

1 Michael R. Lozeau (CA State Bar No. 142893)
Brian B. Flynn (CA State Bar No. 314005)
2 LOZEAU DRURY LLP
1939 Harrison Street, Suite 150
3 Oakland, CA 94612
Tel: (510) 836-4200
4 Fax: (510) 836-4205
E-mail: michael@lozeaudrury.com
5 brian@lozeaudrury.com

6 M. Benjamin Eichenberg (CA State Bar No. 270893)
SAN FRANCISCO BAYKEEPER
7 1736 Franklin Street, Suite 800
Oakland, CA 94612
8 Tel: (510) 735-9700
Fax: (510) 735-9160
9 E-mail: ben@baykeeper.org

10 Attorneys for Plaintiff
SAN FRANCISCO BAYKEEPER
11

12 UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 OAKLAND DIVISION
15

16 SAN FRANCISCO BAYKEEPER, a non-profit
17 corporation,

18 Plaintiff,

19 v.

20 UNITED STATES FISH AND WILDLIFE
SERVICE, a United States Government Agency;
21 MARTHA WILLIAMS, in her official capacity
as Acting Director of U.S. Fish and Wildlife
22 Service; and DEB HAALAND, in her official
capacity as Secretary of the U.S. Department of
23 the Interior;

24 Defendants.
25
26
27
28

Civil No.

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

(Administrative Procedure Act, Endangered
Species Act)

1 Plaintiff SAN FRANCISCO BAYKEEPER (“Baykeeper”), by and through its counsel, alleges
2 as follows:

3 **INTRODUCTION**

4 1. Baykeeper brings this action for declaratory and injunctive relief against the UNITED
5 STATES FISH AND WILDLIFE SERVICE (“Service”), MARTHA WILLIAMS in her official
6 capacity as Acting Director of U.S. Fish and Wildlife Service, and DEB HAALAND in her official
7 capacity as U.S. Secretary of the Interior, (collectively, “Defendants”) pursuant to the judicial review
8 provision of the Administrative Procedure Act (“APA”), 5 U.S.C. § 702 and 16 U.S.C.
9 1533(B)(3)(C)(ii).

10 2. Baykeeper seeks a declaratory judgment, injunctive relief, and the award of costs,
11 including reasonable attorneys’ fees, for Defendants’ determinations in the Service’s most recent
12 Candidate Notice of Review published on November 16, 2020 (“2020 CNOR”), 85 Fed. Reg. 73164-
13 73179, that the Longfin Smelt (*Spirinchus thaleichthys*) (San Francisco Bay-Delta distinct vertebrate
14 population segment) (“Longfin Smelt DPS”) warranted listing as either an endangered or threatened
15 species under the Endangered Species Act (“ESA”) but (1) that listing of the Longfin Smelt DPS was
16 precluded by higher priority listing actions and (2) that expeditious progress is being made by the
17 Service to add or remove species from the endangered and threatened species lists.

18 3. The Longfin Smelt DPS is on the brink of extinction. The Service has recognized the
19 dire plight of the Longfin Smelt DPS since 2012 when, after several years of litigation, the agency
20 determined that listing was warranted. However, beginning in 2012 and carrying forward through the
21 2020 CNOR, Defendants have claimed that listing the Longfin Smelt DPS has been precluded by other
22 pending listing proposals. As a result, the Longfin Smelt DPS has languished on the Service’s listing
23 candidate list for almost a decade. During that time, none of the safeguards and protections afforded
24 listed species under ESA have been brought to bear on the dramatic social and environmental forces
25 that continue to drive the Longfin Smelt’s slide toward extinction.

26 4. Beginning in 2016, the Service has announced its intention to complete the listing
27 process for the Longfin Smelt DPS by specific fiscal years. As each of those fiscal years has come and

1 gone, the Service has repeatedly pushed off completing the listing. In its 2016 Workplan, the Service
2 scheduled the listing to be completed by FY 2019. In its 2019 Workplan, the Service indicated it
3 would finish the Longfin Smelt listing by FY 2020 and included the work in its budget at that time.
4 However, in 2020, its workplan pushed off the listing for another two years until FY 2022. Given the
5 Service's budgeting and rulemaking priority for the Longfin Smelt, the Service has failed to show how
6 other higher priority listings could have caused the most recent delay.

7 5. Nor can the delay in listing the Longfin Smelt be justified by the required showing
8 under ESA that the Service is making expeditious progress in adding qualified species to the
9 endangered and threatened lists or removing successfully protected species. Instead, over the last four
10 years, the average number of species for which final listing actions were completed by the Service has
11 dropped precipitously by over 80 percent from the preceding five-year period. The average number of
12 species for which the Service has issued 90-day findings on petitions for listing has dropped by over
13 90 percent during those same time periods. Looking at the rate of all species-specific listing actions,
14 the number of actions between 2017 and 2020 dramatically declined by over 77 percent. Slower
15 progress is not expeditious progress.

16 6. By arbitrarily delaying the listing of the Longfin Smelt, Defendants are denying the
17 Longfin Smelt the only protections capable of counteracting the powerful interests arrayed against this
18 critically endangered fish. Whether the Longfin Smelt will be extirpated from the San Francisco Bay
19 Estuary is directly related to whether various resource agencies will be required to allow sufficient
20 water flows through the Sacramento-San Joaquin River Delta. As long as Defendants continue to
21 arbitrarily delay adding the Longfin Smelt to the threatened or endangered lists, the powerful entities
22 and interests that are diverting and diminishing the Smelt's aquatic habitat will continue to also drive
23 the Longfin Smelt further towards extermination.

24 7. Plaintiff Baykeeper brings this lawsuit to challenge Defendants' unjustified delay in
25 providing the full protections of ESA to the Longfin Smelt.

1 **JURISDICTION AND VENUE**

2 8. This action is brought pursuant to the APA, 5 U.S.C. §§ 701-706. This Court has
3 jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 2201 (declaratory relief).

4 9. Venue is proper in the Northern District of California pursuant to 28 U.S.C. § 1391(e)
5 as Baykeeper is incorporated in California and its headquarters are located within the district,
6 Baykeeper's members reside in this district, and no real property is involved in this action.

7 **INTRADISTRICT ASSIGNMENT**

8 10. Intradistrict assignment of this matter to the Oakland Division of the Court is
9 appropriate pursuant to Civil Local Rule 3-2(e) because the events or omissions which give rise to
10 Baykeeper's claims occurred in Alameda County.

11 **PARTIES**

12 11. Plaintiff SAN FRANCISCO BAYKEEPER is a non-profit public benefit corporation
13 organized under the laws of the State of California with its office located at 1736 Franklin Street, Suite
14 800, Oakland, California, 94612.

15 12. Baykeeper has approximately 5,000 members and supporters who live and/or recreate
16 in and around the San Francisco Bay area. Baykeeper's mission is to defend San Francisco Bay from
17 the biggest threats and hold polluters and government agencies accountable to create healthier
18 communities and help wildlife thrive. Baykeeper patrols on the water, investigates and stops polluters,
19 and strengthens laws that protect the Bay. Baykeeper is dedicated to preserving, protecting, and
20 defending the environment, wildlife, and natural resources of San Francisco Bay and its tributaries for
21 the benefit of its ecosystems and communities. Baykeeper furthers its goals through education,
22 advocacy, restoration, and directly initiates enforcement of environmental laws on behalf of itself and
23 its members.

24 13. Baykeeper and its members are concerned with, and have concrete interests in, the
25 conservation of imperiled species, including the Longfin Smelt DPS.

26 14. On behalf of itself and its members, Baykeeper has an interest in the effective
27 implementation of the ESA and the timely listing of endangered or threatened species, including the
28

1 timely listing of imperiled species for which listing petitions have been submitted.

2 15. Baykeeper's members include citizens, taxpayers, property owners, and residents, with
3 recreational, educational, scientific, conservation, aesthetic, and/or spiritual interests in the species at
4 issue in this suit and are similarly interested in the health of these species' habitat.

5 16. The interests of Baykeeper and its members in the Longfin Smelt DPS and its habitat
6 are dependent upon the persistence of healthy and sustainable populations of the species in the wild.
7 Unless the Longfin Smelt DPS is promptly protected under the ESA, it will continue to decline and
8 likely will go extinct. Thus, the interests of Baykeeper's members have been, are being, and will
9 continue to be adversely affected by Defendants' failure to protect the Longfin Smelt DPS under the
10 ESA.

11 17. Defendants' failure to protect the Longfin Smelt DPS under the ESA is also subverting
12 Baykeeper's core mission to protect the Bay and its wildlife. As a consequence of Defendant's
13 unlawful delay in protecting Longfin Smelt, Baykeeper has been compelled to expend resources
14 (exclusive of this litigation) on alternative means of protecting the species, which has diverted time
15 and resources that could and would have been spent on other activities that are central to Baykeeper's
16 mission.

17 18. Continuing commission of the acts and omissions alleged herein will irreparably harm
18 Baykeeper and one or more of its members, for which harm they have no plain, speedy or adequate
19 remedy at law.

20 19. Baykeeper has one or more members who use, explore, research, and recreate in areas
21 impacted by the Longfin Smelt DPS decision herein at issue and could sue in their own right.
22 Baykeeper's members are suffering recreational, aesthetic, scientific, conservational, or other
23 environmental injuries due to Defendants' unlawful decision and delay in adding the Longfin Smelt
24 to the ESA's endangered or threatened species list. Baykeeper has one or more members that
25 endeavor to observe Longfin Smelt and have ongoing interests in the species and its habitat.
26 Baykeeper has one or more members who have concrete plans to visit these species' habitats and try
27 to observe them. Defendants' actions have harmed and continue to harm Baykeeper's members'

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.