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14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
16 **OAKLAND DIVISION**

17 CENTER FOR BIOLOGICAL DIVERSITY,
18 and TURTLE ISLAND RESTORATION
19 NETWORK

20 Plaintiffs,

21 v.

22 WILBUR ROSS, Secretary of Commerce, and
23 NATIONAL MARINE FISHERIES SERVICE,

24 Defendants.

Case No. 19-cv-03135-KAW

**PLAINTIFFS' NOTICE OF MOTION,
MOTION FOR SUMMARY JUDGEMENT,
AND MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: Thursday, December 5, 2019
Time: 1:30pm
Place: 1301 Clay St., Oakland, CA
Magistrate Judge: Honorable Kandis
Westmore

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1 **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

2 On December 5, 2019, at 1:30 p.m., or as soon as possible thereafter, Plaintiffs Center for
3 Biological Diversity and Turtle Island Restoration Network (“Plaintiffs”) will move for summary
4 judgment pursuant to Federal Rule of Civil Procedure 56. Plaintiffs move for summary judgment
5 because there is no genuine dispute as to any material fact and Plaintiffs are entitled to judgment
6 as a matter of law.

7 Plaintiffs seek an order declaring that Defendants Wilbur Ross, in his official capacity as
8 the Secretary of Commerce, and the National Marine Fisheries Service (collectively, “Fisheries
9 Service”) violated the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2), National
10 Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332(2)(C), Magnuson-Stevens Fishery
11 Conservation and Management Act (“MSA”), 16 U.S.C. § 1853(a)(1)(C), and Administrative
12 Procedure Act (“APA”), 5 U.S.C. § 706(2), in issuing a permit allowing longline fishing off
13 California’s coast. Plaintiffs also seek an order vacating the permit and the accompanying
14 documents issued under the ESA and NEPA. This Motion is based on the Notice of Motion; the
15 supporting Memorandum of Points and Authorities and declarations attached hereto; all
16 pleadings and documents on file in this action; and such oral and documentary evidence as may
17 be presented at or before the hearing on the Motion.

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 **STATEMENT OF THE ISSUES**

20 Plaintiffs challenge the Fisheries Service’s unlawful issuance of a permit to allow
21 commercial longline fishing in federal waters off California. The agency’s actions and inactions
22 in issuing the permit threaten the survival and recovery of highly imperiled Pacific leatherback
23 sea turtles and other endangered species.

24 This permit is a dramatic change for the Fisheries Service, which for many years has
25 implemented an absolute ban on longline fishing in these waters due to the severe risks to sea
26 turtles. Longline vessels use fishing lines up to 60 miles long, suspended by floats in the water
27 for hours. Several hundred or thousand individual hooks on a longline allow a single fishing
28 vessel to catch fish over many miles of ocean. The longlines often ensnare sea turtles, marine

1 mammals, and other marine wildlife in addition to the target swordfish or tuna. The incidental
2 catch, called “bycatch,” significantly contributes to the decline of many of protected species
3 worldwide. Due in large part to these harmful impacts, longline fishing has been prohibited in
4 waters off California under both state and federal law for many years.

5 In spite of these well-known harms, in 2019, the Fisheries Service issued a permit
6 authorizing two vessels to fish for swordfish and tuna using longlines between 50 and 200 miles
7 off California. The Fisheries Service’s issuance of the longline permit failed to comply with the
8 ESA, NEPA, MSA, and APA.

9 Summary judgment is appropriate here where the record shows that the Fisheries Service
10 disregarded the law. Specifically, despite the Fisheries Service’s recognition that (1) Pacific
11 leatherback sea turtles are on the brink of extinction, (2) reducing bycatch in fishing gear is the
12 number one priority for recovery, and (3) every turtle counts in considering the survival and
13 recovery of the species, the agency issued a biological opinion finding that issuance of the permit
14 would not jeopardize the continued existence of these critically endangered sea turtles. In
15 reaching this decision, the agency failed to use the best available science, used a flawed jeopardy
16 analysis that the Ninth Circuit has repeatedly found unlawful, and otherwise failed to articulate a
17 rational connection to the relevant facts and its conclusion, in violation of the ESA and APA.
18 Additionally, the agency issued a cursory environmental assessment (“EA”) and finding of no
19 significant impact (“FONSI”) under NEPA that failed to take the “hard look” of the impacts of
20 the longline permit that NEPA mandates. By failing to comply with the ESA, NEPA, and APA,
21 the agency also violated the MSA.

22 Accordingly, the Court should grant Plaintiffs’ motion for summary judgment and vacate
23 the longline permit and accompanying biological opinion, EA, and FONSI.

24 **FACTUAL BACKGROUND**

25 Capture in commercial longline fishing gear is a significant threat to threatened and
26 endangered sea turtles. AR 258 at 13491; *Turtle Island Restoration Network v. U.S. Dep’t of*
27 *Commerce*, 878 F.3d 725, 731 (9th Cir. 2017). Longline fishing uses thousands of hooks over a
28 large ocean area to catch swordfish and tuna. *See id.* at 730–31 (describing longline fishing

1 methods). Sea turtles can become hooked while trying to eat longline bait off the hook or
2 entangled while swimming through nearly invisible lines. *See id.*

3 Because of its harmful impacts, longline fishing is banned within 200 miles off the U.S.
4 West Coast under federal regulations and state law to ensure the protection of sea turtles. 50
5 C.F.R. § 660.712; Cal. Fish & Game Code § 9028. The Fisheries Service enacted the federal
6 prohibitions in 2004 to continue “the *de facto* longline prohibition throughout the U.S. EEZ
7 [exclusive economic zone] by states’ regulations and minimize[] potential bycatch of fish and
8 protected species.” 69 Fed. Reg. 18,444, 18,450 (Apr. 7, 2004) (codified at 50 C.F.R.
9 § 660.712(a)). In addition, the Fisheries Service extended the prohibition beyond the U.S. EEZ—
10 to 150° West longitude—for longlines targeting swordfish because of unacceptable impacts to
11 loggerhead sea turtles. *Id.* 18,446 (“The consultation concluded that allowing [such fishing in the
12 area] would appreciably reduce the likelihood of survival and recovery in the wild of loggerhead
13 sea turtles”).

14 Since the implementation of the prohibition on longlines within the U.S. West Coast
15 EEZ, leatherback sea turtle conservation concerns have increased. For example, Pacific
16 leatherback sea turtles that migrate to the U.S. West Coast from nesting beaches on the other side
17 of the Pacific Ocean¹ are one of eight marine species the Fisheries Service has identified as most
18 at risk of extinction. Defs’ Answer ¶¶ 4, 53, Dkt. No. 16. Scientific studies show that Pacific
19 leatherback sea turtles declined at a rate of about six percent per year from the 1980s through
20 2011. AR 152 at 05298–312. In 2013, scientists predicted that because threats have not ceased,
21 the population would be nearly extirpated by 2040, less than one generation from now. AR 258
22 at 13487.

23
24 _____
25 ¹ In the Pacific Ocean, genetic studies have identified three distinct populations of leatherback
26 turtles, only the first of which is at issue in this case: (1) the western population nesting in Papua
27 Barat in Indonesia, Papua New Guinea, Solomon Islands, and Vanuatu; (2) Mexico and Costa
28 Rica, which are distinct from the western population; and (3) Malaysia, which likely is
extirpated. AR 1038 at J_00007312; *see also* AR 18 at 01069 (“One hundred percent of
leatherbacks interacting with the California drift gillnet fishery and hand-captured off California
originated from the Western Pacific”).

1 The available science demonstrates there have been “substantial declines or collapse of
2 some [leatherback nesting] populations throughout the Pacific.” AR 18 at 01042. These declines
3 at nesting beaches track the decline in the subset of leatherback sea turtles that visit the U.S.
4 West Coast EEZ: between 1990 and 2003, scientists estimated an annual average of 178
5 leatherbacks off the West Coast, but their estimated annual average was only 52 animals during
6 2005–2014. AR 362 at J_00000460. The decline is especially worrisome because “researchers
7 that have captured leatherbacks in-water off central California have documented that
8 approximately 2 out of 3 leatherbacks were females (~66 percent).” AR 18 at 1070. This means
9 the decline in leatherbacks off California’s coastline is primarily a decline in the individuals most
10 important for sustaining the future of the population—females. *See* AR 18 at 1070 (“to estimate
11 the risk that the proposed action poses to leatherbacks, in general, we would need to determine
12 the number of adult females removed from the western Pacific subpopulation”). In short,
13 according to the Fisheries Service, Pacific leatherbacks are “declining rapidly” and “every turtle”
14 that is taken from the water off the U.S. West Coast “counts” when it comes to survival of the
15 species. AR 1038 at J_00007320.

16 Leatherback sea turtles off the U.S. West Coast have the largest range of any living
17 reptile and migrate hundreds, and often thousands, of miles across the Pacific Ocean to feed on
18 jellyfish. 77 Fed. Reg. 4,170, 4,171 (Jan. 26, 2012); AR 46 at 01860, 01863. In 2001, the
19 Fisheries Service established the Pacific Leatherback Conservation Area (“PCLA”) off the coasts
20 of central California and Oregon. 50 C.F.R. § 660.713(c); AR 61 at 02156. The PCLA consists
21 of 213,000 square miles of the EEZ and bans drift gillnet fishing from August 15 to November
22 15 annually to protect leatherbacks when they are typically present and foraging off the U.S.
23 West Coast. 50 C.F.R. § 660.713(c); AR 61 at 02156. The Fisheries Service decided to close this
24 area to gillnet fishing because doing so was necessary “to avoid the likelihood of the . . . fishery
25 jeopardizing the continued existence of the leatherback sea turtle.” 66 Fed. Reg. 44,549 (Aug.
26 24, 2001) (codified at 50 C.F.R. § 660.713(c)).

27 Nonetheless, in May 2019, the Fisheries Service issued a longline permit authorizing two
28 vessels to fish for swordfish and tuna using longlines between 50 and 200 miles off California

1 for two years. 84 Fed. Reg. 20,108 (May 8, 2019). The Fisheries Service estimates that fishing
2 under the permit from just these two vessels will entail the use of 330,000 hooks in the area. AR
3 18 at 01029. In its biological opinion, the Fisheries Service found that fishing under the permit
4 would result in the hooking or entanglement of two female Pacific leatherback sea turtles, one of
5 which would result in the death of the animal; and the hooking or entanglement of two
6 loggerhead sea turtles, one of which would result in the death of the animal. AR 18 at 01078,
7 01080.

8 The Fisheries Service’s longline permit reverses protections in place for leatherback sea
9 turtles despite continuing population declines and the agency’s admission that the extinction of
10 Pacific leatherbacks “is almost certain in the immediate future.” AR 258 at 13486.

11 STANDARD OF REVIEW

12 Judicial review of the Fisheries Service’s biological opinion and its EA and FONSI are
13 governed by section 706 of the APA, 5 U.S.C. § 706. *See Bennett v. Spear*, 520 U.S. 154, 176–
14 79 (1997) (review of a biological opinion arises under the APA); *Klamath-Siskiyou Wildlands*
15 *Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 992 (9th Cir. 2004) (review of NEPA document
16 arises under the APA). Under the APA, a reviewing court “shall ‘hold unlawful and set aside
17 agency action, findings, or conclusions found to be . . . arbitrary, capricious, an abuse of
18 discretion, or otherwise not in accordance with law.’” *All. for the Wild Rockies v. U.S. Forest*
19 *Serv.*, 907 F.3d 1105, 1112 (9th Cir. 2018) (quoting 5 U.S.C. § 706(2)(A)).

20 The APA “require[s the court] to engage in a substantial inquiry[,] . . . a thorough,
21 probing, in-depth review.” *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960
22 (9th Cir. 2005) (citation and internal quotation marks omitted). Even where an agency with
23 “special expertise” acts “within its area of expertise,” the Court “need not defer to the agency
24 when the agency’s decision is without substantial basis in fact.” *Ctr. for Biological Diversity v.*
25 *Zinke*, 900 F.3d 1053, 1067 (9th Cir. 2018) (citation omitted). An agency’s decision is arbitrary
26 and capricious if it “entirely failed to consider an important aspect of the problem, offered an
27 explanation for its decision that runs counter to the evidence before the agency, or is so
28 implausible that it could not be ascribed to a difference in view or the product of agency

1 expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
 2 Importantly, the Court “may not supply a reasoned basis for the agency’s action that the agency
 3 itself has not given.” *Id.* (citation and internal quotation marks omitted).

4 Summary judgment must be granted “if there is no genuine issue as to any material fact
 5 and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). District courts
 6 are encouraged to utilize summary judgment in appropriate cases. *Anderson v. Liberty Lobby,*
 7 *Inc.*, 477 U.S. 242, 247–49 (1986). Plaintiffs’ motion raises legal issues on undisputed facts,
 8 rendering summary judgment appropriate here.²

9 ARGUMENT

10 **I. The Fisheries Service Violated the ESA by Failing to Properly Evaluate the Impacts** 11 **of Longline Fishing on Endangered Sea Turtles.**

12 The Fisheries Service’s issuance of the longline permit—risking leatherback sea turtle
 13 entanglement off the West Coast—violated the ESA. The Fisheries Service disregarded the best
 14 available science and binding case law when it issued the permit. As described below, Plaintiffs
 15 are entitled to summary judgment on Claim 1.

20 ² Plaintiffs have standing to bring this case. Plaintiffs’ members have suffered concrete and
 21 particularized injuries to their aesthetic, recreational, scientific, and spiritual interests in
 22 leatherback sea turtles, loggerhead sea turtles, humpback whales, and fur seals that are fairly
 23 traceable to the Fisheries Service’s actions; and those injuries will likely be redressed by a
 24 favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envt’l Servs.*, 528 U.S. 167, 180–81
 25 (2000) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-561 (1992)); *Ctr. for Biological*
 26 *Diversity v. Kempthorne*, 588 F.3d 701, 707–08 (9th Cir. 2009) (holding that plaintiffs with
 27 interests in viewing polar bears and walrus in the Beaufort Sea region had standing to challenge
 28 regulations allowing the take of these animals incidental to oil and gas activity); Bevington
 Decl.; Stabb Decl. Further, the Plaintiffs have standing to sue on their members’ behalf because
 these “members would have standing to sue in their own right, the interests at stake are germane
 to the organization[s]’ purposes, and neither the claim asserted nor the relief requested requires
 the participation of individual members in the lawsuit.” *Laidlaw*, 528 U.S. at 181; Cummings
 Decl.; Steiner Decl.

1 A. The ESA Requires the Fisheries Service to Carefully Analyze the Impacts of
2 Longline Fishing on Protected Species Based on the Best Available Science.

3 Considered “the most comprehensive legislation for the preservation of endangered
4 species ever enacted by any nation,” the ESA embodies Congress’s “plain intent” to “halt and
5 reverse the trend toward species extinction, whatever the cost.” *Tenn. Valley Auth. v. Hill*, 437
6 U.S. 153, 180, 184 (1978). Congress enacted the ESA “to provide a means whereby the
7 ecosystems upon which endangered species and threatened species depend may be conserved”
8 and “to provide a program for the conservation of such endangered species and threatened
9 species.” 16 U.S.C. § 1531(b). Through the ESA, “Congress clearly intended that [agencies] give
10 ‘the highest of priorities’ and the ‘benefit of the doubt’ to preserving endangered species.” *Sierra*
11 *Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987) (quoting *Tenn. Valley Auth.*, 437 U.S. at
12 174) (additional citation omitted). The goal of the statute is not to maintain a species on life
13 support indefinitely, but to recover the species to the point where it no longer requires ESA
14 protections. *See* 16 U.S.C. § 1532(3); *Alaska v. Lubchenco*, 723 F.3d 1043, 1054 (9th Cir. 2013)
15 (citation omitted).

16 To accomplish these goals, section 9 prohibits any person from “taking” an endangered
17 species, 16 U.S.C. § 1538(a)(1), defined broadly to include acts that kill, harm, harass, and
18 capture protected animals. *Id.* § 1532(19). A federal agency may authorize actions causing take
19 of endangered species, “only if the projected take ‘is not likely to jeopardize the continued
20 existence’ of any listed species.” *Turtle Island Restoration Network v. U.S. Dep’t of Comm.*, 878
21 F.3d 725, 735 (9th Cir. 2017) (quoting 16 U.S.C. § 1536(a)(2)).³

22 The ESA prescribes a consultation process by which a federal agency can meet its
23 substantive no-jeopardy obligation. When an action agency proposes to take any action that
24 “may affect” a listed species, it must consult with the expert wildlife agency delegated
25 responsibility for that species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Where, as here, the

26 ³ The Fisheries Service’s regulations implementing the ESA define “jeopardy” as “to engage in
27 an action that reasonably would be expected, directly or indirectly, to reduce appreciably the
28 likelihood of both the survival and recovery of a listed species . . . by reducing the reproduction,
numbers, or distribution of that species.” 50 C.F.R. § 402.02.

1 Fisheries Service is both the action agency (for issuing the longline permit at issue) and expert
2 wildlife agency, it must undertake intra-agency consultation to meet its ESA obligations.

3 At the completion of formal consultation, the Fisheries Service issues a biological
4 opinion, providing its evaluation of whether the agency action may jeopardize any listed species'
5 continued existence. The ESA requires the consultation process and resulting biological opinion
6 to be based on "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); 50
7 C.F.R. § 402.14(g)(8). To comply with this requirement, the Fisheries Service "cannot ignore
8 available biological information" and must "give the benefit of the doubt to the species." *Conner*
9 *v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988) (citation omitted).

10 In conducting its jeopardy analysis, the Fisheries Service must determine whether the
11 direct and indirect effects of an action—in the context of the existing status of the species, added
12 to the environmental baseline, and taken together with cumulative effects—"is likely to
13 jeopardize the continued existence of a species." 50 C.F.R. § 402.14(g)(4), (h)(1); *see* 16 U.S.C.
14 § 1536(b)(3)–(4). The environmental baseline includes "the past and present impacts of all
15 federal, state, or private actions and other human activities in the action area, the anticipated
16 impacts of all proposed Federal projects in the action area that have already undergone formal or
17 early section 7 consultation, and the impact of State or private actions which are
18 contemporaneous with the consultation in process." 50 C.F.R. § 402.02. "Cumulative effects" are
19 "those effects of future State or private activities, not including Federal activities, that are
20 reasonably certain to occur within the action area of the Federal action subject to consultation."
21 *Id.*

22 The Fisheries Service cannot simply compare the effects of the agency action on the
23 listed species to other threats; it must consider the status of the species, the impacts of the
24 proposed action *added to* the environmental baseline *added to* cumulative effects and whether
25 these effects *in the aggregate* are likely to jeopardize a species' survival and recovery. Were it
26 otherwise, "a listed species could be gradually destroyed, so long as each step on the path to
27 destruction is sufficiently modest." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524
28

1 F.3d 917, 930 (9th Cir. 2008). But “[t]his type of slow slide into oblivion is one of the very ills
2 the ESA seeks to prevent.” *Id.*

3 B. The Fishery Service Failed to Properly Analyze the Impacts of Its Decision to
4 Allow Longline Fishing on Endangered Sea Turtles.

5 The Fisheries Service violated its obligation to rationally assess, based on the best
6 available science, whether the longline permit will jeopardize the survival and recovery of
7 endangered sea turtles. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8), (h). The Fisheries
8 Service has repeatedly determined that Pacific leatherback sea turtles are critically endangered,
9 *e.g.*, AR 258 at 13486, that entanglement in fishing gear is the primary threat to their continued
10 existence, *e.g.*, AR 18 at 01044, AR 127 at 04873, and that reducing interactions with fisheries is
11 the number one priority for recovery. *E.g.*, AR 18 at 01081, AR 258 at 13489–90. The Fisheries
12 Service has also recognized that “every turtle counts” when it comes to ensuring the survival and
13 recovery of this highly endangered, declining population. AR 1038 at J_00007320. Scientists
14 predict that, because current threats have not ceased, the Pacific leatherback sea turtle could be
15 nearly entirely wiped out by 2040. AR 258 at 13487; *see also* AR 18 at 01042 (biological
16 opinion noting that there have been “substantial declines or collapse of some [leatherback
17 nesting] populations throughout the Pacific”).

18 Nevertheless, the Fisheries Service concluded that allowing new longline fishing—which
19 the agency assumes will kill at least one female leatherback sea turtle⁴—in an area where the
20 Fisheries Service has prohibited it since 2004 precisely because of the fishery’s deadly impacts
21 on sea turtles and other marine life, would not jeopardize the species’ continued existence. In
22 reaching this conclusion, the Fisheries Service erred in three primary ways: (1) it ignored highly
23 pertinent information representing the best available science on leatherbacks; (2) it failed to
24 consider the *additional* impacts from fishing under the permit in light of degraded baseline
25

26 ⁴ The death of a female leatherback is particularly significant as it means her potential offspring
27 are also lost to the population—the Fisheries Service has concluded that protecting nesting
28 females is necessary to “preserve the capacity of a population to recover from a depleted state.”
AR 127 at 04904.

1 conditions that have already pushed the species to the brink of extinction; and (3) it otherwise
2 failed to make a rational connection between the facts found and choices made. Each of these
3 faults render the biological opinion unlawful and entitle Plaintiffs to summary judgment on their
4 ESA claim.

5 1. *The Fisheries Service Failed to Consider the Best Available Science.*

6 The ESA requires the Fisheries Service to use the “best scientific and commercial
7 information available” in forming its biological opinion. 16 U.S.C. § 1536(a)(2). This command
8 means that the “agency cannot ignore available biological information or fail to develop
9 projections’ which may indicate potential conflicts between the proposed action and the
10 preservation of endangered species.” *Greenpeace v. Nat’l Marine Fisheries Serv.*, 80 F. Supp. 2d
11 1137, 1150 (W.D. Wash. 2000) (quoting *Conner*, 848 F.2d at 1454).

12 Yet that is just what the Fisheries Service unlawfully did with this permit. The Fisheries
13 Service failed to use the best available science by ignoring available information indicating that
14 both the number of nesting Pacific leatherbacks and the number of leatherbacks off California
15 have declined substantially beyond the assumptions in the biological opinion; and by ignoring
16 recent bycatch data.

17 With respect to the Pacific leatherback population, the biological opinion acknowledges
18 that the population is declining and some scientists believe the population “is on the verge of
19 extirpation,” AR 18 at 01043, but it ignores available information regarding the severity of the
20 decline. As a result, the biological opinion underestimates the impact of longline fishing. For
21 example, the biological opinion assesses the risk of killing one female leatherback “from a
22 population estimate of approximately 2,600 nesting females in the Western Pacific.” AR 18 at
23 01070. The Fisheries Service based this estimate on data through 2012, claiming that updated
24 data was not yet available. *See id.* at 01043. But months earlier, the Fisheries Service had
25 determined that the number of nesting females is now at 562, nearly 80 percent less than its
26 assumption in the biological opinion on the longline permit. Kilduff Decl., Ex. A (submitted in
27 support of Plaintiffs’ Motion to Amend) (Fisheries Service’s December 2017 programmatic
28

1 biological opinion analyzing the impacts of its research activities on threatened and endangered
2 sea turtles).

3 As courts have explained, when a biological opinion uses “data [that] are either outdated
4 or inaccurate, it should, at the very least, analyze the new data or explain why it nevertheless
5 chose to rely on the older data.” *Dow AgroSciences LLC v. Nat’l Marine Fisheries Serv.*, 707
6 F.3d 462, 473 (4th Cir. 2013); *see also Intertribal Sinkyone Wilderness Council v. Nat’l Marine*
7 *Fisheries Serv.*, 970 F. Supp. 2d 988, 998-1002 (N.D. Cal. 2013) (invalidating the Fisheries
8 Service’s reliance on outdated exposure thresholds the agency had abandoned elsewhere). That is
9 particularly true here, where the estimated number of nesting females was the basis from which
10 the Fisheries Service analyzed the risks of the longline permit. But the Fisheries Service failed to
11 acknowledge its own subsequent science containing a different and substantially lower
12 population estimate. Instead, the Fisheries Service used old data that inflates the current status of
13 the species, thereby diminishing the true import of the death of a reproductive female in this
14 critically endangered population.

15 Similarly, the biological opinion also relies on data from 1990–2003 regarding the
16 current numbers of Pacific leatherbacks off California. *See* AR 18 at 01070; *see also* AR 18 at
17 01100 (references for biological opinion listing this 2007 study). However, in response to
18 questions regarding an updated estimate for the current population off California, a Fisheries
19 Service biologist stated that from 2004–2014 there may have been substantially fewer
20 leatherbacks off California. AR 362 at J_00000460. And while the scientist states that the
21 information is “preliminary,” *id.*, “[t]he ‘best scientific . . . data available,’ does not mean ‘the
22 best scientific data possible.’” *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581,
23 602 (9th Cir. 2014) (quoting *Bldg. Indus. Ass’n v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir.
24 2001)). To the contrary, “[t]o the extent that there is any uncertainty as to what constitutes the
25 best available scientific information, Congress intended ‘to give the benefit of the doubt to the
26 species.’” *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1127
27 (N.D. Cal. 2006) (citation omitted).

1 The Fisheries Service also ignored available information regarding recent entanglement-
2 related injury and death to the same sea turtle population being harmed here. Agency staff
3 recognized that data regarding how many Pacific leatherback sea turtles were caught in the
4 Hawaii longline fishery in 2017 were relevant to the analysis in the biological opinion, *see, e.g.*,
5 AR 1014 at J_00007138-39 (email from staff scientist requesting data on sea turtle interactions
6 in the Hawaii longline fishery from 2017), yet the Fisheries Service did not consider that data in
7 its evaluation of the current status of the species. *See* AR 18 at 01039 (biological opinion only
8 considering Hawaii longline fishery data through 2016).⁵ Bycatch information from 2017 is
9 especially relevant because of the increase in Hawaii longline fishing in recent years near the
10 U.S. West Coast exclusive economic zone. *See* AR 5 at 00594 (noting “an increase in the total
11 number of hooks observed by 44.5 percent for shallow-set longline . . . and by 142.9 percent for
12 deep-set longline”). Based on Fisheries Service science, increased fishing in this area risks
13 increased leatherback sea turtle bycatch. *See* AR 18 at 01068 (noting a seasonal closure in this
14 area was a “key recommendation” from agency scientists “to reduce impacts to leatherback sea
15 turtles” in the Hawaii longline fishery). In short, the Fisheries Service failed to evaluate data
16 from 2017, despite knowing the potential for increased fishing in an area where impacts to
17 Pacific leatherback sea turtles were high.

18 The population abundance and entanglement data that the Fisheries Service failed to
19 consider here are precisely the type of data that courts have found are needed to conduct a lawful
20 jeopardy analysis. *See, e.g., Nat. Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 362,
21 367 (E.D. Cal. 2007) (holding biological opinion issued in 2005 arbitrary and capricious for
22 failing to consider 2004 annual population survey of endangered species at issue which was
23 “regularly compiled . . . and relied upon by the agency in the past”). The need to consider such
24 information is particularly important here given the highly imperiled status of the species at
25 issue, *e.g.*, AR 1038 at J_00007320; a scientific study concluding that, to avoid delaying the

26 _____
27 ⁵ The Fisheries Service began consultation on March 22, 2018. AR 18 at 01028. The 2017
28 Hawaii annual data report was compiled in February 2018, AR 249 at 12956–57, meaning it was
available during the consultation.

1 species' recovery, total take by all U.S. West Coast fisheries needs to be limited to less than one
2 turtle every five years, AR 188 at 08647; and the Fisheries Service's acknowledgments that
3 Pacific leatherbacks are "declining rapidly" and that "every turtle counts" when it comes to
4 considering the impacts of an action on the survival and recovery of the species. AR 1038 at
5 J_00007320.

6 2. *The Fisheries Service Employed an Unlawful Jeopardy Analysis.*

7 In addition to failing to consider the best available scientific data, the Fisheries Service's
8 biological opinion is based on an unlawful jeopardy analysis. In evaluating whether the longline
9 permit will jeopardize endangered leatherback sea turtles, the ESA requires the Fisheries Service
10 to aggregate the cumulative effects, environmental baseline, and proposed action in light of the
11 status of the species to determine whether they collectively jeopardize the species' continued
12 existence. *See* 50 C.F.R. § 402.14(g)(4), (h). The proper analysis "is not the proportional share of
13 responsibility the federal agency bears for the decline in the species, but what jeopardy might
14 result from the agency's proposed action in the present and future human and natural contexts."
15 *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Recl.*, 426 F.3d 1082, 1093 (9th Cir.
16 2005) (citations omitted).

17 The Ninth Circuit has repeatedly rejected jeopardy analyses that fail to consider the
18 impacts of the action under review when *added to* baseline conditions that have already
19 contributed to a species' decline. For example, in *Turtle Island Restoration Network v. U.S.*
20 *Department of Commerce*, the plaintiffs challenged a biological opinion concluding that a
21 longline fishery in Hawaii that would kill one loggerhead sea turtle per year would not
22 jeopardize the continued existence of the species, despite a population model indicating the
23 population would decline to a quasi-extinction level within the next generation (i.e., 25 years)
24 from other stressors. 878 F.3d at 736-37. In the biological opinion at issue, the agency
25 acknowledged the science predicted a decline in loggerhead populations to a level that
26 constituted an increased risk of extinction, but inappropriately found "no jeopardy" because
27 "there was 'little to no difference in the extinction risk when the annual removal of one adult
28 female loggerhead . . . is considered.'" *Id.* (quoting the Hawaii biological opinion).

1 The Ninth Circuit held that the Fisheries Service unlawfully and arbitrarily minimized the
2 risk of bycatch by basing its determination “on the proportionally low risk that the [longline]
3 fishery poses to the loggerheads relative to other threats, such as international fishing and climate
4 change” *Id.* at 738. According to the Ninth Circuit, this logic defies the ESA, because
5 “where baseline conditions already jeopardize a species, an agency may not take action that
6 deepens the jeopardy by causing additional harm.” *Id.* (quoting *Nat’l Wildlife Fed’n*, 524 F.3d at
7 930); *see also Pac. Coast Fed’n of Fishermen’s Ass’ns v. Nat’l Marine Fisheries Serv.*, 265 F.3d
8 1028, 1036–37 (9th Cir. 2001) (holding that if “individual projects are diluted to insignificance
9 and not aggregated,” then the Fisheries Service’s “assessment . . . is tantamount to assuming that
10 no project will ever lead to jeopardy of a listed species”).

11 The Fisheries Service took a similarly arbitrary approach in the biological opinion at
12 issue. The Fisheries Service found that the western Pacific leatherback population has declined
13 more than 80 percent, AR 258 at 13487; concluded that the Pacific leatherback is “a species
14 whose extinction is almost certain in the immediate future because of a rapid population decline
15 or habitat destruction,” AR 258 at 13486; and recognized scientific evidence indicating the
16 population could decline by nearly 96 percent by 2040 because existing threats have not ceased.
17 AR 258 at 13487; *see also* AR 18 at 01043 (biological opinion recognizing that some scientists
18 have “conclude[d] that the Pacific leatherback is on the verge of extirpation”). Nevertheless, in
19 the section of the biological opinion titled “Integration and Synthesis” AR 18 at 01076, the
20 Fisheries Service concluded that the death of a female leatherback from new longline fishing
21 under the permit would not jeopardize the species. *See* AR 18 at 01081.

22 In making this determination, the Fisheries Service violated the ESA by nowhere
23 considering the effects of the longline permit when *combined* with baseline conditions,
24 cumulative impacts, and the grim status of the species. Instead, the Fisheries Service reached its
25 determination on the basis that the death of one adult female “would present negligible additional
26 risk” to the survival and recovery of the western Pacific leatherback in light of the overall
27 threats. *Id.*; *see also* AR 18 at 01080 (finding that “small fractions of the total population [] may
28 be affected” and the projected leatherback mortality under the permit “may have an insignificant

1 effect on the population growth rate”). The Fisheries Service also found that the longline permit
2 would not “impair or limit leatherback nesting populations from becoming more stable or
3 increasing over the long term.” AR 18 at 01081. But the overwhelming scientific evidence
4 indicates that nesting populations are neither stable nor increasing. AR 18 at 01042.

5 Put simply, the Fisheries Service impermissibly based its “no jeopardy” conclusions on
6 the view that, because the prospects for survival are dismal either way, the mortality expected
7 from the permit will not leave the turtles that much worse off, comparatively speaking. This
8 approach is forbidden by the ESA and Ninth Circuit precedent. *See Nat’l Wildlife Fed’n*, 524
9 F.3d at 930 (rejecting the Fisheries Service’s approach where only if the effects of the action “are
10 ‘appreciably’ worse than baseline conditions must a full jeopardy analysis be made”).

11 3. *The Record Fails to Support the Fisheries Service’s Conclusion that the*
12 *Longline Fishing Permit Will Not Jeopardize Endangered Sea Turtles.*

13 Even if the Fisheries Service used the appropriate jeopardy analysis (which it did not),
14 the agency still had to articulate “a rational connection between the facts found and the
15 [conclusion] made.” *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Nat’l Marine Fisheries Serv.*,
16 265 F.3d at 1034. The Fisheries Service’s biological opinion fails to do so and therefore is
17 unlawful.

18 The record establishes that Pacific leatherback sea turtles are in serious trouble. Indeed,
19 the Fisheries Service itself has concluded that the population has undergone a substantial decline,
20 AR 258 at 13487, nesting populations are collapsing, AR 18 at 01042, and that the extinction of
21 the Pacific leatherback “is almost certain in the immediate future.” AR 258 at 13486. The
22 Fisheries Service lists reducing interactions with fishing gear as the number one priority action
23 for recovery of this critically endangered species. *Id.* And it closed the Pacific Leatherback
24 Conservation Area to gillnet fishing specifically to protect leatherbacks during their annual
25 migration upon determining such closure was necessary “to avoid the likelihood of the . . .
26 fishery jeopardizing the continued existence of the leatherback sea turtle.” 66 Fed. Reg. 44,549
27 (Aug. 24, 2001) (codified at 50 C.F.R. § 660.713(c)).

1 The biological opinion also recognizes many other threats to endangered leatherback sea
2 turtles. For example, the opinion notes that collisions with vessels are an occasional source of
3 injury and mortality to leatherbacks off California, AR 18 at 01055, and that leatherbacks can be
4 killed by ingesting plastic pollution or poisoned by domoic acid—a potent marine algal
5 neurotoxin. AR 18 at 01056–57. Additionally, the biological opinion notes that climate change is
6 and will continue to affect sea turtles, including through altered sex ratios and sea level rise that
7 can destroy nesting habitat. AR18 at 01034.

8 Yet the biological opinion concludes the longline fishing permit is not likely to
9 jeopardize the continued existence of endangered leatherback sea turtles. The Fisheries Service
10 reached this conclusion despite the many serious threats endangered sea turtles face, despite the
11 agency’s repeated recognition that these threats are already having a negative impact on
12 recovery, and despite the fact the permit will allow longline fishing in an area that has been off-
13 limits precisely to protect sea turtles from deadly entanglements. It is hard to see how takes from
14 this new fishing activity—including one death—can have no appreciable effect on the survival or
15 recovery of the species when this take is *added to* other threats the Fisheries Service believes are
16 already preventing recovery. *See* 50 C.F.R. §§ 402.02 (effects of the action must be *added to* the
17 environmental baseline), 402.14(g)(4) (biological opinion must analyze whether the effects of
18 the action taken together with the cumulative effects is likely to cause jeopardy); *see also Nat’l*
19 *Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 872 (D. Or. 2016) (noting
20 that the Fisheries Service’s “*Consultation Handbook* recognizes that ‘the longer a species
21 remains at low population levels, the greater the probability of extinction from chance events,
22 inbreeding depression, or additional environmental disturbance.’”). The Fisheries Service’s
23 biological opinion certainly provides no answer.

24 In short, the Fisheries Service has made no rational connection between the relevant facts
25 and its finding that the longline permit is not likely to result in jeopardy of leatherback sea
26 turtles. The biological opinion is therefore arbitrary, capricious, an abuse of discretion, and not in
27 accordance with law, and it should be set aside. 5 U.S.C. § 706(2)(A).

1 **II. The Fisheries Service Violated NEPA By Issuing a Deficient Final EA and Finding**
2 **of No Significant Impact.**

3 The Fisheries Service's failure to consider reasonable alternatives to mitigate the longline
4 permit's environmental impacts, failure to take a hard look at the cumulative impacts, and failure
5 to prepare an environmental impact statement violated NEPA. As described below, Plaintiffs are
6 entitled to summary judgment on Claim 2.

7 A. NEPA Requires the Fisheries Service to Evaluate the Environmental
8 Consequences of Longline Fishing on Protected Species Including Reasonable
9 Alternatives.

10 NEPA is "our basic national charter for protection of the environment." 40 C.F.R.
11 § 1500.1(a); *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1012 (9th Cir. 2009).
12 Congress enacted NEPA to "promote efforts which will prevent or eliminate damage to the
13 environment." 42 U.S.C. § 4321. To that end, NEPA establishes "a set of 'action-forcing'
14 procedures that require agencies to take a 'hard look' at environmental consequences."
15 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citation omitted).

16 The cornerstone of NEPA is the environmental impact statement ("EIS"). An EIS is
17 required for all "major Federal actions significantly affecting the quality of the human
18 environment." 42 U.S.C. § 4332(2)(C); *see* 40 C.F.R. § 1501.4. An EIS must "provide full and
19 fair discussion of significant environmental impacts and [must] inform decisionmakers and the
20 public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance
21 the quality of the human environment." 40 C.F.R. § 1502.1. The NEPA process is intended to
22 force federal agencies, including the Fisheries Service, to fully consider and disclose the
23 environmental consequences of an agency action before proceeding with that action. *See* 42
24 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1501.2, 1502.5.

25 Here, the Fisheries Service relied on a less exhaustive environmental assessment ("EA")
26 to determine whether the proposed action may significantly affect the environment and thus
27 whether an EIS is required. *See* 40 C.F.R. §§ 1501.4(b), 1508.9. An EA "[s]hall include brief
28 discussions of the need for the proposal . . . [and] of the environmental impacts of the proposed
action and alternatives." *Id.* § 1508.9(b). When an agency uses this process and concludes that an

1 EIS is not necessary it must issue a “finding of no significant impact” (“FONSI”) identifying the
2 reasons why the proposed action will not have a significant impact on the environment. *See id.*
3 §§ 1501.4(e), 1508.13. “Because the very important decision whether to prepare an EIS is based
4 solely on the EA, the EA is fundamental to the decision-making process.” *Metcalf v. Daley*, 214
5 F.3d 1135, 1143 (9th Cir. 2000). The agency’s EA and FONSI must supply a “convincing
6 statement of reasons” why the effects are insignificant. *Blue Mtns. Biodiv. Proj. v. Blackwood*,
7 161 F.3d 1208, 1211 (9th Cir. 1998) (citation omitted). If the EA reveals that “the agency’s
8 action *may* have a significant effect upon the . . . environment, an EIS must be prepared.” *Nat’l*
9 *Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (citations and internal
10 quotation marks omitted).

11 B. The Fisheries Service Failed to Analyze Alternatives to Avoid
12 Environmental Harm.

13 The Fisheries Service violated NEPA and the APA by failing to consider a reasonable
14 range of alternatives to issuance of the permit, including measures that would reduce the risk
15 critically endangered sea turtles would become entangled or hooked on longline gear.

16 NEPA requires the Fisheries Service to consider, address, and explain “all reasonable
17 alternatives” to allowing longline fishing that is otherwise prohibited. 40 C.F.R. § 1502.14(a);
18 *see* 42 U.S.C. § 4332(2)(C)(iii) (requiring “alternatives to the proposed action”); *see also* 42
19 U.S.C. § 4332(E). The rigorous alternatives requirement is “at the heart of the environmental
20 impact statement.” 40 C.F.R. § 1502.14. The Ninth Circuit has held that NEPA requires an
21 agency to consider a reasonably full range of alternatives to its proposed action, “even when an
22 [EIS] is not required.” *Env’tl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 234 Fed. App’x 440, 442 (9th
23 Cir. 2007) (citing *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir.
24 1999); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1229 (9th Cir. 1988)). To satisfy that
25 obligation, the Fisheries Service had “to study all alternatives that appear reasonable and
26 appropriate for study . . . as well as significant alternatives suggested by other agencies or the
27 public during the comment period.” *Dubois v. U.S. Dep’t of Ag.*, 102 F.3d 1273, 1286 (1st Cir.
28 1996) (citations omitted), *cert. denied*, 521 U.S. 1119 (1997); *see also id.* at 1290-91.

1 The Fisheries Service admits that Pacific leatherback sea turtles are among the species
2 most at-risk of extinction. Defs' Answer ¶¶ 4, 53, Dkt. No. 16. The Fisheries Service has also
3 determined that reducing entanglement in fishing gear is the most important recovery action and
4 that every sea turtle counts in ensuring their survival. AR 258 at 13491, AR 1038 at J_00007320.
5 Considering alternatives that avoid catching leatherback sea turtles is, therefore, vital to NEPA's
6 purpose: "to require disclosure of relevant environmental considerations that were given a 'hard
7 look' by the agency, and thereby to permit informed public comment on proposed action and any
8 choices or alternatives that might be pursued with less environmental harm." *Lands Council v.*
9 *Forester of Region One of the U.S. Forest Serv.*, 395 F.3d 1019, 1027 (9th Cir. 2004). Analyzing
10 such alternatives would provide information for both the Fisheries Service and the public to
11 weigh this action allowing fishing in areas specifically closed to fishing to protect sea turtles. *See*
12 50 C.F.R. §§ 660.712(a), 660.713(c); AR 61 at 02156 (map of areas closed to drift gillnet fishing
13 to protect turtles).

14 The Fisheries Service's EA evaluated only three alternatives. These alternatives included
15 Alternative 1 (the "no action" alternative, under which the Fisheries Service would deny the
16 permit), along with two nearly identical alternatives: Alternative 2 and Alternative 3 (the
17 preferred alternative). AR 1 at 00276. Alternative 2 and Alternative 3 would permit the same
18 extent and scope of activity with the same fishing conditions; they differed only in the number of
19 incidental takes of sea turtles that would be allowed before fishing under the permit would have
20 to cease. *See id.* ("Under the Preferred Alternative, the National Marine Fisheries Service . . .
21 would approve the EFP as described in Alternative 2, with an adjustment to the limits placed on
22 hooked or entangled leatherback and loggerhead sea turtles").

23 The Fisheries Service failed to evaluate different methods of fishing using longlines or
24 seasonal or area restrictions to reduce the environmental impacts. In particular, the Fisheries
25 Service did not analyze any alternatives requiring fishing vessels (1) to avoid the Pacific
26 Leatherback Conservation Area (*see* 50 C.F.R. § 660.713(c)(2)), or (2) to use EcoCast, an
27 available tool that can predict the location of leatherback sea turtles. *See* AR 277 at 15331–35
28 (explaining EcoCast model).

1 First, the EA failed to include an alternative in which the Pacific Leatherback
2 Conservation Area remained closed to longline fishing for the fall months while leatherback sea
3 turtles left feeding grounds off California. For drift gillnet fishing, a seasonal closure has been in
4 place since 2004 to protect sea turtles. *See* 69 Fed. Reg. at 18,444, 18,460 (codified at 50 C.F.R.
5 § 660.713(c)).⁶ The Fisheries Service made the determination not to include a closure despite
6 “the results of a recent study [that] showed that the [Pacific Leatherback Conservation Area] is
7 still the shortest (i.e., August 15 to November 15) and most effective closure to balance sea turtle
8 interactions and [swordfish gillnet] fishing.” AR 57 at 02007; *see also* AR 18 at 01068 (noting a
9 seasonal closure was a “key recommendation” from agency scientists “to reduce impacts to
10 leatherback sea turtles” in the Hawaii longline fishery).

11 Second, the EA did not evaluate an alternative that would require the use of EcoCast—an
12 available tool to tell fishermen what areas to avoid to prevent catch of leatherback sea turtles and
13 other endangered species—despite its feasibility and known benefits for the protection of
14 endangered species. AR 277 at 15331-35. In the cumulative impacts section, the EA noted that
15 use of this tool by fishermen off the U.S. West Coast “may incrementally and cumulatively
16 reduce the interactions with protected species.” AR 1 at 00116 (EA). The Fisheries Service even
17 internally considered requiring the use of EcoCast in a draft of the permit. AR 1104 at
18 J_00007731-32 (“EFP holders and vessel operator are responsible for ensuring the use of
19 EcoCast . . . to optimize the catch of target species (e.g. swordfish) while minimizing the
20 accidental bycatch of non-target and protected species”). Yet, seemingly without analysis, the
21 final version of the Permit did not require EcoCast, but merely recommended it. AR 52 at 01903
22 (“It is recommended that [the longline permittees] consult the dynamic ocean modeling tool,
23 EcoCast, prior to making fishing sets”). This cursory dismissal of what could have been a
24 reasonable alternative violated NEPA. 42 U.S.C. § 4332(E); 40 C.F.R. § 1508.9(b); *Muckleshoot*
25 *Indian Tribe*, 177 F.3d at 814.

26
27 ⁶ While the closure is specific to gillnets, longlines are prohibited entirely, so the seasonal
28 closures did not need to apply to longlines. *See* 50 C.F.R. § 660.712(a)(1).

1 Both closing the Pacific Leatherback Conservation Area seasonally and requiring
2 EcoCast to avoid leatherback interactions were available and feasible alternatives. The failure to
3 evaluate them in the EA renders it inadequate and unlawful. *See Citizens for a Better Henderson*
4 *v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985) (a “viable but unexamined alternative renders
5 [the] environmental impact statement inadequate” (citations omitted)); *W. Watershed Project v.*
6 *Abbey*, 719 F.3d 1035, 1053 (9th Cir. 2013) (holding that an agency violated NEPA in failing to
7 examine a more environmentally friendly alternative that would reduce the amount of acreage
8 open to grazing in its EA).

9 C. The Fisheries Service Failed to Take a Hard Look at Cumulative Impacts.

10 The Fisheries Service also violated NEPA by failing to properly assess the cumulative
11 impacts of the longline permit on leatherbacks, and therefore failing to provide the necessary
12 information for the agency or the public to understand the risk.

13 To ensure that the full effect of its decision is analyzed, NEPA requires the Fisheries
14 Service to examine both the direct impact of its decision and potential cumulative impacts as part
15 of the analysis in its EA. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9; *Te-Moak Tribe of W.*
16 *Shoshone of Nev. v. U.S. Dep’t of Interior*, 608 F.3d 592, 602-03 (9th Cir. 2010) (citation
17 omitted). A “cumulative impact” is “the impact on the environment which results from the
18 incremental impact of the action when added to other past, present, and reasonably foreseeable
19 future actions regardless of what agency (Federal or non-Federal) or person undertakes such
20 other actions. Cumulative impacts can result from individually minor but collectively significant
21 actions taking place over a period of time.” 40 C.F.R. § 1508.7. “[I]n considering cumulative
22 impact, an agency must provide some quantified or detailed information; . . . general statements
23 about possible effects and some risk do not constitute a hard look absent a justification regarding
24 why more definitive information could not be provided.” *Ocean Advocates v. U.S. Army Corps*
25 *of Eng’rs*, 361 F.3d 1108, 1128 (9th Cir. 2004) (internal quotation marks omitted) (quoting
26 *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379-80 (9th Cir. 1998),
27 *amended by* 402 F.3d 846).

1 The Fisheries Service failed to comply with these requirements. The Fisheries Service’s
2 “analysis” of cumulative impacts amounts to nothing more than general statements about
3 activities that impact sea turtles. As one example, the Fisheries Service lists sea turtle
4 interactions in other fisheries and makes a conclusory statement that “sea turtle interactions are
5 considered rare events in these fisheries.” AR 3 at 00415. Yet in just one of those fisheries
6 mentioned, the sablefish trap fishery, the Fisheries Service elsewhere estimated that 35
7 individual leatherback sea turtles were caught between 2006 and 2010. AR 1038 at J_00007318.
8 The failure to report and analyze the total estimated bycatch of sea turtles stymies an assessment
9 of the cumulative impacts to leatherback sea turtles.

10 While the Fisheries Service may consider the environmental impacts of the longline
11 permit to be minor, that does not absolve the agency from its duty under NEPA to consider the
12 combined impacts of fishery bycatch on these endangered turtles. As the Ninth Circuit has
13 explained:

14 the addition of a small amount of [pollution] to a [waterway] may
15 have only a limited impact on [fish] survival, or perhaps no impact
16 at all. But the addition of a small amount here, a small amount
17 there, and still more at another point could add up to some-thing
18 with a much greater impact, until there comes a point where even a
19 marginal increase will mean that *no* [fish] survive.

17 *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 994 (9th Cir. 2004).

18 The same is true for the incidental take of leatherback sea turtles in fishing gear — the addition
19 of one take here, and one take there, could add up to cumulative significant impacts, particularly
20 considering the Fisheries Service has repeatedly recognized that every sea turtle counts when it
21 comes to analyzing impacts on the species, AR 1038 at J_00007320; AR 188 at 08647, and that
22 reducing entanglement in fishing gear is the number one priority for ensuring the survival of this
23 highly imperiled species on the verge of extinction. AR 258 at 13489–90.

24 Similarly, the Fisheries Service’s EA violated NEPA because it provided insufficient
25 information to weigh the cumulative impacts to leatherback sea turtles from ship strikes. The
26 Fisheries Service fails to estimate ongoing leatherback mortality from ship strikes despite
27 “specific reports of leatherback sea turtles being struck off central California.” AR 1 at 00121;
28

1 AR 18 at 1055. The vague information regarding the scale and magnitude of West Coast ship
2 strike mortality fails to provide the information the Fisheries Service needs to examine the
3 potential cumulative impacts as part of its analysis in the EA. *See* 42 U.S.C. § 4332(2)(C); 40
4 C.F.R. § 1508.7; *see also Klamath Siskiyou Wildlands Ctr. v. Grantham*, 623 Fed. App'x 320,
5 321 (9th Cir. 2015) (“while the EA explained that the . . . proposed action was supposed to result
6 in little to no cattle drift within a few years of implementation, it provided essentially no
7 information about the environmental impact of the drifting cattle”). Such failures render its EA
8 arbitrary and unlawful.

9 D. The Fisheries Service Unlawfully Failed to Prepare an EIS.

10 The Fisheries Service also violated NEPA by failing to prepare an EIS to evaluate the
11 impacts of longline fishing off California. An EIS is required for every “major Federal action[,]”
12 42 U.S.C. § 4332(2)(C), when “substantial questions are raised whether a project may have a
13 significant effect” on the environment. *Found. for N. Am. Wild Sheep v. U.S. Dep’t of Agric.*, 681
14 F.2d 1172, 1178 (9th Cir. 1982). Significance considers both the context and intensity of an
15 action. 40 C.F.R. § 1508.27. NEPA regulations list numerous factors that may make an action
16 significant, warranting the preparation of an EIS. These factors include whether the action will
17 adversely affect endangered species, whether the action has highly controversial or uncertain
18 environmental impacts, and whether the action threatens to violate federal or state environmental
19 laws. *Id.* § 1508.27(b). The presence of just one factor “may be sufficient to require preparation
20 of an EIS.” *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 865 (9th Cir. 2005).
21 Here, several significance factors are present, including the factors discussed below:

22 ***Impacts on Endangered Species.*** An action is likely significant if it “may adversely
23 affect an endangered or threatened species.” 40 C.F.R. § 1508.27(b)(9). Here, the Fisheries
24 Service admits that “more than one leatherback may be captured because the two vessels
25 associated with this EFP will likely be fishing during a time and in the area encompassed by the
26 Pacific Leatherback Conservation Area (PLCA); therefore, we anticipate that the risk of an
27 interaction is relatively high.” AR 18 at 01068 (biological opinion finding leatherbacks would be
28 adversely affected by the proposed action). Where the agency’s own finding is that the activity

1 may adversely affect endangered species, it has, “by its own terms ma[de] clear that the [activity]
2 may ‘significantly’ affect the environment,” likely requiring an EIS. *Nat. Res. Def. Council v.*
3 *Winter*, 518 F.3d 658, 692 (9th Cir. 2008) (citation omitted), *rev’d on other grounds*, 555 U.S. 7
4 (2008). The same is true here. The Fisheries Service itself has found that Pacific leatherbacks are
5 “declining rapidly” and “every turtle counts” that is taken from the waters off the U.S. West
6 Coast when it comes to survival of the species. AR 1038 at J_00007320.

7 ***Highly Controversial Effects.*** An action is likely significant when there is “a substantial
8 dispute [about] the size, nature or effect of” the action. *Blue Mtns.*, 161 F.3d at 1212; 40 C.F.R.
9 § 1508.27(b)(4). With respect to the longline permit, one manifestation of the substantial dispute
10 over the longline permit’s impact is the federal government’s denial of the California Coastal
11 Commission’s request to review the longline permit’s effects on the California coastal zone’s
12 marine resources.⁷ On June 19, 2015, the California Coastal Commission notified the federal
13 government of its intent to review the applications for a permit and determine consistency (or
14 lack thereof) with California’s Coastal Zone Management Plan. AR 46 at 01857–01888. The
15 request focused “primarily on changes in leatherback status” and highlighted the continued
16 decline and the need for more stringent protection of the remaining individuals. *Id.* at 01861–62.
17 And it highlighted recent scientific studies that “clearly show that Western Pacific leatherback
18 turtles depend on coastal and nearshore California marine habitats for a biologically significant
19 part of their life cycle.” *Id.* at 01863. Yet the federal government denied California Coastal
20 Commission’s request for review on March 28, 2019. AR 37 at 01319–01341, AR 1 at 00282.
21 The basis of the dispute between the California Coastal Commission and the federal government
22 was precisely “the size, nature, or effect” of longline fishing on leatherback sea turtles. *Blue*
23 *Mtns.*, 161 F.3d at 1212.

24 In addition, concern over the plight of highly endangered marine mammals and sea turtles
25 and the risk presented by longlines has existed for over a decade. In 2007 and again in 2008, the

26 _____
27 ⁷ The Fisheries Service itself acknowledged that the longline permit, and the denial of the
28 California Coastal Commission’s request to review the proposed permit, was controversial. *See*
AR 1284 at J_00009527 (“This is related to the controversial longline action I briefed you on”).

1 Commission requested permission to review exempted fishing permits for longline fishing in
2 federal waters off the California coast. AR 46 at 01859. In 2007 the federal government granted
3 the Commission's request, and the Commission's review ultimately halted the permit's issuance.
4 AR 47 at 01889. In 2008, the federal government denied the Commission's request for review,
5 but did not issue the permit. *Id.* The objections from "conservationists, biologists, and other
6 knowledgeable individuals" demonstrate that an EIS was required. *Found. for N. Am. Wild Sheep*
7 *v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1182 (9th Cir. 1982).⁸

8 ***Threatens Violation of Federal, State, or Local Law.*** An action is likely to be significant
9 if it "threatens a violation of Federal, State, or local law or requirements imposed for the
10 protection of the environment." 40 C.F.R. § 1508.27(b)(10); *see also Sierra Club v. U.S. Forest*
11 *Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988) (requiring the Forest Service "to consider state
12 requirements imposed for environmental protection to determine whether the action will have a
13 significant impact on the human environment").

14 California's regulatory scheme effectively prohibited longline fishing in the EEZ off
15 California before that ban was codified in federal regulations. *See* 69 Fed. Reg. 11,540 (Mar. 11,
16 2004) (noting that longlines "are generally prohibited by state regulations from fishing within
17 200 nautical miles (370 km) of the West Coast") (codified at 50 C.F.R. § 660.712(a)(1)).
18 California has prohibited longlining for swordfish within the EEZ since at least 1977, when the
19 state promulgated regulations declaring that swordfish may be taken only with handheld hook
20 and line or handthrust harpoon. *See* Cal. Code Regs. tit. 14 § 107(e). Longlines more generally
21 were prohibited by California Fish and Game Code § 9028, which banned hook and line fishing
22 gear longer than 900 feet.

23 Two narrow exceptions in state law maintain the general prohibition on longline fishing
24 in the EEZ and maintain consistency with federal regulations: swordfish and other longline-
25 caught fish caught outside the EEZ may be landed in California if a declaration indicating such

26 _____
27 ⁸ *See also* AR 7 at 00696 (citing letters from scientists opposing fishing with longlines in the
28 Pacific Leatherback Conservation Area, dated Feb. 12, 2015, and opposing longlines off
California, dated Mar. 13, 2007).

1 intent was filed with the Department of Fish and Game prior to departure, Cal. Fish & Game
2 Code § 8113, and a specific method of fishing, called “buoy gear,” is allowed only where
3 “authorized under federal law.” Cal. Fish & Game Code § 9028 (*amended by* Stats. 2018, Ch.
4 844 § 9. (SB 1017), effective Jan. 1, 2019). The Fisheries Service’s longline permit falls under
5 neither of these narrow exceptions.

6 Further, the Fisheries Service failed to consider a state law imposed solely to protect
7 wildlife. The California Fully Protected Mammal Statute protects Guadalupe fur seals,
8 prohibiting any take of the species, incidental or not. Cal. Fish & Game Code § 4700(a), (b)(4).
9 The Fisheries Service anticipated that one Guadalupe fur seal would be caught and killed (i.e.,
10 “taken”) in a longline under the permit, specifying that it “did not propose a cessation of fishing
11 activity” after that event. AR 17 at 01013, 01015. Thus, the Fisheries Service anticipated a
12 violation of the California Fully Protected Mammal Statute. *See Ctr. for Biological Diversity v.*
13 *Dep’t of Fish & Wildlife*, 62 Cal. 4th 204, 234 (2015) (“Fully protected status does not allow for
14 incidental take of species due to otherwise lawful activities”); *Sierra Club v. U.S. Forest Service*,
15 843 F.2d at 1195 (finding EA inadequate for, *inter alia*, failing to consider that a timber sale
16 might violate California’s water quality standards).

17 ***Cumulatively Significant Impacts.*** An agency must prepare an EIS “if it is reasonable to
18 anticipate a cumulatively significant impact on the environment.” 40 C.F.R. § 1508.27(b)(7); *see*
19 *also id.* § 1508.7 (defining cumulative impact). As discussed above, the EA failed to look at the
20 potential cumulative impact of the longline fishing permit. The Fisheries Service was required to
21 prepare an EIS because longline fishing will have cumulatively significant impacts considering
22 the small number of endangered leatherback sea turtles. *See, e.g.*, AR 188 at 08647 (estimating
23 that to prevent a delay in the population rebuilding would require a limit of 0.8 leatherback
24 mortalities on the U.S. West Coast every five years). Given that the Fisheries Service anticipates
25 that the longline permit will result in a leatherback mortality, and the species is already suffering
26 from numerous other stressors, including death and injury in other fisheries, the permit could
27 result in cumulative significant impacts, such as a further delay in rebuilding the population.
28 Thus, “there is at least a substantial question as to whether” the longline permit “will result in

1 cumulatively significant environmental impacts” when evaluated in light of ongoing and
2 foreseeable activities. *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989,
3 1003 (9th Cir. 2004).

4 In summary, there are “substantial questions” that the longline fishing permit “may have
5 a significant impact” on the environment. *Found. for N. Am. Wild Sheep*, 681 F.2d at 1178
6 (citations omitted). The Fisheries Service was required to prepare an EIS. Its failure to do so
7 violated NEPA and the APA, and rendered issuance of the longline permit unlawful.

8 **III. The Fisheries Service Violated the MSA Because the Longline Permit Does Not**
9 **Comply with Applicable Laws.**

10 As described above, the Fisheries Service’s issuance of the longline permit violated the
11 ESA, NEPA, and APA. Because the longline permit is an action taken while implementing a
12 Fishery Management Plan, the Fishery Service also violated the APA and MSA, 16 U.S.C.
13 § 1853(a)(1)(C), which mandates that Fishery Management Plans be “consistent with . . . any
14 other applicable law.” *See Turtle Island Restoration Network*, 878 F.3d at 730 (noting that the
15 MSA “demands that a management plan be consistent with the national standards set out in the
16 Act and ‘any other applicable law,’ including the ESA”) (citation omitted).

17 **CONCLUSION**

18 State and federal law prohibit longline fishing off California precisely because of how
19 dangerous it is to a wide variety of marine life, including endangered sea turtles that can be
20 caught on hooks or entangled in nearly invisible line. Opening up this important habitat area to
21 longline fishing further threatens imperiled species, including Pacific leatherback sea turtles
22 already hovering on the brink of extinction. Yet, the Fisheries Service issued a permit
23 authorizing an experimental longline fishery without first conducting the careful analysis that the
24 law demands. The agency’s biological opinion ignores highly relevant information and fails to
25 consider the true impacts of the permit on the continued existence of Pacific leatherback sea
26 turtle. Likewise, the Fisheries Service’s EA and FONSI fail to consider alternatives to the permit
27 that could eliminate the risk of a leatherback sea turtle being captured and killed in the longline
28 gear and failed to consider the cumulative impacts of the permit. Plaintiffs therefore request that

1 the Court grant their motion for summary judgment. The Court should declare the Fisheries
2 Service in violation of the ESA, NEPA, MSA, and APA and set aside the longline permit and
3 accompanying biological opinion, EA, and FONSI.

4
5 Respectfully submitted this 12th day of September, 2019.

6
7 /s/ Catherine Kilduff
Catherine Kilduff

8
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18
19 **ATTESTATION**

20 I, Catherine Kilduff, am the ECF user whose identification and password are being used
21 to file this MOTION FOR SUMMARY JUDGEMENT. In compliance with L.R. 5-1(i), I attest
22 that the other signatory has concurred in this filing.

23
24 DATED: September 12, 2019

25 /s/ Catherine Kilduff
26 Catherine Kilduff