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Via Electronic and U.S. Certified Mail

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RE: 60-Day Notice of Intent to Sue for Violations of the Endangered Species Act
Concerning the California Drift Gillnet Fishery and the Humpback Whale

Dear Gentlemen/Ladies:

On behalf of Turtle Island Restoration Network (“TIRN”), this letter provides formal sixty-day notice of intent to sue the NOAA Fisheries/ National Marine Fishery Service (NMFS) for past and continuing violations of Sections 7 and 9 of the Endangered Species Act (“ESA”),¹ for actions and inactions related to the management and regulation of the California drift gillnet fishery (“Fishery”) as described below. Unless and until NMFS’ violations of the ESA are remedied, TIRN intends to bring suit against NMFS under Section 11(g) of the ESA to enforce such provisions.²

In summary, the NMFS is in violation of the take prohibition set forth in Section 9 of the ESA as follows: (1) the permitted levels of take for the endangered humpback whale by the Fishery under the 2013 Biological Opinion/Incidental Take Statement

¹ 16 U.S.C. §§ 1531-1544.

² 16 U.S.C. § 1540(g).

(“ITS”)³ was exceeded in 2015 and 2016, (2) the ITS became invalid on September 4, 2016 upon expiration of the Marine Mammal Protection Act (MMPA)⁴ authorization for the Fishery, and no take of a humpback whale is permitted after that date, (3) the ITS is invalid due to NMFS’ failure to maintain an adequate observer program for the Fishery as required by the terms and conditions of the ITS and the MMPA authorization, and (4) the ITS is invalid due to NMFS’ failure to use the best available scientific and commercial data available to establish the permissible levels of humpback whale incidental take by the Fishery.

Further, the NMFS is in violation of Section 7 of the ESA which requires the reinitiation of consultation regarding the Fishery for the following reasons: (1) the permitted take of the humpback whale under the ITS was exceeded in 2015 and 2016, (2) the alarming increase in entanglements of all large whales in 2015 and 2016 is new information that affects the humpback whale in a manner not previously considered, (3) the 2016 listings of the humpback whale Distinct Population Segments (“DPS”) for Mexico and Central America are a new species listing that is affected by the Fishery, and (4) the NMFS observer program in place to monitor Fishery interactions with the humpback whale has not been maintained as required by the ITS, resulting in a failure to ensure accurate monitoring of all interactions of the Fishery with humpback whales and produce statistically reliable scientific data on incidental take.

To provide a provisional remedy these violations, we request that the NMFS immediately suspend all Fishery operations until such time as (1) Section 7 consultation for the Fishery has been reinitiated and completed, and (2) an emergency regulation is promulgated that requires a NMFS-certified observer to observe 100% of sets in the Fishery to ensure accurate monitoring of all interactions of the Fishery with humpback whales.

LEGAL & FACTUAL BACKGROUND

The Endangered Species Act

Section 7(a)(3) of the ESA requires federal agencies to consult with the Department of Commerce whenever they authorize actions that “may affect” a listed marine species.⁵ After formal consultation is completed with the issuance of a biological

³ 50 CFR 402.16; Revised Incidental Take Statement for the California Thresher Shark/Swordfish Drift Gillnet Fishery – (NOAA Aug. 21, 2013), Table 12.

⁴ 16 U.S.C. §§ 1631 – 1407.

⁵ 16 U.S.C. § 1536(a)(3); 16 U.S.C. § 1532(15).

opinion (BiOp),⁶ and “where discretionary Federal involvement or control over the action has been retained or is authorized by law,” the agency must reinitiate formal consultation if, among other things, “the amount or extent of taking specified in the incidental take statement is exceeded,” new information becomes available that the project affects the listed species in a manner not previously considered, or “a new species is listed (. . .) that may be affected by the identified action.”⁷

Section 9(a)(1)(B) of the ESA prohibits any “person” from “taking” listed species listed within the United States or the territorial sea of the United States.⁸ The term “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁹ The term “harass” means an “intentional or negligent act (. . .) which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior.”¹⁰ The term “harm” means “means an act which actually kills or injures wildlife.”¹¹ “Incidental take” is defined as take that is incidental to, and not for the purpose of, the carrying out of an otherwise lawful activity.¹² “ ‘Take’ is defined ... in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.”¹³

The incidental take of a listed species can only be authorized under an incidental take statement that meets the requirements set forth in Section 7(b)(4).¹⁴ NMFS cannot authorize incidental takes of endangered marine mammals through an ITS alone and must also authorize the take through the issuance of a Negligible Impact Determination under the MMPA.¹⁵ Any taking of a listed species that is in compliance with the terms and conditions of a statement issued under Section 7(b)(4) is not prohibited under Section 9(a)(1)(b) if such taking is “in compliance with the terms and conditions” of such statement.¹⁶

⁶ 16 U.S.C. § 1536(b)(3)(A).

⁷ 50 C.F.R. § 402.16(a), (b) & (d).

⁸ 16 U.S.C. § 1538(a)(1)(B).

⁹ 16 U.S.C. § 1532(19).

¹⁰ 50 C.F.R. § 17.3.

¹¹ *Id.*

¹² 16 U.S.C. § 1539(a)(1)(B).

¹³ *Strahan v. Coxe*, 127 F.3d 155, 162 (1st Cir. 1997), *cert. denied* 525 U.S. 830.

¹⁴ 16 U.S.C. § 1536(b)(4).

¹⁵ 16 U.S.C. § 1536(b)(4)(C)(iii); 16 U.S.C. § 1371(a)(5)(E).

¹⁶ 16 U.S.C. § 1436(o)(2); 50 C.F.R. § 402.14(i)(5).

The Drift Gillnet Fishery

The California thresher shark/swordfish drift gillnet fishery (≥ 14 in mesh) targets swordfish and thresher shark. This fishery is a limited entry fishery with seasonal closures and gear restrictions. The Fishery operates outside of state waters to about 150 miles offshore ranging from the U.S./Mexico border in the south to the Oregon border in the north, depending on sea temperature conditions. Regulations restrict the fishery to waters outside 200 nautical miles (nm) from February 1 through April 30, outside 75 nm from May 1 through August 14, and outside 12 nm from August 15 through January 31. The drift gillnet vessels targeting swordfish tend to set on warm ocean water temperature breaks, which do not appear along the California coast until late summer; therefore, vessels are not active during February, March, and April, and very little fishing effort occurs during the months of May, June, and July.

The Fishery is one of the U.S. West Coast commercial fisheries that has been documented as incidentally killing or injuring ESA-listed marine mammals, including humpback whales and sperm whales, and is a federally-managed Category I fishery.¹⁷ In 2015, there were 69 permits issued and 17 active vessels.

The NMFS' West Coast Region has operated an at-sea federal observer program in the Fishery since July 1990, with the objective to record, among other things, information on non-target fish species and protected species interactions. Observer coverage of the Fishery fleet targets 20% of the annual sets, a level which is established as a "target" the ITS. However, from 1990-2015 observer coverage averaged 15.8%.¹⁸ During the 2015/2016 fishing season observer coverage was only 10.8% of all sets, which is the lowest observer coverage of the fishery since the 1991-1992 fishing season.¹⁹

For several years managers have supported increasing observer coverage in the Fishery. In 2015, the Pacific Offshore Cetacean Take Reduction Team reiterated its

¹⁷ 81 Fed.Reg. 20550 (Apr. 8, 2016).

¹⁸ Regression Tree and Ratio Estimates of Marine Mammal, Sea Turtle, and Seabird Bycatch in the California Drift Gillnet Fishery: 1990-2015 (NOAA Jan. 2017) at 2.

¹⁹ NMFS California/Oregon Drift Gillnet Observer Program Observed Catch - 2015/2016 Fishing Season May 1, 2015 through January 31, 2016, *available at* http://www.westcoast.fisheries.noaa.gov/publications/fishery_management/swr_observer_program/drift_gillnet_catch_summaries/observed_dgn_catch_2015-2016.pdf.

support for 100 percent observer coverage of the Fishery.²⁰ Also in 2015, the Pacific Fishery Management Council recommended removing the “unobservable vessel exemption,” which allows some vessels never to take an observer, and achieving 100% monitoring by 2018, with a minimum of 30% coverage until then.²¹

The Fishery seriously injures or kills a wide variety of marine mammals, which is most likely attributable to the non-selectivity of gear and location of fishing effort. Based on data from 1990-2014, NMFS has estimated that one in four whales entangled in Fishery gear is killed or seriously injured, and entangled whales that continue to drag fishing gear can die slow, painful deaths. Some whales are disentangled from fishing gear, often with the help of California Whale Rescue teams that are now being overwhelmed with entanglement reports. Still, even disentangled whales may suffer from injuries and stress which may reduce fitness and make the whale more vulnerable to infection, disease, and predation.

Record Whale Entanglements Off the U.S. West Coast 2014-2016

Between 1982 and 2013 a total of 281 whales were recorded entangled in fishing gear off the U.S. West Coast.²² In 2015, 62 whales were reported by NMFS to be entangled in fishing gear.²³ In 2016 alone, 71 whales were reported entangled off the U.S. West Coast, setting a new record for the third straight year.²⁴ A total of five humpback whales were confirmed entangled by NMFS in 2015 and 2016 in nets and gear from the Fishery.²⁵

However, these confirmed reports of whale entanglements provide only a minimum estimate of whale and fisheries interactions, because many entanglements are not observed by NMFS observers or not reported through other channels. As noted, observer coverage in the 2015 – 2016 drift gillnet fishing season – i.e. during a time

²⁰ Key Outcomes Memorandum, Pacific Offshore Cetacean Take Reduction Team Meeting, March 17-19, 2015: Long Beach, California, at 11, 16.

²¹ California Large Mesh Drift Gillnet Fishery Management Final Preferred Alternatives, *available at* <http://www.pcouncil.org/2015/09/38641/california-large-mesh-drift-gillnet-fishery-management-final-preferred-alternatives/>.

²² Updates on whale entanglement reports- comparing years 2014 – 2016 (Jul. 2016) *available at* http://www.opc.ca.gov/webmaster/ftp/project_pages/whale-entanglement/EntanglementUpdates2014-2016.pdf.

²³ 2016 West Coast Entanglement Summary (NOAA Fisheries Mar. 2017).

²⁴ *Id.*

²⁵ *Id.*

of peak whale entanglements – was well below the 20% minimum target level established in the ITS.

In addition, entanglements in commercial fishing gear that are not positively identified likely result in the under-reporting of humpback whale interactions with the Fishery. For example, of the 54 humpback whale entanglements in commercial fishery gear were reported by NMFS in 2016, two were identified to be entangled in gillnet fishing gear. However, an additional 28 humpback whales were reported as entangled in “unidentified fishing gear” off the coast of California in the same year.

In 2015, four other humpback whales were reported in California wrapped in gillnet gear for which neither mesh size nor material could be identified. In May 2015, there was an unconfirmed report of a humpback entangled 10 miles west of Channel Islands Harbor, outside of Santa Barbara, in netting and buoys. In September 2015, a humpback whale was confirmed entangled off Ventura, California, six miles south of White Sands, below Mugu Lagoon, with gillnet wrapped around and covering most of its tail and with netting and line trailing 40 feet behind the whale. On October 17, 2015, a humpback was confirmed entangled in large mesh blue gillnet approximately four miles off Del Mar. The mouth and head were entangled in the mesh netting and the netting was cutting into the rostrum. The mesh appeared to be twine, not monofilament, which is consistent with gear used in the Fishery.²⁶ Furthermore, the nearest Mexican port with strong fishing activities is Ensenada, 300 km away. On October 31, 2015, a juvenile humpback was confirmed entangled around its head and pectoral fin in blue gillnet 4.9 miles outside of Newport Harbor in Southern California.

LEGAL CLAIMS

Claims under Section 9 of the ESA

The NMFS is in violation of Section 9(a)(1)(B) of the ESA as follows:

1. The incidental take of the humpback whale by the Fishery in 2015 and 2016 exceeded the permissible take levels under the ITS for both an annual period and for a five-year period;

²⁶ See Fixed Gear Guide: California, Oregon, and Washington Commercial Fisheries Trap/pot, gillnet, and longline/set line (NOAA 2012), *available at* http://www.westcoast.fisheries.noaa.gov/publications/protected_species/marine_mammals/large_w_hale_entanglement_appendix_a-e.pdf

2. The ITS became invalid on September 4, 2016 upon expiration of the Fishery's MMPA authorization, and any take of a humpback whale after that date is not permitted by the ITS;²⁷
3. The ITS is invalid due to the failure to maintain an adequate observer program for the Fishery required under the terms and conditions in the ITS and of the MMPA authorization;²⁸ and
4. The ITS is invalid due to a failure to use the best available scientific and commercial data available to establish the permissible levels of humpback whale incidental take by the Fishery specified in the ITS.²⁹

Claims Under Section 7 of the ESA

Under Section 7(a)(2) of the ESA, reinitiation of consultation is required as follows:

1. The permitted take for the endangered humpback whale by the Fishery under the ITS was exceeded in 2015 and 2016;³⁰
2. The significant increase in entanglements of all large whales in 2015 and 2016 is new information that affects the endangered humpback whale in a manner not considered in the 2013 BiOp;³¹
3. The 2016 listings of the two new humpback whale DPS³² are a new species listing that is affected by the Fishery;³³ and
4. NMFS has failed to maintain an adequate observer program in to monitor the effects of the Fishery on the humpback whale, which has undermined NMFS' ability to monitor the level of take to determine whether mandatory reinitiation is required, and is "new information" that requires reinitiation to determine the effects of the Fishery on the humpback whale.³⁴

²⁷ 50 C.F.R. §§ 402.14(i)(1).

²⁸ 50 C.F.R. § 402.14(i)(1)(iii), (i)(3).

²⁹ 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

³⁰ 50 C.F.R. § 402.14(i)(4), § 402.16(a).

³¹ 50 C.F.R. § 402.16(b).

³² 81 Fed. Reg. 62260, Identification of 14 Distinct Population Segments of the Humpback Whale (*novaeangliae*) and Revision of Species-wide Listing, (Sept. 8, 2016).

³³ 50 C.F.R. § 402.16(d).

³⁴ 50 C.F.R. § 402.16(a).


CONCLUSION

The large increase in whale entanglements off the U.S. West Coast has brought to the forefront of the public's attention the threats to endangered whales from drift gillnet fishing operations and gear. Given the entanglement reports in 2015 and 2016, the Fishery has exceeded its allowable level of incidental take of humpback whales for both a one-year period and total take for a five-year period. Further, the ITS itself is invalid due to lack of take authorization under the MMPA and failure to adequately monitor the Fishery for humpback whale interactions. These facts all evidence direct violations of the take prohibition in Section 9 of ESA. Further, the NMFS must reinitiate consultation of the Fishery's effects on the humpback whale based upon excessive levels of incidental take, new information on entanglements, low levels of NMFS monitoring of the Fishery, and new listing of the Mexico and Central America distinct population segments of the humpback whale.

To provide a provisional remedy these violations, we request that the NMFS immediately suspend all Fishery operations until such time as (1) Section 7 consultation for the Fishery has been reinitiated and completed, and (2) an emergency regulation is promulgated that requires a NMFS-certified observer to observe 100% of sets in the Fishery to ensure accurate monitoring of all interactions of the Fishery with humpback whales.

In conclusion, we request that you advise us if you intend to remedy any of the violations of the ESA described above within 60 days of the date of this letter. Please contact the undersigned you have any questions regarding the discussion above or would like copies of the references cited, or would like to discuss this matter with the party providing this notice.

Sincerely,



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