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 13 *and Turtle Island Restoration Network*

14 **UNITED STATES DISTRICT COURT FOR THE**  
 15 **NORTHERN DISTRICT OF CALIFORNIA**

16 CENTER FOR BIOLOGICAL DIVERSITY, a  
 17 non-profit organization, and TURTLE ISLAND  
 18 RESTORATION NETWORK, a non-profit  
 19 organization,

20 Plaintiffs,

21 v.

22 WILBUR ROSS, Secretary of Commerce, and  
 23 NATIONAL MARINE FISHERIES SERVICE,  
 24

25 Defendants.

Case No.

**COMPLAINT FOR DECLARATORY AND  
 OTHER RELIEF**

**INTRODUCTION**

1  
2 1. In this action, Plaintiffs the Center for Biological Diversity and Turtle Island  
3 Restoration Network (collectively, Plaintiffs) challenge the National Marine Fisheries Service’s  
4 issuance of a permit to fish longlines in federal waters off California. 84 Fed. Reg. 20108 (May 8,  
5 2019) (Permit).

6 2. Longlines float horizontally in the water for up to 60 miles in length with a  
7 thousand hooks dangling in the Pacific Ocean. Industrial longline fishing has pushed sea turtles  
8 toward extinction, while also decimating seabirds and marine mammals. California has prohibited  
9 longlines for decades. The Fisheries Service has prohibited them since 2004. Yet this year the  
10 Fisheries Service has authorized longlines in waters off California currently protected for  
11 leatherback conservation.

12 3. Defendants Wilbur Ross and the National Marine Fisheries Service (collectively,  
13 the Fisheries Service) issued the Permit allowing two vessels to fish using longlines between 50  
14 and 200 miles off California for two years. In doing so, the Fisheries Service failed to comply  
15 with the Endangered Species Act, 16 U.S.C. §§ 1531-1544, the National Environmental Policy  
16 Act (NEPA), 42 U.S.C. §§ 4321-4370, the Magnuson-Stevens Fishery Conservation and  
17 Management Act (Magnuson-Stevens Act), 16 U.S.C. §§ 1801-1884, and the Administrative  
18 Procedure Act, 5 U.S.C. §§ 500-596, 701-706. Specifically, the Fisheries Service prepared an  
19 inadequate biological opinion that fails to properly analyze the impacts of the Permit on  
20 threatened and endangered animals as required by the Endangered Species Act; failed to take a  
21 hard look at the numerous significant impacts that could result from the Permit, as required by  
22 NEPA; and issued the Permit in violation of the applicable standards of the Magnuson-Stevens  
23 Act.

24 4. Pacific Leatherback sea turtles are among the most imperiled of U.S. marine  
25 animals and have experienced an alarming decades-long decline. Scientists predict the Pacific  
26 leatherback may be effectively extinct within 20 years if current trends continue. Leatherback sea  
27 turtles face numerous, ongoing threats in the ocean waters off the coasts of California, Oregon  
28 and Washington, including incidental capture, injury, and death by commercial fishing gear. The

1 failure of the Fisheries Service to comply with environmental laws in issuing the Permit  
2 diminishes leatherback sea turtles' slim chance to defy predictions of extinction.

3 5. Plaintiffs therefore request that the Court hold unlawful and set aside the longline  
4 fishing Permit, the accompanying biological opinion, and the finding of no significant impact.

5 **JURISDICTION, VENUE, and INTRADISTRICT ASSIGNMENT**

6 6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal  
7 question); 28 U.S.C. § 1346 (action against the United States); 28 U.S.C. § 1361 (action to  
8 compel an officer of the United States to perform his or her duty); 28 U.S.C. §§ 2201-02 (power  
9 to issue declaratory judgments and grant relief in cases of actual controversy); 16 U.S.C. §1855(f)  
10 (review of actions under the Magnuson-Stevens Act); and 5 U.S.C. § 702 (Administrative  
11 Procedure Act).

12 7. Venue is proper in the Northern District of California pursuant to 28 U.S.C.  
13 § 1391(e), as one or more Plaintiffs reside in this judicial district, and this is a civil action in  
14 which officers or employees of the United States or an agency thereof are acting in their official  
15 capacity or under color of legal authority and a substantial part of the events or omissions giving  
16 rise to the claim occurred here.

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

19 **PARTIES**

20 **Plaintiffs**

21 9. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (the Center) is a national  
22 nonprofit conservation organization that works through science, law, and policy to secure a future  
23 for all species, great or small, hovering on the brink of extinction. The Center is dedicated to the  
24 preservation, protection, and restoration of biodiversity and ecosystems throughout the world.  
25 The Center has more than 69,500 members.

26 10. The Center's Oceans Program focuses specifically on conserving marine  
27 ecosystems, and seeks to ensure that imperiled species are properly protected from destructive  
28 practices in our oceans. In pursuit of this mission, the Center has been actively involved in

1 securing Endangered Species Act protections for imperiled marine mammals and sea turtles, and  
2 protecting leatherback sea turtles, loggerhead sea turtles, marine mammals and other wildlife from  
3 deadly and harmful entanglement in commercial fishing gear.

4 11. Center members and staff live in and regularly visit ocean waters, bays, beaches  
5 and other coastal areas to observe, photograph, study and otherwise enjoy humpback whales and  
6 their habitat. Center members have an interest in leatherback sea turtles, loggerhead sea turtles,  
7 marine mammals, and other wildlife and their Pacific Ocean habitat; including waters off  
8 California, Oregon, and Washington. For example, Center members frequently sail, kayak and go  
9 on whale watching tours in Gulf of the Farallones, Half Moon Bay, Monterey Bay, and Santa  
10 Barbara Channel to look for and photograph sea turtles, marine mammals, including Guadalupe  
11 fur seals, and other wildlife. Center members and staff derive recreational, spiritual, professional,  
12 scientific, educational and aesthetic benefit from the presence of sea turtles, seals, and their  
13 habitat. The Center's members and staff intend to continue to use and enjoy the habitat of sea  
14 turtles and marine mammals frequently and on an ongoing basis in the future.

15 12. Plaintiff TURTLE ISLAND RESTORATION NETWORK (Turtle Island) is a  
16 nonprofit 501(c)(3) corporation with its principal place of business in Olema, California, that  
17 works through scientific research, legal and policy advocacy, education, and restoration efforts to  
18 protect marine and riparian wildlife globally. Turtle Island's organizational mission is dedicated  
19 to the preservation, protection, and restoration of marine biodiversity, native species, and  
20 ecosystems. Turtle Island's approximately 160,000 supporters and members throughout the  
21 United States and the world share a commitment to the study, protection, enhancement,  
22 conservation, and preservation of the world's marine and terrestrial ecosystems, including  
23 protection of sea turtles and marine mammals.

24 13. Turtle Island has devoted considerable resources to studying and communicating  
25 the threats to a wide range of threatened and endangered marine species. For example, Turtle  
26 Island has actively advocated on all levels to protect leatherback and loggerhead sea turtles and  
27

1 marine mammals and other species from both the use of harmful fishing gear and attempts to  
2 ramp up fishery effort.

3 14. Turtle Island's members and staff have researched, studied, observed, and sought  
4 protection for many federally-listed threatened and endangered species, including leatherback and  
5 loggerhead sea turtles and marine mammals. Turtle Island's members and staff regularly use, and  
6 plan to continue to use, waters of the Pacific Ocean off California and its wildlife for observation,  
7 research, aesthetic enjoyment, and other recreational, scientific, and educational activities. Turtle  
8 Island's members and staff derive educational, scientific, recreational, conservation, spiritual,  
9 commercial, and aesthetic benefits from observing, photographing, producing film documentaries,  
10 and providing naturalist-led interpretive activities to view leatherback sea turtles, marine  
11 mammals, and other marine species in the wild. Turtle Island brings this action on behalf of itself  
12 and its adversely affected members and staff.

13 15. An integral aspect of the Plaintiffs' members' use and enjoyment of the sea turtles  
14 and marine mammals is the expectation and knowledge that the species are in their native habitat.  
15 For this reason, Plaintiffs' use and enjoyment of sea turtles and marine mammals is entirely  
16 dependent on the continued existence of healthy, sustainable populations in the habitat off the  
17 Pacific Coast. The Fisheries Service's failure to comply with applicable environmental laws  
18 deprives sea turtles and marine mammals of statutory protections that are vitally important to the  
19 species survival and eventual recovery. The Fisheries Service's failure to prepare an adequate  
20 biological opinion under the Endangered Species Act and an adequate environmental assessment  
21 or an environmental impact statement under NEPA diminishes the aesthetic, recreational,  
22 spiritual, scientific, and other interests of Plaintiffs and their members because leatherback and  
23 loggerhead sea turtles and marine mammals are more vulnerable to harm and less likely recover  
24 absent the protections that result from those actions. Plaintiffs are therefore injured because  
25 Plaintiffs' use and enjoyment of the sea turtles and seals, and those areas inhabited by them, are  
26 threatened by the Fisheries Service's issuance of the longline fishing Permit without compliance  
27 with those environmental laws.  
28



1 methods and procedures which are necessary to bring any endangered species or threatened  
2 species to the point at which the measures provided pursuant to this chapter are no longer  
3 necessary.” *Id.* § 1532(3).

4 22. Section 7(a)(2), 16 U.S.C. § 1536(a)(2), is a critical component of the statutory and  
5 regulatory scheme to conserve endangered and threatened species. It requires that every federal  
6 agency must determine whether its actions “may affect” any endangered or threatened species. If  
7 so, the action agency must formally consult with the Fisheries Service as part of its duty to “insure  
8 that [its] action is . . . not likely to jeopardize the continued existence” of that species. *Id.*  
9 § 1536(a)(1), (2); 50 C.F.R. § 402.14 (1986). The term “jeopardize” is defined as an action that  
10 “reasonably would be expected . . . to reduce appreciably the likelihood of both the survival and  
11 recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of  
12 that species.” 50 C.F.R. § 402.02 (1986).

13 23. At the completion of consultation, the Fisheries Service will issue a biological  
14 opinion that determines if the agency action is likely to jeopardize the species. 16 U.S.C.  
15 §1536(b)(3)-(4); 50 C.F.R. § 402.14(h) (1986). In formulating the biological opinion, the  
16 Fisheries Service must use only “the best scientific and commercial data available.” 16 U.S.C.  
17 § 1536(a)(2).

18 24. The ESA generally prohibits any person, including both private persons and  
19 federal agencies, from “taking” any endangered or threatened species, such as, in this case,  
20 leatherback sea turtles or loggerhead sea turtles. *Id.* § 1538(a)(1). The term “take” is defined by  
21 the Endangered Species Act to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture,  
22 or collect, or attempt to engage in any such conduct.” *Id.* § 1532(19).

23 25. Leatherback sea turtles, olive ridley sea turtles, and the North Pacific Ocean  
24 distinct population segment of loggerhead sea turtles are listed as endangered under the  
25 Endangered Species Act. 50 C.F.R. § 224.101 (1970, 1978, 2011).

26 26. The Guadalupe fur seal is listed as a threatened species under the Endangered  
27 Species Act. 50 C.F.R. § 223.102 (1985). The prohibition on the take of endangered species under  
28 the Endangered Species Act applies to the threatened Guadalupe fur seal, with narrow exceptions.

1 *Id.* § 223.201 (1985); 16 U.S.C. § 1538(a).

## 2 **National Environmental Policy Act**

3 27. Congress enacted the National Environmental Policy Act (NEPA) to “promote  
4 efforts which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321. To achieve  
5 this goal, NEPA requires federal agencies, including the Fisheries Service, to fully consider and  
6 disclose the environmental consequences of an agency action before proceeding with that action.  
7 *See id.* § 4332(2)(C); 40 C.F.R. §§ 1501.2, 1502.5 (1978). An agency’s evaluation of  
8 environmental consequences must be based on scientific information that is both accurate and of  
9 “high quality.” 40 C.F.R. § 1500.1(b) (1978). In addition, federal agencies must notify the public  
10 of proposed projects and allow the public the chance to comment on the environmental impacts of  
11 their actions. *See id.* § 1506.6 (1978). “Accurate scientific analysis, expert agency comments, and  
12 public scrutiny are essential to implementing NEPA.” *Id.* § 1500.1(b) (1978).

13 28. The cornerstone of NEPA is the environmental impact statement (EIS). An EIS is  
14 required for all “major Federal actions significantly affecting the quality of the human  
15 environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4 (1978). It must provide a “full and fair  
16 discussion of significant environmental impacts and . . . inform decision-makers and the public of  
17 the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality  
18 of the human environment.” 40 C.F.R. § 1502.1 (1978).

19 29. Regulations describe numerous factors indicating that an action significantly  
20 affects the environment, including the degree to which the action: sets precedent for future  
21 actions; affects ecologically critical areas; impacts endangered or threatened species; threatens a  
22 violation of Federal, State, or local law; has unknown effects; has effects likely to be highly  
23 controversial; or has cumulatively significant impacts. *Id.* § 1508.27 (1978).

24 30. NEPA’s regulations provide that an agency may first prepare an Environmental  
25 Assessment (EA) aimed at determining whether the environmental impact of a proposed action is  
26 “significant,” warranting preparation of an EIS. *Id.* § 1501.3 (1978). If, pursuant to the EA, an  
27 agency determines that an EIS is not required, it must issue a “Finding of No Significant Impact”  
28 (FONSI) that presents the reasons why the proposed agency action will not have a significant



1 impact on the human environment. *Id.* §§ 1501.4(e) (1978), 1508.13 (1978). The EA must  
2 “provide sufficient evidence and analysis for determining whether” a FONSI is sufficient to  
3 satisfy NEPA. *Id.* § 1508.9(a)(1) (1978). An agency may only issue a FONSI for actions with no  
4 significant impact on the human environment. *Id.* § 1508.13 (1978). If an action may have a  
5 significant effect on the environment, or if there are substantial questions as to whether it may, the  
6 agency must prepare an EIS.

7 31. EAs and EISs must also include a reasonable range of alternatives, 42 U.S.C.  
8 § 4332(2)(C)(iii), (E), 40 C.F.R. § 1508.9(b) (1978), and provide “a clear basis for choice among  
9 options by the decisionmaker and the public.” 40 C.F.R. § 1502.14 (1978).

#### 10 **Magnuson-Stevens Fishery Conservation and Management Act**

11 32. The Magnuson-Stevens Act governs fishing by U.S. vessels. 16 U.S.C. § 1801(a).

12 33. The Fisheries Service may authorize – for limited testing, exploratory fishing, or  
13 other reasons – fishing that would otherwise be prohibited. *Id.* § 1867(d); 50 C.F.R. § 600.745(b)  
14 (1996). The permit, known as an “exempted fishing permit,” exempts a vessel only from  
15 regulations specified in the permit; all other applicable regulations remain in effect. 50 C.F.R.  
16 § 600.745(b) (1996).

17 34. The Magnuson-Stevens Act provides for judicial review of the Fisheries Service’s  
18 actions implementing a fishery management plan. 16 U.S.C. § 1855(f).

#### 19 **Administrative Procedure Act**

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

#### 26 **California Environmental Laws**

27 36. California prohibits the use of fishing lines more than 900 feet in length. Cal. Fish  
28 & Game Code § 9028.

1           37.     The leatherback sea turtle is California’s official marine reptile. Cal. Gov’t Code  
2 § 422.5. California has designated October 15 as Pacific Leatherback Sea Turtle Conservation  
3 Day, and urges state and federal agencies to take proactive conservation measures and prevent  
4 further threats to Pacific leatherback sea turtles and their habitats. *Id.* § 7593.5.

5           38.     The Guadalupe fur seal is a California “fully protected mammal,” which means  
6 that it may not be taken or possessed at any time, except for necessary scientific research. Cal.  
7 Fish & Game Code § 4700. The Guadalupe fur seal is listed as “threatened” under the California  
8 Endangered Species Act. Cal. Code Regs. tit. 14, § 670.5.

### 9                                   **FACTUAL AND PROCEDURAL BACKGROUND**

10           39.     Fishing for swordfish and tuna with longlines is banned by both the Fisheries  
11 Service, 50 CFR § 660.712 (2004), and California law, Cal. Fish & Game Code § 9028, to protect  
12 sea turtles from being incidentally caught on hooks.

13           40.     The existing swordfish fishery off California uses mile-long drift gillnets and has a  
14 long, embattled history of taking endangered sea turtles and marine mammals. Large area closures  
15 and mitigation measures are in place for the swordfish drift gillnet fishery to reduce bycatch (i.e.  
16 incidental catch) of sea turtles and marine mammals. 50 C.F.R. §§ 229.31 (1997), 660.713(c)  
17 (2004).

18           41.     Mitigation measures have fallen short. Thus the Fisheries Service has faced  
19 continued efforts to reduce bycatch of endangered sea turtles and whales in the Pacific Ocean  
20 swordfish fishery. *See Oceana, Inc. v. Ross*, No. 2:17-cv-05146-RGK-JEM, 2018 U.S. Dist.  
21 LEXIS 185369 (C.D. Cal. Oct. 24, 2018) (holding that the Fisheries Service exceeded its statutory  
22 authority when it did not publish regulations proposed as part of a continued effort to combat  
23 bycatch in the Pacific Ocean) (appeal dismissed, *Oceana, Inc. v. Ross*, No. 19-55021, 2019 U.S.  
24 App. LEXIS 12094 (9th Cir. Apr. 23, 2019)).

25           42.     Against this backdrop, on May 8, 2019, the Fisheries Service issued the Permit, i.e.  
26 authorized an exemption from its longline prohibition for two California-registered vessels to fish  
27 between 50 and 200 miles from shore for two years.

28           43.     The Fisheries Service anticipates that these vessels will catch up to two loggerhead

1 sea turtles, resulting in one death; up to two leatherback sea turtles, resulting in one death; up to  
2 one olive ridley sea turtle, resulting in one death, and up to one Guadalupe fur seal, resulting in  
3 one death.

4 44. Longline fishing distributes numerous hooks over a large ocean area to catch  
5 swordfish or tuna. A monofilament mainline up to 60 nautical miles long is set horizontally at a  
6 preferred depth in the water column, suspended by floats spaced at regular intervals. Branchlines  
7 are clipped to the mainline at regular intervals, and each branchline carries a single baited hook.  
8 On average, about one percent of the total hooks set catch a marketable swordfish or tuna.

9 45. When set at less than 330 feet deep, the longlines are “shallow-set” to target  
10 swordfish, but also incidentally catch marlin, albatross, Guadalupe fur seals, and sea turtles. When  
11 set deeper, at 900 to 1300 feet, the longlines are “deep-set” to target tuna. While deep-set  
12 longlines incidentally catch fewer sea turtles on a per-hook basis, U.S. fishermen set far more  
13 deep-set hooks offshore in the Pacific Ocean and those are deadlier because of the higher  
14 probability of turtles drowning.

15 46. The Fisheries Service prohibited the use of longlines along the U.S. West Coast out  
16 to 200 miles to protect loggerhead sea turtles in 2004. 50 CFR § 660.712 (2004).

17 47. Since 2004 and the prohibition on the use of longlines off the U.S. West Coast,  
18 three separate times the Fisheries Service has proposed an exempted fishing permit for a longline  
19 fishery. The California Coastal Commission has requested to review the permit under the Coastal  
20 Zone Management Act each time. In 2007, the National Oceanic and Atmospheric Administration  
21 (NOAA) approved California’s request to review the permit for longline fishing; the permit  
22 applicant withdrew the application before the California Coastal Commission completed its  
23 review. In 2008, the same applicant applied to fish using longlines 50 to 200 nautical miles  
24 offshore; this time NOAA denied California’s requested review but again the applicant withdrew.

25 48. Then in 2015, the Fisheries Service requested public comment on a proposal for  
26 one vessel to use deep-set and shallow-set longline gear in the exclusive economic zone (within  
27 200 nautical miles from shore) off the U.S. West Coast for two years. 80 Fed. Reg. 29662 (May  
28 22, 2015) (proposed permit).

1           49.     On June 19, 2015, the California Coastal Commission formally notified NOAA  
2 that it intended to review the proposed permit under the Coastal Zone Management Act and  
3 requested permission to proceed with federal consistency review. NOAA denied the California  
4 Coastal Commission’s request on March 28, 2019.

5           50.     On May 8, 2019, the Fisheries Service issued the Exempted Fishing Permit for two  
6 vessels fishing deep-set and shallow-set longlines between 50 and 200 miles off California for  
7 two years. 84 Fed. Reg. 20108 (May 8, 2019).

8           51.     In reviewing the proposed permit, the Fisheries Service prepared and issued a  
9 biological opinion under section 7 of the Endangered Species Act on July 11, 2018 (the 2018  
10 Biological Opinion). It anticipated that the fishing under the Permit will result in the death of a  
11 western Pacific leatherback sea turtle, a North Pacific Ocean loggerhead sea turtle, an olive ridley  
12 sea turtle, and a Guadalupe fur seal, but not jeopardize the animals’ continued existence.

13           52.     The Fisheries Service also issued an EA and FONSI on April 19, 2019.

14           53.     Pacific leatherback sea turtles are one of eight species the Fisheries Service has  
15 identified as most at risk of extinction. From the 1980s through 2011, the West Pacific  
16 leatherback population declined at a rate of about 6% per year. There are now only an estimated  
17 562 female, nesting adults in the population, assuming the decades-long annual declining trend  
18 has continued since 2011. Based on that trend, scientists predicted in 2013 that there would be  
19 about 260 adult females in 2040, i.e. a population so low that leatherbacks could not make a  
20 comeback.

21           54.     In 2012 the Fisheries Service designated approximately 16,910 square miles of  
22 ocean off the California coast as leatherback “critical habitat,” i.e. essential to the conservation of  
23 the species. 77 Fed. Reg. 4170 (Jan. 26, 2012).

24           55.     In the 2018 Biological Opinion the Fisheries Service failed to consider the impact  
25 to the West Pacific leatherback sea turtle population from deaths due to fisheries like gillnets and  
26 pot gear, ship strikes, and other human-caused threats that occur both within that critical habitat  
27 and outside of it.

28           56.     Endangered North Pacific Ocean loggerheads spend the majority of their lives in

1 the ocean, migrating over 7,500 miles between nesting sites in Japan and the South China Sea,  
2 and at least two primary feeding grounds, one off the coast of Mexico and Southern California  
3 and one in the central North Pacific, north of Hawaii. The North Pacific population of loggerhead  
4 sea turtles was reclassified from threatened to endangered in 2011. 76 Fed. Reg. 58868 (Sept. 22,  
5 2011). The Fisheries Service concluded that incidental capture in commercial fishing gear is a  
6 significant threat to the survival of the species. *Id.* at 58907.

7 57. Threatened Guadalupe fur seals have been suffering from an “unusual mortality  
8 event” beginning in January 2015, when strandings on the California coast were eight times  
9 higher than the historical average. Nearly 100 stranded in 2015; over 80 have stranded in 2019  
10 through May 31st.

## 11 **CLAIMS FOR RELIEF**

### 12 **FIRST CLAIM FOR RELIEF**

#### 13 **Violation of the Endangered Species Act and Administrative Procedure Act**

14 58. Plaintiffs reallege and incorporate by this reference each and every allegation set  
15 forth in this Complaint.

16 59. The 2018 Biological Opinion is a final agency action within the meaning of the  
17 APA.

18 60. The 2018 Biological Opinion the Fisheries Service prepared to assess the Permit’s  
19 impacts upon threatened and endangered species is arbitrary, capricious, contrary to law, and  
20 invalid, for reasons including but not limited to those alleged below.

21 61. The 2018 Biological Opinion is arbitrary, capricious and contrary to law in that it  
22 is not based on the best scientific and commercial data available. The Fisheries Service entirely  
23 ignored relevant factors and failed to analyze and develop projections based on information and  
24 methodology that was available, in violation of the Endangered Species Act and the APA. 16  
25 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14 (1986); 5 U.S.C. § 706(2)(A).

26 62. The 2018 Biological Opinion is arbitrary, capricious and contrary to law in that it  
27 fails to determine whether the action, in combination with the environmental baseline and  
28 cumulative effects, will jeopardize the species, in violation of the Endangered Species Act and the

1 APA. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14 (1986); 50 C.F.R. § 402.02 (1986); 5 U.S.C.  
2 § 706(2)(A).

3 **SECOND CLAIM FOR RELIEF**

4 **Violations of National Environmental Policy Act and Administrative Procedure Act**

5 63. Plaintiffs re-allege and incorporate by reference, as if fully set forth herein, each  
6 and every allegation in the preceding paragraphs of this Complaint.

7 64. NEPA requires that an agency fully consider and disclose the environmental  
8 consequences of an agency action before proceeding with that action. 42 U.S.C. § 4332(2)(C).  
9 NEPA requires a federal agency to prepare an EIS for all “major Federal actions significantly  
10 affecting the quality of the human environment.” *Id.* NEPA also requires that an agency consider  
11 the cumulative impacts associated with the action, 40 C.F.R. § 1508.7 (1978), and a reasonable  
12 range of alternatives to the proposed action. *Id.* §§ 1502.1, 1508.9(b) (1978); 42 U.S.C.  
13 § 4332(2)(C)(iii), (E).

14 65. The Permit is a major federal action within the meaning of NEPA.

15 66. The Permit implicates several of the NEPA significance factors for when an EIS is  
16 required: it may affect geographically unique areas; it is highly controversial; it involves highly  
17 uncertain or unique or unknown risks; it may establish a precedent for future actions with  
18 significant effects; it has cumulatively significant impacts; threatens a violation of Federal, State,  
19 or local law; and it may adversely affect threatened or endangered species. 40 C.F.R. § 1508.27  
20 (1978).

21 67. The Fisheries Service’s failure to prepare an EIS before issuing the Permit  
22 constitutes an agency action unlawfully withheld or unreasonably delayed, in violation of the  
23 APA. 5 U.S.C. § 706(1). Alternatively, the Fisheries Service’s decision not to prepare an  
24 Environmental Impact Statement was arbitrary, capricious, an abuse of discretion, not in  
25 accordance with NEPA and its implementing regulations, and/or without observance of procedure  
26 required by law, in violation of the APA. *Id.* § 706(2).

27 68. The Fisheries Service’s environmental assessment failed to discuss the factors that  
28 an agency must consider. In addition, despite having been urged to consider do so by Plaintiffs,

1 the Fisheries Service failed and refused to analyze the cumulative impacts on leatherback,  
2 loggerhead and olive ridley sea turtles and Guadalupe fur seals. The Fisheries Service failed to  
3 consider a reasonable range of alternatives to mitigate the impacts on sea turtles and Guadalupe  
4 fur seals. The Fisheries Service's EA and a FONSI are arbitrary, capricious, an abuse of discretion  
5 and not in accordance with NEPA and its implementing regulations, and/or without observance of  
6 procedure required by law, in violation of the APA. *Id.*

### 7 **THIRD CLAIM FOR RELIEF**

#### 8 **Violation of Magnuson-Stevens Fishery Conservation and Management Act and** 9 **Administrative Procedure Act**

10 69. Plaintiffs re-allege and incorporate by reference, as if fully set forth herein, each  
11 and every allegation in the preceding paragraphs of this Complaint.

12 70. For the reasons set forth above, the Permit is not consistent with applicable law.  
13 The Fisheries Service's decision to issue the Permit in spite of its inconsistency with applicable  
14 law violates the Magnuson-Stevens Act and is arbitrary, capricious, an abuse of discretion, not in  
15 accordance with law, and/or without observance of procedure required by law within the meaning  
16 of the APA, 5 U.S.C. § 706(2).

### 17 **REQUEST FOR RELIEF**

18 For the reasons stated above, Plaintiffs respectfully request that the Court:

19 1. Declare that the Fisheries Service has violated and is violating the Endangered  
20 Species Act, its implementing regulations, and the Administrative Procedure Act by  
21 issuing an inadequate biological opinion;

22 2. Declare that the Fisheries Service has violated and is violating the National  
23 Environmental Policy Act, its implementing regulations, and the Administrative Procedure  
24 Act by failing to issue an EIS and/or issuing an inadequate environmental assessment and  
25 finding of no significant impact;

26 3. Declare that the Fisheries Service has violated and is violating the Magnuson-  
27 Stevens Act and the Administrative Procedure Act by issuing the Permit;

28 4. Vacate and set aside the 2018 Biological Opinion;

- 1 5. Vacate and set aside the EA and FONSI;
- 2 6. Vacate and set aside the Permit;
- 3 7. Issue any appropriate injunctive relief;
- 4 8. Award Plaintiffs the costs of this litigation, including reasonable attorney's fees;
- 5 and
- 6 9. Provide such other relief as the Court deems just and proper.

7 DATE: June 6, 2019

8 Respectfully Submitted,

9 /s/ Catherine Kilduff

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