

Species Act (“ESA”), 16 U.S.C. § 1536. Thus, all parties have urged the Court to reconsider its August 31, 2003 Order, 2003 WL 22082390, insofar as it vacates the Final Rule and the 2002 BiOp, and to leave the Final Rule and 2002 BiOp in place pending the completion of ESA section 7 consultation on a new fishery management action, although the parties have championed different procedural mechanisms by which to replace the Final Rule and 2002 BiOp and varying timeframes during which they should be left in place.

HLA proposes a short-term stay during which NMFS would be compelled to conduct an extremely accelerated consultation on an as yet unidentified interim action, which would divert resources from the development of a permanent replacement fishery conservation and management regime, and would not leave sufficient time to develop and consider potentially important new information relevant to the impacts of longline fishing on sea turtles. NMFS’ proposal for remand without vacatur avoids the gridlock that would result from HLA’s impractical proposal by allowing the parties, through the statutorily created Western Pacific Fishery Management Council, to focus on the development of a permanent replacement regime. In the interim, the Final Rule and 2002 BiOp and Incidental Take Statement (“ITS”) would provide section 9 coverage for the Fishery and a measure of protection for the sea turtles.

This Reply and Supplemental Brief and the accompanying Declaration of Dr. William Hogarth, Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration (“NOAA”), and Director NMFS (“Hogarth Decl.”)², set forth the agency’s current plans for administrative proceedings on remand. The supplemental information and argument provided through these documents was not available at the time defendants filed their

² The Hogarth Declaration is attached hereto as Exhibit 1.

motion for reconsideration because the ten-day deadline mandated for motions under Federal Rule of Civil Procedure 59(e) did not provide the agency adequate time to formulate its response to the Court's order remanding the matter. Defendants recognize that plaintiff may want to respond to the supplemental information and argument presented and would not object to such a response (although defendants reserve the right to reply, if necessary). It is not defendants' intention, however, to delay immediate relief for both the sea turtles and the Fishery during further briefing with respect to defendants' motion for reconsideration of the vacatur of the Final Rule and 2002 BiOp. Accordingly, defendants respectfully urge the Court to enter an immediate stay of the Court's August 31, 2003 Order, as requested by plaintiff, and concurred in by intervenor-defendants. Immediate entry of a stay would avoid the continuing potential for adverse consequences for both sea turtles and the Fishery, pending the completion of briefing and a determination on defendants' motion for reconsideration.

BACKGROUND

Section 7 of the ESA requires NMFS to ensure that "any action" that it "authorize[s], fund[s] or carries out * * * is not likely to jeopardize the continued existence of any endangered species or threatened species * * *." 16 U.S.C. § 1536(a)(2). Consultation is not a hypothetical exercise; rather, it must be conducted with reference to a specific action described by the action agency (the proposed action). See 50 C.F.R. § 402.14(c)(1). Moreover, a biological opinion, which is the culmination of formal consultation, does not itself provide authority to implement a proposed action. The biological opinion merely summarizes the consulting agency's findings and conclusions about whether the proposed action is likely to jeopardize listed species. See 50 C.F.R. § 402.14(h). The proposed action must be authorized by and implemented consistent

with the action agency's programmatic authorities.

In the case of fishery conservation and management actions, regulation is authorized by the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.* (“Magnuson Act”). The Magnuson Act, provides the Secretary of Commerce, by and through NMFS, authority to regulate domestic marine fisheries where necessary and appropriate. *Id.* §§ 1811, 1853. A fishery is regulated at the federal level, under the Magnuson-Stevens Act, if it “requires conservation and management.” *See* 16 U.S.C. §§ 1852(h)(1), 1854(c)(1)(A); *see also id.* § 1802(5) (defining “conservation and management”). The task of preparing fishery management plans and FMP amendments falls first to the regional fishery management councils established by the Magnuson Act. *See* 16 U.S.C. § 1852(h)(1). The Western Pacific Pelagics FMP was developed and recommended by the Western Pacific Fishery Management Council (“WestPac Council”). *See* 16 U.S.C. § 1852(a)(1)(H). Pursuant to the Magnuson Act, NMFS approves (or disapproves) FMPs and FMP amendments and other proposed regulations developed by the WestPac Council. *See* 16 U.S.C. § 1854(a), (b).

The Magnuson Act requires that FMPs conform to “other applicable law,” including the consultation requirements of section 7 of the Endangered Species Act. *Id.* § 1853(a)(1). Development and promulgation of regulations to replace the invalidated Final Rule must be done in compliance with all statutory obligations imposing specific substantive or procedural requirements on agency action. *See* Magnuson Act § 303(a)(1)(C), 16 U.S.C. § 1853(a)(1)(C) (FMPs must conform to other “applicable law”). In addition to the Endangered Species Act, the “applicable laws” with which the agency must comply include the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*, the National Environmental Policy Act (“NEPA”), 42 U.S.C. §

4332, the Coastal Zone Management Act (“CZMA”), 16 U.S.C. § 1456(c) (requiring consistency determination and notice to States with 90 days notice), the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. §§ 1371-1389, the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (requiring consideration of the effect of proposed regulations on small businesses), the Paperwork Reduction Act (“PRA”), 44 U.S.C. § 3501 et seq. (requiring OMB approval of a “collection of information”). See also Executive Order 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993), as amended by Executive Order 13258, 67 Fed. Reg. 9385 (Feb. 28, 2002) (requiring centralized review by OMB of all regulatory actions to ensure that regulations “are effective, consistent, sensible, and understandable”).

DISCUSSION

Remand of the Final Rule and the 2002 BiOp obviously will require further administrative proceedings. As the Court recognized, “it is up to the agency to determine how to proceed next – not for the Court to decide or monitor.” Memorandum Opinion (Docket No. 132) (“Mem. Op.”) at 63, 2003 WL 22083290, at *32 (citing County of Los Angeles v. Shalala, 192 F.3d 1005, 1011 (D.C. Cir. 1999)). The briefing that has followed the Court’s rulings on August 31, 2003, reveals that the parties unanimously hold the view that an interim conservation and management regime is appropriate during those further administrative proceedings, and the parties appear to agree that the Final Rule and 2002 BiOp should be reinstated, at least as an initial step, although the parties disagree about the mechanism through which an interim regime should be implemented and its duration. The parties also disagree about whether there should be a subsequent interim regime pending remand proceedings, or whether they should turn directly to development and implementation of a long-term fix.

The Court retains equitable discretion to determine whether to leave the 2002 BiOp in place while remand proceedings are underway. In the circumstances of this case, remand without vacatur is appropriate because there is “a serious possibility” the Final Rule or the 2002 BiOp are consistent with the best available science and the substantive standards of both the Magnuson Act and the ESA, and because the parties are generally in agreement that vacatur could cause severe disruptions for both the sea turtles and the fishery. Although defendants were not in a position to describe a plan for remand proceedings at the time that they filed their motion for reconsideration, the current plan is described below and in the accompanying Hogarth Declaration. The schedule proposed by NMFS will allow NMFS to identify a proposed action and conduct a section 7 consultation with the benefit of several efforts to develop and analyze information relevant to the impacts of longline fishing on sea turtles. HLA’s proposal that consultation should be completed in sixty days does not leave NMFS adequate time to develop and consider the new information.

***The Court May and Should Exercise its Equitable Discretion
to Leave the Final Rule and 2002 BiOp in Place***

During the pendency of further administrative proceedings, the Court should exercise its equitable discretion to leave the Final Rule and 2002 BiOp in place. Judicial review in this action was based on section 706(2)(A) of the APA, which authorizes the Court to “hold unlawful and set aside agency action * * * found to be * * * arbitrary, capricious, an abuse of discretion, or not in accordance with law.” 5 U.S.C. § 706(2)(A). The Court has concluded that the Final Rule and 2002 BiOp were arbitrary and capricious. Having “h[e]ld unlawful” the Final Rule and the 2002 BiOp, the proper course is for the Court to “set [them] aside” and remand the matter to the agency for further administrative proceedings. See NRDC v. Daley, 209 F.3d 747, 756 (D.C.

Cir. 2000); County of Los Angeles v. Shalala, 192 F.3d 1005, 1011 (D.C. Cir. 1999). However, the Court need not necessarily vacate the invalidated agency action as well. The Court holds broad equitable discretion to determine whether vacatur is appropriate as a remedy in a particular case. See ASARCO, Inc. v. Occupational Safety and Health Administration, 647 F.2d 1, 2 (9th Cir. 1981) (citing Ford Motor Co. v. NLRB, 305 U.S. 364, 373 (1939)); see also ICORE, Inc. v. FCC, 985 F.2d 1075, 1081-82 (D.C. Cir. 1993) (noting that vacatur is a question of remedial discretion).^{3/}

Defendants have previously reviewed the standards applicable in this Circuit to determining whether remand without vacatur is appropriate. (See Defs.’ Mem. in Support of Motion for Reconsid., etc. (Docket No. 136) (“Defs.’ Reconsid. I”) at 5-6). Specifically, the Court should consider the seriousness of the invalidated order’s deficiencies and the disruptive consequences of an interim change that may itself be changed. (See id. citing International Union, United Mine Workers v. Federal Mine Safety and Health Admin., 920 F.2d 960, 966-67 (D.C. Cir. 1990), and other cases).

With respect to the first inquiry, even though HLA itself asks the Court to reinstate the Final Rule and the 2002 BiOp pending further administrative proceedings (albeit through the mechanism of a stay of the Court’s order), HLA argues that those actions are so flawed that it would be inappropriate to remand without vacatur. (See Pl.’s Reconsid. II at 4). The question

^{3/} Plaintiff’s most recent brief states: “NMFS argues that it is *entitled* to have its 2002 BiOp and regulations reinstated * * *.” (Pl.’s Opp. at 3 (emphasis added)). To the contrary, defendants recognize that the decision whether to vacate is entrusted to the Court’s discretion, and is not a matter of right. In the present circumstances, where all parties agree that some interim regime is required pending further agency action, and where the Court has neither addressed nor invalidated the agency’s substantive determination that the measures in place prior to August 31, 2003, are not likely to jeopardize the sea turtles, there is good reason for the Court to exercise its discretion to provide for remand without vacatur.

for the Court to consider is whether “there is at least ‘a serious possibility’ that the Secretary on remand could explain [the ultimate determination] in a manner that is consistent with the statute or choose [a different analytical method] to correct the problem, a factor that favors remanding rather than vacating.” Milk Train, 310 F.3d at 756; Allied Signal, 988 F.2d at 150-51. Given that the Court has expressly declined to address the scientific underpinnings of either the Final Rule or the 2002 BiOp, the answer must be that there is at least a serious possibility that those actions are consistent with the best available science and the substantive standards of both the Magnuson Act and the ESA.^{4/}

To be sure, the Court found, as HLA points out, deficiencies in the manner in which NMFS derived the Final Rule and conducted the consultation resulting in the 2002 BiOp. HLA argues that “NMFS’ failure to ‘consider an important aspect of the problem’ by unlawfully constricting the scope of the action consulted upon in the 2002 BiOp renders the entire substance of that analysis unlawful,” and that NMFS’ failure to utilize HLA’s expertise in devising the 2001 BiOp RPA denied HLA substantive participation in the ESA consultation. (Pl.’s Reconsid. II at 4 (citing Mem. Op. at 52-62)). HLA argues that these errors “inextricably infected the substance of the 2002 BiOp.” (Id.) Yet neither of these arguments goes to the inquiry required under Milk Train and other cases: whether the substance of the Final Rule and the 2002 BiOp might be sustained if NMFS had followed the proper procedures.

^{4/} Defendants reiterate that their request for remand without vacatur does not indicate that defendants have prejudged the proceedings on remand or that a future fishery management and conservation regime upon which consultation will be conducted necessarily will resemble the measures implemented under the Final Rule. To the contrary, NMFS’ efforts to develop and consider new information relevant to the consultation (see Hogarth Decl. ¶¶ 9-10) demonstrate its commitment to employ the best available science as it endeavors in good faith to balance its competing statutory duties to administer federally regulated fisheries and to ensure that its actions are not likely to jeopardize the continued existence of listed species.

Contrary to HLA's contention, remand without vacatur is not limited to circumstances in which the agency's decision is invalid for a failure to explain its reasoning. See International Union, 920 F.2d at 966-67 ("We have commonly remanded without vacating an agency's rule or order where the failure lay in lack of reasoned decisionmaking, *but also where the order was otherwise arbitrary and capricious.*" (emphasis added)). This case is not unlike Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392 (9th Cir. 1995) or Endangered Species Committee v. Babbitt, 852 F. Supp. 32 (D.D.C. 1994). In both of those cases the courts were confronted with the decision whether to vacate a rule that listed a species as threatened or endangered under section 4 of the ESA because the Service had failed to provide full public notice and comment on some of the data used in the listing determination. Both courts acknowledged that vacatur was the usual remedy for a procedural violation of the APA, but found that under the circumstances presented, remand without vacatur was appropriate. In both cases the Service had compelling scientific evidence that the species ought to be listed, but vacating the rule would have left the species without any protection under the law.

In another context, the court in Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation, No. C 02-2006 SBA (N.D. Cal.), considered a challenge with respect to section 7 consultation on the Klamath Irrigation Project. Plaintiffs challenged the adequacy of an RPA establishing target flow rates. The court found that although short and long-term flow rates required by the RPA were sufficient to provide for endangered coho salmon, the RPA was arbitrary and capricious because it relied on actions by states and private parties which were not reasonably certain to occur in order to achieve the target long-term flow rates. (Order, July 15, 2003, attached hereto as exhibit 2, at 22). The court remanded the

biological opinion to NMFS for further proceedings, but declined to vacate the biological opinion, noting that regulations held to be invalid may be left in place while the agency follows the necessary procedures ““when equity demands.”” Id. at 25 (citing Idaho Farm Bureau Fed’n, 58 F.3d at 1405). The court noted that notwithstanding the inadequacies of the RPA with respect to the reliance on future actions to achieve long-term flow rates, the short-term and long-term flow rates themselves were consistent with the best available science and that the problematic long-term flow rates would not be implicated for several years. In these circumstances, it was appropriate to leave the biological opinion in place until NMFS completed proceedings on remand. Id. at 26.

By way of contrast, Greenpeace v. NMFS, 80 F.Supp.2d 1137 (W.D. Wa. 2000), is instructive. In that case, NMFS essentially confessed error as to the sufficiency of a biological opinion prepared in response to the court’s previous order. Id. at 1143. The court found that, under the circumstances, there was no valid agency determination ensuring against the possibility that the continued existence of Steller sea lions might be jeopardized while a new consultation was pending. See Id. at 1151. To the extent that NMFS continued to rely upon the withdrawn biological opinion to justify continued commercial fishing during the 1999 fishing season while a new consultation was being completed, the court found that the biological opinion was legally inadequate. Greenpeace II, 80 F.Supp.2d at 1152. Therefore, the court enjoined the commercial pollack fishery. Here, by contrast, based on the current administrative record, NMFS stands behind the scientific underpinnings of the Final Rule and 2002 BiOp and there has been no finding that the measures previously in place are insufficient to avoid jeopardy to sea turtles. To the contrary, HLA and the agency agree that those measures are not likely to

jeopardize sea turtles, even if HLA argues that they go too far in protecting sea turtles.

Although in the present case the Court has not affirmatively upheld the measures implemented through the Final Rule and evaluated in the 2002 BiOp, neither has the Court found that they are not consistent with the best available science. Given the undisputed need for interim conservation and management measures, the *status quo ante* provides a reasonable baseline upon which to regulate the fishery pending remand proceedings. See Endangered Species Cmte., 852 F. Supp. at 42-43; Southern Offshore Drilling Ass'n v. Daley, 995 F. Supp. 1411, 1437 (M.D. Fla. 1998).

Remand without vacatur is preferable to HLA's proposal for a series of renewable stays which would merely embroil the Court and the parties in continuing litigation and distract the agency from its efforts to develop a replacement fishery management and conservation regime. As discussed below, if a stay were entered for 45 days, emergency action would be required to govern the fishery and provide for conservation of sea turtles pending a full administrative process on a permanent replacement regime. Any interim action would require consultation under the ESA, which even HLA recognizes could not be completed within 45 days. Thus, uncertainty about the status of the Fishery would reign and the parties would be required to seek further stays. HLA's motion for a stay is a thinly veiled effort to goad the Court into supervising the agency's remand proceedings. HLA requested such monitoring in its summary judgment papers and the Court has already declined to get involved in monitoring the remand. (Mem. Op. at 63, 2003 WL 22083290, at *32).

NMFS Has Proposed a Reasonable Schedule for Remand

The accompanying Hogarth Declaration sets forth NMFS' plan for conducting further

administrative proceedings on remand. NMFS believes that a reasonable schedule would provide for completion of a new ESA section 7 consultation by June 1, 2004, followed by issuance of regulations implementing a new fishery conservation and management regime. Hogarth Decl. ¶ 11. The first step must be identification of a new proposed action to replace the fishery conservation and management regime implemented through the invalidated Final Rule. Only after a proposed action has been identified can NMFS' Office of Protected Resources conduct a section 7 consultation.⁵¹ As explained above, the Magnuson Act contemplates that fishery conservation and management actions will be developed initially by the WestPac Council, which prepares and submits proposed regulations to NMFS for its approval or disapproval. The WestPac Council is scheduled to meet during the week of October 20, 2003, to consider proposals to conform this fishery with ESA standards for sea turtle protection. Hogarth Decl. ¶ 5; see generally 50 C.F.R. § 660.31(d) (describing procedures for Council action). As provided by the Magnuson Act, 16 U.S.C. § 1854(a), NMFS will consider and approve or disapprove any proposed regulations for implementing a long-term replacement fishery conservation and management regime that are submitted by the Council. Hogarth Decl. ¶ 5. In the event that the Council does not make such a recommendation, PIRO will propose a fishery conservation and management regime. Id.⁵² In either event, NMFS will pursue the steps

⁵¹ Although NMFS hypothetically could consult on the fishery conservation and management regime that had been consulted on in 1998 and found not likely to jeopardize the sea turtles, even HLA recognizes that "turtle protection measures in addition to those devised in 1998 are appropriate" and that a new proposed action should "result in turtle take well below 1998 levels." (Pls.' Combined Reply, etc. (Docket No. 140) (Pl.'s Reconsider. II") at 2 n.1).

⁵² NMFS may issue emergency regulations (effective for up to 360 days), prepare FMPs or FMP amendments if the relevant fishery management council fails to act or after a FMP or FMP amendment prepared by a council is disapproved and the council fails to submit an adequate plan or amendment. Id. § 1854(c). In the present case, HLA has not argued that NMFS should circumvent Congress's expressed

necessary to implement a long-term regime, including publication of a proposed rule in the Federal Register (see 50 C.F.R. § 660.31(d)(2)), and initiation of consultation under section 7 of the ESA. Hogarth Decl. ¶ 5.

According to the forgoing, a proposed action should be available for consultation under section 7 of the ESA soon after the Council meeting on October 20, 2003. Hogarth Decl. ¶ 5. NMFS has undertaken several important efforts to develop and consider new information as part of a new consultation. First, NMFS will analyze new biological, human interaction, and nesting beach data on for Pacific turtles that have become available since the 2002 BiOp was issued. Hogarth Decl. ¶ 8. Second, NMFS Office of Protected Resources has contracted to hold a series of workshops to consider post-hooking mortality and risk assessment methodologies relevant to consultation on the effects of the Fishery on endangered and threatened sea turtles. Hogarth Decl. ¶ 9. Third, NMFS is seeking outside experts to conduct an analysis of whether the prohibition of swordfish fishing and the time and area closures for tuna fishing that were part of the prior fishery management regime has resulted in, or will result in “transferred effects,” such that restrictions on Hawaii-based longline vessels increase impacts on sea turtles. Id. Finally, NMFS is awaiting completion, analysis, and peer review of gear experiments currently underway in the Atlantic Ocean pelagic longline fishery to determine whether experimental techniques to minimize or avoid sea turtle bycatch from swordfish-style fishing could be incorporated in a Hawaii-based swordfish fishery consistent with ESA standards. Hogarth Decl. ¶ 10. NMFS does not expect these efforts to provide information that could be considered during consultation

intent that fishery management councils develop fishery conservation and management measures in the first instance, and there is at this point no apparent basis for doing so.

until January and February, 2004, at the earliest. See Hogarth Decl. ¶¶ 9, 10. In view of the forgoing, NMFS believes that it will require until June 1, 2004, to complete a consultation and prepare a biological opinion on a new fishery conservation and management regime. Hogarth Decl. ¶ 11.

The NOAA Fisheries and Fish and Wildlife Service (“FWS”) joint ESA consultation regulations provide that consultation concludes within 90 days after initiation, and that NOAA Fisheries must produce a biological opinion within 45 days after formal consultation is concluded. The 90-day period may be extended to 150 days, or longer if the applicant agrees. 50 C.F.R. § 402.14(e); see also 16 U.S.C. § 1536(b)(1)(B); id. subpara. (3)(A). Assuming that a proposed action is available for consultation after the Council meeting in October, 2003, and that consultation is reinitiated shortly thereafter, the standard statutory 135-day period for completion of consultation and preparation of a biological opinion would conclude in approximately February, 2004, and an additional 59-day extension of consultation (for which the applicant’s consent is not required) would extend the deadline for preparation of a new BiOp until approximately April, 2004. See Hogarth Decl. ¶ 12.

Consistent with the Court’s rulings in this matter, NMFS intends to accord HLA all the rights of an applicant in any further consultation on fishery conservation and management actions related to the Fishery. Hogarth Decl. ¶ 7.⁷ Thus, NMFS recognizes that HLA must

⁷ Pursuant to 50 CFR § 402.14, an applicant is entitled to: submit information for consideration during the consultation through the action agency; be informed of the estimated length of any extension of the 180-day time frame for preparation of a biological assessment, along with a written statement of the reasons for the extension; consent to any extension of the time frames for concluding formal consultation longer than 59 days; consistent with the Court’s rulings, review draft biological opinions obtained through the action agency; discuss with the consulting agency the basis of the agency’s biological determination and share its expertise in identifying reasonable and prudent alternatives to the action if likely jeopardy is determined; and be provided a copy of the final biological opinion. See Hogarth Decl.

concur in any extension of consultation that would result in delaying preparation of a new biological opinion until June 1, 2004, and NMFS will seek HLA's concurrence. See id. ¶ 12. As discussed above, NMFS believes that it needs the additional time to consider as part of this consultation scientific and risk assessment information that is being developed but will not be completed before early 2004. See id. ¶¶ 9,10.

In the event that HLA, exercising its rights as an applicant consistent with the Court's rulings in this matter, does not concur in an extension of consultation to permit completion of the new biological opinion by June 1, 2004, NMFS will complete the consultation and preparation of the written biological opinion within the legal timeframe. See Hogarth Decl. ¶ 12. Consultation would thus be completed by approximately February, 2004, or April, 2004, if NMFS avails itself of a 59-day extension authorized by law. See id. In that event, however, NMFS may not have the benefits of the, information derived from workshops on post-hooking mortality and risk assessment methodologies, the results of research on transferred effects, or peer-reviewed information regarding gear experiments in the Atlantic pelagics longline fishery. See id. NMFS believes that a consultation conducted with the benefit of the forgoing information will permit a more reasoned, scientifically grounded analysis of the interactions between the Fishery and sea turtles. See Hogarth Decl. ¶ 11.

NMFS' June 1, 2004 target for issuing a new biological opinion and subsequently publishing regulations implementing a new fishery conservation and management regime provides a reasonable schedule for remand in this procedurally and scientifically complex matter. The agency's proposed alternative schedules for remand are consistent with statutory

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and regulatory timeframes and the June 1, 2004 schedule would permit the agency to obtain the benefit of potentially significant new scientific information when evaluating the interactions of the Fishery and sea turtles.⁸

***HLA's Proposal for a 45-Day Stay and its Demand that Consultation
Be Completed Within 60 Days is Unreasonable***

HLA's opposition to defendants' motion for reconsideration requests for the first time that the Court compel NMFS to complete consultation within 60 days (a timetable that seems at odds with HLA's request for a 45-day stay). In the first instance, HLA's request puts the cart before the horse in that they do not identify a proposed action as to which consultation should be conducted. Moreover, HLA's proposed 60-day deadline is unreasonable because it would not provide NMFS adequate time to complete consultation and prepare a biological opinion for an interim regime that would be required upon expiration of the stay. Hogarth Decl. ¶¶ 4, 16. A consultation within that short timeframe would not permit development and evaluation of new information relevant to evaluating the impacts of longline fishing on sea turtles. *Id.* ¶ 16. A hurried consultation that does not permit consideration of NMFS' efforts to develop new information is not in the interest of the sea turtles or the Fishery, and does not serve the ESA's mandate that consultation be based on the best scientific information available.

HLA's reference to "NMFS' demonstrated ability to issue a biological opinion on a new

⁸ Defendants are advised that yesterday afternoon, September 23, 2003, the WestPac Council voted to recommend to NMFS an emergency regulation under the Magnuson Act. Hogarth Decl. ¶ 15. Once the recommendation has been submitted to NMFS, the agency will, consistent with the Magnuson Act, make a preliminary determination whether the proposed measures are "necessary and appropriate" for conservation and management of the fishery, and comply with other applicable law. *See* 16 U.S.C. § 1853(b). NMFS has not yet had an opportunity to fully consider the proposal, but the agency's preliminary reaction to the proposal is that it would allow a higher level of sea turtle takes than the current scientific record would support. *See* Hogarth Decl. ¶ 15.

action in only two weeks” (Pl.’s Reconsid. II at 6), mischaracterizes of the administrative record. HLA apparently refers to the fact that NMFS produced a draft of the 2002 BiOp within several weeks after a decision was made in early October, 2002, to consult on the fishery as it had been operating under the Final Rule, and not as it had been consulted upon in 1998 and 2001. (See 2002 BiOp AR-464; see also 2002 BiOp AR-713, at 5935; 2002 BiOp AR-426). However, HLA ignores the months of work that had occurred prior to the decision to change the proposed action to reflect the reality on the water. (See the Administrative Record generally, including extensive correspondence and drafting in spring of 2002). In addition, because the “new action” was the fishery as managed under the RPA from the 2001 BiOp, NMFS was not required to start from scratch, as it might be in the present case. Indeed, it is ironic that HLA apparently wants NMFS to come up with something new, but will allow the agency little time to do so.

As Dr. Hogarth explains, consultations on the FMP are extremely complicated and involve more complex analyses than are required for typical formal consultations. Hogarth Decl. ¶ 8. Any new consultation will require the agency to identify, gather and analyze new biological, human interaction, and nesting beach data, and examine the effects of several fisheries over large areas of ocean. *Id.* ¶¶ 8, 14. Rather than force NMFS into a schedule under which it might not have time to engage in a careful administrative process supported by meaningful scientific and economic information, the Court should adopt the proposed schedule set forth in the Hogarth Declaration.

The matter of setting a schedule on remand lies within the Court’s equitable authority, and the Court should exercise its discretion in setting a schedule that NMFS is able to meet without

compromising the quality of the new fishery conservation and management regime and the consultation that will follow.

When agency action has been set aside under the APA, 5 U.S.C. § 706(2), a court retains significant equitable discretion to set a reasonable schedule for the completion of remand proceedings, should setting such a schedule be appropriate. For example, in Central and South West Services, Inc. v. EPA, 220 F.3d 683, 695 n.13 (5th Cir. 2000), the court set aside the agency's rule at issue and then addressed the petitioner's request that the court "direct that the remand be completed and a new rule promulgated within three years of the mandate." Id. The court noted that the petitioner did "not cite any cases in which a court, through an exercise of equitable powers, imposed such a time limit on remand" and denied the request stating that, "we decline to impose particular time limits in this area of activity within the province of the Executive Branch." Id. The court went on to state that denial of a set timeline on remand did not leave the petitioner without a remedy: "If following the remand, [the petitioner] believes that the [agency] is unduly delaying the promulgation of new rule, it may seek a writ of mandamus compelling [the agency] to expedite its rulemaking." Id. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 524-25, 544-45 (1978) (courts generally refrain from imposing additional procedural requirements on agency proceedings on remand). In short, this Court has broad discretion over whether to impose any schedule on remand and great latitude over what that schedule may be. See Defenders of Wildlife v. Gale Norton, 97-CV-2330 W (LSP)(S.D.Cal. Oct. 24, 2001); Conservation Council for Hawaii v. Babbitt, 24 F. Supp. 2d 1074, 1076 (D. Haw. 1998) (applying standard of reasonableness in setting deadlines ranging from 2-4 years for completing remand of "not prudent" critical habitat findings); Southern

Appalachian Biodiversity Project v. USFWS, 181 F.Supp.2d 883 (E.D. Tenn. 2001)(court adopts FWS's proposed schedule for completing remand of "not prudent" critical habitat findings for 7 species).

CONCLUSION

For the forgoing reasons, defendants request that Court reconsider its Order of August 31, 2003, and provide for remand without vacatur.

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