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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

LA JOLLA FRIENDS OF THE SEALS, a)	Civil Case No.: 08 CV 1847 WQH POR
nonprofit organization; and JAMES H. N.)	
HUDNALL, JR., an individual,)	PLAINTIFFS' OPPOSITION TO
)	MOTION TO DISMISS
Plaintiffs,)	
)	Date: Nov. 25, 2008
v.)	Time: 9:30am
)	Courtroom: 4
NATIONAL OCEANIC AND)	Judge: Hon. William Q. Hayes
ATMOSPHERIC ADMINISTRATION)	
NATIONAL MARINE FISHERIES)	
SERVICE ("NMFS"), an agency of the U.S.)	
Dept. of Commerce; CARLOS M.)	
GUTIERREZ, Secretary of Commerce;)	
JAMES W. BALSIGER, Acting Director of)	
NMFS; RODNEY MCINNIS, Acting)	
Regional Administrator of NMFS; JAMES)	
LECKY, Director of Office of Protected)	
Resources at NMFS; CITY OF SAN DIEGO;)	
and DOES 1 TO 100,)	
)	
Defendants.)	

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1 **I. INTRODUCTION**

2 The Federal Defendants¹ move to dismiss Plaintiffs’ claims against them only and not
3 against the City. Federal Defendants take no position on whether Plaintiffs assert a valid state
4 law claim against the City that may be brought in federal court, and if so, on whether the TRO
5 should remain in effect in the form of a preliminary injunction. *See* Fed. Defs.’ Mem. In Opp. to
6 Pls.’ Mot. for TRO at 3, fn. 2 (Doc 19). NMFS contends that enforcement of the MMPA is
7 solely “committed to agency discretion by law,” and is thus exempt from review under the APA
8 pursuant to 5 U.S.C. § 701(a)(2).

9 However, as discussed below, NMFS has taken an active role in urging the City to violate
10 the MMPA, contrary to the advice of the Marine Mammal Commission and its head biologist in
11 charge of this rookery, and these affirmative representations by NMFS are what led a state court
12 to conclude that a NMFS recognized rookery can be destroyed without a permit. Such
13 affirmative steps by NMFS are exactly the type of agency action the APA is designed to address.
14 As such, NMFS’ actions can be reviewed under 5 U.S.C. § 706(2)(A) as being “arbitrary,
15 capricious, an abuse of discretion, or otherwise not in accordance with law.”

16 Indeed the Complaint details the affirmative twists and turns taken by NMFS in
17 attempting to lead the city and the state court to conclude that an NMFS recognized rockery can
18 be destroyed without a permit. See Complaint at paragraphs 24, 32, 34 and 35 and relevant
19 exhibits cited in these paragraphs. These allegations must be accepted as true for purposes of
20 deciding this motion to dismiss. Therefore as a result of the allegations alleged in the complaint,
21 any claim by NMFS that they are not an active participant in the action of the city and the state
22 court must as a matter of law fall on deaf ears.

23 In contrast to the allegations of the complaint, the hollow claim of NMFS that they have
24 not acted involves at best “inaction only in an extremely formalistic sense” which is insufficient
25 as a matter of law as held by the Ninth Circuit in *Socop-Gonzalez v. INS*, 208 F.3d 838, 845 (9th
26

27 ¹ Plaintiffs use the terms “Federal Defendants” and NMFS interchangeably in this brief.

1 Cir. 2000) to deny this Court a right to review the actions of NMFS. At bottom the preemptive
2 effect of the empowering laws granting authority to NMFS are so pervasive as trumpeted by
3 NMFS (see Exhibit G to the Complaint) that only through this action can the acts of NMFS be
4 reviewed as Plaintiffs are entitled under 5 U.S.C. section 706.

5 As discussed below, NMFS has taken an active role in urging the City to violate the
6 MMPA, contrary to the advice of the Marine Mammal Commission and NMFS' own head
7 biologist in charge of this rookery, and these affirmative representations by NMFS are what led a
8 state court to conclude that this NMFS recognized rookery can be destroyed without a permit.
9 Such affirmative steps by NMFS are exactly the type of agency action the APA is designed to
10 address. As such, NMFS' actions can be reviewed under 5 U.S.C. § 706(2)(A) as being
11 "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

12 NMFS simply cannot avoid review under § 706 by on the one hand setting policy by
13 which others are compelled to act and on the other hand claim as a result of others acting
14 pursuant to their pronouncements NMFS has not acted. This fairy tale created from whole cloth
15 by NMFS should be given short shrift and their motion to dismiss must respectfully be denied.

16 **II. ARGUMENT**

17 **A. The APA gives Plaintiffs standing to challenge NMFS' affirmative** 18 **representations and actions that are causing the City to violate the MMPA**

19 Courts have frequently found agency letters and less-than-formal statements to be
20 reviewable agency actions under Section 706(2) of the APA. *See, e.g., Bonnichsen v. United*
21 *States, 357 F.3d 962, 977 (9th Cir. 2004)* (reviewing "Notice of Intent" published in newspaper
22 announcing agency's decision to return skeleton to certain Native American tribes); *Ciba-Geigy*
23 *Corp. v. U.S.E.P.A., 801 F.2d 430, 436 (D.C. Cir. 1986)* (agency letter "unequivocally stat[ing]
24 EPA's position on the question whether" entities were entitled to a hearing before agency could
25 amend labeling requirements); *Her Majesty the Queen in Right of Ontario v. EPA, 912 F.2d*
26 *1525, 1532 (D.C. Cir. 1990)* (reviewing agency letter "confirm[ing agency's] definitive position"
27 on plaintiff's request that the agency issue findings).

1 “It is well settled that ‘the authoritative interpretation of an executive official has the
2 legal consequence, if it is reasonable and not inconsistent with ascertainable legislative intent, of
3 commanding deference from a court that itself might have reached a different view if it had been
4 free to consider the issue as on a blank slate.’ [Citations].” *Ciba-Geigy*, 801 F.2d 430, 436. “We
5 conclude, as this court has repeatedly held before, that ‘an agency’s interpretation of its
6 governing statute, with the expectation that regulated parties will conform to and rely on this
7 interpretation, is final agency action fit for judicial review.’ [Citations].” *Id.* at 438.

8 If the present case is dismissed, it is likely that a state court will immediately order the
9 City to destroy a NMFS recognized seal rookery by hiring a worker to constantly harass and
10 chase pregnant and nursing seals off of the beach, causing pups to be aborted. *See* City Ex. 1 at
11 2 (Dkt. #18 at 10). The state court’s belief that such an order would not violate federal law is
12 based on official representations by NMFS, in the form of defendant LECKY testifying on
13 behalf of NMFS at a City Council meeting. *O’Sullivan v. City of San Diego*, 2007 Cal. App.
14 Unpub. LEXIS 7265 at 10-11. (McArdle Dec. Ex. 1 at 4, Dkt. #21-2 at 4). The state court
15 relying on the advice of a federal official on matters of federal law “might have reached a
16 different view if it had been free to consider the issue as on a blank slate.” *Ciba-Geigy*, 801 F.2d
17 430, 436. Such pronouncements and active ratification of an illegal course of action by Federal
18 Defendants are reviewable under 5 U.S.C. § 706 as being “arbitrary, capricious, an abuse of
19 discretion, or otherwise not in accordance with law.”

20 The Federal Defendants rely mainly on *Heckler v. Chaney*, 470 U.S. 821 (1985), for their
21 argument that NMFS cannot be compelled to exercise its enforcement authority. *Heckler*
22 involved a question of whether the Food and Drug Administration (FDA) could be compelled to
23 prevent the states of Oklahoma and Texas from using lethal injection to execute prisoners when
24 the FDA had not approved those drugs for such use. Although City Attorney Mike Aguirre
25 recently commented on the present case that “representing the seals is like representing someone
26
27
28

1 on death row,”² there are several differences between these two cases. The FDA in *Heckler* did
2 not affirmatively tell the states that it was legal to use the drugs for executions or that they should
3 use them in that manner. It simply failed to take enforcement action the plaintiffs wished it to
4 take but that it was not required to take by law. In contrast, NMFS in the present case has taken
5 an active role in affirmatively ratifying and approving the threatened MMPA violation.

6 *Heckler*, 470 U.S. 821, 838, held, “The general exception to reviewability provided by §
7 701(a)(2) for action ‘committed to agency discretion’ remains a narrow one, *see Citizens to*
8 *Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)...” In distinguishing *Overton Park* and
9 explaining why the narrow exception applied in *Heckler*, the Court noted, “*Overton Park* did not
10 involve an agency’s refusal to take requested enforcement action. It involved an affirmative act
11 of approval under a statute that set clear guidelines for determining when such approval should
12 be given,” a situation in which APA review *is* appropriate. *Id.* at 831. Similarly, in the present
13 case, NMFS has given affirmative approval for the destruction of a rookery and active dispersal
14 of seals from their rookery, and such approval was relied on by the state court in ordering the
15 City to take such action.

16 NMFS claim that they have not acted involves at best “inaction only in an extremely
17 formalistic sense” which is insufficient as a matter of law as held by the Ninth Circuit in *Socop-*
18 *Gonzalez v. INS*, 208 F.3d 838, 845 (9th Cir. 2000) to deny this Court a right to review the
19 actions of NMFS. In fact, NMFS has acted by affirmatively ratifying the threatened action.

20 *Alaska Fish and Wildlife Fed’n and Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 938
21 (9th Cir. 1987), cited on page 7 of Federal Defendants’ memorandum, did hold that the court
22 lacked jurisdiction to hear claims arising from the Migratory Bird Treaty Act when the actions of
23 the Fish and Wildlife Service that plaintiffs complained of were committed to agency discretion.
24 However, the court did find jurisdiction to review the agency’s act of entering into agreements to
25 allow third party actions that were contrary to the MBTA. *Id.*

26
27 ² “Seals Safe, For Now,” by David Washburn, Voice of San Diego, Oct. 22, 2008
28 (http://www.voiceofsandiego.org/articles/2008/10/22/this_just_in/505sealsafe102208.txt)

1 The present case is not a situation in which NMFS is simply passively failing to enforce
2 the MMPA. To the contrary, NMFS is actively involved in forcing the city to violate the
3 MMPA. In ordering the City to disperse the seals, the state court relied entirely on hearsay
4 statements made by defendant JAMES LECKY at a City Council hearing. *See* NMFS Ex. 1 at 4
5 (Dkt. #21-2 at 4); Cmplt. at 13. This was despite LECKY's previous statements to the contrary.
6 *See* Cmplt. Ex. J at 21. There are also letters back and forth between defendant MCINNIS and
7 the city evidencing an agreement to allow the city to disperse the seals without applying for a
8 permit under the MMPA, which the MMC was concerned enough about to write its own letter.
9 *See* Cmplt. Ex. K at 23. Because NMFS, LECKY and MCINNIS are complicit in forcing the
10 city to violate the MMPA, the present case presents a situation similar to that in *Dunkle* in which
11 the federal agency entered into an agreement that encourages or allows a third party to violate
12 federal law. Even though the federal law in question may afford the federal agency discretion to
13 ultimately prosecute a violation, a federal court has jurisdiction to review agency action in the
14 form of an agreement or active ratification of the threatened action. *Dunkle*, 829 F.2d 933 at
15 938.

16 *Friends of the Cowlitz & CPR-Fish v. FERC*, 2001 U.S. App. LEXIS 28368 (9th Cir.
17 June 14, 2001)³, also cited by Federal Defendants on page 7 of their memorandum, involved a
18 question almost totally subject to agency discretion unless explicitly made otherwise by statute:
19 whether to decide to *investigate* the violation of a license. *Id.* at 32. In the present case,
20 Plaintiffs do not ask NMFS to investigate anything. Rather, Plaintiffs challenge NMFS'
21 affirmative representations and encouragement for the City to violate the MMPA, which were
22 then used by the state court to order the city to do so without a permit, in violation of federal law.

23 *Big Country Foods, Inc. v. Board of Educ. of Anchorage School Dist.*, 952 F.2d 1173,
24 1176 (9th Cir. Alaska 1992), also cited on page 7 of Federal Defendants' memorandum, was

25
26 ³ Federal Defendants cite this case as appearing at 253 F.3d 1161, 1171 (9th Cir.2001), amended
27 on other grounds, 282 F.3d 609 (2002). However, the actual amended opinion appears to be
28 published at 2001 U.S. App. LEXIS 28368, and the quote used by Federal Defendants is on page
32 of that opinion.

1 brought by a dairy provider that believed the State of Alaska had violated federal law in not
2 awarding a contract to it. The plaintiff lacked standing to challenge the Department of
3 Agriculture’s decision not to enforce the regulations against the State of Alaska due to the
4 presumption that enforcement action is committed to agency discretion. *Id.* at 1176. Unlike the
5 present case, none of the exceptions in *Heckler* to rebut this presumption existed. *Big Country*
6 *Foods*, 952 F.2d. at 1177. Those exceptions are a refusal to institute proceedings based solely on
7 a belief that the federal agency lacks jurisdiction, or the federal agency has “‘consciously and
8 expressly adopted a general policy’ that is so extreme as to amount to an abdication of its
9 statutory responsibilities.” *Id.* Both of these exceptions *are* present in the case at bar.

10 NMFS has already indicated that it will not institute enforcement proceedings based
11 solely on the belief that it lacks jurisdiction due to the 109(h) exception to the MMPA, despite
12 the contrary advice of the Marine Mammal Commission and the advice of its head biologist in
13 charge of this rookery, Joe Cordaro. *See Pease Dec. Ex. A* at 1⁴. Additionally, by formally
14 recognizing CPB as a rookery and initially stating that 109(h) does not apply, and then advising
15 the City that it can simply destroy this rookery, NMFS has consciously and expressly adopted a
16 general policy that is so extreme as to amount to an “abdication of its statutory responsibilities.”
17 *Big Country Foods*, 952 F.2d. at 1177. Defendant LECKY wrote a letter to the City on February
18 11, 2003 stating:

19 The National Marine Fisheries Service (NOAA Fisheries) has determined that Section
20 109(h) does not apply to pinnipeds (seals and sea lions) on haulouts and rookeries, as
21 these animals are not a threat to themselves or the general public and are not considered
22 to be nuisance animals. Therefore, the City of San Diego may not initiate any actions
that would result in a permanent impact to the harbor seals at CPB.
(Cmplt. Ex. J at 21).

23 Then a year and a half later, LECKY appeared at a San Diego City Council meeting and
24 stated that the City could use the 109(h) exception to disperse the seals, which a state court relied
25

26 ⁴ The fact that Mr. Cordaro is the “lead biologist for the NMFS in matters relating to the colony
27 of seals inhabiting Children’s Pool Beach” appears in declarations submitted by Mr. Cordaro in
28 state and federal court. *See Pease Ex. B* at 4, ¶ 4; *Ex. C* at 6, ¶ 4.

1 on to require the City to do just that. *See* NMFS Ex. 1 at 4 (Dkt. #21-2 at 4). This Court now
2 has jurisdiction under 5 U.S.C. § 706 to review these affirmative steps taken by LECKY and
3 NMFS to determine which of their self-contradictory positions is correct.

4 **B. NMFS’ actions are subject to review as being arbitrary, capricious, an abuse of**
5 **discretion, or otherwise not in accordance with law**

6 5 U.S.C. § 706 provides that the “reviewing court shall...(2) hold unlawful and set aside
7 agency action, findings, and conclusions found to be--(A) arbitrary, capricious, an abuse of
8 discretion, or otherwise not in accordance with law.” *Anderson v. Evans*, 371 F.3d 475 (9th Cir.
9 2004), found NMFS approval of a tribe’s whaling quota to be reviewable under both the MMPA
10 as well as the National Environmental Policy Act due to being arbitrary and capricious.

11 “There is no private right of action under the MMPA. *Hawaii County Green Party v. Clinton*,
12 124 F. Supp. 2d 1173, 1190 (D.Haw. 2000) (citing *Didrickson v. U.S. Dep’t of Interior*, 982 F.2d
13 1332, 1338 (9th Cir. 1992)). Citizens challenging actions done under the MMPA must sue under
14 the APA. *Id.* Therefore, actions challenged under the MMPA are reviewed under the APA
15 ‘arbitrary and capricious’ standard.” *Nat’l Res. Def. Council v. Evans*, 232 F. Supp. 2d 1003,
16 1018-1019 (N.D. Cal. 2002).

17 Contrary to NMFS’ assertions that there is no review available under the APA for its
18 failure to abide by the MMPA, the APA does in fact provide for review when the agency’s
19 failure to enforce is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
20 with law, as well as when the agency itself encourages violation of the law or actively agrees to
21 allow the law to be violated as discussed above.

22 Not only does the Marine Mammal Commission, an independent federal agency created
23 under the MMPA, have a problem with NMFS’ failure to enforce the MMPA in this
24 circumstance, but its own head biologist believes that the 109(h) exception should not be applied
25 to rookeries such as CPB. *See* Pease Dec. Ex. A at 1. NMFS’ official position to the contrary is
26 in fact arbitrary and capricious and is contrary to what its own experts believe. Joe Cordaro, a
27 NMFS biologist for 19 years, states:

1 The official position of my superiors at NMFS is that the City can use 109(h) to disperse
2 the seals off the rookery. I disagree with that interpretation and believe that 109(h)
3 cannot be used on rookeries. Furthermore, in order to use 109(h) anywhere, a city must
4 show that the animals are a threat to the human welfare or are nuisance animals. Since
5 the City has maintained a shared use policy for 20+ years, I believe that the City has
6 proved through the use of that policy that the animals are neither nuisance animals nor a
7 threat to the public.

8 I also believe the intent of my superiors was to allow the City to use 109(h) if they
9 wanted to. They certainly did not tell the City that they must use 109(h). Now we have a
10 state court judge telling the City that they must use 109(h), which is contrary to the
11 statute and the code of federal regulations. Not to mention that there could be pregnant
12 females on the beach and any displacement of them could result in premature abortions
13 which would result in a Level A take under the MMPA. All Level A takes must be
14 authorized through a NMFS permit. Unfortunately, I do not anticipate my agency
15 intervening to protect the seals if the judge rules that the City must immediately displace
16 the seals.

17 (Pease Dec. Ex. A at 1).

18 NMFS did not see fit to include a declaration from Mr. Cordaro, the lead biologist for
19 NMFS in matters relating to the colony of seals inhabiting CPB. *See* Pease Dec. Ex. B at 2, ¶ 4;
20 Ex. C at 6, ¶ 4. Instead, NMFS filed a declaration from Sarah Wilkin, who has been a NMFS
21 biologist for only five years and does not state that she has any particular experience with CPB
22 other than going there on one particular day. *See* Wilkin Dec. ¶ 13. Ms. Wilkin's declaration is
23 focused mainly on stating that harbor seals are not endangered and that potentially hundreds of
24 them could be killed without significantly affecting the population. *See* Wilkin Dec. ¶ 8.
25 However, Congress has required a complete moratorium on the taking of marine mammals
26 whether they are currently endangered or not. 16 U.S.C. § 1371(a). Ms. Wilkin's declaration for
27 NMFS arguing that no harm will take place by the threatened action also contradicts her
28 declaration previously filed on behalf of the city in state court demonstrating that pregnant
29 mothers are likely to miscarry and nursing pups are likely to be separated. *See* City Ex. 1 ¶ 9.

30 Tellingly, this entire case is about whether section 109(h) of the MMPA can be used to
31 destroy a NMFS recognized seal rookery without a permit, yet Ms. Wilkin's only example of her
32 knowledge of section 109(h) being used is "stranded marine mammals are rescued by beach first

1 response agencies, such as lifeguards acting in their official capacity as city, county or state
2 employees.” See Wilkin Dec. ¶ 14. Federal Defendants’ claim that section 109(h) can suddenly
3 be used to destroy an entire rookery as ordered by the state court based on Federal Defendants’
4 representations is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
5 with law.” 5 U.S.C. § 706(2)(A).

6 **C. The MMPA sets substantive priorities NMFS has violated**

7 Contrary to Federal Defendants’ assertions that all implementation of the MMPA is left
8 solely to their discretion with no chance for review under the APA, there are several provisions
9 in the MMPA placing mandatory duties on NMFS.

10 16 USCS § 1371(3)(A) provides:

11
12 The Secretary, on the basis of the best scientific evidence available *and in consultation*
13 *with the Marine Mammal Commission*, is authorized and *directed*, from time to time,
14 having due regard to the distribution, abundance, breeding habits, and times and lines of
15 migratory movements of such marine mammals, to determine when, to what extent, if at
16 all, and by what means, it is compatible with this Act to waive the requirements of this
17 section so as to allow taking, or importing of any marine mammal, or any marine
18 mammal product, and to adopt suitable regulations, issue permits, and make
19 determinations in accordance with sections 102, 103, 104, and 111 of this title [16 USCS
§§ 1372-1374, and 1381] permitting and governing such taking and importing, in
accordance with such determinations: Provided, however, That the Secretary, in making
such determinations, *must be assured* that the taking of such marine mammal is in accord
with sound principles of resource protection and conservation as provided in the purposes
and policies of this Act...[Emphasis added].

20 Thus, NMFS has an affirmative duty to consult with the MMC in determining when to
21 waive MMPA requirements, and in doing so *must be assured* that the taking is “in accord...with
22 the purposes and polices of this Act.” Instead, NMFS has disregarded the advice of the MMC
23 and waived the requirement that the City abide by the MMPA if the state court orders it to
24 destroy a NMFS recognized rookery. The “directed” and “must be assured” language is
25 mandatory rather than discretionary and is thus subject to review under the APA.
26
27

1 16 USCS § 1371(a)(5)(D) provides:

2 (i) Upon request therefor by citizens of the United States who engage in a specified
3 activity (other than commercial fishing) within a specific geographic region, the
4 Secretary *shall* authorize, for periods of not more than 1 year, subject to such conditions
5 as the Secretary may specify, the incidental, but *not intentional*, taking by harassment of
6 small numbers of marine mammals of a species or population stock by such citizens
while engaging in that activity within that region *if* the Secretary finds that such
harassment during each period concerned--

7 (I) will have a negligible impact on such species or stock, and

8 (II) will not have an unmitigable adverse impact on the availability of such
9 species or stock for taking for subsistence uses pursuant to subsection (b), or section
10 109(f) [16 USCS § 1379(f)] or pursuant to a cooperative agreement under section 119 [16
11 USCS § 1388].

12 (ii) The authorization for such activity *shall* prescribe, where applicable--

13 (I) permissible methods of taking by harassment pursuant to such activity, and
14 other means of effecting the least practicable impact on such species or stock and its
15 habitat, *paying particular attention to rookeries, mating grounds, and areas of similar
16 significance*, and on the availability of such species or stock for taking for subsistence
17 uses pursuant to subsection (b) or section 109(f) [16 USCS § 1379(f)] or pursuant to a
18 cooperative agreement under section 119 [16 USCS § 1388]...

19 (Emphasis added.)

20 While the City in its non-opposition refers to an incidental harassment permit, what
21 NMFS has actually authorized is for the City to *intentionally* take seals. Yet, the above section
22 requires it to issue such authorization only for unintentional harassment and requires particular
23 attention to be paid to rookeries and mating grounds. It is not within NMFS' discretion to
24 affirmatively authorize and ratify the intentional and constant chasing of hundreds seals out of a
25 rookery without a permit, against the better judgment of its own lead biologists and the MMC.
26 Plaintiffs are not requesting an order requiring NMFS to actually *prosecute* the City for violating
27 the MMPA, but are rather seeking a declaration from this Court that NMFS' affirmative
28 encouragement for the City to destroy the rookery is in violation of the MMPA. The state court
will not order the City to take action that violates federal law, so NMFS will never actually need
to prosecute the City if this Court makes such a determination.

29 *Salmon Spawning & Recovery Alliance v. United States Customs & Border Prot.*, 532
30 F.3d 1338 (Fed. Cir. 2008), cited on page 8 of Federal Defendants' memorandum, is not to the

1 contrary. *Salmon Spawning* concerned the Endangered Species Act (“ESA”) and the scope of
2 the jurisdiction of the United States Court of International Trade. *Id.* at 1342. The plaintiffs in
3 that case challenged the failure of U.S. Customs and Border Protection and other defendants to
4 take enforcement action to stop endangered salmon from being imported from Canada. *Id.* at
5 1343. The plaintiffs did not even attempt to rebut the presumption of unreviewability of an
6 agency’s decision not to enforce laid out in *Heckler*, 470 U.S. at 832-33. “There is no need to
7 consider here the question left open in *Heckler* of whether the presumption of unreviewability
8 can be rebutted by a finding that ‘the agency has ‘consciously and expressly adopted a general
9 policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.’ 470 U.S.
10 at 833 n.4. The plaintiffs have not alleged that there was any express policy of non-
11 enforcement.” *Salmon Spawning* at 1346, fn. 5.

12 In contrast, Plaintiffs’ in the present case *have* alleged and can prove that NMFS has
13 adopted an express policy of non-enforcement and that its affirmative approval of destruction of
14 the rookery is what led the state court to order the City to violate the MMPA. In fact, the MMC
15 felt compelled to write two letters to NMFS regarding its current express policy of non-
16 enforcement, which contradicts its earlier position. *See* Cmplt. Ex. I at 20, Ex. K at 23.

17 Additionally, *Salmon Spawning* did find jurisdiction to consider violation of Section
18 7(a)(2) of the ESA, which provides:

19 Each Federal agency shall, in consultation with and with the assistance of the Secretary,
20 insure that any action authorized, funded, or carried out by such agency (hereinafter in
21 this section referred to as an “agency action”) is not likely to jeopardize the continued
22 existence of any endangered species or threatened species or result in the destruction or
23 adverse modification of habitat of such species...

24 The court found that the requirements for standing under the APA were met by plaintiffs
25 alleging “members frequent the habitat areas of ESA-listed salmon for recreation and attempt to
26 observe the endangered salmon spawning.” *Id.* at 1348. The court noted that the lower court had
27 confused likelihood of success on the merits with subject matter jurisdiction by finding that there
28 was no “redressability,” when in fact a favorable decision would have redressed plaintiffs’
alleged injuries. *Id.* at 1347-1348. Thus, the failure of an agency to follow the mandatory

1 Plaintiffs are aggrieved within the meaning of the MMPA by Federal Defendants'
2 unlawful actions, and Plaintiffs fall within the zone of interests the MMPA was designed to
3 protect. Therefore, Plaintiffs have standing to challenge this agency action. *City of Sausalito v.*
4 *O'Neill*, 386 F.3d 1186, 1203 (9th Cir. 2004). The questions raised by Federal Defendants go to
5 the merits, not to federal jurisdiction, and as the court in *Salmon Spawning*, 532 F.3d 1338,
6 1347-1348 pointed out, the two should not be confused.

7 **III. CONCLUSION**

8 Federal Defendants' actions in affirmatively agreeing to and approving a course of action
9 that violates the MMPA is reviewable under the APA. The City is about to be forced by a state
10 court to destroy a NMFS recognized rookery without an MMPA permit based on NMFS'
11 representations that it does not consider such a permit necessary. This is not a situation in which
12 NMFS is simply exercising its discretion to not prosecute a private party for violating the
13 MMPA. Rather, NMFS has taken an active role in forcing the City to violate the MMPA, and its
14 contradictory and internally inconsistent policy pronouncements that are contrary to law are
15 reviewable under the APA so that the contours of the 109(h) exception to the MMPA can be
16 determined by a federal court.

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18 Dated: November 11, 2008

19 By: /s/ Bryan W. Pease
20 Bryan W. Pease
21 Attorney for Plaintiffs
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