June 6, 2022

Gina Raimondo, Secretary
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Kimberly Damon-Randall, Director
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Scott Rumsey, Acting Regional Administrator
National Marine Fisheries Service
West Coast Regional Office
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Re: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act Related to the California Drift Gillnet Fishery

Dear Secretary Raimondo, Director Damon-Randall, and Regional Administrator Rumsey:

On behalf of the Center for Biological Diversity (the “Center”), 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 authorization of the California drift gillnet fishery (“Fishery”). Based on the data NMFS has provided, the Fishery caught approximately a dozen humpback whales in 2021. This number of humpback whales has the potential to jeopardize the continued existence of ESA-listed whales, particularly when combined with vessel strikes and bycatch in other fisheries.

NMFS’s continued authorization of the Fishery without an incidental take statement (“ITS”) to take ESA-listed humpback whales – the Central America distinct population segment (“DPS”) and Mexico DPS – violates the ESA’s prohibition on take of endangered animals.1 NMFS listed these DPSs in 20162 and has not issued an ITS that allows take incidental to the management and authorization of the Fishery. Accordingly, the continuing take of humpback whales in the Fishery is unlawful.

2 Endangered and Threatened Species; Identification of 14 Distinct Population Segments of the Humpback Whale (Megaptera novaeangliae) and Revision of Species-Wide Listing; Final Rule, 81 Fed.
NMFS has failed to initiate and complete ESA consultation on the impacts of the Fishery on ESA-listed humpback whales and their critical habitat, as the ESA requires.\textsuperscript{3} NMFS published a final rule identifying critical habitat for the humpback whale DPSs in 2021, yet has not initiated consultation on the impact of the Fishery on either ESA-listed humpback whales or their critical habitat.\textsuperscript{4} Therefore NMFS’s continued authorization of the Fishery violates the agency’s duty to ensure its actions are not likely to jeopardize the continued existence of ESA-listed humpback whales or destroy or adversely modify their critical habitat.\textsuperscript{5} NMFS’s reliance on the 2013 legally-flawed biological opinion to authorize the Fishery violates the agency’s duty to ensure its actions are not likely to jeopardize the continued existence of ESA-listed humpback whales or destroy or adversely modify their critical habitat.\textsuperscript{6}

NMFS must reinitiate consultation in light of new information since publication of the biological opinion issued May 2, 2013, for the Fishery that reveals effects of the Fishery on humpback whales and their critical habitat to an extent NMFS has not previously considered.\textsuperscript{7} This new information includes (1) the aforementioned rules identifying the Central America DPS and the Mexico DPS and designating critical habitat, (2) elevated numbers of humpback whale entanglements since 2014, (3) Fishery interactions with humpback whales in the 2021/2022 fishing season and in the 2020/2021 fishing season,\textsuperscript{8} (4) issuance of the Marine Mammal Protection Act (“MMPA”) section 101(a)(5)(E) permit that authorized the CA/OR/WA stock of humpback whale and CA/OR/WA stock of sperm whale,\textsuperscript{9} and (5) a change in the Fishery from targeting swordfish and sharks to targeting Pacific bluefin tuna.\textsuperscript{10} NMFS’s ongoing failure to reinitiate and complete consultation violates section 7 of the ESA.\textsuperscript{11}

To remedy these legal deficiencies, we request that NMFS implement an emergency regulation to prevent further Fishery interactions with humpback whales to remain in place until NMFS has published a new biological opinion that includes an ITS for humpback whales. The emergency rule would close the Fishery in waters off of Los Angeles, Orange, and San Diego

\textsuperscript{3} 16 U.S.C. § 1536(a)(2).


\textsuperscript{5} 16 U.S.C. § 1536(a)(2).

\textsuperscript{6} 16 U.S.C. § 1536(a)(2).

\textsuperscript{7} Id.; 50 C.F.R. § 402.16.


\textsuperscript{11} 16 U.S.C. § 1536(a)(2).
counties because this area is predicted to support high densities of whales in the winter and spring months.\textsuperscript{12} NMFS has noted that in this area, “the higher densities of humpback whales in winter may stem from the fact that some of the whales sighted in this area are likely transiting” rather than staying in the area to feed.\textsuperscript{13} NMFS must take action to protect these migratory giants from Fishery interactions while on their long-distance routes. If NMFS does not take action within 60 days, we will pursue litigation over these claims.

I. Legal Background

Congress enacted the ESA, in part, to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . [and] a program for the conservation of such endangered species and threatened species.”\textsuperscript{14}

Section 2(c) of the ESA establishes that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.”\textsuperscript{15} The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”\textsuperscript{16} Similarly, section 7(a)(1) of the ESA directs that NMFS and other federal agencies shall use their programs and authorities to conserve endangered and threatened species.\textsuperscript{17}

To fulfill the purposes of the ESA, section 9 of the ESA prohibits any “person” from “taking” any endangered species, including endangered humpback whales.\textsuperscript{18} This take prohibition also applies to threatened humpback whales.\textsuperscript{19} 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.”\textsuperscript{20} Incidental take is defined as take that is incidental to, and not for the purpose of, the carrying out of an otherwise lawful activity.\textsuperscript{21}

Additionally, section 7(a)(2) of the ESA requires federal agencies to “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 or result in the destruction or adverse modification of [their] federally designated critical habitat.”\textsuperscript{22} To comply with this

\textsuperscript{13} Id.
\textsuperscript{14} 16 U.S.C. § 1531(b).
\textsuperscript{15} Id. § 1531(c)(1).
\textsuperscript{16} Id. § 1532(3).
\textsuperscript{17} Id. § 1536(a)(1).
\textsuperscript{18} Id. § 1538.
\textsuperscript{19} 50 C.F.R. § 223.213.
\textsuperscript{20} 16 U.S.C. § 1532(19).
\textsuperscript{21} Id. § 1539(a)(1)(B).
\textsuperscript{22} Id. § 1536(a)(2); 50 C.F.R. § 402.14(a).
mandate, section 7(a)(2) requires federal agencies to consult with the departments of Commerce or Interior whenever their actions “may affect” a listed species and utilize the “best scientific and commercial data available” in doing so.23

Where, as here, NMFS is both the action agency and the consulting agency, NMFS must undertake intra-agency consultation. At the completion of consultation, the consulting branch of NMFS issues a biological opinion that determines whether the action is likely to jeopardize the continued existence of the species. If NMFS concludes that the action will not cause jeopardy, but may result in the take of endangered species, NMFS will issue an ITS that specifies “the impact, i.e., the amount or extent, of . . . incidental taking” that may occur.24 An ITS must include “reasonable and prudent measures . . . necessary . . . to minimize such impact,” and must specify the permissible level of taking, “thus . . . serv[ing] as a check on the agency’s original decision that the incidental take of listed species resulting from the proposed action will not jeopardize the continued existence of the species.”26 Additionally, when the endangered species to be taken are marine mammals, the ITS must also “specify] those measures that are necessary to comply with section 1371(a)(5) of this title [the Marine Mammal Protection Act’s section 101(a)(5)] with regard to such taking.”27 The take of a listed species in compliance with the terms of a valid ITS is not prohibited under section 9 of the ESA.28

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;” “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;” or “a new species is listed…that may be affected by the identified action.”29

II. NMFS Is Causing Ongoing Humpback Whale-Fishery Interactions in Violation of ESA Section 9

Since 2014’s drastic increase in reported West Coast whale entanglements, fishery entanglements of humpback whales have remained a serious conservation problem. In 2021, NMFS confirmed 27 entangled whales off the coasts of California, Oregon, and Washington or off the coast of other countries but entangled in U.S. commercial fishing gear.30 As in past years, humpback whales were the most common species entangled with 17 separate entanglements confirmed in 2021. The actual entanglements are likely far higher because most confirmed reports come from opportunistic sightings of entangled whales. In the 2020-2021 drift gillnet fishing season, in which one humpback whale was observed injured, observer coverage was

26 Id.; Center for Biological Diversity v. Salazar, 695 F.3d 893, 911 (9th Cir. 2012).
28 Id. § 1536(b)(4), (o)(2); 50 C.F.R. § 402.14(i)(5).
29 50 C.F.R. § 402.16.
about 15 percent; in the 2021-2022 fishing season, in which another humpback whale was observed incidentally caught, observer coverage was 19.49 percent.31

Figure 1. Whale entanglements in commercial fishing gear in southern California. Gear with multiple entanglements include drift gillnet gear (green); unidentified gear (red); and Dungeness crab (dark blue).32

The Fishery entangles humpback whales in nets a mile long set overnight to catch tuna, swordfish, and sharks by ensnaring them by the gills. Endangered species like large whales and sea turtles are vulnerable to entanglement, injury, and drownning in drift gillnets. The majority of the fishing effort occurs from August 15 through January 31.

The two observed humpback whale entanglements in 2021 resulted in one whale released alive uninjured and one released alive with gear attached.33 Given the conservation concerns over the imperiled population of endangered Central America humpback whales that migrates to feed almost exclusively off California and Oregon, this level of interactions is alarming. Wade et al. (2021) estimated the population of the Central America DPS to be 755 individual whales.34 NMFS estimated that in the 2020-2021 season, 4.55 humpback whales were caught per 100 sets.35 NMFS estimated 147 sets in that season, so approximately 6.7 humpbacks were caught in the 2020-2021 season. The observer coverage for the 2021-2022 season was close to 20 percent, so the one whale caught is likely an estimated 5 whales caught.36 In total, that means an estimated 11.7 humpbacks were caught in the two most recent fishing seasons.

NMFS’s permitting, management, oversight, and authorization of the Fishery causes and will continue to cause these entanglements, which kill, injure, harm, harass, capture, and otherwise take threatened and endangered humpback whales. NMFS is responsible for authorizing operation of the Fishery and managing the impacts of commercial fisheries on marine mammals and endangered species under the authority of the MMPA, ESA, and the

31 NMFS West Coast Region Observer Program Observed Catch - 2020/2021, supra n.10.
32 Id.
33 NMFS Report on Highly Migratory Species Activities, supra n. 7.
34 Wade, P.R. Estimates of abundance and migratory destination for North Pacific humpback whales in both summer feeding areas and winter mating and calving areas. IWC SC/68C/IA/03 (2021).
35 NMFS West Coast Region Observer Program Observed Catch - 2020/2021, supra n.10.
36 NMFS Report on Highly Migratory Species Activities (June 2022), supra n.8.
Magnuson-Stevens Fishery Conservation and Management Act. For example, NMFS issues a West Coast Drift Gillnet limited entry permit to fishermen using drift gillnet gear to fish for highly migratory species within the Exclusive Economic Zone of California and Oregon. NMFS also issues a Pacific Highly Migratory Species permit endorsed for drift gillnet and a Marine Mammal Authorization Program certificate that fishermen must carry on board the vessel to lawfully fish in the Fishery. NMFS recently issued the Fishery a MMPA permit to seriously injure and kill the CA/OR/WA stock of humpback whale and CA/OR/WA stock of sperm whale. These affirmative acts of regulatory control by NMFS subject it to section 9 liability for entangling these threatened and endangered whales.

These and other acts and omissions in permitting, managing, overseeing, and authorizing the Fishery, individually and collectively comprise regulatory control of the Fishery, thereby making NMFS liable under the ESA for causing entanglements of endangered and threatened whales in drift gillnets.

III. NMFS Must Reinitiate Consultation Based on New Information.

New information warranting reinitiation of consultation includes (1) NMFS’s ESA listing of the Central America DPS and the Mexico DPS and designating critical habitat, (2) elevated numbers of humpback whale entanglements since 2014, (3) Fishery interactions with humpback whales in the 2021/2022 fishing season and in the 2020/2021 fishing season, (4) issuance of the Marine Mammal Protection Act section 101(a)(5)(E) permit that authorized the CA/OR/WA stock of humpback whale and CA/OR/WA stock of sperm whale, and (5) a change in the Fishery from targeting swordfish and sharks to targeting Pacific bluefin tuna.

First, since publication of the Biological Opinion, NMFS has published the final rule identifying humpback whale DPSs and the final rule identifying humpback whale critical habitat. The prey items necessary for the conservation of each DPS differ in part because the two DPSs have different but overlapping foraging grounds. Unfortunately, some of the DPS’s shared prey items – Pacific sardine and northern anchovy – have new information about low or

39 Id. (including “Additional Requirements”).
43 NMFS West Coast Region Observer Program Observed Catch - 2020/2021, supra n.8.
declining abundances. Recent science that shows that marine heatwaves caused both sardine and anchovy biomass to decrease despite science that once predicted that sardine biomass would increase with warmer temperatures resulting from decadal-scale changes.\textsuperscript{46} It is important for NMFS to reinitiate consultation on the impacts of the Fishery on humpback whale DPSs and critical habitat. The Fishery’s target, Pacific bluefin tuna, preys on the same items as are included in humpback whales’ critical habitat. This suggests that fishing for tuna feeding on anchovy and sardine increases the risk that humpback whales will be entangled.

Second, while fishing gear has always been a primary threat to endangered whales, since the 2013 biological opinion, humpback whale entanglements have increased greatly. Between 1982 and 2017, 184 entangled humpback whales were reported.\textsuperscript{47} Humpback whale entanglement reports have generally been increasing in frequency since 2000, with a sharp increase in the years 2014 to 2017, reaching a record high of 53 entanglements reported in 2016.\textsuperscript{48} In some areas off the West Coast, changing environmental conditions and whale migrations have increased the time in which humpback whales are at risk of entanglement.\textsuperscript{49} Based on these models, climate change is likely to continue to exacerbate the risk of West Coast whale entanglement.\textsuperscript{50} It is therefore important for NMFS to reinitiate consultation to assess accurately future entanglement risk and include terms and conditions to mitigate the risk so as not to jeopardize the continued existence of endangered whales.

Third, as described in the section on NMFS’s section 9 violations, the incidental take of ESA-listed whales in the Fishery in the 2020/2021 (one observed; 6.7 estimated) and 2021/2022 (one observed; 5 estimated) fishing seasons require NMFS to reinitiate consultation. The 2013 biological opinion anticipated that one humpback whale would be observed taken in the Fishery during a five-year period.\textsuperscript{51} These takes exceed the 2013 ITS for the world-wide listing of

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\item \textsuperscript{46} Cheung, William WL, and Thomas L. Frölicher. “Marine heatwaves exacerbate climate change impacts for fisheries in the northeast Pacific.” \textit{Scientific reports} 10.1: 1-10 (2020) (“warm regimes tend to favor sardine’s recruitment and abundance while cool regimes favor anchovy. Thus, under decade-scale mean ocean warming, sardine was projected to increase in biomass while the opposite was projected for anchovy in the California Current. In contrast, poleward range expansion of sardine and anchovy was projected to result in long-term increase in their abundance in the Gulf of Alaska. However, the projected short-term rapid warming under MHWs pushed environmental temperature beyond those preferred by both sardine and anchovy, leading to a drop in their biomasses in both the California Current and Gulf of Alaska.”)
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Ingman, Kaytlin, et al. “Modeling changes in baleen whale seasonal abundance, timing of migration, and environmental variables to explain the sudden rise in entanglements in California.” \textit{Plos one} 16.4 (2021): e0248557.
\item \textsuperscript{50} Id.
\item \textsuperscript{51} NMFS, \textit{Biological Opinion on the continued management of the drift gillnet fishery under the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species}, 2012/03020:DDL, May 2, 2013; see also Memorandum from W. Stelle, Southwest Region, to M. Helvey, Sustainable Fisheries Division, regarding Consideration of Potential Impacts from the Temporary Rule for Emergency Action
\end{itemize}
humpback whales under the ESA, and thus should trigger reinitiation in the absence of new ITSs for the Central America and Mexico DPSs.

Fourth, in the past NMFS has consulted on the issuance of the issuance of the MMPA section 101(a)(5)(E) permit and thus should reinitiate consultation on the May 11, 2022 issuance of the MMPA permit.\textsuperscript{52} In 2013 NMFS published a memorandum with a revised ITS that “also constitutes our ESA consultation on the issuance of the 101(a)(5)(E) permit to the Federally managed DGN and WA/OR/CA sablefish trap fisheries.”\textsuperscript{53} This is particularly important now because the 2022 MMPA permit authorized incidental serious injury and mortality of the CA/OR/WA stock of humpback whale without analyzing the impact to the ESA-listed humpback whale DPSs. NMFS must reinitiate consultation on the issuance of the MMPA permit.

Fifth, the Fishery has changed from targeting swordfish and thresher shark to targeting Pacific bluefin tuna in the 2020/2021 and 2021/2022 fishing seasons. In both fishing seasons it was the most commonly caught species, and the most commonly kept species.\textsuperscript{54} More Pacific bluefin tuna were caught than swordfish or thresher shark by an order of magnitude. Targeting a different fish entails significant changes to fishing behavior, including changes in the temporal and spatial extent of fishing effort. This likely has changed the likelihood of incidental catch of humpback whales, which requires that NMFS reinitiate consultation.

IV. \textbf{NMFS’s Reliance on the 2013 Biological Opinion Violates Its ESA Section 7 Duties.}

NMFS’s reliance on the 2013 legally-flawed biological opinion to authorize the Fishery violates the agency’s duty to ensure its actions are not likely to jeopardize the continued existence of ESA-listed humpback whales or destroy or adversely modify their critical habitat.\textsuperscript{55} By relying on the unlawful biological opinion to support the continued permitting, authorization, and management of the Fishery, NMFS is failing to ensure its actions will avoid the likelihood of jeopardy to ESA-listed humpback whales and is failing to ensure its actions will not destroy or adversely modify their critical habitat. Thus, NMFS has violated, and continues to violate, section 7(a)(2) of the ESA.\textsuperscript{56}

\begin{itemize}
\item to Modify the 2013-2014 California Thresher shark/Swordfish Drift Gillnet (DGN) Swordfish Fishery, Aug. 21, 2013 (including a revised Table 13).
\item Memorandum from W. Stelle, \textit{supra} n. 47.
\item NMFS West Coast Region Observer Program Observed Catch - 2020/2021, \textit{supra} n.10; NMFS Report on Highly Migratory Species Activities, June 2022, at 2, \textit{supra} n.8.
\item Council Staff, \textit{Information paper on Council action setting hard caps for protected species in the California/Oregon large mesh drift gillnet fishery}, Agenda Item G.4 (June 2022), Attachment 1 at 18 (“The most recent BO and ITS for the DGN fishery was completed in 2013 (NMFS 2013).”), https://www.pcouncil.org/documents/2022/05/g-4-attachment-l-information-paper-on-council-action-setting-hard-caps-for-protected-species-in-the-california-oregon-large-mesh-drift-gillnet-fishery.pdf/
\item 16 U.S.C. § 1536(a)(2).
\end{itemize}
V. Conclusion

NMFS has violated and continues to violate the ESA’s section 7 and 9. NMFS permits, manages, regulates, and authorizes the Fishery in a manner that has resulted in, and is likely to continue to result in, violations of the ESA by entangling threatened and endangered humpback whales. For nearly six years NMFS has failed to complete consultation on the Fishery’s impact on the Central America and Mexico humpback whale DPSs, in dereliction of NMFS’s mandatory statutory duties under the ESA. For the past two fishing seasons catch of ESA-listed humpback whales in the Fishery has been shockingly high. New science suggests that a changing climate makes whales more vulnerable to fishing gear entanglement; West Coast observations have borne out this prediction with peak humpback whale entanglement reports occurring in 2016. NMFS issued a MMPA permit to take humpback whales from the CA/OR/WA stock of humpback whale without consulting under the ESA on impacts to the Central America DPS and Mexico DPS of humpback whales. The Fishery has changed from targeting swordfish and thresher shark to Pacific bluefin tuna, which feeds on the same prey items as those designated as the essential feature of humpback whale critical habitat, suggesting a new overlap between the Fishery and humpback whales.

NMFS has neither reinitiated consultation nor recommended any management actions to address the continuing interactions. We ask you to end this continuing violation of the ESA by either no longer permitting the use of gear or fishing practices causing these entanglements or obtaining a valid ITS and, in the meantime, using your authority to restrict, modify, or eliminate the use of commercial drift gillnet gear. We reiterate our proposal that NMFS take immediate action to prevent further Fishery interactions with humpback whales by closing the Fishery in waters off Los Angeles, Orange, and San Diego counties because this area is predicted to support high densities of whales in the winter and spring months. This closure should remain in place until a new biological opinion that includes ITSs for the Central American DPS and the Mexico DPS humpback whales is published.

Unless NMFS takes action to remedy the legal violations discussed in this letter within 60 days, we will bring legal action to seek appropriate relief to protect threatened and endangered humpback whales from continued entanglements. If you have any questions about this notice, please feel free to contact me.

Sincerely,

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