

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

JUN 25 2012

at 10 o'clock and 15 min. A. M.
SUE BEITIA, CLERK

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

CV12 00363 BMK

CENTER FOR BIOLOGICAL
DIVERSITY; and TURTLE ISLAND
RESTORATION NETWORK,

Plaintiffs

v.

NATIONAL MARINE FISHERIES
SERVICE; UNITED STATES
DEPARTMENT OF COMMERCE;
and REBECCA BLANK, ACTING
SECRETARY OF THE
DEPARTMENT OF COMMERCE,

Defendants.

) Civil No. **CV12 00363 BMK**
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) COMPLAINT FOR DECLARATORY
) JUDGMENT AND INJUNCTIVE
) RELIEF
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COMPLAINT FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

INTRODUCTION

1. By this action, Plaintiffs Center for Biological Diversity (“the Center”) and Turtle Island Restoration Network (“TIRN”) challenge the continued failure of Defendants National Marine Fisheries Service (“NMFS”), the United States Department of Commerce, and Acting Secretary of Commerce Rebecca Blank (collectively, “Defendants”), to finalize and implement a take reduction plan for Hawai‘i’s false killer whales, as required by section 118(f) of the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. § 1387(f). Due to Defendants’ longstanding and illegal foot-dragging, the Hawai‘i-based longline fisheries continue to kill and seriously injure false killer whales in Hawaiian waters at rates far beyond what these populations can sustain, violating Congress’s command to reduce the harm to marine mammals in commercial fisheries to “insignificant levels approaching a zero mortality and serious injury rate” by April 30, 2001. *Id.* § 1387(b)(1).

2. This action arises under and alleges violations of the MMPA, 16 U.S.C. §§ 1361-1407, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-706.

3. On August 10, 2004, under pressure from litigation brought by Plaintiffs, NMFS classified the Hawai‘i-based longline fisheries as Category I commercial fisheries due to their excessive levels of mortality and serious injury to false killer whales. 69 Fed. Reg. 48,407 (Aug. 10, 2004). The subsequent issuance

of a final stock assessment report confirming that the Hawai'i longline fisheries were killing and seriously injuring false killer whales in Hawaiian waters at unsustainable rates – as they had for years – triggered NMFS's obligation promptly to establish a take reduction team to devise a plan to eliminate this harm. Again, the agency failed to act, triggering a second lawsuit by Plaintiffs.

4. On January 19, 2010, under pressure from the second round of litigation, NMFS finally established a take reduction team for Hawai'i's false killer whales. 75 Fed. Reg. 28,53 (Jan. 19, 2010). NMFS subsequently released a draft take reduction plan for public comment, with the public comment period ending on October 17, 2011. 76 Fed. Reg. 42,082 (July 18, 2011).

5. Despite the MMPA's command to issue a final take reduction plan and implementing regulations "not later than 60 days after the close of the comment period" on the draft plan, NMFS failed to finalize and implement a take reduction plan by December 16, 2011, or at any time thereafter, and now is over six months late in satisfying this statutory mandate. 16 U.S.C. § 1387(f)(7)(C) (emphasis added). NMFS's failure to finalize and implement a plan to reduce fishery-related harm to Hawai'i's false killer whales has resulted in the continued and entirely avoidable killing of these marine mammals, unlawfully depriving Hawai'i's false killer whales of legal protections vital to their continued survival.

6. As the Government Accountability Office stressed in a December 2008 study, "it is important that NMFS adhere to the deadlines in the MMPA, as

delays in establishing teams and developing and finalizing take reduction plans could result in continued harm to already dwindling marine mammal populations.”

7. According to NMFS’s most recent stock assessment report, released on May 21, 2012, the Hawai‘i-based longline fisheries’ rate of mortality and serious injury to the Hawai‘i Pelagic Stock of false killer whales – one of the stocks addressed in the draft take reduction plan – is over four times the level the population can sustain, and the Hawai‘i Insular Stock – also covered by the draft plan – is suffering death and serious injury from the fisheries at three times sustainable levels. To put an end to this ongoing harm, Plaintiffs seek a declaratory judgment that NMFS’s continued failure to finalize and implement a take reduction plan for Hawai‘i’s false killer whales violates the MMPA and the APA. Plaintiffs further request injunctive relief to ensure NMFS finally complies with its obligation under the MMPA to protect Hawai‘i’s false killer whales from unsustainable levels of mortality and serious injury in the Hawai‘i-based longline fisheries.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 706 (actions under the APA); 28 U.S.C. § 1331 (actions under the laws of the United States); 28 U.S.C. § 1361 (action to compel an officer of the United States to

perform his or her duty); and 28 U.S.C. §§ 2201-02 (power to issue declaratory judgments in cases of actual controversy).

9. Venue is properly vested in the Court pursuant to 28 U.S.C. § 1391(e), as a substantial part of the events or omissions giving rise to the claims occurred within this judicial district.

PARTIES

10. Plaintiff Center for Biological Diversity is a non-profit corporation dedicated to preserving, protecting, and restoring biodiversity, native species, ecosystems, and public lands. The Center has approximately 40,000 members, many of whom reside in the state of Hawai'i, and maintains offices throughout the western United States. The Center's members regularly use the coastal and pelagic waters off the coast of Hawai'i for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities. The Center's members have researched, studied, visited, observed or attempted to observe, photographed or attempted to photograph, and sought protection for many marine mammal species, including the false killer whale, in the waters off the coast of Hawai'i. The Center's members intend to continue to research, study, visit, observe, photograph and seek protection for these marine mammals in the future. The Center's members derive scientific, recreational, conservation, and aesthetic benefits from

the existence of the false killer whale in the wild. The Center brings this action on behalf of itself and its adversely affected members.

11. Plaintiff Turtle Island Restoration Network is a non-profit corporation with its principal place of business in Forest Knolls, California. TIRN is an environmental organization with approximately 5,500 members and 55,000 supporters, including members who reside in the state of Hawai'i. Each of TIRN's members shares a commitment to the study, protection, enhancement, conservation, and preservation of the marine environment and the wildlife that lives within it. All of TIRN's members spend time in activities devoted to these goals. TIRN's members regularly use the coastal and pelagic waters off the coast of Hawai'i for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities, including wildlife-viewing activities such as swimming, snorkeling, kayaking, scuba diving, and whale watching. TIRN's members include marine biologists who are engaged in the study, protection, enhancement, conservation, and preservation of false killer whales, as well as professional wildlife photographers, whose livelihood depends in part on the survival of these marine mammals and the ability to photograph them in the wild. TIRN's members intend to continue to study, visit, observe, and photograph the false killer whale in the future. TIRN brings this action on behalf of itself and its adversely affected members.

12. Plaintiffs' concern about the death and serious injury of false killer whales in the Hawai'i longline fisheries is longstanding. In 2003, Plaintiffs brought suit in this Court, challenging defendants' failure to classify the Hawai'i longline fisheries as Category I commercial fisheries due to their excessive incidental mortality and serious injury to false killer whales. Under pressure from that litigation, NMFS finally reclassified the fisheries as Category I on its 2004 List of Fisheries. Unfortunately, NMFS subsequently failed to develop and implement a take reduction plan to reduce fishery-related harm to false killer whales, as the MMPA mandates. In 2009, Plaintiffs again brought suit in this Court, challenging defendants' failure to establish a take reduction team to devise a plan to eliminate the fisheries' incidental mortality and serious injury to Hawai'i's false killer whales. As a result of that litigation, NMFS finally established a take reduction team in 2010. Despite its creation of a take reduction team, NMFS still has not finalized and implemented a take reduction plan for the false killer whales, resulting in unnecessary death and serious injury to Hawai'i's false killer whales.

13. Plaintiffs' scientific, cultural, recreational, conservation, and aesthetic interests in the false killer whale are harmed by NMFS's failure to protect these marine mammals from the Hawai'i-based longline fisheries. Specifically, NMFS's failure to finalize and implement a take reduction plan to reduce fishery-related harm to the false killer whale has resulted in the continued mortality of, and serious

injury to, these marine mammals at levels their populations can not sustain. These deaths and injuries impair Plaintiffs' scientific, cultural, recreational, conservation, and aesthetic interests in the false killer whale. This harm to false killer whales – and to Plaintiffs' interests in them – would not have occurred had NMFS complied with the MMPA's legal mandates. Only if NMFS complies with the MMPA's procedural and substantive requirements, and consequently takes the necessary steps to reduce to insignificant levels the mortality and serious injury of the false killer whale, will the harm to Plaintiffs' interest be redressed. Therefore, Plaintiffs' members have been, are being, and unless the relief requested herein is granted, will continue to be adversely affected and injured by NMFS's failure to comply with the MMPA.

14. Defendant National Marine Fisheries Service is an agency of the National Oceanic and Atmospheric Administration of the United States Department of Commerce. NMFS is sometimes referred to as "NOAA Fisheries." NMFS is charged with the management of fisheries in the United States' waters, including the Hawai'i-based longline fisheries, and is entrusted with the conservation and management of ocean resources in the Pacific. NMFS is responsible for ensuring compliance with the federal laws for whose violation Plaintiffs bring this suit.

15. Defendant Department of Commerce is the federal agency with ultimate responsibility to implement and enforce compliance with the federal laws for whose violation Plaintiffs bring this suit.

16. Defendant Rebecca Blank is sued in her official capacity as Acting Secretary of the Department of Commerce.

LEGAL AND FACTUAL BACKGROUND

NMFS's Mandatory Duties Under the MMPA

17. Congress enacted the Marine Mammal Protection Act in 1972 in response to widespread concern that “certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man’s activities.” 16 U.S.C. § 1361(1). The policy behind the MMPA is that “such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population.” Id. § 1361(2).

18. The primary mechanism by which the MMPA protects marine mammals is through the implementation of a “moratorium on the taking” of marine mammals. Id. § 1371(a). “Take” is defined broadly by the MMPA to mean “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine

mammal.” Id. § 1362(13). The MMPA includes exceptions to the moratorium, including a regime to regulate and authorize limited incidental taking in conjunction with commercial fishing operations.

19. Congress added sections 117 and 118 to the MMPA on April 30, 1994, to address interactions between commercial fisheries and marine mammals. Section 117 requires NMFS to prepare marine mammal stock assessments for marine mammals within a fishery based upon “the best scientific information available.” Id. § 1386(a). Section 118 addresses the taking of marine mammals incidental to commercial fishing operations and requires NMFS to classify each commercial fishery according to its rate of fishery-related injury to marine mammals. Id. § 1387.

20. Section 117 requires NMFS to “prepare a draft stock assessment report [(“SAR”)] for each marine mammal stock which occurs in waters under the jurisdiction of the United States.” Id. § 1386(a). Each SAR must include, among other things, a minimum population estimate, an estimate of “the annual human-caused mortality and serious injury of the stock,” descriptions of commercial fisheries that interact with the stock, including “the estimated level of incidental mortality and serious injury of the stock by each such fishery on an annual basis,” and an estimate of the potential biological removal level for the stock. Id.

21. The MMPA defines the term “potential biological removal level” (“PBR”) as “the maximum number of animals, not including natural mortalities,

that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.” Id. § 1362(20).

22. Section 118(b) mandates that “[c]ommercial fisheries shall reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate within 7 years after April 30, 1994,” i.e., by April 30, 2001. Id. § 1387(b)(1). The regulations implementing the MMPA generally define the “zero mortality rate goal” as “10 percent of the Potential Biological Removal level for a stock of marine mammals.” 50 C.F.R. § 229.2 (defining “insignificance threshold”).

23. To help accomplish this goal, the MMPA requires NMFS to publish each year in the Federal Register a list of commercial fisheries that categorizes each fishery according to the rate of fishery-related injury to marine mammals. 16 U.S.C. § 1387(c)(1). The three categories identify fisheries that have:

- (i) frequent incidental mortality and serious injury of marine mammals [(“Category I” fisheries)];
- (ii) occasional incidental mortality and serious injury of marine mammals [(“Category II” fisheries)]; or
- (iii) a remote likelihood of or no known incidental mortality or serious injury of marine mammals [(“Category III” fisheries)].

Id. § 1387(c)(1)(A).

24. The MMPA’s implementing regulations define a Category I fishery as one that has “frequent incidental mortality and serious injury of marine mammals.”

50 C.F.R. § 229.2. Such a fishery “is one that is by itself responsible for the annual removal of 50 percent or more of any stock’s [PBR] level.” Id.

25. A Category II fishery “occasionally causes mortality or serious injury of marine mammals,” which is defined as a commercial fishery “that, collectively with other fisheries, is responsible for the annual removal of more than 10 percent of any marine mammal stock’s [PBR] level and that is by itself responsible for the annual removal of between 1 and 50 percent, exclusive, of any stock’s [PBR] level.” Id.

26. A Category III commercial fishery “has a remote likelihood of causing incidental mortality and serious injury of marine mammals.” Id. Such a fishery is “one that collectively with other fisheries is responsible for the annual removal of:”

- (1) Ten percent or less of any marine mammal stock’s [PBR] level, or
- (2) More than 10 percent of any marine mammal stock’s [PBR] level, yet that fishery by itself is responsible for the annual removal of 1 percent or less of that stock’s [PBR] level.

Id.

27. MMPA section 118(f)(1) requires NMFS to “develop and implement a take reduction plan designed to assist in the recovery or prevent the depletion of each strategic stock that interacts with” a Category I or II commercial fishery. 16 U.S.C. § 1387(f)(1). The term “strategic stock” is defined as a marine mammal stock:

- (A) for which the level of direct human-caused mortality exceeds the [PBR] level;
- (B) which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the Endangered Species Act of 1973 . . . within the foreseeable future; or
- (C) which is listed as a threatened species or endangered species under the Endangered Species Act of 1973 . . . , or is designated as depleted under [the MMPA].

Id. § 1362(19).

28. “The immediate goal of a take reduction plan [is] to reduce, within 6 months of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to levels less than the [PBR] level established for that stock.” Id. § 1387(f)(2).

Within five years of implementing the take reduction plan, the goal is to reduce “the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate.” Id. § 1387(f)(2).

29. To develop take reduction plans, NMFS is charged with establishing, no later than thirty (30) days after the issuance of a final SAR for a strategic stock, take reduction teams comprised of scientists, fishermen and other interested and qualified parties. Id. § 1387(f)(6). The take reduction teams are then charged with developing draft take reduction plans that NMFS must amend as necessary to comply with the MMPA, approve, and implement. Id. § 1387(f)(7), (8).

30. In cases where “the human-caused mortality and serious injury from a strategic stock is estimated to be equal to or greater than the [PBR] level,” the take reduction team must “submit a draft take reduction plan for such stock to the Secretary” not later than six (6) months after the date of the team’s establishment. Id. § 1387(f)(7)(A)(i). Following receipt of the draft plan, NMFS must revise the draft within sixty (60) days, publish it for ninety (90) days of public comment, and, not later than an additional sixty (60) days after the close of the comment period, publish a final take reduction plan and implementing regulations. Id. § 1387(f)(7)(B), (C).

31. The MMPA provides that, “[i]f there is insufficient funding available to develop and implement a take reduction plan for all [strategic] stocks that interact with” Category I or II fisheries, NMFS “shall give highest priority to the development and implementation of take reductions plans for species or stocks whose level of incidental mortality and serious injury exceeds the [PBR] level, those that have a small population size, and those which are declining most rapidly.” Id. § 1387(f)(3).

NMFS Has Unlawfully Delayed Finalizing and Implementing a Hawai‘i False Killer Whale Take Reduction Plan

32. The false killer whale (*Pseudorca crassidens*) is a large member of the dolphin family that is found primarily in tropical and warm-temperate waters. The miles of lines used by the Hawai‘i-based longline fleet hook and entangle false

killer whales, often resulting in serious injury or death through drowning. NMFS's 2011 SAR estimates, based on observed false killer whale interactions with the Hawai'i-based longline fisheries, that 92% of fishery interactions with false killer whales result in death or serious injury.

33. On March 15, 2001, NMFS published a notice of availability for the final SARs for 2000, which included the first SAR that calculated a PBR level for the Hawaiian stock of false killer whales: 0.8 whales per year. 66 Fed. Reg. 15,081 (Mar. 15, 2001). The 2000 SAR reported that, on average, the Hawai'i longline fishery seriously injures or kills nine false killer whales per year, more than eleven times the PBR level. Accordingly, the SAR concluded that "this stock is considered a strategic stock under the 1994 amendments to the MMPA."

34. Since the issuance of the 2000 SAR, every final SAR for false killer whales in Hawaiian waters, including the most recent assessment for 2011, has confirmed that annual incidental mortality and serious injury due to the Hawai'i-based longline fisheries exceeds by far the PBR level.

35. On November 13, 2003, Plaintiffs filed suit in this Court, challenging NMFS's failure to classify the Hawai'i-based longline fisheries as "Category I" fisheries, based on their interactions with Hawai'i's false killer whales.

36. On August 10, 2004, under pressure from Plaintiffs' lawsuit, NMFS finalized its 2004 List of Fisheries, which classified the Hawai'i longline fisheries

as Category I due to their excessive levels of mortality and serious injury to false killer whales. 69 Fed. Reg. 48,407 (Aug. 10, 2004).

37. NMFS published a notice of availability for the next final SAR for Hawai'i's false killer whales – the 2004 SAR – on June 20, 2005. 70 Fed. Reg. 35,397 (June 20, 2005). As in the past, this SAR concluded the Hawai'i longline fisheries' rate of mortality and serious injury to false killer whales in Hawaiian waters – now estimated at 4.4 whales per year – remained far above the stock's PBR level – now estimated at 1.0 – and, consequently, “this stock is considered a strategic stock.”

38. The issuance of the final 2004 SAR triggered NMFS's obligation under MMPA section 118(f)(6)(A), 16 U.S.C. § 1387(f)(6)(A), to establish a take reduction team for Hawai'i false killer whales “[a]t the earliest possible time” and “not later than 30 days” after the SAR's issuance. NMFS failed, however, to act.

39. On December 1, 2008, NMFS issued its 2009 List of Fisheries, which split the Hawai'i longline fisheries into a deep-set longline fishery, which targets tuna, and a shallow-set longline fishery, which targets swordfish. 73 Fed. Reg. 73,032 (Dec. 1, 2008). NMFS classified the Hawai'i deep-set fishery as Category I, since its annual mortalities and serious injuries to false killer whales exceed the stock's PBR level. In the 2009 List of Fisheries, NMFS classified the Hawai'i

shallow-set fishery as Category II based on its incidental take of marine mammals other than false killer whales.

40. On March 17, 2009, Plaintiffs again filed suit in this Court, this time challenging NMFS's failure to convene a take reduction team to address the Hawai'i-based longline fisheries' incidental take of Hawai'i's false killer whales.

41. On April 29, 2009, NMFS finalized the 2008 SAR for Hawai'i false killer whales, which, for the first time, split false killer whales found in Hawaiian waters into two stocks: the Hawai'i Insular Stock and the Hawai'i Pelagic Stock. Based on genetic analyses, NMFS currently considers false killer whales within 40 km (approximately 25 miles) of the main Hawaiian Islands as belonging to the Insular Stock, animals inhabiting the waters of the United States Exclusive Economic Zone ("EEZ") of the Hawaiian Islands beyond 140 km (approximately 87 miles) of the main Hawaiian Islands as belonging to the Pelagic Stock. The two stocks overlap between 40 km and 140 km from shore.

42. The 2008 SAR identified the Hawai'i Pelagic Stock as "a 'strategic stock' under the 1994 amendments to the MMPA" because "the rate of mortality and serious injury ... in the Hawaii-based longline fishery (5.7 animals per year) exceeds the PBR (2.2)."

43. On November 8, 2010, NMFS issued its 2011 List of Fisheries, which maintained the Hawai'i shallow-set fishery's classification as Category II, but

updated the list of marine mammals with which the fishery interacts to include the incidental take of false killer whales. 75 Fed. Reg. 68,468 (Nov. 8, 2010).

44. On January 19, 2010, under pressure from Plaintiffs' second lawsuit, NMFS finally established a false killer whale take reduction team to address interactions between the Hawai'i Pelagic and Hawai'i Insular stocks of false killer whales and the Hawai'i-based deep-set and shallow-set longline fisheries. 75 Fed. Reg. 2,853 (Jan. 19, 2010).

45. The false killer whale take reduction team developed a false killer whale draft take reduction plan by consensus and, in compliance with the MMPA's statutory deadline, submitted the draft plan to NMFS on July 19, 2010, six months after the date of the take reduction team's establishment. 76 Fed. Reg. 42,082 (July 18, 2011); see also 16 U.S.C. § 1387(f)(7)(A)(i).

46. NMFS then failed to release the draft take reduction plan for public review and comment within the sixty (60) days the MMPA mandates. See 16 U.S.C. § 1387(f)(7)(B)(i). Instead, NMFS delayed nearly a year, waiting until July 18, 2011 to publish the draft plan in the Federal Register. 76 Fed. Reg. at 42,082.

47. NMFS's draft take reduction plan contains important measures designed to reduce mortality of, and serious injury to, Hawai'i's false killer whales from interactions with the Hawai'i-based longline fisheries. For example, the majority of false killer whale mortalities and serious injuries occur when the animals become hooked or entangled in longline fishing gear. To prevent this, the

draft plan would require the use of “weak” circle hooks that take advantage of the size and weight disparity between the fishery’s target species and false killer whales. The “weak” circle hook is designed to be strong enough to retain the fishery’s target species, but weak enough to bend and straighten under the pull strain of a hooked false killer whale, allowing the animal to release itself and thereby reduce the severity of the animal’s injury and risk of death.

48. The draft false killer whale take reduction plan proposes other regulatory measures to reduce the excessive rate of false killer whale mortality and serious injury in the Hawai‘i-based longline fisheries, including expanding the area around the Hawaiian Islands in which longline fishing is prohibited and mandating training and certification in marine mammal handling and release. The draft plan also proposes important non-regulatory measures, including research and data collection recommendations. Unless and until a final take reduction plan is issued and these regulatory and non-regulatory measures are implemented, however, Hawai‘i’s false killer whales will continue to be deprived of vital protections that Congress mandated to prevent unsustainable levels of death and serious injury in the Hawai‘i-based longline fisheries.

49. The public comment period on the draft take reduction plan ended on October 17, 2011. 76 Fed. Reg. at 42,082. Pursuant to the MMPA’s mandatory deadlines, NMFS had sixty (60) days – i.e., until December 16, 2011 – to finalize the false killer whale take reduction plan and issue implementing regulations. See

16 U.S.C. § 1387(f)(7)(C). To date, NMFS has failed to discharge this mandatory duty.

50. Plaintiffs are informed and believe, and on the basis thereof allege, that NMFS has sufficient funds available to issue a final false killer whale take reduction plan and implementing regulations.

51. On May 21, 2012, NMFS finalized the latest SAR – the 2011 SAR – for Hawai‘i’s false killer whales, confirming that the Hawai‘i-based longline fisheries continue to kill and injury false killer whales at unsustainable rates. The 2011 SAR states that the fisheries’ rate of mortality and serious injury to the Hawai‘i Pelagic Stock of false killer whales has increased to 10.8 whales per year, which is over four times the stock’s PBR level (2.4). In addition, for the first time, the 2011 SAR identified the Hawai‘i Insular Stock of false killer whales as “strategic” due to a rate of mortality and serious injury in the Hawai‘i-based longline fisheries that is three times the level the population can sustain.

52. NMFS’s failure to finalize the take reduction plan for Hawai‘i’s false killer whales and to issue implementing regulations has resulted in continued needless death and injury to these marine mammals, subverting Congress’s mandate promptly to reduce incidental take of false killer whales in the Hawai‘i longline fishery “to insignificant levels approaching a zero mortality and serious injury rate.”

CLAIM FOR RELIEF

(Failure to Issue a Final Take Reduction Plan and Implementing Regulations)

53. Plaintiffs reallege and incorporate by reference each and every allegation set forth in paragraphs 1-52 of this Complaint.

54. Defendants' failure to issue a final a take reduction plan for Hawai'i's false killer whales and implementing regulations no later than sixty (60) days after the close of the public comment period on the draft plan violates their non-discretionary duty to do so under MMPA section 118(f)(7)(C), 16 U.S.C. § 1387(f)(7)(C).

55. Defendants' failure to issue a final a take reduction plan for Hawai'i's false killer whales and implementing regulations no later than sixty (60) days after the close of the comment period on the draft plan constitutes agency action that is unreasonably delayed and/or unlawfully withheld, in violation of the APA, 5 U.S.C. § 706(1).

56. Alternatively, defendants' failure to issue a final a take reduction plan for Hawai'i's false killer whales and implementing regulations no later than sixty (60) days after the close of the comment period on the draft plan is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

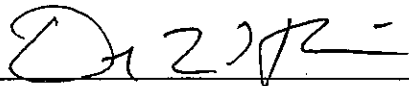
WHEREFORE, the Plaintiffs respectfully request that the Court:

1. Enter a declaratory judgment that Defendants have violated and are continuing to violate the Marine Mammal Protection Act and the Administrative Procedure Act by failing to issue a final take reduction plan for Hawai'i's false killer whales and implementing regulations.
2. Enter appropriate injunctive relief to ensure that Defendants comply with the MMPA and the APA by promptly issuing a final take reduction plan for Hawai'i's false killer whales and implementing regulations;
3. Award Plaintiffs the cost of this litigation, including reasonable attorneys' fees; and
4. Provide such other relief as may be just and proper.

DATED: Honolulu, Hawai'i, June 25, 2012.

Respectfully submitted,

EARTHJUSTICE
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By: 
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