

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Center for Biological Diversity v. Raimondo

No. 3:22-cv-00117-JD (N.D. Cal. Mar. 14, 2023) · No. 3:22-cv-00117-JD · Decided March 14, 2023

SUMMARY

The Northern District of California granted the Center for Biological Diversity summary judgment in part, holding that the National Marine Fisheries Service unlawfully issued a 2021 incidental-take permit for the Washington/Oregon/California sablefish pot fishery. The court concluded that the Marine Mammal Protection Act required a take reduction plan for ESA-listed humpback whales and that insufficient funding did not eliminate that requirement. The court deferred consideration of remedies and the challenge to the 2020 biological opinion.

OPINION

1 2 3 4 UNITED STATES DISTRICT COURT 5 NORTHERN DISTRICT OF CALIFORNIA 6 7
CENTER FOR BIOLOGICAL Case No. 3:22-cv-00117-JD DIVERSITY, 8 Plaintiff, ORDER RE
CROSS-MOTIONS FOR 9 SUMMARY JUDGMENT v. 10 GINA RAIMONDO, et al., 11
Defendants. 12 13 14 Plaintiff Center for Biological Diversity (CBD) has sued defendants
National Marine 15 Fisheries Service and Secretary of Commerce Gina Raimondo (collectively,
NMFS) under the 16 Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361 et seq., and the
Endangered Species 17 Act (ESA), 16 U.S.C. § 1531 et seq.

The case concerns commercial fishing operations in the 18 Washington/Oregon/California
sablefish pot fishery. Sablefish is a bottom-dwelling species that 19 is valued as a consumer
delicacy. To harvest the fish, approximately 150 commercial fishing 20 vessels deploy tens of
thousands of pots that “sit on the bottom of the ocean and are connected to 21 each other in
approximately two-mile-long strings of 15 to 50 pots.” Dkt.

No. 1 ¶¶ 4, 69-70. 22 Local populations of humpback whales, including ESA-listed endangered
and threatened 23 populations, can become entangled with the fishing gear used in the pot fishery,
which causes 24 injury and on occasion death. See id. ¶¶ 60-61, 75; see also MMPA 000453;
BiOp 000124-25. 25 The case presents a straightforward challenge by CBD to the issuance of a
permit by 26 NMFS in 2021 that authorized the incidental taking of ESA-listed humpback whales
in the pot 27 fishery, a challenge that both parties agree is timely under the MMPA.

See Dkt. No. 283 at 7 n.5; 1 that a take reduction plan for the whales had been developed or was
being developed, as required 2 by the MMPA. See Dkt. No. 282 at 11. NMFS says that it simply
lacks the funding to develop 3 and implement take reduction plans for all marine mammal species

and stocks that are entitled to 4 one, and consequently a statutory exception applies to relieve the agency of its obligation to 5 develop a plan in this case.

See Dkt. No. 283 at 22. 6 The parties have filed cross-motions for summary judgment, which the Court found 7 suitable for decision without oral argument under Civil Local Rule 7-1(b). Dkt. Nos. 282, 283, 8 287. The parties' familiarity with the record is assumed, and CBD's motion is granted in part. 9 The Court defers consideration of the appropriate remedy, as well as CBD's challenge to the 2020 10 biological opinion that NMFS relied upon in issuing the incidental take permit, pending further 11 proceedings.¹ 12 LEGAL STANDARDS 13 Under the deferential standard of the Administrative Procedure Act (APA), an agency 14 action will be upheld unless it is found to be "arbitrary, capricious, an abuse of discretion, or 15 otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see also *Defs. of Wildlife v. Zinke*, 16 856 F.3d 1248, 1256-57 (9th Cir.

2017). The ESA and MMPA allow citizens to sue, but "lack 17 independent judicial review provisions." *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 18 733 (9th Cir. 2020). Consequently, the Court reviews these claims under Section 706 of the APA. 19 See *id.*; see also *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012). 20 An agency action is arbitrary and capricious "if the agency has: relied on factors which 21 Congress has not intended it to consider, entirely failed to consider an important aspect of the 22 problem, offered an explanation for its decision that runs counter to the evidence before the 23 1 The timeliness of CBD's challenge to the biological opinion is disputed.

See Dkt. No. 283 at 7; 24 Dkt. No. 284 at 7. NMFS says CBD is in effect challenging "NMFS's authorization and management of the fishery," which came about as a result of several rulemakings under the 25 Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. § 1801 et seq., see Dkt. No. 283 at 7-8, and so the 30-day statute of limitations period in the MSA applies, see *id.* 26 at 7 (citing 16 U.S.C. § 1855(f)).

CBD says the MMPA permit challenge is timely and that "NMFS stated it relied on the Biological Opinion in issuing the Permit." Dkt. No. 284 at 8. In 27 light of the determination here that the permit was unlawfully issued, and the possibility that CBD 1 agency, or is so implausible that it could not be ascribed to a difference in view or the product of 2 agency expertise." *Ctr. for Cmty.*

Action & Env't Just. v. FAA, --- F.4th ----, 2023 WL 2213470, 3 at *4 (9th Cir. Feb. 24, 2023); see also *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. 4 Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "The Court's deference extends to less than stellar work 5 by an agency, so long as its analytical path and reasoning can be reasonably discerned." 6 *Ecological Rts.*

Found. v. FEMA, 384 F. Supp. 3d 1111, 1119 (N.D. Cal. 2019) (citing *San Luis v. 7 Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 627 (9th Cir. 2014)); see also *Friends of Del 8*

Norte v. Cal. Dep't of Transp., No. 18-cv-00129-JD, 2023 WL 2351649, at *5 (N.D. Cal. Mar. 3, 2023). 10 Summary judgment is an appropriate procedure for resolving plaintiffs' challenges.

See 11 Nw. Motorcycle Ass'n v. USDA, 18 F.3d 1468, 1471-72 (9th Cir. 1994); Friends of Del Norte, 12 2023 WL 2351649, at *5. Summary judgment may be granted when there is no genuine issue of 13 material fact and the moving party is entitled to judgment as a matter of law. See Ecological Rts. 14 Found., 384 F. Supp. 3d at 1119; Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

15 DISCUSSION 16 Two statutory regimes, the ESA and the MMPA, frame the analysis. The ESA was 17 enacted to protect and conserve endangered and threatened species and their habitats, and 18 embodies "a conscious decision by Congress to give endangered species priority over the 'primary 19 missions' of federal agencies." Ctr. for Biological Diversity v. EPA, 847 F.3d 1075, 1084 (9th 20 Cir.

2017) (quoting TVA v. Hill, 437 U.S. 153, 185 (1978)); see also Friends of Gualala River v. 21 Gualala Redwood Timber, LLC, 552 F. Supp. 3d 924, 931 (N.D. Cal. 2021). It authorizes the 22 Secretaries of Commerce and the Interior, through their agencies, to list plants and animals for 23 protection and to designate critical habitats. See Ecological Rts. Found., 384 F. Supp. 3d at 1115 24 (citing 16 U.S.C. § 1533). "The ESA imposes a variety of procedural and substantive 25 requirements to ensure that the actions of federal agencies do not harm listed species or critical 26 habitats." Id. (citing, e.g., Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 652 27 (2007)).

The relevant stock of humpback whales in this case includes two distinct population 1 The MMPA "generally prohibits any individual from 'taking' a marine mammal, defined 2 as harassing, hunting, capturing, or killing it." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 3 15 (2008) (citing 16 U.S.C. §§ 1362(13), 1372(a)).

The take prohibition admits of several 4 exceptions, including one for "incidental take in the course of commercial fishing," which is 5 relevant here. Ctr. for Biological Diversity v. Salazar, 695 F.3d 893, 899 (9th Cir. 2012) (citing 6 16 U.S.C. § 1371(a)(1)-(2)). 7 ESA-listed marine mammals enjoy enhanced protection under the MMPA.

Before issuing 8 a permit to authorize for up to three years the incidental taking of listed marine mammals in 9 commercial fishing operations, the MMPA requires NMFS to make the following determinations 10 after a notice-and-comment period: 11 (I) the incidental mortality and serious injury from commercial fisheries will 12 have a negligible impact on such species or stock; (II) a recovery plan has been developed or is being developed for such species 13 or stock pursuant to the [ESA]; and 14 (III) where required under section 1387 of this title, a monitoring program is established under subsection (d) of such section, vessels engaged in such 15 fisheries are

registered in accordance with such section, and a take reduction plan has been developed or is being developed for such species or stock.

16 U.S.C. § 1371(a)(5)(E)(i). At issue here are the take reduction plans. Under Section 1387(f)(1), NMFS is required to “develop and implement a take reduction plan” for all “strategic stocks” -- which by definition includes all ESA-listed marine mammal stocks, see id. § 1362(19)(C) -- that interact with commercial fisheries that cause at least “occasional incidental mortality and serious injury of marine mammals,” id. § 1387(c)(1)(A)(ii).

These fisheries are classified as Category I or II fisheries, and the sablefish pot fishery is in Category II. See MMPA 000001. The MMPA sets a goal of reducing, within five years of implementing a take reduction plan, “the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate, taking into account the economics of the fishery, the availability of existing technology, and existing State or 1 There is no dispute that NMFS issued the 2021 incidental take permit for the sablefish pot 2 fishery without developing, or even starting to work on, a take reduction plan for the humpback 3 whales.

See Dkt. No. 284 at 3; Dkt. No. 285 at 12-14. NMFS’s own assessment of its compliance 4 with Section 1371(a)(5)(E) concluded that the take reduction plan requirements were satisfied 5 because a plan was “on the priority list for development,” even though it was not “complete” or 6 “underway.” MMPA 000022. 7 This assessment overtly conflicts with the statutory requirement that “a take reduction plan 8 has been developed or is being developed for” the ESA-listed humpback whales.

16 U.S.C. 9 § 1371(a)(5)(E)(i)(III). The main point of contention between the parties is whether Section 10 1387(f) lets NMFS off the hook. The parties agree that the phrase “where required under section 11 1387” applies to all the provisions in Section 1371(a)(5)(E)(i)(III). See Dkt. No. 284 at 5-6; Dkt. 12 No. 285 at 12. NMFS says that it was not required under Section 1387 to develop a take reduction 13 plan because it lacked the funding to do so.

See Dkt. No. 283 at 22. It says that the MMPA 14 expressly contemplates this situation: 15 If there is insufficient funding available to develop and implement a take reduction 16 plan for all such stocks that interact with commercial fisheries [that cause at least occasional incidental mortality and serious injury of marine mammals], the 17 Secretary shall give highest priority to the development and implementation of take reduction plans for species or stocks whose level of incidental mortality and serious 18 injury exceeds the potential biological removal level, those that have a small population size, and those which are declining most rapidly.

19 20 16 U.S.C. § 1387(f)(3). In the view of NMFS, this provision “allows [it] to set priorities for 21 developing take reduction plans and ‘not develop a reduction plan at all if there is insufficient

22 funds.” Dkt. No. 283 at 22 (quoting *Kohola v. Nat’l Marine Fisheries Serv.*, 669 F. Supp. 2d 23 1182, 1191 (D. Haw. 2009), vacated as moot, 439 F. App’x 618 (9th Cir.

2011)).² Plaintiffs 24 2 NMFS has not argued that its interpretation of Section 1387(f)(3) is entitled to any measure of 25 deference, whether under the doctrines of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984) or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

In any event, its interpretation 26 could not make it past Chevron step one, “which asks whether the statute is ambiguous.” *Nat. Grocers*, 2022 WL 4227248, at *11. As discussed in an ensuing section, Congress has spoken 27 clearly in the relevant sections of the MMPA, and “that is the end of the matter; for the court, as 1 respond that the “‘where required under section 1387’ phrase... refers only to the limited 2 situation in which section [1387] does not require a take reduction plan for ESA-listed marine 3 mammals -- when fisheries interact with them ‘infrequently.’” Dkt.

No. 284 at 5-6. 4 This is a question of statutory interpretation, and as in all such cases, “[o]ur analysis begins 5 and ends with the text.” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 6 (2014); see also *Michigan v. DeVos*, 481 F. Supp. 3d 984, 991 (N.D. Cal. 2020). “The Court gives 7 Congress’s words their ordinary and everyday meaning, and may consult dictionary definitions to 8 ensure a plain interpretation.” *Nat.*

Grocers v. Vilsack, No. 20-cv-05151-JD, --- F. Supp. 3d ----, 9 2022 WL 4227248, at *9 (N.D. Cal. Sept. 13, 2022) (citing *City of Los Angeles v. Barr*, 941 F.3d 10 931, 940 (9th Cir. 2019)). The “inquiry must cease if the statutory language is unambiguous” and 11 “the statutory scheme is coherent and consistent.” *Schindler Elevator Corp. v. United States ex 12 rel.*

Kirk, 563 U.S. 401, 412 (2011) (internal quotations and citation omitted). “When construing a 13 statute, a virtuoso feat of analysis is neither required nor particularly useful.” *DeVos*, 481 F. Supp. 14 3d at 991. The ultimate goal of statutory construction is to effectuate Congress’s intent in enacting 15 the statute. “In every case, ‘it is the intent of Congress that is the ultimate touchstone.’” *Barr*, 941 16 F.3d at 940 (quoting *Arizona v. United States*, 567 U.S. 387, 453 (2012) (Alito, J., concurring in 17 part and dissenting in part)).

The Court bears “the conventional judicial duty to give faithful 18 meaning to the language Congress adopted in the light of the evident legislative purpose in 19 enacting the law in question.” *Graham Cnty. Soil & Water Conservation Dist. v. United States ex 20 rel. Wilson*, 559 U.S. 280, 298 (2010) (internal quotations and citation omitted); see also *Nat. 21 Grocers*, 2022 WL 4227248, at *9.

22 CBD has the better reading of the MMPA. Section 1387 directs that NMFS “shall develop 23 and implement a take reduction plan” for strategic stocks in commercial fisheries that involve 24

occasional incidental mortality or serious injury to marine mammals. 16 U.S.C. § 1387(f)(1) 25 (emphasis added). That fits to a tee the ESA-listed humpback whales and pot fishery here.

The 26 same provision states that NMFS “may develop and implement” take reduction plans for non- 27 strategic stocks that interact with fisheries that cause frequent incidental mortality and serious 1 reduction plans for marine mammal stocks, listed or not, that interact with fisheries which pose 2 only “a remote likelihood of or no known incidental mortality or serious injury of marine 3 mammals.” Id. § 1387(c)(1)(A)(iii).3 4 The difference between the mandatory “shall” and the discretionary “may” in Section 5 1387(f)(1) is obvious.

See *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 172 (2016) 6 (“When a statute distinguishes between ‘may’ and ‘shall,’ it is generally clear that ‘shall’ imposes 7 a mandatory duty.”). Consequently, under the plain language of Section 1387(f)(1), a take 8 reduction plan was “required” in this case. 9 The fact that NMFS has some room for prioritizing the order in which to develop and 10 implement take reduction plans does not point to a different conclusion.

The statute uses the 11 phrase, “shall give highest priority,” which means in ordinary usage “to deal with or do 12 (something) first.” See Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/give%20priority> (last visited Mar. 13, 2023). It may be that several mandatory tasks 14 can be ranked in order of completion, but the mandatory quality remains unchanged.

Nothing 15 about the prioritization process transforms a mandatory duty into a discretionary one. 16 NMFS’s reading of Section 1387 would also create unnecessary conflicts within the 17 statute. For example, another provision in Section 1387 authorizes NMFS to create “take 18 reduction teams.” 16 U.S.C. § 1387(f)(6). These are advisory groups composed of representatives 19 from stakeholder organizations who serve without compensation to help draft take reduction plans, 20 among other duties.

See id. § 1387(f)(6)-(8). NMFS “may request a take reduction team to 21 address a stock that extends over one or more regions or fisheries, or multiple stocks within a 22 region or fishery, if [it] determines that doing so would facilitate the development and 23 implementation of plans required under this subsection.” Id. § 1387(f)(6)(B). Interpreting 24 “required” here to mean, as NMFS would have it, only those plans for which it has sufficient 25 funding would make little sense.

The provision clearly contemplates that all the take reduction 26 27 1 plans called for in Section 1387(f)(1) are “required,” and provides NMFS with a tool to marshal its 2 limited resources to develop the plans. 3 Because the “where required under section 1387” condition in the ESA-listed incidental 4 take permit provision was satisfied, NMFS could have lawfully issued the 2021

permit only if it is determined that a take reduction plan “has been developed or is being developed” for the humpback whales.

Id. § 1371(a)(5)(E)(i)(III). This is an additional requirement above and beyond what is mandated by Section 1387(f). Even though Section 1387(f) covers most of the requirements and timing of take reduction plans, it applies in tandem with Section 1371(a)(5)(E). See *id.* § 1387(a)(2) (“In the case of the incidental taking of marine mammals from species or stocks designated under this chapter as depleted on the basis of their listing as threatened species or endangered species under the [ESA], both this section and section 1371(a)(5)(E) of this title shall apply.”).

And while the insufficient funding provision in Section 1387(f)(3) may provide the government with some relief from complying with all the deadlines for developing take reduction plans -- a question that need not be resolved in this dispute -- the bottom line is that NMFS cannot indefinitely delay developing a take reduction plan while continuing to authorize Section 1371(a)(5)(E) permits for the incidental take of endangered and threatened humpback whales.

Consequently, NMFS’s conclusion that the requirements of Section 1371(a)(5)(E) were satisfied without a take reduction plan being under development was arbitrary and capricious. The authorization of the 2021 permit for the incidental taking of humpback whales at the pot fishery was unlawful. CONCLUSION Summary judgment is granted to CBD on its second claim that NMFS violated the MMPA and APA by issuing the 2021 incidental take permit.

The parties’ briefing suggested a question of whether CBD may challenge NMFS’s 2020 biological opinion independent of the 2021 permit. See Dkt. No. 283 at 9; Dkt. No. 284 at 8. NMFS has also requested the opportunity to provide separate briefing on remedies if CBD prevailed on any of its claims, as is the case here. See Dkt. No. 283 at 25; Dkt. No. 285 at 15.

A status conference is set for April 20, 2023, at 10:00 a.m., to discuss these issues and the next steps in this case. IT IS SO ORDERED. Dated: March 14, 2023 JAMES/PONATO United States District Judge