



Via electronic and certified mail

September 12, 2016

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RE: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act and Marine Mammal Protection Act Related to the California Drift Gillnet Fishery and the California/Oregon/Washington Sablefish Pot Fishery

Dear Assistant Administrator Sobeck and Regional Administrator Stelle:

On behalf of the Center for Biological Diversity (the “Center”) and Turtle Island Restoration Network (“TIRN”), this letter serves as a sixty day notice of intent to sue the National Marine Fisheries Service (“NMFS”) over violations of sections 7 and 9 of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, for actions and inactions related to the management and regulation of the California drift gillnet fishery and the California/Oregon/Washington sablefish pot fishery (“Fisheries”). First, NMFS’s authorization of the Fisheries without a valid permit to take ESA-listed humpback and sperm whales violates the agency’s duties under the ESA. The Marine Mammal Protection Act (“MMPA”) authorization for takes of marine mammals in the Fisheries expired September 4, 2016.¹ Accordingly, the continuing operation of the Fisheries is unlawful. Second, as a consequence of the very large increase in whale entanglements from 2014 through June 30, 2016, both Fisheries have likely exceeded their respective incidental take statement levels for endangered humpback whales. Finally, we request that NMFS reinstate consultation for the Fisheries in light of the listing of humpback whales that feed off California and Oregon as two distinct population segments (“DPSs”), the Central America DPS and the Mexico DPS.²

¹ *Taking of Threatened or Endangered Marine Mammals Incidental to Commercial Fishing Operations; Issuance of Permit, Notice*, 80 Fed. Reg. 22709 (Apr. 23, 2015).

² *Identification of 14 Distinct Population Segments of the Humpback Whale (Megaptera novaeangliae) and Revision of Species-wide Listing*, 81 Fed. Reg. 62260, (Sept. 8, 2016).

To remedy these legal deficiencies, we request that NMFS: (1) propose an emergency regulation that requires a NMFS-certified observer on board all fishing trips in the Fisheries and, in the event of an interaction with a humpback whale, will immediately shut down the respective fishery until NMFS has completed consultation; or (2) close the Fisheries by September 30, 2016.

I. Legal Background

Section 9 of the ESA prohibits any “person” from “taking” threatened and endangered species.³ The term “take,” found at 16 U.S.C. § 1532(19), means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁴ Incidental take is defined as take that is incidental to, and not for the purpose of, the carrying out of an otherwise lawful activity.⁵ Such take can only be authorized under an Incidental Take Statement (“ITS”). NMFS cannot authorize incidental takes of endangered marine mammals through an ITS alone, but must also authorize the take under the MMPA.⁶

Section 7(a)(2) of the ESA requires federal agencies to consult with the departments of Commerce or Interior whenever their actions “may affect” a listed species.⁷ After consultation, NMFS issues a written statement – the biological opinion – that in the case of marine mammals “specifies those measures that are necessary to comply with section 1371(a)(5) of this title [the MMPA’s section 101(a)(5)] with regard to such taking.”⁸ After the issuance of a final biological opinion 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” or “a new species is listed...that may be affected by the identified action.”⁹

The MMPA places a moratorium on the taking of marine mammals, and only after invoking limited exceptions to this moratorium may NMFS allow take incidental to commercial fishing operations.¹⁰ Specifically, MMPA section 101(a)(5)(E) requires that for endangered or threatened marine mammals, NMFS must make a finding that any incidental mortality or serious injury from commercial fisheries will have a negligible impact on such species or stock.

³ 16 U.S.C. § 1538.

⁴ *Id.* § 1532(19).

⁵ *Id.* § 1539(a)(1)(B).

⁶ *Id.* § 1536(b)(4)(C)(iii) [ESA]; *Id.* § 1371(a)(5)(E) [MMPA].

⁷ *Id.*

⁸ 16 U.S.C. 1536(b)(4)(C)(iii).

⁹ 50 C.F.R. § 402.16.

¹⁰ 16 U.S.C. § 1371(a) (“There shall be a moratorium on the taking and importation of marine mammals . . . during which time no permit may be issued for the taking of any marine mammal . . . except in the following cases”).

Therefore, NMFS may only authorize incidental take of endangered marine mammals when it has authorized take under both the MMPA and the ESA.

II. Increasing Whale Entanglements On the U.S. West Coast 2014-2016

As of June 30, 2016, 40 whales were reported entangled in fishing gear off the U.S. West Coast, putting this year on pace to break the record for the third straight year. Reports of whale entanglements, although very high the last few years with 62 reports during 2015, provide only a minimum estimate because many entanglements are not observed. Some whales are disentangled from fishing gear, often with the help of California Whale Rescue teams that are now being overwhelmed with entanglement reports, but even disentangled whales still may suffer from injuries and stress that continue to impair their fitness. Entangled whales that continue to drag fishing gear can die slow, painful deaths. Of the 40 reported entanglements in the first six months of 2016, two were reported entangled in sablefish gear, and there may have been additional entanglements from the sablefish fishery because at least half of the reported entanglements could not be attributed to a specific fishery.

State/Region	1982-2013	2014	2015	2016 (through 6/30)
CA	281	22	58	39
OR	24	6	1	1
WA	31	3	3	0

Table 1. Whale entanglement reports by year for the U.S. West Coast. Source: NMFS 2016.

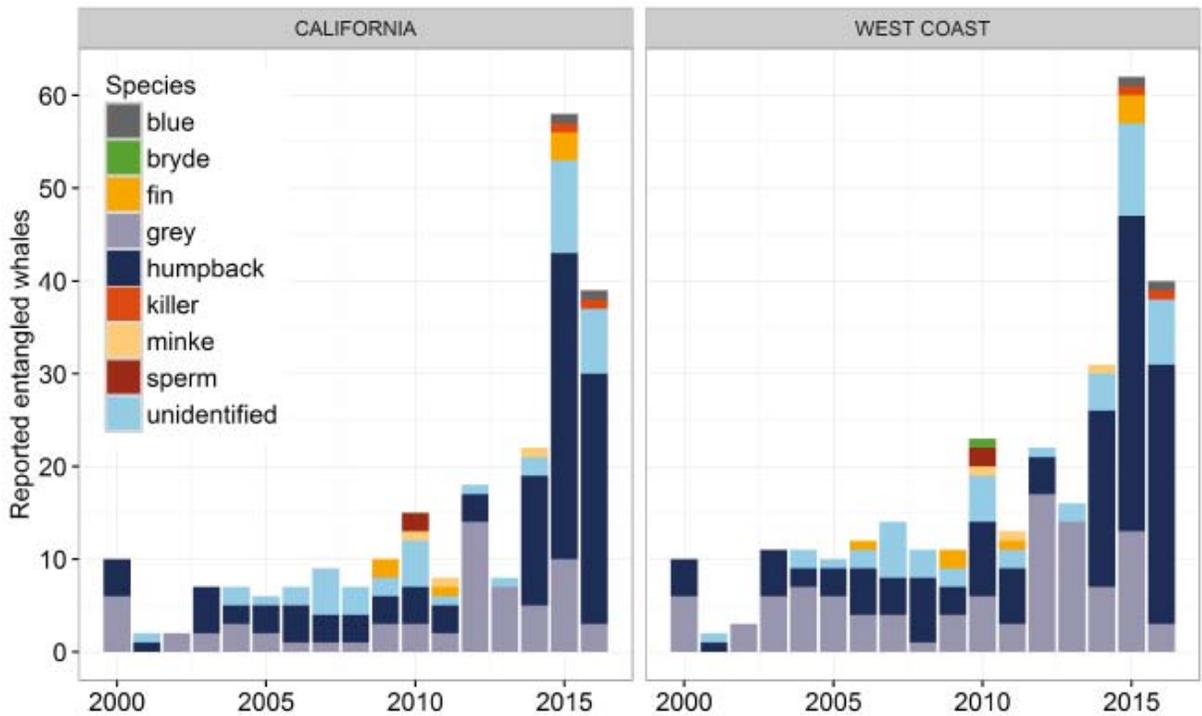


Figure 1. Whale entanglements reported (confirmed and unconfirmed) to NMFS from 2000 to June 2016. Source: NMFS, 2016, ‘Copy of Whale Entanglement Spreadsheet for WG 2014-2016-7-8-16.xlsx.’

NMFS has been working with Dungeness crab fishermen and environmental groups to monitor and address whale entanglements in crab pots. In May 2016 the California Department of Fish and Wildlife issued an advisory to crab-vessel permit holders, calling for them to voluntarily reduce the use of trailer buoys and remove gear from Monterey Bay and the shelf edges and canyons where krill and small fish were abundant.¹¹ Reports indicated that a significant amount of fishing gear remained in those areas after the advisory and new entanglements were reported. In addition to whales, one critically endangered leatherback sea turtle was reported entangled, and disentangled, in the Monterey area in April.

¹¹ California Department of Fish and Wildlife, May 24, 2016, https://www.biologicaldiversity.org/campaigns/fisheries/pdfs/Whale_Entanglement_Letter_Dcrab_Fleet_Best_Practices_5_24_16.pdf.

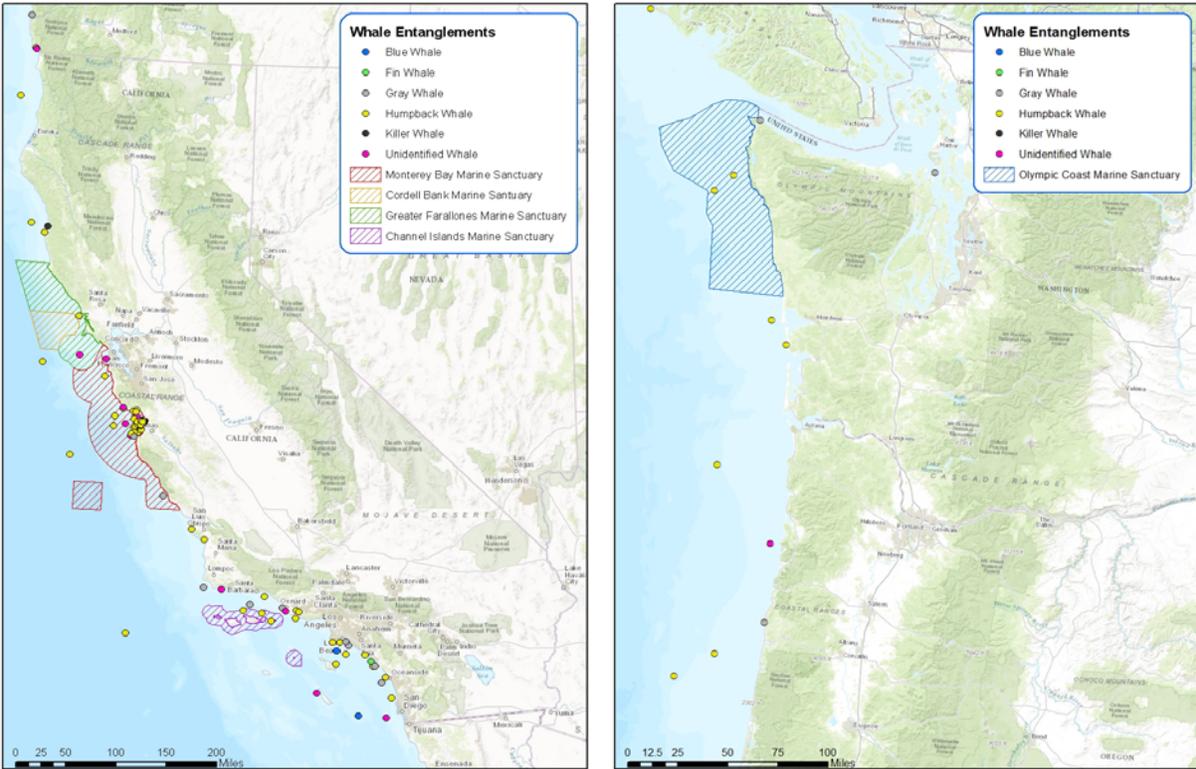


Figure 2. Reported whale entanglement locations from 2014 through July 2016 off California (left) and Oregon and Washington (right). Twenty-five reported entanglements did not have latitude and longitude information and so are not included on the map. Entanglements: Monterey Bay National Marine Sanctuary (n=44); Channel Islands National Marine Sanctuary (n=3); Olympic Coast National marine Sanctuary (n=2); Greater Farallones National Marine Sanctuary (n=2); federal waters that are not sanctuaries (n=23); and state waters (n=25). Source: NMFS 2016. Map by Kara Clauser, Center for Biological Diversity.

III. The Drift Gillnet Fishery

Four total whales were reported entangled from 2014 through June 30, 2016, in netting that may have been from the drift gillnet fishery, but could not conclusively be identified to a fishery. None of the whales were disentangled. For example, on October 17, 2015, a humpback was confirmed entangled in large mesh blue gillnet approximately four miles off Del Mar.¹² 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, consistent with the drift gillnet fishery, but

¹² NMFS, 2016.

the mesh itself is not distinctive to a particular area or fishery. The nearest Mexican port with strong fishing activities is Ensenada, 300 km away.

Three other humpback whales were reported in southern California wrapped in gillnets 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 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 California.

For several years fisheries managers have supported additional observer coverage in the drift gillnet fishery. In 2015, the Pacific Offshore Cetacean Take Reduction Team reiterated its support for 100 percent observer coverage of the California drift gillnet fishery.¹³ 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.¹⁴ As an interim emergency step toward protecting sperm whales, in 2013, NMFS required mandatory 100% observer coverage on vessel trips to deep waters, which is sperm whale habitat.¹⁵ The rule requiring 100% observer coverage for sperm whale hotspots expired in 2014.

Unfortunately in the 2015-2016 drift gillnet fishing season – i.e. during a time of peak whale entanglements – observer coverage was 10.8% of all sets, which is the lowest observer coverage of the fishery since the 1991-1992 fishing season. One third of the fishing effort was “unobservable.” Observer coverage at historical lows undermines NMFS’s ability to determine whether the trigger has been met for reinitiation.

NMFS must reinitiate consultation for the drift gillnet fishery because the four endangered humpback whales reported entangled in gillnets in southern California in 2015 exceeded the ITS level of up to two humpback whale interactions in one year.¹⁶ And because

¹³ Key Outcomes Memorandum, Pacific Offshore Cetacean Take Reduction Team Meeting, March 17-19, 2015: Long Beach, California, at 11, 16.

¹⁴ Pacific Fishery Management Council, *California Large Mesh Drift Gillnet Fishery Management Final Preferred Alternatives*, <http://www.pcouncil.org/2015/09/38641/california-large-mesh-drift-gillnet-fishery-management-final-preferred-alternatives/>.

¹⁵ National Marine Fisheries Service, Fisheries Off West Coast States; Highly Migratory Fisheries; California Drift Gillnet Fishery; Sperm Whale Interaction Restriction, 78 Fed. Reg. 54548, 54550 (Sept. 4, 2013), renewed May 22, 2014 through August 5, 2014 (79 Fed. Reg. 29377 (May 22, 2014)).

¹⁶ 50 CFR 402.16; Revised Incidental Take Statement for the California Thresher Shark/Swordfish Drift Gillnet Fishery – August 21, 2013, Table 12, www.pcouncil.org/wp-content/uploads/poctr_dgn_biop.pdf.

reported entanglements are a minimum estimate of all entanglements in a fishery, it is likely the level of incidental take is even higher.

As stated above, we request that NMFS either: (1) propose an emergency regulation that requires a NMFS-certified observer on board all California drift gillnet fishing trips and, in the event of an interaction with a humpback whale, immediately shuts down the drift gillnet fishery until NMFS has completed consultation; or (2) close the drift gillnet fishery by September 30, 2016. We ask in particular that the observers record not only whales entangled in the nets, but also large holes in the gillnet or missing segments that could indicate a “blow-through” of a whale.

IV. Sablefish Pot Fishery

A. Entanglements Directly Attributable to Sablefish Pots, 2014-2016

Since the start of 2014, several humpback whales have been observed or reported entangled in sablefish fishing gear. One was observed dead and brought up with pot gear in 2014, one reported entangled and released alive in 2014, and two others were reported entangled and released alive in April and May 2016. These anecdotal reports underscore the importance of having observers onboard to not only record interactions but also to help with disentanglements.

In October 2014, an observer aboard a limited entry sablefish pot vessel fishing off the Washington/Oregon border saw a deceased adult humpback whale brought next to the vessel while recovering a string of approximately 35 pots with weighted line between traps. The whale had apparently been caught in a portion of the ground line between the pots and drowned. This event prompted a deckhand on the vessel to report a similar encounter on another limited entry sablefish vessel two months prior. This time the whale was entangled in the buoy line. The crew was able to pull the whale’s tail near the rail of the vessel and cut the line with knives in hand to free it and the whale was able to swim away.

In 2016, two endangered humpback whales were at least partially disentangled from sablefish pots: First, in April 2016 a fisherman and fishery observer disentangled a humpback from confirmed sablefish gear off Humboldt, California. It was unclear whether the whale was fully disentangled. Second, in May 2016, a juvenile humpback was disentangled off Oregon. It had been entangled with ¾” line with sablefish pot gear, three poly balls and a high flyer. The entire gear set included a total of 37 traps set at intervals at 220 fathoms and 80 pound anchors at each end. The whale swam away from the disentanglement efforts with about 3’ feet of line on its tail.

B. Estimated Entanglements in Sablefish Pots, 2014-2016

To calculate incidental take of endangered humpback whales in the sablefish fishery, the 2012 biological opinion requires that a portion of unidentified whale and gear entanglements are counted against the incidental take statement level. With the large increase in humpback whale entanglements reported 2014-2016, we believe the fishery has exceeded the incidental take statement of a 5-year average of 1 humpback whale injury or mortality per year, and up to three injuries or mortalities per year. Specifically, we believe that from 2014 through June 30, 2016 an estimated 5.3 humpback whales were entangled in sablefish gear. Therefore, we request that NMFS reinstate consultation for the sablefish pot fishery and, due to the risk of population-level effects resulting from serious injury and mortality of the recently listed Central America DPS, require a NMFS-certified observer on board all sablefish pot fishing trips and, in the event of an interaction with a humpback whale, immediately shut down the pot fishery until NMFS has completed consultation; or (2) close the sablefish pot fishery by September 30, 2016.¹⁷

First, from 2014 through June 30, 2016, there were six confirmed reports of entangled, unidentified whales with rope and buoy on them.¹⁸ The biological opinion would estimate that 62.5% of these, or 3.75, were humpback whales. Of those, the biological opinion estimates 16.7%, or **0.63**, were entangled in sablefish gear. Second, for each humpback whale entangled in unidentified fishing gear, the biological opinion estimates that 16.7% were entangled in sablefish gear. From 2014 through June 30, 2016, there were 28 confirmed reports of humpback whales entangled in unspecified fishing gear, resulting in an estimated **4.67** humpback whales entangled in sablefish fishing gear.¹⁹ In total, this leads to an estimated **5.30** humpback whales entangled in sablefish gear from 2014 through June 30, 2016.

V. **Identification of Two Humpback DPSs**

Last week NMFS published a final decision to identify and downlist to threatened the Mexico humpback DPS (that feeds off California, Oregon and Alaska). One reason for keeping the DPS as threatened and not delisting entirely was a new, lower abundance estimate of 3,264 individuals (the prior estimate was around 6,000 individuals). Another reason that NMFS

¹⁷ 50 CFR 402.16.

¹⁸ These had the following NMFS CaseIDs: 20150301Unk ; 20150509Unk; 20150825Unk; 20150827Unk; 20151107Unk; 20160624Unk.

¹⁹ These had the following NMFS CaseIDs:

2014 – April 2015: 20140501Mn; 20140719Mn; 20140816Mn; 20140912Mn; 20140916Mn; 20140919Mn; 20140920Mn_2; 20150108Mn; 20150216Mn; 20150326Mn.

May 2015-June 2016: 20160522Mn_1; 20160601Mn_2; 20160602Mn; 20150719Mn; 20150810Mn; 20150528Mn; 20151025Mn; 20151017Mn; 20150707Mn; 20150927Mn; 20151031Mn; 20150703Mn; 20151028Mn; 20150514Mn; 20150516Mn; 20150609Mn; 20150625Mn; 20150929Mn.

decided to keep in place ESA protections for the Mexico DPS is because of the increasing number of West Coast whale entanglements.

In the same rule NMFS designated as endangered the Central America DPS, which consists of about 400 individuals although it could be less than 250. This DPS feeds almost exclusively offshore California and Oregon. While the majority of humpback whales feeding in this area are from the Mexico DPS, the impact of injuries and death from fishing gear would disproportionately affect the smaller, more vulnerable, Central America DPS.

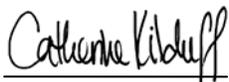
VI. Conclusion

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 fishing gear. Since the expiration of the MMPA authorization on September 4, 2016, each interaction that occurs in the California drift gillnet fishery and the sablefish pot fishery will violate the ESA and the MMPA. The operation of the Fisheries creates an ongoing and imminent probability of taking endangered whales.

As stated above, NMFS's authorization of the Fisheries without a valid ITS violates Section 9 of the ESA and its failure to reinitiate consultation and continued reliance on inadequate biological opinions to authorize the Fisheries constitutes a violation of Section 7(a)(2). We request an emergency regulation to require 100 percent observer coverage in the Fisheries and, in the event of an interaction with a humpback whale, immediately closure of the fishery until NMFS has completed consultation. We also request reinitiation of ESA consultation for the Fisheries due to both the very high numbers of entanglement reports from 2014 through June 30, 2016, and the rule listing two DPSs of humpbacks that feed off the West Coast.

Please feel free to contact me at 202-780-8862 to discuss this matter.

Sincerely,



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