-TMB

AMICI CURIAE THE ALEUT ENTITIES' BRIEF ON REMEDY

Amici Curiae the Aleut Corporation and Aleut Enterprise, LLC (collectively, the "Aleut Entities") hereby submit their Brief on Remedy in accordance with the Court's January 19, 2012 Order (ECF Doc. No. 130) (the "Jan. 19 Order"). In that Order, the Court proposed a remedy consisting of a remand of the Interim Final Rule, 75 Fed. Reg. 77,535 *et seq.* (Dec. 13, 2011) (the "Interim Final Rule") to the National Marine Fisheries Service ("NMFS") for preparation of an Environmental Impact Statement ("EIS") in accordance with the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA") while leaving the Interim Final Rule, including its fisheries closures and restrictions, in place pending that remand. Jan. 19 Order at 55. The Aleut Entities agree with the State of Alaska regarding the appropriate remedy in this matter. However, regardless of the remedy the Court ultimately elects to order, during the NEPA process on remand NMFS must give serious consideration to the impacts of the EIS's alternatives on the Aleut Entities (and the Aleut people they represent).

NEPA requires in relevant part that an agency, in undertaking major federal action:

> [I]nclude in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action[.]

42 U.S.C. § 4332(2)(C). In promulgating the Interim Final Rule, NMFS prepared an Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") expressing the agency's conclusion that the Interim Final Rule would have no significant impacts on the human environment. The Court disagreed, concluding that the Interim Final Rule is a "major Federal action significantly affecting the quality of the human environment[,]" and therefore that NMFS violated NEPA by not preparing an EIS and not providing an adequate opportunity for public review and comment. *See* Jan. 19 Order at 50. The Court proposed a remand for NMFS to prepare an EIS, while leaving the Interim Final Rule (including its fisheries closures and restrictions) in place. *See id.* at 54-55.

In preparing its EIS, NMFS must

> [P]rovide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternative which would avoid or minimize adverse impacts or enhance the quality of the human environment.

40 C.F.R. § 1502.1. This includes "full and fair discussion" of the impacts of all alternatives evaluated in the EIS on the Aleut Entities and the local Aleut people and communities, including Adak, which will feel severe, immediate, and irreparable crippling impacts from the Interim Final Rule.

Particularly important in a case like this one, where the agency has already approved a major Federal action that the Court intends to let stand during the EIS preparation process, the agency cannot treat its EIS preparation as a cursory, box-checking exercise. NMFS must give environmental consequences a "hard look." *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 486 (9th Cir. 2011) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989)). Furthermore, the agency's late EIS preparation in this case must treat the process seriously, even though the Interim Final Rule will remain in effect:

> [NEPA's] purpose is to assure that, by following the procedures that it prescribes, agencies will be fully aware of the impact of their decisions when they make them. . . . That result can be achieved only if the prescribed procedures are faithfully followed; grudging, pro forma compliance will not do.

Lathan v. Brinegar, 506 F.2d 677, 693 (9th Cir. 1974). Accordingly, this EIS preparation process may not be merely a *post hoc* rationalization for the Interim Final Rule, or a superficial exercise. It must demonstrate the required "hard look" at the environmental consequences of the alternatives NMFS examines.

Finally, the effects that NMFS must evaluate include "historic, cultural, economic, social, [and] health [impacts], whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8. These include impacts on the Aleut Entities, the local Aleut communities, and in particular, the City of Adak, which stands to be devastated by the Interim Final Rule.

* * * *

The Aleut Entities agree with the State of Alaska regarding what the appropriate remedy is in this case. Furthermore, the Aleut Entities submit that NMFS must avoid any temptation to simply "check the box" on remand with regard to its NEPA compliance and must, instead, evaluate an appropriate range of alternatives and conduct a thorough evaluation, giving a "hard look" to significant effects of each of its alternatives, including cultural, historic, financial, etc. impacts on the Aleut Entities and local Aleut communities.

Dated this 8th day of February, 2012.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of February, 2012, a true and correct copy of the foregoing was served via ECF on the following:

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