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14 **UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN FRANCISCO DIVISION**

17 CENTER FOR BIOLOGICAL DIVERSITY,
18 et al.

19 *Plaintiffs,*

20 v.

21 GINA RAIMONDO, et al.,

22 *Defendants.*

Case No. 3:23-cv-06642-AMO

**PLAINTIFFS' NOTICE OF
MOTION, MOTION FOR
SUMMARY JUDGMENT, AND
MEMORANDUM IN SUPPORT**

Date: January 2, 2025

Time: 2:00 p.m.

Place: Courtroom 10, 19th Floor

Judge: Honorable Araceli Martínez-Olguín

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APA	Administrative Procedure Act
ESA	Endangered Species Act
FMP	Fishery Management Plan
MSA	Magnuson-Stevens Fishery Conservation and Management Act
Reopening Rule	Amendment 32 of the Pacific Coast Groundfish Fishery Management Plan

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

1 On January 2, 2025, at 2:00 p.m., or as soon as the Court can accommodate this request,
2
3 Plaintiffs Center for Biological Diversity and Turtle Island Restoration Network (“Plaintiffs”)
4 will move for summary judgment pursuant to Federal Rule of Civil Procedure 56 on the third
5 claim in their Complaint for Declaratory and Other Relief, filed on December 28, 2023 (ECF No.
6 1).¹ Plaintiffs move for summary judgment because there is no genuine dispute as to any material
7 fact and Plaintiffs are entitled to judgment as a matter of law. This motion is based upon the
8 pleadings and administrative record on file in this case and the points and authorities herein.

9 Plaintiffs seek an order declaring that Defendants Gina Raimondo, in her official capacity
10 as the Secretary of Commerce, and the National Marine Fisheries Service (collectively,
11 “Fisheries Service”) violated the Magnuson-Stevens Fishery Conservation and Management Act
12 (“MSA”), 16 U.S.C. §§ 1853(a)(1)(C), 1854(a)(1)(A), (a)(3), in amending its Pacific Coast
13 Groundfish Fishery Management Plan. This amendment, or “Reopening Rule,” permits the use
14 of sablefish pots in previously closed areas that are prime feeding grounds for critically
15 endangered leatherback sea turtles, risking their entanglement and death. The Fisheries Service
16 issued the Reopening Rule without consulting on the impacts to leatherback sea turtles and their
17 critical habitat as the Endangered Species Act (“ESA”) requires, *id.* § 1536(a)(2), violating the
18 MSA’s requirement that the Fisheries Service may approve a Fishery Management Plan (“FMP”)
19 or FMP amendment only if it is consistent with other applicable laws, which includes the ESA,
20 *id.* §§ 1853(a)(1)(C), 1854(a)(1)(A), (a)(3). Plaintiffs also seek an order vacating the Reopening
21 Rule as it applies to sablefish pots.

22 This Motion is based on the Notice of Motion; the supporting Memorandum of Points
23 and Authorities and declarations attached hereto; all pleadings and documents on file in this
24 action; and such oral and documentary evidence as may be presented at or before any hearing on
25 the Motion. Concurrently, Plaintiffs have filed a Motion to Expedite given the significant threats
26 the Reopening Rule poses to the endangered leatherback sea turtle.

27 ¹ On July 24, 2024, the Court issued an order granting Defendants’ motion for partial dismissal
28 and dismissed Claims 1 and 2 of Plaintiffs’ Complaint. ECF No. 43.

MEMORANDUM OF POINTS AND AUTHORITIES**STATEMENT OF THE ISSUES**

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3 Plaintiffs challenge the Fisheries Service's unlawful issuance of a regulation to allow
4 sablefish pot fishing in nearshore waters off the West Coast. The agency's action and inactions
5 while issuing the Reopening Rule threaten the survival and recovery of highly imperiled
6 leatherback sea turtles.

7 The population of West Pacific leatherback sea turtles has declined by nearly six percent
8 annually for 28 years, according to surveys of both the female nesting population in Indonesia
9 and the adult leatherback sea turtles feeding off central California. AR_03192.² Scientists predict
10 a future 75 percent decline from already precarious levels by 2041. AR_01731. Due to this rapid
11 decline, the West Pacific leatherback sea turtle is facing almost certain extinction in the
12 immediate future. AR_09242–43.

13 The Reopening Rule is a dramatic change for the Fisheries Service, which for over 20
14 years implemented groundfish conservation areas to limit the catch of groundfish or protected
15 species; since it issued the Reopening Rule, these areas are now open to the sablefish pot fishery.
16 Leatherback turtles' important West Coast foraging grounds overlap with the groundfish
17 conservation areas; consequently, the U.S. sablefish pot fishery threatens leatherbacks with
18 entanglement and death in these areas because of the Reopening Rule.

19 To catch sablefish using pot gear, vessels attach a line of 15 to 50 pots on the seafloor to
20 a surface buoy. This creates a gauntlet of vertical lines that ensnare leatherback sea turtles, who
21 have long flippers that enable cross-ocean migrations. One dead leatherback sea turtle was
22 observed entangled in a sablefish pot line by an on-board monitor in 2008. AR_00305, 00698.
23 With little pot fishery monitoring, more entanglement deaths undoubtedly occur than are
24 documented. *Id.* Thus, the Fisheries Service estimated in 2012 that the sablefish pot fishery kills
25 at least one leatherback sea turtle every three years. AR_00592, 00611.

26 Even though the Fisheries Service admits that overlap of leatherback foraging habitat

27 ² References to the Administrative Record are preceded with "AR_" and include the last five
28 digits of the Bates number. The cited records are attached to this motion as Exhibits A–R.

1 with the sablefish pot fishery risks entanglement of West Pacific leatherbacks, the Fisheries
2 Service failed to reinitiate consultation on the impacts of the Reopening Rule on leatherback sea
3 turtles and their critical habitat. Instead, the agency relied on an outdated consultation completed
4 in 2012, when sablefish pot gear was prohibited in the groundfish conservation areas. Starting
5 January 1, 2024, the Fisheries Service allowed the sablefish pot fishery to set gear in newly
6 reopened areas in the primary feeding area of leatherback sea turtles. At the leatherback's current
7 population level, even one entanglement-related death would be a major blow. Indeed, on the
8 issue of potential bycatch in the sablefish pot fishery, the Fisheries Service emphasized "every
9 turtle counts for sustaining and hopefully recovering the population." AR_00703.

10 Given the precarious status of the Pacific leatherback sea turtle population, the Fisheries
11 Service's refusal to reinitiate consultation before approving the Reopening Rule is an egregious
12 violation of the MSA. Accordingly, the Court should grant Plaintiffs' Motion for Summary
13 Judgment, find the Fisheries Service in violation of the MSA, and vacate the Reopening Rule as
14 it pertains to the sablefish pot fishery.

15 **FACTUAL BACKGROUND**

16 The leatherback sea turtle has been listed as endangered throughout its range since 1970.
17 50 C.F.R. § 224.101(h) (1970). Leatherback critical habitat, originally designated in 1978, was
18 expanded in 2012 to add waters off the U.S. West Coast. 50 C.F.R. § 226.207 (2012). In
19 designating these areas as critical habitat, the Fisheries Service recognized them as containing
20 features "essential to the conservation of the species" that "may require special management
21 considerations or protection." 16 U.S.C. § 1532(5)(A). After a comprehensive status review of
22 leatherback sea turtles in 2020, the Fisheries Service found that the West Pacific leatherback sea
23 turtle is a distinct population of endangered species under the ESA. AR_07967. This population
24 has the largest range of any living reptile and migrates hundreds, and often thousands, of miles
25 across the Pacific Ocean to feed on jellyfish. AR_00449. As noted above, the West Pacific
26 leatherback population has been declining by approximately six percent annually for 28 years.

1 AR_03192. As of 2017, there were only 1,053 nesting females, placing leatherbacks at a great
2 risk of extinction. AR_01728.



12 *Figure 1.* Leatherback sea turtle. Credit: National Marine
13 Fisheries Service.

14 The Fisheries Service manages “groundfish” that live on or near the bottom of the ocean,
15 including sablefish, in the waters off Washington, Oregon, and California. 50 C.F.R. §§ 660.10–
16 660.79. The Fisheries Service has approved the Pacific Coast Groundfish FMP, amendments to
17 the FMP, and its implementing regulations that govern the continued operation of the fishery. *Id.*
18 “Trap” or “pot” gear is a type of “fixed gear” used to catch sablefish. *Id.* § 660.11 (2022). The
19 sablefish pot fishery typically includes multiple pots that, when set, are linked together on the
20 seafloor along with surface buoys connected by a vertical line in the water column. Am. Answer
21 ¶ 67, ECF No. 37; *see* Figure 2. Fishing occurs in areas and during the time of year when the
22 West Pacific leatherback migrates to feed off the West Coast. AR_00305–06, AR_01374,
23 AR_01405.

24 In 2012, the Fisheries Service issued a biological opinion assessing the effects of the
25 sablefish pot fishery on endangered and threatened species and their critical habitats, including
26 leatherback sea turtles. AR_00484–682. The 2012 biological opinion anticipated that the
27 sablefish pot fishery would injure or kill about one leatherback sea turtle every three years (or
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0.38 annually). AR_00592, 00611. It calculated this risk by including one entanglement observed in a sablefish pot line in 2008, AR_00698, as well as those attributable to unidentifiable fishing gear. AR_00592.

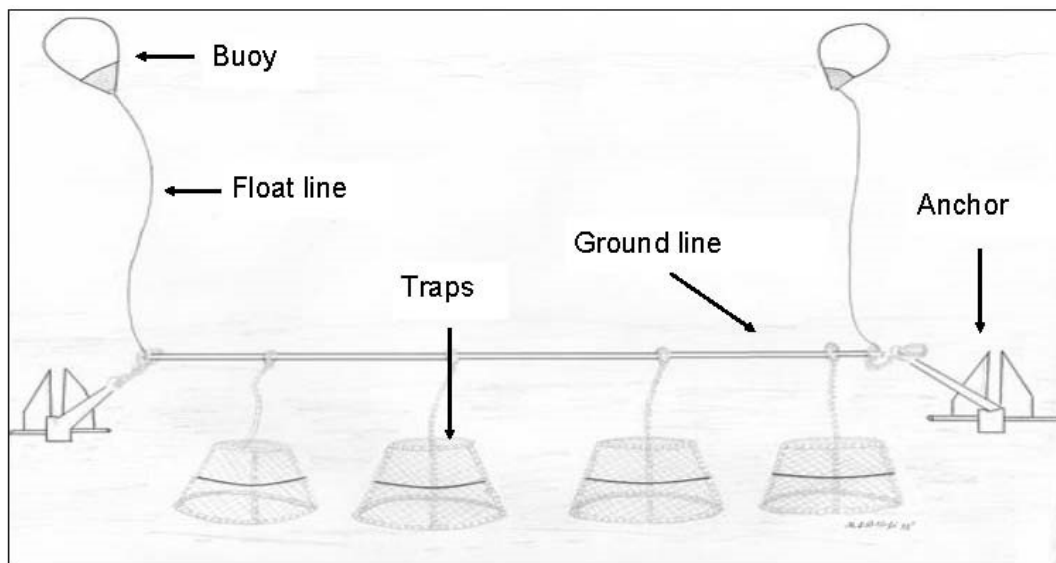


Figure 2. Sablefish traps attached to a common ground line. Diagram by Monica DeAngelis, National Marine Fisheries Service, <https://www.fisheries.noaa.gov/s3/2024-04/nmfs-gear-guide-march-2024.pdf>.

On December 1, 2023, the Fisheries Service promulgated the Reopening Rule to open nearly 2,000 square miles of leatherback sea turtle critical habitat to sablefish pot fishing. AR_02071–72; AR_01983–84 (most of the opened area is in designated critical habitat). The Rule specifically allows sablefish pot gear in parts of a conservation area that had been closed since the early 2000s to protect overfished rockfish (a type of groundfish) and allows fishing closer to shore. AR_02072–73. The Reopening Rule expanded the sablefish fishery’s footprint to include more leatherback critical habitat, including a portion of the leatherback’s principal feeding area off central California, which is designated critical habitat “Area 1.” See Figure 3; AR_00467; 50 C.F.R. § 226.207(b)(1). The Fisheries Service admits that “West Pacific leatherbacks have a degree of risk of entanglement where there is overlap with the Pot Fishery.” Am. Answer ¶ 69, ECF No. 37.

1 Yet the Fisheries Service determined that there were no anticipated impacts of the
2 Reopening Rule on endangered leatherback sea turtles beyond what it already considered in its
3 2012 biological opinion. AR_02078. The Fisheries Service did not reinstate or complete
4 consultation on the impacts of the Reopening Rule on leatherback sea turtles and their designated
5 critical habitat. *Id.*

6 LEGAL BACKGROUND

7 I. Magnuson-Stevens Fishery Conservation and Management Act (“MSA”)

8 In response to concerns about overfishing, Congress enacted the MSA “to take immediate
9 action to conserve and manage the fishery resources found off the coasts of the United States”
10 and “to promote domestic[,] commercial[,] and recreational fishing under sound conservation
11 and management principles” 16 U.S.C. § 1801(b)(1), (b)(3). The Act created eight regional
12 fishery management councils, including the Pacific Fishery Management Council, which has
13 jurisdiction over the Pacific groundfish fisheries. *Id.* § 1852(a)(1)(F). The MSA requires councils
14 to develop—and the Fisheries Service to approve—FMPs and implementing regulations that
15 contain measures necessary to conserve and manage each fishery. *Id.* §§ 1852(h)(1), 1853(a),
16 1854(a). The MSA requires the Fisheries Service to issue implementing regulations that are
17 consistent with the FMP, amendments, the MSA, and “other applicable law.” *Id.* 1854(b)(1).

18 The Fisheries Service can manage groundfish fisheries by establishing a conservation
19 area, in which “NMFS may prohibit fishing with particular gear types.” 50 C.F.R. § 660.11. A
20 groundfish conservation area allows NMFS to control the catch of groundfish or protected
21 species. *See id.* The Fisheries Service established the Non-Trawl Rockfish Conservation Area in
22 2003, which prohibits all commercial groundfish fishing with non-trawl gear, such as sablefish
23 pot gear, in a contiguous area along the U.S. West Coast with boundaries approximating depth
24 contours. 68 Fed. Reg. 908, 913 (Jan. 7, 2003).

25 II. Endangered Species Act (“ESA”)

26 The ESA embodies Congress’s “plain intent” to “halt and reverse the trend toward
27 species extinction, whatever the cost.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). The
28

1 goal of the statute is not to maintain a species on life support indefinitely, but to recover the
2 species to the point where it no longer requires protection. *See* 16 U.S.C. § 1532(3); *Alaska v.*
3 *Lubchenco*, 723 F.3d 1043, 1054 (9th Cir. 2013) (citation omitted). Recognizing the importance
4 of timely habitat protections to the conservation and recovery of endangered species, the ESA
5 requires the designation of critical habitat concurrently with listing a species as threatened or
6 endangered. 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(C). Critical habitat includes places that are
7 essential to a species' survival and recovery. *Id.* § 1532(5).

8 To accomplish the Act's goals of species protection and recovery, section 9 prohibits any
9 person from "taking" an endangered species, 16 U.S.C. § 1538(a)(1), defined broadly to include
10 acts that kill, harm, harass, and capture protected animals, *id.* § 1532(19). Section 7(a)(2) of the
11 ESA requires that every federal agency determine whether its actions "may affect" any listed
12 endangered or threatened species. If so, the action agency must typically formally consult with
13 the Fisheries Service as part of its duty to "insure that [its] action is . . . not likely to jeopardize
14 the continued existence of any endangered species or threatened species or result in the
15 destruction or adverse modification of" designated critical habitat. *Id.* § 1536(a)(2); 50 C.F.R.
16 § 402.14 (2019). Where, as here, the Fisheries Service is both the action agency (for issuing the
17 Reopening Rule at issue) and expert wildlife agency, it must undertake intra-agency consultation.
18 At the completion of formal consultation, the Fisheries Service issues a biological opinion,
19 providing its evaluation of whether the agency action may jeopardize a listed species' continued
20 existence or adversely modify its critical habitat. The ESA requires the consultation process and
21 resulting biological opinion to be based on "the best scientific and commercial data available."
22 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d), (g)(8). The term "jeopardize" is defined as an
23 action that "reasonably would be expected, directly or indirectly, to reduce appreciably the
24 likelihood of both the survival and recovery of a listed species in the wild by reducing the
25 reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02 (2019). Recovery is
26 defined as "improvement in the status of listed species to the point at which listing is no longer
27 appropriate." *Id.* "Destruction or adverse modification means a direct or indirect alteration that
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1 appreciably diminishes the value of critical habitat as a whole for the conservation of a listed
2 species.” *Id.*

3 In conducting its jeopardy analysis, NMFS must determine whether the direct and
4 indirect effects of an action—in the context of the existing status of the species, environmental
5 baseline, and cumulative effects—are “likely to jeopardize the continued existence of a listed
6 species or result in the destruction or adverse modification of critical habitat..” 50 C.F.R.
7 § 402.14(g)(4), (h)(1); *see also* 16 U.S.C. § 1536(b)(3), (4) (if the Fisheries Service finds
8 jeopardy or adverse modification, it is required to suggest reasonable and prudent alternatives to
9 avoid that result, require reasonable and prudent measures to minimize any incidental take, and
10 set forth mandatory terms and conditions for implementing such measures).

11 The environmental baseline includes “the past and present impacts of all Federal, State,
12 or private actions and other human activities in the action area,” along with “the anticipated
13 impacts of all proposed Federal projects in the action area that have already undergone formal or
14 early section 7 consultation, and the impact of State or private actions which are
15 contemporaneous with the consultation in process.” 50 C.F.R. § 402.02. “Cumulative effects” are
16 “those effects of future State or private activities, not involving Federal activities, that are
17 reasonably certain to occur within the action area of the Federal action subject to consultation.”
18 *Id.*

19 The Fisheries Service’s ESA obligations do not end with the issuance of a biological
20 opinion. The agency must reinitiate Section 7 consultation:

21 (1) If the amount or extent of taking specified in the incidental take statement is
22 exceeded; (2) If new information reveals effects of the action that may affect listed
23 species or critical habitat in a manner or to an extent not previously considered; (3)
24 If the identified action is subsequently modified in a manner that causes an effect
25 to the listed species or critical habitat that was not considered in the biological
opinion or written concurrence; or (4) If a new species is listed or critical habitat
designated that may be affected by the identified action.

26 50 C.F.R. § 402.16(a) (2019). Reinitiation of consultation is non-discretionary when one or more
27 of these conditions is met. *See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698
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1 F.3d 1101, 1115 (9th Cir. 2012) (citing 50 C.F.R. § 402.16(c)). This requirement applies to
2 FMPs and the Fisheries Service’s implementation of FMPs. *Greenpeace Found. v. Daley*, 122 F.
3 Supp. 2d 1110, 1121 (D. Haw. 2000); *see also Greenpeace v. Nat’l Marine Fisheries Serv.*, 80 F.
4 Supp. 2d 1137, 1145–46 (W.D. Wash. 2000) (FMPs and their implementation “constitute on-
5 going agency action under the ESA”). The reinitiation process culminates in “develop[ment of] a
6 comprehensive, up-to-date biological opinion.” *Pac. Coast Fed’n of Fishermen’s Assn’s v. U.S.*
7 *Bureau of Reclamation*, 226 Fed. Appx. 715, 717–18 (9th Cir. 2007).

8 STANDARD OF REVIEW

9 The Administrative Procedure Act (“APA”) provides for judicial review of federal
10 agency actions for persons “adversely affected or aggrieved” by them. 5 U.S.C. § 702. The APA
11 requires a reviewing court to “compel agency action unlawfully withheld or unreasonably
12 delayed” and “hold unlawful and set aside agency action, findings, and conclusions found to
13 be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or
14 “without observance of procedure required by law.” *Id.* § 706(1), (2)(A), (2)(D). Section 706 of
15 the APA governs judicial review of the validity of the Fisheries Service’s actions under the
16 MSA. 16 U.S.C. § 1855(f)(1)(B); *Alaska v. Lubchenco*, 723 F.3d at 1051–52 (applying the APA
17 to uphold an MSA regulation to protect endangered species). The arbitrary and capricious
18 standard requires an agency to “examine the relevant data and articulate a satisfactory
19 explanation for its action including a ‘rational connection between the facts found and the choice
20 made.’” *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43
21 (1983) (citation omitted). Importantly, a court “may not supply a reasoned basis for the agency’s
22 action that the agency itself has not given.” *Id.* (citation omitted).

23 An action is arbitrary and must be set aside if the agency has “entirely failed to consider
24 an important aspect of the problem, offered an explanation for its decision that runs counter to
25 the evidence before the agency, or is so implausible that it could not be ascribed to a difference
26 in view or the product of agency expertise.” *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Nat’l*
27 *Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001) [hereinafter *Pac. Coast Fed’n v.*
28

1 NMFS) (quoting *Motor Vehicle*, 463 U.S. at 43); *see also Midwater Trawlers Coop. v. U.S. Dep't*
 2 *of Com.*, 282 F.3d 710, 720 (9th Cir. 2002) (finding a Fisheries Service rule arbitrary and
 3 capricious because it “was a product of pure political compromise, not reasoned scientific
 4 endeavor”). Even where an agency with “special expertise” acts “within its area of expertise,”
 5 the Court “need not defer to the agency when the agency’s decision is without substantial basis
 6 in fact.” *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1067 (9th Cir. 2018) (citation
 7 omitted).

8 Summary judgment is appropriate to resolve a challenge to a federal agency’s decision
 9 where review is based on an administrative record. *See, e.g., Friends of Endangered Species, Inc.*
 10 *v. Jantzen*, 589 F. Supp. 113, 118 (N.D. Cal. 1984). Summary judgment must be granted “if
 11 “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a
 12 matter of law.” Fed. R. Civ. P. 56(a). District courts are encouraged to utilize summary judgment
 13 in appropriate cases. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–49 (1986). Plaintiffs’
 14 motion raises legal issues on undisputed facts, rendering summary judgment appropriate here.

15 ARGUMENT

16 I. The Challenged Action Harms Plaintiffs’ Interests.

17 Plaintiffs have standing to bring this case. *See Friends of the Earth, Inc. v. Laidlaw Env’t*
 18 *Servs.*, 528 U.S. 167, 180–81 (2000) (discussing “injury-in-fact”); *see also Hunt v. Wash. State*
 19 *Apple Advert. Comm’n*, 432 U.S. 333, 342–45 (1977) (describing associational standing test);
 20 *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 707–08 (9th Cir. 2009) (finding
 21 standing to challenge MMPA take authorization). Plaintiffs’ missions are to protect wildlife,
 22 including leatherback sea turtles. Cummings Decl. ¶¶ 3, 5–9; Steiner Decl. ¶¶ 3–4, 7. Plaintiffs’
 23 members value, observe, study, look for, and otherwise enjoy seeing leatherback sea turtles.
 24 Bevington Decl. ¶¶ 4, 7, 8, 13–16, 18, 21–23; Stabb Decl. ¶¶ 2, 5, 8–9; Hartl Decl. ¶¶ 5, 8–9.
 25 Plaintiffs’ members are injured by the Fisheries Service’s issuance of the Reopening Rule that
 26 allows the sablefish pot fishery to expand into leatherback sea turtle critical habitat, potentially
 27 killing leatherback sea turtles and negatively impacting critical habitat, without complying with
 28

1 federal law. Bevington Decl. ¶¶ 24, 26–29; Stabb Decl. ¶¶ 12, 14–15; Hartl Decl. ¶¶ 10. A
2 favorable decision would redress these injuries.

3 **II. The Fisheries Service Violated the MSA by Failing to Reinitiate Consultation and**
4 **Relying on an Outdated Biological Opinion.**

5 The Fisheries Service’s issuance of the Reopening Rule—specifically the expansion of
6 the area where pot gear can be used in leatherback habitat—violated the MSA because it did not
7 comply with federal law. The MSA requires that fishery management plans be consistent with
8 federal law. 16 U.S.C. § 1853(a)(1)(C), 1854(a)(1)(A), (a)(3); *see Turtle Island Restoration*
9 *Network v. U.S. Dep’t of Com.*, 878 F.3d 725, 730 (9th Cir. 2017) (noting that the MSA
10 “demands that a management plan be consistent with the national standards set out in the Act and
11 ‘any other applicable law,’ including the ESA”) (citations omitted); *Alaska v. Lubchenco*, 723
12 F.3d at 1048 (“at the intersection of the MSA and the ESA,” the Fisheries Service “must evaluate
13 the effect of the fishing plans on the [endangered species] and its habitat”); *Ctr. for Biological*
14 *Diversity v. Ross*, No. 4:19-cv-03135, 2019 U.S. Dist. LEXIS 220065, at *20 (N.D. Cal. Dec. 20,
15 2019) (citing 16 U.S.C. § 1853(a)(1)(C) and *Turtle Island*, 878 F.3d at 730) (holding a fishing
16 permit’s impact on leatherback sea turtles violated the ESA and, as a result, violated the MSA).

17 The Fisheries Service’s issuance of the Reopening Rule was “arbitrary, capricious, an
18 abuse of discretion, or otherwise not in accordance with law” or “without observance of
19 procedure required by law,” 5 U.S.C. § 706(2)(A), (D). Specifically, the agency violated the
20 MSA’s mandate to comply with any “other applicable law,” 16 U.S.C. § 1854(b)(1), by failing to
21 reinitiate consultation on the impacts of the sablefish pot fishery even though two of the four
22 reinitiation triggers described above were met. First, the action was “subsequently modified in a
23 manner that causes an effect to the listed species or critical habitat” which the Fisheries Service
24 did not consider in its 2012 biological opinion. 50 C.F.R. § 402.16(a)(3) (2019). Second, new
25 information about the population’s continuing decline and recent leatherback entanglements in
26 other kinds of pot fishing gear (and possibly in the very area opened by the Fisheries Service’s
27 action) “reveals effects of the action that may affect listed species or critical habitat in a manner
28 or to an extent not previously considered.” *Id.* § 402.16(a)(2) (2019).

1 **A. The Reopening Rule constituted a modification of the action that triggered a**
 2 **legal duty to reinitiate consultation.**³

3 The Fisheries Service’s approval of the Reopening Rule without first reinitiating
 4 consultation violated the MSA, with potentially dire consequences for the survival of endangered
 5 leatherback sea turtles. The Reopening Rule drastically modified the action by opening nearly
 6 2,000 square miles of leatherback sea turtle critical habitat to sablefish pots, a gear type known to
 7 entangle and kill leatherbacks, whose populations are in decline and approaching extinction,
 8 without considering the impact of that change on leatherback sea turtles or their critical habitat.

- 9 1. The Fisheries Service’s finding of “no anticipated impacts” on
 10 leatherback turtles from the modified action was arbitrary and
 11 unsupported by the record.

12 The Reopening Rule results in greater overlap between leatherback sea turtles and fishing
 13 gear known to entangle those sea turtles, and this increases their entanglement risk. *See*
 14 AR_01983 (the action opened more places to pot fishing gear, “most of which resides in the
 15 critical habitat” of leatherback sea turtles); Am. Answer, ECF No. 37 ¶ 69 (admitting that “West
 16 Pacific leatherbacks have a degree of risk of entanglement where there is overlap with the Pot
 17 Fishery”). The Fisheries Service determined that there were *no anticipated impacts* of the
 18 Reopening Rule on endangered leatherback sea turtles beyond what it already considered in the
 19 2012 biological opinion, AR_02078, which is entirely rebutted by evidence in the administrative
 20 record.

21 The Reopening Rule modified the action to an extent that required reinitiation under 50
 22 C.F.R. § 402.16(a)(3). It expanded pot gear fishing into a new area. AR_01880. Most of the area
 23 is occupied by leatherback turtles and is known leatherback turtle foraging grounds. AR_00464–
 24 65 (summarizing “the data used to determine each area occupied by leatherbacks”), AR_01983–
 25 84. The 2012 biological opinion did not anticipate that pot fishing would occur in the areas that

26 ³ Plaintiffs consented to Defendants filing an amended Answer to correct the year an entangled
 27 leatherback sea turtle was found. Joint Stip., ECF No. 34 ¶ 2, 4; *see also* AR_01768 (using
 28 incorrect date). Based on that correction, Plaintiffs are not pursuing the argument alleged in their
 Complaint that from 2015 to 2019 the amount of leatherback sea turtles entangled exceeded the
 incidental take statement’s limit.

1 the Rule opened; it instead noted that the fishery’s geographic extent was constrained “by
2 established Marine Protected Areas, such as those to protect groundfish [habitat].” AR_00499.
3 Further, the biological opinion anticipated that “the direct effects to the ESA-listed species are
4 most likely to occur” in the “area where fishing has occurred from 2002 through 2010,”
5 AR_00519, i.e. a period during which the rockfish closures were in place.⁴ Thus, on its face, the
6 2012 biological opinion did not anticipate or evaluate the impacts to leatherback turtles from
7 sablefish pot fishing in areas closed since the early 2000s.

8 In a case less clearcut than this one, the Ninth Circuit evaluated whether modifications at
9 issue were “infrequent and insignificant,” and, because they were not, it found the modifications
10 triggered the agency’s duty to reinitiate consultation. *Forest Guardians v. Johanns*, 450 F.3d
11 455, 465–66 (9th Cir. 2006). In *Forest Guardians*, the Ninth Circuit found that excessive
12 utilization of a grazing allotment combined with a failure to adequately monitor utilization
13 constituted a modification of a land management plan. *Id.* at 465. The modification rose above
14 the level of “infrequent and insignificant deviations” from the plan, thus the modified plan
15 “affected listed species in a manner and to an extent not previously considered.” *Id.* (citations
16 omitted); *see also All. for Wild Rockies v. Probert*, 412 F. Supp. 3d 1188, 1205 (D. Mont. 2019)
17 (applying the same test to hold that chronically ineffective road closures and inadequate
18 monitoring rose above the level of infrequent and insignificant deviations from the mitigation
19 measures anticipated in the biological opinion).

20 The Reopening Rule easily passes the Ninth Circuit’s test in *Forest Guardians* because
21 the Fisheries Service made a significant and permanent change to the Pacific Coast Groundfish
22 FMP when it reopened a large area of the ocean (approximately 2,411 square miles) to fishing
23 that (1) had been closed to the sablefish pot fishery for over 20 years, AR_02072; and (2)
24 overlapped with the most important feeding areas in California waters for endangered
25 leatherback turtles, *see* Figure 3 (below); AR_00464–66, 71; AR_01983–84. This goes far
26 beyond what the Fisheries Service analyzed in its 2012 biological opinion. *See, e.g.*, AR_00499.

27 _____
28 ⁴ The areas the Rule reopened are the Cowcod Conservation Areas and the coastwide Non-Trawl
Rockfish Conservation Area. AR_02072.

1 Therefore, the Reopening Rule “subsequently modified” the FMP in ways that negatively affect
2 leatherbacks and their critical habitat, and these impacts were not previously considered. 50
3 C.F.R. § 402.16(a)(3).⁵

4 Further, the record belies the Fisheries Service’s findings of “no anticipated impacts,” as
5 it establishes that the Fisheries Service’s typical method of estimating entanglement risk is based
6 on the spatial extent of overlap between the pot fishery and leatherback sea turtles. The Fisheries
7 Service admitted the sablefish pot fishery will likely shift “into the newly opened area” and the
8 Reopening Rule “will increase the spatial distribution of pot gear.” AR_01880. The Fisheries
9 Service also acknowledged the link between the fishery’s footprint and risk of harm to
10 leatherback turtles. AR_00305 (groundfish “fisheries clearly overlap with the foraging
11 distribution of leatherback turtles . . . , so there is clearly some potential for impacts due to . . .
12 entanglement”); AR_00482 (“[d]ue to the overlap of the fishery and past fishery interactions
13 with listed species, [the Fisheries Service] has determined that the continued operation of the
14 Pacific Coast Groundfish Fishery is likely to adversely affect . . . leatherback sea turtles.”); *see*
15 *also Conservation Law Found. v. Ross*, 422 F. Supp. 3d 12, 32–33 (D.D.C. 2019) (noting
16 potential harm from an MSA regulation because it eliminated fishing gear restrictions in areas
17 with whales).

18 Despite this evidence, in proposing the Reopening Rule, the Fisheries Service stated that
19 “it is the amount of gear in the water rather than the amount of area or habitat designation that
20 affects potential entanglement risk for leatherback sea turtles.” AR_01880. In other words, the
21 Fisheries Service claimed the overall fishing effort—regardless of the presence of leatherback
22 turtles or whether traps are placed in the most or least important habitat areas—determines
23 entanglement risk. The Fisheries Service made similar claims when issuing the Reopening Rule,
24 asserting, “there is *no evidence* to suggest that a geographic expansion of fishery effort . . .
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27 ⁵ This standard for reinitiating consultation, 50 C.F.R. § 402.16(a)(3), is much less demanding
28 than the standard for finding jeopardy or destruction or adverse modification to critical habitat.
Id. § 402.02.

1 significantly increases the risk of entanglement to leatherback sea turtles.” AR_02078 (emphasis
2 added).

3 This argument fails for two reasons: (1) some areas with leatherback turtles that
4 previously had *no* fishing pots will now *have* fishing pots, AR_01880 (“some vessels will likely
5 shift some of their effort to the newly opened depth bin”); *id.* (a portion of the newly opened area
6 “overlaps with ESA-designated critical habitat for leatherback sea turtles”); and AR_00464–65
7 (occupied critical habitat was “based on aerial surveys, telemetry studies, and fishery
8 interactions”), and (2) the administrative record contains no evidence that leatherback turtle
9 entanglements are solely correlated with fishing effort. *See* AR_01432 (“it is difficult to assess
10 whether the number of bycatch events is indeed linked to levels of fishing effort.”).

11 The Fisheries Service’s no anticipated impacts determination places unfounded weight on
12 the fact that “there has not been a documented interaction with a leatherback sea turtle in the
13 groundfish fishery since 2008.” AR_02078. This contrasts with the biological opinion’s analysis,
14 which assessed not only documented leatherback turtle interactions with the groundfish fishery
15 but also in unidentified fisheries that could have been the sablefish pot fishery. *See* AR_00592
16 (including entanglements in any pot gear “that could not be identified to a specific fishery”
17 because the “very low observer coverage of the sablefish pot/trap fishery does not allow for
18 accurate estimation of the fleet-wide mortality rate”). AR_00592–93. The Fisheries Service must
19 rely on the best scientific data available to make its projections and reach its conclusions, which
20 it did not do here when it did not include unidentified pot fishery entanglements as a proxy for
21 sablefish pot fishery interactions. 16 U.S.C. §§ 1851(a)(2), 1536(a)(2).

22 On the issue of available data, the 2012 biological opinion’s “[r]easonable and prudent
23 non-discretionary measures . . . include[] ‘ . . . identify[ing] goals for minimum [observer]
24 coverage levels to achieve fleetwide take estimates for leatherback sea turtles . . .and a plan for
25 implementation.” AR_01434. But the Fisheries Service never increased monitoring rates over
26 the next ten years, and in 2021, still could not make “conclusive statements about leatherback
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1 turtle bycatch” “[b]ecause of the low observer coverage of the fishery.”⁶ AR_01436; *see also*
 2 AR_01661 (low levels of pot fishery monitoring caused “high uncertainty when estimating total
 3 bycatch” of leatherbacks). Thus, the Fisheries Service cannot rely on the lack of documented
 4 leatherback turtle interactions to anticipate no impacts from the Rule’s geographic expansion of
 5 the fishery.

6 For these reasons, the Fisheries Service’s finding of no impact to leatherback sea turtles
 7 “runs counter to the evidence before the agency,” *Pac. Coast Fed’n v. NMFS*, 265 F.3d at 1034
 8 (citations omitted); does not “articulat[e] a rational connection between the facts found and the
 9 choice made,” *id.*; and is not based on the best available science, 16 U.S.C. §§ 1851(a)(2),
 10 1536(a)(2)—rendering it arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A), (D).

11 2. The Fisheries Service’s refusal to reinitiate consultation on the
 12 impacts of the modified action on leatherback critical habitat was
 13 arbitrary and capricious.

14 As discussed above, section 7 consultation requires the Fisheries Service to ensure that its
 15 actions advance the purposes of the ESA and are unlikely to “result in the destruction or adverse
 16 modification of” designated critical habitat. 16 U.S.C. § 1536(a)(1)–(2); *see* 50 C.F.R. § 402.14
 17 (detailing the ESA’s formal consultation procedures). The designation of critical habitat thus
 18 benefits listed species by imposing an additional consultation requirement where an action will
 19 result in the destruction or adverse modification of critical habitat that may affect the recovery
 20 (not just the survival) of a species. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378
 21 F. 3d 1059, 1069–70 (9th Cir. 2004).

22 The Fisheries Service’s determination arbitrarily discounted key points: critical habitat
 23 for the leatherback consists of two areas in California, Area 1 and Area 7, and Area 1 contains
 24 the highest density of prey and highest conservation value for leatherbacks. AR_00471 (Table 2).
 25 The Reopening Rule not only affects Area 1, but also Area 7, an adjacent, offshore area

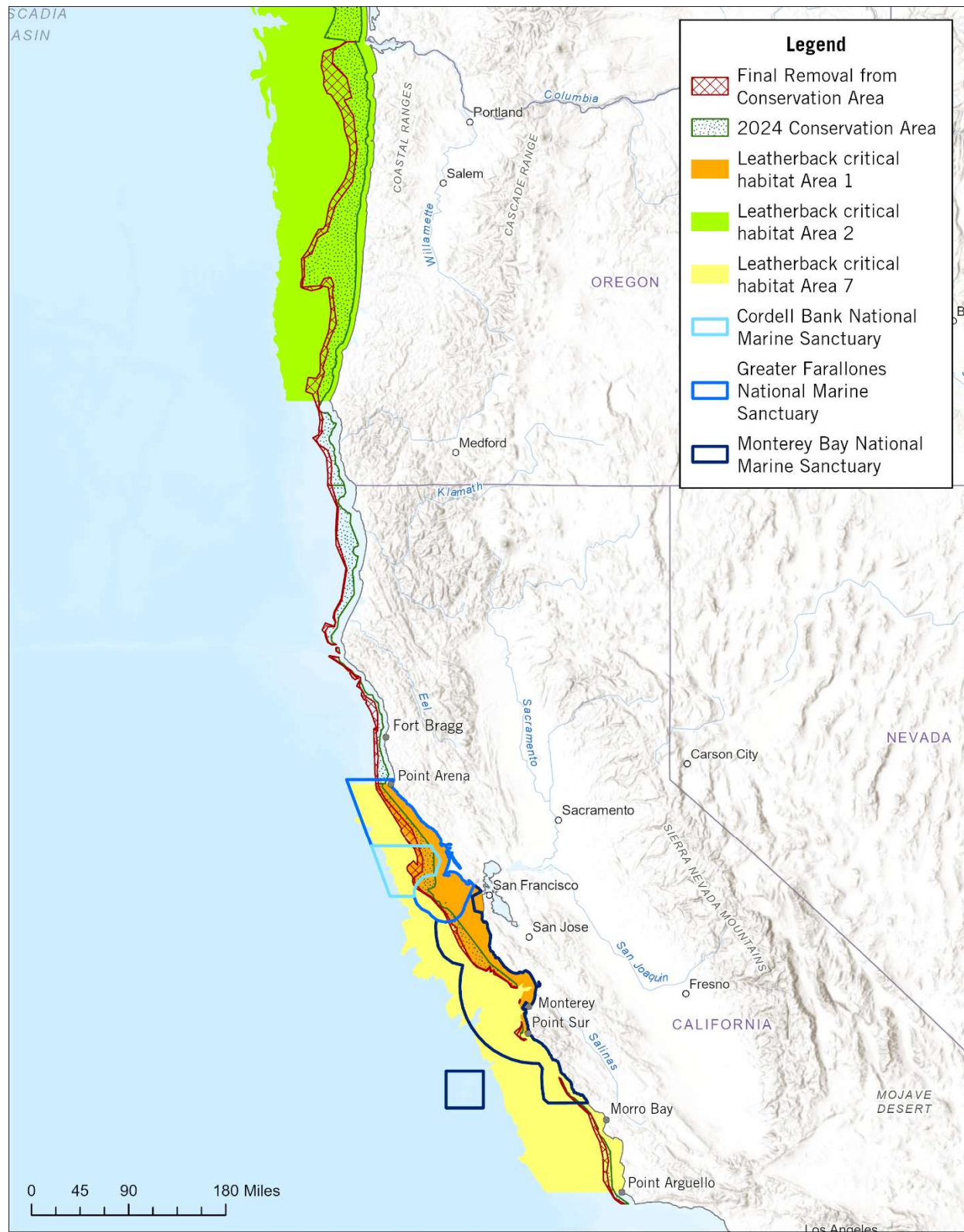
26 ⁶ In June 2012, the Fisheries Services was working “to increase observer coverage of the
 27 sablefish pot and trap fishery in order to improve bycatch estimates of leatherback sea turtles.”
 28 AR_00482. In 2021, the Fisheries Service planned “to maintain historic [monitoring] coverage
 rates (3–12%) in the [open access] fixed gear fishery where the single leatherback interaction
 occurred.” AR_01434.

1 “commonly utilized by leatherbacks when jellyfish availability in Area 1 is poor, and as a region
2 of passage to/from Area 1.” AR_00464–65; 50 C.F.R. § 226.207(b)(1) (2012) (codifying these
3 boundaries); Figure 3.

4 The Fisheries Service ignored the importance of and impacts to leatherback turtle critical
5 habitat in its Reopening Rule, claiming, “there is no evidence to suggest” it would cause more
6 sea turtle interactions. AR_02078. But this contradicts the Fisheries Service’s reasons for
7 drawing the critical habitat boundaries as it did: Area 1 is “a principal California foraging area”
8 for leatherback turtles, with the highest conservation value among all three designated critical
9 habitat areas (Areas 1, 2 and 7, as depicted in Figure 3). AR_00464. The complete failure to
10 consider this nuance is arbitrary. *See Pac. Coast Fed’n v. NMFS*, 265 F.3d at 1037 (holding that
11 NMFS improperly disregarded an action’s site-specific impacts to salmon spawning grounds
12 given the importance of that habitat).

13 In addition, the Rule’s impacts to Area 1 were not considered in the outdated biological
14 opinion, which was limited to analysis of fishing with sablefish pots *outside* the groundfish
15 conservation area. The Reopening Rule introduces dangerous pot lines into leatherback’s most
16 important foraging areas.

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Data Sources: National Oceanic & Atmospheric Administration

Map by: K. Clauser, Center for Biological Diversity 8/2024

27 *Figure 3. Designated critical habitat for leatherback sea turtles in California and Oregon and*
 28 *areas open to pot fishing under the Reopening Rule. Source: Clauser Decl., Ex A.*

1 Finally, the Fisheries Service has indicated that federal actions restricting movement of
2 an endangered species in critical habitat would constitute a negative impact; here, allowing
3 sablefish pots that entangle leatherbacks and prevent foraging in critical habitat is a negative
4 impact. In 2021, the Fisheries Service considered an analogous situation for the critical habitat of
5 humpback whales, who are also vulnerable to entanglement in fishing gear: “where a Federal
6 action has the potential to obstruct the whales’ movement and thereby prevent or impede the
7 whales’ ability to access prey, *we would consider that as constituting a negative impact on the*
8 *area of designated habitat itself . . .*” AR_01310–11. In other words, the Federal action does not
9 need to impact the critical habitat “prey” feature to negatively affect the critical habitat itself.⁷
10 The potential to obstruct leatherback sea turtles’ movement is a negative impact on the critical
11 habitat itself and triggers the requirement to reinitiate consultation.

12 **B. Leatherback sea turtles’ ongoing decline and deaths in California Dungeness**
13 **crab pot gear constitute new information requiring reinitiation of**
14 **consultation.**

15 Even if, *arguendo*, the 2012 biological opinion somehow adequately considered the
16 Reopening Rule’s impacts on critically endangered leatherback sea turtles, new information
17 since 2012 about the population’s continuing decline and recent entanglements in pot gear along
18 the West Coast triggered the Fisheries Service’s duty to reinitiate consultation prior to issuing the
19 Reopening Rule. *See* 50 C.F.R. § 402.16(a)(2). Under the ESA, reinitiation of consultation is
20 required if, among the other reasons discussed above, “new information reveals effects of the
21 action that may affect listed species or critical habitat in a manner or to an extent not previously
22 considered.” *Id.*

23 This new information—including the species’ steep population decline and new threats,
24 AR_08206; AR_08226—is extensive and shows the Reopening Rule may affect West Pacific
25 leatherback sea turtles and their critical habitat in a manner or to an extent not previously

26 ⁷ Prey was identified as essential to the conservation of both humpback whales and leatherback
27 turtles. The description of leatherback sea turtle critical habitat does not specifically include the
28 word “accessibility,” but it similarly emphasizes the prey’s ability “to support individual as well
as population growth, reproduction, and development of leatherbacks.” 50 C.F.R.
§ 226.207(b)(4).

1 considered. The Fisheries Service did not evaluate this new information in its 2012 biological
2 opinion (it could not have) and none of this new information was evaluated in the context of the
3 Reopening Rule. *See, e.g.*, AR_01909–2070 (Environmental Assessment); *see also Ctr. for*
4 *Biological Diversity v. Ross*, 2019 U.S. Dist. LEXIS 220065, at *14–15 (biological opinion for a
5 different fishery was arbitrary and capricious because its leatherback population estimate of
6 “approximately 2,600 nesting females” did not consider a more recent estimate that reflected the
7 “estimated population decline of almost six percent per year since 1984”).

8 The abundance of leatherback turtles compared to leatherback turtle mortality estimates
9 is the backbone of the 2012 biological opinion’s analysis of the sablefish pot fishery’s effects,
10 AR_00605–06. The Fisheries Service anticipated that the “minimum number of potential injuries
11 and mortalities from entanglements is 3 turtles over 8 years (including entanglement with
12 proposed fishing gear),” and—when combined with other threats—“represents 0.22 to 0.13
13 percent of the 2,700 to 4,500 breeding female turtles in the population.” AR_00606. New
14 information shows that as of 2017, there were only 1,053 nesting leatherback turtle females,
15 AR_01728, which is *less than half* the 2012 biological opinion’s lowest abundance estimate of
16 2,700. The abundance estimate makes the West Pacific leatherback population significantly more
17 vulnerable to extinction. AR_08205 (the low population “places it at elevated risk for
18 environmental variation, genetic complications, demographic stochasticity, negative ecological
19 feedback, and catastrophes”).

20 Further, the California Dungeness crab pot fishery has caused recent, fatal entanglements
21 of leatherbacks, a “new emerging threat” that illustrates the cumulative risks to leatherbacks.
22 AR_08226 (“two documented leatherback takes occur[ed] in 2015 and 2016”); *see also*
23 AR_02112 (“A leatherback sea turtle entanglement mortality was reported on November 24,
24 2023, near the Farallon Islands” in California Dungeness crab fishing gear). The Fisheries
25 Service must aggregate the cumulative effects, environmental baseline, *and* proposed action in
26 light of the status of endangered leatherbacks sea turtles to ensure their survival and recovery.
27 *See* 50 C.F.R. § 402.14(g)(4), (h). In making this determination, the proper analysis “is not the
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1 proportional share of responsibility the federal agency bears for the decline in the species, but
2 what jeopardy might result from the agency’s proposed actions in the present and future human
3 and natural contexts.” *Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*,
4 426 F.3d 1082, 1093 (9th Cir. 2005) (citations omitted). Were it otherwise, “a listed species
5 could be gradually destroyed, so long as each step on the path to destruction is sufficiently
6 modest.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008).

7 The Ninth Circuit has repeatedly required analysis of an action’s impacts when *added to*
8 baseline conditions that have already contributed to a species’ decline. For example, in *Turtle*
9 *Island*, plaintiffs challenged a biological opinion that concluded one loggerhead sea turtle death
10 each year from a longline fishery in Hawaii would not jeopardize the continued existence of the
11 species because it was in decline from other threats. *See* 878 F.3d at 735–36. The court held this
12 approach unlawful, finding NMFS arbitrarily minimized the effects of the action at issue because
13 “where baseline conditions already jeopardize a species, an agency may not take action that
14 deepens the jeopardy by causing additional harm.” *Id.* at 737–39 (citation omitted); *see also Pac.*
15 *Coast Fed’n v. NMFS*, 265 F.3d at 1036–37 (if “individual projects are diluted to insignificance
16 and not aggregated,” then an agency’s “assessment . . . is tantamount to assuming that no project
17 will ever lead to jeopardy of a listed species”). Here, the Fisheries Service impermissibly ignored
18 over a decade of continued population decline, including in central California waters, and
19 emerging pot gear threats to leatherbacks when it approved expanding sablefish pot gear fishing
20 into key leatherback habitat.

21 The Fisheries Service’s refusal to reinitiate consultation prior to issuing the Reopening
22 Rule violated the MSA. Furthermore, its reliance on an outdated biological opinion to implement
23 the Rule also constituted a violation of the MSA because that too is inconsistent with the ESA’s
24 legal mandates. *See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d at 1108
25 (“When reinitiation of consultation is required, the original biological opinion loses its validity”
26 (citation omitted)); *Ctr. for Biological Diversity v. Ross*, 2019 U.S. Dist. LEXIS 220065, at *20
27 (citing 16 U.S.C. § 1853(a)(1)(C) and *Turtle Island*, 878 F.3d at 730). The Fisheries Service
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1 violated the MSA when it relied on a legally flawed biological opinion and failed “to discuss
2 information that would undercut the [biological] opinion’s conclusion.” *Ctr. for Biological*
3 *Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d at 1127–28; *accord WildEarth Guardians v.*
4 *Steele*, 545 F. Supp. 3d 855, 880–81 (D. Mont. 2021). The Fisheries Service had access to recent
5 data that undercuts the 2012 biological opinion’s “no jeopardy” conclusion. “Ignoring
6 information that would undercut the opinion’s conclusions violates the [agency’s] obligation
7 under § 7 of the ESA.” *Steele*, 545 F. Supp. 3d at 881 (citation and internal quotation marks
8 omitted). Because the Fisheries Service did not question or reexamine the 2012 biological
9 opinion’s conclusions in the face of new information, the Fisheries Service’s reliance on the 12-
10 year-old biological opinion to issue the Reopening Rule was unlawful.

11 **C. The Reinitiation Memorandum Cannot Cure the MSA Violations.**

12 The Fisheries Service’s reinitiation of consultation on March 24, 2024, after issuance of
13 the Reopening Rule, does not cure its MSA violations. AR_02116–126. Consultation is required
14 *before* an agency action and cannot be remedied by a process begun after the fact. *Nat. Res. Def.*
15 *Council v. Houston*, 146 F.3d 1118, 1129 (9th Cir. 1998) (“The failure to respect the
16 [consultation] process mandated by law cannot be corrected with post-hoc assessments of a done
17 deal”); *see also id.* (noting that “if the Biological Opinion had been rendered before the contracts
18 were executed, the [consulting agency] would have had more flexibility to make, and the
19 [contract holder] to implement, suggested modifications to the proposed contracts.”); *Ctr. for*
20 *Biological Diversity v. Env’t Prot. Agency*, 861 F.3d 174, 188 n.10 (D.C. Cir. 2017) (“In no
21 uncertain terms, the ESA mandates that every federal agency ‘shall’ engage in consultation
22 before taking ‘any action’” that adversely affects a listed species (quoting 16 U.S.C.
23 § 1536(a)(2)).

24 **III. The Court Must Vacate the Reopening Rule as It Applies to the Expansion of the**
25 **Sablefish Pot Fishery.**

26 The Court has both the ability and the obligation to vacate illegal agency actions. The
27 APA unequivocally states that a “reviewing court *shall* . . . hold unlawful and *set aside* agency
28 action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or

1 otherwise not in accordance with law; [or] without observance of procedure required by law.” 5
2 U.S.C. § 706(2)(A), (D) (emphasis added). If an agency’s decision is improper, “then the
3 [agency’s] decision *must be vacated* and the matter remanded to [the agency] for further
4 consideration.” *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (emphasis added); *see also Corner Post,*
5 *Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2460 (2024) (Kavanaugh, J.
6 concurring) (“The Federal Government and the federal courts have long understood § 706(2) to
7 authorize vacatur of unlawful agency rules, including in suits by unregulated plaintiffs who are
8 adversely affected by an agency’s regulation of others.”).

9 While the Ninth Circuit has authorized remand without vacatur, it does so only in “rare”
10 or “limited” circumstances.” *Humane Soc’y of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir.
11 2010); *Pollinator Stewardship Council v. Env’t Prot. Agency*, 806 F.3d 520, 532 (9th Cir. 2015).

12 To determine if such “rare” circumstances exist, courts must “weigh the seriousness of
13 the agency’s errors against the disruptive consequences of an interim change that may itself be
14 changed.” *Nat’l Fam. Farm Coal. v. Env’t Prot. Agency*, 960 F.3d 1120, 1144 (9th Cir. 2020)
15 (quoting *Pollinator*, 806 F.3d at 532). An interim change has “disruptive consequences” if it
16 results in harm to the environment or less protection than the status quo. *Pollinator*, 806 F.3d at
17 532 (quoting *Cal. Cmty. Against Toxics v. Env’t Prot. Agency*, 688 F.3d 989, 992 (9th Cir.
18 2012); *accord Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405–06 (9th Cir. 1994).
19 These rare and limited exceptions are not present in this case, and vacatur is warranted. The
20 Fisheries Service cannot carry its burden of proving otherwise. *See All. for Wild Rockies v. U.S.*
21 *Forest Serv.*, 907 F.3d 1105, 1121–22 (9th Cir. 2018) (burden is on defendants to “overcome the
22 presumption of vacatur”).

23 First, the Fisheries Service’s errors in promulgating the Reopening Rule are serious. The
24 unlawfulness of the Rule’s promulgation is not due to mere procedural impropriety. *See Oceana,*
25 *Inc. v. Raimondo*, No. 21-cv-05407, 2024 U.S. Dist. LEXIS 115033, at *6–7 (N.D. Cal. June 28,
26 2024) (holding that failure to adopt an MSA-compliant fishery plan is a substantive, not
27 procedural, defect). Legal violations that resulted from the Reopening Rule’s promulgation are
28

1 due to “fundamental flaws” in the Fisheries Service’s action, and as such, are considered
2 “serious.” *Pollinator*, 806 F.3d at 532; *see also Klamath-Siskiyou Wildlands Ctr. v. Nat’l*
3 *Oceanic & Atmos. Admin.*, 109 F. Supp. 3d 1238, 1244–45 (N.D. Cal 2015) (finding serious
4 errors because the Fisheries Service “failed to evaluate the proposed action’s short-term impacts”
5 and “failed to conduct a cumulative effects analysis” on listed species).

6 Second, vacatur of the Reopening Rule will not have disruptive consequences that
7 outweigh these serious errors. Rather, returning the boundaries of the sablefish pot fishery to
8 those in place before January 1, 2024—boundaries that existed for 24 years—will better protect
9 the environment by preventing dangerous fishing in nearshore leatherback critical habitat.
10 Because remand without vacatur in this case would not “maintain[] ‘the enhanced protection of
11 the environmental values,’” vacatur is the appropriate remedy. *Ctr. for Food Safety v. Regan*, 56
12 F.4th 648, 668 (9th Cir. 2022) (quoting *Ctr. for Biological Diversity v. Env’t Prot. Agency*, 861
13 F.3d at 188 (D.C. Cir. 2017)).

14 Due to the seriousness of the Fisheries Service’s errors and the lack of environmentally
15 disruptive consequences from any interim change, the Court should vacate the Reopening Rule
16 as applied to sablefish pot fishing gear.

17 CONCLUSION

18 The Fisheries Service’s Reopening Rule significantly expands the geographic access of
19 the sablefish pot fishery to the critically endangered leatherback sea turtle’s most important
20 foraging habitat. The Fisheries Service was required, but failed, to consult on the impacts of its
21 sweeping Reopening Rule on leatherbacks and their designated critical habitat before taking this
22 action. The agency instead relied on a consultation that is a dozen years old; contains outdated
23 population estimates; and does not contemplate emerging threats from pot gear. This approach is
24 inconsistent with applicable federal law and thus violates the MSA. Plaintiffs therefore
25 respectfully request that the Court grant their motion for summary judgment, declare the
26 Fisheries Service in violation of the MSA, and vacate the Reopening Rule as it applies to the
27 sablefish pot fishery.

1 Dated: August 14, 2024.

Respectfully submitted,

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