

Via first class certified mail and electronic mail

July 1, 2014

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RE: Request for Immediate Compliance with Regulatory Measures Necessary to Protect Loggerhead Sea Turtles from the California Drift Gillnet Fishery During an El Niño Event; 50 C.F.R. § 660.713(c)(2)

Dear Assistant Administrator Sobeck and Regional Administrator Stelle:

Our organizations are writing to request immediate compliance with non-discretionary regulations governing the California Drift Gillnet Fishery. Current regulations prohibit fishing with drift gillnet gear in the Pacific loggerhead conservation area from June 1 to August 31 during a forecasted El Niño event and require the National Marine Fisheries Service (“NMFS”) to publish notice of such closure in the Federal Register. 50 C.F.R. § 660.713(c)(2). NOAA’s Climate Prediction Center has released numerous public pronouncements that an El Niño event will occur this summer, and there have been documented sea surface temperature anomalies in southern California. Nonetheless, NMFS has failed to publish the required notice. On June 26, 2014, we participated in a telephone conversation with NMFS staff from the West Coast Region in which we expressed our concerns but received no assurances that NMFS would comply with its obligations. Absent an indication from you that NMFS will immediately take action to come into compliance with these requirements by July 8, 2014, our organizations will consider all available options to compel action. Our concerns are detailed below. We look forward to your prompt response.

1. NMFS regulations prohibit drift gillnet fishing east of the 120° W meridian from June 1 through August 31 during an El Niño event.

In 2000, a NMFS biological opinion found that the California Drift Gillnet Fishery, as then managed, jeopardized the continued existence of the loggerhead sea turtle in violation of the Endangered Species Act (“ESA”). The reasonable and prudent alternative mandated to avoid jeopardy included a seasonal closure of waters off southern California during El Niño years,

when warmer water brought loggerhead sea turtles into the range of the California fishery. After delay and subsequent litigation, *Center For Biological Diversity v. National Marine Fisheries Service*, No. 02-05643 (N.D. Cal. filed Dec. 2, 2002), NMFS promulgated regulations implementing this provision, currently codified at 50 C.F.R. § 660.713(c)(2). NMFS has relied on the existence (and presumed implementation) of these regulations in subsequent biological opinions to support no-jeopardy findings for the fishery (NMFS BiOp (2013) at 82).

When El Niño conditions exist or are forecasted, regulations prohibit drift gillnet fishing in the Pacific loggerhead conservation area:

(2) *Pacific loggerhead conservation area.* No person may fish with, set, or haul back drift gillnet gear in U.S. waters of the Pacific Ocean east of the 120° W. meridian from June 1 through August 31 during a forecasted, or occurring, El Niño event off the coast of southern California.

50 C.F.R. § 660.713(c)(2).

In determining whether an El Niño event is forecasted or occurring, the Assistant Administrator is required to rely on certain sources of information, including NOAA's Climate Prediction Center and monthly sea surface temperature anomaly charts. 50 C.F.R. § 660.713(c)(2)(ii). Those sources indicate that El Niño conditions are occurring or are forecasted. Because oceanographic information from (a) NOAA's Climate Prediction Center and (b) sea surface temperature anomalies shows that an El Niño event is occurring or is going to occur, the Assistant Administrator must publish a notification pursuant to 50 C.F.R. § 660.713(c)(2)(i).

a. The Assistant Administrator must rely on information developed by NOAA offices such as NOAA's Climate Prediction Center.

The Assistant Administrator must rely on information from NOAA offices to identify El Niño conditions:

(ii) *Determination of El Niño conditions.* The Assistant Administrator will rely on information developed by NOAA offices which monitor El Niño events, such as NOAA's Climate Prediction Center and the West Coast Office of NOAA's Coast Watch program, in order to determine whether an El Niño is forecasted or occurring for the coast of southern California.

50 C.F.R. § 660.713(c)(2)(ii).

The NOAA Climate Prediction Center meteorologists and oceanographers review climate and weather observations and data along with model results and assess their meaning, significance and likely future climate impacts. Around the middle of each month, the Climate Prediction Center issues an El Niño-Southern Oscillation ("ENSO") Diagnostic Discussion. The May 8, 2014, Diagnostic Discussion concluded that the tropical Pacific continues to evolve toward El

Niño and the overall chance of El Niño was 65% during the Northern Hemisphere summer (Climate Prediction Center, May 2014). Thus the trigger for the Pacific loggerhead conservation area was met and the prohibition on fishing has been effective as of June 1, 2014. It is imperative, therefore, that the agency immediately publish the required notice and enforce the mandatory closure.

In addition to the monthly Diagnostic Discussion, the Climate Prediction Center gives a weekly ENSO update that provides the most up-to-date predictions. The most recent update shows that most models favor El Niño conditions to develop in June, July, and August and persist through the Northern Hemisphere winter 2014-2015 (fig. 1). The models project sea surface temperature anomalies at the equatorial Pacific (area NINO3.4) for the coming months, with few exceptions (fig. 1).

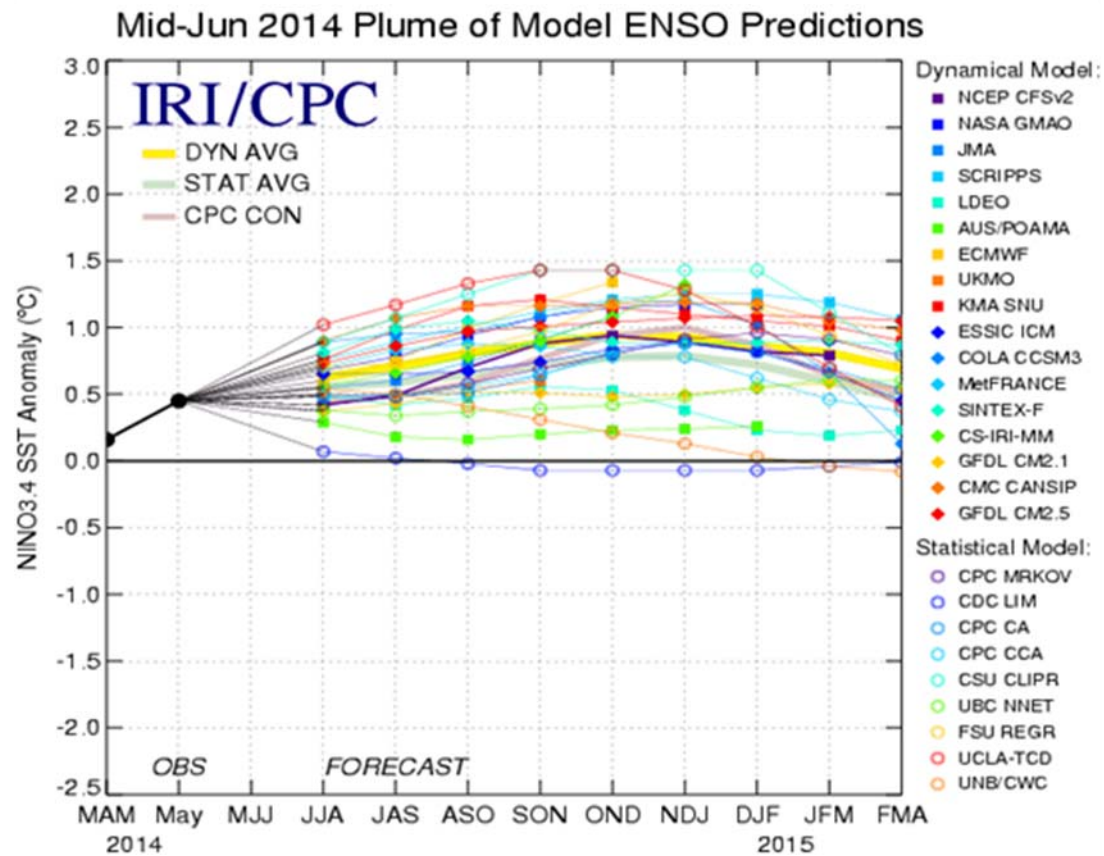


Figure provided by the International Research Institute (IRI) for Climate and Society (updated 17 June 2014).

Figure 1. IRI/CPC Pacific El Niño 3.4 SST Model Outlook. Most models favor El Niño (greater or equal to +0.5) to develop in June, July and August and persist through Northern Hemisphere winter 2014-2015. (Source: NOAA Climate Prediction Center (23 June 2014), slide 25.)

Based on the Diagnostic Discussion, the Climate Prediction Center issues an ENSO alert if warranted. The alert system includes three levels, a “watch” when conditions are favorable, “advisory” when conditions are observed, and “final advisory” when conditions have ended (NOAA, Climate Prediction Center Website). The current El Niño Watch means that “conditions are favorable for the development of El Niño conditions within the next six months” (*id.*).

b. The Assistant Administrator must use sea surface temperature data for determining whether El Niño conditions are present off of southern California.

The Assistant Administrator must also use monthly sea surface temperatures in making a finding that El Niño conditions exist:

The Assistant Administrator will use the monthly sea surface temperature anomaly charts to determine whether there are warmer than normal sea surface temperatures present off of southern California during the months prior to the closure month for years in which an El Nino event has been declared by the NOAA Climate Prediction Center. Specifically, the Assistant Administrator, will use sea surface temperature data from the third and second months prior to the month of the closure for determining whether El Nino conditions are present off of southern California.

50 C.F.R. § 660.713(c)(2)(ii).

Sea surface temperature data indicate anomalies above 0.5°C for March, April, May, and June (figs. 2-5). The regulation specifies that the Assistant Administrator will rely on data from the third and second months prior to the month of the closure. 50 C.F.R. § 660.713(c)(2)(ii). For March, April, May, and through June 21, 2014, these anomalies reflect sea surface temperatures above 0.5° C, indicative of El Niño conditions (figs. 2-5). Thus, according to regulations, the Pacific loggerhead conservation area closure has been in place since June 1, 2014.

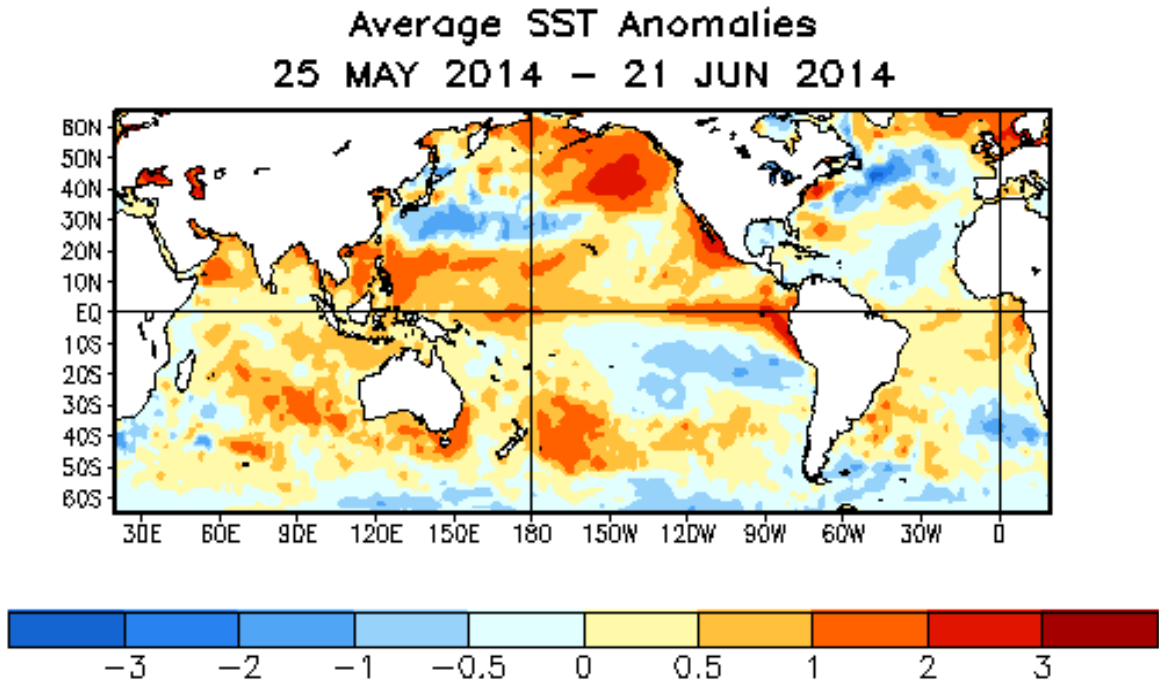


Figure 2. Average SST Anomalies 25 May 2014 – 21 June 2014. Southern California’s average SST exceeded 0.5 for the most recent month, through 21 June. (Source: NOAA Climate Prediction Center (23 June 2014), slide 7.)

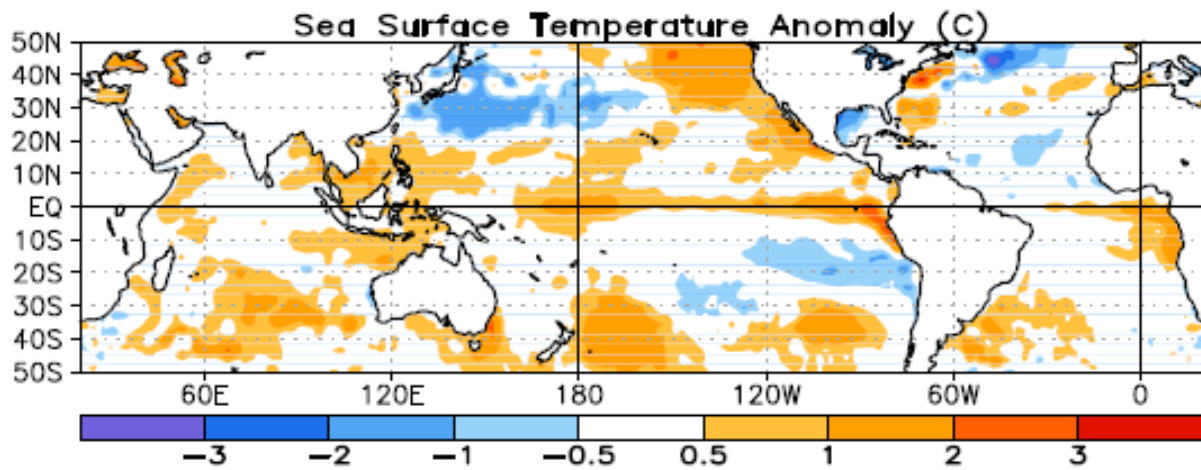


Figure 3. SST Anomaly May 2014. Southern California’s SST anomaly exceeded 0.5 in May, (Source: NOAA Climate Prediction Center (May 2014), p. 26, figure T18 (bottom).)

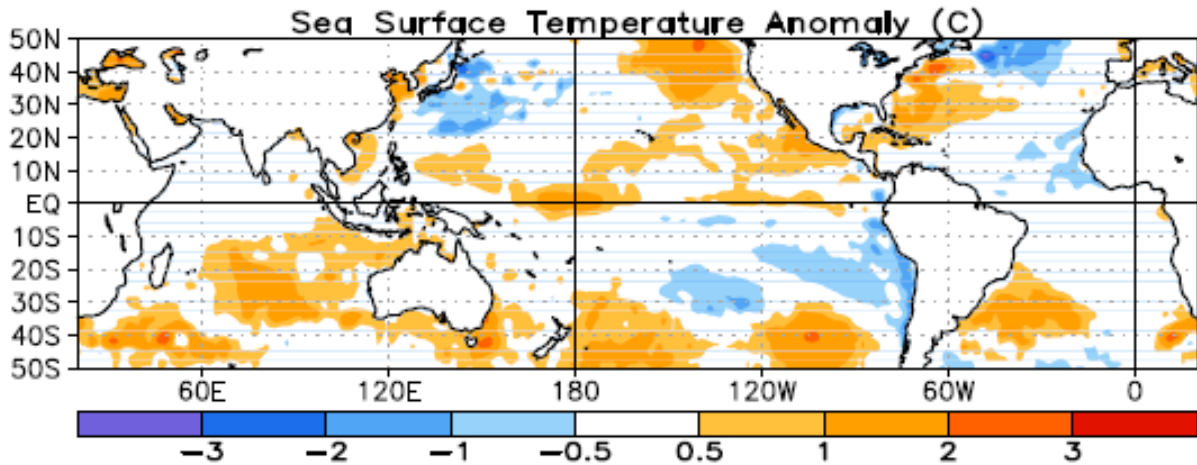


Figure 4. SST Anomaly April 2014. Southern California’s SST anomaly exceeded 0.5 in April, (Source: NOAA Climate Prediction Center (April 2014), p. 26, figure T18 (bottom).)

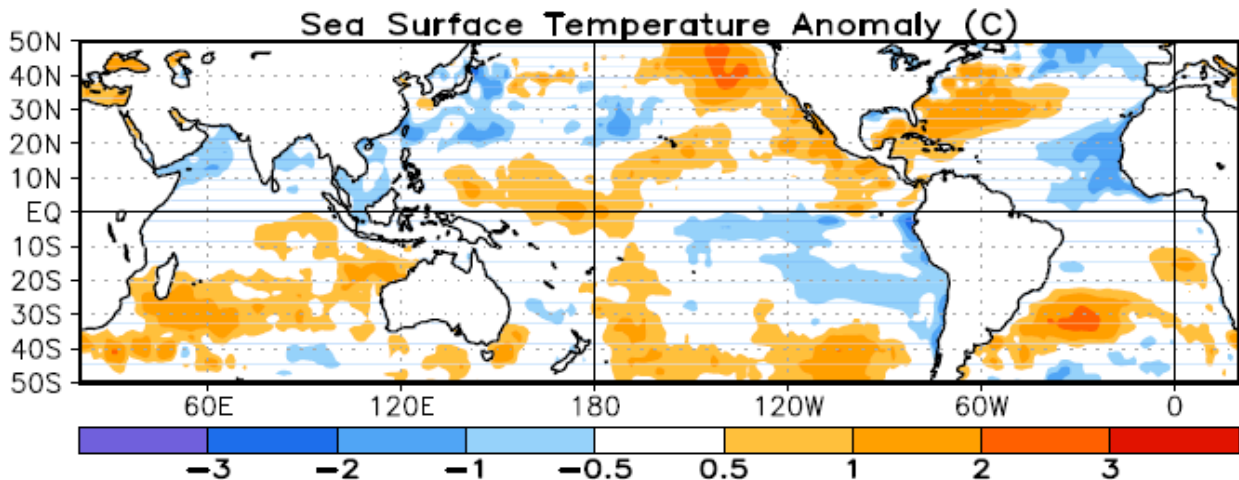


Figure 5. SST Anomaly March 2014. Southern California’s SST anomaly exceeded 0.5 in March, (Source: NOAA Climate Prediction Center (March 2014), p. 26, figure T18 (bottom).)

c. Anecdotal fisheries information corroborates sea surface temperature data showing El Niño conditions.

Anecdotal information, including unusual fish catches, also suggests the onset of El Niño conditions in southern California. According to Tim Barnett, marine research physicist emeritus at Scripps Institute of Oceanography, the first yellowfin tuna was caught off San Diego in May and the first dorado Mahi Mahi in early June (Murphy, 11 June 2014). These species are not usually seen in California until late summer. Alisa Schulman-Janiger saw two Bryde’s whales, a mother and calf, off Huntington Beach in early June (Thomas, 15 June 2014). Common in Mexico’s Sea of Cortez, Bryde’s whales are more rarely seen in California (*id.*). Around the same time a large pod of pilot whales showed off Dana Point – not seen off southern California

in nearly 20 years (*id.*). These unusual sightings and catches corroborate the data predicting El Niño conditions in southern California.

CONCLUSION

The NOAA Climate Prediction Center's expert assessments and southern California sea surface temperature anomalies show clearly that an El Niño event is forecasted or occurring. Accordingly, the Assistant Administrator must immediately declare an El Niño event and notify the public that the Pacific loggerhead conservation area currently prohibits drift gillnet fishing east of the 120° W meridian from June 1 through August 31, 2014.

Due to the immediate need for the closure and the critical role the Assistant Administrator plays in disseminating information about the closure to the public, we urge you to take action immediately, by sending a copy of the submitted *Federal Register* notice to us by July 8, 2014. Absent such an indication that you are moving to timely implement this overdue requirement, we are will consider taking additional actions. Please feel free to contact us with any questions.

Sincerely,

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