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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI'I

HUI MĀLAMA I KOHOLĀ; CENTER	)	Civil No.
FOR BIOLOGICAL DIVERSITY; and	)	
TURTLE ISLAND RESTORATION	)	COMPLAINT FOR DECLARATORY
NETWORK,	)	JUDGMENT AND INJUNCTIVE
	)	RELIEF; SUMMONS
Plaintiffs	)	
	)	
v.	)	
	)	
NATIONAL MARINE FISHERIES	)	
SERVICE; UNITED STATES	)	
DEPARTMENT OF COMMERCE;	)	
and OTTO J. WOLFF, ACTING	)	
SECRETARY OF THE	)	
DEPARTMENT OF COMMERCE,	)	
	)	
Defendants.	)	
	)	
	)	

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COMPLAINT FOR DECLARATORY  
JUDGMENT AND INJUNCTIVE RELIEF

## INTRODUCTION

1. By this action, Plaintiffs Hui Mālama i Koholā (“the Hui”), 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 Otto J. Wolff to develop and implement a take reduction plan for the Hawai‘i stock of false killer whales, as required by Section 118(f) of the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. § 1387(f).

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 Swordfish, Tuna, Billfish, Mahi Mahi, Wahoo, and Oceanic Sharks Longline/Setline Fishery (“Hawai‘i longline fishery”) as a Category I commercial fishery due to its excessive levels of mortality and serious injury to false killer whales. 69 Fed. Reg. 48,407 (Aug. 10, 2004). The issuance of a final stock assessment report on June 20, 2005 confirming the Hawai‘i longline fishery’s rate of mortalities and serious injuries to false killer whales in Hawaiian waters remained far above the stock’s “potential biological removal” (“PBR”) level – as it had been for years – triggered NMFS’s obligation to establish within thirty (30) days a take reduction team to devise a plan to seek to

eliminate incidental mortality and serious injury to false killer whales in the fishery. 70 Fed. Reg. 35,397 (June 20, 2005). Instead, NMFS did nothing, claiming insufficient funding.

4. Even if NMFS's claims of insufficient funding were true, its refusal to develop and implement a take reduction plan for Hawai'i's false killer whales still would not be justified. Despite the MMPA's command to prioritize stocks when funding is limited, in the more than four years since classifying the Hawai'i longline fishery as Category I due to excessive mortalities and serious injuries to false killer whales, NMFS has never performed an analysis of the statutory factors set forth in MMPA section 118(f)(3), 16 U.S.C. § 1387(f)(3), to determine whether to prioritize take reduction efforts for false killer whales over other eligible stocks. Having ignored the factors Congress identified as relevant, NMFS's decision to withhold funding for take reduction for Hawai'i's false killer whales constitutes "an abuse of discretion," is "otherwise not in accordance with law," and is "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

5. Moreover, while NMFS has consistently rebuffed public calls to establish a false killer whale take reduction team, claiming inadequate funding, it has never bothered to ask Congress to appropriate additional funds for that purpose. Given that the statutory deadline to "reduce incidental mortality and serious injury of marine mammals in commercial fisheries to insignificant levels approaching a zero mortality and serious injury rate" expired nearly eight years

ago, 16 U.S.C. § 1387(b)(1), NMFS's continued failure to make any effort to pursue take reduction for Hawai'i's false killer whales constitutes agency action "unreasonably delayed" pursuant to the APA, 5 U.S.C. § 706(1).

6. As noted in a December 2008 Government Accountability Office ("GAO") study, "the false killer whale is the only marine mammal for which incidental take by commercial fisheries is above its maximum removal level that is not covered by a take reduction team." The GAO stressed that "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, the rate of mortality and serious injury to false killer whales in the Hawai'i longline fishery remains more than twice the level the population can sustain. To put an end to this ongoing harm, Plaintiffs seek declaratory judgment that NMFS's continued failure to make any effort to pursue take reduction for Hawai'i's false killer whales, including its failures to apply the statutory factors set forth in MMPA section 118(f)(3), 16 U.S.C. § 1387(f)(3), to determine whether to prioritize take reduction efforts for false killer whales and to seek additional funds to establish a false killer whale take reduction team, violates the MMPA and the APA. Plaintiffs also request appropriate injunctive relief to ensure NMFS complies fully with its

obligations under the MMPA to develop and implement a take reduction plan for the false killer whale.

### 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 and Plaintiff Hui Mālama i Koholā resides in this judicial district and no real property is involved in this action.

### PARTIES

10. Plaintiff Hui Mālama i Koholā is a Hawai‘i unincorporated association whose members consist of fishermen, Hawaiian cultural practitioners, and others from across the state of Hawai‘i who share a common goal: the protection of koholā (whales) and other marine life. The Hui seeks to promote sound management of ocean resources, with an emphasis on utilizing the precautionary approach to ensure that, seven generations from now, there will be healthy populations of koholā and other marine species for Hawai‘i’s keiki

(children) to observe and to mālama (care for). The members of the Hui regularly use the coastal and pelagic waters off the coast of Hawai‘i for subsistence, commercial, recreational, and aesthetic activities, including sailing, swimming, and fishing. In addition, the Hui’s Hawaiian cultural practitioners have a spiritual relationship with the many species of koholā, as well as other marine mammal species, native to Hawai‘i. The Hui’s members have studied, visited, observed or attempted to observe and sought protection for many marine mammal species, including the false killer whale. The Hui’s members intend to continue to study, visit, observe, and seek protection for these marine mammals in the future. The Hui’s members derive cultural, recreational, conservation, and aesthetic benefits from the existence of the false killer whale in the wild. The Hui brings this action on behalf of itself and its adversely affected members.

11. 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 over 200,000 members and online activists, many of whom reside in the state of Hawai‘i, and maintains offices throughout the western United States. The Center’s members and staff 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 and staff 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 and staff intend to continue to research, study, visit, observe, photograph and seek protection for these marine mammals in the future. The Center’s members and staff 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 and staff.

12. 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 10,000 members, many of whom reside in the state of Hawai‘i. Each of TIRN’s members share 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 and staff 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 and staff 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 and staff 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 and staff.

13. Plaintiffs' concern about the death and serious injury of false killer whales in the Hawai'i longline fishery is longstanding. In 2003, Plaintiffs brought suit in this Court, challenging defendants' failure to classify the Hawai'i longline fishery as a Category I commercial fishery due to its excessive incidental mortality and serious injury to false killer whales. Under pressure from that litigation, NMFS finally reclassified the fishery as Category I on its 2004 List of Fisheries. Unfortunately, however, NMFS subsequently failed to develop and implement a take reduction plan to reduce fishery-related harm to the false killer whale, as the MMPA mandates.

14. Plaintiffs' scientific, cultural, recreational, conservation, and aesthetic interests in the false killer whale are harmed by NMFS's failure adequately to protect these marine mammals from the Hawai'i longline fishery. Specifically, NMFS's failure to develop 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. 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 and staff 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.

15. 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 longline fishery, 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.

16. 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.

17. Defendant Otto J. Wolff is sued in his official capacity as Acting Secretary of the Department of Commerce.

## LEGAL AND FACTUAL BACKGROUND

### NMFS's Mandatory Duties Under the MMPA.

18. Congress enacted the Marine Mammal Protection Act in 1972 in response to widespread concern that large numbers of marine mammals were being killed through interactions with commercial fisheries. Congress found 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.” 16 U.S.C. § 1361(2).

19. The primary mechanism by which the MMPA protects marine mammals is through the implementation of a “moratorium on the taking” of marine mammals. 16 U.S.C. § 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.” 16 U.S.C. § 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.

20. 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.” 16 U.S.C. § 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. 16 U.S.C. § 1387.

21. 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.” 16 U.S.C. § 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.

22. The MMPA defines the term “potential biological removal level” 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.” 16 U.S.C. § 1362(20).

23. Section 117(d) mandates that NMFS “establish three independent regional scientific review groups representing Alaska, the Pacific Coast (including

Hawaii), and the Atlantic Coast (including the Gulf of Mexico).” 16 U.S.C. § 1386(d)(1). These groups consist of individuals with expertise in, among other things, marine mammal biology and ecology, population dynamics and modeling, and commercial fishing technology and practices. Id.

24. NMFS prepares its SARs “in consultation with the appropriate regional scientific review group established under [section 117(d)].” 16 U.S.C. § 1386(a). NMFS publishes final SARs “[a]fter consideration of the best scientific information available, the advice of the appropriate regional scientific review group . . . , and the comments of the general public.” 16 U.S.C. § 1386(b)(3).

25. 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. 16 U.S.C. § 1387(b)(1). The regulations implementing the MMPA generally define the “zero mortality rate goal” (“ZMRG”) as “10 percent of the Potential Biological Removal level for a stock of marine mammals.” 50 C.F.R. § 229.2 (defining “insignificance threshold”).

26. 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)].

16 U.S.C. § 1387(c)(1)(A).

27. 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.

28. 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.

29. 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.

30. 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].

16 U.S.C. § 1362(19).

31. “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.” 16 U.S.C. § 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.” 16 U.S.C. § 1387(f)(2).

32. Section 118(f)(4) describes the required contents of take reduction plans. 16 U.S.C. § 1387(f)(4). These include, among other things, a review of the information found in the final stock assessments, regulatory measures to reduce mortality, and dates for achieving the plan’s objectives.

33. To develop take reduction plans, NMFS is charged with establishing, no later than 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. 16 U.S.C. § 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. 16 U.S.C. § 1387(f)(7), (8).

34. 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 months after the date of the team’s establishment. 16 U.S.C. § 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. 16

U.S.C. § 1387(f)(7)(B), (C). In sum, the MMPA gives NMFS a maximum of fourteen (14) months from the publication of a final SAR to complete a take reduction plan for a strategic stock that interacts with a Category I or II fishery where human-caused mortality and serious injury is greater than PBR.

35. 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.” 16 U.S.C. § 1387(f)(3).

#### NMFS Unlawfully Fails to Develop and Implement a Take Reduction Plan for Hawai‘i’s False Killer Whales

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36. The false killer whale (*Pseudorca crassidens*) is an uncommon marine mammal found primarily in tropical and sub-tropical waters. Recent studies indicate that false killer whales in Hawaiian waters may comprise a distinct genetic population. The miles of lines used by the Hawai‘i-based longline fleet hook and entangle false killer whales, which can result in serious injury or death through drowning.

37. 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 (9) false killer whales per year. It concluded that:

Because the rate of serious injury to false killer whales within the U.S. [Exclusive Economic Zone] in the Hawaiian longline fishery (9 animals per year) exceeds the PBR (0.8), this stock is considered a strategic stock under the 1994 amendments to the MMPA. The total fishery mortality and serious injury cannot be considered to be insignificant and approaching zero, because it exceeds the PBR.

38. Since the issuance of the 2000 SAR, every final SAR for Hawai‘i’s false killer whales has confirmed that annual incidental mortality and serious injury in the Hawai‘i longline fishery exceeds the PBR level and that, accordingly, false killer whales in Hawaiian waters constitute a strategic stock.

39. On August 10, 2004, NMFS finalized its 2004 List of Fisheries, which classified the Hawai‘i longline fishery as a Category I commercial fishery due to its excessive levels of mortality and serious injury to false killer whales. 69 Fed. Reg. 48,407 (Aug. 10, 2004).

40. 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 fishery’s 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.”

41. 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’s false killer whales “[a]t the earliest possible time” and “not later than 30 days” after the SAR’s issuance. Instead, NMFS has done nothing, claiming insufficient funding.

42. Plaintiffs are informed and believe, and on the basis thereof allege, that, since the issuance of the 2004 final SAR for false killer whales, NMFS has never performed an analysis of the statutory factors set forth in MMPA section 118(f)(3), 16 U.S.C. § 1387(f)(3), to determine whether, in the face of allegedly insufficient funding, it should prioritize take reduction efforts for Hawai‘i’s false killer whales over other eligible stocks.

43. Had NMFS applied the statutory factors, it would have realized Hawai‘i’s false killer whales warrant high priority for development and implementation of a take reduction plan. According to the 2007 SAR for false killer whales (the most recent final SAR for the stock), the rate of mortality and serious injury to false killer whales in the Hawai‘i longline fishery (4.9 whales per year) remains more than double the PBR level (2.4). Moreover, the population size, estimated at fewer than 500 animals, is extremely small. Finally, recent

studies indicate false killer whales in Hawai‘i’s nearshore waters have suffered dramatic declines in the last twenty years.

44. Plaintiffs are informed and believe, and on the basis thereof allege, that, despite Congress’s unambiguous command in the MMPA to reduce incidental mortality and serious injury in the Hawai‘i longline fishery to ZMRG by April 30, 2001, and NMFS’s knowledge that, in the absence of a take reduction plan, the fishery’s annual incidental take of false killer whales has remained far above the PBR level, NMFS has failed to ask Congress to appropriate additional funds to establish a false killer whale take reduction team.

45. On December 1, 2008, NMFS issued its 2009 List of Fisheries, which split the Hawai‘i longline fishery 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.

46. 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. NMFS’s own observer data confirm, however, that the shallow-set fishery continues to injure false killer whales. These interactions trigger NMFS’s obligation to develop and implement a take reduction plan for this fishery as well as for the deep-set fishery.

47. On February 26, 2009, the experts on the Pacific Scientific Review Group (“PSRG”) wrote NMFS to urge it to establish a take reduction team to focus on fishery-related mortality to false killer whales in both the deep-set and shallow-set longline fisheries.

48. NMFS’s continued failure to develop and implement a take reduction plan for Hawai‘i’s false killer whales has resulted in the continued needless death and injury of these marine mammals and has subverted Congress’s mandate for the Hawai‘i longline fishery to meet the substantive ZMRG.

### FIRST CLAIM FOR RELIEF

#### (Failure to Establish a Take Reduction Team)

49. Plaintiffs reallege and incorporate by reference each and every allegation set forth in paragraphs 1-48 of this Complaint.

50. Defendants’ failure to convene a take reduction team for Hawai‘i’s false killer whales within thirty (30) days of the issuance of the stock’s 2004 final SAR, and every final SAR issued thereafter, violates MMPA section 118(f)(6)(A), 16 U.S.C. § 1387(f)(6)(A).

51. Defendants’ failure to convene a take reduction team for Hawai‘i’s false killer whales within thirty (30) days of the issuance of the stock’s 2004 final SAR, and every final SAR issued thereafter, 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).

52. Defendants' failure to convene a take reduction team for Hawai'i's false killer whales within thirty (30) days of the issuance of the stock's 2004 final SAR, and every final SAR issued thereafter, constitutes agency action that is unreasonably delayed and/or unlawfully withheld, in violation of the APA, 5 U.S.C. § 706(1).

### SECOND CLAIM FOR RELIEF

(Failure to Develop and Implement a Take Reduction Plan)

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

54. Defendants' failure to develop and implement a take reduction plan for Hawai'i's false killer whales following the issuance of the stock's 2004 final SAR, and every final SAR issued thereafter, violates MMPA section 118(f), 16 U.S.C. § 1387(f).

55. Defendants' failure to develop and implement a take reduction plan for Hawai'i's false killer whales following the issuance of the stock's 2004 final SAR, and every final SAR issued thereafter, 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).

56. Defendants' failure to develop and implement a take reduction plan for Hawai'i's false killer whales following the issuance of the stock's 2004 final SAR, and every final SAR issued thereafter, constitutes agency action that is unreasonably delayed and/or unlawfully withheld, in violation of the APA, 5 U.S.C. § 706(1).

### THIRD CLAIM FOR RELIEF

(Failure to Prioritize Take Reduction Planning Pursuant to Statutory Factors)

57. Plaintiffs reallege and incorporate by reference each and every allegation set forth in paragraphs 1-56 of this Complaint.

58. Defendants' failure to prioritize the development and implementation of a take reduction plan for Hawai'i's false killer whales pursuant to the statutory factors set forth in MMPA section 118(f)(3), 16 U.S.C. § 1387(f)(3), violates the MMPA.

59. Defendants' failure to prioritize the development and implementation of a take reduction plan for Hawai'i's false killer whales pursuant to the statutory factors set forth in MMPA section 118(f)(3), 16 U.S.C. § 1387(f)(3), is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or without procedure required by law, in violation of the APA, 5 U.S.C. § 706(2).

60. NMFS's failure to prioritize the development and implementation of a take reduction plan for Hawai'i's false killer whales pursuant to the statutory

factors set forth in MMPA section 118(f)(3), 16 U.S.C. § 1387(f)(3), constitutes agency action that is unreasonably delayed and/or unlawfully withheld, in violation of the APA, 5 U.S.C. § 706(1).

FOURTH CLAIM FOR RELIEF

(Failure to Make Efforts to Develop and Implement False Killer Whale Take Reduction Plan)

61. Plaintiffs reallege and incorporate by reference each and every allegation set forth in paragraphs 1-60 of this Complaint.

62. In light of Congress's command to reduce incidental mortality and serious injury of marine mammals in commercial fisheries to insignificant levels approaching a zero mortality and serious injury rate no later than April 30, 2001, Defendants' continued failure to make any effort to pursue take reduction for Hawai'i's false killer whales, including, but not limited to, their failure to seek the necessary funding to develop and implement a false killer whale take reduction plan, constitutes agency action unreasonably delayed and/or unlawfully withheld, in violation of the APA, 5 U.S.C. § 706(1).

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## 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:
  - a. convene a take reduction team for Hawai'i's false killer whales within thirty (30) days of the issuance of the stock's 2004 final SAR, and every final SAR issued thereafter;
  - b. develop and implement a take reduction plan for Hawai'i's false killer whales following the issuance of the stock's 2004 final SAR, and every final SAR issued thereafter;
  - c. prioritize the development and implementation of a take reduction plan for Hawai'i's false killer whales pursuant to the statutory factors set forth in MMPA section 118(f)(3), 16 U.S.C. § 1387(f)(3); and
  - d. make any effort to pursue take reduction for Hawai'i's false killer whales, including, but not limited to, their failure to seek the necessary funding to develop and implement a false killer whale take reduction plan.
2. Enter appropriate injunctive relief to ensure that Defendants comply with the MMPA and the APA;



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, March 17, 2009.

Respectfully submitted,

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