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8 *Counsel for Plaintiff Oceana, Inc.*

9 **IN THE UNITED STATES DISTRICT COURT**  
10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

11 OCEANA, INC.  
1350 Connecticut Avenue NW, Fifth  
12 Floor  
Washington, D.C. 20036,

13 *Plaintiff,*

14 v.

15 NATIONAL MARINE FISHERIES  
SERVICE  
16 1315 East-West Highway  
Silver Spring, MD 20910,  
17

18 *Defendant.*

Case No. 2:24-cv-10929

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

Freedom of Information Act Case

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## INTRODUCTION

1  
2 1. Plaintiff Oceana, Inc. (“Oceana”), a not-for-profit international  
3 advocacy organization dedicated to ocean conservation, brings this action under  
4 the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel Defendant  
5 the National Marine Fisheries Service (“Fisheries Service”) to release agency  
6 records related to the bycatch of fish and wildlife in the California halibut trawl  
7 fishery. “Bycatch” refers to animals that are not targeted by a fishery but are  
8 nonetheless caught—and often injured or killed—during fishing operations.  
9 Bycatch includes fish that are discarded (i.e., thrown overboard) as well as  
10 captured wildlife such as marine mammals, sea turtles, and sea birds.

11 2. The California halibut trawl fishery catches enormous quantities of  
12 marine species as bycatch. Studies have found that this fishery has the highest  
13 bycatch rate in the nation. Because the fishery catches so much non-target fish that  
14 it cannot keep or does not want to keep, it discards about 77% of the fish it  
15 catches.

16 3. The fishery’s bycatch results in the injury and death of thousands of  
17 fish and other animals, putting the conservation and recovery of a variety of  
18 marine species as well as the health of the West Coast marine ecosystem at risk.  
19 The fishery catches enormous amounts of important non-target species like the  
20 Dungeness crab—in fact, it catches more Dungeness crab than California halibut.  
21 The fishery also catches and kills protected marine mammals, endangered and

1 threatened species, and other sensitive animals.

2 4. The Fisheries Service is responsible for the West Coast Groundfish  
3 Observer Program, which is the program that deploys observers on California  
4 halibut trawl fishing vessels and collects crucial information about the fishery,  
5 including information about the fishery's bycatch.

6 5. In June 2022, Oceana submitted a FOIA request to the Fisheries  
7 Service, seeking photos and/or videos from the West Coast Groundfish Observer  
8 Program for the California halibut trawl fishery. The records sought are related to  
9 Oceana's advocacy and public education missions to protect marine life and  
10 ecosystems from unsustainable fishing activities. Oceana plans to disseminate the  
11 requested records in order to educate the public about the harmful effects that  
12 trawl gear has on marine species and the need for improved management of the  
13 California halibut trawl fishery.

14 6. In response to Oceana's request, the Fisheries Service refused to  
15 produce any records on California halibut trawl fishery bycatch. Noting that FOIA  
16 exempts certain information from disclosure only if that information is  
17 specifically prohibited by another statute, the Fisheries Service claimed that  
18 another federal statute, the Magnuson-Stevens Fishery Conservation and  
19 Management Act ("Magnuson-Stevens Act" or "MSA"), prohibited release of the  
20 requested records. But the Fisheries Service itself acknowledged the MSA does  
21 not specifically prohibit the release of this information: the agency recognized that

1 it has discretion to produce the requested records but is choosing not to disclose  
2 them. The agency has also previously released similar records to the public.

3 7. The Fisheries Service’s withholding unlawfully deprives Oceana—  
4 and the public—of important information regarding the fishery’s damaging effects  
5 on marine species, including protected and sensitive species, and the ecosystem.  
6 Congress enacted FOIA to advance government transparency and accountability  
7 by conferring upon the public a right to access federal agency information. FOIA  
8 thus requires federal agencies to release all requested agency records unless that  
9 information is specifically exempt from disclosure under the statute. The Fisheries  
10 Service violated FOIA by withholding information that is not lawfully exempt  
11 from disclosure under the statute.

12 8. Oceana has exhausted its administrative remedies with the Fisheries  
13 Service and now turns to this Court to enforce FOIA’s guarantee of public access  
14 to agency records and remedy the agency’s withholding of the requested  
15 information. Oceana respectfully asks this Court to declare the Fisheries Service’s  
16 withholding unlawful and order the agency to immediately provide Oceana with  
17 all non-exempt records and all reasonably segregable portions of any lawfully  
18 exempt records that are responsive to the FOIA request.

19 **JURISDICTION AND VENUE**

20 9. This Court has jurisdiction over this action pursuant to 28 U.S.C.  
21 § 1331 (federal question) and 5 U.S.C. § 552(a)(4)(B) (FOIA).

1 10. Venue properly vests in this District pursuant to 5 U.S.C. §  
2 552(a)(4)(B) because the agency records sought by Oceana are situated in this  
3 District.

4 11. This Court has authority to grant Oceana’s requested relief pursuant to  
5 FOIA, 5 U.S.C. § 552(a)(4)(B), (E), and the Declaratory Judgment Act, 28 U.S.C.  
6 §§ 2201–2202.

7 **PARTIES**

8 12. Plaintiff OCEANA, INC. is a not-for-profit international advocacy  
9 organization dedicated to protecting and restoring the world’s oceans through  
10 public education, policy, advocacy, science, and law. Oceana’s mission includes  
11 advocating for the sound management of U.S. fisheries and ensuring the  
12 conservation and protection of marine species. Oceana devotes considerable  
13 resources to studying and publicly communicating the ecological and economic  
14 importance of sound management of West Coast fisheries. Oceana monitors  
15 agency compliance with laws related to West Coast species and ecosystems, and  
16 Oceana advocates for policies and practices to advance protections for such  
17 species and ecosystems. Oceana regularly educates its supporters, members, and  
18 the public on issues relevant to protecting and conserving West Coast species and  
19 ecosystems. Specifically, Oceana has advocated for years for improved  
20 management of California halibut fisheries, and Oceana has pursued public  
21 education campaigns to further this advocacy. Oceana cannot fully achieve its

1 organizational purposes without access to information regarding California halibut  
2 fisheries. Oceana has over 1,028,904 members nationally, including 129,448  
3 members in California. Oceana maintains an office in Monterey, California.

4 13. Defendant NATIONAL MARINE FISHERIES SERVICE is the  
5 federal agency within the U.S. Department of Commerce’s National Oceanic and  
6 Atmospheric Administration with responsibility for managing, conserving, and  
7 protecting living marine resources within 200 nautical miles of the United States  
8 coast. Although the Fisheries Service does not manage the California halibut  
9 fishery, it is responsible for deploying observers and collecting observer  
10 information on bycatch from this fishery pursuant to its authority under the MSA  
11 and the Marine Mammal Protection Act (“MMPA”). The Fisheries Service is also  
12 responsible for the protection of marine mammals such as whales, dolphins,  
13 porpoises, seals, and sea lions under the MMPA. And the Fisheries Service is  
14 responsible for the protection, conservation, and recovery of endangered and  
15 threatened marine species under the Endangered Species Act (“ESA”). The  
16 Fisheries Service is in possession and control of the records that Oceana seeks.

## 17 STATUTORY BACKGROUND

### 18 I. Freedom of Information Act

19 14. Enacted in 1966, FOIA was designed to protect “the citizens’ right to  
20 be informed about what their government is up to.” *U.S. Dep’t of Justice v.*  
21 *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (internal

1 quotations omitted). “The basic purpose of FOIA is to ensure an informed  
2 citizenry, vital to the functioning of a democratic society, needed to check against  
3 corruption and to hold the governors accountable to the governed.” *Nat’l Labor*  
4 *Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The  
5 statute was intended “to permit access to official information long shielded  
6 unnecessarily from public view and . . . to create a judicially enforceable public  
7 right to secure such information from possibly unwilling official hands.” *Env’t*  
8 *Prot. Agency v. Mink*, 410 U.S. 73, 80 (1973).

9 15. FOIA requires that “each agency . . . shall make . . . records promptly  
10 available to any person” upon receipt of a request, unless certain narrow  
11 exemptions to disclosure apply. 5 U.S.C. § 552(a)(3)(A). The agency bears the  
12 burden of establishing the applicability of each exemption as to each record for  
13 which it is claimed. *See id.* § 552(a)(4)(B); *Lahr v. Nat’l Transp. Safety Bd.*, 569  
14 F.3d 964, 973 (9th Cir. 2009) (“FOIA’s strong presumption in favor of disclosure  
15 means that an agency that invokes one of the statutory exemptions to justify the  
16 withholding of any requested documents or portions of documents bears the  
17 burden of demonstrating that the exemption properly applies to the documents.”)  
18 (internal quotations omitted).

19 16. To meet this burden, the agency must offer oral testimony or detailed  
20 affidavits to justify the exemptions claimed. *Mink*, 410 U.S. at 93. “The  
21 description and explanation the agency offers [to justify the exemptions] should

1 reveal as much detail as possible as to the nature of the document,” in order to  
2 provide “the requestor with a realistic opportunity to challenge the agency’s  
3 decision.” *Oglesby v. U.S. Dep’t of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996).  
4 Affidavits must be “detailed enough to allow the court to make an independent  
5 assessment of the government’s claim.” *Lane v. Dep’t of Interior*, 523 F.3d 1128,  
6 1135 (9th Cir. 2008).

7 17. When a requested document contains some information which falls  
8 under one of the exemptions, FOIA requires that all non-exempt portions of the  
9 record be released. FOIA expressly mandates that any “reasonably segregable  
10 portion” of a record must be disclosed to a requester after exempt parts of the  
11 record are redacted. 5 U.S.C. § 552(b).

12 18. FOIA contains a total of nine exemptions. Exemption 3 authorizes an  
13 agency to withhold information if another statute specifically prohibits its  
14 disclosure. *Id.* § 552(b)(3). If the other statute in question was enacted before the  
15 enactment of the OPEN FOIA Act of 2009, Exemption 3 only applies if the other  
16 statute “requires that the matters be withheld from the public in such a manner as  
17 to leave no discretion on the issue” or “establishes particular criteria for  
18 withholding or refers to particular types of matters to be withheld.” *Id.* Any  
19 statutes enacted after the enactment of the OPEN FOIA Act of 2009 must  
20 specifically cite to 5 U.S.C. § 552(b)(3) for Exemption 3 to apply.

21 19. FOIA requires federal agencies to determine within twenty working



1 days after the receipt of a FOIA request whether to comply with such request and  
2 to immediately notify the requestor of “such determination and the reasons  
3 therefor” and “the right of such person to seek assistance from the FOIA Public  
4 liaison of the agency.” *Id.* § 552(a)(6)(A). In the case of an adverse determination,  
5 federal agencies must notify the requestor of its right to appeal and the right to  
6 seek dispute resolution services. *Id.* § 552(a)(6)(A)(i).

7 20. When an administrative appeal is filed, the agency must respond to  
8 the appeal within twenty working days. *Id.* § 552(a)(6)(A)(ii).

9 21. An agency’s failure to comply with any deadlines to respond to a  
10 requester’s FOIA requests and appeals satisfies the requester’s requirement to  
11 exhaust administrative remedies. *Id.* § 552(a)(6)(C)(i).

12 22. FOIA provides this Court with jurisdiction to enjoin federal agencies  
13 “from withholding agency records and to order the production of any such records  
14 improperly withheld from” the requester. *Id.* § 552(a)(4)(B).

## 15 **II. Magnuson-Stevens Fishery Conservation and Management Act**

16 23. The MSA governs the conservation and management of fisheries in  
17 U.S. territorial waters and in the exclusive economic zone, which extends from the  
18 boundaries of state waters (typically three nautical miles from shore) to 200  
19 nautical miles offshore or to an international boundary with neighboring countries.  
20 16 U.S.C. §§ 1801(b)(1), 1802(11). The Fisheries Service is responsible for  
21 implementing and administering the MSA pursuant to authority delegated to the

1 agency by the Secretary of Commerce.

2 24. In enacting the MSA, Congress recognized the importance of “sound  
3 management” of U.S. fisheries “to prevent overfishing, to rebuild overfished  
4 stocks, to insure conservation, to facilitate long-term protection of essential fish  
5 habitats, and to realize the full potential of the Nation’s fishery resources.” *Id.* §  
6 1801(a)(5), (6). The MSA requires the Fisheries Service to conserve not only  
7 target species but also non-target species and the health of marine ecosystems. For  
8 example, the MSA’s National Standard 9 requires that conservation and  
9 management measures in fishery management plans and regulations, “to the  
10 extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be  
11 avoided, minimize the mortality of such bycatch.” *Id.* § 1851(a)(9); *see also id.* §  
12 1853(a)(11). “Bycatch” under the MSA refers to “fish which are harvested in a  
13 fishery, but which are not sold or kept for personal use.” *Id.* § 1802(2).  
14 “Conservation and management measures” refers to measures “(A) which are  
15 required to rebuild, restore, or maintain, and which are useful in rebuilding,  
16 restoring, or maintaining, any fishery resource and the marine environment and  
17 (B) which are designed to assure that, [among other things,] . . . irreversible or  
18 long-term adverse effects on fishery resources and the marine environment are  
19 avoided.” *Id.* § 1802(5).

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1           25. The MSA also requires fishery management plans and regulations to  
2 be consistent with other applicable law, including the MMPA and ESA. *Id.* §  
3 1854(a)(1), (b)(1), (c)(1).

4           26. The MSA is built on the principle that the public must be able to  
5 participate meaningfully in fisheries management. *Id.* § 1801(b)(5) (purpose of the  
6 MSA includes enabling “consumer and environmental organizations, and other  
7 interested persons to participate in, and advise on,” fisheries conservation and  
8 management processes), (c)(3) (policy of the MSA includes “involv[ing], and  
9 [being] responsive to the needs of, interested and affected . . . citizens” and  
10 “draw[ing] upon . . . academic capabilities in carrying out research,  
11 administration, management, and enforcement”).

12           27. The MSA recognizes that fisheries information is critical for fisheries  
13 management. *Id.* § 1801(a)(8) (“The collection of reliable data is essential to the  
14 effective conservation, management, and scientific understanding of the fishery  
15 resources of the United States.”). As such, the agency collects information through  
16 various mechanisms, including through deploying observers on fishing vessels  
17 “for the purpose of collecting data necessary for the conservation and  
18 management of the fishery.” *Id.* § 1853(b)(8); *see id.* § 1802(31) (defining an  
19 “observer” as “any person required or authorized to be carried on a vessel for  
20 conservation and management purposes”). The MSA defines “observer  
21 information” as “any information collected, observed, retrieved, or created by an

1 observer or electronic monitoring system pursuant to authorization by the  
2 Secretary, or collected as part of a cooperative research initiative . . . .” *Id.* §  
3 1802(32).

4 28. Although the MSA generally applies to federal marine fisheries  
5 management in federal waters, the statute provides for circumstances where states  
6 may manage fishing in federal waters and circumstances where the federal agency  
7 and states may work together for fisheries management purposes. *See, e.g., id.* §§  
8 1856(a)(3) (listing circumstances where states may regulate fishing vessels  
9 outside the boundary of the state), 1861a(a) (providing the Fisheries Service with  
10 the authority to work with states on fishery resource disaster relief).

11 29. The Fisheries Service, pursuant to its authority under the MSA and in  
12 cooperation with states, deploys observers on certain state-managed fishery  
13 vessels to collect crucial information on these fisheries’ bycatch, including  
14 bycatch of fish managed by the Fisheries Service and of species protected under  
15 federal law.

16 30. The MSA sets forth confidentiality requirements for certain observer  
17 information collected by observer programs, but provides a variety of exceptions  
18 to these requirements. *Id.* § 1881a(b).

19 31. For example, the MSA provides that observer information is not  
20 confidential and may be disclosed if the submitter of the observer information  
21 consents to its release. *Id.* § 1881a(b)(1)(F), (b)(2).

1           32. The MSA also authorizes the Fisheries Service to disclose observer  
2 information that is subject to the statute’s confidentiality requirements in “any  
3 aggregate or summary form which does not directly or indirectly disclose the  
4 identity or business of any person who submits such information.” *Id.* §  
5 1881a(b)(3).

6           33. Moreover, information related to take of marine mammals is generally  
7 not confidential under the MSA. *See infra* ¶¶ 38–39. The Fisheries Service has  
8 long recognized that the MSA allows the release of information related to take of  
9 marine mammals—including the names and description of the fishery; the species  
10 of each marine mammal killed or injured by the fishery; the date, time, and  
11 geographic location of the take; and non-proprietary information regarding gear  
12 used in the take—to the public.<sup>1</sup> Photos and videos that convey this information  
13 are therefore not confidential.

### 14 **III. Marine Mammal Protection Act**

15           34. Congress enacted the MMPA to address the concern that “certain  
16 species and population stocks of marine mammals are, or may be, in danger of  
17 extinction or depletion as a result of man’s activities,” and to help “protect[] and  
18 encourage[]” marine mammals “to develop to the greatest extent feasible.” 16  
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20 <sup>1</sup> *See, e.g.*, Email from Ned Cyr, Dir., Off. of Sci. & Tech., Fisheries Service, to  
21 Fisheries Service Science Directors et al., Re: Data Aggregation and  
Summarization Guidelines (July 2, 2009).

1 U.S.C. § 1361(1), (6). Congress declared that “such species and population stocks  
2 should not be permitted to diminish beyond the point at which they cease to be a  
3 significant functioning element in the ecosystem of which they are a part.” *Id.* §  
4 1361(2).

5 35. To further these objectives, the MMPA prohibits the taking of marine  
6 mammals, except in certain limited circumstances. *Id.* § 1371(a). “Take” means  
7 “to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect  
8 or kill, any marine mammal.” *Id.* § 1362(13); 50 C.F.R. § 216.3.

9 36. Section 118 of the MMPA governs the incidental taking of marine  
10 mammals during commercial fishing operations, and it sets an immediate goal of  
11 reducing incidental marine mammal mortality or serious injury in the course of  
12 commercial fishing operations to insignificant levels (i.e., approaching a zero  
13 mortality and serious injury rate). 16 U.S.C. § 1387(a)–(b).

14 37. The Fisheries Service is responsible for protecting cetaceans (whales,  
15 dolphins, and porpoises) and pinnipeds other than walruses (seals and sea lions)  
16 under the MMPA. Among other things, the MMPA requires the Fisheries Service  
17 to: prevent the depletion of marine mammals from incidental take by commercial  
18 fisheries; prepare stock assessments for marine mammal stocks (which must  
19 include descriptions of commercial fisheries’ take of stocks); publish an annual  
20 list of commercial fisheries, with the fisheries classified based on their risk of  
21 taking marine mammals; and develop and implement take reduction plans for each

1 strategic stock of marine mammals, including any species listed under the  
2 Endangered Species Act. *Id.* §§ 1386(a), 1387(c), (f).<sup>2</sup>

3 38. The MMPA authorizes the Fisheries Service to deploy observers and  
4 collect observer information on marine mammal take. *Id.* § 1387(d). Only  
5 “proprietary” observer information is confidential under the MMPA. *Id.* §  
6 1387(d)(8). The MMPA requires the Fisheries Service to “release or make public  
7 upon request any such [otherwise confidential] information in aggregate,  
8 summary, or other form which does not directly or indirectly disclose the identity  
9 or business of any person.” *Id.* § 1387(d)(9).

10 39. Moreover, information regarding marine mammal take must be made  
11 public in order to implement the MMPA’s mandates. *See, e.g., id.* § 1387(f)(6)(D)  
12 (take reduction teams under the MMPA are required to meet in public to develop  
13 take reduction plans). This information is often only available through observer  
14 information collected under the MSA and/or the MMPA. This observer  
15 information regarding take of marine mammals is thus non-confidential, as long as  
16 it does not reveal proprietary information. *Id.* § 1387(d)(8), (9).

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19 <sup>2</sup> The MMPA defines strategic stocks as marine mammal stocks (1) for which the  
20 level of direct human-caused mortality exceeds the potential biological removal  
21 level; (2) which, based on the best available scientific information, is declining  
and is likely to be listed under the ESA within the foreseeable future; or (3) which  
is listed under the ESA or is designated as depleted under the MMPA. *Id.* §  
1362(19).

#### 1 **IV. Endangered Species Act**

2 40. In the face of widespread extinction crisis and biodiversity loss,  
3 Congress enacted the ESA to “provide a means whereby the ecosystems upon  
4 which endangered species and threatened species depend may be conserved, [and]  
5 to provide a program for the conservation of such endangered species and  
6 threatened species.” 16 U.S.C. § 1531(b).

7 41. The ESA’s “language, history, and structure . . . indicate[] beyond  
8 doubt that Congress intended endangered species to be afforded the highest of  
9 priorities,” with the intent to “halt and reverse the trend toward species extinction,  
10 whatever the cost.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174, 184 (1978).  
11 Accordingly, Congress made a conscious choice to “give endangered species  
12 priority over the ‘primary missions’ of federal agencies.” *Id.* at 185. Congress  
13 declared its policy “that all Federal departments and agencies shall seek to  
14 conserve endangered species and threatened species and shall utilize their  
15 authorities in furtherance of the purposes of [the ESA].” 16 U.S.C. § 1531(c)(1).

16 42. Congress defined “conservation” under the ESA as “the use of all  
17 methods and procedures which are necessary to bring any endangered species or  
18 threatened species to the point at which the measures provided pursuant to this  
19 chapter are no longer necessary.” *Id.* § 1532(3).

20 43. The ESA seeks to protect and recover imperiled species by first listing  
21 them as threatened or endangered based on certain enumerated statutory factors.



1 *Id.* § 1533(a)(1)(A)–(E); *see id.* § 1532(6), (20). The ESA also requires the  
2 designation of critical habitat for threatened and endangered species to protect the  
3 areas essential to the species’ conservation. *Id.* § 1533(a)(3)(A)(i); *see id.* §  
4 1532(5).

5 44. The ESA requires agencies to ensure, through consultation with the  
6 U.S. Fish and Wildlife Service (for terrestrial species) and the Fisheries Service  
7 (for most marine species), that their actions are not likely to jeopardize the  
8 continued existence of any endangered or threatened species or result in the  
9 destruction or adverse modification of the species’ critical habitat. 16 U.S.C. §  
10 1536(a)(2). During consultation, the Fisheries Service must use “the best scientific  
11 and commercial data available” to develop a variety of public documents such as  
12 biological assessments, biological opinions, and incidental take statements  
13 required by the ESA. *See, e.g., id.* § 1536(a)(2), (c)(1); 50 C.F.R. § 402.14(d),  
14 (g)(8). These public documents must include information and findings regarding  
15 the proposed action’s impact on the listed species and critical habitat.

16 45. The ESA also requires the Fisheries Service to prepare and implement  
17 recovery plans for the conservation and recovery of ESA-listed species. 16 U.S.C.  
18 § 1533(f)(1). The Fisheries Service must provide opportunities to the public for  
19 notice and comment prior to final approval of such plans. *Id.* § 1533(f)(4).  
20 Meaningful public participation requires access to information on listed species.

21 46. The ESA allows any person to bring citizen suits to enforce violations

1 of the ESA and its regulations. *Id.* § 1540(g). Such citizen suits often must rely on  
2 public information provided by the Fisheries Service and the U.S. Fish and  
3 Wildlife Service regarding listed species and their critical habitat.

4 47. Thus, in order to implement the ESA’s mandates, information about  
5 take of certain threatened and endangered marine species must be made public.  
6 *See, e.g., id.* §§ 1533(f), 1536(a)(2), (c)(1), 1540(g); 50 C.F.R. § 402.14(d), (g)(8).  
7 This information is often only available through observer information collected  
8 under the ESA, MSA or MMPA. This observer information regarding take of  
9 threatened and endangered species is therefore non-confidential.

## 10 STATEMENT OF FACTS

### 11 I. Bycatch from the California Halibut Trawl Fishery

12 48. Fisheries bycatch—the catch of non-target fish and wildlife in fishing  
13 gear—poses serious threats to the conservation and recovery of marine species.  
14 Bycatch includes “discards,” which are fish that are caught but are not retained,  
15 often because the species, or the size, sex, or quality of the fish, is not marketable  
16 or because applicable law prohibits fishermen from retaining the species. Fish that  
17 are caught as bycatch often die or are so seriously injured that they cannot  
18 reproduce. Bycatch thus contributes to overfishing, slows efforts to rebuild  
19 overfished fish stocks, and removes species that are important to the functioning  
20 of the marine ecosystem, like top predators and forage species.

1           49. Bycatch also harms marine wildlife. Seriously injured animals may  
2 not be able to feed, breed, or avoid predators. Air-breathing animals—marine  
3 mammals, sea birds, and sea turtles—often drown as a result of being caught in  
4 fishing gear, or die of other injuries like crushing or lacerations. As with fish,  
5 bycatch and removal of these species harms the marine ecosystem and puts  
6 protected marine mammals and endangered and threatened species at risk.

7           50. Trawling is one of the most damaging and least sustainable fishing  
8 methods. It is a non-selective fishing technique in which large boats drag  
9 enormous nets on or near the ocean floor, scooping up almost everything they  
10 encounter. As a result, trawling results in much higher levels of bycatch than  
11 other, more selective fishing techniques. Trawl fisheries typically catch more non-  
12 target species than the fish they are targeting.

13           51. The California halibut trawl fishery has among the highest bycatch  
14 rates in the United States. A 2020 study analyzing bycatch records from ninety-  
15 five U.S. fisheries from the years 2010 to 2015 found that the California halibut  
16 trawl fishery had the highest average bycatch rate of all the fisheries analyzed.<sup>3</sup>  
17 The discarded bycatch rate was 0.77, meaning that 77% of the California halibut  
18 trawl fishery's catch (by weight) was discarded fish.

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<sup>3</sup> Matthew S. Savoca et al., *Comprehensive bycatch assessment in US fisheries for prioritizing management*, 3 *Nature Sustainability* 472–480 (Mar. 30, 2020), <https://doi.org/10.1038/s41893-020-0506-9>.

1           52. Similarly, the Fisheries Service’s U.S. National Bycatch Report from  
2 2019 notes that “[t]he California Halibut Trawl Fishery had the highest fishery  
3 bycatch ratios at 0.76 in 2014 and 0.71 in 2015,” meaning that 76% of the  
4 fishery’s catch in 2014 was bycatch and 71% of the fishery’s catch in 2015 was  
5 bycatch.<sup>4</sup>

6           53. A 2022 study also shows that the open access<sup>5</sup> California halibut trawl  
7 fishery has the highest rate of bycatch among any other single species fisheries on  
8 the U.S. West Coast.<sup>6</sup>

9           54. The California trawl halibut fishery most frequently catches species  
10 such as the Dungeness crab, bat ray, and big skate. In fact, the open access  
11 California halibut trawl fishery catches more Dungeness crab than California  
12 halibut.<sup>7</sup>

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14 <sup>4</sup> Lee R. Benaka et al., *U.S. National Bycatch Report First Edition Update 3*, at  
15 54, NOAA Tech. Mem. NMFS-F/SPO-190 (Feb. 2019),  
[https://media.fisheries.noaa.gov/dam-migration/nbr\\_update\\_3.pdf](https://media.fisheries.noaa.gov/dam-migration/nbr_update_3.pdf).

16 <sup>5</sup> The “open access” California halibut fishery refers to vessels that are in the *state*  
17 limited entry fishery but do not have a federal groundfish permit. The vast  
18 majority of vessels in the state limited entry trawl fishery do not have a federal  
19 groundfish permit. Vessels with both state fishery permits and federal groundfish  
20 permits are included in the “limited entry” California halibut fishery.

21 <sup>6</sup> Christopher M. Free, *Assessment of associated landed species and bycatch  
discards in the California halibut gill net and trawl fisheries* 15, 87–88, Bren Sch.  
of Env’t Sci. & Mgmt. (2022) (included as Exhibit 2 in Susan Ashcraft, Marine  
Res. Comm., California Fish & Game Comm’n, *Committee Staff Summary for  
November 17, 2022* [hereinafter Nov. 2022 MRC Summary],  
<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=206229&inline>).

<sup>7</sup> Free, *supra* note 6, at 84–85.

1           55. The California halibut trawl fishery also catches species listed under  
2 the ESA, such as the green sturgeon, and other sensitive species, such as the giant  
3 sea bass.<sup>8</sup>

4           56. The California Department of Fish and Wildlife, which is responsible  
5 for managing the California halibut fishery, recognizes the reduction of bycatch in  
6 the trawl fishery as a “high priority” management need.<sup>9</sup>

7           57. Although the Fisheries Service is not directly responsible for  
8 managing the California halibut trawl fishery, the agency is responsible for the  
9 West Coast Groundfish Observer Program, which collects observer information  
10 on this fishery’s bycatch. The West Coast Groundfish Observer Program is a  
11 collaborative program between the Fisheries Service and the Pacific States Marine  
12 Fisheries Commission, an interstate compact agency consisting of California,  
13 Oregon, Washington, Idaho, and Alaska that helps agencies manage Pacific Ocean  
14 resources.

15           58. The Fisheries Service trains and certifies the observers deployed by  
16 the West Coast Groundfish Observer Program and stores, maintains, and analyzes  
17 the data collected by the observers. The information created and collected by  
18 observers includes photos and videos of bycatch. Because the California halibut  
19

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20 <sup>8</sup> Kirsten Ramey, *Evaluation of Bycatch in the California Halibut Fishery*,  
California Dep’t of Fish & Wildlife (Nov. 17, 2022) (included as Exhibit 3 in  
21 Nov. 2022 MRC Summary, *supra* note 6).

<sup>9</sup> See, e.g., Free, *supra* note 6, at 1.

1 trawl fishery’s bycatch includes fish and wildlife that are federally managed by  
2 the Fisheries Service or protected by federal law, the observer information  
3 regarding this fishery is essential for both the state’s management of the fishery  
4 and the federal agency’s marine species conservation and protection efforts.  
5 Photos and videos created and collected by observers provide specific details  
6 regarding fishing practices and the gear involved, the circumstances surrounding  
7 the bycatch, the nature and severity of the bycatch, and more—details that are  
8 critical for identifying or confirming the species caught as bycatch, analyzing  
9 fisheries’ specific effects on fish and wildlife, developing plans and mechanisms  
10 to support conservation and recovery, and providing the public with necessary  
11 information to understand fisheries’ impacts on public resources and protected  
12 species.

## 13 **II. Oceana’s FOIA Request**

14 59. On June 22, 2022, Oceana submitted a FOIA request to the Fisheries  
15 Service, seeking photos and videos from, among other things, “the Fisheries  
16 Service and the Pacific States Marine Fisheries Commission’s West Coast  
17 Groundfish Observer Program for the California Halibut trawl sector (including  
18 all Limited Entry and Open Access) from 2000 until the present.”<sup>10</sup>

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21 <sup>10</sup> Oceana also sought photos and videos from the Fisheries Service’s California Set Gillnet Observer Program from 2000 until the present.

1           60. Oceana requested up to ten photos and/or videos per species of  
2 elephant seals, harbor porpoise, Brandt’s cormorant, green sturgeon, giant sea  
3 bass, Dungeness crab, soupfin shark, bat ray, big skate, cowcod rockfish,  
4 yelloweye rockfish, tow with high amount of jelly fish catch, and aggregate catch  
5 on the deck of California halibut bottom trawl vessels. Oceana also requested up  
6 to twenty photos and/or videos of any sea turtle species observed or caught in the  
7 California halibut trawl fishery from 1990 to date.

8           61. Oceana requested the photos and/or videos at the highest resolution  
9 available that show the species, whether by themselves or mixed with other catch,  
10 in trawl nets, on the deck of the fishing vessel, or in observer sampling baskets.  
11 For each image and video, Oceana requested an identification of the date, species,  
12 whether the animal was kept or discarded, and whether it was dead, alive, or  
13 injured, at the finest-scale spatial location known. If this information was not  
14 known or unavailable, Oceana requested that each record include any available  
15 information.

16           62. Oceana sought these records to advance its advocacy and public  
17 education missions to protect public resources and the ecosystem from the impacts  
18 of government-managed fisheries. As Oceana explained in its request, Oceana is a  
19 public-interest organization whose “core mission is to protect the marine  
20 environment, public resources, and human health. This includes monitoring  
21 government management of our marine waters, encouraging public participation

1 in government processes, and enforcing applicable laws. The requested documents  
2 will undergo significant scientific and legal scrutiny by Oceana . . . and these  
3 analyses will form the foundation for responding to the Fisheries Service’s  
4 actions.”

5 63. In particular, the requested records will enable the organization to  
6 better understand the bycatch in the California halibut trawl fishery and to educate  
7 the public on these issues. Oceana’s FOIA request explained that the requested  
8 records will “further both [Oceana’s] and members’ understanding of the  
9 management of marine life in West Coast fisheries, particularly the California  
10 Halibut . . . Trawl fisher[y]” and “help disclose the effects of these fisheries and  
11 associated activities on marine life.” Oceana’s request further explained that the  
12 requested records are “necessary for the public to gain a complete understanding  
13 of the impact of . . . trawl gear on the ecosystem including essential fish habitat,  
14 protected species, bycatch species, and other public resources.” Oceana also noted  
15 that the requested records are “critical to assessing the government’s actions in  
16 protecting these public resources, and specifically, its compliance with various  
17 environmental and natural resource management laws.”

18 64. On August 29, 2022, the Fisheries Service requested that Oceana limit  
19 the scope of the record search for the FOIA request to June 22, 2007, through the  
20 submission date of June 22, 2022.



1           65. On September 7, 2022, Oceana agreed to limit the scope as requested  
2 by the Fisheries Service.

3           66. On October 6, 2022, the Fisheries Service informed Oceana that it  
4 would not release any records related to the California halibut trawl fishery. The  
5 agency claimed that the California halibut trawl fishery “is observed by Magnuson  
6 Stevens Act (MSA) observers. . . [and] Section 402(b)(2) of the MSA states that  
7 ‘any observer information shall be confidential and shall not be disclosed.’”

8           67. Subsequently, Oceana requested to meet the Fisheries Service staff  
9 and National Oceanic and Atmospheric Administration (“NOAA”) General  
10 Counsel to discuss the withholding. Oceana wished to obtain clarity on the  
11 agency’s position because the Fisheries Service had previously released photos  
12 taken by MSA observers to the public.

13           68. At a virtual meeting on November 15, 2022, NOAA General Counsel  
14 acknowledged that the Fisheries Service has the discretion to release the requested  
15 records but stated that the agency was opting not to do so under this request.

16           69. On November 29, 2022, in an email to Oceana, the Fisheries Service  
17 reiterated that “[i]t is the agency’s decision, per the agency discretion provided  
18 under the Magnuson Stevens Act, to withhold the photos taken by Magnuson  
19 Stevens Act observers as described in FOIA Request 2022-001919.”

20           70. On January 10, 2023, the Fisheries Service sent a final response to  
21 Oceana, in which it stated that “[t]he 77 records responsive to this request . . . are

1 being withheld under 5 U.S.C. § 552 (b)(3), which prohibits the disclosure of  
2 records that are protected by federal statutes other than U.S.C. § 552(b), and under  
3 the confidentiality provisions of the Magnuson-Stevens Act[.]”

4 71. On April 10, 2023, Oceana timely administratively appealed the  
5 Fisheries Service’s determination to discretionarily withhold the requested  
6 records. Oceana pointed out that FOIA requires disclosure of agency records  
7 unless a statutory exemption applies and that Exemption 3 only applies in  
8 situations where another statute specifically prohibits disclosure of the  
9 information in such a manner as to leave no discretion to the agency. Oceana  
10 pointed out that, as the Fisheries Service itself has acknowledged, the MSA  
11 provides the agency ample discretion to release the requested records here, so  
12 Exemption 3 does not apply, and the agency’s decision is inconsistent with FOIA  
13 and the MSA. Oceana also pointed out that, even assuming an exemption applied  
14 to portions of the requested records, the Fisheries Service failed to reasonably  
15 segregate non-exempt information.

16 72. Under FOIA, the Department of Commerce was required to respond  
17 to the appeal within twenty working days, by May 8, 2023. 5 U.S.C. §  
18 552(a)(6)(A)(ii). More than a year and a half later, the Department of Commerce  
19 still has not issued a determination on Oceana’s appeal.  
20  
21

**CLAIMS FOR RELIEF**

**FIRST CAUSE OF ACTION – Violation of the Freedom of Information Act, 5 U.S.C. § 552, for Failure to Disclose Responsive Records**

73. The allegations made in paragraphs 1–72 are realleged and incorporated by this reference.

74. Under FOIA, Oceana has a statutory right to obtain all non-exempt records responsive to their FOIA request. 5 U.S.C. § 552(a)(3)(A).

75. The Fisheries Service violated FOIA by unlawfully withholding records that are responsive to Oceana’s FOIA request. *Id.* FOIA Exemption 3 only allows an agency to withhold information if disclosure of that information is *specifically prohibited* by another statute. Here, the Fisheries Service has acknowledged that it has discretion to release the information requested. The Fisheries Service’s withholding of the requested records is inconsistent with FOIA, the MSA, and the MMPA.

76. Under FOIA, the Fisheries Service bears the burden of establishing that its claimed exemptions apply to the records that it continues to withhold. *Id.* § 552(a)(4)(B). Here, the Fisheries Service has not met the burden necessary to justify withholding records under the claimed FOIA Exemption 3. The Fisheries Service also has not provided detailed descriptions and explanations for how the information withheld falls within the claimed exemption, as the agency is required to provide under FOIA. Indeed, the agency has failed to provide any information regarding how the records withheld are exempt.

1 77. Oceana has fully exhausted its administrative remedies as to this  
2 claim.

3 **SECOND CAUSE OF ACTION – Violation of the Freedom of Information**  
4 **Act, , 5 U.S.C. § 552, for Failure to Provide Reasonably Segregable Portions**  
5 **of Any Lawfully Exempt Records**

6 78. The allegations made in paragraphs 1–77 are realleged and  
7 incorporated by this reference.

8 79. Under FOIA, Oceana has a statutory right to reasonably segregable  
9 portions of any record that contains information that is subject to any of FOIA’s  
10 exemptions. 5 U.S.C. § 552(b).

11 80. The Fisheries Service violated FOIA by unlawfully withholding  
12 reasonably segregable portions of any lawfully exempt records that are responsive  
13 to Oceana’s FOIA request. *Id.*

14 81. Oceana has fully exhausted its administrative remedies as to this  
15 claim.

16 **REQUEST FOR RELIEF**

17 WHEREFORE, Oceana requests that this Court:

18 A. Declare that the Fisheries Service has violated FOIA by failing to  
19 disclose all non-exempt records and the reasonably segregable portions of any  
20 lawfully exempt records that are responsive to Oceana’s FOIA request;  
21

1 B. Order the Fisheries Service to provide Oceana all non-exempt records  
2 and the reasonably segregable portions of any lawfully exempt records that are  
3 responsive to Oceana’s FOIA request, within ten days of this Court’s order;

4 C. Maintain jurisdiction over this action until the Fisheries Service is in  
5 compliance with FOIA and every order of this Court;

6 D. Award Oceana’s litigation costs and reasonable attorneys’ fees in this  
7 action; and

8 E. Grant such other and further relief as the Court deems just and proper.  
9

10 Respectfully submitted this 19th day of December, 2024.

11 /s/Rumela Roy

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