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UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HAWAII LONGLINE ASSOCIATION,) CIVIL NO. CV 10-00044 HG LEK
Plaintiff,) COMPLAINT FOR
vs.) DECLARATORY AND
NATIONAL MARINE FISHERIES) INJUNCTIVE RELIEF; SUMMONS
SERVICE; and GARY LOCKE,)
SECRETARY OF THE UNITED)
STATES DEPARTMENT OF)
COMMERCE,)
Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. SUMMARY OF ACTION

1. This civil action is brought by Plaintiff Hawaii Longline Association because Defendant National Marine Fisheries Service (“NMFS”) has failed to issue required determinations and authorizations pursuant to Section 101(a)(5)(E) of the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. § 1371(a)(5)(E), and Section 7(b)(4) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(b)(4), authorizing the incidental, but not the intentional, taking of humpback whales in the Hawaii-based commercial shallow-set (swordfish target) longline fishery (“shallow-set fishery”).

2. Defendants’ failure to issue an MMPA § 101(a)(5)(E) determination, and Defendants’ related failure to issue incidental take authorization pursuant to ESA § 7(b)(4), are violations of mandatory duties pursuant to the MMPA and the ESA, constitute agency action unreasonably delayed and unlawfully withheld in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(1), and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of APA § 706(2).

3. Plaintiff seeks a declaration that Defendants have unreasonably delayed and unlawfully withheld agency action in violation of APA § 706(1), and that the failure to issue MMPA § 101(a)(5)(E) and ESA § 7(b)(4) decisions and authorizations is arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law, in violation of the MMPA, ESA and APA § 706(1). In addition, Plaintiff seeks to enjoin NMFS to make an MMPA § 101(a)(5)(E) determination, and to issue an incidental take authorization pursuant to ESA § 7(b)(4), in accord with an established, judicially-supervised, schedule.

II. PARTIES

4. Plaintiff Hawaii Longline Association (“HLA”) is a § 501(c)(6) non-profit corporation, which represents owners and crews of vessels that participate in the Hawaii-based commercial longline fisheries, as well as suppliers, dealers and other associated businesses. With more than 200 members, HLA represents all of the longline vessels that participate in the shallow-set fishery. Association members hold federal “limited entry” permits issued by NMFS allowing them to participate in the Hawaii-based commercial longline fisheries. HLA and its members are committed to the protection of the environment of the Central and Western Pacific Ocean, and to ensuring that the living marine resources of the Central and Western Pacific are managed and conserved to enhance the health and productivity of the ecosystem.

5. Defendant National Marine Fisheries Service is an agency of the National Oceanographic and Atmospheric Administration (“NOAA”), United States Department of Commerce. Among its duties, NMFS is responsible for managing commercial marine fisheries to ensure sustainable harvests that provide

the greatest overall benefit to the nation pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”), for administration of the ESA with respect to marine species that are listed as threatened or endangered under that statute, and for administration of the MMPA with respect to incidental take of marine species in commercial fisheries.

6. Defendant Gary Locke is the Secretary of the United States Department of Commerce. Secretary Locke directs all business of the Department of Commerce, including NOAA and its agency, NMFS. Through these agencies, Secretary Locke is, among other duties and obligations, responsible for administering the MMPA and the ESA with respect to humpback whales, and for promoting effective management and stewardship of the nation’s fisheries resources and assets to ensure sustainable economic opportunities.

III. JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 701-706 (APA), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory judgments) and 28 U.S.C. § 2202 (injunctive relief).

8. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) because Defendants reside in this district.

IV. STATUTORY FRAMEWORK

The Administrative Procedure Act

9. The APA authorizes courts reviewing agency action to enjoin an agency to perform mandatory agency action that has been unreasonably delayed or unlawfully withheld. 5 U.S.C. § 706(1). The APA also authorizes courts to hold unlawful and to set aside agency action, findings and conclusions that are arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

The Marine Mammal Protection Act

10. Sections 101(a)(5)(E), 117 and 118 of the MMPA establish the primary federal regulatory scheme pertaining to interactions between commercial fisheries and U.S. marine mammal stocks. 16 U.S.C. §§ 1371, 1386-87. In enacting these provisions, Congress clarified that its goal was not to eliminate all incidental taking of marine mammals, but to minimize such interactions so as to ensure that populations remain at or recover to healthy levels commensurate with sound policies of resource management.

11. In Section 101(a)(5)(E) of the MMPA, Congress directed that NMFS shall authorize the incidental take of individuals from marine mammal stocks listed as threatened or endangered under the ESA in the course of commercial fishing operations, if the agency determines that: (i) the incidental mortality and serious

injury caused from commercial fisheries will have a negligible impact on the affected species or stock; (ii) a recovery plan has been developed or is being developed for such species or stock under the ESA; and (iii) where required under Section 118 of the MMPA, a monitoring program has been established, vessels engaged in such fishery are registered in accordance with Section 118 of the MMPA, and a take reduction plan (“TRP”) has been developed or is being developed for such species or stock.

12. NMFS must provide a 45-day notice and an opportunity to comment prior to issuing an incidental take determination pursuant to Section 101(a)(5)(E) of the MMPA, and must publish a final decision in the Federal Register. 16 U.S.C. §§ 1371(a)(5)(E)(i)-(ii); 50 C.F.R. § 229.20(b).

The Endangered Species Act

13. The ESA was enacted by Congress to establish a comprehensive program for the conservation of species identified as threatened or endangered. Primary authority for administering and enforcing the ESA vests with the Secretaries of Commerce (for marine species) and Interior (for terrestrial and freshwater species). The Secretary of Commerce has delegated responsibility for administration and enforcement of the ESA to NMFS.

14. Section 7 of the ESA establishes an interagency consultation process to ensure federal actions do not jeopardize listed species or destroy or adversely

modify critical habitat. 16 U.S.C. § 1536; 50 C.F.R. § 402.14. Under this process, a federal agency proposing to authorize, fund or carry out an action that “may affect” a listed marine species, including humpback whales, must initiate formal consultation with NMFS. 16 U.S.C. § 1536(a)(2); 50 U.S.C. § 402.14(a).

Where, as here, NMFS is both the agency undertaking the action under consultation (the “action agency”), and the agency conducting the consultation (the “consulting agency”), NMFS must engage in an intra-agency consultation with itself to comply with Section 7 of the ESA.

15. During formal consultation, NMFS must review all relevant information provided by the action agency or otherwise available and formulate its biological opinion as to whether the effects of the action, together with cumulative effects, are likely to “jeopardize the continued existence of listed species....” 50 C.F.R. § 402.14(g)(1)-(4).

16. “Jeopardize the continued existence of” is defined as engaging in an action that “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. 402.02. A biological opinion issued by NMFS provides the agency’s determination either that an action is likely to jeopardize (a “jeopardy opinion”) or

not likely to jeopardize (a “no jeopardy opinion”) listed species. 50 C.F.R. § 402.14(h)(3).

17. Where NMFS concludes that a proposed action is not likely to jeopardize the continued existence of listed species, NMFS must issue an incidental take statement (“ITS”) which specifies the amount or extent of incidental take anticipated to occur as a result of the action, and includes terms and conditions to minimize the effect of that take. 50 C.F.R. § 402.14(i)(1)(i). “Take” includes interactions resulting in mortality or injury; “injury” includes interactions that harm or harass the individual in such a way as to actually kill or injure the individual by significantly interfering with its essential behavioral patterns. 16 U.S.C. § 1532(19); 50 C.F.R. §§ 222.102, 17.3. Any incidental take which occurs in compliance with the terms and conditions of the ITS is not considered a prohibited taking. 16 U.S.C. § 1536(o).

18. Issuance of an incidental take determination pursuant to MMPA § 101(a)(5)(E) is a statutory prerequisite to issuance of incidental take authorization for interactions between commercial fisheries and threatened or endangered marine mammals under the ESA. 16 U.S.C. § 1536(b)(4)(C).

19. In formulating a biological opinion and an ITS, NMFS must use the “best scientific and commercial data available.” 50 C.F.R. § 402.14(g)(8).

V. STATEMENT OF FACTS

Humpbacks Whales

20. The humpback whale (*Megaptera novaeangliae*) is distributed worldwide in all ocean basins from subtropical to subpolar waters. Humpback whales carry out seasonal migrations between warmer temperate and subtropical waters in winter for reproduction, and cooler temperate and subpolar waters of high prey productivity in summer for feeding. At least thirteen humpback whale stocks have been recognized based on the geography of their migratory behavior. Three of these stocks occur within jurisdictional waters of the United States.

21. The world-wide abundance of humpback whales as a species is believed to have exceeded 125,000 prior to commercial whaling, and at its low point to have been reduced by approximately 90 percent to 10,000 to 12,000 whales.

22. Humpback whales were hunted commercially in the North Pacific until 1966. NMFS has concluded that the pre-exploitation North Pacific population declined by over 90 percent from approximately 15,000 whales to an estimated 1,400 or fewer whales.

23. The humpback whale was listed as an endangered species under the ESA in 1973. A final Recovery Plan was issued in 1991. The Recovery Plan establishes a 20-year goal to double population abundance from depressed levels

resulting from commercial hunting, and a long-term “numerical goal” for recovery “to achieve population sizes equal to at least 60% of the historical environmental carrying capacity for those populations in each of the North Atlantic and North Pacific Oceans that contain whales which enter waters under U.S. jurisdiction.”

24. The best available abundance data demonstrate that the humpback whale species, including both the North Atlantic and North Pacific humpback whale populations, has strongly rebounded. The worldwide abundance of humpback whales now exceeds 80,000 whales (a recovery of 64 percent of the species’ estimated pre-exploitation abundance). As a consequence of this recovery, in 2008, the International Union for Conservation of Nature and Natural Resources (“IUCN”) recategorized the humpback whale to “least concern” status. According to the IUCN, a taxon qualifies as a species of “least concern” when it is “[w]idespread and abundant.”

25. In 2008, a comprehensive study of North Pacific humpback whale abundance and structure was completed. The Structure of Populations, Levels of Abundance and Status of Humpback Whales in the North Pacific (“SPLASH”) study was “one of the largest international collaborative studies of any whale population ever conducted [and was] designed to determine the abundance, trends, movements and population structure of humpback whales throughout the North Pacific and to examine human impacts on this population.” The abundance

findings of the SPLASH study establish that the North Pacific humpback whale population has increased to approximately 20,000 whales (best estimate of 18,302, excluding calves). Accordingly, the North Pacific population has more than doubled in size since previous abundance estimates in the early 1990s, and has attained a population size greater than NMFS's estimate of pre-exploitation abundance.

26. Approximately half of the North Pacific population winters in Hawaiian waters, and migrates north to feeding grounds in northern British Columbia, Southeast Alaska, and Prince William Sound west to Unimak Pass (the Central North Pacific ("CNP") stock of North Pacific humpback whales). The entire North Pacific population, including the CNP stock, has exhibited a dramatic increase in abundance and is estimated to be growing at the rate of 4.9 to 6.8 percent annually. Based upon these accepted rates, the North Pacific population is currently growing at the rate of several hundred individuals annually.

The Shallow-Set Fishery

27. The Hawaii-based commercial longline fleet consists of two separately operated and managed fisheries – the shallow-set (swordfish-target) gear configuration fishery and the deep-set (tuna-target) gear configuration fishery. A maximum of 164 vessels, which may not exceed 101 feet in length, are authorized to participate in total in these limited access fisheries. Approximately 125 vessels

are currently engaged in commercial longline fishing under this limited access permit program.

28. In general, longline fishing gear consists of a continuous mainline that is set on the surface and supported in the water column horizontally by attaching plastic floats. Longline fishing allows a vessel to distribute fishing effort over a large area to harvest fish that are not concentrated in great numbers.

29. Shallow-set gear is set at night, with luminescent light sticks, to attract swordfish. The main line is 30 to 100 kilometers long. Typically, four to six branch lines (gangions), are clipped to the mainline at regular intervals between plastic floats. Each gangion, which is typically 11 to 15 meters long, terminates with a single baited hook. Generally, a set for swordfish uses between 700 and 1,000 hooks, which are set at a depth between 30 and 90 meters. Radar reflectors and radio beacons are used to keep track of the line.

30. The shallow-set fishery is conducted primarily in international waters of the central and western north Pacific Ocean, as far as 2,000 miles from Hawaii. The shallow-set fishery also operates within limited areas of the Hawaiian Islands U.S. exclusive economic zone (“EEZ”), particularly in the EEZ adjacent to the Northwest Hawaiian Islands. Although foreign vessels are barred from fishing within the EEZ, a large and unregulated foreign longline fishery competes with the Hawaii-based shallow-set fishery in international waters.

31. The United States' pelagic fisheries in the Western Pacific, including the shallow-set fishery, are managed by the Western Pacific Regional Fishery Management Council (the "Western Pacific Council"), which consists of 16 members including NMFS's regional director, state and territorial fishery management officials, individuals with scientific experience or training in conservation and management, and participants in commercial and recreational fisheries under the Western Pacific Council's jurisdiction. 16 U.S.C. §§ 1852(a)(1)(H), (b)(2)(B). Pursuant to the MSA, the Western Pacific Council authorizes and manages pelagic fisheries within its jurisdiction through the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region ("Pelagics FMP") and its amendments.

32. NMFS enacts and implements regulations under the MSA to administer enforceable elements of the Pelagics FMP. NMFS is also directly or jointly responsible with the Western Pacific Council for implementing the provisions of other federal laws and regulations, including under the National Environmental Policy Act ("NEPA"), the MMPA and the ESA, with respect to U.S. commercial fisheries authorized by the Pelagics FMP.

33. The shallow-set fishery is likely the most highly regulated and observed commercial fishery in the world. The shallow-set fishery operates subject to strict management and conservation controls, and 100 percent federal

observer coverage, imposed by NMFS and the Western Pacific Council pursuant to the Pelagics FMP.

34. There has never been an observed mortality of a humpback whale attributable to the Hawaii-based longline fleet. Since 2001, there have been only five observed interactions between humpback whales and the entire fleet.

35. The shallow-set fishery generally operates in areas where humpback whales are uncommon. As a result, interactions between the shallow-set fishery and the CNP stock of humpback whales are rare and unpredictable events. Since the current shallow-set fishery began operations in 2004 with 100 percent federal observer coverage, there have been only two interactions with humpback whales.

Pelagics FMP Amendment 18

36. Pelagics FMP Amendment 18 removes the pre-existing annual limit on the number of fishing gear deployments (sets) in the shallow-set fishery, while maintaining existing regulatory requirements and conservation measures to reduce and to offset sea turtle interactions and mortality, including the required use of circle hooks and 100 percent federal observer coverage. Amendment 18 is premised upon the documented reductions in sea turtle interaction and mortality rates experienced in the shallow-set fishery since implementation of management measures in 2004, the beneficial effects of ongoing sea turtle conservation measures undertaken to offset sea turtle interactions occurring in the Hawaii-based

longline fisheries, and the adverse transferred effects on sea turtle conservation from shallow-set fishing effort restrictions in Hawaii. The Final Rule was issued by NMFS pursuant to the MSA on December 10, 2009 and became effective as of January 11, 2010. 74 Fed. Reg. 65460 (Dec. 10, 2009).

37. Amendment 18 proceeded through a lengthy series of public meetings and reviews, including preparation of a Supplemental Environmental Impact Statement (“SEIS”) analyzing the environmental impacts of nearly twenty different alternative actions. The public review process included the Western Pacific Council, the Scientific and Statistical Committee (“SSC”) of the Western Pacific Council, the Turtle Advisory Committee (“TAC”) of the Western Pacific Council, NMFS’s Pacific Island Regional Office, NOAA’s Pacific Islands Fisheries Science Center (“PIFSC”), NMFS’s Office of Protected Resources and, ultimately, Dr. Jane Lubchenko, the Administrator of NOAA.

38. The Amendment 18 regulatory process also included consultation pursuant to Section 7 of the ESA regarding likely effects to threatened or endangered species, including humpback whales. HLA participated in the Section 7 consultation regarding Amendment 18 as an “applicant” party.

39. On October 15, 2008, in conclusion of the ESA § 7 consultation process, the Regional Administrator of NMFS’s Pacific Islands Region issued a “no jeopardy” biological opinion regarding proposed Amendment 18. With

respect to humpback whales, the biological opinion concludes, based upon the “most conservative possible interpretation” of the available data, that (i) if and when the shallow-set fishery increases to the maximum projected effort, the shallow-set fishery may cause up to three entanglements annually, and may result in the mortality of one humpback whale every 1-2 years, and (ii) this level of interaction will not result in a reduction in the numbers, distribution, or reproduction of the North Pacific population of humpback whales.

40. The Amendment 18 biological opinion is accompanied by an ITS. However, the ITS does not authorize the incidental take of humpback whales by the shallow-set fishery. The ITS states that NMFS must authorize incidental take of humpback whales pursuant to MMPA § 101(a)(5)(E) first, and that the agency has not completed that authorization.

**HLA's Requests For, and Assurances by NMFS of,
an MMPA § 101(a)(5)(E) Decision**

41. Since at least August, 2005, and on many formal and informal occasions thereafter, in writing and otherwise, HLA has requested that NMFS issue an MMPA § 101(a)(5)(E) decision, as well as an ITS pursuant to Section 7 of the ESA, for incidental interactions by the shallow-set fishery with humpback whales.

42. In each instance, HLA has informed NMFS that in failing to make a decision pursuant to § 101(a)(5)(E) of the MMPA, and in failing to issue a companion ESA ITS to the shallow-set fishery for humpback whale incidental

take, (i) NMFS is violating the MMPA, the ESA and the APA, and (ii) NMFS is inevitably and unnecessarily subjecting the shallow-set fishery to the risk of litigation from advocacy groups that have misguidedly declared as their purpose the closure of the shallow-set fishery by any and all means possible.

43. In response, in instances too numerous to recount, NMFS has assured HLA that it is actively engaged in the MMPA § 101(a)(5)(E) process, and that a proposal and decision will soon be forthcoming.

44. Despite its assurances, NMFS has failed to engage in and complete the MMPA § 101(a)(5)(E) process, and to issue a related ITS pursuant to § 7 of the ESA, for the incidental take of humpback whales in the shallow-set fishery.

45. As a direct consequence of NMFS's failure to engage in and complete the MMPA § 101(a)(5)(E) process, and to issue a related ITS pursuant to § 7 of the ESA, for the incidental take of humpback whales in the shallow-set fishery, as HLA has long predicted to NMFS, advocacy groups seeking closure of the shallow-set fishery have sued NMFS for violations of the ESA, the MMPA and the APA, and seek to enjoin authorization of shallow-set fishery operations pursuant to Amendment 18.

VI. FIRST CLAIM FOR RELIEF

46. Plaintiff incorporates by reference all preceding paragraphs of this Complaint for Declaratory and Injunctive Relief.

47. Congress mandated in Section 101(a)(5)(E) of the MMPA that the Secretary of Commerce shall allow, for any period of up to three consecutive years, the incidental, but not the intentional, taking of marine mammals during authorized commercial fishing operations from a species or stock designated as depleted because of its listing as an endangered or threatened species under the ESA, subject only to determination, after notice and comment, that specified criteria identified in subsections I through III of Section 101(a)(5)(E)(i) have been met.

48. For going on five years, NMFS has failed to perform the required analysis, to engage in the required public comment process and to issue required incidental take authorization under Section 101(a)(5)(E) of the MMPA to address potential future interactions between the shallow-set fishery and humpback whales.

49. NMFS's actions and inaction are reviewable under the APA, 5 U.S.C. §§ 701-706.

50. NMFS has violated the MMPA and Section 706(1) of the APA by unreasonably delaying and unlawfully withholding agency action pursuant to Section 101(a)(5)(E) of the MMPA.

51. NMFS has violated the MMPA and Section 706(2) of the APA because its failure to issue incidental take authorization pursuant to

Section 101(a)(5)(E) of the MMPA is arbitrary and capricious, and an abuse of discretion, and otherwise violates provisions of federal law.

52. The consequences of NMFS's unlawful action are, among other things, (i) that HLA's members engaged in the shallow-set fishery cannot obtain, and therefore do not have, incidental take authorization for incidental interactions with humpback whales to which they are entitled by law, and (ii) authorization of HLA's members to engage in the shallow-set fishery pursuant to Pelagics Amendment 18 is at risk in litigation brought against NMFS by advocacy groups seeking to capitalize upon NMFS's inexplicable and unjustifiable delay.

VII. SECOND CLAIM FOR RELIEF

53. Plaintiff incorporates by reference all preceding paragraphs of this Complaint for Declaratory and Injunctive Relief.

54. Congress mandated in Section 7(b)(4) of the ESA that the Secretary of Commerce shall authorize the incidental, but not the intentional, taking of marine mammals during authorized commercial fishing operations from a species or stock listed as an endangered or threatened species under the ESA, subject only to completion of the Section 7 consultation process, issuance of a no jeopardy biological opinion, and issuance of a determination pursuant to 101(a)(5)(E) of the MMPA.

55. For a period of going on five years, NMFS has failed to perform the required analysis, to engage in the required public comment process and to issue required incidental take authorization under Section 101(a)(5)(E) of the MMPA to address potential future interactions between the shallow-set fishery and humpback whales and, as a result, NMFS has also failed to issue incidental take authorization pursuant to Section 7(b)(4) of the ESA.

56. NMFS's actions and inaction are reviewable under the APA, 5 U.S.C. §§ 701-706.

57. NMFS has violated the ESA and Section 706(1) of the APA by unreasonably delaying and unlawfully withholding agency action pursuant to Section 7(b)(4) of the ESA.

58. NMFS has violated the ESA and Section 706(2) of the APA because its failure to issue incidental take authorization pursuant to Section 7(b)(4) of the ESA is arbitrary and capricious, and an abuse of discretion, and otherwise violates provisions of federal law.

59. The consequences of NMFS's unlawful action are, among other things, (i) that HLA's members engaged in the shallow-set fishery cannot obtain, and therefore do not have, incidental take authorization for incidental interactions with humpback whales to which they are entitled by law, and (ii) authorization of HLA's members to engage in the shallow-set fishery pursuant to Pelagics FMP

Amendment 18 is at risk in litigation brought against NMFS by advocacy groups seeking to capitalize upon NMFS's inexplicable and unjustifiable delay.

VIII. REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

- A. Declare that Defendants have unreasonably delayed and unlawfully withheld agency action;
- B. Declare that Defendants' failure to engage in and to complete the MMPA § 101(a)(5)(E) and ESA § 7(b)(4) processes, and to issue incidental take authorizations pursuant thereto, is arbitrary, capricious, an abuse of discretion, and contrary to law;
- C. Enjoin NMFS to prepare and to issue a decision pursuant to MMPA § 101(a)(5) and pursuant to ESA § 7(b)(4);
- D. Award HLA its reasonable attorneys' fees and litigation expenses pursuant to the applicable provisions of Equal Access to Justice Act and the ESA; and
- E. Award HLA such other and further relief as this Court may deem just and equitable.

DATED: Honolulu, Hawaii, January 22, 2010.



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