

**Agenda Item H.3**



September 2, 2008

Mr. Mark Helvey, Assistant Regional Administrator  
National Marine Fisheries Service, Southwest Region  
Sustainable Fisheries Division  
501 West Ocean Boulevard, Suite 4200  
Long Beach, California 90802-4213

**RE: (RIN 0648-X167) Amendment 2 to the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species**

Dear Mr. Helvey:

These comments are submitted on behalf of the Center for Biological Diversity, Defenders of Wildlife, the Monterey Bay Aquarium, Ocean Conservancy, Oceana, Turtle Island Restoration Network and our combined 1.5 million members nationwide regarding the National Marine Fisheries Service ("NMFS") proposal to develop a management framework for a high seas shallow-set longline fishery off the West Coast of the United States. NMFS should discontinue this process. Creation of a high seas longline fishery is inappropriate given its potential adverse ecological consequences and the numerous legal, policy, and scientific concerns it raises. These concerns are discussed in detail below. Rather than seeking to allow a high seas longline fishery, NMFS should maintain the current prohibition on shallow-set longlining east of 150°W longitude and strengthen this measure by prohibiting Hawaii longline permit holders from fishing in this area and landing their catch on the West Coast.

Should NMFS proceed with its analysis of the proposed new pelagic longline fishery, that analysis must comply with the mandates of the National Environmental Policy Act (“NEPA”) and NMFS’s duty under the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”) to manage marine resources sustainably for the benefit of the public. Towards that end, NMFS should not allow selection of a preliminary preferred alternative until all scoping comments are received and considered. In addition, NMFS must better define the purpose and need for its proposal to allow the fishery and consider a broader range of alternatives to achieve the goal of providing more sustainable fishing opportunities while promoting the recovery of endangered and threatened sea turtles and over-exploited fish populations. We also encourage NMFS to prioritize the development of a coordinated management strategy for pelagic fisheries between the Pacific Fishery Management Council (“PFMC”) and the Western Pacific Regional Fishery Management Council (“WPRFMC”).

**I. The selection of a “preliminary” preferred alternative by the PFMC before scoping comments are considered violates the intent of NEPA and the APA.**

As an initial matter, the decision-making process described in NMFS’s scoping notice, 73 Fed. Reg. 45965 (Aug. 7, 2008), inappropriately limits public participation in the environmental review and fishery management processes. By allowing selection of a preliminary preferred alternative before the Council or NMFS reviews public scoping comments, the process violates the spirit and possibly the letter of the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*

On August 7, 2008, NMFS issued public notice that the agency was beginning development of a supplemental environmental impact statement evaluating the potential impacts of amending the Highly Migratory Species Fishery Management Plan (“HMS FMP”) to include a framework for a high seas longline fishery. That public notice requests that scoping comments be submitted by September 8 and states that the PFMC will select a preliminary preferred alternative at its September meeting, which begins on September 7. Accordingly, the scoping comments will not be considered before the Council selects its preliminary preferred alternative.

This process has the potential to rob the public of its opportunity for meaningful participation in the decision-making process and is inconsistent with NEPA and the APA. Both statutes are designed to foster informed decision-making and to encourage public participation. Neither NMFS nor the PFMC should contravene these policies by establishing a process in which requested comments are not considered before the Council’s recommendations to the agency potentially narrow the scope of alternatives. While NMFS ultimately is responsible for ensuring compliance with NEPA and the APA – this approach is simply bad process and could complicate the agency’s ability to comply with legal mandates.

NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). NEPA has twin aims:

First, it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. Second, it guarantees that the relevant information will be made

available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.

*Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004) (citation omitted). These dual objectives require that environmental information be disseminated “early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made.” 40 C.F.R. § 1502.5. NEPA regulations require that the public be given an opportunity to comment on a draft EIS *before* the action agency makes its final decision. 40 C.F.R. § 1503.1(a)(4). “Publication of an EIS, both in draft and final form, also serves a larger informational role. It gives the public the assurance that the agency ‘has indeed considered environmental concerns in its decision-making process.’” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989), quoting *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983).

In this case, the public must be given an opportunity to submit its scoping comments, and NMFS the opportunity to fully consider those comments, before the Council’s recommendations to the agency narrow the range of alternatives to be considered in the draft EIS. The Council should not move forward with recommending, and the agency should not move forward with selecting a preferred alternative, “preliminary” or otherwise, until the draft EIS is complete and made available for the public and the public has had its full opportunity to comment on that document.

The process outlined in NMFS’s scoping notice is also inconsistent with the notice and comment requirements of the APA. The APA requires that an agency engaged in a rulemaking process “give interested persons an opportunity to participate in the rulemaking through submissions of written data, views, or arguments...” 5 U.S.C. § 553(c). In order for the public to have a meaningful opportunity to provide comment, the public must be informed both of information relevant to the agency’s decision-making process, as well as the nature of the agency decision itself. “It is a fundamental tenet of the APA that the public must be given some indication of what the agency proposes to do so that it might offer meaningful comment thereon.” *Riverbend Farms, Inc. v. Madigan*, 958 F.2d1479, 1486 (9th Cir. 1992), citing 5 U.S.C. § 553(b)(3). While the public will have the opportunity to comment on this proposal at a later time, the Council should not marginalize these comments by making a recommendation without so much as looking at them. The PFMC, apparently, expects the public to guess at the full range of alternatives the Council will consider and tailor its comments accordingly. Indeed, one of the options now on the table for an open access fishery was first adopted at the March 2008 meeting with virtually no discussion or public input. Likewise, as part of these scoping comments, we will be proposing an additional alternative intended to strengthen existing measures and ensure greater equity between California and Hawaii-based fishermen. Most importantly, neither the public nor the Council has the critical environmental analyses of the alternatives’ likely impacts that NEPA requires to inform decision-making. As described below, these impacts are likely to be quite significant.

## **II. The establishment of a high seas shallow-set longline fishery threatens numerous species.**

## A. Increase longline pressure threatens endangered sea turtle populations.

Sea turtles throughout the Pacific are hovering on the brink of extinction due in large part to incidental mortality associated with fishing operations. Pacific leatherbacks are classified as “endangered” throughout their range under the Endangered Species Act (“ESA”) and “critically endangered” by the World Conservation Union (“IUCN”). Numbering over 100,000 nesting females as recently as the 1980s, the species is in rapid decline with a current estimate of only 2,000-5000 nesting females.<sup>1</sup> In 2000, an article published in the scientific journal *Nature*, predicted extinction of leatherbacks in the Pacific within decades.<sup>2</sup> The primary cause of the leatherback decline, and the greatest threat to its continued existence, is entanglement and drowning in longline fishing gear.<sup>3</sup>

According to the latest surveys, there are fewer nesting loggerheads in the Pacific than nesting leatherbacks. The two major loggerhead populations in the Pacific are found in Japan and Australia, with less than 1,000 and 300 turtles, respectively, nesting annually. The IUCN’s Red List of Threatened Species identifies loggerheads as “endangered” while the ESA classifies loggerheads as “threatened” throughout their range. North Pacific loggerheads have declined by upwards of 80% in recent decades, and are likely approaching the perilous state of the Pacific leatherback. On July 12, 2007, the Center for Biological Diversity and Turtle Island Restoration Network petitioned NMFS to change the status of North Pacific loggerheads from threatened to endangered. NMFS determined that the status change may be warranted, 72 Fed. Reg. 64585 (Nov. 16, 2007), and is due to issue its final decision regarding the North Pacific loggerhead’s status before the end of 2008

The Pacific longline fisheries out of California and Hawaii were both previously found to cause jeopardy to leatherback and loggerhead sea turtle populations under the ESA. In November 1999, concerned about the high level of sea turtle mortality associated with longlining, Ocean Conservancy (previously known as the “Center for Marine Conservation”) and its partners secured an injunction restricting longline fishing under the fishery management plan for pelagic fisheries in the western Pacific. The objective of the injunction was to reduce leatherback sea turtle mortality by the shallow-set longline fishery targeting swordfish around the Hawaiian Islands. *Center for Marine Conservation, et al., v. NMFS, et al.*, (Civ. No. 99-00152 DAE)(D. Hawaii 1999). NMFS subsequently issued a Biological Opinion pursuant to Section 7 of the ESA on the Pelagics FMP. The agency concluded that continued operation of the fishery would jeopardize the existence of leatherback, loggerhead, and green sea turtles, and amended the FMP to close the Hawaii-based shallow-set longline fishery. The fishery was allowed to re-open again in 2004 subject to the mandatory conditions that vessels maintain 100% observer coverage, utilize only large 18/0 circle hooks, establish an effort cap to control the number of longline sets, and institute a hard cap on turtle take to close the fishery if it approached the limits of its take authorization. In March 2006, the annual hard cap on take of loggerheads was reached after the fishery operated for less than three months. 71 Fed. Reg. 14824 (March 24, 2006).

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<sup>1</sup> Lewison, R. *et al.*, (2004) Quantifying the effects of fisheries on threatened species: the impact of pelagic longlines on loggerhead and leatherback sea turtles, *Ecology Letters* 7:221.

<sup>2</sup> Spotila *et al.* (2000), Pacific leatherback turtles face extinction, *Nature* 405:529-530.

<sup>3</sup> *Id.*

Meanwhile, when the west coast HMS FMP was finalized in 2004, it prohibited shallow-set longlining *east* of 150°W longitude even after the Pacific Council banned longlining *west* of 150°W longitude. Section 7 consultation and the resulting biological opinion concluded that such a fishery would jeopardize the continued existence of loggerhead sea turtles.

Scientists have concluded that: “The critical issue for an individual turtle is the likelihood of capture across an ocean region, not capture by a particular nation. With multiple fleets deployed the cumulative effects of pelagic longlines across fleets in large ocean regions must be taken into account.”<sup>4</sup> It would be inappropriate to allow the capture of turtles by a California-based fishery when the Hawaii fishery was closed for exactly this reason only two years ago. The Hawaii and California based fleets fish in the same manner, often in the same area, and catch the same turtles. 69 Fed. Reg. 11540, 11543 (March 11, 2004) (preamble to final rule closing Pacific longline fishery east of 150 degrees West longitude). In addition, the fleets consist of many of the same boats that have had a history of moving back and forth to avoid the closures to protect sea turtles that have alternated between Hawaii and California in recent years.

Where target fish stocks and associated non-target species act as a single unit, a more comprehensive and coordinated impact evaluation is crucial. The ad hoc approach often employed by U.S. fishery managers does not properly account for the cumulative effect of all U.S. managed pelagic fisheries on fish and wildlife populations. Evaluations of the relative impact of longline fishing on Pacific turtle populations have concluded that “[a]lthough bycatch rates from individual longline vessels are extremely low, the amount of gear deployed by longline vessels suggests that cumulative bycatch of turtles from older age classes is substantial.”<sup>5</sup> The conservation community has repeatedly called for a comprehensive evaluation of the impacts of all U.S. longlining in the Pacific on imperiled sea turtle populations, yet that essential step still has not occurred.

The recovery plan for Pacific Leatherback populations noted that “...the waters off the west coast of the United States may represent some of the most important foraging habitat in the entire world for the leatherback turtle.”<sup>6</sup> In June 2007, NMFS rejected an EFP application that would have authorized expansion of the drift gillnet fishery into the Pacific Leatherback Conservation Area, citing recent satellite-tracking studies which confirm the importance of the waters off the California coast as vital foraging grounds for endangered leatherback turtles.<sup>7</sup> Since the tracking studies referenced by NMFS in their decision were limited to the neritic zone, scientists speculate that the number of sea turtles and the leatherback habitat range off the coast of California and Oregon may be underestimated. In response to a petition to designate those waters as Pacific leatherback critical habitat under the ESA, NMFS has found that the critical habitat designation may be warranted and is due to make its final decision this fall. 72 Fed. Reg. 73745 (December 28, 2007).

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<sup>4</sup> Crowder, L. B and R.I. Lewison. Putting Longline Bycatch of Sea Turtles into Perspective. Conservation Biology 2007, Volume 21, No.1, p. 81.

<sup>5</sup> Crowder, L. B and R.I. Lewison. Putting Longline Bycatch of Sea Turtles into Perspective. Conservation Biology 2007, Volume 21, No.1, p.79.

<sup>6</sup> NMFS and USFWS. 1998. Recovery Plan for US Pacific Populations of Leatherback Turtle (*Dermochelys coriacea*), p. 14.

<sup>7</sup> Benson, S.R., K.A. Forney, J.T. Harvey, J.V. Carretta, and P.H. Dutton. In press. Abundance, distribution, and habitat of leatherback turtles (*Dermochelys coriacea*) off California, 1990-2003. Fishery Bulletin.

**B. Non-fishery conservation measures do not offset fisheries-related sea turtle mortality.**

Sea turtles face a myriad of threats throughout their range and at every stage in their life cycle. Under the ESA, NMFS has a duty to use its authority and all of its programs to provide for the conservation of endangered and threatened species. 16 U.S.C. § 1536(a)(1). As such, we strongly support both domestic and international conservation measures that will help reverse the decline of Pacific sea turtle populations and promote their recovery. Protecting nesting beach habitat, identifying prime foraging grounds, and educating the public and engaging local communities is critical to the recovery of sea turtle populations around the world. We are troubled however, with the suggestion that fisheries-related turtle mortality can be offset with non-fishery conservation strategies. It would not be appropriate (or consistent with Section 7(a)(2) of the Endangered Species Act) to consider non-fishery related conservation measures as offset measures or compensatory strategies justifying continued or additional fishery-related mortality. Despite strong scientific backing, the ultimate effect of such non-fishery conservation measures on turtle populations remains, at this point, entirely speculative. While we certainly hope that they will result in larger populations of turtles in the future, predictions that larger numbers of nests and eggs will be saved cannot be used to allow takes of *any* existing turtles, let alone reproductively mature animals. For example, the recovery of the Kemp's Ridley turtle is the result of decades of conservation of primary nesting habitat in Mexico *and* full implementation of measures to protect these animals from drowning in shrimp trawls. Only by focusing on reducing mortality throughout the range of these species and at all stages of life will recovery efforts be successful.

**C. The proposed high seas longline fishery would cause harm to marine mammal and seabird populations.**

Many species of protected marine mammals and seabirds occur in the area NMFS now proposes to open to shallow-set longline fishing. These species are known to become entangled in, injured, and killed by pelagic longline gear. A number of them, such as short-finned pilot whales and multiple albatross species, are already subject to unsustainable mortality rates due to fishery interactions. As explained in more detail below, allowing further take of these species is neither scientifically supportable nor legally defensible.

**D. Increased longline fishing effort and capacity threatens vulnerable fish populations.**

In addition to potential negative interactions between shallow-set longline gear and endangered sea turtle populations, we are concerned about the impact of increased fishing effort and capacity on select target and non-target fish species. While the proposed high seas shallow set longline fishery specifies swordfish as the target catch, other more vulnerable highly migratory species may be targeted or caught incidentally. The 2007 draft environmental assessment for the failed exempted longline fishery within the EEZ noted that shallow set longlining off the west coast may lead to a greater level of interactions with protected shark

species including great white sharks and basking sharks.<sup>8</sup> Characterized by their slow growth, late maturity and low fecundity, shark species are particularly vulnerable to the impacts of longline fisheries.

Proponents of the high seas longline fishery acknowledge that several tuna species are likely to be caught intentionally and incidentally to shallow-set longline activities. Of greatest concern is the potential impact to yellowfin, bigeye and albacore, all of which are classified as overfished and/or experiencing overfishing. Both the Inter-American Tropical Tuna Commission (“IATTC”) and U.S. stock assessment scientists have identified Pacific bigeye and yellowfin tuna populations as being overfished and subject to overfishing.<sup>9</sup> The IATTC adopted a resolution which declared that “bigeye stocks are below the level that would produce the average maximum sustainable yield (‘AMSY’)” and directed Member nations to implement a seasonal closure for commercial purse seine and longline vessels targeting bigeye (and yellowfin) tuna.<sup>10</sup> Likewise, the IATTC and the Western and Central Pacific Fisheries Commission (“WCPFC”) adopted resolutions in 2005 identifying North Pacific albacore populations as experiencing overfishing and requiring member nations to cap fishing effort at current levels.<sup>11</sup> The first Stock Assessment and Fishery Evaluation (“SAFE”) Report for the U.S. West Coast HMS FMP echoed this conclusion and warned that “[t]he current fishing mortality rate is high...and may be cause for concern regarding the current stock status of North Pacific albacore.”<sup>12</sup> In light of the vulnerable status of these tuna populations, expanding capacity, increasing fishing effort and establishing a high seas shallow set longline fishery off the U.S. West Coast is not consistent with international resolutions, domestic regulations, the best available science and the principles of precautionary management.

### **III. Expanding shallow-set longlining in the Pacific would be inconsistent with key environmental laws.**

The potential biological impacts of establishing a new high seas shallow-set longline fishery are so severe that the fishery would likely violate numerous federal laws, including the Endangered Species Act, Marine Mammal Protection Act, and Migratory Bird Treaty Act. In addition, engaging in the fishing activities proposed under Alternatives 2 and 3 of NMFS’s scoping notice, absent lawfully issued permits, could subject permittees to civil and criminal liability for knowing violations of federal law. Each of these violations is outlined briefly below. Given these significant legal problems with the proposed HMS FMP Amendment Alternatives 2 and 3, Alternative 1 (with the additional provision, described elsewhere in these comments, prohibiting holders of Hawaii permits from fishing the proposed area) remains the only viable alternative at this time.

#### **A. Endangered Species Act**

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<sup>8</sup> Draft Longline Exempted Fishing Permit Environmental Assessment, March 2007, p.51.

<sup>9</sup> 2005 HMS Stock Assessment and Fishery Evaluation Report, Table 5-1, p. 111.

<sup>10</sup> Resolution C-06-02, IATTC, June 2006

<sup>11</sup> PROP IATTC-73-C1, June 2005

<sup>12</sup> 2005 HMS Stock Assessment and Fishery Evaluation Report, Section 5.3.1, page 106.

Any expansion of shallow-set pelagic longlining effort would likely jeopardize the continued existence of at least two ESA-listed species: the Pacific leatherback and loggerhead sea turtles.<sup>13</sup> 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.” 16 U.S.C. § 1531(c)(1). 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.” 16 U.S.C. § 1532(3). Similarly, Section 7(a)(1) of the ESA directs that the Secretary review “...other programs administered by him and utilize such programs in furtherance of the purposes of the Act.” 16 U.S.C. § 1536(a)(1). Placing more pressure on leatherback and loggerhead sea turtle populations – particularly when available evidence indicates that pelagic longline bycatch poses a serious threat to their existence – would violate the ESA’s statutory directive to conserve listed species. Indeed, if anything, the ESA requires that NMFS do *more* to ensure that species on the brink, such as the Pacific leatherback, not only continue to survive but recover.

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 adverse modification of habitat of such species . . .determined . . . to be critical . . . .” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). To accomplish this goal, agencies must consult with the delegated agency of the Secretary of Commerce or Interior whenever their actions “may affect” a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Where, as here, NMFS is both the acting agency and the delegated wildlife agency for purposes of the listed species in question, different branches of NMFS must undertake internal consultation with each other. For species under the jurisdiction of the U.S. Fish and Wildlife Service, such as the endangered short-tailed albatross, NMFS must also consult with that agency as well.

At the completion of consultation NMFS issues a Biological Opinion that determines if the agency action is likely to jeopardize the species. If so, the opinion must specify a Reasonable and Prudent Alternative (“RPA”) that will avoid jeopardy and allow the agency to proceed with the action. 16 U.S.C. § 1536(b).

Using this consultation process, NMFS concluded in 2004 that permitting pelagic longline fishing east of 150° W longitude would jeopardize the continued existence of the North Pacific loggerhead. NMFS therefore instituted the closure of shallow-set longlining east of 150° W longitude in part to protect loggerheads. 69 Fed. Reg. 11540 (March 11, 2004); 50 C.F.R. § 223.206(d)(9). The proposed high seas longline fishery would also threaten the critically endangered Pacific leatherback sea turtle.

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<sup>13</sup> Pelagic longline fisheries are known to hook, entangle, and kill ESA-listed sea turtles, marine mammals, and seabirds. While our most immediate concerns regarding ESA-listed species are related to the critically endangered leatherback sea turtle and loggerhead sea turtle, the establishment of the proposed high seas pelagic longline fishery would also compromise the recovery of numerous other listed species, including, but not limited to, green and olive ridley sea turtles, humpback, sperm, blue, sei, fin, and North Pacific right whales, Southern Resident killer whales, Steller sea lions, Guadalupe fur seals, and short-tailed albatross.

NMFS and the Council acknowledge that the proposed new longline fishery would cause the injury and death of a significant number of Pacific leatherbacks and loggerheads. Preliminary estimates indicate that the proposed high seas longline fishery could take up to 18 loggerheads and 23 leatherbacks in a single fishing year. *See* NMFS Draft HMS FMP Amendment 2, Section 4.2 Protected Species, July 30, 2008. These turtles belong to the same population that already suffers injury and death in the Hawaii longline fishery, and would be subject to injury and death from shallow-set longline fishing pursuant to a proposed exempted fishing permit to allow shallow-set longline fishing in the Pacific Leatherback Conservation Area off the California and Oregon coasts. NMFS has previously determined that fishing in both of these areas posed jeopardy to leatherbacks. In its 2001 biological opinion for the Western Pacific shallow set longline fishery, NMFS concluded that the mortality of up to 57 leatherbacks per year in the Hawaii longline fishery would:

...appreciably reduce the leatherback sea turtles' likelihood of surviving and recovering in the wild, particularly given the status and trend of leatherback turtle populations in the Pacific basin. Based on published estimates of nesting female abundance, leatherback populations have collapsed or have been declining at all major Pacific basin nesting beaches for the last two decades.

NMFS 2001 BiOp at 125.

In another relevant biological opinion concerning the impacts of fishing on Pacific leatherbacks, NMFS found that Pacific leatherback populations have continued their worrisome decline and concluded that

...*any* additional impacts to the western Pacific leatherback stocks are likely to maintain or exacerbate the decline in these populations. This would further hinder population persistence or attempts at recovery as long as mortalities exceed any possible population growth, which appears to be the current case, appreciably reducing the likelihood that western Pacific leatherback populations will persist. Additional reductions in the likelihood of persistence of western Pacific leatherback stocks are likely to affect the overall persistence of the entire Pacific Ocean leatherback population by reducing genetic diversity and viability, representation of critical life stages, total population abundance, and metapopulation resilience as small sub-populations are extirpated. *These effects would be expected to appreciably reduce the likelihood of both the survival and recovery of the Pacific Ocean population of the leatherback sea turtle.*

NMFS, Biological Opinion on CA-OR Drift Gillnet Fishery (2000) at 94 (emphasis added).

Given NMFS's acknowledgment that any additional mortality to Pacific leatherbacks threatens the species' very existence, and the fact that the Western Pacific Regional Fishery Management Council (WPRFMC) is in the process of amending its Pelagics FMP to weaken existing bycatch mitigation measures and allow for greater take of leatherback and loggerhead sea turtles (up to 19 and 46 respectively), NMFS may not permit the establishment of yet another shallow-set longline fishery that will increase the number of leatherbacks and loggerheads harmed or killed by the fishery. *See* Amendment 18 to the Fishery Management Plan for Pelagic

Fisheries of the Western Pacific Region and Draft Supplemental Environmental Impact Statement, August 12, 2008. To the contrary, the ESA requires that NMFS do more to save these creatures from the brink of extinction and move them towards recovery. *See, e.g., Nat'l Wildlife Fed'n v. NMFS*, 481 F.3d 1224, 1236-38, (9th Cir. 2007) (“jeopardy” includes impacts to recovery as well as survival and NMFS may not permit further impacts to a species already in jeopardy, regardless of whether the activity at issue is the cause of the baseline jeopardy).

The establishment of a new high seas pelagic longline fishery also threatens the short-tailed albatross. Self-reports of seabird interactions with the former California-based longline fishery acknowledged take of 100 albatross of various species. It is therefore reasonable to assume that short-tailed albatross are likely to be entangled and killed if pelagic longline fishing is allowed outside the EEZ off the California coast. Given the imperiled status of the short-tailed albatross, we do not believe than any additional take authorization for the species can be lawfully granted.

Finally, the proposed high seas shallow-set longline fishery threatens to harm several species of ESA-listed marine mammals. For example, both sperm whales and humpback whales have been observed entangled in identical fishing gear used by Hawaii-based pelagic longlining vessels. Sperm, blue, sei, fin, and humpback whales also occur in this area. As discussed below, take of ESA-listed marine mammals may not occur absent both ESA and MMPA authorization.

## **B. Marine Mammal Protection Act**

Pelagic longline fishing permitted by Alternatives 2 and 3 would hook, entangle and kill ESA-listed marine mammals as well as numerous non-listed marine mammal species. Therefore, the proposed high seas longline fishery may not proceed unless it operates in a manner fully consistent with the procedural and substantive mandates of the ESA and MMPA. Take of such species can be authorized via an incidental take statement issued pursuant to Section 7 of the ESA only if such take is also authorized pursuant to Section 101 of the MMPA. *See* 16 U.S.C. §§ 1371(a)(5)(E) and 1536(b)(4)(C).

NMFS has not indicated how it intends to comply with its duty to secure MMPA take authorizations for marine mammals in a newly established pelagic longline fishery. Absent such authorization, the fishery cannot lawfully be implemented. Should NMFS decide to forgo permitting under the MMPA, this would constitute a knowing violation of the statute. As with the ESA, engaging in a knowing violation of the MMPA carries substantial civil and criminal penalties. *See* 16 U.S.C. §§ 1375 (fines and imprisonment) and 1376 (forfeiture of vessels).

The establishment of a new high seas pelagic longline fishery would also violate the unambiguous command of the MMPA that all fisheries “shall reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate” by April 30, 2001. 16 U.S.C. § 1387(b)(1). NMFS has defined ZMRG by regulation as ten percent of Potential Biological Removal (“PBR”). The likely take of marine mammal species by the proposed new high seas shallow-set longline fishery would exceed this threshold.

Both the Hawaii and Atlantic pelagic longline fisheries are classified as Category 1 fisheries on the 2008 List of Fisheries (72 Fed. Reg. 66048 (Nov. 27, 2007)), while the remnant California-based deep-set longline fishery is listed as a Category 2 fishery. Only the Atlantic longline fishery has a take reduction team to address marine mammal bycatch. It would be unwise and unlawful to allow an additional fishery that will kill marine mammals to operate without a take reduction team prior to at least initiating the take reduction process for these other two longline fisheries. Additionally, a Category 1 or 2 fishery is, by definition, taking marine mammals at levels above ZMRG. Given the statutory deadline for reaching ZMRG has already passed, we do not believe that establishing a new fishery that would result in take of marine mammals - where mortality and serious injury are already above ZMRG - is consistent with the ZMRG mandate of the MMPA.

A large number of marine mammal species occur in the area of the proposed new shallow-set longline fishery. Two of the most likely species of marine mammals to be taken by the proposed new fishery are Risso's dolphins and short-finned pilot whales. Pilot whales are the most frequent marine mammal species encountered by the Atlantic longline fishery. There is no reason to believe that they would not also be taken by a similar fishery off California. According to NMFS's 2007 stock assessment report for the California-Oregon-Washington stock of short-finned pilot whales, PBR for this stock is 0.98. The ZMRG level for pilot whales would therefore equate to less than one animal taken every ten years. Take of pilot whales from the California drift gillnet fishery is already above PBR and is, of course, well over ZMRG. Similarly, take of long-beaked common dolphin is well over PBR. Take of sperm, humpback and fin whales, as well as northern right whale dolphins also remains well above 10% of PBR, thereby exceeding the definition of ZMRG. Allowing further take of this species is clearly inconsistent with the MMPA.

NMFS cannot lawfully authorize new and additional take of marine mammals for which take levels already exceed the PBR and ZMRG thresholds of the MMPA. Rather than establish a new shallow-set longline fishery that will likely result in additional take over lawful levels, NMFS should instead take action using its authority under the MMPA to reduce marine mammal take in existing fisheries.

### **C. Migratory Bird Treaty Act**

The proposed high seas shallow-set longline fishery would violate the Migratory Bird Treaty Act ("MBTA"). The MBTA provides that "it shall be unlawful at any time, by any means or in any manner," to, among many other prohibited actions, "pursue, hunt, take, capture, [or] kill" any migratory bird included in the terms of the treaties. 16 U.S.C. § 703 (emphasis added). The term "take" is defined as to "pursue, hunt, shoot, wound, kill, trap, capture, or collect." 50 C.F.R. § 10.12 (1997). The primary species taken by pelagic longline fisheries in the North Pacific are albatrosses and fulmars. These are included in the list of migratory birds protected by the MBTA. *See* 50 C.F.R. § 10.13 (list of protected migratory birds).

The MBTA imposes strict liability for killing migratory birds, without regard to whether the harm was intended. Its scope extends to harm occurring "by any means or in any manner," and is not limited to, for example, poaching. *See e.g., U.S. v. Moon Lake Electric Association,*

45 F. Supp. 2d 1070 (1999) and cases cited therein. Indeed, the federal government itself has successfully prosecuted under the MBTA's criminal provisions those who have unintentionally killed migratory birds. *See, e.g., U.S. v. Corbin Farm Service*, 444 F. Supp. 510, 532-534 (E. D. Cal.), *aff'd*, 578 F.2d 259 (9th Cir. 1978); *U.S. v. FMC Corp.*, 572 F.2d 902 (2nd Cir. 1978).

The MBTA applies to federal agencies such as NMFS as well as private persons. *See Humane Society v. Glickman*, No. 98-1510, 1999 U.S. Dist. LEXIS 19759 (D.D.C. July 6, 1999), *aff'd*, *Humane Society v. Glickman*, 217 F.3d 882, 885 (D.C. Cir. 2000) (“There is no exemption in § 703 for farmers, or golf course superintendents, or ornithologists, or airport officials, or state officers, or federal agencies.”). Following *Glickman*, FWS issued Director’s Order No. 131, confirming that it is FWS’s position that the MBTA applies equally to federal and non-federal entities, and that “take of migratory birds by Federal agencies is prohibited unless authorized pursuant to regulations promulgated under the MBTA.” The MBTA authorizes the Secretary of the Interior to “determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, take, capture, [or] killing . . . of any such bird.” 16 U.S.C. § 704. FWS may issue a permit allowing the take of migratory birds if consistent with the treaties, statute, and FWS regulations. To our knowledge, NMFS has not applied for such a permit authorizing any take for longline fishing pursuant to the proposed FMP amendment.

NMFS cannot dispute that longline fishing kills birds protected under the MBTA. Self-reports of seabird interactions with the former California-based longline fishery acknowledged take of 100 albatross of various species. Dozens of albatross were also observed taken in the handful of trips with actual observer coverage. We believe that until such take is permitted, NMFS cannot lawfully allow any fishing, including that which would be authorized by the FMP amendment, which is likely to result in the deaths of members of such species.<sup>14</sup>

While the short-tailed albatross is ESA-listed and take can be authorized pursuant to that statute, of equal or greater concern here is the black-footed albatross. This species has been listed as Endangered by the IUCN and is under review for ESA listing. It is regularly seen off the California coast and is almost certain to be caught and killed by longline fishing. Absent a permit under the MBTA authorizing the take of the black-footed albatross and other migratory birds, NMFS may not institute a new pelagic longline fishery with the proposed FMP amendment.

#### **D. Coastal Zone Management Act**

The proposed new pelagic longline fishery would likely be inconsistent with the Coastal Zone Management Act (“CZMA”) (16 U.S.C. § 1451 *et seq.*). CZMA requires that

[A]ny applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or

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<sup>14</sup> In its response to comments on the FMP, NMFS claimed that the MBTA does not apply beyond the 3 nautical mile territorial sea and therefore it need not comply. This is simply wrong. In 2001, an Interior Solicitor’s Opinion concluded that the MBTA does in fact apply both in the U.S. EEZ and in international waters. NMFS’s unsupported assertions to the contrary do not withstand scrutiny.

permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data.

16 U.S.C. § 1456(c)(3)(A). The sea turtles, seabirds, marine mammals, and fish that will be caught and killed by the proposed new fishery are all "natural resources" protected by California's Coastal Management Program. Hooking, entangling and killing these animals "affects" these resources, triggering the consistency requirement of CZMA. Therefore, if NMFS chooses to proceed with Alternative 2 or 3, or any similar alternative, NMFS must seek a CZMA consistency certification and California's concurrence in that determination.

**IV. Any further analysis of the proposed high seas shallow-set longline fishery must clearly define its purpose and need, address the full range of reasonable alternatives, and existing mechanisms to reduce bycatch from international fisheries, and involve a coordinated effort by PFMC and WPRFMC.**

We believe that the expansion of pelagic longline fishing in the Pacific is wholly inconsistent with NMFS's paramount duty to conserve threatened and endangered species as well as protected marine mammals and seabirds. It is also inconsistent with sound management of fisheries resources. Therefore, NMFS should cease any development of a new longline fishery. However, should NMFS continue to analyze possibilities for developing such a fishery, it must do so in accordance with sound science and policy, as well as its non-discretionary duties under NEPA and other relevant statutes. In this section, we suggest some measures necessary for a valid analysis of the proposed high seas fishery.

**A. Clarify the objectives and consider a broad range of management alternatives.**

As an initial matter, we recommend that the Council and NMFS reframe this issue as a broader policy discussion and articulate a more accurate and inclusive "purpose and need" statement. For years, fishermen and fishery managers have expressed a desire to create domestic opportunities to target swordfish and transition the drift gillnet fleet to a more selective and less destructive method of fishing. If there is legitimate interest in developing a cleaner and more sustainable swordfish fishery, the Council and NMFS must identify that as an objective and evaluate a wider range of alternatives than simply authorizing a high seas shallow set longline fishery. The purpose and need must, at a minimum, be broad enough to allow consideration of a *reasonable* range of alternatives.

In 2004, NMFS imposed a moratorium on pelagic longline fishing east of 150° W longitude to guard against jeopardy to loggerheads even after the Pacific Council banned longlining west of 150° W longitude. Likewise, the Hawaii-based longline fishery was shut down in 2006 after only three months because of excessive turtle interactions. These far reaching closures demonstrate just how vulnerable sea turtles are to the impacts of longline fishing. As such, it would be inappropriate to artificially limit the range of alternatives

considered to longlining exclusively or to definitively conclude that a west coast-based swordfish fishery, however prosecuted, is appropriate given the potential ecological consequences.

Of the action alternatives currently being considered, the open access alternative, which would impose no limits on fishing effort, is patently irresponsible. An unrestricted increase in capacity and fishing effort is likely to have significant impacts on over-exploited and protected species and run afoul of international overfishing resolutions, the Endangered Species Act, the Marine Mammal Protection Act, the Migratory Bird Treaty Act, and the Magnuson-Stevens Act among others. Since both Hawaii and California-based longline fisheries were previously closed due to their adverse impacts on sea turtle populations, it is improper to again call for a renewed longline fishery off the west coast without also evaluating options that would provide greater protection for sea turtles and other non-target species.

A loophole exists in the management regime whereby Hawaii-permitted vessels are allowed to fish seaward of the U.S. West Coast EEZ and east of 150° W longitude and land on the West Coast. While records indicate that there have been no West Coast landings by fishermen with a Pelagics permit since 2004, the potential remains. To address this management inconsistency, ensure access equity, and foreclose possible increases in longline fishing effort off the West Coast, we recommend that the Council and NMFS consider including another action alternative that would close the loophole and prohibit Hawaii-permitted vessels from fishing seaward of the U.S. West Coast EEZ and east of 150° W longitude and landing on the West Coast.

Fishery managers have repeatedly attempted to justify the establishment of a high seas shallow set longline fishery explaining that there is a need for a more selective alternative to drift gillnetting that does not increase overall fishing capacity. Whether or not establishing a new fishery is a reasonable objective, it is unclear how the drift gillnet fleet might transition to longline fleet when, as the PFMC's staff white paper notes, "the size and configuration of drift gillnet vessels makes it unlikely that existing vessels could be fitted for distant water fishing beyond the EEZ."

NMFS is charged with developing and refining a reasonable range of alternatives for public review and conducting the requisite environmental analyses pursuant to NEPA. The alternatives analysis "is the heart of the environmental impact statement."<sup>15</sup> It "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public."<sup>16</sup> Moreover, it should "rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated,"<sup>17</sup> and "devote substantial treatment to each alternative considered in detail,"<sup>18</sup> Should NMFS opt to proceed with the development of a management framework, we urge managers to revise the purpose and need statement to more accurately reflect the objective of permitting a swordfish fishery to the extent it does not

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<sup>15</sup> 40 C.F.R. §1502.14

<sup>16</sup> *Id.*

<sup>17</sup> 40 C.F.R. §1502.14(a)

<sup>18</sup> 40 C.F.R. §1502.14(b).

impermissibly harm other species. We also recommend that the Council and NMFS broaden the scope of alternatives and not prematurely discount other reasonable options including the potential expansion of a California-based harpoon fishery for swordfish.

**B. Investigate options to expand the California harpoon fishery as an alternative to less selective fishing methods.**

To the extent that fishery managers are interested in transitioning the California drift gillnet fleet to a more selective gear type, we recommend that the Council and NMFS investigate opportunities to expand the California-based harpoon fishery for swordfish as an alternative to drift gillnet and longline fishing. The high value, zero bycatch harpoon fishery has been in existence for nearly a century and may provide a viable and more sustainable alternative to drift gillnets and longlines for targeting swordfish. At its peak in 1978, the harpoon fishery had 309 vessels landing 2,700 metric tons of swordfish. Since then, the harpoon fishery has gradually, albeit not entirely, been replaced by the more efficient yet more destructive drift gillnet fishery. Critics claim that a harpoon fishery could not match the volume of fish yielded by the drift gillnet fleet, however drift gillnet landings of swordfish peaked in 1984 at 2,400 metric tons. What's more, research is underway to improve the efficiency of harpooning by analyzing swordfish movement data to better understand how environmental conditions influence swordfish basking rates and times.<sup>19</sup>

**C. Prioritize development of a coordinated management framework for pelagic fisheries throughout the Pacific.**

The conservation community has repeatedly called for more coordinated management between the Western Pacific and Pacific regional fishery management councils and a comprehensive evaluation of the impacts of all U.S. longlining in the Pacific on imperiled sea turtle population. Towards that end, we support the recent request by NMFS Headquarters to the Administrators from the Southwest Regional Office and the Pacific Island Regional Office to explore options for collaboration.<sup>20</sup> The Hawaii and California based fleets fish in the same manner, often in the same area, and catch the same turtles.<sup>21</sup> In addition, the fleets consist of many of the same boats as they have historically moved back and forth to avoid the closures to protect sea turtles that have alternated between Hawaii and California in recent years.

If current fishing practices continue, scientists predict that the extinction of Pacific leatherback sea turtles within the next 10-30 years is imminent.<sup>22</sup> Time/area closures and more selective fishing practices can help avert the alarming decline in population of these ancient reptiles, but it will depend on efforts at both the national and international level. The United States has an important leadership role to play in investigating ways to fish more selectively. As such, we recommend that NMFS actively facilitate collaboration and information sharing between the PFM, the WPRFMC and other management bodies to develop more selective and innovative fishing practices and gear technologies in existing fisheries. To promote

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<sup>19</sup> Pflieger Institute of Environmental Research (PIER), [http://www.pier.org/hm\\_fishes\\_swordfish.shtml](http://www.pier.org/hm_fishes_swordfish.shtml).

<sup>20</sup> Letter from Dr. James W. Balsiger, Acting Asst. Administrator for Fisheries to Dr. Don McIsaac, Executive Director, Pacific Fishery Management Council, July 17, 2008.

<sup>21</sup> 2004 Draft BiOp at 90

<sup>22</sup> Nature 405, June 2000

sustainability on a global scale, the U.S. must lead by example, by minimizing domestic capacity and developing strong conservation measures that promote ecosystem health and ensure the recovery of endangered sea turtle populations. Even with the most stringent conservation measures in place, reintroduction of longline fishing off the U.S. West Coast will result in a net increase in capacity and fishing effort and put vulnerable fish, marine mammal, seabird and sea turtle populations at even greater risk.

At the same time that the Pacific Council is taking steps to establish a high seas longline fleet off the west coast, fishery managers in the Western Pacific are actively taking steps to relax critical bycatch mitigation measures in their shallow-set longline fishery. Should both efforts be successful, the likely result would be an overall increase in longline fishing effort Pacific-wide and jeopardy determinations for many species of sea turtles, as well as harm to marine mammals, seabirds, and non-target and overexploited fish species. Any proposed changes to the status quo management regime for longlining off the west coast and in Hawaii, should be well-vetted by *both* Councils and NMFS before time and resources are expended. Absent better communication and coordination, existing longline fisheries may be subject to even greater constraints and sea turtle recovery efforts may be irreversibly compromised. As such, we recommend that the Pacific Council cease development of a west-coast based longline fishery and initiate a process to develop a joint pelagics management framework with the WPRFMC.

**D. Adopt import restrictions and demand-side strategies to reduce reliance on imported swordfish.**

Proponents of the high seas longline proposal also claim that a west coast based fishery is warranted and necessary to meet the domestic demand for swordfish and reduce our reliance on imported swordfish from countries that may have weaker standards for sustainability and conservation. While the impact of U.S. swordfish imports is a legitimate concern, the implied assumption is that demand is static and therefore we must increase supply in order to meet demand. Previous efforts to inform and educate consumers about the ecological impacts of fishery operations have been tremendously successful at influencing demand and paving the way for more effective management strategies. For example, the tuna-dolphin issue is part of the broader public consciousness of American consumers and influences many purchasing decisions. Similarly, a recent campaign to discourage consumers from buying severely depleted Chilean sea bass (Patagonian toothfish) was hugely successful. It is clear that informed consumers can substantially influence the demand side of the equation; therefore a more prudent approach would be to focus agency efforts on educating the public about the relative sustainability and associated impacts of the domestic and international swordfish fisheries.

If the objective in establishing a longline fishery off the west coast is to meet consumer demand while promoting more sustainable management approaches abroad, a better approach would be to monitor and control imports. The U.S. has the authority and the legal responsibility to monitor and control imports from countries whose vessels are fishing in a manner that undermines the conservation of protected species. The recent reauthorization of the Magnuson-Stevens Act (MSA) clarified the intent of Congress to crack down on illegal, unreported or unregulated (IUU) fishing to raise the bar for sustainability. Specifically, the Act requires that NMFS identify fishing vessels engaged in “fishing activities or practices...that result in bycatch

of protected living marine resources...”<sup>23</sup> Moreover, the MSA specifically endorses the use of market-related measures such as import prohibitions and landing restrictions to combat IUU fishing.<sup>24</sup> Likewise, the Marine Mammal Protection Act (MMPA) is another statutory tool by which the U.S. can restrict imports of swordfish from countries that do not meet strong conservation standards to minimize the impact of fisheries on marine mammals. Though still pending, the Center for Biological Diversity and Turtle Island Restoration Network submitted a petition in 2008 to ban imports of swordfish from countries failing to submit proof of the effects of fishing technology on marine mammals pursuant to Section 101 of the MMPA. Indeed, if NMFS is sincerely concerned about the impacts that foreign fleets are having on protected resources, limiting or restricting the import of swordfish caught in an unsustainable manner is a powerful tool that should be employed.

## CONCLUSION

It would be irresponsible to re-establish the high seas longline fishery without the necessary conservation safeguards for protected species, a thorough environmental impacts analysis, consideration of alternative gear types to target swordfish, and a coordinated management strategy with the WPRFMC. Indeed, many of the species that would be harmed by the proposed fishery already suffer unsustainable adverse impacts from existing fishing pressure, and in many cases NMFS has not yet complied with its legal duties to analyze, authorize, or prevent even existing take of those species. The best available science indicates that Pacific leatherbacks, loggerheads, and other species simply cannot sustain the harm wrought by another pelagic longline fishery. We do not believe there is sufficient evidence to justify allowing a high seas longline fishery off the west coast at this time and urge NMFS to discontinue the development of a management framework for a high seas shallow set longline fishery. Should the process move forward, we recommend that an additional action alternative be included for analysis that would, in addition to maintaining the current closure, close the loophole whereby Hawaii based fishermen with a Pelagics permit are authorized to fish east of 150 degrees West longitude and land their catch on the west coast.

Sincerely,



Meghan Jeans  
Pacific Fish Conservation Manager  
Ocean Conservancy

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<sup>23</sup> 16 USC 1826d et seq., Section 610(a)(1)(A)

<sup>24</sup> 16 USC 1826d et seq., Section 608(2)



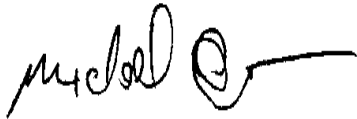
Andrea A. Treece  
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Ben Enticknap  
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Jim Curland  
Marine Program Associate  
Defenders of Wildlife



Michael Sutton  
Vice President & Director  
Center for the Future of the Oceans  
Monterey Bay Aquarium

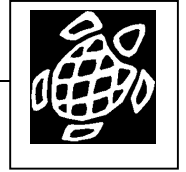


Michael Milne  
Leatherback Campaign Coordinator  
Turtle Island Restoration Network

cc: Pacific Fishery Management Council  
Bill Robinson, NMFS PIRO  
Don McIsaac, PFMC  
Rod McInnis, NMFS SWR

# Turtle Island Restoration Network

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Mr. Donald K. Hansen  
Chairman  
Pacific Fishery Management Council  
7700 NE Ambassador Place, Suite 101  
Portland, Oregon 97220-1384

September 2, 2008

Dear Chairman Hansen:

The Turtle Island Restoration Network (TIRN) submits these comments regarding the proposed High Seas Shallow-Set Longline Amendment off the U.S. West Coast.

The Sea Turtle Restoration Project would like to bring to your attention California Assembly Joint Resolution (AJR) 62. This recent action taken by the California Assembly and Senate affirms the State of California's position in opposing the development of a swordfish longline fishery in the California Economic Exclusive Zone (EEZ) where it has been prohibited since 1977, and expresses opposition to any further consideration of the proposed High Seas Shallow-Set Longline Amendment.

With the passage of AJR 62 in July 2008, the California legislature joins scientists, recreational fishing organizations, and environmental groups who believe that longline fisheries off the U.S. West Coast will undermine successful conservation measures protecting the critically endangered Pacific leatherback sea turtle, Pacific loggerhead turtle, and other marine wildlife by allowing this non-selective gear type into areas where it is currently prohibited. AJR 62 is yet another indication of the widespread popular support for strong protections for marine wildlife and the continuance of closures that currently safeguard sea turtles, marine mammals, and seabirds from interactions with pelagic fisheries. As such, we urge the PFMC to abandon its attempt to reopen the U.S. West coast high seas shallow-set longline fishery.

Please find a following copy of AJR 62 attached.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Milne".

Michael Milne  
Leatherback Campaign Coordinator

## Assembly Joint Resolution No. 62

### RESOLUTION CHAPTER 100

Assembly Joint Resolution No. 62—Relative to West Coast sea turtle protection.

[Filed with Secretary of State July 23, 2008.]

#### LEGISLATIVE COUNSEL'S DIGEST

AJR 62, Leno. West Coast sea turtle protection.

This measure would request the National Marine Fisheries Service to delay consideration of, or deny, the swordfish longline exempted fishing permit for a specified period of time. The measure would request the National Marine Fisheries Service to defer consideration of efforts to introduce shallow-set longline fishing off the California coast for that specified period of time.

WHEREAS, California is a coastal state that is dedicated to protection of our ocean resources, fisheries, and marine wildlife; and

WHEREAS, Sea turtles, fish, and marine mammals are a central component of California's natural heritage and marine biodiversity; and

WHEREAS, According to the National Marine Fisheries Service, the waters off the central California coast are a critical foraging area for Pacific leatherback sea turtles; and

WHEREAS, According to the National Marine Fisheries Service and the United States Fish and Wildlife Service in its "Recovery Plan for the U.S. Pacific Populations of the Loggerhead Turtle (*Caretta caretta*)," the waters off the California coast are a significant migratory corridor and foraging area for North Pacific loggerhead sea turtles; and

WHEREAS, Scientists have determined that the populations of Pacific leatherback and North Pacific loggerhead sea turtles have declined by approximately 95 percent and 80 percent to 86 percent, respectively, in the last 25 years, as reported by Duke University in 2004; and

WHEREAS, Prominent sea turtle biologists from Drexel University and Indiana-Purdue University predict that the death of more than 1 percent of the adult female Pacific leatherback sea turtle population each year could lead to the extinction of the species, as published in 2000 in the journal *Nature*, indicating the catch of small numbers of Pacific leatherback sea turtles is a serious threat to their future survival; and

WHEREAS, Scientists at the 2003 annual meeting of the American Association for the Advancement of Science estimated that the Pacific leatherback sea turtle could become extinct if existing by-catch rates are not reduced; and

WHEREAS, The National Marine Fisheries Service biological opinion and incidental take statement on the Hawaii-based pelagic, deep-set longline fishery predicts that current population trends indicate a high probability that North Pacific loggerhead sea turtles will be effectively extinct within approximately 50 years; and

WHEREAS, Injury and mortality from interactions with longline fishing gear are direct contributors to the rapid decline, and potential extinction, of Pacific leatherback and North Pacific loggerhead sea turtles, according to a study published by Duke University scientists in 2004; and

WHEREAS, Data collected from fishing vessels have revealed that shallow-set longlines that are targeting swordfish snare loggerhead turtles at a rate 10 times greater, and leatherback sea turtles at a rate approximately 3 times greater, than deep-set longlines, as reported by scientists at Dalhousie University and Duke University; and

WHEREAS, The National Marine Fisheries Service is considering approval of an exempted fishing permit (EFP) to authorize shallow-set longlining to target swordfish within the Exclusive Economic Zone (EEZ) of the California coast where commercial pelagic longline fishing has never been permitted; and

WHEREAS, The proposed EFP would allow longline fishing inside the Pacific leatherback conservation area, an area closed to selected types of fishing gear that are known to impact Pacific leatherback sea turtles; and

WHEREAS, In 1989 with the enactment of Section 9028 of the Fish and Game Code, the California Legislature prohibited pelagic longline fishing in the EEZ off the California coast by banning the use of hook and line fishing gear longer than 900 feet; and

WHEREAS, The National Marine Fisheries Service is also considering authorizing the placement of a shallow-set longline fishery to target swordfish on the high seas (High Seas Swordfish Fishery) off the West Coast of the United States in an area known to be used by Pacific leatherback and North Pacific loggerhead sea turtles; and

WHEREAS, Longlining for swordfish has been prohibited on the high seas off the West Coast of the United States since 2004 when the federal government determined that by-catch of North Pacific loggerheads by the High Seas Swordfish Fishery would violate the federal Endangered Species Act's jeopardy prohibition and determined that the "reasonable and prudent alternative" was to close the shallow-set (swordfish) component of the High Seas Swordfish Fishery; and

WHEREAS, A high seas swordfish fishery off the West Coast of the United States will also result in the intentional and incidental capture of Yellowfin, and Bigeye tuna, which populations are already considered to be overfished or are experiencing overfishing by the Inter-American Tropical Tuna Commission (IATTC) or US Stock Assessments or both; and

WHEREAS, On December 27, 2007, the National Marine Fisheries Service found merit in a formal petition asking that California's waters be designated as critical habitat area for the endangered Pacific leatherback

sea turtle under the federal Endangered Species Act and a study to make a final determination is currently underway; and

WHEREAS, On November 16, 2007, the federal government announced it had found merit in a formal petition request to list the North Pacific loggerhead sea turtles found off the West Coast of the United States as endangered under the federal Endangered Species Act and a study to make a final determination is ongoing; and

WHEREAS, The federal Endangered Species Act requires the National Marine Fisheries Service to give highest priority to the protection of threatened and endangered species; now, therefore, be it

*Resolved by the Assembly and the Senate of the State of California, jointly,* That the Legislature of the State of California acknowledges the severe decline of Pacific leatherback and North Pacific loggerhead sea turtle populations and supports efforts to recover and preserve these populations; and be it further

*Resolved,* That the Legislature of the State of California requests the National Marine Fisheries Service to delay consideration of, or deny, the swordfish longline exempted fishing permit in the West Coast EEZ, until Pacific leatherback sea turtle critical habitat is established, the federal status of the North Pacific loggerhead sea turtle is clarified, and critical habitat is designated for the North Pacific loggerhead sea turtle should its protected status be strengthened to “endangered”; and be it further

*Resolved,* That the Legislature of the State of California requests that the National Marine Fisheries Service defer consideration of any efforts to introduce shallow-set longline fishing off the California coast, both inside and outside the EEZ, until Pacific leatherback sea turtle critical habitat is established, the federal status of the North Pacific loggerhead sea turtle is clarified, and critical habitat is designated for the North Pacific loggerhead sea turtle, if it is designated as “endangered”; and be it further

*Resolved,* That the Chief Clerk of the Assembly transmit copies of this resolution to the President and Vice President of the United States, to the Speaker of the House of Representatives, to the Secretary of Commerce, and to each Senator and Representative from California in the Congress of the United States.