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9  
10 **UNITED STATES DISTRICT COURT FOR THE**  
11 **NORTHERN DISTRICT OF CALIFORNIA**

12 CENTER FOR BIOLOGICAL DIVERSITY,  
13 a non-profit organization,

14 Plaintiff,

15 v.

16 GINA RAIMONDO, Secretary of Commerce,  
17 and NATIONAL MARINE FISHERIES  
18 SERVICE,

19 Defendants.

Case No. 22-

**COMPLAINT FOR DECLARATORY AND  
OTHER RELIEF**

1 **INTRODUCTION**

2 1. Plaintiff Center for Biological Diversity brings this action under the Endangered  
3 Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, and the Marine Mammal Protection Act  
4 (“MMPA”), 16 U.S.C. §§ 1361-1423h, against the Secretary of Commerce Gina Raimondo and  
5 the National Marine Fisheries Service (collectively, “the Fisheries Service”) for failing to ensure  
6 that commercial fisheries do not jeopardize the continued existence of, or cause more than a  
7 negligible impact to, threatened and endangered humpback whales. Specifically, Plaintiff  
8 challenges Defendants’ unlawful authorizations under the ESA and MMPA to take humpback  
9 whales in the Washington/Oregon/California sablefish pot fishery (“Pot Fishery”). *Id.*  
10 §§ 1536(a)(2), 1371(a)(5)(E).

11 2. Entanglement in commercial fishing gear is one of the primary threats to the  
12 recovery of imperiled humpback whales. The most recent annual estimates of mortality and  
13 serious injury of humpback whales off California, Oregon, and Washington are 48.6 from human  
14 activities, of which at least 25.2 are from fisheries. This represents a *400 percent increase* in  
15 humpback whale mortality and serious injury from human activities since 2018 estimates.

16 3. The Pot Fishery entangles humpback whales. When humpback whales get tangled  
17 in sablefish pot gear, they can drown or die of starvation or infection. The lines can wrap around a  
18 whale, sometimes anchoring the whale in place and drowning or severely injuring it. Other times  
19 the whale swims away with the gear dragging behind it, causing painful constrictions of the rope  
20 and sapping the whale’s energy.

21 4. Sablefish pots sit on the bottom of the ocean and are connected to each other in  
22 approximately two-mile-long strings of 15 to 50 pots. Each of the string’s ends is connected to a  
23 vertical line to a surface buoy. The gear sometimes soaks for long periods.

24 5. Despite the nearly 50 humpback whales annually killed or seriously injured by  
25 human activities off the U.S. West Coast, the Fisheries Service has not issued regulations to  
26 reduce humpback whale mortality and serious injury from either of the primary threats –  
27 commercial fishing or vessel strikes – since the listing of the Central America distinct population  
28 segment (“DPS”) and the threatened Mexico DPS under the ESA in 2016.

1           6.       The Fisheries Service’s authorization, permitting, oversight, and management of  
2 the Pot Fishery has caused, and will likely continue to cause, the death and injury of threatened  
3 and endangered humpback whales.

4           7.       In October 2020 Defendants issued an inadequate biological opinion that failed to  
5 comply with the ESA and the Administrative Procedure Act. Specifically, the 2020 Biological  
6 Opinion failed to include the best available science. 16 U.S.C. § 1536(a)(2), (b)(4)(C)(iii).

7           8.       The Fisheries Service’s continued authorization and management of the Pot  
8 Fishery in reliance on the fundamentally flawed 2020 Biological Opinion violates the agency’s  
9 substantive duty under Section 7 of the ESA to ensure that the actions it authorizes are not likely  
10 to jeopardize the continued existence of humpback whales. 16 U.S.C. § 1536(a)(2).

11           9.       On December 8, 2021, the Fisheries Service unlawfully issued a MMPA permit for  
12 the taking of threatened and endangered humpback whales in the Pot Fishery (“2021 Permit”). 86  
13 Fed. Reg. 69,627 (Dec. 8, 2021). The 2021 Permit is based on a faulty negligible impact  
14 determination that failed to consider fishing gear mortality other than that which is attributable to  
15 the Pot Fishery, and arbitrarily failed to base its determination on the most recent scientific  
16 information regarding humpback whale populations. Further, the Fisheries Service issued the  
17 2021 Permit without developing or having completed a take reduction plan, which is a pre-  
18 requisite for issuance of such permits. 16 U.S.C. §1371(a)(5)(E).

19           10.      Accordingly, Plaintiff seeks a declaration that Defendants’ 2020 Biological  
20 Opinion violates the ESA and that Defendants’ 2021 Permit violates the MMPA. Plaintiff also  
21 seeks mitigation measures to protect humpback whales from further unlawful death, injury, and  
22 other harm due to Defendants’ illegal actions and omissions.

23                           **JURISDICTION, VENUE, and INTRADISTRICT ASSIGNMENT**

24           11.      This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal  
25 question); 28 U.S.C. § 1346 (action against the United States); 28 U.S.C. § 1361 (action to  
26 compel an officer of the United States to perform his or her duty); 28 U.S.C. §§ 2201-02 (power  
27 to issue declaratory judgments and grant relief in cases of actual controversy); 16 U.S.C.  
28 § 1540(g) (ESA citizen suit provision); and 5 U.S.C. § 702 (Administrative Procedure Act).

1 12. Plaintiff provided Defendants with notice of Plaintiff’s intent to sue over the ESA  
2 violations alleged in this Complaint more than 60 days ago. Defendants have not remedied these  
3 violations of law.

4 13. Venue is proper in the Northern District of California pursuant to 16 U.S.C.  
5 § 1540(g)(3)(A) because the ESA violations are occurring in this district and pursuant to 28  
6 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claims occurred here.

7 14. Pursuant to Civil Local Rule 3-2(c) and 3-2(d), the appropriate intradistrict  
8 assignment of this case is either to the San Francisco Division or the Oakland Division.

9 **PARTIES**

10 **Plaintiff**

11 15. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (the “Center”) is a national  
12 nonprofit conservation organization that works through science, law, and policy to secure a future  
13 for all species, great or small, hovering on the brink of extinction. The Center is dedicated to the  
14 preservation, protection, and restoration of biodiversity and ecosystems throughout the world.  
15 The Center has more than 89,600 members.

16 16. The Center’s Oceans Program focuses specifically on conserving marine  
17 ecosystems and seeks to ensure that imperiled species are properly protected from destructive  
18 practices in our oceans. In pursuit of this mission, the Center has been actively involved in  
19 securing ESA protections for imperiled marine mammals and protecting whales and other wildlife  
20 from deadly and harmful entanglement in commercial fishing gear.

21 17. Center members live in and regularly visit ocean waters, bays, beaches, and other  
22 coastal areas to observe, photograph, study and otherwise enjoy humpback whales and their  
23 habitat. Center members have an interest in whales, marine mammals, and other wildlife and their  
24 Pacific Ocean habitat; including waters off California, Oregon, and Washington. For example,  
25 Center members frequently sail, kayak, and go on humpback whale-watching tours in Gulf of the  
26 Farallones, Half Moon Bay, Monterey Bay, and the Santa Barbara Channel to look for and  
27 photograph humpback whales and other wildlife. Center members derive recreational, spiritual,  
28 professional, scientific, educational, and aesthetic benefit from the presence of humpback whales,

1 and their habitat. One Center member took her young daughter whale watching in Monterey Bay  
2 in September 2021 and saw many humpbacks. She enjoyed her trip but felt sad to see multiple  
3 humpbacks with entanglement scars. She and other Center members intend to continue to use and  
4 enjoy the habitat of humpback whales frequently and on an ongoing basis in the future.

5 18. Entanglements of humpback whales in the Pot Fishery kills and harms animals that  
6 Center members enjoy viewing. The Fisheries Service's failure to comply with the ESA makes it  
7 less likely that Center members will be able to observe, study, and enjoy these animals.  
8 Additionally, Center members reasonably fear that they will see a humpback whale entangled in  
9 fishing gear when recreating and visiting California's beaches and ocean waters.

10 19. An integral aspect of the Center's members' use and enjoyment of humpback  
11 whales is the expectation and knowledge that the species are in their native habitat. For this  
12 reason, the Center's members' use and enjoyment of humpback whales is entirely dependent on  
13 the continued existence of healthy, sustainable populations in the habitat off the Pacific Coast.  
14 The Fisheries Service's failure to comply with applicable environmental laws deprives humpback  
15 whales of statutory protections that are vitally important to the species' survival and eventual  
16 recovery. The Fisheries Service's failure to prepare an adequate biological opinion under the ESA  
17 diminishes the aesthetic, recreational, spiritual, scientific, and other interests of the Center and its  
18 members because humpback whales are more vulnerable to harm and less likely recover absent  
19 the protections that result from those actions. The Center and its members are therefore injured  
20 because the Center's use and enjoyment of the humpback whales, and those areas inhabited by  
21 them, are threatened by the Fisheries Service's ongoing authorization of the Pot Fishery without  
22 compliance with environmental law.

23 20. The Center's members' above-described cultural, spiritual, aesthetic, recreational,  
24 scientific, educational, and other interests have been, are being and, unless the relief prayed herein  
25 is granted, will continue to be adversely affected and irreparably injured by the Fisheries Service's  
26 continued refusal to comply with obligations under the ESA, the MMPA, and other laws. The  
27 relief sought in this case will redress these injuries.



1 agency must determine whether its actions “may affect” any endangered or threatened species. If  
2 so, the action agency must formally consult with the Fisheries Service as part of its duty to “insure  
3 that [its] action is . . . not likely to jeopardize the continued existence” of that species. *Id.*  
4 § 1536(a)(1), (2); 50 C.F.R. § 402.14 (2019). The term “jeopardize” is defined as an action that  
5 “reasonably would be expected . . . to reduce appreciably the likelihood of both the survival and  
6 recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of  
7 that species.” 50 C.F.R. § 402.02 (2019).

8 27. At the completion of formal consultation, the Fisheries Service will issue a  
9 biological opinion that determines if the agency action is likely to jeopardize the species. 16  
10 U.S.C. § 1536(b)(3)-(4); 50 C.F.R. § 402.14(h). In formulating the biological opinion, the  
11 Fisheries Service must use only “the best scientific and commercial data available.” 16 U.S.C.  
12 § 1536(a)(2).

13 28. The biological opinion must include a summary of the information upon which the  
14 opinion is based, an evaluation of the “current status of the listed species,” the “effects of the  
15 action,” and the “cumulative effects.” 50 C.F.R. § 402.14(g)(2), (g)(3).

16 29. “Effects of the action” include both direct and indirect effects of an action “that  
17 will be added to the environmental baseline.” *Id.* § 402.02. The “environmental baseline” includes  
18 “the past and present impacts of all Federal, State, or private actions and other human activities in  
19 the action area, the anticipated impacts of all proposed Federal projects in the action area that  
20 have already undergone formal or early section 7 consultation, and the impact of State or private  
21 actions which are contemporaneous with the consultation in process.” *Id.* “Cumulative effects”  
22 include “future State or private activities, not involving Federal activities, that are reasonably  
23 certain to occur within the action area.” *Id.*

24 30. Thus, in issuing a biological opinion, the Fisheries Service must consider not just  
25 the isolated share of responsibility for impacts to the species traceable to the activity that is the  
26 subject of the biological opinion, but also the effects of that action when added to all other  
27 activities and influences that affect the status of that species.

28 31. After the Fisheries Service has added the direct and indirect effects of the action to

1 the environmental baseline and cumulative effects, it must make its determination of “whether the  
2 action is likely to jeopardize the continued existence of a listed species.” 16 U.S.C. § 1536(b)(3),  
3 (b)(4); 50 C.F.R. § 402.14(h). A likelihood of jeopardy is found when “an action [] reasonably  
4 would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival  
5 and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution  
6 of that species.” 50 C.F.R. § 402.02. Recovery is defined as “improvement in the status of listed  
7 species to the point at which listing is no longer appropriate.” *Id.*

8 32. A biological opinion that concludes that the agency action is not likely to  
9 jeopardize the continued existence of a listed species but will result in take incidental to the  
10 agency action must include an incidental take statement. 16 U.S.C. § 1536(b)(4).

11 33. The incidental take statement must specify the amount or extent of incidental  
12 taking on such listed species, “reasonable and prudent measures” that the Fisheries Service  
13 considers necessary or appropriate to minimize such impact and set forth “terms and conditions”  
14 that must be complied with by the action agency to implement the reasonable and prudent  
15 measures. *Id.*; 50 C.F.R. § 402.14(i). Additionally, when the listed species to be incidentally taken  
16 are marine mammals, the take must first be authorized by the Fisheries Service pursuant to the  
17 MMPA, and the incidental take statement must include any additional measures necessary to  
18 comply with the MMPA take authorization. *Id.*

19 34. The ESA generally prohibits any person, including both private persons and  
20 federal agencies, from “taking” any endangered species, such as, in this case, humpback whales.  
21 16 U.S.C. § 1538(a)(1). The term “take” is defined by the ESA to mean “harass, harm, pursue,  
22 hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” *Id.*  
23 § 1532(19). The take of a listed species in compliance with the terms of a valid incidental take  
24 statement is not prohibited under section 9 of the ESA. *Id.* § 1536(b)(4), (o)(2); 50 C.F.R.  
25 § 402.14(i)(5).

26 35. If the Fisheries Service determines in its biological opinion that the action is likely  
27 to jeopardize the continued existence of a listed species, the biological opinion must include  
28 “reasonable and prudent alternatives” to the action that will avoid jeopardy. 16 U.S.C.



1 § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3).

2 36. Regardless of the conclusion reached in the biological opinion, the agency  
3 undertaking the federal action has an independent duty to ensure that its actions are not likely to  
4 jeopardize the continued existence of listed species. 16 U.S.C. § 1536(a)(2). An agency's reliance  
5 on a legally flawed biological opinion to authorize an action does not satisfy its substantive duty  
6 to ensure against jeopardy.

7 37. The ESA specifies that Section 7 consultation must typically be completed within  
8 ninety days after initiation. 16 U.S.C. § 1536(b)(1); 50 C.F.R. § 402.14(e). The substantive duty  
9 to ensure against jeopardy of listed species remains in effect regardless of the status of the  
10 consultation.

11 38. The ESA defines the term "species" to include "any distinct population segment of  
12 any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16).

13 39. The Central America distinct population segment of humpback whales is listed as  
14 endangered under the ESA, 50 C.F.R. § 224.101 (2016), and the Mexico distinct population  
15 segment of humpback whales is listed as threatened, *id.* § 223.102 (2016). The prohibition on the  
16 take of endangered species under the ESA applies to the threatened Mexico humpback whales. *Id.*  
17 § 223.213 (2016).

### 18 **Marine Mammal Protection Act**

19 40. Congress enacted the MMPA in 1972 in response to widespread concern that large  
20 numbers of marine mammals were being killed through interactions with commercial fisheries.  
21 Congress found that "certain species and population stocks of marine mammals are, or may be, in  
22 danger of extinction or depletion as a result of man's activities." 16 U.S.C. § 1361(1). The policy  
23 behind the MMPA is that "such species and population stocks should not be permitted to diminish  
24 beyond the point at which they cease to be a significant functioning element in the ecosystem of  
25 which they are a part, and, consistent with this major objective, they should not be permitted to  
26 diminish below their optimum sustainable population." *Id.* § 1361(2).

27 41. The primary mechanism by which the MMPA protects marine mammals is through  
28 the implementation of a moratorium on the take of marine mammals. *Id.* § 1371(a). "Take" is

1 defined broadly by the MMPA to mean “to harass, hunt, capture, or kill, or attempt to harass,  
2 hunt, capture or kill any marine mammal.” *Id.* § 1362(13).

3 42. In addition, the MMPA requires the Fisheries Service to prepare a “stock  
4 assessment” for each marine mammal population in U.S. waters, documenting the population’s  
5 abundance and trend, describing the fisheries that interact with the stock, and estimating the level  
6 of “mortality and serious injury” caused by those fisheries each year. 16 U.S.C. § 1386(a). The  
7 Fisheries Service defines “serious injury” as “any injury that will likely result in mortality.” 50  
8 C.F.R. § 229.2 (1995). The MMPA requires the Fisheries Service to review stock assessments at  
9 least annually for stocks which are specified as strategic stocks, like the humpback whale, and  
10 revise the stock assessment if the status of the stock has changed or can be more accurately  
11 determined. 16 U.S.C. § 1386(c).

12 43. Based on the stock assessment, the agency must estimate the “potential biological  
13 removal” (“PBR”) level for each stock, *id.* § 1386(a), defined as the maximum number animals,  
14 not including natural mortalities, that may be removed from a marine mammal stock while  
15 allowing that stock to reach or maintain its optimum sustainable population. *Id.* § 1362(20).

16 44. The MMPA also requires that the Fisheries Service annually publish a list of  
17 commercial fisheries, classifying each fishery as a Category I, II, or III fishery. *Id.* § 1387(c)(1).  
18 Category I fisheries are those that cause “frequent incidental taking of marine mammals”;  
19 Category II fisheries are those that cause “occasional incidental mortality and serious injury of  
20 marine mammals”; and Category III fisheries are those that have “a remote likelihood of or no  
21 known incidental mortality or serious injury of marine mammals.” *Id.*

22 45. The MMPA established a Marine Mammal Commission. *Id.* § 1401. The duties of  
23 the Commission include recommending to the Fisheries Service the steps that “it deems necessary  
24 or desirable for the protection and conservation of marine mammals.” *Id.* § 1402(a). The MMPA  
25 requires the Fisheries Service either to adopt the recommendation or respond “with a detailed  
26 explanation of the reasons why those recommendations were not followed or adopted.” *Id.*  
27 § 1402(d).

28 46. The MMPA established regional scientific review groups. *Id.* § 1386(d). The

1 MMPA states that the scientific review groups shall advise the Fisheries Service on, *inter alia*,  
2 “population estimates and the population status and trends” of marine mammal stocks, “research  
3 needed to identify modifications in fishing gear and practices likely to reduce the incidental  
4 mortality and serious injury of marine mammals in commercial fishing operations,” and other any  
5 other issue that the Fisheries Service of the groups consider appropriate. *Id.*

6 47. The MMPA defines the term “population stock” or “stock” as “a group of marine  
7 mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed  
8 when mature.” *Id.* § 1362(11). Based on the management objectives of the MMPA, the Fisheries  
9 Service has determined that stocks should represent demographically independent populations.

10 48. The Fisheries Service has defined the California/Oregon/Washington stock  
11 (“CA/OR/WA stock”) to include humpback whales that feed off the U.S. West Coast. Off  
12 California and Oregon, the feeding group includes whales from the endangered Central America,  
13 which almost exclusively use this area to feed, and threatened Mexico DPSs. Off Washington and  
14 southern British Columbia, the feeding group includes primarily threatened Mexico DPS whales,  
15 with smaller numbers of endangered Central America DPS humpbacks and of unlisted Hawaii  
16 DPS humpbacks.

17 49. The Fisheries Service considers the CA/OR/WA stock a “strategic stock” under the  
18 MMPA because it is listed on the Endangered Species Act. *See id.* § 1362(19).

19 *Permitting Commercial Fisheries’ Incidental Take*

20 50. The MMPA contains limited exceptions to its broad prohibition on take. Section  
21 101(a)(5)(E) of the MMPA allows the Fisheries Service to permit take incidental to commercial  
22 fishing from marine mammal species or stocks listed as threatened or endangered under the ESA  
23 *only if* the Fisheries Service determines that:

24 (I) the incidental mortality and serious injury resulting from fishery  
25 operations will have a negligible impact on such species or stock;

26 (II) a recovery plan has been developed or is being developed for such  
27 species or stock pursuant to the ESA, and  
28

1 (III) a monitoring program is established and a take reduction plan has been  
2 or is being developed for such species or stock pursuant to 16 U.S.C. § 1387.  
3 16 U.S.C. § 1371(a)(5)(E).

4 51. According to the committee report for the legislation creating this permit, “the  
5 ‘negligible impact’ standard in the MMPA is more stringent than the ‘no jeopardy’ standard in the  
6 ESA, and consequently provides more protection for endangered or threatened marine mammals  
7 under the MMPA than under the ESA.” H.R. Rep. No. 103-439 (1994).

8 52. For fisheries for which the Fisheries Service makes a “negligible impact  
9 determination” under clause (I) above, “if, during the course of the commercial fishing season, the  
10 [Fisheries Service] determines that the level of incidental mortality or serious injury . . . has  
11 resulted or is likely to result in an impact that is more than negligible on the endangered or  
12 threatened species or stock, the [Fisheries Service] shall use the emergency authority granted  
13 under section 1387” to prescribe regulations that reduce incidental mortality and serious injury in  
14 that fishery. 16 U.S.C. § 1371(a)(5)(E)(iii).

15 Monitoring Program Required by the MMPA

16 53. With respect to the monitoring program required under clause (III) of Section  
17 101(a)(5)(E), the MMPA states that the Fisheries Service “shall establish a program to monitor  
18 incidental mortality and serious injury of marine mammals during commercial fishing  
19 operations.” *Id.* § 1387(d)(1). The program’s purposes “shall be to—(A) obtain statistically  
20 reliable estimates of incidental mortality and serious injury; (B) determine the reliability of  
21 reports of incidental mortality and serious injury [submitted by fishermen]; and (C) identify  
22 changes in fishing methods or technology that may increase or decrease incidental mortality and  
23 serious injury.” *Id.*

24 54. The Fisheries Service may place observers on board vessels as necessary, *id.* at  
25 § 1387(d)(2), and “may establish an alternative observer program to provide statistically reliable  
26 information on the species and number of marine mammals incidentally taken. . . . [that] may  
27 include direct observation of fishing activities from vessels, airplanes, or points on shore.” *Id.* at  
28 § 1387(d)(5).

Take Reduction Plan

1  
2       55. With respect to the take reduction plan required under clause (III) of section  
3 101(a)(5)(E) to issue authorization of incidental take of ESA-listed marine mammals, the  
4 Fisheries Service must develop a take reduction plan for each strategic stock that interacts with a  
5 commercial fishery that the Fisheries Service has identified as causing frequent or occasional  
6 mortality and serious injury of marine mammals, i.e. Category I and II fisheries, respectively. *Id.*  
7 § 1387(f)(1).

8       56. The Fisheries Service must establish a take reduction team “[a]t the earliest  
9 possible time (not later than 30 days) after the Secretary issues a final stock assessment ... for a  
10 strategic stock.” *Id.* § 1387(f)(6)(A). For any stock in which incidental mortality and serious  
11 injury from commercial fisheries exceeds the potential biological removal level, “the plan shall  
12 include measures the Secretary expects will reduce, within 6 months of the plan’s  
13 implementation, such mortality and serious injury to a level below the potential biological  
14 removal level.” *Id.* § 1387(f)(5)(A).

15       57. Congress provided strict deadlines for the team to develop a draft plan that the  
16 Fisheries Service must amend, approve, and implement as necessary to comply with the MMPA.  
17 *Id.* § 1387(f)(7), (8).

**Administrative Procedure Act**

18  
19       58. The Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-706, provides for  
20 judicial review of final agency action. Under the APA, a person may seek judicial review to  
21 “compel agency action unlawfully withheld or unreasonably delayed. . . .” *Id.* § 706(1). The APA  
22 also requires that a reviewing court “hold unlawful and set aside agency action, findings, and  
23 conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in  
24 accordance with law.” *Id.* § 706(2)(A).

**FACTUAL AND PROCEDURAL BACKGROUND**

25  
26       59. The humpback whale (*Megaptera novaeangliae*) is an ESA-listed species that has  
27 been, and is being, taken by the Fisheries Service’s authorization and management of the Pot  
28 Fishery.

## Imperiled Humpback Whales

1  
2           60.     Humpback whales were listed as endangered in 1970 under the Endangered  
3 Species Conservation Act—the precursor to the ESA—and as endangered under the ESA upon its  
4 enactment in 1973. 35 Fed. Reg. 18,319 (Dec. 2, 1970). Entanglement in fishing gear is the most  
5 frequently identified source of human-caused injury or mortality to the species.

6           61.     The Fisheries Service reclassified the globally listed humpback whale species into  
7 14 different distinct population segments (“DPS”) in 2016. 81 Fed. Reg. 62,259 (Sept. 8, 2016).  
8 Two of those populations are found in waters off California and Oregon: the Central America  
9 DPS and the Mexico DPS. *Id.* The Fisheries Service listed the Central America DPS as  
10 endangered and the Mexico DPS as threatened. *Id.* at 62,269; 50 C.F.R. § 17.11 (2016).

11           62.     Humpback whales in the Central America DPS generally migrate from their winter  
12 breeding grounds off Central America to feed almost exclusively off California and Oregon in  
13 spring and summer. The Fisheries Service determined the Central America DPS is endangered  
14 based, in part, on the continuing, ongoing threat of entanglement in fishing gear. Vessel strikes  
15 and entanglement in fishing gear are considered likely to moderately reduce the population size or  
16 growth rate of the Central America DPS. In 2021, a scientist working for the Fisheries Service  
17 updated the abundance estimate of the Central America DPS and concluded it contained about  
18 750 individuals.

19           63.     The Central America DPS breeding grounds – along the Pacific coast of Costa  
20 Rica, Panama, Guatemala, El Salvador, Honduras, and Nicaragua – occupy a unique ecological  
21 setting. The Fisheries Service determined this DPS is a discrete population based on sightings  
22 data and significant genetic differentiation between it and other North Pacific populations. The  
23 genetic composition of this DPS is unique also in that it shares some DNA with Southern  
24 Hemisphere humpback whale DPSs, suggesting it may serve as a conduit for gene flow between  
25 the North Pacific and the Southern Hemisphere.

26           64.     The Central America DPS is in danger of extinction. Loss of the Central America  
27 DPS would result in a significant gap in the range of humpback whales as a species. The potential  
28

1 for its imminent extinction warrants caution in assessing impacts of take.

2 65. The Mexico DPS consists of whales that breed along the Pacific coast of mainland  
3 Mexico in winter, migrate through the Baja California Peninsula coast and feed across a broad  
4 geographic range from California to the Aleutian Islands in the summer and spring, with  
5 concentrations in California and Oregon.

6 66. The Fisheries Service determined the Mexico DPS is threatened because the  
7 estimate of 3,264 Mexico DPS humpback whales is more reliable than the higher estimates that  
8 were not DPS-specific. *Id.* at 62,305. In 2021 a scientist working for the Fisheries Service updated  
9 the abundance estimate of the Mexico DPS and concluded it contained about 2,900 individuals.

10 67. Five biologically important feeding areas for humpback whales exist off  
11 California. These areas include waters from San Francisco Bay to Monterey Bay, Morro Bay, and  
12 parts of the Santa Barbara Channel. Humpback whales are generally present in these areas during  
13 the spring, summer, and fall, but can be found off California in every month of the year.

14 **The Pot Fishery**

15  
16 68. The Fisheries Service implements the Pacific Coast Groundfish Fishery  
17 Management Plan, 50 C.F.R. § 660.10 (2010), which uses measures like quotas, area restrictions,  
18 and gear specifications to manage over 100 different species that primarily live on or near the  
19 ocean bottom. Sablefish are one of six species of “groundfish” covered in the Plan.

20 69. The Washington/Oregon/California Pot Fishery uses pots (or “traps”), heavy-duty  
21 fishing line, and buoys. The gear is configured so that multiple heavy pots are fished, linked along  
22 the seafloor, with ends marked at the surface by one or more buoys attached to a line that runs  
23 through the water column. The heavy pots can weigh hundreds of pounds.

24 70. Approximately 155 vessels fish in the Pot Fishery off Washington, Oregon, and  
25 California. From 2015 to 2019, those vessels fished an annual average of approximately 75,000  
26 pots.

27 71. Landings indicate that concentrated fishing areas exist off Astoria, OR; Newport,  
28 OR; Fort Bragg, CA, and San Francisco, CA. While fishing occurs year-round, landings of

1 groundfish in the Pot Fishery are highest from May through December.

2 72. Some vessels in the Pot Fishery fished in the Dungeness crab fishery in 2015 and  
3 2016, especially vessels in Fort Bragg, California. The Dungeness crab fishery closure in 2016  
4 due to naturally-occurring toxins caused additional vessels from the Dungeness crab fishery to  
5 switch to the Pot Fishery for that season.

6 73. In 2009 the Fisheries Service designated the Pot Fishery as a Category II fishery  
7 for humpback whales, meaning it causes “occasional” mortality and serious injury of humpback  
8 whales, based on a reported humpback whale with numerous sablefish pots trailing in 2006 off  
9 Monterey, California. 73 Fed. Reg. 33,760, 33,772 (2009); *see also* 86 Fed. Reg. 3029, 3041,  
10 3043 (Jan. 14, 2021).

11 74. Central California is a known “hot spot” for humpback whale activity, especially  
12 from April through November. Fishing in this area at this time increases the risk of the Pot  
13 Fishery’s whale entanglements.

14 75. The rate of entanglements of large whales in fishing gear reported off the West  
15 Coast has increased dramatically since 2014. Since 2000, the Fisheries Service has confirmed 289  
16 large whale entanglements in fishing gear. Pot gear has become the most commonly identified  
17 gear type associated with entanglement reports, representing 32 percent, or 92 instances, of  
18 confirmed reports. The Fisheries Service estimated that the Pot Fishery has entangled more than  
19 one humpback whale every year since 2003 and entangled an estimated 3.26 humpbacks in 2016.

20 76. In 2016 the Fisheries Service received the highest number of large whale  
21 entanglement reports in its history (53 entangled humpbacks, 91 percent of which were confirmed  
22 reports). These results represent a minimum estimate of entanglement events.

23 77. Scientists estimated based on a scar study that at a minimum, 45 percent of  
24 humpback whales in California and Oregon and 33 percent in Washington and British Columbia  
25 have been entangled in fishing gear.

26 78. Entanglement reports most frequently came from Monterey, California. Whale  
27 entanglement reports are opportunistic and are likely biased towards areas of higher human  
28 populations and areas where whale species are closer to shore. Most pot fisheries are not observed



1 or have observers on a very low percent of the vessels, as in the Pot Fishery.

## 2 **The Pot Fishery’s Humpback Whale 2020 Biological Opinion**

3  
4 79. The 2020 Biological Opinion purports to analyze the effects of the Pot Fishery on  
5 endangered Central America DPS and threatened Mexico DPS of humpback whales. The 2020  
6 Biological Opinion defines the agency action as the Fisheries Service’s continuing  
7 implementation of the Pacific Coast Groundfish Fishery Management Plan.

### 8 Humpback Whale Population Estimates

9 80. The 2020 Biological Opinion states that the population trend for the Central  
10 America DPS is unknown yet assumed that the positive growth rates of U.S. West Coast  
11 humpback whales as a whole reflects growth of the DPS. The Central America DPS population  
12 growth could differ given its relatively small population size and other unique demographic  
13 factors. Nevertheless, the Fisheries Service assumed the DPS has increased by six percent  
14 annually in the past 15 years, yielding a current abundance estimate of 1,876 individual whales.

15 81. The Fisheries Service concluded that the most recent estimated abundance of the  
16 Central America DPS (about 750 whales) by a Fisheries Service scientist is not a reliable  
17 estimate, in part because the data are more than eight years old. The data used for this estimate  
18 comes from the ocean basin-wide study referred to as the “Structure of Populations, Levels of  
19 Abundance, and Status of Humpbacks” or the “SPLASH study,” which was a significant effort  
20 undertaken in coordination with ten countries that involved the collection of both photo-  
21 identification and genetic data during three breeding seasons (2004, 2005, and 2006) and over two  
22 feeding seasons (2004, 2005) in known breeding and feeding areas.

23 82. The SPLASH study underpinned the Fisheries Service’s abundance estimate of the  
24 Central America DPS when it was listed as endangered in 2016, despite the data being more than  
25 eight years old. 81 Fed. Reg. at 62,287.

26 83. The Fisheries Service relied on the SPLASH study again in 2021 to estimate  
27 movement probabilities of each particular DPS and designate critical habitat for humpback  
28 whales. 86 Fed. Reg. 21,082, 21,097 (Apr. 21, 2021). The notice for the final critical habitat rule

1 stated that the Fisheries Service continues “to find that this information—i.e., the estimated  
2 number or proportion of whales from the listed DPS within a feeding region—to be . . . part of the  
3 best available data regarding habitat use by the listed DPSs.” *Id.*

4 84. The 2020 Biological Opinion, however, concluded that there have been changes in  
5 the abundance and/or distribution of humpback whales DPSs and generated new estimates of  
6 current abundance and distribution of the listed DPSs. It assumes that the “probability rates in  
7 summer feeding areas off of CA/OR estimated by [using the SPLASH study data] are outdated.”

8 85. The 2020 Biological Opinion tries to explain the Fisheries Service’s change in  
9 position since its decision to list the DPSs on the ESA by saying that humpback whales have  
10 increased between six and seven percent annually over the last 30+ years, yet the Fisheries  
11 Service knew this at the time it listed the Central America DPS as endangered and the Mexico  
12 DPS as threatened.

13 86. An increase in humpback whales off the U.S. West Coast could be due to several  
14 factors other than an increase in the populations of the Central American and Mexico DPSs,  
15 including an influx of animals into the region from neighboring areas such as southeast Alaska.  
16 The 2020 Biological Opinion did not consider these factors that potentially contradict the  
17 assumption of population increases.

18 *Scientific Papers Assessing the Pot Fishery’s Humpback Whale Entanglement Risk*

19 87. The Fisheries Service has published scientific papers assessing the Pot Fishery’s  
20 entanglement risk for humpback whales that it did not consider in the 2020 Biological Opinion.

21 88. Saez et al. (2013) performed an entanglement risk assessment for eleven fisheries,  
22 including the Pot Fishery. The Pot Fishery tied for the third-highest entanglement risk for  
23 humpback whales.

24 89. Feist et al. (2015) overlaid the predicted densities of humpback whales with data  
25 for commercial fishing effort in the West Coast groundfish fishery, including the Pot Fishery. The  
26 authors, all Fisheries Service scientists, characterized the study as an important first step “in  
27 generating formal risk assessments for quantification of the impacts of various fishing fleets on  
28 populations of cetacean species that occur in the California Current.”



1 mortality and serious injury off the U.S. West Coast from either of the primary threats –  
2 commercial fishing or vessel strikes – since the listing of the Central America DPS and the  
3 threatened Mexico DPS in 2016.

4 97. The 2020 Biological Opinion fails to include reasonable and prudent measures that  
5 will minimize humpback take. Instead, it requires that the Fisheries Service “monitor the [Pot  
6 Fishery] to ensure compliance with the regulatory and conservation measures included in the  
7 proposed action and the identified amount or extent of incidental take, including collection and  
8 evaluation of data on the capture, injury, and mortality of humpback whales.”

9 98. The terms and conditions include a Fisheries Service feasibility study for gear  
10 marking; review of the terms of reference for a humpback-related work group; observer coverage  
11 to provide humpback whale bycatch estimates; and a review of the utility and benefit of electronic  
12 monitoring.

### 13 **The 2021 Permit Authorizing Take Under the MMPA**

14 99. Five years after the expiration of the Pot Fishery’s most recent MMPA permit, the  
15 Fisheries Service proposed and finalized the 2021 Permit for the Fishery. 86 Fed. Reg. 69,627.

#### 16 *The Negligible Impact Determination Relied on an Outdated Stock Definition*

17 100. In making its negligible impact determination, the Fisheries Service analyzed the  
18 impact to the CA/OR/WA stock of humpback whales. The Fisheries Service’s own scientists have  
19 said that the stock definition is outdated because of the identification of the Central America and  
20 Mexico DPSs.

21 101. The Fisheries Service’s guidance on revising stock assessment reports states that  
22 the stock, or “population stock,” is the fundamental unit of legally-mandated conservation. The  
23 guidance also proposes that when “information becomes available that appears to justify a  
24 different stock structure or stock boundaries, it may be desirable to include the new structure or  
25 boundaries as ‘prospective stocks’” in the stock assessment report, and include calculations of the  
26 prospective PBR for each new stock. Despite this guidance, the Fisheries Service has neither  
27 revised the definition of the CA/OR/WA stock of humpback whales nor identified a prospective  
28

1 stock and its PBR.

2 102. Grouping multiple DPSs into the CA/OR/WA stock of humpback whales increases  
3 the stock's abundance and PBR, which is the biological threshold that triggers management action  
4 under the MMPA.

5 103. On or before December 8, 2021, the Fisheries Service finalized a technical  
6 memorandum evaluating humpback whales wintering in Central America and Southern Mexico as  
7 a demographically independent population under the MMPA.

8 104. In other cases where mortality or serious injury cannot be ascribed to a particular  
9 marine mammal stock, the entire take within the area of the stock's overlap is applied to each  
10 marine mammal stock separately. If the Fisheries Service applied that method in its negligible  
11 impact determination, the estimates of takes of Central America DPS humpbacks and perhaps the  
12 Mexico DPS would exceed PBR and not meet the negligible impact criteria.

13 *The Negligible Impact Determination Considered Only Mortality and Serious Injury Attributed to*  
14 *the Pot Fishery*

15 105. The Fisheries Service concluded the Pot Fishery would have a negligible impact on  
16 the ESA-listed humpback whales. 86 Fed. Reg. 69,627. The agency reached this determination  
17 even though since 2009, the Fisheries Service's estimate of mortality and serious injury of  
18 humpback whales from all commercial fisheries has increased almost ten-fold.

19 106. Below is a table of the estimates of (a) PBR (the biological-based threshold), (b)  
20 serious injuries and mortality of the CA/OR/WA stock of humpback whales from commercial  
21 fisheries, and (c) from all human activities.

22 <b>Notice of Final Stock Assessment Report</b>	23 <b>PBR, U.S. waters</b>	24 <b>Mortality + Serious Injury, U.S. Commercial Fisheries</b>	25 <b>All U.S. Human- Caused Mortality + Serious Injury</b>
26 71 Fed. Reg. 26,340 (May 4, 2006)	2.3	> 1.2	> 1.6
27 74 Fed. Reg. 19,530 (Apr. 29, 2009)	2.5	≥ 2.6	≥ 2.6
28 76 Fed. Reg. 34,054 (June 10, 2011)	11.3	≥ 3.2	≥ 3.6

1	80 Fed. Reg. 50,599 (Aug. 20, 2015)	11	$\geq 4.4$	$\geq 5.5$
2				
3	83 Fed. Reg. 32,093 (July 11, 2018)	11	$\geq 7.6$	9.2
4	85 Fed. Reg. 46,589 (Aug. 3, 2020)	16.7	$\geq 17.3$	42.1
5	86 Fed. Reg. 58,887 (Oct. 25, 2021)	28.7	$\geq 25.2$	48.6
6				

7 107. The Fisheries Service's draft 2021 stock assessment report said that if methods  
8 were available to correct for undetected serious injury and mortality, total fishery mortality and  
9 serious injury would likely exceed PBR.

10 108. Thus, mortality from commercial fisheries alone is likely exceeding the level of  
11 serious injury and mortality that the CA/OR/WA stock of humpback whales may withstand  
12 without impairing its ability to reach or maintain its optimum sustainable population. *See* 16  
13 U.S.C. § 1362(20).

14 109. In making its negligible impact determination, the Fisheries Service relied on the  
15 approach for determining negligible impact in Procedural Directive 02–204–02, “Criteria for  
16 Determining Negligible Impact under MMPA section 101(a)(5)(E),” which became effective on  
17 June 17, 2020.

18 110. The Fisheries Service considered only the mortality and serious injury attributed to  
19 the Pot Fishery in making the negligible impact determination. The Fishery Service failed to tally  
20 or otherwise consider mortality and serious injury (a) from unspecified pot fisheries; (b)  
21 unidentified other fisheries; and (c) state-managed pot fisheries.

22 111. In contrast, in 2013 the Fisheries Service tallied the mortality and serious injuries  
23 from state-managed fisheries in its negligible impact determination. 78 Fed. Reg. 54,553, 54,558  
24 (Sept. 4, 2013).

25 112. More than half of all commercial fisheries' humpback mortalities and serious  
26 injuries are from unidentified fisheries (13.55 annually). This is over five times the Fisheries  
27 Service's negligible impact threshold for a single fishery ( $13.55 / 2.48 = 5.46$ ). The Fisheries  
28 Service failed to tally or otherwise consider this large source of commercial fishing mortality in  
its negligible impact determination.

1 113. Because of the piecemeal approach to the negligible impact analysis, the Fisheries  
2 Service unlawfully authorized incidental take in the Pot Fishery without implementing any  
3 mitigation measures to reduce or avoid the risk that the Pot Fishery will entangle, injure, and kill  
4 humpback whales.

5 *The Fisheries Service's Determination Regarding a Take Reduction Plan*

6 114. The Fisheries Service has neither implemented nor is developing a take reduction  
7 plan for the Pot Fishery under section 118 of the MMPA.

8 115. The Fisheries Service first authorized the mortality and serious injury of ESA-  
9 listed humpback whales in the Pot Fishery in 2013, 78 Fed. Reg. 54,553. At that time the Marine  
10 Mammal Commission recommended that the Fisheries Service take affirmative steps to develop a  
11 take reduction plan for the Pot Fishery before issuing the permit. *Id.* at 54,557. But the Fisheries  
12 Service deferred the development of the take reduction plan and proceeded to issue the MMPA  
13 permit. *Id.*

14 116. While issuing the 2013 permit, the Fisheries Service noted that the Pot Fishery's  
15 biological opinion dated December 7, 2012, required the creation of a work group with a duty to  
16 propose conservation and management measures to minimize bycatch of protected species,  
17 including humpback whales. *Id.* The work group is not a substitute for a take reduction team.

18 117. The work group met four times between 2015 and 2021. At the work group's 2019  
19 meeting, it stated that it understood that "no specific actions are being taken or are imminent in  
20 terms of conservation and management measures to minimize humpback whale entanglements."  
21 At its meeting in 2021, the work group did not provide any recommendations regarding  
22 management measures for humpback whales. The Fisheries Service has not implemented any  
23 management measures to minimize the take of humpback whales in the Pot Fishery.

24 118. In 2017, the Fisheries Service proposed issuing a permit to authorize the incidental  
25 take of the CA/OR/WA stock of humpback whales in the Pot Fishery. 82 Fed. Reg. 2,954 (Jan.  
26 10, 2017). In that notice the Fisheries Service stated that it intended to continue to defer the  
27 development of a take reduction plan for the Pot Fishery. *Id.* at 2,959.







1 ESA-listed species, including humpback whales. 16 U.S.C. §1536(a)(2).

2 134. The Fisheries Service cannot rely on the unlawful 2020 Biological Opinion to meet  
3 its duty to ensure that its authorization of the Pot Fishery will not jeopardize the Central America  
4 DPS or Mexico DPS of humpback whales.

5 135. The Fisheries Service's continued authorization and management of the Pot  
6 Fishery based on the 2020 Biological Opinion is in violation of section 7(a)(2) of the ESA, 16  
7 U.S.C. § 1536(a)(2), and reliance on the 2020 Biological Opinion is arbitrary, capricious, an  
8 abuse of discretion, and not in accordance with law, contrary to the APA, 5 U.S.C. § 706(2).

9 **REQUEST FOR RELIEF**

10 For the reasons stated above, Plaintiff respectfully requests that the Court:

- 11 1. Declare that the Fisheries Service has violated and is violating the ESA, its  
12 implementing regulations, and the APA by issuing an inadequate biological opinion;
  - 13 2. Declare that the Fisheries Service has violated and is violating the MMPA, its  
14 implementing regulations, and the APA by issuing an inadequate negligible impact  
15 determination and an invalid permit to authorize incidental take of humpback whales in  
16 the Pot Fishery;
  - 17 3. Declare that the Fisheries Service is in violation of its ESA section 7(a)(2), 16  
18 U.S.C. § 1536(a)(2), duty to ensure that the agency's continued authorization and  
19 management of the Pot Fishery is not likely to jeopardize the continued existence of the  
20 Central America DPS and Mexico DPS of humpback whales;
  - 21 4. Vacate and set aside the 2020 Biological Opinion;
  - 22 5. Vacate and set aside the 2021 Permit to authorize the incidental take of humpback  
23 whales under the MMPA;
  - 24 6. Issue any appropriate injunctive relief;
  - 25 7. Award Plaintiff the costs of this litigation, including reasonable attorneys' fees;  
26 and
  - 27 8. Provide such other relief as the Court deems just and proper.
- 28

1 DATE: January 9, 2022

Respectfully Submitted,

2 /s/ Catherine Kilduff

3  
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