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November 25, 2013

Via email and U.S. mail

Dr. James Balsiger, Regional Administrator
National Oceanic and Atmospheric Administration
National Marine Fisheries Service, Alaska Region
P.O. Box 21668
Juneau, Alaska 99802-1668

RECEIVED
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Re: Steller sea lion consultation under Section 7 of the ESA

Dear Dr. Balsiger:

I write on behalf of the Alaska Seafood Cooperative and its members (collectively “AKSC”) to request that they be recognized and treated as applicants in the formal consultation recently initiated by NMFS under Section 7 of the Endangered Species Act (“ESA”) on the effects of proposed changes to Steller sea lion protection measures for the Groundfish Fisheries in the Bering Sea and Aleutian Islands Management Area (“BSAI”).¹ AKSC specifically asks to be provided with a copy of any draft Biological Opinion that is prepared as a result of this consultation.

AKSC requires formal approval and authorization from NMFS in order to fish for groundfish and otherwise operate in the federal fishery in the BSAI. Accordingly, it is an applicant under the ESA.² As an applicant, AKSC has specific and exclusive rights during formal consultation – rights to which the general public is not entitled. These include, but are not limited to: the opportunity to review the draft biological opinion, participate in consultation discussions, and contribute expertise to the consultation. NMFS is specifically required to do the following:

Review all relevant information provided by the Federal agency or otherwise available. . . . [and d]iscuss with the Federal agency **and any applicant** the Service’s review and evaluation conducted under [50 C.F.R. § 402.14(g)(1)-(3)], the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency **and the applicant** can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency **and any applicant** in identifying these alternatives. If requested, the Service shall

¹ Letter from James W. Balsiger to Cora Campbell, Sept. 12, 2013.

² 50 C.F.R. § 402.02 (defining an “applicant” as “any person, as defined in section 3(13) of the Act [(broadly defining the term “person”)], who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.”).

make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. . . . **The applicant may request a copy of the draft opinion from the Federal agency.** All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service³

However, our understanding is that NMFS has not been consistent in fulfilling its legal obligations to applicants during consultation. NMFS, for example, has attempted to deny other applicants participating in federal fisheries the right to review draft biological opinions under 50 C.F.R. § 402.14(g). In 2002, the U.S. District Court for the District of Columbia explicitly rejected NMFS' arguments on this issue and required NMFS to afford the plaintiff-applicant its participatory rights. *Hawaii Longline Ass'n v. Nat'l Marine Fisheries Serv.*, No. 01-765, 2002 WL 732363 (D.D.C. April 25, 2002) ("*HLA I*").⁴

In *HLA I*, plaintiff-applicant HLA argued that NMFS "violated the ESA's implementing regulations by shutting HLA out of the consultation and biological opinion process." Explaining that "[t]he consultation regulations require that NMFS review all relevant information submitted by the applicant and discuss its analysis and grounds for the biological opinion with the applicant[.]" the court held that release of the draft biological opinion to applicants before completion of a final biological opinion "was intended to be automatic."⁵ The court noted that, in NMFS' responses to comments on the proposed rule governing applicant rights during

³ 50 C.F.R. § 402.14(g)(1)-(5) (emphasis supplied); NMFS & USFWS, *Endangered Species Consultation Handbook*, 1-14, 2-13 (1998) ("ESA Handbook").

⁴ The district court adopted Magistrate Facciola's *HLA* opinion its Memorandum Opinion, No. 01-00765 at 5 (D.D.C. filed Sept. 24, 2002) ("the Court agrees with Magistrate Judge Facciola, that Plaintiff's procedural rights were violated when it was not treated as an applicant under the governing regulations and not provided with a copy of the draft 2001 BiOp.") and 281 F.Supp.2d 1, 13 (D.D.C. 2003).

Other courts considering the Services' obligations under 50 C.F.R. § 402.14(g)(5) have consistently determined that they must release draft biological opinions to applicants. *See, e.g., Good v. United States*, 39 Fed. Cl. 81, 92-93 (Fed. Cl. 1997) ("[Service] regulations exhibit a clear preference for receiving applicant input during the development of RPAs, 50 C.F.R. § 402.11(a)-(b), and provide the applicant with the right to review a draft of the biological opinion so that he may comment upon both the jeopardy determination and the proposed RPAs before they are finalized, 50 C.F.R. § 402.14(g)(5)) (quoting Interagency Cooperation: Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19926, 19952 (June 3, 1986) ("Paragraph (g) provides for . . . applicant review of the basis for any finding contained in draft biological opinions, including the availability of reasonable and prudent alternatives."); *Wash. Toxics Coalition v. U.S. Dep't of Int.*, 457 F.Supp.2d 1158, 1165-66 (W.D. Wash. 2006) (addressing rules streamlining pesticide consultations by making discussion with applicants discretionary, and contrasting those rules with the mandatory requirements of 50 C.F.R. § 402.14(g)(5), which are "not couched in optional language" and require the Service to discuss its review and evaluation with the action agency and applicants).

⁵ *HLA I*, 2002 WL 732363 at *4, 11-12 (citing 50 C.F.R. § 402.14(d), (g)). The *HLA* court also rejected NMFS' constrained interpretations of the term "applicant" and the meaning of applicants' rights under 50 C.F.R. § 402.14(g). The court explained that NMFS' "preamble to the regulations explicitly states that applicant status is to be 'broadly' conferred and reiterates the statutory command that any person seeking 'any other form of authorization or approval issued by a Federal agency . . . ' be deemed an applicant." *Id.* at *7 (citing 51 Fed. Reg. 19926 (June 3, 1986)).

consultation, NMFS explained that “release of draft opinions to Federal agencies and any applicants (through the Federal agency) facilitates a more meaningful exchange of information. Review of draft opinions may result in the development and submission of additional data, and the preparation of more thorough biological opinions.”⁶ The *HLA* court found “[e]ven more explicit language” in the ESA Handbook, “which confirms that ‘[t]he applicant is entitled to review draft biological opinions obtained through the action agency, and to provide comments through the action agency.’ . . . In spite of its present position, NMFS cannot wish these earlier interpretations away.”⁷

In a subsequent opinion in the same case, the *HLA* court admonished NMFS for “com[ing] close to misleading the Court when registering [its] objections” to the issue of whether a draft biological opinion must be released to an applicant.⁸ The court found that NMFS’ objection to disclosure was “flatly belied by the text of the regulation which explicitly states, . . . ‘The Service believes that the applicant should participate in the review and should receive a copy of the draft [biological opinion] from the Federal agency. The final rule includes this provision.’”⁹ The *HLA* court continued: “Defendants [(NMFS)] come perilously close to wasting the Court’s time with such a meritless objection; particularly when the comments to the regulation state in crystal clear terms that the agency changed the rule so that the draft [biological opinion] is to be disclosed to the applicants.”¹⁰

The legal consequences of a failure to share a draft biological opinion with AKSC are significant. They could derail the entire consultation process and send the NPFMC and NMFS back to the drawing board. In a recent case in which the U.S. District Court for the District of Oregon determined that NMFS did not afford applicants their participatory rights during an ESA consultation, the court explained that, as a result, “the biological opinion *must* be construed as arbitrary and capricious.” *Oregon Natural Desert Ass’n v. Tidwell*, 716 F.Supp.2d 982, 1001 (D. Or. 2010) (citing 50 C.F.R. ¶ 492.14(d)) (emphasis added); *see also HLA II* at 5 (finding that plaintiff-applicant’s “procedural rights were violated [by NMFS] when it was not treated as an applicant under the governing regulations and not provided a copy of the draft . . . biological opinion” and that “these violations merit vacating and remanding the . . . biological opinion to the agency.”).

During the development of the 2010 Biological Opinion on Steller sea lions, NMFS released the draft biological opinion to the public and the NPFMC. However, applicants have rights under the ESA not granted to members of the general public. “[A] substantial difference exists between being treated by the agency as an applicant and being treated by the agency as a member of the general public.” *HLA II* at 5, 9 n.7 (addressing 50 C.F.R. § 402.14(g)). Those rights must be observed in this consultation. This can be done while maintaining the schedule set by Judge Burgess. We ask NMFS to provide AKSC, as an applicant, with the opportunity for

⁶ *Id.* at *11 (citing 51 Fed. Reg. at 19952).

⁷ *Id.* (quoting ESA Handbook at 2-13).

⁸ *HLA v. NMFS* (“*HLA I*”), No. 01-00765, Memorandum Opinion, Dkt. 87 at 8, n.6 (D.D.C. Sept. 24, 2002).

⁹ *Id.* (quoting Interagency Cooperation – ESA, as amended; Final Rule, 51 Fed. Reg. 19926, 19952 (June 3, 1986) (codified at 50 C.F.R. Pt. 402)).

¹⁰ *Id.*

meaningful review of the draft biological opinion by AKSC and participation in the development of any reasonable and prudent alternatives, as required by the ESA.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Orr", with a horizontal line extending to the right.

William Orr
President, Alaska Seafood Cooperative

cc: Eric Olsen, Chair, North Pacific Fishery Management Council
Samuel D. Rauch III, (Acting) Assistant Administrator for Fisheries