UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE HUMANE SOCIETY OF THE UNITED STATES; WILD FISH CONSERVANCY; BETHANIE O'DRISCOLL; ANDREA KOZIL	)	Case No. 1:12-cv-00427(JEB)
Plaintiffs,	)	
v.	)	
JOHN BRYSON, Secretary of Commerce; SAM RAUCH, Assistant Administrator, NOAA Fisheries JAMES LECKY, Director, Office of Protected Resources National Marine Fisheries Service	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

RULES

MISCELLANEOUS

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INTRODUCTION

Plaintiffs The Humane Society of the United States ("The HSUS"), Wild Fish Conservancy ("WFC"), and individual citizens Bethanie O'Driscoll and Andrea Kozil (collectively "Plaintiffs") seek a Temporary Restraining Order delaying implementation of the National Marine Fisheries Service's ("NMFS") decision to authorize the States of Oregon and Washington to kill up to 460 federally protected California sea lions over a five-year period at Bonneville Dam for doing what comes naturally – eating fish. *See* Letter of Authorization to Idaho State (March 15, 2012) (Exh. 1).[1]

Despite its appearance at first glance, this case does not require the Court to balance competing claims by consumers of salmon in the Columbia River. Unlike fishing, hydropower dams, the stocking of non-native fish, and other human-caused impacts to salmon, sea lions are

[1] NMFS issued Oregon and Washington a Letter of Authorization with the same language. *See* NMFS, *Authority for States to Remove California Sea Lions under Marine Mammal Protection Act Section 120,* http://www.nwr.noaa.gov/Marine-Mammals/Seals-and-Sea-Lions/Sec-120-Authority.cfm (last updated March 15, 2012).

statutorily protected by the MMPA, and thus may not be killed simply because they take salmon. Rather, Congress has considered the appropriate balance between sea lions and salmon carefully, and decided in enacting Section 120 of the Marine Mammal Protection Act ("MMPA") that sea lions may feed on salmon as needed – and regardless of the impacts on other consumptive users of salmon – up to the point at which NMFS can demonstrate that "*individually identifiable pinnipeds*" are "having a *significant negative impact* on the *decline or recovery* of salmonid fishery stocks." 16 U.S.C. § 1389(b)(1) (emphasis added). At that point, and only upon such a showing, can the agency engage in the killing of federally protected pinnipeds.

This decision challenged here is similar to two prior authorizations to kill sea lions at the Bonneville Dam – decisions which *were both stayed* by agreement or court order during prior litigation, first in the District of Oregon and the Ninth Circuit, *see Humane Soc'y v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010), and most recently in the District of Columbia (*see Humane Soc'y v. Locke*, D.D.C. Civ. No. 11-0942-JEB, filed May 19, 2011 and withdrawn after NMFS rescinded the authorization in response to the litigation).

In 2010 the Court of Appeals for the Ninth Circuit examined NMFS's first decision to authorize killing of sea lions at Bonneville Dam – in essence, the same decision presented here – and set aside that decision because NMFS failed to adequately explain why killing sea lions was appropriate in light of the much greater impacts to salmon and steelhead caused by fisheries and dam operations permitted by the agency. *Humane Soc'y v. Locke*, 626 F.3d at 1049. In particular, the court found that NMFS's decision that sea lions' take of approximately 4.2 percent of salmon constituted a "significant negative impact" on five species of Columbia River salmonids, was impossible to reconcile factually with NMFS's previous conclusion that authorizing fishermen to take *up to 17 percent of the very same salmon stock* would, as a factual matter, have "*minimal adverse effects on Listed Salmonid [populations] in the Columbia River Basin.*" *Id*. at 1048 (emphasis in original). Thus, the Ninth Circuit vacated NMFS's 2008 decision and remanded the

matter to the agency, noting that NMFS's contradictory factual findings regarding equivalent or greater sources of salmon and steelhead mortality "*raise questions as to whether the agency is fulfilling its statutory mandates impartially and competently*." *Id*. at 1049 (emphasis added).

NMFS' 2012 decision suffers from similar defects as the original authorization. NMFS has again failed to offer a cogent rational for why killing sea lions, who eat at most 4.2 percent of adult salmon and steelhead runs (and a mere 1.1 percent of the run last year), is warranted in light of the agency's prior *factual* determinations that much greater takes by fisheries and dams, both of which NMFS authorizes to take up to 17 percent adult salmonid runs, are *not* significant. Indeed, the agency itself has flatly conceded that "[i]n general, *predation rates on salmon are considered to be an insignificant contribution to the large declines observed in west coast populations*." NMFS, *Pacific Salmonids: Major Threats and Impacts*, *at* http://www.nmfs.noaa.gov/pr/species/fish/salmon.htm (last accessed Mar. 18, 2012) (emphasis added).

In addition, where the Ninth Circuit said that 2008 threshold for termination of lethal removal activity (1.0 percent predation rate) was not adequately explained with respect to the MMPA significance standard, NMFS simply eliminated that threshold rather than attempt to explain it, such that any individually identifiable sea lions seen hanging around the dam and eating fish can be killed any time in the next 5 years, even if predation rates continue to decline, and indeed, even if predation at the dam *ceases completely*.

NMFS also failed to authorize the take of Steller sea lions that will occur as the result of the lethal removals of California sea lions under the MMPA or Endangered Species Act ("ESA"); and decided to forego any supplement to its Final Environmental Assessment issued in 2008 under the National Environmental Policy Act ("NEPA") despite the fact it is now more than 3.5 years old and there is new evidence that salmon and steelhead run sizes are growing – indeed, the estimated run size for 2012 is 314,000 fish, *which would be the fourth highest run size in 30 years*, that the rate of sea lion predation is decreasing, that fisheries have exceeded

their allocations in recent years, and that there are newly recognized sources of salmon and steelhead mortality.

There is nothing in the record on NMFS's 2012 authorization that might support a finding that sea lions must be killed immediately, and certainly not before this case can be resolved on the merits. By their own admission, the federal government's sea lion killing program is designed to address what they perceive as a long-term conservation issue, and does not present any type of emergent need to kill protected wildlife that might justify action prior to judicial review. Indeed, *the rate of California sea lion predation has decreased every year since NMFS's 2008 authorization to kill sea lions at the Dam* – which hardly suggests a need for urgent action. At the same time, the irreparable harm identified by plaintiffs is both *identical* to that which formed the basis for the issuance of a stay of lethal removal of sea lions at Bonneville Dam in prior litigation, *see HSUS v. Locke*, 527 F.3d 788 (9th Cir. 2008), and similar to the type of harm that supported the issuance of preliminary injunctive relief a number of similar cases before this court. *See, e.g., Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 220-21 (D.D.C. 2003); *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998). Plaintiffs and Plaintiffs' members regularly see, enjoy watching, and recognize specific sea lions at the Dam, including some of the "individually identifiable" animals that are targeted to be killed, and thus will be irreparably harmed if these federally protected animals are killed simply for eating fish before such time as the Court can resolve Plaintiffs' request for preliminary injunction after briefing by all parties. Therefore, in order to simply preserve the *status quo* and to prevent irreparable harm to Plaintiffs if federally protected sea lions are unlawfully killed, plaintiffs ask that the Court issue the requested restraining order. Further, even if the agency is correct, and this is an extraordinary case where federally protected native wildlife must be killed to protect other federally protective wildlife, that conclusion should be given at least some modicum of judicial review before being irretrievably executed on the ground.

BACKGROUND

I. THE STATUTORY SCHEME

A. Marine Mammal Protection Act

The MMPA broadly prohibits the unauthorized "take" of any marine mammal. 16 U.S.C. § 1371(a)(1). The Act defines "take" as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." *Id*. § 1362(13).

However, the MMPA provides a few narrow exemptions from the broad take prohibition. *Id.* § 1371(a) ("[t]here shall be a moratorium on the taking and importation of marine mammals . . . during which no permit may be issued for the taking of any marine mammal . . . except" in accordance with specifically listed exemptions). One of those limited exemptions is section 120 of the MMPA, which permits the Secretary of Commerce, upon the filing of a section 120 application by a state, to "authorize the intentional lethal taking of *individually identifiable pinnipeds which are having a significant negative impact on the decline or recovery* of salmonid fishery stocks" listed as threatened or endangered. *Id*. § 1389(b) (emphasis added). Before authorizing lethal take, the Secretary also "shall consider" a number of other factors, including "how many individual pinnipeds are involved" in the significant negative impact and "the extent to which such pinnipeds are causing undue injury or impact to" fish populations. *Id*. § 1389(d). Congress intended for NMFS to authorize lethal take of sea lions under Section 120 of the MMPA sparingly. *See* H. Rpt. No. 103-439 (1994) (Congress "intends that the current levels of protection afforded to seals and sea lions under the Act should not be lifted without first giving careful consideration to other reasons for the decline").

Another limited exception to the MMPA's broad prohibitions on take Another exception to the MMPA's broad prohibition on the take of marine mammals is contained in Section 101(a)(5). Under this provision, NMFS can authorize the *unintentional* take of "small numbers" of marine mammals by those engaged in "a specified activity . . . within a specified geographical

area." 16 U.S.C. § 1371(a)(5), but only if first finds, after notice and comment, that the incidental take will have a "negligible impact" on the species or stock to be taken, and promulgates regulations establishing the permissible methods of taking to effect "the least practicable adverse impact" on the species. *Id.* § 1371(5)(A)(i)(I)-(II).

B. Endangered Species Act

Under the ESA, a species is listed as "endangered" when the species is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A species is listed as "threatened" when the species "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20). Once listed, a species is entitled to a number of protections, including both prohibitions on harm and affirmative duties to promote the species' conservation and recovery.

Specifically, Section 9 of the ESA prohibits any person from "taking" an endangered species, with limited exceptions, *id.* § 1538(a)(1)-(2), and this prohibition can be extended to threatened species by rule. *Id.* §§ 1533(d), 1538(a)(1)(G). A "person" includes private parties as well as local, state, and federal agencies. 16 U.S.C. § 1532(13). "Take" is defined broadly under the ESA to include harming, harassing, trapping, capturing, wounding, or killing a protected species either directly or by degrading its habitat sufficiently to impair essential behavior patterns. *Id.* § 1532(19). The ESA prohibits the acts of parties directly causing a take as well as the acts of third parties, such as governmental agencies, whose acts authorize or otherwise bring about the taking. *Id.* § 1538(g).

Section 7(a)(2) of the ESA requires federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or result in the adverse modification of [critical] habitat." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). To comply with this mandate, federal agencies must consult with the delegated agency of the Secretary of Commerce or Interior whenever their actions "may

affect" a listed species and utilize the "best scientific and commercial data available" in doing so. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Where, as here, NMFS is both the action agency and the consulting agency, different branches of NMFS must undertake interagency consultation. At the completion of consultation, the consulting branch of NMFS issues a biological opinion that determines whether the action is likely to jeopardize the continued existence of the species. Typically, a biological opinion that finds that the activity is unlikely to jeopardize the continued existence of species but nevertheless is likely to result in the incidental take of listed species, must include an incidental take statement ("ITS"). 16 U.S.C. § 1536(b)(4). The ESA requires the ITS to contain a number of particular safeguards, including an acceptable amount of taking and "reasonable and prudent measures" necessary to minimize the impact of the taking.16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). The incidental take of a listed species is unlawful unless it is permitted by, and conducted in compliance with the terms of, an ITS. 16 U.S.C. §§ 1536(b)(4) and (o)(2); 50 C.F.R. § 402.14(i)(5).

B. National Environmental Policy Act

NEPA is the nation's "basic national charter for the protection of the environment." 50 C.F.R. § 1500.1. Under NEPA, a federal agency must prepare a detailed Environmental Impact Statement ("EIS") for any "major Federal actions significantly affecting the quality of the environment." 42 U.S.C. § 4332(C). NEPA's regulations provide that an agency may first prepare a preliminary Environmental Assessment ("EA") aimed at determining whether the environmental impact of a proposed action is "significant." 40 C.F.R. §§ 1501.3, 1501.4, 1508.9, 1508.27. If the EA establishes that the agency's action may have significant environmental impacts, the agency must prepare an EIS. *Id.* § 1501.4(b). NEPA requires that agencies take a "hard look" at the environmental effects of their planned action, even after a proposal has received initial approval. Agencies are required to prepare a supplemental EIS if: "(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Id.* § 1502.9(c).

II. FACTS

A. Listed Salmonids in the Columbia River Basin

Due to numerous threats and declining populations, in 1992, NMFS began listing certain salmon and steelhead ("salmonid") populations as threatened or endangered under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, *et seq*. Five of the thirteen listed Columbia River salmonid populations, containing both natural and hatchery-spawned fish, are implicated in this case, including: (1) Upper Columbia River spring-run Chinook (endangered); (2) Snake River spring/summer-run Chinook (threatened); (3) Snake River Basin steelhead (threatened); (4) Middle Columbia River steelhead (threatened); and (5) Lower Columbia River steelhead (threatened). 70 Fed. Reg. 37,160 (June 28, 2005) (listing rule): 50 C.F.R. § 223.102(a) (listing threatened salmonid evolutionary significant units); *Id*. § 224.101(a) (listing endangered salmonid evolutionary significant units).

Although salmonid populations in the Columbia River have long been in decline and continue to face a multitude of threats, returns of these salmonid runs have increased every year since the States' original December 2006 applications to kill California sea lions at Bonneville Dam, increasing by more than 250 percent from 2007 to 2011. NMFS, Report on Consideration of Statutory Factors under Section 120 of the MMPA at 6–7 ("2012 Decision Memo") (Exh. 2) The salmonid passage at the Dam in 2010 was the largest since sea lion presence at the Dam was first recorded in 2002, and the 2011 run was the third largest since counting began in 2002. Stansell et al.,[2] 2011 Field Report, Evaluation of Pinniped Predation on Adult Salmonids and

[2] Pursuant to Local CvR 5.1(g) counsel has attached only those documents "essential to the Court's determination" of this request for a restraining order. Plaintiffs can provide copies of any studies and reports cited herein but not attached to the motion if necessary.

other Fish in the Bonneville Dam Tailrace, 2011 at 6 ("2011 Stansell Report"). The 2012 forecast for the upriver spring Chinook is 314,200 adults, which would represent the fourth highest return since 1980, and 156% of average return observed over the past decade. *Id.* at 15.

B. Sea Lions at Bonneville Dam

California sea lions (*Zalphous californianus californianus*) are large marine mammals that are strictly protected under the MMPA. The sea lions arrive at Bonneville Dam in mid-February and typically leave the Columbia River to return to breeding grounds by late May or early June. Official counts of California sea lions at Bonneville Dam began in 2002. NMFS estimates that approximately 30 California sea lions were present in 2002; the number jumped to 104 in 2003 but then decreased annually to 71 in 2007. Exh. 2 at 5-6. In the last four years, the number of California sea lions at the dam has fluctuated from a high of 89 to a low of 54. *Id*. However, the mean residency time for individual sea lions observed at the Dam has been declining, from 20 days in 2007 to 9.3 days in 2010. *Id*.

California Sea lions consume a number of different types of fish in the Columbia River, including salmonids, as well as other fish species that prey on salmonids, such as pikeminnow. Estimated salmonid consumption by California sea lions at the Bonneville Dam varies depending largely on salmonid run size, ranging from 0.4 percent to 4.2 percent in the last decade. Exh. 2 at 6–7. However, the rate of California sea lion predation has decreased every year since NMFS's 2008 authorization to kill sea lions at the Dam. In 2008, the rate was 2.8 percent of the run, and the rate decreased to 2.1 percent in 2009, then again to 1.9 percent in 2010 and to only 1.1 percent in 2011, a year in which lethal removals were not permitted. *Id*.

Steller sea lions also frequent the Bonneville Dam area in the spring. In addition to being protected under the MMPA, the eastern distinct population segment of Steller sea lions are listed as a threatened species under the ESA. 62 Fed. Reg. 30,772 (June 5, 1997); 50 C.F.R. § 17.11. Pursuant to its authority under Section 4 of the ESA, NMFS has applied all of the take

prohibitions of Section 9 to the eastern population of Steller sea lions and specifically prohibits the "discharge of a firearm at or within 100 yards (91.4 meters) of a Steller sea lion." 50 C.F.R. § 223.202(a). It is difficult to distinguish California sea lions from Steller sea lions while they are in the water. In addition, Stellers are often in close proximity to California sea lions, and cleptoparasitism has been documented, whereby Stellers regularly steal fish from California sea lions. *See* 2011 Stansell Report at 21. In addition, both Steller and California sea lions use the traps placed at the Dam, as was tragically illustrated in May of 2008 when two Steller sea lions hauled out on floating platform traps died after the gates had been closed preventing their exit. NMFS 2009 Biological Opinion, Consultation No. 2008/08780 ("2009 Sea Lion BiOp"). Initial reports suggested that the sea lions had been shot, but NMFS later concluded that the sea lions died of heat stroke. *Id.* NMFS's biological opinions acknowledge that the proposed action will result in the take of Stellers via disruption of resting and foraging behavior and that Stellers may be accidentally killed. *Id* NMFS 2012 Supplemental Biological Opinion, Consultation No. 2011/05874 ("2009 Sea Lion BiOp").

C. Causes of Salmonid Decline in the Columbia River Basin

Although sea lions eat fish, they only consume between 0.4 and 4.2 percent of the 80,000 to 300,000 salmonids that spawn in the Columbia River. Exh. 2 at 6–7. In comparison, NMFS estimates that the dams along the Columbia River take up to 60 percent of juvenile salmonids and up to 17 percent of adult salmonids. NMFS, Final Environmental Assessment on Reducing the Impact on At-risk Salmon and Steelhead by California Sea Lions in the Area Downstream of Bonneville Dam on the Columbia River (2008) at 3-7. (Exh. 3).

Unlike other ESA-listed species, salmonids are unusual in that the federal government routinely allows high levels of taking of these species for recreational and other purposes—NMFS authorizes fishermen to take between 5.5 and 17 percent of spring-run Chinook. NMFS, 2012 Supplemental Information Report at 25-26 (March 2, 2012) (Exh. 4) in Response to the

Aug. 18, 2011 Application by Idaho, Oregon, and Washington for Lethal Removal Authority under Section 120 of the MMPA (Exh.5). In light of the recent record run sizes, Oregon and Washington increased fishing quotas from 9 to 12 percent of the total run in 2008, and increased them again to 13 percent of the total run in 2009 and 2010, and set the quota at 11 percent in 2011. *Id*. In two of the last four years, fisheries have exceeded their harvest allocations. *Id.* In both 2008 and 2010, fishermen took 4 percent more of the salmonid runs than initially allocated. *Id*. This level of take far exceeds that of sea lion predation.

Year	**Total Salmonid Passage at the Dam**	**Allowable Fishery Harvest**	**Actual Fishery Harvest**	**California Sea Lion Predation**	**Steller Sea Lion Predation**
2008	147,534	12% (later reduced to 11%)	16%	2.83%	0.12%
2009	186,060	13% (later reduced to 11%)	10.5%	2.12%	0.24%
2010	267,184	13%	17%	1.87%	0.37%
2011	223,380	11% (later increased to 12%)	10%	1.1%	0.50%

Other animals are also a source of salmonid mortality. By example, birds, such as great blue herons, gulls, and osprey, consume up to 18 percent of salmonids. NMFS, Upper Columbia River Spring-run Chinook Salmon and Steelhead Recovery Plan (August 2007) at 94 ("2007 Recovery Plan"). Hatchery fish transmit hatchery-borne disease to wild-run salmon, and interbreeding can affect genetic variability. NMFS, Biological Opinion on Impacts of Treaty Indian and Non-Indian Fisheries in the Columbia River Basin in Years 2005-2007, on Salmon and Steelhead Listed Under the Endangered Species Act (2005) at 78 ("2005 Fisheries BiOp"). Further, new studies indicate that salmonid mortality due to predation by non-indigenous fish on juvenile salmonids "could equal or exceed impacts" from each of four primary factors impacting salmonid recovery: hydrosystem development, fisheries harvest, hatchery practices, and habitat alteration. Exh. 4 at 22.

D. Plaintiffs' Interests in Sea Lions and Salmon Conservation

NMFS's irrational and unjustified decision in this case comes at the expense of the recreational, aesthetic, and professional interests of Plaintiffs and their members. Plaintiffs and their members not only have ongoing relationships with specific sea lions that inhabit the Columbia River and Bonneville Dam area—the precise areas where NMFS has authorized the States to kill sea lions—but also have recreational interests in hiking along and kayaking in the Columbia River in order to view such sea lions. For example, Bethanie O'Driscoll, an individual Plaintiff and member of Plaintiff The HSUS can see the Columbia River and sea lions from the windows of her home. Declaration of Bethanie O'Driscoll ("O'Driscoll Decl.") ¶ 3 (Exh. 6). She frequently kayaks on the Columbia River to look for wildlife on the water and often visits Astoria, Oregon to observe sea lions hauling out. *Id*. ¶ 5. Andrea Kozil, another individual Plaintiff, HSUS member, and Oregon resident, also regularly travels to Bonneville Dam and Astoria to hike along the Columbia River and to watch sea lions. Declaration of Andrea Kozil ("Kozil Decl.") ¶¶ 8-10 (Exh. 7). She frequently photographs the sea lions and especially enjoys watching them scratch an itch and hearing their barks. *Id.* ¶¶ 13, 14; *see also* Declaration of Bernadette Price ¶¶ 1–4 ("Price Decl.") (Exh. 8) (watching sea lions swimming in the river from her home and while kayaking during the spring "is one of the biggest thrills of [her] life.").

After years of recreating in and around the Columbia River and Dam, observing, and interacting with sea lions, both Ms. Driscoll and Ms. Kozil have come to know individual animals whom they can recognize based on their unique markings or distinctive personalities. *See* O'Driscoll Decl. ¶¶ 7, 8, 12–17; Kozil Decl. at 11, 12. Ms. O'Driscoll has even named several of the sea lions and can identify their unique behaviors. O'Driscoll Decl. ¶¶ 8, 12, 14. One of these sea lions, Porpoise, is on the "hit list"—the list of sea lions authorized for lethal removal, as is C795, one of the sea lions Ms. Kozil has come to know and enjoys seeing. O'Driscoll Decl. ¶¶ 17; Kozil Decl. ¶¶ 11, 16; Exh. 1, Appndx. 1 (listing C404 and C795).

The knowledge that any sea lion Ms. Driscoll has seen swimming in the river or hauling out could be permanently removed, euthanized, or shot is "excruciating" to her and "brings her to tears." O'Driscoll Decl. ¶ 17, 18. She is especially concerned about Porpoise because he is like a friend and neighbor and she knows he is on the hit list and could be killed at any moment. *Id.* ¶ 17. Similarly, when Ms. Kozil makes trips to Astoria and elsewhere along the river, she finds herself "feeling anxious, desperately looking to see the same individuals [she has] seen before so [she] will know they are safe. . . Knowing and thinking about the fact that some of these individuals that [she] love[s] to watch would be killed if NMFS's authorization is upheld makes [her] upset." Kozil Decl. ¶ 8; *see also* Price Decl¶¶ 9-10 (describing her fear of seeing dead sea lions while kayaking on the river).

Plaintiffs and their members can no longer enjoy photographing, kayaking, sailing, and hiking in and around the river as they used to. Moreover, because of NMFS's authorization the sea lions who Plaintiffs' members regularly view, photograph, and observe—some of whom they have developed unique and treasured relationships with—will be lost forever.

E. NMFS's 2008 Decision to Authorize to Killing Sea Lions at Bonneville Dam

In December 2006, the states of Oregon, Washington, and Idaho filed a formal application requesting authorization to kill sea lions at Bonneville Dam. *See* 72 Fed. Reg. 4,239 (Jan. 30, 2007). Pursuant to Section 120, NMFS determined that the States' application contained sufficient information to warrant convening a Pinniped-Fishery Task Force ("the Task Force") to consider the application. *Id.* at 4,239. NMFS then solicited comments on the States' application and convened a Task Force.

Although the 18-member Task Force was unable to reach consensus on the application, it nevertheless issued a "majority" opinion recommending approval of the States' application. Thereafter, the Marine Mammal Commission ("MMC"), an entity created by the MMPA to advise NMFS on scientific matters, submitted extensive comments on the Task Force's

recommendations. November 23, 2007 Letter from MMC to NMFS at 1 ("2007 MMC Letter"). Among its suggestions, the MMC recommended that NMFS compare the level of salmonid predation to the level of take from other sources and "explain why some sources are considered significant while others are not," and identify a particular predation level at which NMFS would no longer consider sea lion predation to be significant. *Id.*

On March 18, 2008, NMFS issued its Final EA, a Finding of No Significant Impact ("FONSI") under NEPA, and identical Letters of Authorization to Washington, Oregon, and Idaho, granting the states authority to lethally take sea lions under Section 120. *See* Exh. 3. NMFS's Letters of Authorization authorized the states to either trap or euthanize sea lions, if after a 48-hour waiting period the states could not find a pre-approved facility to which the animal could be held in permanent captivity, or to shoot the animals after they have hauled out or while they are in the water. *Id.* at 4-7.

F. NMFS's 2008 Authorization was Vacated by the Court of Appeals.

Shortly after NMFS issued its March 2008 authorization to kill sea lions at the Bonneville Dam in 2008, Plaintiffs filed a lawsuit challenging NMFS's authorization. The District Court ruled in favor of NMFS, but in November 2010, the Court of Appeals for the Ninth Circuit reversed and ruled in favor of the plaintiffs. 626 F.3d at 1049. The Court of Appeals opinion highlighted two primary errors with NMFS's 2008 decision: (1) the agency failed to adequately explain its inconsistent factual findings that sea lion predation is having a significant negative impact on salmonid recovery, and that much greater takes by fisheries and hydropower operations are not significant; and (2) the agency failed to adequately explain its implicit determination that sea lion predation greater than 1 percent of the total run results in a significant negative impact on salmonid recovery, which must be assumed from NMFS's choice to terminate lethal removal of sea lions if the 3-year predation rate average drops below 1 percent. *Id.*; *see also* Exh. 2 at 11-12.

In remanding to the District Court with instructions to vacate in its entirety NMFS's Section 120 authorization, and to remand the matter to the agency, the Court of Appeals noted that NMFS's contradictory factual findings regarding equivalent or greater sources of salmonid mortality "raise questions as to whether the agency is fulfilling its statutory mandates *impartially and competently*." 626 F.3d at 1049 (emphasis added).

G. NMFS's 2011 Decision to Authorize to Killing Sea Lions at Bonneville Dam

Less than two weeks after the Ninth Circuit's decision, the States of Washington and Oregon requesting new Letters of Authorization for the killing of sea lions at the Dam. On May 12, 2011, NMFS granted the states' request without requiring new applications, without providing any prior public notice of the decision, without providing opportunity for public comment on the decision, and without convening the Pinniped-Fishery Interaction Task Force, the purpose of which is to advise NMFS on whether to approve Section 120 applications, and to make recommendations about how sea lion removal should be undertaken and when it should be terminated.

NMFS's own decision documents, published along with this public announcement after the letters of authorization had already been sent to the states, make clear that the agency dispensed with any public notice, comment, or updated environmental review not for any valid legal or factual reason, but because the agency was "facing a significant constraint to issue a revised decision" due to a May 31, 2011 deadline to add individual sea lions to the list of those that can be killed. Moreover, the agency issued the decision in almost exactly the same manner, and for the same reasons in the decision vacated by the Ninth Circuit. Plaintiffs challenged the authorization on May 20, 2011 and NMFS revoked its authorization on July 26, 2011 citing the litigation.

H. NMFS's 2012 Decision to Authorize to Killing Sea Lions at Bonneville Dam

Following the revocation of the July 2011 authorization, the States of Oregon, Washington, and Idaho quickly submitted a new application on August 18, 2011, once again requesting authority to lethally removal individually identifiable California sea lions seen eating salmon at Bonneville Dam. *See* Exh. 5. NMFS found that the application contained "sufficient evidence" to warrant further action and published notice in the Federal Register on September 12, 2011, requesting public comment on the application. NMFS also convened the Task Force, which this time met on October 24, 2011 for approximately eight hours via conference call. On November 2011, the Task Force issued its recommendation under which a majority recommended lethal removal, with two dissenters both of whom expressed their belief that lethal removals were not warranted.

On March 15, 2012 – after a delay of many months – NMFS suddenly granted the states' request, authorizing state agents to kill as many as 92 federally protected California sea lions each year for 5 years – a total of 460 animals – and made the decision effective in just two business days. NMFS's Letters of Authorization authorize the states to either trap and euthanize sea lions or to shoot the animals while in the water or hauled out on certain areas. Exh. 1 at 2-3.

The terms of the authorization largely mirror those of the 2008 authorization, with the exception that the area in which sea lions seen taking salmonids may be added to the list of animals targeted for removal (i.e., the California sea lions deemed "individually identifiable pinnipeds") has been expanded to include the fish ladders and areas above the Dam, and NMFS is no longer requiring the states to hold California sea lions captured in traps for 48 hours prior to euthanizing them—the states can immediately euthanize an individually identifiable California sea lion captured in a trap. *Id.* In addition, NMFS eliminated the 1 percent predation rate threshold which, if achieved, would have required termination of lethal removals. *See* NEPA Review of the 2012-2016 Proposal to Authorize Lethal Removal (March 2, 2012) (Exh. 9) The

States can now continue to engage in lethal removals for the next five years on the theory that they are having a "significant negative impact" on salmon, even if California sea lion predation was to fall below 1 percent, or even cease entirely.

ARGUMENT

Courts use the traditional four-part test in determining whether to issue a temporary restraining order. *Sottera, Inc. v. Food & Drug Admin.*, 627 F.3d 891, 893 (D.C. Cir 2010).[3] Under the test, Plaintiffs must demonstrate: (1) a substantial likelihood of success on the merits, (2) that Plaintiffs would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction. *Id*. As discussed below, Plaintiffs easily satisfy the requisite standard for issuance of a temporary restraining order.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. NMFS's Authorization of the Intentional Take of California Sea Lions Violates Section 120 of the MMPA and the APA

Pursuant to the Administrative Procedure Act ("APA"), a reviewing court must set aside any agency decision deemed to be "arbitrary and capricious" or "not in accordance with law. 5 U.S.C. § 706. In addition to requiring an agency decision to comply with substantive law, an agency is required to adequately explain its reasoning behind its decision. *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). Specifically, a court must determine whether the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it

[3] Although *Sottera, Inc.* addressed the standards for a preliminary injunction, "[t]he same standards apply to both temporary restraining orders and to preliminary injunctions." *Hall v. Daschle,* 599 F.Supp.2d 1, 6 n. 2 (D.D.C.2009).

could not be ascribed to a difference in view." *Id*. at 43; *see also Beno v. Shalala*, 30 F.3d 1057, 1073 (9th Cir. 1994). Further, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962)).

Here, NMFS has failed to provide a cogent explanation for how its decision that sea lion feeding is having a "significant negative impact" on the decline or recovery of listed salmonids as required under Section 120 of the MMPA. Indeed, as discussed below, NMFS has (a) not provided a rational explanation, supported by record evidence, of how the taking of up to 4.2 percent of salmon by sea lions (which has declined to a present rate of 1.1 percent), can possibly be considered "significant" in light of other much higher sources of mortality that NMFS has previously authorized and determined to be *not* "significant"; and (b) eliminated the requirement that lethal removal be terminated when the sea lion predation rate falls below 1 percent, without providing a cogent explanation for its decision.

1. NMFS Failed to Explain the Agency's Dramatic Departure from Past Agency Precedent Concerning the "Significance" of Salmon Take

In enacting Section 120, Congress clearly intended that federally-protected sea lions would not become unnecessary scapegoats for the decline or any delay in recovery of ESA-listed salmonid stocks, specifically finding that "current levels of protection afforded to seals and sea lions under the [MMPA] should not be lifted without first giving careful consideration to other reasons for the decline" H.R. REP. NO. 103-439 (1994); *see also* S. REP. NO. 103-220, at 524 (1994). Nevertheless, that's exactly what happened in 2008, when NMFS first authorized the killing of sea lions at Bonneville Dam.

In 2010, the U.S. Court of Appeals for the Ninth Circuit overturned NMFS's 2008 lethal removal authorization due to the discrepancies between NMFS's factual findings regarding

different sources of threats to the same populations of salmonids. *HSUS, et al v. Locke*, 626 F.3d at 1048. Specifically, the Ninth Circuit found that the NMFS had failed to adequately explain its finding that sea lions were having a significant negative impact on the decline or recovery of listed salmonids in light of earlier findings by the NMFS that human fisheries that cause similar or greater mortality to the same populations are *not* having a significant negative impact. *Id*. at 1049. That discrepancy has not only continued, but it *has grown in magnitude*, once again "rais[ing] questions as to whether the agency is fulfilling its statutory mandates impartially and competently." *Id.*

The agency's decision to give short shrift to a comparison of other salmon impacts is understandable in light of the fact that, under any *reasoned* analysis, sea lion feeding simply cannot be considered "significant" in light of the "other reasons for the decline" of salmonids in the Columbia River. Indeed, NMFS acknowledges that sea lion take is *not* significant when compared to other higher sources of salmon mortality. *See* NMFS, *Pacific Salmonids: Major Threats and Impacts* (NMFS claiming that "[i]n general, predation rates on salmon are considered to be an *insignificant* contribution to the large declines observed in west coast populations") (emphasis added).

In addition, NMFS's decision to authorize the killing of native, federally protected animals that are having, at best, a 4.2 percent impact on salmonid runs is simply impossible to reconcile with *the government's decision to increase fishermen's share of the Chinook run on several occasions since the States first submitted applications under Section 120 authorization*. By example, for the 2008 season, the same season that NMFS first authorized the killing of sea lions at Bonneville Dam under Section 120 of the MMPA, the states of Oregon and Washington *increased* the amount of upriver spring Chinook allowed to be incidentally taken by tribal and non-tribal fisheries from 9 percent to 12 percent of the runs. *See* Joint 2008 Staff Report: Stock Status and Fisheries for Spring Chinook, Summer Chinook, Sockeye, Steelhead, and Other

Species (2008) at 41 ("2008 Joint Staff Report"). In 2010, NMFS set the permissible harvest level at 13 percent. Exh. 4 at 26. NMFS's decision to allow the killing of sea lions who eat far less salmonids than fishermen take by any measure, while at the same time increasing fishing quotas is a quintessential arbitrary and capricious course of action under the APA. *See*, *e.g.*, *Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1237 (D.D.C. 1987) ("[f]or an agency to say one thing . . . and do another . . . is the essence of arbitrary action").

The agency's decision to kill native wildlife so the animals' usual share of salmon can be eaten instead by fishermen is also impossible to reconcile with numerous past NMFS's decisions authorizing the taking of salmon far in excess of 4 percent by fishermen, tribes, and other resource users, and declaring that such taking does *not* have a "significant" impact on the species. For example, NMFS has authorized commercial fisheries, recreational fisheries, and tribal fisheries to take 5.5 to 17 percent of Upper Columbia River spring Chinook salmon, 5.5 to 17 percent of Snake River spring/summer Chinook salmon, 4 percent of Snake River steelhead, 6 percent of Middle Columbia River steelhead, and 6 percent of Lower Columbia River steelhead – the same salmonid stocks that are predated upon by the California sea lions at Bonneville Dam. Exh. 3 at 3-32.

Notably, NMFS has not only determined that these high levels of fishery take – up to nearly 20 percent – would not jeopardize these various species, but has also officially declared that the impacts of such taking are *not* significant. *See* 2005 Fisheries BiOp at 118; *see also* NMFS, EA on the Biological Opinion and Associated Incidental Take Statement on Treaty Indian and Non-Indian Fisheries in the Columbia River Basin in the Years 2005-2007 at 79 ("2005 Fisheries EA") (issuing a "Finding of No Significant Impact" for NMFS's issuance of fishery take of up to 17 percent for listed salmonid species in the mainstem Columbia River and stating

that "cumulative impacts from NMFS' Proposed Action [of fishery take authorization] would be *minor if at all measurable*") (emphasis added).[4]

It is hard to imagine a legitimate reason why the agency would spend the last ten years issuing decisions finding that taking in excess of 10 percent of salmon by fishermen is *not* a "significant" impact on salmon, only to reverse course in 2008 and suddenly declare that sea lion take of 0.4 to 4.2 percent is not only "significant," but so significant that the sea lions must die immediately, and before this case can even be heard on the merits. The decision under review certainly provides no such answer.

In response to the Ninth Circuit opinion and the remand of NMFS's 2008 authorization, the MMC recommended that one way for NMFS to reconcile its disparate findings "would be to *revisit the findings* under the National Environmental Policy Act and the Endangered Species Act *and to bring them into conformance* with the finding being made under the [MMPA]." Oct. 18, 2011 Letter from MMC to NMFS at 3 ("2011 MMC Letter"). But NMFS chose not to

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[4] *See also, e.g.*, NMFS, *Environmental Assessment for Oregon and Washington Fishery Management Plans for Lower Columbia Tributaries* 41 (2003), *available at* http://www.nwr.noaa.gov/Salmon-Harvest-Hatcheries/State-Tribal-Management/upload/FMEP-LCR-EA.pdf (issuing a "Finding of No Significant Impact" for the five fishery management plans for the Lower Columbia River salmonid species and specifically determining that taking *4 percent* of steelhead was "*not significant*") (emphasis added); NMFS, *Environmental Assessment for Approval of Five Fisheries Management and Evaluation Plans For Tributaries of the Middle Columbia River Submitted by the Oregon Department of Fish and Wildlife and Washington Department of Fish and Wildlife* 31, 39-40 (2007), *available at* http://www.nwr.noaa.gov/ Salmon-Harvest-Hatcheries/State-Tribal-Management/upload/MCR_FMEP_EA_Final_April_07 .pdf (stating that "impacts from the adult and juvenile fisheries are not expected to exceed *10 percent* of the annual abundance of natural-origin adult and juvenile steelhead" yet determining "that [this] Rule and its implementation would not significantly affect the quality of the human environment") (emphasis added); NMFS, *Environmental Assessment on Pacific Coast Salmon Plan Amendment 15: An Initiative to Provide for De Minimis Fishing Opportunity for Klamath River Fall-Run Chinook Salmon Environmental Assessment* (2007), *available at* http://www.pcouncil.org/ salmon/ salfmp/a15/Salmon_FMP_A15_Final_EA.pdf (authorizing *10 percent* of Klamath salmon to be taken by ocean fishing harvest as NMFS considers that to be a "de minimus" fishery and because all alternatives result in less than 50 percent risk of Klamath run falling between 35,000 fish over next 5-40 years, there "were no significant adverse effects to the environment") (emphasis added).

undertake the task of actually resolving the massive discrepancies between its Section 120 decisions and its authorizations of other sources of salmonid mortality.

Instead, NMFS's 2012 Decision Memorandum seeks to explain away the inconsistencies by asserting that (1) pinniped predation is a new, unmanageable and increasing threat to salmonids, and fisheries and hydropower dams are a controlled and decreasing threat; (2) pinnipeds predation could have a "depensatory effect" on salmon, increasing the risk of an "extinction vortex" if run sizes are low; and (3) pinniped predation occurs disproportionately on early and late arriving fish. Exh. 2 at 31. However, as indicated below, these arguments *are not supported in the record* and the available data paint a very different picture.

First, sea lion predation is not a new phenomenon, and it is not increasing. Sea lions have travelled upriver to consume salmonids for decades. Exh. 3 at 1-5. Indeed, Lewis & Clark spotted sea lions in the Columbia River in 1893. *See* Merriwether Lewis, Willliam Clark, Elliot Coues, Thomas Jefferson. 1893. History of the Expedition Under the Command of Lewis and Clark. Volume 3 at page 854. Recent data suggest that sea lion predation is *decreasing*, not increasing. *See e.g.*, Exh. 2 at 6–7.[5]

Second, the fact that fisheries and hydropower dams are highly regulated does not mean that they are well-controlled. New information available since 2008 confirms what has long been the case—that fisheries take far more of the ESA-listed salmonids than California sea lions.

[5] With respect to the contention that sea lion predation is "unmanageable," it is important to note that there is evidence suggesting that nonlethal deterrence have some effect. By example, the Corps' three-year summary report on predation at the Dam states that "individuals spent less time at Bonneville Dam [in 2010] which may also be due to the concrete blocks placed on the favorite haul out for pinnipeds. . . forcing the animals to either haul out on rip-rap, traps, rest in the water, or go back to Astoria or some other location to get out of the water." Stansell, et. al, Evaluation of Pinniped Predation on Adult Salmonids and Other Fish in the Bonneville Dam Tailrace, 2008-2010 (Oct. 14, 2010) ("2010 Stansell Report"). Further, as noted *infra*, the threat from fishing and hydropower activities, while manageable to a degree, is not actually any more controlled than sea lion take. *Unauthorized* take by fisheries and dams *in excess of* take due to sea lion predation still often occurs. *See* Exh. 5 at 25-26.

According to NMFS's 2012 SIR, the fisheries harvest rates set under the court-approved stipulated agreement were far higher than removals by sea lions and *they are not well controlled as has been asserted* by NMFS. For example, in 2008, fisheries harvest was initially permitted at a level of 12 percent and subsequently adjusted downward to 11 percent of the spring run; however fisheries harvested 16 of the run that year, exceeding the catch limits. Exh. 4 at 25-26. In 2010, the in-season fisheries harvest rate was set at 13 percent; however, the actual harvest level of 17 percent far exceeded that allowable catch limit. *Id*. And in 2011, fisheries again exceeded the established harvest quota of 11 percent, taking 12 percent. *Id.* In these same years, estimated predation by California sea lions was 2.8, 1.9, and 1.1 percent, respectively. Exh 2 at 7.

The 2012 SIR also shows continual high harvests by fisheries that exceed the allowable percentages during 2 of the past 3 years even when mid-season adjustments/reductions in quota were implemented, implying that mid-season adjustments are *not* effective means of assuring fisheries do not kill higher levels of fish than mandated. Exh.4 at 25-26. Far from being the controllable source of mortality that is asserted in both the states' application and the Federal Register announcing receipt of the states' application and requesting public comment, in-river fisheries have regularly exceeded the maximum rate with no subsequent penalty.[6]

Finally, the claims that sea lion predation "could" have a depensatory effect on salmon, and that impacts of sea lion predation on early- and late-arriving could disproportionately affect listed salmonids are supported only by a reference to a personal communication between the author of NMFS's 2012 Decision Memorandum and a scientist at the Northwest Fisheries Science Center. Exh 2 at 31. The 2012 authorization notes the existence of a "memorandum" with respect to this communication, but that memorandum does not appear to be publicly

[6] Notably, when other fisheries overseen by NMFS exceed their harvest quotas, NMFS reduces the subsequent season's harvest quota to adjust for the excess taken. *See e.g.,* 50 C.F.R. § 635.27 (rule related to shark fishery).

available, was not given to the Section 120 Task Force for its consideration, and was not produced by the agency. *Id*. at 37.[7]

NMFS also attempts to rationalize the differences between its Section 120 authorization and its authorizations of much larger take by fisheries and hydropower operations by relying on the differences between the statutory schemes under which the decisions were made. Exh. 2 at 22, 30-31. However, as noted by the Ninth Circuit in its November 2010 decision, while the agency's MMPA actions may not constitute a "swerve from prior precedent" with respect to decisions made under NEPA or the ESA, "an agency's duty to explain cogently the bases of its decisions is not limited to circumstances in which the agency departs directly from an earlier path." *HSUS, et al v. Locke*, 626 F.3d at 1050-51; *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 1811 (2009) (an agency must offer "a reasoned explanation" when its current course "rests upon *factual findings* that contradict those which underlay" a previous course) (emphasis added).

More specifically, the Ninth Circuit held that NMFS must explain "[d]ivergent factual findings with respect to seemingly comparable cause of salmonid mortality. . . ." *HSUS, et al v. Locke*, 626 F.3d at 1049. Rather than actually resolving the *factual discrepancies* between its Section 120 authorizations and its authorizations of other sources of salmonid mortality (as recommended by the MMC), NMFS simply attempted to "paper-over" the problem by reaching a few bald conclusions about the different character of the take due to sea lion predation, fisheries harvest and hydropower operations. However, because these recycled arguments are conclusory

[7] The "depensatory effect" claim appears to rely on impacts of sea lion predation at very low run sizes, Exh. 2 at 31, but salmonid run sizes have continued to increase over the last several years and this year's run is expected to be extremely high. NMFS *2012 Joint Staff Report: Stock Status and Fisheries for Spring Chinook, Summer Chinook, Sockeye, Steelhead, and Other Species* at 14 ("2012 Joint Status Report"). Further, with respect to the claim about early- and late- run takes, even though *fewer* fish entered the river early in the season in 2011, the numbers of sea lions at the dam during that time were lower, and both the rate of predation and actual consumption *were lower*, than each of the preceding three years. Exh 2 at 6-7.

and not supported by the available data, NMFS still has not explained away the dramatic *factual* inconsistences between its findings that sea lions are having a significant negative impact on ESA-listed salmonids and its findings that other, greater sources of mortality to the same populations are *not* having a significant negative impact.

In the end, the only rules that appear to apply to NMFS's decision-making concerning the "significance" of the taking of protected salmon is that (1) human taking of salmon – like dams or fishermen – is never "significant," even if it exceeds 15 percent; and (2) native wildlife feeding on salmon is "significant," intolerable, and requires immediate lethal reprisals – even if it's less than 4 percent. Such arbitrary and irrational decision-making is "so implausible that it could not be ascribed to a difference in view," and must be set aside under the APA. *State Farm*, 463 U.S. at 43; *Wagner v. Prof'l Eng'rs in California Gov't*, 354 F.3d 1036, 1044 (9th Cir. 2004) (litigants must be prevented from "playing fast and loose with the courts" by "gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position").

2. The Agency Failed To Provide a Cogent Explanation for Elimination of the Requirement that Lethal Removal be Terminated if the Sea Lion Predation Rate Drops Below 1-Percent

An integral part of NMFS's original Section 120 authorization in 2008 was a provision requiring termination of the lethal removal program if the rate of sea lion predation dropped below 1 percent. In its November 2010 opinion, the Ninth Circuit concluded that NMFS had failed to explain "why this level of predation amounts to a 'significant negative impact' or how this level of removal is related to the decline or recovery of listed salmonids." *HSUS, et al v. Locke*, 626 F.3d at 1052. In response, NMFS simply eliminated the 1 percent predation rate provision entirely. Exh. 2 at 35-36.[8]

[8] In its May 2011 authorization, NMFS replaced the 1 percent predation provision with a requirement that NMFS consult with the states regarding the appropriateness of continuing lethal

In its Decision Memo, NMFS gave three reasons for eliminating the 1 percent provision: (1) the provision was unnecessary to protect California sea lions; (2) the 1 percent threshold was unlikely to be met over the course of the authorization; and (3) even if the 1 percent threshold was met, predation rate could quickly rise above the threshold again. *Id.*

None of these reasons appears to have anything to do with impacts on "the decline or recovery of salmonid stocks," i.e., the specific statutory language of the MMPA. Nor does NMFS provide any other explanation for how elimination of the provision is related to impacts on the decline or recovery of listed salmonids. Without such explanation it is impossible to conclude that this action is consistent with the statutory standard. Section 120 only allows NMFS to authorize killing of sea lions when they "are having significant negative impacts on the decline or recovery of salmonid stocks," and therefore the 1 percent predation rate provision implicitly represents the lowest level of predation that NMFS considers to be have such impacts. *HSUS, et al v. Locke*, 626 F.3d at 1052, n.6, *id*. at 1052 (noting, therefore, that NMFS must provide an explanation for why this lowest level of actionable predation amounts to a 'significant negative impact' and how the level of removal is related to the decline or recovery of listed salmonids).

By eliminating the provision entirely, NMFS's lethal authorization program will not terminate unless *all predation at the dam ceases*. Put another way, NMFS's authorization would allow the killing of a sea lion *for eating a single salmon* at the Bonneville Dam if he was present at the dam for any 5 days, even if he was *the only sea lion present* at the Bonneville Dam that entire season. NMFS's stated reasons for eliminating the provision do not address how eating a single salmon would impact the "decline or recovery" of the species, nor why any amount of

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removals upon a "detectable decline" in the total number of fish taken by California sea lions per season and a declining trend in predation has been observed. NMFS *Memorandum Authorizing the States of Washington and Oregon to Lethally Remove California Sea Lions at the Bonneville Dam under Section 120 of the MMPA* (May 12, 2011) at 37 ("2011 Decision Memo").

predation below the previous 1 percent threshold now all of a sudden constitutes a "significant negative impact."

Indeed, the Ninth Circuit "echo[ed] the concerns of the Marine Mammal Commission, which repeatedly emphasized to NMFS the need to 'identify the level at which predation of salmonids by pinnipeds no longer would be considered significant,' because 'the taking authority should lapse once predation is reduced to a level where it is no longer having a significant impact." *HSUS, et al v. Locke*, 626 F.3d at 1052, *citing* 2007 MMC Letter at 6. In addition, the Task Force has previously determined that "the historical predation rate was believed to be greater than zero." Exh. 2 at 34. NMFS's decision to ignore the concerns expressed by both the Ninth Circuit and the MMC, and to authorize the killing of sea lions for eating salmon in minuscule amounts, is arbitrary and capricious on its face.

The decision to eliminate the termination 1 percent predation rate provision also violates Section 120 of the MMPA because the states' applications failed to mention, and NMFS failed to seek public comment on, such a significant aspect of the 2012 authorization. *See* Exh. 5; 76 Fed Reg. 56,167–56,171. The MMPA requires that the states' applications "shall include a detailed description of the problem interaction and expected benefits of the taking" (ostensibly including the purported benefits to killing sea lions when predation drops below 1 percent), and NMFS "publish[es] a notice in the Federal Register requesting public comment on the application." Moreover, as a result of the Ninth Circuit decision, it was clear that any future Section 120 authorization would be required to articulate a reasonable explanation for the chosen predation rate at which the lethal removal authorization would terminate, and how any sea lion feeding above that point would have a "significant negative impact to the decline ore recovery of salmonid stocks." Thus, the agency's failure to identify and seek input on this decision violates the plain language of the MMPA.

3. The Agency Has Failed To Consider Important New Data as well as Feasible and Prudent Non-Lethal Alternatives

When considering whether to authorize lethal removal under Section 120 of the MMPA, NMFS must determine whether the states' applications have demonstrated, *inter alia*, "past efforts to nonlethally deter such pinnipeds, whether the applicant has demonstrated that *no* feasible and prudent alternatives exist and that the applicant has taken *all* reasonable nonlethal steps without success." 16 U.S.C. § 1389(d)(2) (emphasis added). This requirement is in keeping with Congressional intent that NMFS authorize lethal take under Section 120 of the MMPA sparingly. *See* H.R. REP. NO. 103-439 (1994) (Congress "intends that the current levels of protection afforded to seals and sea lions under the Act should not be lifted without first giving careful consideration to other reasons for the decline"). NMFS, however, authorized lethal removal despite the fact that the States entirely failed to prove that no feasible and prudent nonlethal methods exist and that they have utilized all reasonable nonlethal methods without success.

First, the States' applications and NMFS's SIR briefly mention the threat to salmonids caused by stocking of non-native fish that eat salmon, but cursorily dismiss the issue without consideration of the feasibility of reducing or eliminating the stocking program and whether doing so would be a viable alternative to lethal removal of federally-protected sea lions. In 2009, a report reviewing studies on the effects of predation by non-native fish, such as bass and walleye, on juvenile salmonids. *See* Sanderson, et al. *Non-Indigenous Species of the Pacific Northwest: An Overlooked Risk to Endangered Salmon* at 245 (March 2009). ("Sanderson Report"). This report found, *inter alia*, that non- native walleye alone consume up to *2 million* juvenile salmon in the Columbia each year and concludes that predation by non-indigenous fish on juvenile salmonids "*could equal or exceed impacts" from each of the four primary factors impacting salmonid recovery: hydrosystem development, fisheries harvest, hatchery practices, and habitat alteration*. *Id.* at 245. It also concludes that there appears to be "bias in the allocation

of salmon recovery resources toward mitigation of the commonly identified affecting salmonids at the expense of newly identified and potentially significant source of morality." *Id*..

These non-native fish are introduced to the river solely for the purpose of increasing sport fishing opportunities. *Id.* at 250. (noting that the Columbia River basin "is renowned for its walleye fishing, producing some of the largest individuals on record"). Stocking of these non-native fish is big business – a large number of outfitting and other services are available to promote fishing for these non-native competitors with salmon. *Id.* The Sanderson Report documented that less than 1 percent of funds for salmon recovery allocated by the Bonneville Power Authority goes to addressing impacts of non-native fish predators, while upwards of 5 percent is spent on control of native predators such as birds. *Id*. at 254. Even more alarmingly, far from trying to reduce this source of mortality, in the years considered by the study, half a million dollars was spent to *enhance* populations of non-native fish predators that are consuming salmon in the Columbia. *Id*. Were it not for the fact that these fish are deliberately stocked, they would be considered noxious invasive species.

The Sanderson Report concluded that "managing nonindigenous species *may be imperative* for salmon recovery." *Id*. at 245. However, despite this imperative, the only "action" described in the states' most recent application is that "there is a commitment to study and develop plans concerning predation of salmon by non-indigenous fish populations." Exh. 5 at 12. Despite the fact that predation by non-native fish was also cursorily mentioned in NMFS's 2008 Final EA, and the fact that the Sanderson Report was published in early 2009, the states are still only "commit[ing] to study" the issue at some point in the future. This attempt at willful ignorance is transparent, and the failure to give careful consideration to this unnecessary government-funded and directed source of salmonid mortality is clearly arbitrary and capricious.

Second, the States' applications and NMFS also fail to consider of the feasibility of specific options for changing hatchery practices even though competition with non-listed

salmonids is among the largest sources of ESA-listed salmonid mortality, and despite the recent publication of new data and management recommendations by the Congressionally-appointed blue ribbon Hatchery Scientific Review Group ("HSRG"). In 2009, the HSRG issued a report finding that many hatchery programs have had substantial adverse effects on the reproduction capacity of listed salmonids, among other concerns. HSRG, Summary of Report to Congress on Columbia River Basin Hatchery Reform (Feb. 2009) ("HSRG Report"). The expert panel was also concerned that hatcheries are being managed for harvest success rather than to promote conservation and recovery. *Id*.

The HSRG also recommended a series of changes to *both* hatchery system *and* fisheries harvest operations to reduce competition and promote recovery of wild runs, including changes in harvest management practices, as well as altering the number, timing or area in which hatchery fish are released. *Id*. A number of the HSRG's recommendations focus on the need to minimize adverse ecological interactions between hatchery and natural-origin fish "such as competition for feeding and spawning locations, predation of hatchery fish upon natural-origin fish and the potential transfer of disease from hatchery to natural-origin fish" *Id*. Despite the HSRG's extensive analyses and recommendations, NMFS's 2012 SIR notes that there has been "no change relative to harvest levels or hatchery practices," Exh. 4 at 20, and the states' applications and NMFS's Decision Memo fail to demonstrate any effort to address salmonid mortality caused by hatcheries as an alternative to the lethal removal of sea lions.

Finally, numerous non-lethal pinnipeds deterrence measures have been suggested but essentially ignored by the States and NMFS. The Task Force indicated that deploying additional harassment techniques, such as carbide cannons, while expensive and challenging, is possible. Pinniped-Fishery Interaction Task Force, *Facilitator's Final Report* at 14 (October 24, 2011) ("2011 Task Force Report"). In response, the states merely noted that they "will check into this as a new alternative." *Id*. In addition, when asked whether the states had explored "'active denial

system' options for keeping Steller sea lions off the traps so that it is easier to trap California sea lions" the states replied that they "don't necessarily want to keep the animals off the traps." *Id.* Similarly, the Task Force's three-year evaluation of the 2008 authorization notes that a number of nonlethal deterrence methods recommended by the International Marine Animal Trainers Association were not pursued. Pinniped-Fishery Interaction Task Force, *Final Report and Recommendations* (December 17, 2010) at 8 ("2010 Task Force Report").

Further, the Corps' three-year summary report on predation at Bonneville Dam states that "individuals spent less time at Bonneville Dam [in 2010] which may also be due to the concrete blocks placed on the favorite haul out for pinnipeds. . . forcing the animals to either haul out on rip-rap, traps, rest in the water, or go back to Astoria or some other location to get out of the water." 2010 Task Force Report at 4. The Corps' 2011 Final Report also recommends the use of additional traps and that the Corps "should work with the states to determine if the use of barriers to prevent sea lions from hauling out near the dam is effective and beneficial to the long term goal of reducing the presence and predation of sea lions near the dam" and, if so, the Corps should provide the States with the necessary funding and resources to develop permanent structures. 2011 Stansell Report at 22.

By authorizing lethal removal despite the existence of "feasible and prudent" nonlethal alternatives that the states have not explored, NMFS has written all but the first clause out of Section 120(d)(2). Under NMFS's approach, a state need only demonstrate that it has engaged in some form of nonlethal activity at some point, regardless of the existence of reasonable alternatives that the state has yet to explore. Such an approach not only flies in the face of Congressional intent that lethal removals be authorized sparingly, but entirely fails to comport with fundamental rules of statutory construction. *See, e.g., Ind. Mich. Power Co. v. Dep't of Energy*, 88 F.3d 1272, 1276 (D.C. Cir. 1996) (court will not countenance what amounts to "a rewrite" of a statute which "blue-pencils out" certain phrases).

B. NMFS's Failure to Authorize the Incidental Take of Steller Sea Lions Violates Section 101 of the MMPA, Section 7 of the ESA, and the APA

The unauthorized take of a Steller sea lion is prohibited under both the MMPA and ESA. *See* 16 U.S.C. § 1372(a) (prohibiting the unauthorized take of marine mammals); 50 C.F.R. § 223.202(a) (prohibiting the take of a Steller sea lion under the ESA).[9] Despite repeatedly acknowledging in multiple documents that Steller sea lions will be harassed by the Section 120 removal activities and potentially even injured or killed,[10] NMFS failed to authorize the take of Steller sea lions under the MMPA or the ESA, 16 U.S.C.§§ 1371(a)(5); 1536(b).

NMFS curiously explains that the because "the taking of Steller sea lions in a humane manner by government officials . . . acting in the course of their official duties related to the *nonlethal* removal of nuisance animals is authorized by 50 CFR 223.202(b)(2)" the anticipated take of Steller sea lions under the Section 120 removal program "is not prohibited and does not require a separate take authorization." 2012 Sea Lion BiOp at 13 (emphasis added). However, the Section 120 authorization allows state officials to *kill* California sea lions. As the regulation only applies to nonlethal removals, it simply does not cover actions related to *lethal* removals. *See* 50 C.F.R.§ 223.202(b)(2). As such, NMFS was legally obligated to authorize the take of Stellers before authorizing the States to engage in lethal removals of California sea lions.

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[9] Because Steller sea lions are listed as a threatened species under the ESA, they cannot be candidates for lethal removal authorization under Section 120 of the MMPA. *See* 16 U.S.C. § 1389(e) (prohibiting NMFS from authorizing the lethal removal of "any pinniped from a species or stock that is . . . listed as threatened" under the ESA).

[10] This possibility became a tragic reality when two Steller sea lions were accidentally killed as a result of the Section 120 removal activities. *See* 2009 Sea Lion BiOp at 4 (noting that two Steller sea lions hauled out on floating platform traps died from heat stroke after the gates were closed preventing their exit), The 2009 BiOp, which the 2012 BiOp incorporates by reference, recognizes that Steller sea lions would be taken via disruption of foraging and resting behavior, "the possibility that Steller sea lions may be physically injured by the deterrence activities" and the possibility that Steller sea lions could be "accidentally killed" *Id.*; *see also* 2012 Sea Lion BiOp (acknowledging that Stellers could be accidentally killed); Exh. 4 at 32 (acknowledging the possibility that Steller sea lions will be accidentally killed).

Under Section 101(a)(5) of the MMPA, NMFS can authorize the take of "small numbers" of marine mammals which is incidental to an otherwise lawful activity, provided NMFS finds that such take will have a "negligible impact" on the species or stock to be taken. 16 U.S.C. § 1371(a)(5). As NMFS itself previously recognized, "the congressional choice of imposing an additional regulatory process before authorizing the incidental taking of listed marine mammals reflected a concern for the need for more safeguards . . ." 54 Fed. Reg. 40,338, 40,341 (1989). The ESA requires the consulting agency issue an incidental take statement ("ITS") as part of a biological opinion when such take "may occur". 50 C.F.R. § 402.14(g)(7). An ITS also provides important safeguards intended to minimize the impact of such take. *See e.g.,* 16 U.S.C. § 1536(b)(4)(C) (an ITS must include reasonable and prudent measures. . . necessary to minimize such impact").[11]

Although some of NMFS's decision documents claim that the possibility a Steller sea lion will be injured or killed is low, this does not excuse NMFS from complying with its statutory duties—because "the term 'may' is broadly interpreted under the ESA regulations" an agency's obligation to issue an ITS with its biological opinion is "triggered by the *possibility* of take" of a listed species, "regardless of how unlikely that possibility may have seemed." *Pacific Shores Subdivision California Water Dist. v. U.S. Army Corps of Engineers,* 538 F.Supp.2d 242, 261 (D.D.C. 2008) (emphasis added). The omission of an ITS from a biological opinion "because of the low probability of take. . . is a flawed interpretation of the [agency's] statutory obligation." *Id.* NMFS's authorization of lethal removals of California sea lions without an incidental take authorization for Steller sea lions under Section 101(a)(5)(a) of the MMPA is arbitrary, capricious, and not in accordance with the MMPA. Similarly, NMFS's failure to

[11] The ESA also specifies that when the take of a marine mammal is at issue, the ITS must also specify the measures necessary to comply with Section 101(a)(5) of the MMPA. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(iii).

include an ITS in its Biological Opinions is arbitrary and capricious and violates the ESA and its authorization of lethal removals in absence of an ITS for Stellers is arbitrary and capricious.

C. NMFS's Failure to Produce a Supplemental Environmental Assessment Violates NEPA and the APA

NEPA imposes a continuing duty on federal agencies to supplement existing EAs and EISs if "(i) [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 CFR § 1502.9(c). Here, NMFS issued an Supplemental Information Report ("SIR") that purports to explain why its 2008 Final EA adequately covers all consideration of the potential environmental impacts of the new authorization.

While neither NEPA nor CEQ's regulation implementing the statute provide for the issuance of SIRs, court haves upheld an agency's use of such documents "for the purpose of determining whether new information or changed circumstances warrant the preparation of a supplemental EA or EIS." *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000); *see also* 40 C.F.R. § 1502.20 (an agency can "tier" back to prior EA to prevent duplication of "discussion of the same issues"). However, "SIRs cannot serve as a substitute" for legally required NEPA analysis. *Idaho Sporting Congress*, 222 F.3d at 566; *see also Oregon v. Marsh*, 490 U.S. 360, 385 (1989) (noting "that if all of the information ... was both new and accurate, the Corps would have been required to prepare a ... supplemental EIS"); NMFS's decision to prepare an SIR rather than a supplemental EA, despite the fact that there are clearly substantial changes in the proposed action, as well as significant new circumstances and information clearly relevant to the environmental effects of the Section 120 authorization violates NEPA and its implementing regulations.

With respect to the changes in the proposed action, NMFS notes that the 2012 authorization is different from the 2008 authorization analyzed under the 2008 Final EA in two ways: (1) removal of the 1 percent termination threshold, and (2) allowing the killing of animals observed up-river from the dam, as opposed to animals at the dam or just below it. Exh. 9 at 5.[12] NMFS determined that these changes to the proposed action are "minor" and not "substantial". *Id*. This conclusion is dubious at best.

For example, the rate of California sea lion take last year was 1.1 percent, Exh. 2 at 7, and the threshold for termination of the Section 120 program under the 2008 authorization was predation of 1.0 percent over three years. *See id.* at 34. After the Ninth Circuit made clear that NMFS had failed to adequately justify the 1 percent termination threshold in its 2008 authorization, 626 F.3d at 1052, NMFS's 2011 authorization eliminated this standard in favor of a termination threshold based upon a "detectable decline" in actual number of salmonids eaten. 2011 Decision Memo at 37. The actual amount of fish eaten by sea lions decreased last year; in fact the amount was *less than half* the take from the previous year (from 5,095 fish in 2010 to 2,527 fish in 2011). Exh. 2 at 6–7. Thus, sea lion predation has either met or is drawing very close to meeting the prior termination thresholds set by NMFS. Yet, as this factual circumstance has evolved, NMFS simply keeps setting the threshold for termination farther out of reach. By eliminating the termination threshold in its current authorization, the agency is allowing the killing of any sea lions on the list for the next 5 years – even if the actual number of fish eaten continues to decline, predation remains at 1 percent or less, or predation *completely ceases*. NMFS cannot reasonably argue that this is not a "substantial change in the proposed action."

[12] The proposed action here also differs from the action analyzed under the 2008 Final EA in that it allows states to immediately kill captured sea lions unless NMFS has already advised them that a facility is available for non-lethal relocation, as opposed to having to waiting 48 hours after capture for the purpose of proactively seeking out a facility for non-lethal placement. The SIR does not mention this change at all. *See* Exh. 4.

With respect to changed circumstances, the NEPA Summary Memo notes new evidence that salmon and steelhead run sizes are consistently growing and not declining, that the number of sea lions at the dam is decreasing, that the rate of sea lion predation is decreasing, that fisheries have exceeded their allocations in recent years, and that there are newly recognized sources of salmon and steelhead mortality. Exh. 9 at 13. However, NMFS concludes that these changed circumstances would not result in impacts that are "significant or uncertain or outside the range of impacts we considered in the 2008 EA and FONSI." *Id*. Again, the agency's conclusion is astonishing and lacks any credibility. The size of the salmon runs in the last two years are over 150 percent the run size in 2008 when the Final EA was produced, and are over 150 percent the average run size passing the dam over the last decade. Moreover, California sea lion predation rates have fallen every year since 2008 and are now less than half what they were when the Final EA was produced. It is absurd for NMFS to claim that these changed circumstances, not at all considered in the 2008 Final EA, do not warrant production of a supplemental EA.

With respect to new information, the SIR ignores or discounts without explanation new data on some of the largest sources of salmonid mortality. For example, in 2009, the Congressionally-appointed blue ribbon Hatchery Scientific Review Group ("HSRG") issued a report finding that many hatchery programs have had substantial adverse effects on the reproduction capacity of listed salmonids, among other concerns. *See* HSRG Report. Pursuant to their mandate, this independent expert panel recommended a series of changes to management of the hatchery system and other sources of salmonid mortality (in particular, fisheries harvest practices) to reduce competition and promote recovery of wild runs. *Id.* Interestingly, NMFS included the HSRG report in in the bibliography of the SIR, but the Report is not mentioned anywhere in the text of the document. Despite the new and extensive analyses and recommendations of the HSRG, NMFS concluded that there was no significant new information

relative to environmental impacts associated with the agency's decision to address salmonid mortality by authorizing the killing of sea lions.

Further, the issue of predation by non-native fish was glossed over in the 2008 Final EA, and despite the issuance of the Sanderson Study in 2009, this issue is given the same treatment in the 2012 SIR (simply referring the reader back to the 2008 EA in the 2-sentence conclusion to the agency's 3-sentence description of the Sanderson Study). The Sanderson Report found, *inter alia*, that non-indigenous walleye alone consume up to 2 million juvenile salmon in the Columbia *each year* and concludes that predation by non-indigenous fish on juvenile salmonids "could equal or exceed impacts" from each of the four primary factors impacting salmonid recovery: hydrosystem development, fisheries harvest, hatchery practices, and habitat alteration. It also concludes that there appears to be "bias in the allocation of salmon recovery resources toward mitigation of the commonly identified factors affecting salmonids at the expense of a newly identified and potentially significant source of mortality." Exh. 4 at 22. In other words, the government's myopic focus on addressing some sources of salmon mortality, like sea lions, is preventing it from using resources to address newly identified sources of salmon mortality, like stocking of non-native fish, that actually have a significant negative impact on salmon recovery.

In its SIR, NMFS claims that predation by non-native fish "does not have a bearing on the environmental impacts associate with the proposed action." *Id*. at 22-23. But consideration of other sources of controllable salmonid mortality and options for reducing or eliminating those sources of mortality as alternatives to killing otherwise federally-protected marine mammals is plainly relevant to an environmental impacts analysis, *see* H.R. REP. NO. 103-439 (1994) (indicating Congress' intent that "the current levels of protection afforded to seals and sea lions under the Act should not be lifted *without first giving careful consideration to other reasons for the decline*"), and is absolutely required under NEPA.

With respect to the analysis to be performed under NEPA, an agency is required by law to consider "all reasonable alternatives," even those "not within the jurisdiction of the lead agency," as well as "appropriate mitigation measures not already included in the proposed action or alternatives." 40 CFR § 1502.14. Certainly some analysis of the possibility of reducing or eliminating the stocking of non-native fish, which is extremely costly and *now believed to be among the greatest threats to salmon recovery*, is required under NEPA. But no such analysis was ever done – not in the 2008 Final EA, and not in the 2012 SIR after the Sanderson Study was published. Moreover, the existence of such significant and previously ill-understood threats dramatically alters the environmental baseline from which NMFS must analyze the environmental impacts of the action. "Without establishing ... baseline conditions ... there is simply no way to determine what effect [an action] will have on the environment and, consequently, no way to comply with NEPA." *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir.1988).

Although an SIR may be used to explain why a prior EA adequately covers all consideration of the potential environmental impacts of a new or amended action, an SIR simply cannot be used to dispose of the requirement to analyze issues not previously considered and thereby avoid the requirements of notice, opportunity for comment, and full consideration of the issue and the input from experts, stakeholders and interested members of the public. *See Price Road Neighborhood Ass'n, Inc. v. U.S. Dept. of Transp.*, 113F.3d 1505 (9th Cir. 1999) (SIR's cannot be used "to supplant any documentation that would be required if the [relevant] threshold[s] were met"); *see also* 40 C.F.R. § 1502.09(c)(4) (supplemental EAs must be treated in the "same fashion" as draft and final EAs, including with respect to public disclosure and discussion).

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT ISSUANCE OF AN INJUNCTION

Plaintiffs will suffer irreparable harm if the States are permitted to kill sea lions this year pursuant to NMFS's authorization. Because the 2012 authorization goes into effect immediately and because the time period in which the states can add individual sea lions to the list of eligible victims ends on May 31, the states will immediately attempt identify more animals to be placed on the list of sea lions authorized to be killed, and to kill a number of sea lions already on the this list. *See* Exh. 1 at 1-2 (specifying the terms and conditions of the authorization). As a direct result of this authorization, individual sea lions who would otherwise be protected by the MMPA can now be immediately killed.

The sea lions that Plaintiffs and Plaintiffs' members view, photograph, and observe on a regular basis—some of whom they have developed unique and treasured relationships with while they kayak and hike in the Bonneville Dam area—will be forever lost unless the Court preserve the *status quo*. It is well established that individuals have a legally protectable interest in viewing wildlife. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992) ("desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest"); *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 422 (D.C. Cir. 1998) (en banc) (internal citations omitted) ("people have a cognizable interest in viewing animals free from inhumane treatment").

In light of these legally protectable interests, many courts have recognized that individuals who have recreational and aesthetic interests in viewing animals, and who routinely interact with and observe specific animals that are threatened with destruction, suffer irreparable harm when these animals are killed illegally. *See Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (finding irreparable injury and enjoining bison hunt where plaintiffs "live near and enjoy the bison" and "would suffer from seeing or contemplating the bison being killed in an organized hunt"); *Fund for Animals v. Espy*, 814 F. Supp. 142, 151 (D.D.C 1993) (recognizing

that viewing harm to animals with whom individuals have developed close, personal relationships with is an aesthetic injury warranting the issuance of a preliminary injunction, stating that "[e]ach of [the plaintiffs] enjoys the neighboring Yellowstone bison in much the same way as a pet owner enjoys a pet, so that the sight or even the contemplation, of treatment in the manner contemplated . . . would inflict aesthetic injury"); *Fund for Animals v. Norton*, 281 F. Supp. 2d at 220-21 (finding irreparable harm to plaintiffs' aesthetic interests in "seeing, or contemplating" mute swans that they know and regularly observe). This is particularly true here, where NMFS has violated a statutory provision that only allows the killing of "*individually* identifiable" animals. 16 U.S.C. § 1389(b).

Plaintiffs' declarations prove that they will suffer irreparable harm. For instance, Bethanie O'Driscoll, an individual Plaintiff and member of Plaintiff The HSUS, "can see the [Columbia] River from the window of [her home]." O'Driscoll Decl. ¶ 3. She also regularly visits Astoria, Oregon, an area where a number of Bonneville Dam sea lions haul out, in order to boat and kayak and to view sea lions. *Id*. ¶¶ 4-6; *see also* Kozil Decl. ¶¶ 8-10 (another individual Plaintiff, HSUS member, and Oregon resident who travels to Bonneville Dam and Astoria frequently to hike along the Columbia River and to watch sea lions). Over the last 11 years of interacting with and seeing the sea lions, Ms. O'Driscoll "can now recognize certain individuals that [she sees] frequently, either through their brand numbers or their markings and personalities" and has "come to know some of the animals very well," including one in particular who "comes up to [her] kayak." O'Driscoll Decl. ¶¶ 7, 8. Other "favorite" sea lions she has viewed are branded C552, C555, and C404, and she has endearingly named some of the animals "Smile," "Porpoise," "Walrus," and "Solo" *see id*. ¶¶ 12–17, and she states in her declaration:

> It kills me to think that some of the sea lions I know – the same ones that I see every season – might be killed. These sea lion are like friends or neighbors. I know them like family. I am especially concerned about C404, or "Porpoise" as my son calls him, because I know that he is on the list of sea lions authorized for immediate removal. It is

> excruciating for me to think that he, along with other sea lions, could be shot or euthanized. . . I cannot even imagine going out to Astoria next year or getting in my kayak and looking for C552 or Smile or C404 or Walrus and not seeing them, knowing that they may not be there because they are dead. The idea brings me to tears. There is no question I will be unable to enjoy sailing, kayaking, and visiting the sea lions in Astoria if I am looking for my favorites but they are no longer there. I have developed a personal relationship with some of the animals, in the same way people develop a relationship with a family pet – and the loss of animals cannot be addressed by money damages or any other type of compensation after the fact. These are not just generic objects to me that the agency can just 'remove' 30 or so of them without consequence. The individuals I know cannot just be replaced by others. These are unique, intelligent, living, breathing beings, and they are very special to me.

O'Driscoll Decl. ¶¶ 17, 18; *see also* Kozil Decl. ¶¶ 11, 14, 18, 19 ("I have always noticed the brand numbers and individual characteristics of certain sea lions . . . I am touched by all of the sea lions, and I feel a special connection to some . . . Although seeing sea lions and trying to identify them is usually one of the highlights of my trips to the Dam, I now find myself feeling anxious, desperately looking to see the same individuals I have seen before so I will know they are safe. . . . Knowing that some of the individuals I know may have been killed for doing what they naturally do, eat fish, will greatly impact my ability to peacefully observe and enjoy these creatures and therefore will harm my recreational, personal, and aesthetic interests."). In fact, some of the sea lions that Plaintiffs know and watch have been placed on the list of sea lions to be targeted for removal. *Compare* O'Driscoll Decl. ¶¶ 17 and Kozil Decl. ¶¶ 16 *with* Exh. 1, Appndx. 1 (noting that C404 and C795 are on this list).

In addition, Bernadette Price, another member of The HSUS lives in Skamania, Washington on the Columbia River about a mile or so downstream of the Bonneville Dam and "often enjoy[s] watching sea lions in the river directly from [her] back yard." Price Decl. ¶¶ 1–4. Watching sea lions swimming in the river "is one of the biggest thrills of [her] life." *Id.* ¶ 4. Her family owns several kayaks and they "go out kayaking at least 3-4 times a month during late spring," which she "particularly enjoy[s] when the sea lions come for a few months each year." *Id*. ¶¶ 5-6. In her declaration, Ms. Price notes: "If the court enjoins the killing of sea lions, I will

be able to continue kayaking and enjoying the river near the Dam without fear of closures, blood, or dead sea lions." *Id*. ¶¶ 9-10.

All of these injuries to Plaintiff's aesthetic, recreational, and environmental interests, including their interests in observing and preserving federally protected marine mammals, are "irreparable" and cannot be recompensed with money damages, as once the sea lion killing begins, there will be nothing the Court can do to restore wildlife that is killed as a result of this unlawful program. *See, e.g.*, *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent" and thus, "the balance of harms will usually favor the issuance of an injunction" to protect against such harm).

In fact, in granting Plaintiffs' motion for an emergency stay pending appeal of the district court's denial of its request for preliminary injunctive relief in the litigation over the 2008 letter of authorization, the Ninth Circuit found that "the lethal taking of the California sea lions is, by definition, irreparable." *Humane Soc'y of the U.S. v. Gutierrez*, 527 F.3d 788 (9th Cir. 2008).

Accordingly, because Plaintiffs and its members have demonstrated that they will suffer several concrete, irreparable injuries if NMFS's lethal take authorization is not enjoined, and because these injuries cannot be adequately remedied with money damages, Plaintiff has easily satisfied its obligation to demonstrate only the "likelihood of irreparable harm." *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F.Supp.2d 1, 8 (D.D.C. 2009).

III. DEFENDANTS ARE NOT LIKELY TO SUFFER HARM, AND ANY SUCH HARM IS CLEARLY OUTWEIGHED BY THE POTENTIAL HARM TO PLAINTIFFS

In contrast to the significant, irreparable injury that Plaintiff has identified if NMFS's authorization is not enjoined, Defendants cannot plausibly argue that either they or any other party would suffer any serious injury if the proposed sea lion killing at Bonneville Dam were to

be temporarily postponed. Indeed, a limited injunction will only require NMFS to continue to protect those sea lions that frequent the Bonneville Dam area under the MMPA, as it has for more than 35 years since the MMPA was enacted in 1972. *Nat'l Senior Citizens Law Ctr. v. Legal Serv. Corp*., 581 F. Supp. 1362, 1373 (D.D.C. 1984) ("preliminary relief will require the defendants to maintain a course of conduct that they have pursued for many years" and therefore "order maintaining the status quo will cause [defendants] little, if any harm"). There is simply no pressing need to go forward with killing federally protected California sea lions *in the remaining 2-3 months* of the 2012 salmon passage at the dam, before this matter can be heard further.

The MMPA action authorized by NMFS is required by statute to target "individually identifiable" animals, 16 U.S.C. § 1389(b), and Plaintiffs and have interests specific to some of the individual animals on the "kill list" (including one just added last week, C016). On the other hand, the harm to listed salmon ESU listed salmon being minimal, both within the context of protection of the entire species under the ESA, and given that the 2012 salmon run is predicted to be the highest in over a decade, *see* 2011 Stansell Report, and the number of sea lions at the dam at this time is lower than the number seen at the dam at the same time in prior years. Stansell, et al, Pinniped Predation and Deterrent Activities (March 9, 2012) ("2012 Stansell Report").

Defendants cannot possibly claim that they will be seriously harmed if the sea lion killing is temporarily postponed, especially in light of the fact that sea lions take a mere 0.4 to 4.2 percent of salmonids, whereas NMFS itself authorizes much higher mortality impacts, such as up to 17 percent fishery take and up to 17 percent hydrosystem take. Exh. 6 at 3-32. As noted above, the agency itself has flatly conceded that "[i]n general, *predation rates on salmon are considered . . . to be an insignificant contribution to the large declines observed in west coast populations*." NMFS, *Pacific Salmonids: Major Threats and Impacts* (emphasis added).

Moreover, temporarily delaying the lethal removal of sea lions will not result in any injury, because sea lion killing is wholly ineffectual for addressing declining salmon populations.

Indeed, the Corps' 2010 Report notes that in the fact of lethal removals of animals who had frequented the dam for multiple years, they "expected the results from the 2010 season to show a steep decline in CSL [California sea lion] numbers, which would have also resulted in reduced salmonid predation by CSL. However, this was not the case, as many new CSL ventured up to Bonneville Dam. . . if only briefly." 2010 Stansell Report at 28. In addition, of the 48 individually identifiable California sea lions observed at Bonneville Dam in 2011, 17 percent were new additions to the list of animals targeted for lethal removal and that in 2010, 65 percent of the identifiable sea lions were new additions. 2011 MMC Letter at 5. Additionally, other manmade factors, such as dam and fishery mortality, are the primary cause of salmon decline in the Columbia River. Exh. 4 at 22 ("the four most commonly addressed factors affecting salomonids…are habitat alteration, harvest, hatchery practices, and hydrosystem development.").

Even if Defendants could establish that sea lions might have some minimal impact on salmon in the Bonneville Dam area, certainly such insignificant, minimal effects do not outweigh the very real, imminent, and irreparable harm that Plaintiffs and Plaintiffs' members will suffer if MMPA-protected sea lions are killed. *See Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 223 (D.D.C. 2003) ("[s]urely waiting a few months to ensure vindication of the public's interest in compliance with NEPA and the MBTA will not so damage the Chesapeake Bay as to counterbalance the irreparable harm claimed by plaintiffs"). Therefore, any possible harm that could result from issuing a limited, temporary stay of NMFS's lethal take authorization – and thereby briefly postponing the States' plan to kill sea lions this Spring – is far outweighed by the significant irreparable harm that Plaintiffs will suffer if Defendants' action is not enjoined.

IV. THE PUBLIC INTEREST FAVORS ISSUANCE OF INJUNCTIVE RELIEF

Because defendants have violated federal statutory provisions pertaining to marine mammal protection and public participation, it invariably follows that the public interest lies in favor of preserving the *status quo*. The public interest is plainly served if NMFS is precluded

from going ahead with an irreversible decision authorizing the killing of protected sea lions in the absence of full compliance with the MMPA. *Fund for Animals v. Clark*, 27 F. Supp. 2d at 15.

Indeed, the very purpose of the MMPA is to ensure "the protection and conservation of marine mammals." 16 U.S.C. § 1361(5); *see also id.* § 1361(6) ("marine mammals have proven themselves to be resources of great international significance, esthetic, and recreational as well as economic, and it is the sense of Congress that they should be protected"); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1125 (9th Cir. 2002) ("public's interest in preserving precious, unreplenishable resources must be taken into account in balancing the hardships"). The MMPA "was not intended as a 'balancing act' between the interests of the fishing industry and the animals," as the "interests of the marine mammals come first under the statutory scheme."*Comm. for Humane Legislation, Inc. v. Richardson*, 414 F. Supp. 297, 306 (D.D.C. 1976), aff'd 540 F.2d 1141 (D.C. Cir. 1976). This purpose will be significantly frustrated if NMFS is allowed to go ahead with an irreversible decision to kill protected sea lions in the absence of full compliance with the conservation mandates embodied in the MMPA.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their motion for a temporary restraining order be granted until the Court has an opportunity to consider this case further.

Respectfully Submitted,

/s/_____
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