

1 Catherine Kilduff (CA Bar No. 256331)
2 Kristen Monsell (CA Bar No. 304793)
3 Miyoko Sakashita (CA Bar No. 239639)
4 CENTER FOR BIOLOGICAL DIVERSITY
5 1212 Broadway, St. #800
6 Oakland, CA 94612
7 Phone: (510) 844-7100
8 Facsimile: (510) 844-7150
9 ckilduff@biologicaldiversity.org
10 kmonsell@biologicaldiversity.org
11 miyoko@biologicaldiversity.org

12 *Attorneys for Plaintiff Center for Biological Diversity*

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

CENTER FOR BIOLOGICAL DIVERSITY,
a non-profit organization,

Plaintiff,

v.

GINA RAIMONDO, Secretary of Commerce,
and NATIONAL MARINE FISHERIES
SERVICE,

Defendants.

Case No. 22-

**COMPLAINT FOR DECLARATORY AND
OTHER RELIEF**

INTRODUCTION

1
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.
28

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