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Ms. Kelly Denit
Division Chief, Office of Sustainable Fisheries
1315 East-West Highway, SSMC3
Silver Spring, MD 20910

Re: Comments on NMFS's Emergency Measures To Address Fishery Observer Coverage During the COVID-19 Coronavirus Pandemic, Docket No. 200321-0084

Dear Ms. Denit:

Earthjustice and Turtle Island Restoration Network submit the following comments on the National Oceanic and Atmospheric Administration (NOAA) National Marine Fisheries Service's (NMFS) Emergency Measures to address fishery observer coverage during the COVID-19 coronavirus pandemic. On March 27, 2020, NMFS issued this emergency waiver rule (effective March 24, 2020 through September 23, 2020) to provide itself with the authority to waive observer coverage requirements established in regulations promulgated under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and other statutes.¹

While we support NMFS's efforts to protect observers and attempt to address the logistical and practical challenges posed by COVID-19, the agency must do so in accordance with federal and international law. This includes publishing any individual waivers issued under this rule in the Federal Register, ensuring that each waiver complies with other legal requirements, and identifying in each waiver whether the affected fishery or entity must implement substitute data collection and monitoring mechanisms to temporarily fulfill the vital functions of observers. Moreover, an emergency waiver for observer coverage does not fully address the larger health and safety risks the coronavirus poses to fishing captains, crewmen, seafood processors, seafood dealers, and nearby communities, or mitigate the economic harm to fishing communities caused by current market conditions. We urge the agency to, outside of this rulemaking, take actions to protect coastal communities from exposure to the coronavirus and the related economic threats to the fishing communities from the COVID-19 pandemic.

¹ 85 Fed. Reg. 17,285 (Mar. 24, 2020).

Background

Observers play a critical role in supporting and informing the science, conservation, and management of our nation's fisheries. Fisheries observers and at-sea monitors are professionally trained biological scientists hired by third-party providers to gather first-hand data on catch, including bycatch and discards, by U.S. commercial fishing vessels.² Fisheries observer programs exist in all five NOAA Fisheries management regions: Alaska, West Coast, Pacific Islands, Greater Atlantic, and Southeast. Fisheries management is science-based and heavily data-dependent. Depending on the fishery, NMFS and the associated regional fishery management council may use a combination of data sources (*e.g.*, fishermen logbooks, landing data from dealers, and data from observers) to assess the state of a fishery. As NMFS recognizes, “[o]bservers are the only independent data collection source for some types of at-sea information, such as bycatch, catch composition, protected species interactions, and gear configuration.”³ Observer reports also support compliance with fishing and safety regulations by tracking compliance with annual catch limits, accountability measures, and other measures to prevent or correct overfishing. In furtherance of science and research, observers at times collect biological samples and specimens from animals. Overall, third-party observers are a vital component in verifying and ensuring the accuracy of the data used for management, and may even serve as the only data source.

In the past several months, COVID-19 has swept through countries worldwide and infection and death rates continue to rapidly rise in the United States.⁴ Part of the challenge in containing the coronavirus is the emerging understanding of how the virus is transmitted through community spread, the delay in the onset of symptoms, and the possibility that those infected and contagious remain asymptomatic.⁵ In the United States, where community spread is extensive and contact tracing is unrealistic, the Centers for Disease Control and Prevention recommend “social distancing” as the best measure available to prevent continued transmission.⁶ In line with this recommendation, local and state authorities around the country have implemented measures requesting that people remain at least six feet apart and avoid groups and crowded places, suspending non-essential business, issuing stay-at-home orders, and canceling large events and social gatherings.⁷ Health experts do not know how long the pandemic will continue, and at least

² *Fishery Observers: Observer Programs*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/topic/fishery-observers#observer-programs>.

³ *Fishery Observers: Overview*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/topic/fishery-observers>.

⁴ *Situation Summary*, CTRS. FOR DISEASE CONTROL AND PREVENTION (updated Apr. 19, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html>.

⁵ *Id.*

⁶ *Social Distancing, Quarantine, and Isolation*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>.

⁷ *Coronavirus Resources: State Stay at Home/Shelter in Place Orders*, DRI, <https://www.dri.org/about/coronavirus-resources/state-stay-at-home-shelter-in-place-orders>. See, *e.g.*, *What's open and closed*, WASH. STATE CORONAVIRUS RESPONSE (COVID-19), <https://coronavirus.wa.gov/whats-open-and-closed>; *COVID-19 Resources for Oregonians*, GOVSTATUS, <https://govstatus.egov.com/or-covid-19>; CAL. CORONAVIRUS (COVID-19) RESPONSE, <https://covid19.ca.gov/>.

some social distancing measures could stay in effect for many more months to protect the health and safety of the community at large.⁸

The MSA obligates NMFS to conserve and manage the nation's fisheries using science-based conservation and management principles.⁹ Any fishery management plan must follow the ten national standards for fishery conservation and management and include accountability measures for all stocks in a fishery.¹⁰ The national standards include preventing overfishing, rebuilding overfished stocks, and minimizing bycatch.¹¹ Accountability measures prevent overfishing by ensuring the annual catch limit is not exceeded, and correcting or mitigating overages if the catch limit is exceeded.¹² Accountability measures vary by fishery management plan, but may include an annual catch target, the closure of a fishery, closure of specific areas, gear restrictions, trip size or possession limits, and reductions in effort.¹³ If an annual catch limit is exceeded, further accountability measures must be implemented as soon as possible and may modify the existing accountability measures and impose stricter measures.¹⁴ The monitoring of fishing activities are paramount to track catch and bycatch levels, which feed directly into the specification of accountability measures each fishing year.

Section 305(c) of the MSA authorizes NMFS to take emergency action to address conservation, biological, economic, social, and health emergencies.¹⁵ Specifically, under section 305(c)(3) of the MSA, NMFS may issue an emergency regulation or interim measure that changes any existing fishery management plan or amendment.¹⁶ Every request for emergency rulemaking under this provision must still meet the national standards and conservation and management principles of the MSA. As stated in the agency's 1997 Policy Guidelines for the Use of Emergency Rules:

In order to approve an emergency rule, the Secretary must have an administrative record justifying emergency regulatory action and demonstrating its compliance with the national standards. In addition, the preamble to the emergency rule should indicate what measures could be taken or what alternative measures will be considered to effect a permanent solution to the problem addressed by the emergency rule.¹⁷

NMFS should not approve an emergency rule that does not fulfill these policy guidelines.

⁸ See, e.g., Ed Yong, *Our Pandemic Summer*, THE ATLANTIC (updated Apr. 15, 2020, 11:50 AM), <https://www.theatlantic.com/health/archive/2020/04/pandemic-summer-coronavirus-reopening-back-normal/609940/>.

⁹ 16 U.S.C. § 1801(a)–(b).

¹⁰ *Id.* §§ 1851, 1853(a)(15); 50 C.F.R. § 600.310(h).

¹¹ *Id.* § 1851.

¹² 50 C.F.R. § 600.310(g)(1).

¹³ *Id.* § 600.310(g)(2).

¹⁴ *Id.*

¹⁵ 16 U.S.C. § 1855(c); 62 Fed. Reg. 44,421, 44,422 (Aug. 21, 1997); NOAA, POLICY GUIDELINES FOR THE USE OF EMERGENCY RULES (renewed Aug. 2014) [hereinafter POLICY GUIDELINES] at 2, available at <https://www.fisheries.noaa.gov/webdam/download/64669066>.

¹⁶ 16 U.S.C. § 1855(c)(3).

¹⁷ 62 Fed. Reg. at 44,421–22; POLICY GUIDELINES at 2.

In recognition of the rapidly evolving pandemic situation, on March 27, 2020, NMFS issued an emergency waiver rule (effective March 24, 2020 through September 23, 2020), invoking section 305(c)(3)(B) of the MSA to provide itself with the authority to waive observer coverage requirements, observer training, and other program requirements required under various statutes.¹⁸ The rule does not specify which individuals or fisheries will have observer coverage waived. Instead, it describes the circumstances under which NMFS could exercise its discretion to issue a waiver thereafter. The emergency waiver rule states that NMFS may waive observer coverage for an individual trip or vessel, an entire fishery or fleet, or all fisheries administered under a NMFS Regional Office if either: 1) governments or other entities issue COVID-19-related measures or guidance that effectively restrict or recommend the restriction of placing observers, or 2) no qualified observers are available for placement due to health, safety, or training issues related to COVID-19.¹⁹

To our knowledge, observer coverage waivers have since been announced through bulletins and notices by the NOAA Fisheries Greater Atlantic Region,²⁰ NOAA Fisheries Alaska Region,²¹ Southeast Fisheries Science Center,²² and NOAA Fisheries West Coast Region.²³

We appreciate NMFS's attempt to address the impacts and risks posed by COVID-19. But for the reasons discussed below, we have concerns with the manner and scope of NMFS's emergency action. We do not suggest that NMFS place observers on vessels at the risk of their safety or the safety of the fishing captains and crew on board. However, NMFS should not assume the removal of observers will have "no ecological" impacts,²⁴ and eliminating observer coverage, by itself, will not protect fishing crews or residents in the nearby communities from the threat of infection. Rather, we urge the agency to take all actions necessary to adequately meet its requirements under the law and to protect the health and safety of the general public and livelihoods of fishermen. In this comment letter, we highlight the legal and practical considerations the agency must not ignore in its urgency to address the pandemic. These considerations include the need for the agency to: 1) publish each observer coverage waiver in

¹⁸ 85 Fed. Reg. at 17,287.

¹⁹ *Id.* at 17,286.

²⁰ *Greater Atlantic Regional Administrator Announces Temporary Waivers on Observers, Monitors*, NOAA FISHERIES (Apr. 17, 2020), <https://www.fisheries.noaa.gov/bulletin/greater-atlantic-regional-administrator-announces-temporary-waivers-observers-monitors>.

²¹ *IB 20-29: Notification on Waiver of Observer Coverage Requirements in the Partial Coverage Category*, NOAA FISHERIES (Mar. 27, 2020, 9:00 AM), <https://www.fisheries.noaa.gov/bulletin/ib-20-29-notification-waiver-observer-coverage-requirements-partial-coverage-category>; *IB 20-31: Alaska Observer Waiver Extended through April 19*, NOAA FISHERIES (Apr. 7, 2020, 3:15 PM), <https://www.fisheries.noaa.gov/bulletin/ib-20-31-alaska-observer-waiver-extended-through-april-19>.

²² *Temporary Waiver of Observer Requirement in HMS, South Atlantic, and Gulf of Mexico Fisheries*, NOAA FISHERIES (Apr. 7, 2020, 1:03 PM), <https://content.govdelivery.com/accounts/USNOAAFISHERIES/bulletins/2854aa0>.

²³ *West Coast Groundfish, HMS Fisheries Get 2-week Observer Reprieve*, SEAFOODNEWS.COM (Apr. 15, 2020), <https://www.seafoodnews.com/Story/1169016/West-Coast-Groundfish-HMS-Fisheries-Get-2-week-Observer-Reprieve>.

²⁴ *See* 85 Fed. Reg. at 17,287 (finding that "no ecological or socioeconomic impacts are expected by this temporary rule beyond any caused by the COVID-19 pandemic itself").

the Federal Register, 2) tailor each waiver to comply with federal and international obligations, 3) address what alternative methods for data collection and monitoring the agency may require to fulfill the functions of observers, and 4) evaluate whether other actions should be taken to protect and support fishing communities.

I. NMFS must publish each observer coverage waiver in the Federal Register.

The emergency waiver rule published in the Federal Register describes a broad grant of authority by NMFS to waive observer coverage for certain situations. The rule does not identify which fisheries will be impacted and instead explains that NMFS has the discretion, on a case-by-case basis, to issue a waiver of observer coverage requirements for an individual trip or vessel, an entire fishery or fleet, or all fisheries administered under a NMFS Regional Office.²⁵ The rule states that “[s]uch waivers will be communicated in writing or electronic format.”²⁶ However, it does not describe the recipients or audience of such communication or explain where NMFS will post the waiver.

NMFS cites section 305(c)(3) of the MSA in the emergency waiver rule for its authority to waive observer coverage requirements. Pursuant to section 305(c)(3) of the MSA, “[a]ny emergency regulation or interim measure which changes any existing fishery management plan or amendment . . . shall be published in the Federal Register.”²⁷ The emergency rule currently published does not change any existing fishery management plan or amendment. It only conveys the options for NMFS to waive observer requirements. It is the individual waiver for an individual, fleet, or fishery that will change an observer requirement in an existing fishery management plan or amendment.²⁸ Therefore, each individual waiver constitutes a separate emergency action that will require publication in the Federal Register.

A waiver is not valid unless it is published in the Federal Register. Beyond the explicit language in section 305(c)(3) of the MSA, publication in the Federal Register is necessary to codify the agency’s actions and give it legal effect.²⁹ Furthermore, any waiver issued must be published in the Federal Register to ensure NMFS provides fishing communities and the public constructive notice of the emergency action’s contents and the agency’s reasoning.³⁰ Official publication ensures that every waiver invoking the emergency waiver rule is accessible to and trackable by all affected individuals and available for review.

The contents and reasoning in each waiver are the critical components of this agency action that must be codified and publicly available. As described in the emergency waiver rule, NMFS must make case-specific determinations for each waiver based on a variety of criteria. It

²⁵ 85 Fed. Reg. at 17,286.

²⁶ *Id.*

²⁷ 16 U.S.C. § 1855(c)(3).

²⁸ To the extent an observer coverage requirement exists outside a fishery management plan, NMFS must rely on a different statutory authority in order to waive that observer coverage requirement.

²⁹ See *Cervase v. Office of Fed. Register*, 580 F.2d 1166, 1168 (3d Cir. 1978) (“Codification of a document [in the Federal Register] is prima facie evidence both of its text and of its continuing legal effect”).

³⁰ See *id.* at 1168–69 (“publication in the Federal Register gives [an affected individual] constructive notice of the existence of the regulation”).

must first determine if, in a particular region or area, a government or other entity has issued COVID-19-related measures or guidance that effectively restrict or recommend the restriction of placing observers; or, whether no qualified observers are available for placement due to health, safety, or training issues related to COVID-19.³¹ It must identify the individual vessel, fleet, or fishery that is confronting the particular emergency circumstances.³² It must ensure that the conservation and management goals and national standards of the MSA are still being met.³³

To meet this latter requirement, NMFS should first identify the specific roles the observers play in the relevant fishery management plan (*e.g.*, monitoring, data collection, biological sampling) and the particular conservation and management requirements those roles support. As stated in the emergency waiver rule, NMFS must then decide whether additional, separate actions (*e.g.*, fishery closures, additional monitoring) are necessary and appropriate.³⁴ This should include an evaluation and explanation of what other mechanisms are currently in place that provide similar or relevant data that also support the identified conservation and management requirements, and what additional monitoring and data collection measures may be needed to adequately fulfill the functions of the observers in that fishery during the suspended period.³⁵ Providing this information in the contents of the published notice for each individual waiver is also important to meet NMFS's 1997 Policy Guidelines for the Use of Emergency Rules, which requires the agency to justify the emergency regulatory action, demonstrate its compliance with the national standards, and indicate what alternative measures will be considered.³⁶

The blanket emergency waiver rule NMFS has published in the Federal Register cannot meet these criteria. Only a case-specific waiver can adequately address and supply the necessary information. NMFS's justification for each observer coverage waiver it grants under the emergency waiver rule must therefore be included in the official notice it is required to publish, and should clearly enumerate how the waiver meets the relevant standards given the unique conditions in the subject fishery.

II. NMFS must ensure the individual waivers comply with applicable law.

The MSA is not the only law that requires observer coverage in U.S. fisheries. As noted in the emergency waiver rule, other laws—such as the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), as well as international agreements—may also require observer coverage.³⁷ Because multiple conservation laws mandate observer coverage in certain fisheries, NMFS must ensure that each individual waiver it issues complies with applicable law. As described below, individual waivers issued under this emergency waiver rule could violate the ESA, MMPA, or international agreements.

³¹ 85 Fed. Reg. at 17,286.

³² *Id.*

³³ *Id.* at 17,287.

³⁴ *Id.*

³⁵ See Section III.C, below.

³⁶ 62 Fed. Reg. at 44,421–22; POLICY GUIDELINES at 2.

³⁷ 85 Fed. Reg. at 17,287.

A. The Endangered Species Act limits the scope of NMFS’s waiver authority.

Section 9 of the ESA prohibits the “take” of an animal that is listed as an endangered species.³⁸ “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.”³⁹ Any person who violates section 9, including agencies and their employees, is “subject to substantial civil and criminal penalties, including imprisonment.”⁴⁰ “Private citizens, as well as government entities, may bring suit to enjoin such violations.”⁴¹

Section 7 of the ESA imposes an affirmative duty on federal agencies to prevent illegal take, while also exempting some take from the scope of the section 9 prohibition. Specifically, each federal agency must “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species”⁴² An agency complies with the duty to avoid jeopardy through consultation with the relevant expert agency.⁴³ Where the expert agency concludes that expected take levels will not jeopardize the species, it will issue an Incidental Take Statement (ITS) authorizing specific levels of incidental take as part of a “no jeopardy” Biological Opinion.⁴⁴ An ITS authorizing take must:

- (1) specify the impact of the incidental taking on the species; (2) specify the “reasonable and prudent measures” that the [expert agency] considers necessary or appropriate to minimize such impact; (3) set forth “terms and conditions” with which the action agency must comply to implement the reasonable and prudent measures (including, but not limited to, reporting requirements); and (4) specify the procedures to be used to handle or dispose of any animals actually taken.

Oregon Nat. Res. Council v. Allen, 476 F.3d 1031, 1034 (9th Cir. 2007) (citing 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)). “[A]ny taking that is in compliance with the terms and conditions specified in [an ITS] shall not be considered to be a prohibited taking of the species concerned.”⁴⁵

Accordingly, “the Biological Opinion’s [ITS] constitutes a permit authorizing the action agency to ‘take’ the endangered or threatened species so long as it respects the [expert agency’s] ‘terms and conditions.’”⁴⁶ Conversely, “[i]f the terms and conditions of the Incidental Take

³⁸ 16 U.S.C. § 1538(a)(1)(B).

³⁹ *Id.* § 1532(19).

⁴⁰ *Bennett v. Spear*, 520 U.S. 154, 170 (1997) (overruled on other grounds).

⁴¹ *Arizona Cattle Growers’ Ass’n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1238 (9th Cir. 2001) (citing 16 U.S.C. § 1540(a), (b), (e), (g)).

⁴² 16 U.S.C. § 1536(a)(2).

⁴³ *See id.* *See also* 50 C.F.R. §§ 402.11–14.

⁴⁴ *See* 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(g)(7), (h)(iv)(B).

⁴⁵ 16 U.S.C. § 1536(o)(2); *see also* 50 C.F.R. § 402.14(i)(5).

⁴⁶ *Bennett v. Spear*, 520 U.S. at 170. *See also Sierra Club v. United States Dep’t of the Interior*, 899 F.3d 260, 270 (4th Cir. 2018) (“An ITS is a safe harbor: it allows an agency . . . to approve a project that takes threatened or endangered species without falling afoul of the Endangered Species Act.”); *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1108 (9th Cir. 2012) (“Significantly, the [ITS] functions as a safe harbor

Statement are disregarded and a taking does occur, the action agency or the applicant may be subject to potentially severe civil and criminal penalties under Section 9.”⁴⁷

A number of fisheries currently operate under ITSs that set minimum observer requirements as a term and condition of authorized take, including, for example, the Hawai‘i-based pelagic longline fisheries.⁴⁸ Fishing without the level of observer coverage specified in the terms and conditions would void the safe harbor provided by the operative ITS, and expose individual vessel operators, as well as NMFS, to liability for any “prohibited taking,” regardless of the emergency waiver rule.⁴⁹ Further, granting a waiver to a fishery regulated by the terms and conditions of such an ITS would be *ultra vires* to the emergency waiver rule, which requires compliance with applicable laws.⁵⁰ Therefore, under the ESA and the terms of the emergency waiver rule, NMFS cannot grant a waiver for any fishery where the operative ITS mandates observer coverage, without exposing fishery participants, and the agency, to substantial civil and criminal penalties, and litigation costs.⁵¹

The practical implications of waiving observer coverage—contrary to the terms and conditions of an ITS—are potentially disastrous for protected species. As an example, the Hawai‘i-based deep-set pelagic longline fishery interacts with the Main Hawaiian Island Insular False Killer Whale, a distinct population segment numbering a mere 151 individuals, as well as critically endangered turtle species, humpback whales, and sperm whales.⁵² The ITS requires “observer coverage at rates that have been determined to be statistically reliable for estimating protected species interaction rates onboard Hawaii deep-set longline vessels,”⁵³ which for this fishery is 20 percent.⁵⁴ As a reflection of this 20 percent coverage rate, observed interactions are multiplied by a factor of five to obtain the actual interaction number for that species.⁵⁵ Any reduction in observer coverage levels for the Hawai‘i deep-set fishery thus risks a significant

provision immunizing persons from Section 9 liability and penalties for takings committed during activities that are otherwise lawful and in compliance with its terms and conditions.”) (citations omitted).

⁴⁷ *Arizona Cattle Growers*, 273 F.3d at 1239. See also *Bennett v. Spear*, 520 U.S. at 170 (“The action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril (and that of its employees), for ‘any person’ who knowingly ‘takes’ an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment.”).

⁴⁸ See NMFS, Pacific Islands Region (PIR), Protected Resources Division (PRD), Biological Opinion on the Continued Authorization of the Hawaii Pelagic Shallow-Set Longline Fishery, 395 (June 26, 2019) (“Hawai‘i Shallow-Set BiOp”), Term and Condition 2a; NMFS, PIR, PRD, Biological Opinion on the Continued Operation of the Hawaii-Based Deep-Set pelagic Longline Fishery 172 (Sep. 19, 2014) (“Hawai‘i Deep-Set BiOp”), Term and Condition 1A.

⁴⁹ 16 U.S.C. § 1536(o)(2).

⁵⁰ See 85 Fed. Reg. at 17,287 (“This temporary rule is intended to authorize NMFS to waive any observer requirement implemented under any of those authorities, *consistent with other applicable law.*”) (emphasis added).

⁵¹ See, e.g., *Bennett v. Spear*, 520 U.S. at 170; *Arizona Cattle Growers*, 273 F.3d at 1239.

⁵² See Hawai‘i Deep-Set BiOp at 147, 170.

⁵³ *Id.* at 172.

⁵⁴ *Id.* at 12, 170.

⁵⁵ *Id.* at 170, Table 18.

lapse in protective monitoring, including for the critically endangered insular false killer whale population, which cannot afford for a single fishery interaction to go undetected.⁵⁶

The effects of reducing observer coverage in other fisheries may prove even more significant, depending on the structure of that individual fishery. The ITS for the Hawai'i shallow-set fishery requires 100 percent coverage, as the “statistically reliable” rate for estimating interaction rates.⁵⁷ As the 2019 biological opinion explains, a small number of vessels are responsible for an outsized share of endangered sea turtle interactions in this fishery. Between November 2017 and January 2018, four vessels were responsible for 34 loggerhead interactions, an average of more than 8 *turtles* each, and 82 percent of all loggerhead interactions that year.⁵⁸ If observer coverage were waived for any one of these four vessels, a potentially significant number of sea turtle interactions could go undetected, skewing fleet-wide interactions rates, and precluding timely compliance with hard-cap limits which require the fishery to close down if it reaches a specified number of turtle interactions in a calendar year.⁵⁹ This is particularly problematic for the critically endangered leatherback, which is currently experiencing catastrophic population losses of 6 percent annually, and cannot sustain even temporary exceedance of authorized take levels.

In summary, the ESA precludes waiver of observer coverage in fisheries where an ITS mandates a specific level of observer coverage as a term and condition of the authorized take. Waiver of observer coverage in any such fishery would have significant negative effects on monitoring of protected species interactions, with real world consequences for those species, and void the limited protection from section 9 liability otherwise provided by the ITS.⁶⁰ Further, with respect to the Hawai'i pelagic fisheries discussed above, it is worth noting that, due to the COVID-19 pandemic, a significant reduction in demand has resulted in drastically lower prices for target fish species.⁶¹ Therefore, even disregarding the potentially dire ramifications for protected species and vessel operators who may be exposed to section 9 liability, there is no economic rationale for facilitating fishing by reducing observer coverage in the Hawai'i-based pelagic fisheries. Other fisheries may be facing similar economic disincentives, which should be taken into account when weighing the decision whether to waive observer coverage in individual fisheries.

⁵⁶ Indeed, the potential biological removal level (human-caused mortality) for this species is 0.3 animals annually, demonstrating that every interaction counts. *Id.* at 147.

⁵⁷ Hawai'i Shallow-Set BiOp at 395; *see id.* at 33, 54, 274.

⁵⁸ *Id.* at 285, Table 55. As a point of comparison, since one hundred percent observer coverage levels were set in 2004, 68 percent of vessels have limited their loggerhead interaction rate to *one turtle* per year. *See id.* at 285, Table 54.

⁵⁹ It is also unclear how NMFS can comply with its duty to reinitiate consultation if authorized take levels are exceeded, if the agency is not requiring statistically reliable levels of coverage to monitor take.

⁶⁰ *See* 16 U.S.C. § 1536(o)(2).

⁶¹ *See, e.g.,* Rick Daysog, *Fish prices plummet as coronavirus pandemic cripples industry and idles boats*, HAWAII NEWS NOW (updated Mar. 26, 2020, 6:11PM HST), <https://www.hawaiinewsnow.com/2020/03/27/fish-prices-plummet-coronavirus-pandemic-cripples-industry-idles-boats/>.

B. International agreements limit the scope of NMFS's waiver authority.

The United States is party to many international agreements that regulate fishing. Many of these agreements require observer coverage for all contracting parties fishing within the jurisdiction of the convention. For example, the United States is party to three tuna conventions: the International Commission for the Conservation of Atlantic Tuna (ICCAT), the Inter-American Tropical Tuna Commission (IATTC), and the Western and Central Pacific Fisheries Commission (WCPFC).⁶² When these commissions adopt recommendations or resolutions, statutes such as the Tuna Convention Act,⁶³ the Atlantic Tunas Convention Act,⁶⁴ and the Central Pacific Fisheries Convention Implementation Act⁶⁵ require NMFS to promulgate regulations as may be necessary to fulfill U.S. obligations and implement the resolutions or recommendations.⁶⁶

All the tuna commissions have adopted resolutions or recommendations requiring observer coverage. ICCAT, for example, requires observer coverage in the Atlantic bluefin tuna fishery.⁶⁷ It requires 20 percent observer coverage for pelagic trawlers, longline vessels, and baitboats.⁶⁸ And it requires 100 percent observer coverage on towing vessels, harvesting operations from traps, as well as on purse seiners and transfers from purse seiners.⁶⁹ ICCAT also requires 100 percent coverage during transfers of bluefin tuna from one farm to another, during harvesting from farms, and during the release of tuna from farming cages into the sea.⁷⁰ In fisheries targeting other tuna or tuna-like species, ICCAT requires 5 percent observer or electronic monitoring coverage of fishing effort for pelagic longlines, purse seines, baitboats, traps, gillnets, and trawls.⁷¹ To the extent the United States participates in these fishing activities, NMFS must ensure that it continues to abide by ICCAT's requirements for observer coverage for all U.S.-flagged fishing activities in convention waters.

The IATTC also requires observer coverage in tuna fisheries. Specifically, the IATTC requires all large purse seiners targeting any tuna species to carry observers when fishing in the

⁶² See Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, available at <https://www.wcpfc.int/doc/convention-conservation-and-management-highly-migratory-fish-stocks-western-and-central-pacific>; International Convention for the Conservation of Atlantic Tunas, available at <https://www.iccat.int/Documents/Commission/BasicTexts.pdf>; Antigua Convention, available at https://www.iattc.org/PDFFiles/IATTC-Instruments/English/IATTC_Antigua_Convention%20Jun%202003.pdf

⁶³ 16 U.S.C. § 951 *et seq.*

⁶⁴ 16 U.S.C. § 971 *et seq.*

⁶⁵ 16 U.S.C. § 6901 *et seq.*

⁶⁶ 16 U.S.C. § 955(a); 16 U.S.C. § 971c; 16 U.S.C. § 6904.

⁶⁷ See ICCAT, <https://www.iccat.int/en/>.

⁶⁸ ICCAT Recommendation 18-02 Establishing a Multi-Annual Management Plan for Bluefin Tuna in the Eastern Atlantic and the Mediterranean Sea, available at <https://www.iccat.int/Documents/Recs/compendiopdf-e/2018-02-e.pdf>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ ICCAT Recommendation 16-14 to Establish Minimum Standards For Fishing Vessel Scientific Observer Programs, available at <https://www.iccat.int/Documents/Recs/compendiopdf-e/2016-14-e.pdf>

convention area.⁷² IATTC also requires 5 percent observer coverage on longliners targeting any tuna species in the convention area.⁷³ NMFS must ensure the United States meets its international obligations under IATTC and maintains sufficient observer coverage for the U.S.-flagged fleet.

Beyond the tuna conventions, the United States is also party to general regional fisheries management organizations that regulate fisheries within specific geographical regions, such as the Northwest Atlantic Fisheries Organization (NAFO), the Commission on the Conservation of Antarctic Marine Living Resources (CCAMLR), and the South Pacific Ocean Regional Fisheries Management Organization (SPRFMO). Each of these international organizations also require observer coverage. NAFO requires 25–100 percent observer coverage on all fishing trips within its regulatory area.⁷⁴ CCAMLR requires partial or full observer coverage in all fisheries within its jurisdiction.⁷⁵ And SPRFMO requires 100 percent observer coverage on bottom and mid-water trawls and 10 percent observer coverage on bottom line gear.⁷⁶ NMFS must ensure that the United States is fulfilling these international obligations for all flagged vessels participating in the relevant fisheries, regardless of waivers issued under this rule.

Unless an international body waives its observer coverage requirements, NMFS must ensure its individual waivers comply with international observer requirements within the relevant convention waters.⁷⁷ MSA emergency rulemaking cannot authorize the waiver of international observer requirements. In instances where waivers are not an option in a given fishery due to international agreements, NMFS should find alternative means to protect observers and fishermen from COVID-19, including closing fisheries altogether or requiring testing and quarantine or other social distancing measures before embarking on fishing excursions. These alternative measures have the added benefit of protecting observers *and* fishermen from illness, while keeping the United States in compliance with international obligations.

⁷² IATTC Resolution C-19-08 on Scientific Observers for Longline Vessels, *available at* https://www.iattc.org/PDFFiles/Resolutions/IATTC/English/C-19-08-Active_Observers%20on%20longliners.pdf. *See also* Agreement on the International Dolphin Conservation Program, Annex II, at 9, *available at* <https://www.iattc.org/PDFFiles/AIDCP/English/AIDCP.pdf>.

⁷³ *Id.*

⁷⁴ NAFO 2020 Conservation and Enforcement Measures, Chapter 5 § 5–6, *available at* <https://www.nafo.int/Portals/0/PDFs/COM/2020/CEM-2020-web.pdf>

⁷⁵ CCAMLR Scheme of International Scientific Observation (SISO), <https://www.ccamlr.org/en/science/ccamlr-scheme-international-scientific-observation>. *See also* Schedule of Conservation Measures in Force 2019/20, CCAMLR, https://www.ccamlr.org/en/system/files/e-schedule2019-20_0.pdf.

⁷⁶ CMM 03-2019 Conservation and Management Measure for the Management of Bottom Fishing in the SPRFMO Convention Area, SPRFMO, <https://www.sprfmo.int/assets/Fisheries/Conservation-and-Management-Measures/2019-CMMs/CMM-03-2019-5Mar2019.pdf>

⁷⁷ To our knowledge, WCPFC is currently the only RFMO to waive observer coverage. *See* Commission Decision in response to COVID-19 regarding suspension of requirement for purse seine observer coverage until 31 May 2020, WCPFC, *available at* <https://www.wcpfc.int/doc/circ-2020-24/commission-decision-response-covid-19-regarding-suspension-requirement-purse-seine>.

C. The Marine Mammal Protection Act limits the scope of NMFS’s waiver authority.

The MMPA protects marine mammals from various threats, including commercial fishing operations. Some MMPA implementing regulations also contain observer coverage requirements. Regulations promulgated under the MMPA and the Tuna Conventions Act, for example, require observers on all purse seine vessels fishing for tuna in the Eastern Pacific Ocean.⁷⁸ Any waivers issued under this emergency waiver rule must still adhere to these requirements. To the extent observer coverage is discretionary and temporarily reduced under the authority granted by the MMPA, as described in Section III below, the agency should still address alternative mechanisms that will be implemented in lieu of observers.

III. In the absence of observers, NMFS may need to implement alternative compliance mechanisms to fulfill its obligations under the MSA and other applicable law.

While the suspension of observer requirements may be discretionary and necessary in some instances to protect the health and safety of observers and address the realities of this pandemic, the agency must still comply with legal requirements under the MSA and other laws. Should NMFS waive observer requirements under this emergency waiver rule or under a separate authority outside of this rulemaking, NMFS must evaluate whether and how to implement alternative mechanisms to fulfill the functions of observers.

A. Criteria must be identified and substitute mechanisms may need to be implemented for waivers of observer coverage under the emergency waiver rule.

The MSA requires NMFS to conserve, manage, and monitor U.S. fisheries.⁷⁹ NMFS must ensure it continues to satisfy these requirements in the absence of observers. We understand that in this global emergency situation, it is imperative to act quickly to protect human lives and ensure our food security, but we also urge NMFS to consider the long-term impacts of its decisions to waive observers without other data collection and monitoring tools in their place. The lack of observer coverage in the long term could significantly impact NMFS’s and the regional fishery management councils’ ability to accurately set annual catch limits and associated accountability measures necessary to conserve and optimize our nation’s commercial fish stocks.

Observers play a key role in recording accurate and verifiable data and in monitoring fishing activities to ensure compliance with the accountability measures. For example, in the West Coast groundfish fishery, observers play a major role in collecting year-round discard rates for the groundfish fisheries of the Pacific coast.⁸⁰ Multiple groundfish species are overfished and many are caught as bycatch. At-sea observers are used as the only readily available and active data source on discard rates.⁸¹ The quantification of these discard rates is vital for proper management of the groundfish fisheries. The removal of observers at sea presents a significant

⁷⁸ 50 C.F.R. § 216.24(b)(8).

⁷⁹ See, e.g., 16 U.S.C. §§ 1801, 1851(a), 1853(a)(15).

⁸⁰ *West Coast Groundfish Observer Program (WCGOP)*, PACIFIC STATES MARINE FISHERIES COMM’N, <http://www.psmfc.org/program/west-coast-groundfish-observer-program-wcgop>.

⁸¹ *Id.*

data gap that may need to be filled, at least temporarily, by other substitute measures. Otherwise, over the long-term, NMFS may risk depleting a fish stock to an overfished state.

NMFS states that for this emergency waiver rule, “[i]f observer requirements are waived, the agency will monitor fishing effort and catch data and other relevant information to ensure that there are no significant adverse environmental consequences and consider alternative fishery management measures should such consequences arise.”⁸² NMFS likewise asserts broadly in the emergency waiver rule that it will “monitor the status of the fishery and/or protected species . . . to ensure that the relevant conservation and management goals are still being met.”⁸³ It is unclear, however, how NMFS will monitor these statuses and ensure conservation and management goals are met if observers, who provide much of this key information, are not deployed to monitor and record the data. Furthermore, the rule states that “NMFS may implement additional, separate actions (*e.g.*, fishery closures, additional monitoring) per existing regulations or may issue emergency regulations, as necessary and appropriate,” but does not provide the criteria NMFS will apply to identify the appropriate actions for each waiver.⁸⁴

NMFS should identify in the emergency waiver rule what criteria it will use to determine which additional measures to implement to mitigate the absence of data and verification observers currently provide for a fishery management plan. Additionally, if NMFS issues an individual waiver of observer coverage, the waiver should evaluate what other mechanisms are currently in place for the relevant fishery that provide similar data, and what additional monitoring and data collection measures may be needed to adequately fulfill the functions of observers during the waived period.

B. Substitute mechanisms must be implemented for waivers of observer coverage under other applicable law.

To the extent NMFS exercises its discretion under authorities beyond the MSA to waive observer coverage outside of this emergency rulemaking, it likewise must consider the temporary use of substitute measures. For instance, the MMPA requires NMFS to monitor the rate of marine mammal serious injury and mortality in commercial fisheries.⁸⁵ This monitoring program must obtain “statistically reliable” data.⁸⁶ The monitoring program must also determine the reliability of self-reports from fishermen.⁸⁷ To meet these requirements, the MMPA authorizes NMFS to require fishing vessels to carry observers.⁸⁸ Estimated levels of marine mammal mortality and serious injury, based on observer data, are used throughout the MMPA statutory scheme—including to determine “negligible impact.” If a fishery has more than a negligible impact on certain marine mammal species over a period of three years, NMFS may not allow the

⁸² NOAA Fisheries Issues Emergency Action to Waive Observer Coverage on a Case-by-Case Basis, NOAA FISHERIES (updated Apr. 17, 2020), <https://www.fisheries.noaa.gov/feature-story/noaa-fisheries-issues-emergency-action-waive-observer-coverage-case-case-basis>.

⁸³ 85 Fed. Reg. at 17,287.

⁸⁴ *Id.*

⁸⁵ 16 U.S.C. § 1387(d).

⁸⁶ *Id.* § 1387(d)(1)(A).

⁸⁷ *Id.* § 1387(d)(1)(B).

⁸⁸ *Id.* § 1387(d)(2).

incidental taking of marine mammals at all in that fishery.⁸⁹ As NMFS recognizes, “[d]ata obtained from the observer program and observer coverage levels are important tools in estimating the level of marine mammal mortality and serious injury in commercial fishing operations.”⁹⁰

Observer data is also used extensively in annual stock assessment reports required under section 117 of the MMPA. In the stock assessment, NMFS must determine the potential biological removal rate⁹¹ and the rate of human-caused mortality for each marine mammal stock.⁹² NMFS heavily relies on observer data to derive these numbers, which are used to make important designations under the MMPA, like whether a marine mammal stock is a “strategic stock.”⁹³ The MMPA requires NMFS to develop take reduction plans for strategic stocks that have frequent or occasional interactions with commercial fisheries.⁹⁴ Take reduction plans afford a host of protective measures to the most vulnerable marine mammal populations. Essentially, numbers based on observer data determine the degree to which a marine mammal population is protected under the MMPA. Observer data is thus a crucial element of a fully functional MMPA.

As stated above, NMFS acknowledges that observer data is often the only available independent fisheries data.⁹⁵ In the absence of observer data, NMFS must develop alternative means of monitoring that can obtain statistically reliable estimates.⁹⁶ And because the monitoring program must verify self-reports from fishermen, NMFS may not solely rely on logbook data or other self-reporting mechanisms to fulfill this statutory obligation under the MMPA.

In addition to the role observers play in monitoring and data collection, they also protect marine mammals through their presence aboard vessels. Observers notice and alert fishermen to the presence of marine mammals, potentially avoiding deadly entanglements in fishing gear. Observers are also more likely to be trained in the proper protocol for handling marine mammals after entanglement, thus increasing an entangled animal’s chance of survival. In the absence of observers, NMFS should consider additional protective measures for marine mammals because they no longer have this first line of defense. These protective measures could include temporary closures in sensitive areas, where marine mammals are known to congregate, breed, migrate, or feed.

⁸⁹ 16 U.S.C. § 1371(a)(5)(E)(i).

⁹⁰ 85 Fed. Reg. 21,079, 21,080 (Apr. 16, 2020).

⁹¹ “The ‘potential biological removal level’ means the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population. The potential biological removal level is the product of the following factors: (A) The minimum population estimate of the stock; (B) One-half the maximum theoretical or estimated net productivity rate of the stock at a small population size; (C) A recovery factor of between 0.1 and 1.0.” 16 U.S.C. § 1362.

⁹² 16 U.S.C. § 1386(a)(5).

⁹³ Strategic stocks are marine mammal stocks where the human-caused mortality is higher than the potential biological removal rate, or marine mammals that are listed as threatened or endangered under the ESA. *See Glossary: Marine Mammal Protection Act*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/laws-and-policies/glossary-marine-mammal-protection-act>.

⁹⁴ 16 U.S.C. § 1387(f).

⁹⁵ *Fishery Observers*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/topic/fishery-observers>.

⁹⁶ *Id.* § 1387(d)(1)(A), (B).

C. NMFS may need to consider alternative data collection and compliance mechanisms.

NMFS has at its disposal many other tools that may assist in filling the data collection and monitoring gaps that will result from a suspension of observer coverage. Below is a discussion of two of those potential tools: electronic monitoring and electronic reporting. Other alternative monitoring mechanisms should also be considered, such as the use of drones, aerial surveys, or observations from points on shore, where appropriate. NMFS should evaluate the full suite of options available and closely scrutinize each individual waiver it is considering to determine what appropriate combination of measures may need to be implemented to help meet the fishery's data collection and monitoring needs.

1. Electronic Monitoring.

During a waived period, electronic monitoring in the form of video cameras with gear sensors may be an effective tool and potential substitute for some data collection needs observers meet in fisheries management. Many fisheries across the United States already have electronic monitoring and reporting as required components of their data collection programs. For example, the Atlantic pelagic longline fishery uses electronic monitoring to track the bycatch of bluefin tuna.⁹⁷

If NMFS waives observer coverage for a fishery that has the capability, but is not currently required, to use electronic monitoring, the agency should consider requiring electronic monitoring during the waived period. In the event electronic monitoring is implemented, NMFS should also identify whether other supplementary tools are necessary to fill any remaining data gaps that will result from an observer coverage waiver. Although electronic monitoring can be useful, it is not a complete replacement for observers and contains many practical shortcomings. For instance, electronic monitoring may be insufficient to accurately identify species caught; it may be unable to tally catch data; review and analysis of video footage may not be done in real time; system failures or tampering may occur; discards or other fishing activity may occur outside the boat area captured by camera (*e.g.*, blind spots); and sufficient lighting and video quality may be compromised in certain conditions (*e.g.*, fog, rain, glare, night-time fishing operations).⁹⁸ For these reasons, we encourage NMFS to consider electronic monitoring as a potentially useful, but not sufficient, substitute tool for observers during an emergency situation.

2. Electronic Reporting.

Electronic reporting should be required to assist in mitigating the data gap that will result from the lack of observer coverage during a waived period. It should be considered a

⁹⁷ *Electronic Monitoring*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/national/fisheries-observers/electronic-monitoring>.

⁹⁸ *See, e.g., Electronic Monitoring: Different Fisheries Require Different Solutions*, NOAA FISHERIES (Feb. 16, 2016), <https://www.fisheries.noaa.gov/feature-story/electronic-monitoring-different-fisheries-require-different-solutions>.

requirement for the submission of fishing trip data by fishermen (*i.e.*, logbooks) and the catch, landings, and purchase data by dealers or processors.

Vessel electronic reporting exists in some capacity for many fisheries, but is not universally implemented. Many fisheries still allow fishermen to submit logbooks by hand. For example, vessels using trawl gear in the Pacific Coast groundfish fishery are still required to submit logbook forms by hand—electronic reporting is not an option.⁹⁹ The logbooks are due monthly by mail.¹⁰⁰ Requiring the submission of electronic logbooks, which can be submitted prior to the end of each fishing trip, allows catch data to be processed in near real-time, which may increase NMFS’s management response to adjust accountability measures if a fishery is reaching its annual catch target or annual catch limit. This is especially important if observer monitoring is removed. For instance, when the Western Pacific Regional Fishery Management Council first implemented optional electronic logbook reporting, it noted that electronic reporting could help replace NMFS’s preexisting system of obtaining catch information through satellite phone communications between NMFS and observers, which was used to closely monitor the bigeye tuna fishery’s annual catch limit.¹⁰¹ Electronic reporting may also improve the accuracy and ease of transmission of catch information, as handwritten logbooks may be difficult to read and require observer reports to verify numbers.¹⁰²

Electronic reporting of dealer data is also used in some capacity throughout the United States, but should be a requirement for any fishery receiving an observer coverage waiver. Similar to electronic reporting for logbooks, electronic dealer data can increase the management response and accuracy in data, and may help offset the lack of information from observers NMFS needs for effective fisheries management.

IV. NMFS should take other actions to minimize the risks and impacts from COVID-19.

NMFS should evaluate whether it should take other actions, beyond waiving observer coverage, to protect and support fishing communities during this unprecedented situation. Although the emergency waiver rule offers one way to protect observers and those they would otherwise encounter from potential exposures to the coronavirus, it does not fully consider the dangers and realities of this pandemic to fishing captains, their crew, and others they engage with. Fishermen are risking their health and safety by working in very close quarters, with potentially no economic gain. NMFS should focus on taking actions to protect everyone in the fishing community from exposures to the coronavirus and the associated economic fallout from this pandemic.

First and foremost, the impact on the economy, especially the seafood industry, has been significant and will not be remedied by waiving observer requirements. Seafood demand

⁹⁹ 84 Fed. Reg. 32,096, 32,098 (July 5, 2019).

¹⁰⁰ *Id.*

¹⁰¹ W. Pac. Reg’l Fishery Mgmt. Council, Regulatory Amendment: Authorizing the Optional Use of Electronic Logbook Forms (Nov. 2006) at 2–3, *available at* <http://www.wpcouncil.org/wp-content/uploads/2019/07/Pelagics-FMP-Reg-Amendment-7-E-Logs.pdf>.

¹⁰² *See, e.g., id.* at 2 (noting that “paper logbook forms (and the interpretation thereof) are subject to a high level of error due to bad handwriting and the recording of inaccurate information”).

worldwide has drastically declined and severely impacted the livelihoods of many fishermen. Some have reported that seafood sales have dropped by as much as 95 percent; others have reported a glut in fish and other seafood products that are inundating the seafood market.¹⁰³ News reporters have covered stories of tight cash flow, dealers reluctantly buying 150,000 pounds of extra sea scallops a day to help support their fishermen,¹⁰⁴ and fishermen dumping \$80,000 worth of squid overboard because they were unable to find a customer.¹⁰⁵ Unlike other food industries that have successfully redirected some of their restaurant supply to grocery stores, the seafood industry has been unable to make that transition. Instead, grocery stores have closed their fresh seafood counters and reduced the offerings of prepackaged seafood in an effort to reduce human handling, streamline restocking, and minimize delivery frequency.¹⁰⁶ If NMFS wishes to acknowledge and account for this economic strain on fishing communities, it should make a concerted effort to keep all sectors of the U.S. supply chain safe and viable during this pandemic, which is not achieved through this rulemaking.

Importantly, NMFS should focus on disbursing the \$300 million in funds that Congress allocated to aid fishermen and the seafood industry under the Coronavirus Aid Relief and Economic Security (CARES) Act last month.¹⁰⁷ NMFS has yet to implement an efficient distribution process to ensure the funds are distributed as quickly and fairly as possible.¹⁰⁸ The agency may also have other tools at its disposal to assist fishing communities, including providing disaster relief under the MSA and Interjurisdictional Fisheries Act,¹⁰⁹ and assisting members of the seafood industry in obtaining unemployment benefits and health coverage, if needed. NMFS should not force fishing vessel captains to decide whether to protect themselves and their crew and not fish or, in the alternative, risk their health and safety by going out to sea in close quarters and attempt to sell any catch at greatly reduced prices. Rather than generate a lose-lose situation, NMFS should act swiftly and find other, safe and lawful avenues to protect fishermen's livelihoods and assist fishing communities during this time.

Second, in the current environment, there is risk of further community spread with every fishing trip that crews take. This emergency waiver rule does not mitigate the risk that fishermen

¹⁰³ See, e.g., Laura Reiley, *Commercial fishing industry in free fall as restaurants close, consumers hunker down and vessels tie up*, WASH. POST (Apr. 8, 2020, 4:00 a.m.), <https://www.washingtonpost.com/business/2020/04/08/commercial-fishing-coronavirus/>; Julie Watson, 'A Quarantine Special.' *After a Month at Sea, California Tuna Fisherman Return Home to Coronavirus Storm*, TIME (Mar. 26, 2020), <https://time.com/5810780/fishing-industry-coronavirus/>.

¹⁰⁴ Reiley, *supra* note 103 (quoting a dealer stating, "We could obviously tell our suppliers we would prefer if you don't fish for the next 30 days, . . . But I'm very concerned and nervous about the 28- and 29-year employees and the crews we've built up to produce these quantities.").

¹⁰⁵ Watson, *supra* note 103.

¹⁰⁶ Reiley, *supra* note 103.

¹⁰⁷ NOAA Fisheries Coronavirus (COVID-19) Update, NOAA FISHERIES, <https://www.fisheries.noaa.gov/national/noaa-fisheries-coronavirus-covid-19-update>

¹⁰⁸ See, e.g., Rob Hotakainen, *NOAA accused of moving too slowly on pandemic aid*, E&E NEWS (Apr. 23, 2020), <https://www.eenews.net/greenwire/2020/04/23/stories/1062952091>.

¹⁰⁹ 16 U.S.C. §§ 1861a, 1864; 16 U.S.C. § 4107.

will contract the virus as they work on boats in very close quarters and possibly continue the spread of the virus to the community at large.¹¹⁰

To reduce exposure to the coronavirus, NMFS should narrowly tailor any efforts to promote continued fishing to focus on fishing activities that are essential for food security. NMFS should consider ways to minimize the number of fishermen at the docks and in very close quarters on boats, and protect crew members of fishing vessels from living and working situations exacerbated by the stress from and the realities of the pandemic.¹¹¹ NMFS should also consider ways to foster wider availability and use of protective equipment and implement protective measures on all vessels engaged in fishing.¹¹²

Ensuring that fisheries may continue to operate with the small reduction in safety risks achieved by waiving observer coverage is an insufficient response to addressing the COVID-19 pandemic. Indeed, removing observer requirements alone could actually be counterproductive by contributing further to oversupply and reduced prices, increasing risks to fishing crews and the community through coronavirus exposure on vessels and dockside, and risking irreparable harm to the marine ecosystem.

Conclusion

The risks of the coronavirus and the economic hardship facing millions of Americans are unprecedented. We acknowledge the difficult circumstances of this time and appreciate NMFS's efforts to take some action in an attempt to help minimize harm to human health and to support the domestic fishing economy. The agency must do so, however, in compliance with its domestic and international obligations. It also should consider, separate and apart from observers, what tools it has and should be using to minimize the spread of the virus and to support fishing

¹¹⁰ See, e.g., Hal Bernton, *As Alaska fishing season set to begin, fearful communities and seafood industry try to prevent spread of coronavirus*, SEATTLE TIMES (updated Apr. 21, 2020), <https://www.seattletimes.com/business/as-alaska-fishing-season-set-to-begin-fearful-communities-and-seafood-industry-try-to-prevent-spread-of-coronavirus/> (noting concerns by local and tribal governments of fishing season putting the surrounding community at risk of the coronavirus).

¹¹¹ See, e.g., Associated Press, *Alaska fishing crewman charged with assault after argument over coronavirus safety*, ANCHORAGE DAILY NEWS (updated Mar. 30, 2020), <https://www.adn.com/alaska-news/crime-courts/2020/03/30/alaska-fishing-crewman-charged-with-assault-after-argument-over-coronavirus-safety/> (where a crew member attacked and broke the eye socket of another member after being criticized for serving food without gloves during the coronavirus pandemic). See also GEORGETOWN LAW HUMAN RIGHTS INSTITUTE, *THE PRICE OF PARADISE: VULNERABILITIES TO FORCED LABOR IN THE HAWAIIAN LONGLINE FISHING INDUSTRY* 7 (2019), <https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2019/05/Georgetown-THE-PRICE-OF-PARADISE-5-4-19-WEB-2.pdf>, (detailing how foreign crew on Hawai'i longline vessels are prohibited from leaving the fishing vessel when it is in port). With no access to health care while on the boat or the ability to socially distance themselves or self-quarantine, crewmen in these circumstances may face even greater risk of harm due to the pandemic.

¹¹² See, e.g., State of Alaska, *Alaska Protective Plan for Independent Commercial Fishing Vessels: Appendix 01 to Health Mandate 017* (Apr. 23, 2020), available at <https://gov.alaska.gov/wp-content/uploads/sites/2/COVID-MANDATE-017-Appendix-01-Protective-Plan-for-Independent-Commercial-Fish.pdf> (mandated by Alaska Governor Mike Dunleavy to slow the spread of COVID-19. It includes requirements for crew to screen, self-quarantine, travel with cloth masks, not disembark vessels while in port for non-essential purposes, wash hands, sanitize and disinfect surfaces, isolate if showing symptoms, and notify local public health authorities of any suspected or confirmed cases of COVID-19.).

communities' livelihoods. We urge NMFS to act as responsible stewards of our national marine resources and our communities.

Thank you for your consideration.

Sincerely,



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