Protecting Pacific Sea Turtles

Leatherback sea turtle

PHOTO: SCOTT ECKERT

Ben Enticknap, March 10, 2008
“We don’t need to study this problem to learn how much bycatch there is. We already know the Leatherbacks are declining fast, so the goal is no dead Leatherbacks.” Martín Hall, IATTC

- Quoted in, C. Safina. Voyage of the Turtle

Leatherback in Monterey Bay, California. Photo: J. Sorensen
Trans-Pacific Leatherback Sea Turtle Migrations

Update as of 5/4/05:
2003-2005 post-nesting movement of Leatherback 27957 that nested in Jamursba Medi in July 2003 Days transmitting: 616 days

Figures showing migration routes and sightings from 1980 to 2002.
Locations of observed Leatherback takes in the drift gillnet fishery

J. Carretta, NMFS.
Reported longline fishing effort including all tuna and swordfish directed effort for 2000

Reported Fishing Effort per 5x5 degree cell
- Less than 750,000 hooks
- 750,000 to 1,880,000 hooks
- 1,880,000 to 3,300,000 hooks
- 3,300,000 to 5,470,000 hooks
- 5,470,000 to 9,800,000 hooks
- 9,800,000 to 15,000,000 hooks
- 15,000,000 to 26,200,000 hooks

Photo © PRETOMA, www.tortuganarina.org
Protecting Pacific Sea Turtles Requires:

- Gear modifications and controls in existing fisheries.
- Time and area closures along migratory corridors and feeding areas.
- Trade, market or regulation based approaches to reduce imports.
Import Prohibitions

- Actions to Strengthen International Fishery Management Organizations
  - “Import prohibitions, landing restrictions, or other market-based measures needed to enforce compliance with international fishery management organization measures, such as quotas and catch limits.”

- The Secretary shall determine whether a harvesting nation:
  - “Has provided documentary evidence of the adoption of a regulatory program governing the conservation of the protected living marine resource that is comparable to that of the United States, taking into account different conditions, and which, in the case of pelagic longline fishing, includes mandatory use of circle hooks, careful handling and release equipment, and training and observer programs.”
March 7, 2008

Dr. Donald McIsaac
Executive Director, Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 200
Portland, OR  97220-1384

RE: Agenda Item C.3 – High Seas Shallow-Set Longline Amendment

Dear Dr. McIsaac and Members of the Council:

On behalf of Ocean Conservancy, I am writing to urge the Pacific Fishery Management Council (PFMC) to defer the development a management framework for a high seas shallow-set longline fishery off the west coast of the United States. We believe that the development of a high seas longline fishery is inappropriate given the potential ecological consequences. Instead, we recommend that the Council consider a broader range of alternatives to achieve the goal of providing more sustainable fishing opportunities while promoting the recovery of endangered sea turtles and over-exploited fish populations. We also encourage the Council to prioritize the development of a coordinated management strategy for pelagic fisheries with the Western Pacific Fishery Management Council.

A high seas shallow-set longline fishery poses a threat to endangered sea turtles. Sea turtles throughout the Pacific are hovering on the brink of extinction due in large part to incidental mortality associated with fishing operations. Fisheries mortality has been especially problematic for loggerhead and leatherback sea turtles, with nesting population reductions in excess of 80 percent over the last three generations for both species. Leatherbacks are classified as “endangered” under the Endangered Species Act (ESA) and “critically endangered” by the World Conservation Union (IUCN). The status of the leatherback has been the focus of much attention in recent years, however conservation, protection and support is as critical for the loggerhead as for the leatherback. 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. A pending petition to uplist and reclassify the Pacific loggerhead population as endangered under the ESA suggests that Pacific loggerhead populations warrant even greater protection.

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”) secured an injunction restricting longline fishing under the fishery management plan (FMP) 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.\(^1\) NMFS subsequently issued a Biological Opinion pursuant to Section of 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 conditions that only large 18/0 circle hooks be used, that an effort cap be established to control the number of longline sets, and that a hard cap on turtle take be established 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.\(^2\)

Scientists have concluded that, “[t]he 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.”\(^3\) 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.\(^4\) 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 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 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.”\(^5\) 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.”\(^6\) 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

\(^2\) 71 Fed. Reg. 14824 (March 24, 2006)  
\(^4\) 69 Fed. Reg. 11540, 11543 (March 11, 2004) (preamble to final rule closing Pacific longline fishery east of 150 degrees West long.)  
California coast as vital foraging grounds for endangered leatherback turtles. 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. Despite these findings, the proposed high seas longline fishery would overlap with portions permit Pacific Leatherback Conservation Area and occur during the time of year when leatherbacks are migrating through the region.

**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. 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, 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 could 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 additional fishery-related mortality. Despite strong scientific backing, the ultimate effect of such non-fishery conservation measures on turtle populations is, 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.

**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. 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 have been classified as overfished and/or experiencing overfishing. Both the Inter-American Tropical Tuna

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Commission (IATTC) and U.S. stock assessment scientists have identified Pacific bigeye and yellowfin tuna populations as being overfished and subject to overfishing. The IATTC has put forth a resolution which states that “bigeye stocks are below the level that would produce the average maximum sustainable yield (AMSY)” and directs member nations to implement a seasonal closure for commercial purse seine and longline vessels targeting bigeye (and yellowfin) tuna. Likewise, the IATTC and WCPFC adopted resolutions in 2005 identifying North Pacific albacore populations as experiencing overfishing and requiring member nations to cap current levels of effort. 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.” 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.

Clarify objectives and consider a broad range of management alternatives.
As an initial matter, Ocean Conservancy recommends 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, in fact, there is legitimate interest in developing a cleaner and more sustainable swordfishery, the Council and NMFS must identify that as an objective and evaluate a wider range of alternatives than simply establishing a limited entry high seas shallow set longline fleet of variable sizes. 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 degrees West longitude to guard against jeopardy to loggerheads even after the Pacific Council banned longlining west of 150 degrees West 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 range of alternatives considered to longlining exclusively. Of the action alternatives being presented to the Council, it has been suggested by agency scientists that two (the medium and large size limited entry fleet options), if not all, are patently unreasonable. Such a dramatic 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 (MBTA), 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 more protections for sea turtles and other non-target species. A “reasonable” alternative must also be practicable. The stated goal in establishing a high seas shallow set longline fishery is to create a viable and more selective alternative to drift gillnetting while not increasing overall fishing

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9 2005 HMS Stock Assessment and Fishery Evaluation Report, Table 5-1, p. 111.
10 Resolution C-06-02, IATTC, June 2006
11 PROP IATTC-73-C1, June 2005
12 2005 HMS Stock Assessment and Fishery Evaluation Report, Section 5.3.1, page 106.
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capacity. It is unclear however 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.”

The Council is charged with developing and refining a range of alternatives for public review and conducting further environmental analysis pursuant to the National Environmental Policy Act (NEPA). The alternatives analysis “is the heart of the environmental impact statement.”13 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.”14 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,”15 and “devote substantial treatment to each alternative considered in detail,”16 Should the Council 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 indentifying more selective fishing strategies to target swordfish. 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.

Investigate options to expand the California harpoon fishery.
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. 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. 17

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 fishery management councils and a comprehensive evaluation of the impacts of all U.S. longlining in the Pacific on imperiled sea turtle populations, yet these essential steps still have not occurred. The Hawaii and California based fleets fish in the same manner, often in the same area, and catch the same turtles.18 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.

13 40 C.F.R. §1502.14
14 Id.
15 40 C.F.R. §1502.14(a)
16 40 C.F.R. §1502.14(b).
17 Pfleger Institute of Environmental Research (PIER), http://www.pier.org/hm_fishes_swordfish.shtml.
18 2004 Draft BiOp at 90
Scientists warn that, “[t]he 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.”19

If current fishing practices continue, scientists predict that the extinction of Pacific leatherback sea turtles within the next 10-30 years is imminent.20 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. Towards that end, we recommend that the Pacific Council work closely with fishery managers in the Western Pacific and elsewhere to develop more selective and innovative fishing practices and gear technologies in existing fisheries. To promote 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 US west coast will result in a net increase in capacity and fishing effort and put vulnerable finfish, marine mammal and turtle populations at even greater risk.

At the same time that the Pacific Council is taking steps to establish a high seas limited entry longline fleet off the west coast, fishery managers in the Western Pacific are considering rolling back critical bycatch mitigation measures in their shallow-set longline fishery. Should both efforts be successful, the likely result would be a overall increase in longline fishing effort Pacific-wide and jeopardy determinations for many species of sea turtles. 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 defer development of a west-coast based longline fishery and initiate a process to develop a joint pelagics management framework with the Western Pacific Fishery Management Council.

**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 these are legitimate concerns, 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. Likewise, 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

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20 Nature 405, June 2000
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...”\(^{21}\) Moreover, the MSA specifically endorses the use of market-related measures such as import prohibitions and landing restrictions to combat IUU fishing.\(^{22}\) 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 recently submitted a petition 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 importation of swordfish caught in an unsustainable manner is a powerful tool that should not be discounted.

It would be irresponsible to re-establish the longline fishery without the necessary conservation safeguards, a thorough environmental impacts analysis, consideration of alternative gear types to target swordfish, and a coordinated management strategy with the WesPac. We do not believe there is sufficient evidence to justify allowing a renewed longline fishery at this time and urge the Council to discontinue development of a management framework for a high seas shallow set longline fishery.

Sincerely,

Meghan Jeans
Pacific Fish Conservation Manager

\(^{21}\) 16 USC 1826d et seq., Section 610(a)(1)(A)  
\(^{22}\) 16 USC 1826d et seq., Section 608(2)
March 7, 2008

Dr. Donald McIsaac  
Executive Director, Pacific Fishery Management Council  
7700 NE Ambassador Place, Suite 200  
Portland, OR  97220-1384

RE: Agenda Item C.4 - Exempted Fishing Permit for Longline Fishing in the West Coast Exclusive Economic Zone

Dear Dr. McIsaac and Members of the Council:

On behalf of Ocean Conservancy, I am writing to urge the Pacific Fishery Management Council (PFMC) to disapprove the proposed exempted fishing permit (EFP) application for longline fishing in the west coast exclusive economic zone (EEZ). As we noted in our previous comments and testimony before the Council, we do not believe there is sufficient evidence to justify a renewed longline fishery off the west coast. If implemented, the EFP will compromise successful conservation measures protecting sea turtles, seabirds, marine mammals, billfish, sharks and other fish by allowing pelagic longlines in areas along the California and Oregon coastline where this gear type is currently prohibited. Furthermore, the EFP does not have broad public or governmental support, and is not reasonably designed to achieve its stated objective.

The longline EFP does not have widespread support.

Pelagic longline fishing has been banned within 200 miles of the California coast for well over a decade. In March 2004 this ban was extended to the entire west coast EEZ for all pelagic longlining, and to the high seas beyond the EEZ for west coast-based shallow-set pelagic longlining. As the Council is well aware, previous efforts to reintroduce longlining off the California coast were met with widespread opposition. Scientists, commercial and recreational fishermen, the conservation community, members of the public, and the State of California all voiced concerns about the threat that longlining poses to over-exploited fish populations and vulnerable marine wildlife.

Indeed, representatives to the Council from the California Department of Fish & Game (CDFG) have repeatedly opposed the proposed longline EFP. Likewise, in 2007 the California Coastal Commission (“Commission”) voted unanimously to reject the issuance of the EFP finding that it was not consistent with the policies and principles of the California Coastal Management Program, Chapter 3 of the California Coastal Act, and the best available science. The Commission’s decision was further bolstered by a 2002 resolution to support conservation
programs and the preservation of safe habitat for endangered sea turtles that forage off the California coast.¹

The EFP application presently before the Council incorporates several modifications to the previous proposal including: a change in the fishing season from September through December to November through March; a shift in the shoreward boundary of the fishing area from 30 to 50 miles offshore; authorization for the EFP to continue through 2010 without further review; and reclassification of several tuna species as target species. Despite these revisions, the concerns and flaws identified by the Commission and its staff remain unaddressed by the current proposal. As such, it is unlikely that this revised EFP application will be granted a consistency certification by the Commission. Further evaluation of this proposal by the Council, NMFS and the Commission will waste valuable time and resources.

The longline EFP 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. Fisheries mortality has been especially problematic for loggerhead and leatherback sea turtles, with nesting population reductions in excess of 80 percent over the last three generations for both species. Leatherbacks are classified as “endangered” under the Endangered Species Act (ESA) and “critically endangered” by the World Conservation Union (IUCN). The status of the leatherback has been the focus of much attention in recent years, however conservation, protection and support is as critical for the loggerhead as for the leatherback. According to the latest surveys, there are fewer nesting leatherheads 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. A pending petition to uplist and reclassify the Pacific loggerhead population as endangered under the ESA suggests that Pacific loggerhead populations warrant even greater protection.

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”) secured an injunction restricting longline fishing under the fishery management plan (FMP) 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.² 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 conditions that only large 18/0 circle hooks be used, that an effort cap be established to control the number of longline sets, and that a hard cap on turtle take be established 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.³

¹ Resolution by the California Coastal Commission in Support of the Conservation of Endangered Sea Turtles, December 2002.
³ 71 Fed. Reg. 14824 (March 24, 2006)
In 2004, NMFS imposed a moratorium on pelagic longline fishing east of 150 degrees West longitude to guard against jeopardy to loggerheads even after the Pacific Council banned longlining west of 150 degrees West longitude. These far reaching closures demonstrate just how vulnerable sea turtles are to the impacts of longline fishing. Scientists have concluded that, “[t]he 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.” It would be inappropriate to allow the capture of turtles by a California-based fishery – EFP or otherwise – 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. 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 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 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.” 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.

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. Despite these findings, the proposed longline EFP would permit longlining within the same Pacific Leatherback Conservation Area during the time when leatherbacks are migrating through the region.

**The longline EFP threatens vulnerable finfish 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 on select fish species. While the EFP application proposes to allow a single vessel to target swordfish with shallow-set longline gear in west coast EEZ, other more vulnerable highly migratory species may be targeted or caught incidentally. The draft environmental assessment for the previous EFP proposal noted that the EFP may lead to a greater level of interactions with protected shark species including great white sharks and basking sharks.

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Likewise, the previous EFP identified several tuna species as major non-target species likely to be caught incidentally to shallow-set longline activities. However, the revised proposal reclassifies bigeye, yellowfin, bluefin and albacore tuna as target species. Of these target tuna species, three (yellowfin, bigeye and albacore) have been classified as overfished and/or experiencing overfishing. Given the vulnerable status of these tuna populations, expanding capacity, increasing fishing effort and reintroducing longlining off the U.S. West Coast is not consistent with international directives, domestic regulations, the best available science and the principles of precautionary management.

The longline EFP is not designed to achieve its intended purpose.

The EFP is not reasonably designed to meet its stated objective. The purpose of the proposed EFP is to assess whether longline gear is an economically viable substitute for drift gillnet gear. The EFP however would authorize only one vessel to fish for one year. One vessel fishing for one season will not yield statistically significant results that will allow NMFS to reasonably determine whether transitioning the drift gillnet fleet to a shallow-set longline fishery off the West Coast is a viable option. Given our other concerns with the EFP, we are not recommending that fishery managers authorize more vessels to participate in the EFP to remedy this design flaw. However, we do request that the Council and NMFS weigh the ecological risks against the anticipated value of this EFP.

We agree that the U.S. has a leadership role to play in investigating ways to fish more selectively. Nevertheless, even with the most stringent conservation measures in place, reintroduction of longline fishing off the US west coast will result in a net increase in overall fishing effort, putting vulnerable finfish, marine mammal and turtle populations at even greater risk. If NMFS and the State of California are seeking to establish a viable and sustainable west coast based swordfish fishery sustainable, industry representatives and fishery managers initiate a coordinated management strategy with the Western Pacific Fishery Management Council and investigate opportunities to expand more selective California harpoon fishery.

Current longline closures have provided a successful working balance between the interests of industry and the urgent need to protect critically endangered leatherback and loggerhead sea turtles. It would be irresponsible to re-establish the longline fishery without the necessary conservation safeguards and a thorough environmental impacts analysis. The EFP application currently under review is not predicated on a comprehensive assessment of sea turtle populations and fishery interactions and does not adequately consider the associated impacts on endangered and protected species and the marine ecosystem both inside and outside California’s coastal zone. We do not believe there is sufficient evidence to justify allowing an exempted or a renewed longline fishery at this time and urge the Council to oppose issuance of the proposed longline EFP.

Sincerely,

Meghan Jeans
Pacific Fish Conservation Manager

March 8, 2008

Distributed at March 10, 2008 Meeting

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RE: Agenda Item C.3.b: High Seas Shallow-Set Longline Amendment

Dear Mr. McIsaac, Dr. Dahl, and members of the Council:

The Center for Biological Diversity (“Center”) and Turtle Island Restoration Network (“TIRN”) submit these comments regarding the proposed high seas shallow-set longline amendment. In light of the significant impacts that the current Hawaii longline fishery has on a number of protected species and the fact that the same species are likely to suffer additional impacts if the proposed high seas longline fishery goes forward, we urge the Council to maintain the current restrictions on longline effort.

The Proposed New High Seas Shallow-Set Longline Fishery Would Result in Unacceptable Impacts to Threatened and Endangered Species.

Any expansion of shallow-set pelagic longlining effort in the Pacific would likely jeopardize the continued existence of at least two ESA-listed species, the Pacific leatherback and loggerhead sea turtles. 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).

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). The proposed high seas longline fishery would require consultation with NMFS regarding leatherback and loggerhead sea turtles, as well as other ESA-listed species that may be affected by the proposed fishery.

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). An agency’s duty to avoid jeopardy is continuing, and “where discretionary Federal involvement or control over the action has been retained or is authorized by law,” the agency must in certain circumstances reinitiate formal consultation. 50 C.F.R. § 402.16.

The impacts of longline fishing on sea turtles in particular have been the subject of much study, concern, and litigation. In 2001, NMFS determined that the operation of the western Pacific pelagic longline fishery without the current gear and effort restrictions and without 100% observer coverage would jeopardize the continued existence of leatherback, loggerhead, and green sea turtles. NMFS, Biological Opinion on Authorization of Pelagic Fisheries Under the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region (2001) at 120-24, 136 (green turtles); 124-29, 136 (leatherbacks); 129-32, 136 (loggerheads). As a result, NMFS prohibited shallow-set longline fishing north of the equator and placed additional restrictions on deep-set longlining, including time-area closures. Id. at 138-40.

NMFS reopened the Hawaii-based swordfish fishery in 2004, when it issued a “no jeopardy” biological opinion on impacts to listed sea turtles authorizing the fishery to operate under a number of constraints regarding gear, bait, effort levels, and take. 72 Fed. Reg. 46608, 46609. NMFS has reported that the incidental capture of sea turtles by the shallow-set longline fishery has declined by 89% compared to historic capture rates, presumably because of the
protective measures that have been implemented in recent years.\textsuperscript{1} 72 Fed. Reg. 46608, 46609. This decline indicates that those measures have likely been somewhat effective in reducing the fishery's impact on imperiled turtle species.\textsuperscript{2}

However, NMFS recently proposed to roll back the very same measures for the Hawaii longline fishery that have achieved much needed reductions in sea turtle bycatch and mortality. 72 Fed. Reg. 46608. Therefore, the high seas longlining proposal’s promise to “parallel as closely as possible the key elements and specific regulations applicable to the Hawaii fishery” does not offer any guarantee that these species will receive anything close to adequate protection. To the contrary, the proposals currently under consideration suggest that imperiled sea turtles and other species may be subject to increased interactions with more vessels throughout more of their habitat with less protection than before. In other words, injury and death of imperiled species will increase with the establishment of a new longline fishery.

Scientific evidence indicates that neither loggerhead nor leatherback sea turtle populations can withstand such increased mortality. In response to a petition by the Center and TIRN to reclassify loggerheads in the North Pacific as a distinct population segment (“DPS”) with endangered status and designate critical habitat under the ESA, NMFS agreed that the proposal may be warranted. 72 Fed. Reg. 64585 (November 16, 2007). Increasing the take of loggerheads in longline fisheries is clearly impermissible given the species’ decline. Yet Attachment 1 of the Pacific Fishery Management Council Agenda Item C.3 for the March 2008 meeting estimates that a high seas Shallow Set Longline fishery could result in up to 15 annual interactions with Loggerhead turtles. This far exceeds the current Incidental Take Statement for the West Coast Drift Gillnet fishery that permits up to 5 annual loggerhead takes. Given the loggerhead’s precarious population status, its likely uplisting, and the significant harm the proposed high seas longline fishery would cause, this fishery is clearly inconsistent with ESA requirements.

The leatherback sea turtle is listed as endangered under the ESA throughout its range. Numbering over 100,000 nesting females as recently as the 1980s, the species is now in rapid decline with a current estimate of only 2,000-5000 nesting females. Lewison, R. \textit{et al.}, (2004) Quantifying the effects of fisheries on threatened species: the impact of pelagic longlines on loggerhead and leatherback sea turtles, \textit{Ecology Letters} 7:221. In 2000, an article published in the preeminent scientific journal \textit{Nature}, predicted extinction of leatherbacks in the Pacific within decades. Spotila \textit{et al.} (2000), Pacific leatherback turtles face extinction, \textit{Nature} 405:529-

\textsuperscript{1} NMFS does not report whether there has been any change during this time period in the number of sea birds and marine mammals seriously injured or killed by the pelagic longline fishery.

\textsuperscript{2} We hope the observed decline in interactions is in fact a result of the gear being more selective rather than an artifact of the simple fact that populations of leatherback and loggerhead sea turtles in the Pacific continue to decline and there are simply few turtles in the water for the fishery to interact with.
530. The primary cause of the leatherback decline, and the greatest threat to its continued existence, is entanglement and drowning in longline fishing gear. *Id.*

In its 2001 longline biological opinion, 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 even with current protective measures the Hawaii shallow-set longline fishery continues to take leatherbacks, any expansion of longlining effort in the Pacific would be patently contrary to ESA requirements.
Finally, as discussed in the MMPA section below, current longline fisheries are known to entangle and kill ESA-listed marine mammals. Such take must be authorized under both the ESA and MMPA.


Marine mammals are entangled and killed in the Hawaii and Atlantic longline fisheries, and would more than likely be taken in the proposed high seas longline fishery. Many of these species are also listed under the ESA. We do not believe that the necessary “negligible impact” finding under the MMPA can lawfully be made for the ESA-listed species likely to interact with pelagic longline gear deployed in the high seas. Therefore, no such permit can be issued and any take will be in violation of both the ESA and MMPA.

For non-ESA listed marine mammals, take in violation of the MMPA is also likely to occur. Both the Hawaii and Atlantic longline fisheries are categorized as Category 1 fisheries on the 2006 List of Fisheries, 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 marine-mammal killing fishery 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 longline fishery that would result in take of stocks of marine mammals where mortality and serious injury are already above ZMRG is consistent with the ZMRG mandate of the MMPA.

The most likely species of non-ESA listed marine mammals to be taken by the proposed high seas longline fishery are Risso’s dolphins and short-finned pilot whales. Take of even a single pilot whale by the proposed longline fishery would put mortality and serious injury to the stock over PBR. 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. Until and unless, a take reduction plan is in place that that reduces pilot whale mortality to ZMRG, NMFS cannot authorize any fishing activity through an EFP which is likely to result in additional take of the species.

The Proposed High Seas Longline Fishery Is Not Likely to Reduce Drift Gillnet Effort.

None of the limited entry options for the proposed high seas longline fishery appear to guarantee any significant reduction in drift gillnet effort. One clear obstacle to achieving a reduction in drift gillnet effort by transitioning these permit holders to longlining is that drift gillnet boats often are not equipped to venture far enough offshore to fish in the EEZ; nor are
they equipped with the requisite longline gear. This problem makes it unlikely that even the most ambitious of the limited entry options would meaningfully reduce drift gillnet effort. Moreover, the second and third options, which allow participation by those who once participated in the west coast-based shallow-set longline fishery, would result in an expansion of both longline and overall fishing effort and would likely have little effect on drift gillnet effort. In short, virtually all options set forth for the proposed new high seas longline fishery result in increased fishing effort and increased impacts to protected species.

**Regulatory and Budget Constraints Make the Proposed High Seas Longline Fishery Infeasible.**

The HMSMT report notes that the proposed high seas longline fishery will affect many of the same protected species as the Hawaii fishery and that the limited amount of ESA take allowed would significantly limit the size of the proposed fishery. More likely, an honest assessment of overall impacts of U.S. longline fisheries in the Pacific would prevent the proposed fishery from taking place at all.

Moreover, the HMSMT report also notes that the proposed fishery would be subject to a 100% observer coverage requirement in order to try to comply with ESA requirements. However, no budget exists to provide observer coverage for west coast-based longline trips.

In sum, the proposed high seas longline fishery is inconsistent with the requirements of federal law and impossible to implement given current regulatory and budget constraints. We therefore urge the Council to maintain or strengthen current restrictions on longline effort in Pacific. Thank you for your consideration.

Sincerely,

/s/ Andrea A. Treece

Staff Attorney, Oceans Program
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March 6, 2008

Distributed at March 10, 2008 Meeting

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RE: Agenda Item C.4.a: Application for Exempted Fishing Permit to Fish with Longline Gear in the West Coast Exclusive Economic Zone

Dear Mr. McIsaac, Dr. Dahl, and members of the Council:

The Center for Biological Diversity and Turtle Island Restoration Network ("TIRN") submit these comments regarding the Pacific Fishery Management Council’s ("Council") consideration of the renewed application for an exempted fishing permit to fish with shallow-set longline gear in the West Coast Exclusive Economic Zone ("EEZ"). As noted in the Council’s Situation Summary, this proposal is virtually identical to a proposal that the California Coastal Commission ("Commission") rejected last summer. The Commission concluded that implementation of the proposed EFP would result in harm to a number of imperiled species, most particularly to the endangered Pacific leatherback sea turtle.

We detailed similar concerns in the attached July 13, 2007 letter to the National Marine Fisheries Service ("NMFS"). In addition to concerns regarding the impacts of the proposed EFP on leatherback sea turtles and other threatened and endangered species, we identified numerous legal deficiencies, including the failure to comply with the Endangered Species Act, Marine Mammal Protection Act, Migratory Bird Treaty Act, Magnuson-Stevens Fishery Conservation and Management Act, National Marine Sanctuaries Act, and National Environmental Policy Act. We first identified many of these deficiencies in our November 7, 2006 comment letter to the Council, which is also attached.
The deficiencies and impacts identified in those letters apply equally to the current proposal. The current EFP proposal differs from prior proposals only in that fishing would now take place from November through March (as opposed to September through December), would take place at least 50 miles offshore (as opposed to 30 miles offshore), and would be authorized for 2009 and 2010 without further review of the proposal by the Council. None of these changes address the numerous concerns set forth by the Center, TIRN, other conservation groups, or the Commission. Rather, this proposal, like those that came before it, continues to contravene legal requirements and puts protected species at unjustified and unnecessary risk.

Given that the substantial flaws in the proposal have not been resolved and that it is no more likely to gain the necessary approvals now than it was before, it makes little sense to expend the Council’s and NMFS’s resources in advancing this fatally flawed EFP proposal. We therefore urge the Council to reject the applicant’s request to adopt the EFP for public review.

Thank you for your consideration.

Sincerely,

/s/ Andrea A. Treece

Staff Attorney, Oceans Program
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November 7, 2006

Via Electronic Mail

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RE: Agenda Item C-3: Exempted Fishing Permits

Dear Mr. McIsaac, Mr. Hansen and members of the Council:

The Center for Biological Diversity, Turtle Island Restoration Network, and Oceana submit the following comments regarding Agenda Item C-3 of the November 2006 meeting of the Pacific Fishery Management Council ("PFMC" or "Council") concerning Exempted Fishing Permits ("EFPs"). Pursuant to PFMC policy as articulated on its website, we request that this letter be distributed to the Council at or before the onset of the November meeting.

The Agenda for the November meeting of the Council frames the issues before the Council as "Consider Drift Gillnet EFP (Status for 2006 and Guidance for 2007) and Preliminary Alternatives for 2007 Shallow Set Longline EFP." According to the "Situation Summary," contained in the Briefing Book for the November meeting, "the HMSMT is scheduled to brief the Council on the results of the drift gillnet EFP during the 2006 season." Based on numerous telephone conversations with, and written statements by officials with the National Marine Fisheries Service/NOAA Fisheries, it is our understanding that the proposed Drift Gillnet EFP for 2006 has not yet been issued. Given the proposed EFP has not been issued, and the August 15 to November 15 permit season is virtually over, we do not see what "results" from the EFP could possibly be relayed to the Council for its consideration.1 The only relevant information to be gleaned from the proposed 2006 EFP is that NMFS did not issue the permit because NMFS could not lawfully do so. Since the same legal obstacles to issuing such a permit would also apply to any 2007 Drift Gillnet EFP to be considered by the Council and NMFS, we do not see any reason for the Council to waste the limited resources of NMFS by again recommending that such an unsound and unlawful permit be issued. Nevertheless, given the track record of the Council and NMFS of supporting the proposed 2006 EFP, we offer the following comments regarding any Drift Gillnet EFP for 2007. Similarly, we believe the proposed 2007 longline EFP cannot lawfully be issued by NMFS, and therefore also does not warrant the further consideration of the Council. Our specific objections to both of these proposed EFPs follow.

I. THE 2007 DRIFT-GILLNET EFP MUST BE DENIED

As we have stated on numerous occasions in our comments to the Council and NMFS regarding the proposed 2006 EFP, which would allow vessels currently permitted to participate in the California/Oregon Drift Gillnet Fishery ("Fishery") to set drift-gillnet gear in the Pacific Leatherback Conservation Area from August 15 to November 15, notwithstanding the fact that existing law and regulation prohibit the setting of such gear during this period, any request to allow harmful fishing gear in the Pacific Leatherback Conservation Area while likely to be in the area must be denied. Issuing such an EFP in 2007 would be wholly incompatible with the very purpose for which the Pacific Leatherback Conservation Area was created to protect critically endangered Pacific leatherback sea turtles from entanglement and drowning in drift-gillnet fishing gear. In addition to being utterly misguided as a matter of policy and science, issuance of the 2007 EFP would be illegal, as doing so would violate the Endangered Species Act ("ESA") (16 U.S.C. § 1531 et seq.), Marine Mammal Protection Act ("MMPA") (16 U.S.C. § 1361 et seq.), Migratory Bird Treaty Act ("MBTA") (16 U.S.C. § 706 et seq.), National Marine Sanctuaries Act (16 U.S.C. § 1431 et seq.), Coastal Zone Management Act ("CZMA") (16 U.S.C. § 1451 et seq.), Magnuson-Stevens Fishery Conservation and Management Act ("MSA") (16 U.S.C. § 1801 et seq.), and the National Environmental Policy Act ("NEPA") (42 U.S.C. § 4321 et seq.).

A. The Drift-Gillnet Fishery

The California/Oregon Drift Gillnet Fishery for Shark and Swordfish ("Fishery") is currently primarily a federally-managed fishery, with the majority of the fishing effort occurring in federal waters within 200 miles of the coasts of California and Oregon. The fishery is governed pursuant to the overlapping provisions of a federal Highly Migratory Species Fishery Management Plan ("FMP") under the MSA, and regulations promulgated by NMFS to implement that FMP. Biological Opinions drafted by NMFS under the ESA, regulations promulgated by NMFS pursuant to the ESA to implement the Biological Opinions, regulations promulgated by NMFS pursuant to the MMPA to implement a Take Reduction Plan developed for the Fishery, as well as several provisions of California and Oregon state law.

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1 Given the stated purpose of the 2006 EFP was "data collection" we do not see how NMFS could justify issuing the EFP at this late date, as any "data" collected would be of such limited temporal and spatial scale that any results extrapolated from it would be of little statistical significance. Issuing the EFP at this point would simply place critically endangered leatherback sea turtles and other protected species at needless risk.

2
The Fishery consists of approximately 100 permitted vessels of which approximately 40 are active in a given year. These vessels use nets of approximately one mile in length with mesh sizes of 16 to 22 inches. The nets are generally set in the evening and retrieved in the morning, and theoretically allow small animals to pass through while trapping larger animals. Although termed “gilnets,” the nets used in the Fishery actually entangle fish and other animals rather than trap them by the gills. The majority of fishing effort in the Fishery occurs between August and the end of January.

Although the Fishery originally targeted thrasher sharks, today it also targets both swordfish and shortfin mako sharks. Other species commonly caught and kept by this Fishery include opah, loafer, and various species of tuna. The majority of the targeted catch in the Fishery now consists of swordfish taken off the California coast between San Diego and Cape Mendocino. Sunfish or mola and blue sharks are the two most common unwanted fish species or “bycatch” caught by the Fishery, with over ten thousand molas and a total one thousand blue sharks caught and discarded by the Fishery in 2005 alone.

Historically, the Fishery has resulted in the incidental bycatch of many species of marine mammals, sea turtles and seabirds. Several of these species are listed as endangered or threatened under the ESA, including sperm whales (Physeter macrocephalus), humpback whales (Megaptera novaeangliae), fin whales (Balaenoptera physalus), Steller sea lions (Eumetopias jubatus), leatherback sea turtles ( Dermochelys coriacea), loggerhead sea turtles ( Caretta caretta), green sea turtles ( Chelonia mydas), and olive ridley sea turtles ( Lepidochelys olivacea). Moreover, the critically endangered North Pacific right whale (Eubalaena japonica) occurs within the range of the Fishery and is at risk from it. Similarly, the recently listed Southern Resident population of killer whales ( Orcinus Orca), a species historically entangled and killed by the Fishery, seasonally occurs in the range of the Fishery. In addition, numerous non-ESA listed marine mammals protected by the MMPA have been entangled and killed in gillnets used by the Fishery, including, for example, pilot whales, common, Pacific white-sided, and northern right whale dolphins, and several additional species of whales, sea lions and seals.

NMFS considers the Fishery a Category I fishery under the MMPA. A Category I fishery is a fishery that has “frequent incidental mortality and serious injury of marine mammals.” 16 U.S.C. § 1367(c)(1)(A); 50 C.F.R. § 222.2. Since at least 1990, NMFS has monitored the Fishery due to its high rate of bycatch. Mortality and entanglement rates are calculated based upon the number of individuals observed entangled or killed and the percentage of the fishing effort observed. Mortality and entanglement rates vary from year to year, with some species observed killed every year and others observed killed only every two or three years. Consequently, NMFS’s estimates of annual mortality and entanglement rates vary based upon which years are used to calculate the average.

In response to the high level of marine mammal mortality from the Fishery, in 1997 NMFS adopted the Pacific Offshore Cetacean Take Reduction Plan and accompanying regulations pursuant to Section 118(f) of the MMPA. The Take Reduction Plan and implementing regulations became effective October 30, 1997. 62 Fed. Reg. 51805 (Oct. 3, 1997). Despite the Take Reduction Plan, the Fishery continues to kill marine mammals at rates in excess of those authorized by the MMPA.

Because implementation of the Take Reduction Plan constitutes federal agency action within the meaning of the ESA, NMFS undertook an internal Section 7 consultation in connection with adoption of the Take Reduction Plan and implementing regulations, and issued a Biological Opinion on September 30, 1997, concluding that the Fishery would not jeopardize any listed marine mammal or sea turtle species. However, NMFS also concluded that the requirements of Section 101 of the MMPA for permit issuance could not be met and that, therefore, no incidental take of ESA-listed marine mammal species could be authorized. Nevertheless, in the fact that no take of ESA-listed marine mammals was authorized by NMFS, the Fishery continued to operate and take listed marine mammals. Additionally, take of listed sea turtle species occurred at levels in excess of that authorized by the 1997 Biological Opinion’s Incidental Take Statement.

In March 2000, the Center for Biological Diversity and Turtle Island Restoration Network brought suit against NMFS for violations of the ESA and MMPA related to the Fishery. In response, on October 23, 2000, NMFS issued a new Biological Opinion for the Fishery. NMFS also at this point issued a permit under Section 101 of the MMPA authorizing the Fishery to take ESA-listed marine mammal species. 65 Fed. Reg. 64670. The new Biological Opinion concluded that the Fishery would likely jeopardize both the loggerhead and leatherback sea turtles. With regard to the leatherback sea turtles, NMFS concluded that the projected take of the species from the Fishery, would jeopardize the species because any further mortality to leatherbacks from the western Pacific nesting population equated to jeopardy.

Therefore, 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.

Biological Opinion at 94. (Emphasis added).

As required by Section 7(b) of the ESA, 16 U.S.C. § 1536(b), NMFS proposed a reasonable and prudent alternative that would avoid jeopardy to the leatherback. Id. The reasonable and prudent alternative required that a seasonal closure of the Fishery be implemented North of Point Conception in the fall. Specifically the Biological Opinion states:

By August 1, 2001, NMFS, or the states of California and Oregon, must implement regulations to close an area to drift gillnet from Point Conception, California (34°27'N), north to 45°N, and west to 129°W, from August 15th to October 31st.

Id. at 102. While NMFS illegally delayed the implementation of this closure, on August 24, 2001, after receiving a notice of intent to sue from the Center for Biological Diversity and Turtle Island Restoration Network, NMFS did implement it. Id. The NMFS Biological Opinion was the subject of a lawsuit by the Center for Biological Diversity and Turtle Island Restoration Network. According to the Biological Opinion, NMFS had failed to consult with the CNDRC, as required by Section 7(b) of the ESA, 16 U.S.C. § 1536(b). The Center for Biological Diversity and Turtle Island Restoration Network brought suit against NMFS for violations of the ESA and MMPA related to the Fishery in 2000. The Center for Biological Diversity and Turtle Island Restoration Network brought suit against NMFS for violations of the ESA and MMPA related to the Fishery in 2000. The Center for Biological Diversity and Turtle Island Restoration Network brought suit against NMFS for violations of the ESA and MMPA related to the Fishery in 2000. The Center for Biological Diversity and Turtle Island Restoration Network brought suit against NMFS for violations of the ESA and MMPA related to the Fishery in 2000.
Network, NMFS initially implemented a modified version of the required closure through an interim final rule. 66 Fed. Reg. 44549. 2

The closure ultimately implemented by NMFS runs from August 15 to November 15 each year and extends from Point Sur (36°41'18.5"N) in California to 45°N on the Oregon Coast.

Since the leatherback closure went into effect, no leatherback sea turtles have been observed taken in the Fishery.

In April 2004, NMFS finally promulgated regulations implementing the long overdue FMP for HMS fisheries on the West Coast. 69 Fed. Reg. 18453. Through these regulations, NMFS incorporated the existing leatherback and loggerhead closures into the FMP regulations. See 50 C.F.R. § 660.713(c)(1). The February 4, 2004 Biological Opinion for the FMP reached its no jeopardy conclusion for the leatherback based on the premise that the leatherback closure would remain in effect.

February 4, 2004 Biological Opinion for the FMP contained an Incidental Take Statement estimating the likely take of listed sea turtles and marine mammals from the Fishery. However, due to the interplay of the MMPA and ESA, no take authorization for ESA-listed marine mammals was issued:

The ESA allows takings of threatened and endangered marine mammals only if authorized by section 101(a)(5) of the MMPA. Until the proposed action receives authorization for the incidental taking of marine mammals under section 101(a)(5) of the MMPA, the incidental takes of marine mammals described below are not exempt from the taking prohibition of section 9(a), pursuant to section 7(o) of the ESA. 3

February 4, 2004 Biological Opinion at 226. The MMPA Section 101 permit issued to the Fishery in October 2000 for the take of threatened and endangered marine mammals expired on October 24, 2003. See 65 Fed. Reg. 64670. No subsequent take authorization has been issued even though the Fishery continues to capture and kill ESA-listed marine mammals. 4

B. The Proposed 2007 Drift-Gillnet Exempted Fishing Permit

No EPA for the 2007 fishing season has yet to be officially authorized or proposed by the Council or NMFS. Nevertheless, it is our expectation that any proposed 2007 Drift-Gillnet EPA will be substantially similar to the proposed 2006 EPA. On July 11, 2006, NMFS published a notice in the Federal Register regarding an EPA which would allow vessels currently permitted to participate in the Fishery to set drift-gillnet gear in the Pacific Leatherback Conservation Area from August 15, 2006 to November 15, 2006 notwithstanding the fact that existing law and regulation prohibit the setting of such gear during this period. See 71 Fed. Reg. 39055 (July 11, 2006). NMFS described the 2006 EPA as follows:

The EPA would authorize approximately 30 vessels to fish from August 15, 2006 to November 15, 2006, in an area off the U.S. West Coast of California and Oregon defined as the Pacific Leatherback Conservation Area within the Federal EEZ. The EPA would allow a maximum of 360 DGN sets, and would require 100 percent observer coverage for all fishing under the EPA. The fishery would be managed through limits on the amount of incidental take of protected species. The proposed EPA would impose a limit of two leatherback sea turtles that may be incidentally taken during the course of fishing under the EPA and limit to one the number of serious injuries or mortalities to humpback whales (Megaptera novaeangliae), short-finned pilot whale ( Globicephala macrorhynchus), or sperm whale ( Physeter macrocephalus). If any one of these limits is reached by the fishery authorized by the EPA, the EPA would be immediately revoked.

71 Fed. Reg. 39055. Our understanding is that NMFS has not issued the 2006 EPA and the intended permit duration of the proposed permit has already largely past. Given the Pacific Leatherback Conservation Area is closed to drift-gillnet gear from August 15 to November 15 each year, we anticipate the 2007 EPA would similarly run from August 15, 2007 to November 15, 2007.

C. Violations of Law

In our previous letters to NMFS and the Council we described how the current Fishery is in violation of numerous provisions of law, and how any expansion of that Fishery, including through a proposed EPA that would allow drift-gillnet fishing in the Pacific Leatherback Conservation Area when leatherbacks are present, would also violate numerous provisions of law. Unfortunately, neither the Council nor NMFS have adequately addressed these legal issues in the processing of the 2006 EPA or in the consideration of the 2007 EPA, rendering both the current operation of the Fishery and any proposed EPAs unlawful. We are confident that a reviewing court will not only set aside any EPA as arbitrary and capricious, but will also find NMFS’s management of the Fishery as a whole to be legally infirm. NMFS must reject the proposed 2007 EPA and instead work towards ensuring that the current Fishery operates consistent with all existing law, or not at all.

1. Violations of the ESA

Section 2(c)(3) 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(2). 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).

3 See our letters of August 10, 2006 (Comment letter to NMFS on proposed 2006 EPA), June 23, 2006 (60-day Notice of Intent to Sue), February 28, 2006 (Letter to Council urging rejection of EPA request), October 25, 2006 (Letter to Council regarding Fishery), and September 13, 2005 (Letter to Council regarding EPAs).

4 On July 28, 2006 NMFS published a notice of proposed issuance of a permit under Section 101(a)(5) of the MMPA for ESA-listed marine mammals taken by the Fishery. See 71 Fed. Reg. 42869. This permit has not been finalized and as such is currently of no legal effect.
NMFS's continued authorization of the Fishery is violating Sections 2(c) and 7(a)(1) of the ESA because the agency refuses to use its authorities to further the purpose of listed species conservation. Specifically, by not closing the Fishery or taking other measures to avoid unlawful take following the unprecedented taking of a humpback whale by the Fishery during the 2004/2005 fishing season, NMFS is violating these provisions. See *Sierra Club v. Babbitt*, 65 F.3d 1502, 1511, fn 15 ("If Senate violates section 9, or any other environmental standard, the BLM need not consult with the FWS before exercising its right under the environmental stipulation to terminate the offending project. Indeed, section 7(a)(1) would appear to require the BLM to utilize its authority under the stipulation to suspend an activity that would result in a taking.") (Emphasis in original). Moreover, issuing an EFP which would allow drift-gillnet vessels to fish in the Pacific Leatherback Conservation Area after previously finding that such fishing would jeopardize this critically endangered species, would run afoul of these provisions as well.

Section 7(a)(2) of the ESA requires federal agencies to "inure 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.

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).

As described above, in the 2000 Biological Opinion, NMFS had to the following to say about any further mortality to western Pacific leatherbacks:

*Therefore, any additional impacts to the western Pacific leatherback stocks are likely to maintain or exacerbate the decline in these populations... 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.*

Biological Opinion at 94. (Emphasis added). NMFS then concluded that the estimated annual mortality of leatherbacks from the Fishery would likely jeopardize the species. NMFS therefore proposed as an RPA a seasonal closure of the Fishery in the waters off the Central and Northern California and Southern Oregon Coasts. NMFS adopted a variant of this RPA via an ESA rulemaking which instituted the current closure. 66 Fed. Reg. 44459. The closure was then reaffirmed by NMFS when it adopted the HMS FMP under its authorities under the MSA. 69 Fed. Reg. 18444, 50 C.F.R. § 660.71. Since the October 2000 biological opinion for the Fishery, the status of the leatherback in the Pacific has further declined. We believe, as NMFS stated in 2000, that authorization of any leatherback take in the Pacific would violate the requirement to avoid jeopardy to the species. Therefore, any proposal, such as through an EFP, to allow the Fishery into currently closed areas occupied by the critically endangered leatherback sea turtle would violate Sections 7(a)(2) of the ESA.

Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency initiates consultation on an action under the ESA, the agency, as well as any applicant for a federal permit, "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section." The purpose of Section 7(d) is to maintain the environmental status quo pending the completion of interagency consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its critical habitat. Our understanding is that NMFS is still engaged in consultation over the issuance of the 2006 EFP to allow the Fishery to operate in the leatherback closure area. See 71 Fed. Reg. at 39055-56 ("NMFS is engaged in formal consultation to determine if the proposed action is likely to jeopardize the continued existence and recovery of any endangered or threatened species or result in the destruction or adverse modification of critical habitat.") Continued authorization of the Fishery during this consultation constitutes a violation of this provision as well.

An agency's duty to avoid jeopardy is continuing, and "where discretionary Federal involvement or control over the action has been retained or is authorized by law," the agency must in certain circumstances reinstate formal consultation. 50 C.F.R. § 402.16. An FMP is clearly a continuing agency action requiring reinstatement of consultation if any of the triggering circumstances occur. Among those circumstances is when the authorized take is exceeded. Id. The excessive take also constitutes "new information" triggering the reinitiation requirement.

In this case, no take of ESA-listed marine mammals is authorized by the February 2004 Biological Opinion. Nevertheless, take of humpback whales has occurred. The reinitiation requirements have been triggered. Moreover, the recent listing of the Southern Resident population of killer whales (*Orcinus orca*) as endangered also triggers the reinitiation requirement. Killer whales have historically been documented entangled and killed by the Fishery, and the newly listed population seasonally occurs in the range of the Fishery. Because NMFS has failed to reinstate consultation it is in violation of its procedural and substantive mandates to assure against jeopardy to listed species.

The ESA prohibits any "person" from "taking" threatened and endangered species. 16 U.S.C. § 1538. The definition of "take", found at 16 U.S.C. § 1532(19), states,

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5 Fortunately, the seasonal closure of portions of the Fishery for the protection of the leatherback sea turtles appears to be effective. The past three years of observer data show no take of leatherback sea turtles. It would be criminal for NMFS to undoe this apparently successful management measure and allow drift-gillnet vessels to set their nets in areas where they are likely to entangle and kill this critically endangered species.

6 NMFS's ongoing consultation on the issuance of the 2006 EFP is no substitute for reinstituting consultation on the Fishery as a whole. *Center v. Burford*, 846 F.2d 1441, 1453 (9th Cir. 1988) ("ESA requires the Biological Opinion to analyze the effect of the entire agency action.") (Emphasis in original).
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.

In a case dealing with fisheries, the Court ruled "the statute not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking. We believe that...a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA." Simhan v. Cooke, et al., 127 F.3d 155 (9th Cir. 1997).

NMFS’s continued authorization of the Fishery directly authorizes fishing activities that have been documented to take humpback whales, fin whales, sperm whales, and leatherback and loggerhead sea turtles and therefore fits the statute’s definition of take. Such take is ongoing. Similarly, issuance of any EFP will also cause such take. As discussed below, take of ESA-listed marine mammals by the Fishery is not authorized via either the ESA or MMPA, yet such take, as demonstrated by the entangled humpback whale in 2004/2005, is clearly occurring. NMFS is violating Section 9 of the ESA. The proposed 2007 EFP will violate this provision as well.

2. Violations of the MMPA

The Fishery entangles and kills ESA-listed marine mammals as well as numerous non-listed marine mammal species. It must therefore be operated in a manner consistent with the procedural and substantive mandates of the ESA and MMPA or not at all. The Fishery is currently operating without any take authorization for ESA-listed marine mammals. Take can be authorized via an Incidental Take Statement issued pursuant to the ESA only if such take is also authorized pursuant to Section 101 of the MMPA. On October 30, 2000, NMFS issued a three-year take authorization to the Fishery pursuant to Section 101(a)(5)(E) of the MMPA, 16 U.S.C. § 1371(a)(5)(E), allowing the take of ESA-listed marine mammals, specifically sperm, fin, and humpback whales, and the eastern stock of Steller sea lion. 65 Fed. Reg. 64570. While we believe this permit was improperly issued in the first instance, regardless of the infirmities of this permit, it is now expired and no take of any ESA-listed marine mammal is authorized for the Fishery, or for that matter any fishery under the HMS FMP. Unfortunately, the Fishery continues to entangle ESA-listed marine mammals. For example, observer data from the 2004-2005 fishing season shows the entanglement of a humpback whale. This take was not authorized under the ESA or the MMPA and therefore occurred in violation of both statutes. Continued operation of the Fishery, and certainly the proposed 2007 EFP allowing vessels to currently closed areas, violates the provisions of the ESA and MMPA prohibiting such take. Until and unless the Fishery as a whole receives a lawful Section 101 authorization pursuant to the MMPA, we believe that the Fishery must be suspended. Additionally, no EFP can be issued unless the take that will occur from the fishing pursuant to the EFP is also permitted pursuant to both the MMPA and ESA.8

The continued authorization of the Fishery and the proposed EFP 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 essential Biological Removal ("EBR"). The Fishery’s take of marine mammal species remains above this threshold. For example, in the 2005 Pacific Stock Assessment Reports the Fishery was estimated to kill 23 northern right whale dolphins each year, in excess of a ZMRG level of 16. Similarly, take of the short-finned pilot whale is not just above ZMRG, but almost at PB. Take of sperm, humpback and fin whales also remains well above 10% of PB, thereby exceeding the definition of ZMRG. Because April 30, 2001 has come and gone without the Fishery reaching ZMRG, the continued authorization, or any expansion, of the Fishery violates the MMPA.9

The MMPA explicitly requires NMFS to "amend the take reduction plan and implementing regulations as necessary to meet the requirements of the MMPA to reach ZMRG, and, when necessary, to "proscribe emergency regulations that, consistent with such plan to the maximum extent practicable, reduce incidental mortality and serious injury in the fishery." 16 U.S.C. §§ 1387(b)(1)(P) & 1387(g)(1)(A). Given the Fishery continues to take marine mammals at levels in excess of ZMRG, NMFS failure to utilize this authority to amend the Take Reduction Plan violates these provisions of the MMPA as well. Issuing the proposed EFP would take NMFS further down the path away from compliance with this provision of the MMPA.

3. Violations of the MBTA

We believe that the Fishery as currently authorized is violating the MBTA. Obviously, any EFP would likewise violate the MBTA. Section 2 of the MBTA provides that "it shall be unlawful at any time, by any means or in any manner, to 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 I.2 (1997). The primary species taken by the Fishery, the northern fulmar, is in the list of migratory birds protected by the MBTA. See 50 C.F.R. § 10 I.3 (list of protected migratory birds). Other MBTA protected species such as the Cassin’s auklet are also taken by the Fishery. The MBTA imposes strict liability for killing migratory birds, without regard to whether the harm was intended. Its scope extends to harming "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, 55 F. Supp. 2d 1070 (1998) 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. E.g., U.S. v. Corbin Farm Service, 444 F. Supp. 510, 532-534 (E. D. Cal.), affirmed, 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), affirmed, 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

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8 If NMFS finalizes the proposed issuance of a permit under Section 101(a)(5) of the MMPA for ESA-listed marine mammals taken by the Fishery, this permit would not authorize take of ESA-listed marine mammals by vessels fishing pursuant to the EFP. The proposed permit only covers the current Fishery, not any EFPs. See 71 Fed. Reg. 42869.

9 Even if NMFS could somehow construe the promulgation of the Pacific Offshore Catchback Take Reduction Plan as relieving the Fishery of the April 30, 2001 ZMRG deadline, the five-year deadline contained in the MMPA for a fishery to reach ZMRG under a Take Reduction Plan has also come and gone. See 16 U.S.C. § 1387(c)(2).
birds by Federal agencies is prohibited unless authorized pursuant to regulations promulgated under the MBTA.” MBTA Section 3 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. NMFS however has not obtained, much less applied for such a permit authorizing any take by the Fishery (or any other fishery under the HMS FMP) or for fishing pursuant to the EFP.

NMFS cannot dispute that the Fishery kills birds protected under the MBTA. We believe that until such take is permitted, NMFS cannot lawfully allow any fishing, including that which would be authorized by the EFP, which is likely to result in death of such species.10

4. Violations of MSA

NMFS has promulgated regulations governing the issuance of EFPs. See 50 C.F.R. § 660.745. Under these regulations, NMFS may authorize fishing that would otherwise be prohibited by an FMP only in very limited circumstances. Specifically, NMFS may only authorize such fishing for “limited testing, public display, data collection, exploratory, health and safety, environmental cleanup, and/or hazard removal purposes.” 50 C.F.R. § 660.745(b). In attempting to shoehorn into this regulatory scheme a proposed EFP that would for all practical purposes eliminate the Pacific Leatherback Conservation Area, the Council claimed the 2006 EFP was for the purposes of “collecting data on the incidental take of ESA protected leatherback sea turtles to allow for informed management decisions in determining appropriate protective measures.” Such a rationale is absurd; NMFS has sufficient data on the impact of the Fishery on leatherbacks. Prior to the closure takes were occurring at a rate that NMFS determined jeopardized the species. Subsequent to the closure no takes have been documented. To kill more critically endangered leatherback sea turtles simply to “collect data” to reaffirm the well-established fact that regulated gillnet fishing kills leatherbacks makes a mockery of any rational interpretation of the exempted fishing regulations. If the Council wishes to reopen the leatherback closure area to the Fishery, it must follow standard MSA procedures. It must not be allowed to do so under the guise of an EFP.

5. Violations of National Marine Sanctuaries Act

The proposed EFP also is in apparent violation of the National Marine Sanctuaries Act (“NMSA”) (16 U.S.C. § 1431 et seq.). Among the purposes of the NMSA are “to maintain the natural biological communities in the national marine sanctuaries, and to protect, and, where appropriate, restore and enhance natural habitats, populations, and ecological processes.” 16 U.S.C. § 1431(b)(3). To achieve these purposes, the NMSA requires that “Federal agency actions internal or external to a national marine sanctuary, including private activities authorized by licenses, leases, or permits, that are likely to destroy, cause the loss of, or injure any sanctuary resource are subject to consultation with the Secretary.” 16 U.S.C. § 1434(d)(1)(A) (emphasis added). This consultation provision requires the agency proposing the action to provide a written statement describing the action and the potential effects on sanctuary resources no later than 45 days before the final approval of the proposed action. 16 U.S.C. § 1434(d)(1)(B). The action agency must follow the recommendations of the Secretary to avoid injury to any sanctuary resource or other act to prevent and mitigate damage to such resources. 16 U.S.C. §§ 1434(d)(2), 1434(d)(3) & 1434(d)(4).

The Pacific Leatherback Conservation Area overlaps with the boundaries of three National Marine Sanctuaries, the Monterey Bay, Gulf of Farallones, and Cordell Bank National Marine Sanctuaries. The leatherback sea turtle as well as the marine mammals, seabirds and fish that will likely be caught by vessels fishing pursuant to the EFP are all resources protected by these sanctuary designations. The proposed EFP would clearly “destroy, cause the loss of, or injure” these resources. We are unaware of any action by NMFS to comply with either the consultation provision of the NMSA or its substantive requirements. Absent such compliance, the proposed EFP cannot lawfully be issued.

6. Violations of Coastal Zone Management Act

The proposed EFP also is being processed in apparent violation of 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 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 vessels operating under the proposed EFP are all “natural resources” protected by California’s Coastal Management Program. Entangling and killing these animals clearly “affects” these resources triggering the consistency requirement of CZMA. We are unaware of the appropriate CZMA consistency certification in the application materials for either the 2006 or 2007 EFPs. Absent such a certification and evidence of California’s concurrence in that determination, the EFP applications must be rejected as violative of CZMA.

7. Violations of NEPA

While we believe that the proposed EFP is legally untenable because of the substantive requirements of the ESA, NMMA, MBTA, NMSA, CZMA and MSA, we also believe that the issuance of any such EFP would also violate the environmental review provisions of NEPA. NEPA’s fundamental purposes are to guarantee that: (1) agencies take a “hard look” at the environmental consequences of their actions before these actions occur by ensuring that the agency has, and carefully considers, detailed information concerning significant environmental impacts; and (2) agencies make the relevant information available to the public so that it may also play a role in both the decisionmaking process and the implementation of that decision. See, e.g., 40 C.F.R. § 1506.1. In this instance, NMFS has apparently completely reversed this process. NMFS has decided it wishes to allow drift-gillnet fishing in the area currently closed to such fishing to protect leatherback sea turtles. Such prejudgment of

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10 In its response to comments on the EFP, 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. As NMFS is on record as aware, in 2001 an Interior Solicitor’s Opinion concluded that the MBTA does in fact apply in the U.S. EEZ. NMFS’s conclusion to the contrary will not survive legal scrutiny.
In addition to the flawed timing of the NEPA analysis, NMFS's most significant violation of NEPA is its failure to prepare a full Environmental Impact Statement ("EIS") for the EFP. Under NEPA:

an EIS must be prepared if "substantial questions are raised as to whether a project . . . may cause significant degradation of some human or environmental factor," 10 to trigger this requirement "a plaintiff need not show that significant effects will in fact occur," merely "substantial questions whether a project may have a significant effect is sufficient."

Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149-50 (9th Cir. 1998) (citations omitted) (emphasis in original).

In its processing of the 2007 EFP, we assume NMFS will rely on the same infirm EA as the agency used in its analysis of the 2006 EFP. 11 This EA itself explicitly or implicitly acknowledged that several of the Council on Environmental Quality ("CEQ") "significance" factors triggering the need to prepare an EIS were met by the proposed 2006 EFP. See 40 C.F.R. § 1508. CEQ factors triggered by the 2006 EFP, included but were not limited to, whether the action involves "[a]ny characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands [and] ecologically critical areas," id. at § 1508.27(b)(3) (leatherback foraging areas); 

"[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial," id. at § 1508.27(b)(4) (EA at 6: "The proposed action is likely to be controversial"); 

"[t]he degree to which the action may establish a precedent for future actions with significant effects or represent a decision in principle about a future consideration," id. at § 1508.27(b)(6) (the stated purpose of the EFP is to expand the Fishery); 

"the degree to which the action is related to other actions with . . . cumulatively significant impacts," id. at § 1508.27(b)(7) (the related Longline EFP as well as all other impacts on the leatherback throughout its range); the "degree to which the action may adversely affect an endangered or threatened species," id. at § 1508.27(b)(8) (previously found to jeopardize the leatherback); and whether "the action threatens a violation of Federal . . . law or requirements imposed for the protection of the environment," id. at § 1508.27(b)(10) (violates ESA, MMPA, MBTA, NMFS, CZMA and MSA). Each of these factors would also apply to the 2007 EFP now under considerations. Any of these factors, standing alone, is sufficient to require preparation of an EIS. Ocean Advocates v. United States Army Corps of Engineers, 402 F.3d 846, 865 (9th Cir. 2005). For the 2007 EFP, all of these factors require the preparation of an EIS.

In sum, reliance on an EA for the 2007 EFP is completely at odds with the letter and spirit of NEPA. Rather than cast aside compliance with NEPA in its rush to accommodate the longline industry in time for the upcoming fishing season, if NMFS wishes to consider modifications to the Fishery it must do so only in a careful manner after preparation of an EIS. We therefore believe that the only lawful course for NMFS to follow at this point is to either select the No Action Alternative in the Draft EA, or to forge action until the completion of a full EIS that analyzes a full range of alternatives, including alternatives, such as the complete closure of the Fishery, which may be necessary to come into compliance with existing law.

A separate provision of the Fish and Game Code, Section 8561, allowed fishing for swordfish with drift-gillnet gear, subject to numerous restrictions. These restrictions were largely carried over into federal regulations with the adoption of the HMS TMDL in 2004.
concluded that continued operation of the FMP would jeopardize the continued existence of the leatherback, loggerhead, and green sea turtles. NMFS subsequently modified the Hawaii FMP, virtually eliminating for several years the Hawaii-based longline fishery for swordfish.

Subsequent to the Hawaii injunction and modification of the Hawaii FMP, numerous boats from Hawaii relocated to California, with up to 48 vessels operating out of California in 2000. Due to the fact that West Coast HMS fisheries were not subject to an FMP at that time, these vessels operated virtually to neither federal regulation. Nevertheless, the California-based longline fishery caught and killed numerous federally protected species.

From August 1995 through 1999, California-based longline fishing vessels self-reported numerous interactions with sea turtles. Thirty-three leatherback, twenty-one leatherhead, nineteen olive ridley, and twelve green sea turtles were reported caught during this period. The self-reports of bycatch from this period also report the take of over one hundred albatross, a Hawaiian monk seal and an unidentified sea lion. From October 2001 to March 2003 NMFS placed limited observers on some of the California-based longline fishing vessels. These observers, monitoring only a fraction of the fishing effort, recorded entanglements of 23 leatherhead sea turtles, 2 leatherback sea turtles, and 1 olive ridley sea turtle. In August 2003, NMFS predicted (based on prior observer data and assuming that fishing effort remained the same as in 2002) that the California-based longline fishery was entangling 174 leatherhead sea turtles (47 killed) and 53 leatherback sea turtles (14 killed) each year.

In light of the high level of sea turtle take occurring in the California-based longline fishery, and given that NMFS was unwilling to enforce the ESA, and the Council was years behind schedule in finalizing the HMS FMP and bringing the fishery under federal management, in March 2000, the Center for Biological Diversity and Turtle Island Restoration Network filed suit under the ESA seeking to force NMFS to engage in Section 7 consultation on permits issued to California-based longline fishers pursuant to the High Seas Fishing Compliance Act of 1995 ("HSFCA") (16 U.S.C. § 5501 et seq.).

In August 2003, the Ninth Circuit ruled that NMFS was violating the ESA with regards to its management of the California-based longline fishery. Turtle Island Restoration Network, et al. v National Marine Fisheries Service, 340 F.3d 969 (9th Cir. 2003).

Shortly after the court ruled that the California-based longline fishery was operating in violation of the ESA, the Council and NMFS finally issued the long-overdue HMS FMP and accompanying regulations. 69 Fed. Reg. 18444 (April 7, 2004). The FMP brought the California-based longline fishery under federal management and included a provision prohibiting shallow-set longlining west of 150° W long. 50 C.F.R. § 660.712(c). However, in its biological opinion for the FMP, NMFS concluded that allowing shallow-set longlining east of 150° W long. would jeopardize the loggerhead sea turtle. NMFS therefore issued an RPA requiring the prohibition of shallow-set longlining east of 150° W long. NMFS instituted this closure pursuant to its authorities under the ESA, 69 Fed. Reg. 11540 (March 11, 2004); 50 C.F.R. § 223.206(d)(4)(ii).

Following the FMP and corresponding ESA regulations, most of the California-based longline fishers relocated to Hawaii where the formerly closed swordfish fishery was set to reopen with new management restrictions. A few vessels continued to fish intermittently from California using deep-set longlines to catch tuna outside the EEZ. However, deep-set longlining for tuna (either by California or

Hawaii-based vessels) has been suspended east of 150° W long. to address overfishing of bigeye tuna. 71 Fed. Reg. 38297 (July 6, 2006). Similarly, the Hawaii-based swordfish longline fishery has been suspended for exceeding authorized take of ESA-listed sea turtles. 71 Fed. Reg. 14446 (March 22, 2006).

B. The Proposed 2007 Longline Exempted Fishing Permit

The Council is currently considering an EFP for the 2007 fishing season which would allow pelagic longlining within the EEZ off California for the first time. According to the "Situation Summary" contained in the Briefing Book for the November meeting, the Council has already effectively made its decision on the requested EFP.

The Council also preliminarily approved a second proposal for a single vessel to fish with longline gear within the West Coast Exclusive Economic Zone (EEZ), currently prohibited under the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP). That applicant originally proposed to start in the fall of 2006. But at the time of Council preliminary approval in March, he asked that his proposal be considered for the 2007 fishing season instead.

According to the EFP application, the "purpose of this EFP is to conduct a small scale (1 vessel) pelagic longline fishery within the West Coast EEZ to determine if longline gear is an economically viable HMS harvest substitute for drift gillnet (DG) gear." EFP App. at 1. The application describes the scale, location and duration of the EFP as follows:

EFP fishing will not occur within 20 miles of the coastline, or within the southern California light. Each trip will consist of about 14 sets, approximately 14,000 hooks per trip (1,000 hooks per set x 14 sets). This EFP proposes 4 trips (56,000 hooks) during the period September thru December.

EFP App. at 6.

C. Violations of Law

In our discussion of the Drift-Gillnet EFPs above, we described how both the existing Drift-Gillnet Fishery and any proposed EFP violate numerous statutory provisions. We believe that the proposed Longline EFP is similarly infirm. Rather than repeat the statutory background for each violation, below we briefly described the likely violations of law associated with the processing and issuance of the proposed Longline EFP. Given these significant and largely incontrollable legal problems with the proposed EFP, it must be denied.

13 While the closures of the deep-set longline fishery east of 150° W long., as well as the Hawaiian shallow-set longline fishery, are both theoretically temporary measures, given the status of bigeye tuna and the dubious success of the mitigation measures for the Hawaiian fishery, we are doubtful that either of these fisheries can lawfully reopen.
1. Operations of the ESA

As with the Drift-Gillnet EFP, we believe issuance of the proposed Longline EFP would violate Sections 2, 7, and 9 of the ESA. Longline fisheries are known to hook, entangle, and kill ESA-listed sea turtles, marine mammals, and seabirds. As discussed above, NMFS itself has acknowledged that any further mortality to the critically endangered Pacific leatherback sea turtle would jeopardize the species. Until and unless technology is devised that eliminates the risk of injury or mortality to leatherbacks, we cannot support any pelagic longline fishing in the Pacific. Such an approach is also consistent with the call put out by over 1000 international scientists from more than 100 countries and 300 non-governmental organizations from 62 countries calling on the U.N. to institute an immediate moratorium on pelagic longline fishing in the Pacific until measures can be put in place that eliminate such bycatch. See http://www.seaturtles.org/press_release2/cfr/press10-261.

In addition to the Longline EFP's impacts on the leatherback sea turtle, fishing pursuant to such a permit also puts at risk the loggerhead sea turtle. NMFS instituted the closure of shallow-set longlining east of 150° W long, in part to protect the Pacific loggerhead sea turtles. 69 Fed. Reg. 11540 (March 11, 2004). 50 C.F.R. § 223.206(d)(9). Given the take of loggerheads increases in El Ninio years, and NOAA has declared El Ninio conditions will continue to develop into 2007, the odds of a vessel fishing pursuant to the Longline EFP taking loggerheads are greatly increased. See http://www.epa.nceo.noaa.gov/productions/monitoring/crss_advisory.

The Longline EFP also puts at risk several species of ESA-listed marine mammals. Both sperm whales and humpback whales have been observed entangled in identical fishing gear used by Hawaii-based pelagic longlining vessels. Killer whales are likewise known to interact with and become entangled in longline fishing gear. The Southern Resident population of killer whales (Oreina orca) was recently listed as endangered, and is known to seasonally occur in the range of the proposed EFP. Additionally, Steller sea lions and Guadalupe fur seals also may overlap with the proposed EFP and are subject to entanglement. In order to issue the proposed EFP, NMFS not only needs to undergo Section 7 consultation on each of these marine mammals, but also must obtain take authorization pursuant to both the ESA and Section 101 of the MMPA. We do not believe the EFP can meet the legal standards for such take authorization under either statute.

The issuance of the Longline EFP would likely violate the ESA based on impacts to the Short-tailed albatross. 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. It is therefore reasonable to assume that Short-tailed albatross are likely to be entangled and killed if pelagic longline fishing is allowed off of California. Given the perilous status of the Short-tailed albatross, we do not believe any additional take authorization for the species can be lawfully granted.

Finally, given the closure of shallow-set longlining east of 150° W long, was promulgated pursuant to NMFS's authorities under the ESA, rather than under the MSA, we do not see how an EFP issued under the MSA could lawfully be issued in direct contravention of ESA regulations prohibiting such fishing. See 69 Fed. Reg. 11540 (March 11, 2004); 50 C.F.R. § 223.206(d)(9). If the permit applicant for the EFP wishes to fish in contravention of ESA regulations, the applicant must also apply for a permit under Section 10 of the ESA. Our understanding is that the applicant has not done so. Moreover, we do not see how the standards of Section 10 could possibly be met by the proposed activities. The EFP must be rejected as inconsistent with the intent and letter of the ESA.14

2. Violations of the MMPA

The Longline EFP cannot be issued without also violating the MMPA. As discussed above, take of ESA-listed marine mammals must be authorized under both the ESA and MMPA if it is to lawfully occur. We do not believe that the necessary "negligible impact" finding under the MMPA can lawfully be made for the ESA-listed species likely to interact with pelagic longline gear deployed in the EEZ off California. Therefore, no such permit can be issued and any take will be in violation of both the ESA and MMPA.

For non-ESA listed marine mammals, take in violation of the MMPA is also likely to occur. Both the Hawaii and Atlantic longline fisheries are categorized as Category 1 fisheries on the 2006 List of Fisheries, while the remain 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 marine-mammal killing fishery 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 ZMGR. Given the statutory deadline for reaching ZMGR has already passed, we do not believe that issuing an EFP that would result in take of stocks of marine mammals where mortality and serious injury are already above ZMGR is consistent with the ZMGR mandate of the MMPA.

The most likely species of non-ESA listed marine mammals to be taken by fishing pursuant to the Longline EFP are Risso's dolphins and short-finned pilot whales. Take of pilot whales from the Drift-Gillnet fishery is already near PBR, and is of course well over ZMRG. Take of even a single pilot whale by the Longline EFP would put mortality and serious injury to the stock over PBR. 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. Until and unless, a take reduction plan is in place that reduces pilot whale mortality to ZMGR, NMFS cannot authorize any fishing activity through an EFP which is likely to result in additional take of the species.

3. Violations of the MBTA

As explained above with reference to Drift-Gillnet, the MBTA applies to U.S. fisheries that take migratory birds. It is undisputed that longline fishing kills seabirds protected by the MBTA. Fishing pursuant to the Longline EFP runs the significant risk of hooking and killing all three species of North Pacific albatross. Each of these species is recognized by the IUCN as imperiled. The most likely species to be killed by the EFP is the Black-footed albatross, a species under petition for listing under the ESA. Absent a permit under the MBTA authorizing the take of the Black-footed albatross and other migratory birds, the EFP cannot lawfully be issued.

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14 All other violations of the ESA by the Longline EFP are substantially similar to those of the Drift-Gillnet EFPs and therefore will not be repeated here.
4. Violations of MSA

The proposed EFP is requested to "determine if longline gear is an economically viable HMS harvest substitute for drift gillnet (DGN) gear." EFP App. at 1. This does not meet the regulatory criteria for issuance as it does not fall within the categories enumerated at 50 C.F.R. § 660-745. Moreover, given there is no way a longline fishery using current technology can lawfully operate in the EEZ off California, such a fishery is not "viable" by definition. NMFS cannot issue the permit.

5. Violations of National Marine Sanctuaries Act

The proposed Longline EFP states that "EFP fishing will not occur within 30 miles of the coastline, or within the southern California bight." This language is vague enough that it does not completely foreclose fishing within designated marine sanctuaries. Any EFP issued must include such geographical limitations so as to explicitly preclude its operation with any National Marine Sanctuary. To do otherwise would violate the procedural and substantive provisions of the NMSA as discussed above with reference to the Drift-Gillnet EFPs.

6. Violations of Coastal Zone Management Act

The proposed Longline EFP suffers from the same legal deficiencies under CZMA as the Drift-Gillnet EFPs discussed above. The Council and NMFS must reject the proposed EFP until and unless compliance with CZMA is assured.

7. Violations of NEPA

While we believe that the proposed Longline EFP would be legally untenable because of the substantive requirements of the ESA, MMPA, MBTA, NMSA, CZMA and MSA, we also believe that the issuance of any such EFP would violate the environmental review provisions of NEPA because there is no indication that the Council or NMFS has prepared a full EIS as required by law. The factors triggering the EIS requirements of NEPA are discussed in the Drift-Gillnet section above. These same factors are implicated by the Longline EFP. NMFS and the Council must prepare an EIS, and solicit public review and comment on it before taking any further action with regard to the Longline EFP.

III. CONCLUSION

As the above makes clear, we believe that issuance of either the Drift-Gillnet EFP or the Longline EFP would violate numerous statutory provisions, including the ESA, MMPA, MBTA, MSA, NMSA, CZMA, and NEPA. We therefore recommend the Council and NMFS reject each of the proposed EFPs. Thank you for your concern.

Sincerely,

[Signature]

Brendan Cummings
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cc

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July 13, 2007

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RE: RIN 0648-NA73: Proposed Exempted Fishing Permit to allow Pelagic Longline Fishing in the EEZ off California and Oregon.

Dear Dr. Hogarth and Mr. McNinis:

The Center for Biological Diversity, the Sea Turtle Restoration Project/Turtle Island Restoration Network and Oceana submit these comments regarding the proposed issuance by the National Marine Fisheries Service/NOAA Fisheries (“NMFS”) of an Exempted Fishing Permit (“EFP”) which would allow a pelagic longline vessel to set longline gear for swordfish within the U.S. Exclusive Economic Zone (“EEZ”) off California and Oregon from September through December, 2007, notwithstanding the fact that existing law and regulation prohibit the setting of such gear anywhere in the West Coast EEZ. See 72 Fed. Reg. 32618 (June 13, 2007). In short, our organizations believe the proposed EFP must be denied. Issuing the EFP would be wholly incompatible with the Highly Migratory Species Fishery Management Plan (“HMS FMP”) governing such fisheries as well as with the purposes of the Pacific Leatherback Conservation Area, which was incorporated into the HMS FMP to provide additional protections for critically endangered Pacific leatherback sea turtles. In addition to being utterly misguided as a matter of policy and science, issuance of the EFP would be illegal, as doing so would violate the Endangered Species Act (“ESA”) (16 U.S.C. § 1531 et seq.), Marine Mammal Protection Act (“MMPA”) (16 U.S.C. § 1361 et seq.), Migratory Bird Treaty Act (“MBTA”) (16 U.S.C. § 703 et seq.), National Marine Sanctuaries Act (16 U.S.C. § 1431 et seq.), Magnuson-Stevens Fishery Conservation and Management Act (“MSA”) (16 U.S.C. § 1801 et seq.), Coastal Zone Management Act (“CZMA”) (16 U.S.C. § 1451 et seq.), and the National Environmental Policy Act (“NEPA”) (42 U.S.C. § 4321 et seq.).

THE 2007 LONGLINE EFP MUST BE DENIED

I. BACKGROUND

A. The Pacific Leatherback Sea Turtle

The leatherback sea turtle (Dermochelys coriacea) is the largest of the sea turtles, weighing between 700 and 2,000 pounds as an adult, and ranging from 4 to 8 feet in length. While other sea turtles have hard shells, the leatherback has a rubbery shell. Sea turtles have swum the world's oceans for over 100 million years. Having outlived the dinosaurs, the leatherback is, in effect, the last survivor of the age of giant reptiles.

The species feeds primarily on jellyfish, and is capable of diving to depths greater than 3,000 feet. In the eastern Pacific the leatherback sea turtle nests along beaches in Mexico and Costa Rica. The species also nests in the western Pacific in New Guinea, Indonesia, Malaysia, the Solomon Islands, and Australia. Leatherbacks that visit the west coast of the United States are from the western Pacific population and have been tracked back to nesting beaches in Indonesia and New Guinea.

Numbering over 100,000 nesting females as recently as the 1980s, the species is in rapid decline with current estimated of only 2-5,000 nesting females.1 In 2000, an article published in the preeminent scientific journal Nature, predicted extinction of leatherbacks in the Pacific within decades.2 The primary cause of the leatherback decline, and the greatest threat to its continued existence, is entanglement and drowning in longline fishing gear.3 The leatherback sea turtle is listed as endangered under the ESA throughout its range.

Notwithstanding the species' perilous condition, Pacific leatherbacks continue to be caught and killed in U.S. fisheries. However, as a result of advocacy and litigation, leatherback mortality has been essentially eliminated from California-based fisheries.4 Several of those efforts and subsequent NMFS decisions are relevant to the current longline EFP.

In March 2000, the Center for Biological Diversity and Turtle Island Restoration Network brought suit against NMFS for violations of the ESA and MMPA related to the Drift-Gillnet (“DGN”) Fishery. In response, on October 23, 2000, NMFS issued a new Biological Opinion for the DGN Fishery. NMFS also at this point issued a permit under Section 101 of the

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1 Lawton, 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.
3 Id.
4 Several California gillnet fisheries that have been subject to observer coverage are suspected of interacting with leatherbacks, but such take has not been recently documented.
MMPA authorizing the DGN Fishery to take ESA-listed marine mammal species. 65 Fed. Reg. 64670. The new Biological Opinion concluded that the DGN Fishery would likely jeopardize both the loggerhead and leatherback sea turtles. With regard to the leatherback sea turtles, NMFS concluded that the projected take of the species from the DGN Fishery, would jeopardize the species because any further mortality to leatherbacks from the western Pacific nesting population equated to jeopardy:

Therefore, 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.

Biological Opinion at 94. (Emphasis added).

As required by Section 7(b) of the ESA, 16 U.S.C. § 1536(b), NMFS proposed a reasonable and prudent alternative that would avoid jeopardy to the leatherback. Id. The reasonable and prudent alternative required that a seasonal closure of the DGN Fishery be implemented north of Point Conception in the fall. Specifically, the Biological Opinion states:

By August 1, 2001, NMFS, or the states of California and Oregon, must implement regulations to close an area to drift gillnets from Point Conception, California (34°27'N), north to 45°N, and west to 129°W, from August 15th to October 31st.

Id. at 102. While NMFS illegally delayed the implementation of this closure, on August 24, 2001, after receiving a notice of intent to sue from the Center for Biological Diversity and Turtle Island Restoration Network, NMFS finally implemented a modified version of the required closure through an interim final rule. 66 Fed. Reg. 44549.

The closure ultimately implemented by NMFS runs from August 15 to November 15 each year and extends from Point Sur (36°18.5'N) in California to 45°N on the Oregon Coast.

Since the leatherback closure went into effect, no leatherback sea turtles have been observed taken in the DGN Fishery.

In April 2004, NMFS finally promulgated regulations implementing the long overdue FMP for HMS fisheries on the West Coast. 69 Fed. Reg. 18453. Through these regulations, NMFS incorporated the existing leatherback and loggerhead closures into the FMP regulations. See 50 C.F.R. § 660.713(c)(11). The February 4, 2004 Biological Opinion for the FMP reached its no jeopardy conclusion for the leatherback based on the premise that the leatherback closure would remain in effect.

The regulations implementing the HMS FMP refer to the leatherback closure area as the Pacific Leatherback Conservation Area. This area has been repeatedly recognized by scientists as one of the most important leatherback foraging areas in the Pacific. The significance of this area was summed up in a recent study.

Ultimately, successful conservation efforts for leatherback turtles must include both nesting beach protection and mitigation of at-sea threats in foraging areas and along migratory routes. This study has demonstrated that waters off central California are a critical foraging area for one of the largest remaining Pacific nesting populations. Fortunately, threats such as coastal gillnet and longline fisheries that may incidentally catch leatherback turtles have largely been eliminated within our nearshore study area, although pelagic driftnet and longline fisheries remain along the migratory pathways to and from the coast (e.g., Spotila et al., 1996; Carretta et al., 2005). Continued efforts to identify and characterize Pacific foraging areas are critical for mitigating at-sea threats, monitoring population trends, and, ultimately, for the successful recovery of Pacific leatherback turtle populations.

Benson et al. 2007. It is within this area that the EFP would authorize longline fishing.

B. Pelagic Longline Fishing off California

Pelagic longline fishing involves the use of a monofilament line that stretches from 20 to upwards of 60 miles from a vessel and is set to given depth depending on the target species. Attached to the longline are additional lines to which are attached weights and baited hooks. A single longline fishing vessel may deploy several thousand hooks at one time.

In addition to the target species, usually swordfish, tunas, and sharks, longline gear catches non-target and undersized fish, sharks, sea turtles, marine mammals, and seabirds. Sea turtles, marine mammals, and seabirds all get caught on the baited hooks of longlines, or are
entangled in the lines, and being air breather, subsequently drown. Those that do not immediately drown often suffer serious injury, such as hook ingestion, condemning them to a slower death by starvation, internal bleeding, or infection.

Longlining for swordfish within the California EEZ has been prohibited since at least 1977 when the State of California promulgated regulations declaring that “Swordfish may be taken only with hand-held hook and line or harpoon.” 14 C.C.R. § 107.5 Pelagic longlining more generally was prohibited by Fish and Game Code § 9023 which banned hook and line fishing gear longer than 900 feet. However, swordfish and other longline-caught fish caught outside the EEZ could be landed in California if a declaration indicating such intent was filed with the Department of Fish and Game prior to departure. F & G Code § 8113.

In light of this regulatory scheme effectively prohibiting longlining in the EEZ off California, but allowing the landing of longline-caught fish from outside the EEZ, the California-based longline fleet has historically been rather small, with most U.S. longline fishing in the Pacific being based out of Hawaii rather than California. From the 1980s to late 1990s, the California-based longline fleet fluctuated in size from about two to a couple dozen boats.

However, in November 1999, the Court in Center for Marine Conservation, et al. v. National Marine Fisheries Service, et al. (Civ. No. 99-00152 DAE) (D. Hawaii) issued an injunction restricting longline fishing under the Hawaii FMP throughout much of the North Pacific. The injunction was designed to reduce sea turtle mortality, primarily to leatherbacks from shallow-set longlining targeting swordfish. In March 2001, NMFS issued an ESA Section 7 Biological Opinion on the Hawaii FMP and concluded that continued operation of the FMP would jeopardize the continued existence of the leatherback, loggerhead, and green sea turtles. NMFS subsequently modified the Hawaii FMP, virtually eliminating for several years the Hawaii-based longline fishery for swordfish.

Subsequent to the Hawaii injunction and modification of the Hawaii FMP, numerous boats from Hawaii relocated to California, with up to 48 vessels operating out of California in 2000. Due to the fact that West Coast HMS fisheries were not subject to an FMP at that time, these vessels operated subject to virtually no federal regulation. Nevertheless, the California-based longline fishery caught and killed numerous federally protected species.

From August 1995 through 1999, California-based longline fishing vessels self-reported numerous interactions with sea turtles. Thirty-five leatherback, twenty-one loggerhead, nineteen olive ridley, and twelve green sea turtles were reported caught during this period. The self-reports of bycatch from this period also report the take of over one hundred albatrosses, a Hawaiian monk seal, and an unidentified sea lion. From October 2001 to March 2003 NMFS placed limited observers on some of the California-based longline fishing vessels. These observers, monitoring only a fraction of the fishing effort, recorded entanglements of 23 loggerhead sea turtles, 2 leatherback sea turtles, and 1 olive ridley sea turtle. In August 2003, NMFS predicted (based on prior observer data and assuming that fishing effort remained the same as in 2002) that the California-based longline fishery was entangling 174 loggerhead sea turtles (47 killed) and 53 leatherback sea turtles (14 killed) each year.

In light of the high level of sea turtle take occurring in the California-based longline fishery, and given that NMFS was unwilling to enforce the ESA while the Council was years behind schedule in finalizing the HMS FMP and bringing the fishery under federal management, in March 2000, the Center for Biological Diversity and Turtle Island Restoration Network filed suit under the ESA seeking to force NMFS to engage in Section 7 consultation on permits issued to California-based longline vessels pursuant to the High Sea Fishing Compliance Act of 1995 (“HSFCA”) (16 U.S.C. § 5514 et seq.).

In August 2003, the Ninth Circuit ruled that NMFS was violating the ESA with regards to its management of the California-based longline fishery. Turtle Island Restoration Network, et al. v. National Marine Fisheries Service, 340 F.3d 969 (9th Cir. 2003).

Shortly after the court ruled that the California-based longline fishery was operating in violation of the ESA, the Council and NMFS finally issued the long-overdue HMS FMP and accompanying regulations. 69 Fed. Reg. 18444 (April 7, 2004). The FMP brought the California-based longline fishery under federal management, re-affirmed the long-standing state prohibition against longlining in the EEZ, and included a provision prohibiting shallow-set longlining west of 150°W long. 50 C.F.R. § 660.71 (2). However, in its biological opinion for the FMP, NMFS concluded that allowing shallow-set longlining east of 150°W long would jeopardize the loggerhead sea turtle. NMFS therefore issued a reasonable and prudent alternative (“RPA”) requiring the prohibition of shallow-set longlining east of 150°W long. NMFS instituted this closure pursuant to its authorities under the ESA. 69 Fed. Reg. 11540 (March 11, 2004); 50 C.F.R. § 223.206(d)(9).

Following the FMP and corresponding ESA regulations, most of the California-based longline vessels relocated to Hawaii where the formerly closed swordfish fishery was set to reopen with new management restrictions. A few vessels continued to fish intermittently from California using deep-set longlines to catch tuna outside the EEZ. However, deep-set longlining for tuna (either by California or Hawaii-based vessels) has been seasonally suspended east of 150°W long, to address overfishing of bigeye tuna. 71 Fed. Reg. 38297 (July 6, 2006). Similarly, the Hawaii-based swordfish longline fishery exceeded the authorized take of ESA-listed sea turtles and was closed for the remainder of 2006. 71 Fed. Reg. 14415 (March 22, 2006).8

8 While the closures of the deep-set longline fishery east of 150°W long, as well as the Hawaii shallow-set longline fishery are both theoretically temporary measures, given the status of bigeye tuna and the dubious success of the mitigation measures for the Hawaiian fishery, we do not believe that the reopening of either of these fisheries is lawful.
C. The Proposed 2007 Longline Exempted Fishing Permit

On June 13, 2007 NMFS published in the Federal Register a notice regarding potential issuance of an EFP that would allow pelagic longline fishing within the EEZ off California and Oregon for the first time since the widespread adoption of this gear type.

The EFP would exempt a single vessel from following the gear and fishing restrictions at 50 CFR 660.712(a) implementing the HMS FMP that prohibit owners and operators of vessels registered for use of longline gear from using longline gear to fish for or target HMS within the U.S. EEZ.


According to the EFP application, the “purpose of this EFP is to conduct a small scale (1 vessel) pelagic longline fishery within the West Coast EEZ to determine if longline gear is an economically viable HMS harvest substitute for drift gillnet (DCN) gear.” EFP App. at 1. The application describes the scale, location and duration of the EFP as follows.

EFP fishing will not occur within 30 miles of the coastline, or within the southern California light. Each trip will consist of about 14 sets, approximately 14,000 hooks per trip (1,000 hooks per set x 14 sets). This EFP proposes 4 trips (56,000 hooks) during the period September thru December.

EFP App. at 6. However, the notice by NMFS states that rather than a limit of 1000 hooks per set, “no more than 1,201 hooks can be deployed per set.” 72 Fed. Reg. 32618. This equates to a total of 67,244 hooks that could be deployed under the EFP.

With regard to protected species bycatch, for most species the proposed EFP either defers the setting of caps to a later date or sets no caps at all.

The Council recommended that the applicant be subject to a interaction cap of one short-finned pilot whale and 12 striped marlin, and not fish off the state of Washington. The Council also recommended that the fishery be managed through limits on the amount of incidental take of protected species that may be exposed to and adversely affected by this action that are to be established based upon section 7 consultations under the Endangered Species Act by NMFS for marine mammals and sea turtles and by the U.S. Fish and Wildlife Service for seabirds. If any one of the limits set by these consultations is reached by the fishery authorized by the EFP, the permit would be immediately revoked.

72 Fed. Reg. 32618. Take limits for leatherback and loggerhead sea turtles, humpback, sperm and fin whales, Southern Resident killer whales, Steller sea lions, Guadalupe fur seals, and short-tailed albatross will presumably be set prior to the issuance of the EFP as a result of ESA consultations. However, there are apparently no take limits for numerous species likely to be exposed to the fishery such as the black-footed albatross, which has been petitioned for and is undergoing review for ESA-listing; white sharks, which are protected by state law; bigeye, albacore and yellowfin tuna, all of which are subject to overfishing; long-beaked common dolphins, which are a strategic stock under the MMPA because take exceeds sustainable levels; northern fur seals, which are listed as depleted under the MMPA; andnorthern right whale dolphins which are subject to take from existing fisheries at levels above the MMPA’s zero mortality rate goal ("ZMRRG"). Take of any of these species would exceed important legal and/or biological thresholds.

Despite the scale of effort to be authorized under the EFP, there is no experimental design to meet the EFP’s stated purpose. The permit will simply be allowed to fish with otherwise prohibited gear in an otherwise closed area until he either completes the authorized number of sets, decides based on unstated criteria that such fishing is not “economically viable”, or exceeds largely unspecified caps for protected species interactions. In short, the proposed EFP will place critically endangered leatherback sea turtles at needless risk, add additional fishing pressure on species already subject to overfishing, unlawfully take species protected by the ESA, MMPA, MBTA, and state law, yet provide no meaningful data. As detailed below, issuing the proposed EFP in not only nonsensical, it is patently illegal.

II. Violations of Law

Issuance of the proposed longline EFP by NMFS would violate, at a minimum, seven federal laws. Additionally, we believe that engaging in the fishing activities described in the EFP application, absent lawfully issued permits (some of which we understand neither the applicant has requested nor NMFS intends to issue or seek) would likely subject the applicant to civil and criminal liability for knowing violations of federal law. Each of these violations is outlined briefly below. Given these significant and largely inhumane legal problems with the proposed EFP, it must be denied.

A. Violations of the ESA

Longline fisheries are known to hook, entangle, and kill ESA-listed sea turtles, marine mammals, and seabirds. As such, issuance of the proposed Longline EFP by NMFS would violate Sections 2, 4, 7, 9 and 10 of the ESA. Additionally, fishing under the EFP by the applicant would violate Section 9 of the ESA, subjecting the applicant to civil and criminal liability under the statute.

While our most immediate concerns regarding ESA-listed species are related to the critically endangered leatherback sea turtle, issuance of of and fishing under the EFP would also compromise the recovery of numerous other listed species, including, but not limited to, the

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18 As described infra, we do not believe that any take of ESA-listed species can be authorized for this EFP. Moreover, the deferment of setting such caps until after the public process for commenting on the EFP violates both the MSA and NEPA.
loggerhead, 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 albatrosses.

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 the Secretary to 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).

Section 4 of the ESA calls for the preparation of a recovery plan for every species listed under the Act. Recovery plans establish recovery goals and objectives, describe site-specific management actions recommended to achieve those goals, and estimate the time and cost required for recovery. 16 U.S.C. §1533(h). Section 4(f) specifically requires that NMFS both "...develop and implement plans (hereinafter...referred to as 'recovery plans') for the conservation and survival of endangered species and threatened species..." 16 U.S.C. § 1533(f) (emphasis added). Drafting a recovery plan is not sufficient to comply with this statutory mandate. Consistent with the intent that recovery plans actually be implemented, Congress required that recovery plans "...incorporate..." a description of such site-specific management actions as may be necessary to achieve the plan’s goal for the conservation and survival of the species." 16 U.S.C. § 1533(o)(1)(B)(i).

In 1998, NMFS approved a final recovery plan for the Pacific leatherback. In the recovery plan NMFS acknowledges both the importance of the west coast to leatherbacks and the threat that longline and other fisheries pose to the species.

It is clear that incidental catch poses a very great threat in pelagic foraging and transit areas and the coastal feeding grounds and migratory corridors that probably exist along the west coast of the United States and south into Mexico.

Recovery Plan at 24. In terms of required actions to protect the leatherback, NMFS acknowledges the need for closed areas such as the Pacific Leatherback Conservation Area and HMS FMP’s ban on pelagic longline fishing within the EEZ.

Finally, closing areas or seasons when fisheries and turtle interactions are highest can limit impacts to turtle populations.

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believe, as NMFS stated in 2000, that authorization of any leatherback take in the Pacific would violate the requirement to avoid jeopardy to the species. Therefore, any proposal, such as through the Longline EFP, to allow fishing with longline gear in areas occupied by the critically endangered leatherback sea turtle would violate Sections 7(a)(2) of the ESA.14

In addition to the Longline EFP’s impacts on the leatherback sea turtle, fishing pursuant to such a permit also puts at risk the loggerhead sea turtle. NMFS instituted the closure of shallow-set longlining east of 150° W long. in part to protect the North Pacific loggerhead sea turtles. 69 Fed. Reg. 11540 (March 11, 2004); 50 C.F.R. § 222.206(d)(9). North Pacific loggerhead have also declined by upwards of 80% in recent decades, and are likely approaching the perilous state of the leatherback.5

The issuance of the Longline EFP would also likely violate the ESA based on impacts to the short-tailed albatross. 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 haul of trips with actual observer coverage. It is therefore reasonable to assume that short-tailed albatross are likely to be entangled and killed if pelagic longline fishing is allowed off of California. Given the imperiled status of the short-tailed albatross, we do not believe that any additional take authorization for the species can be lawfully granted.

The ESA also prohibits any “person” from “taking” threatened and endangered species. 16 U.S.C. § 1538. The definition of “take”, found at 16 U.S.C. § 1532(19), states,

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.

In a case dealing with fisheries, the Court ruled “the statute not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking. We believe that…a governmental third party pursuant to whose authority an actor directly effects a taking of an endangered species may be deemed to have violated the provisions of the ESA” Strahan v. Costello, et al., 127 P.3d 155 (1974) Ca. 1997. As such, the take prohibition applies to NMFS as the authorizing agency, and the applicant as the person directly engaged in the activity likely to result in prohibited take.

Violations of Section 9 of the ESA are subject to civil penalties, forfeiture of fishing vessels, and criminal penalties of fines and imprisonment. 16 U.S.C. § 1548(a), (b) and (c).

14 While the leatherback currently has no critical habitat designated in the Pacific, it is clear that the area defined by the Pacific Leatherback Conservation Area meets the statutory definition of critical habitat. We believe such area must promptly be so designated and protected as such under the ESA.

15 On July 12, 2007, the Center for Biological Diversity and Turtle Island Restoration Network petitioned NMFS to split the North Pacific loggerheads from threatened to endangered status. See http://www.biologicaldiversity.org/wcs/l ideal/press/loggerhead/07-12-2007.html

It is our understanding that NMFS is engaging in consultation pursuant to Section 7 of the ESA regarding issuance of the EFP. As such, at the conclusion of consultation, take will likely be authorized pursuant to Section 7(c) of the ESA for listed sea turtles and seabirds.16 However, take of ESA-listed marine mammals can only be issued in conjunction with take authorization under the MMPA. See discussion in MMPA section infra. It is our understanding that NMFS and the applicant have knowingly and willfully chosen to forgo seeking any such take authorization for ESA-listed marine mammals. As such, if any ESA-listed marine mammal interacts with the fishery, both NMFS and the applicant will have violated Section 9 of the ESA and be subject to the civil and criminal penalties thereunder. See also 16 U.S.C. § 1518(g) (a) “It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section.”

The Longline EFP directly puts at risk several species of ESA-listed marine mammals. Both sperm whales and humpback whales have observed entangled in identical fishing gear used by Hawaii-based pelagic longlining vessels. Killer whales are likewise known to interact with and become entangled in longline fishing gear. The Southern Resident population of killer whales (Orcinus Orca) was recently listed as endangered, and is known to seasonally occur in the range of the proposed FFP. Additionally, Stellar sea lions and Guadalupe fur seals may overlap with the proposed EFP and are subject to entanglement. Given the known and frequent interactions of longline fisheries with humpback whales, sperm whales, and killer whales we do not see why NMFS and the applicant would choose this reckless and illegal path.

Additionally, the EFP is, by its own admission, for the purposes of determining “environmental effects, including the potential impacts to protected species.” 72 Fed. Reg. 32618. As such, any take occurring from the EFP cannot be considered “incidental”, and authorized under Section 7(c) of the statute, but is instead part of the purpose of the action and could therefore only be authorized, if at all, under Section 10(a) of the ESA. 16 U.S.C. § 1539(a). This is not to say that the proposed FFP meets any rational definition of good science (see MSA discussion infra), or complies with the issuance criteria of Section 10(a), rather, it is to point out that NMFS and the applicant cannot carry out an action for the claimed purposes of “data gathering” without complying with the provisions of the ESA specifically set up to address such efforts.

Finally, given the closure of shallow-set longlining east of 150° W long., promulgated pursuant to NMFS’s authorities under the ESA, rather than under the MSA, we do not see how an EFP issued under the MSA could lawfully be issued in direct contravention of ESA regulations prohibiting such fishing. See 69 Fed. Reg. 11540 (March 11, 2004); 50 C.F.R. § 222.206(d)(9). If the permit applicant for the FFP wishes to fish in contravention of ESA regulations, the applicant must also apply for a permit under Section 10 of the ESA. As mentioned above, our understanding is that the applicant has not done so. Moreover, we do not

16 While we expect NMFS and FWS to issue such take authorization, we do not believe that the underlying basis for such authorization is lawful.
see how the standards of Section 10 could possibly be met by the proposed activities. The EFP must be rejected as inconsistent with the intent and letter of the ESA.

B. Violations of the MMPA

The Longline EFP cannot be issued without also violating the MMPA. Fishing under the proposed EFP would hook, entangle and kill ESA-listed marine mammals as well as numerous non-listed marine mammal species. It must therefore be operated in a manner consistent with the procedural and substantive mandates of the ESA and MMPA or not at all. 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). As discussed above, it is our understanding that no take authorization for ESA-listed marine mammals is sought, even though such take is highly likely to occur. Issuance of the EFP, and fishing pursuant to it, would therefore violate the MMPA. 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).

In short, the decision by the applicant and NMFS to forgo permitting under the MMPA constitutes a knowing violation of the statute. Absent such a permit, the EFP cannot lawfully be issued or implemented.

The issuance of the proposed EFP 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)(A) NMFS has defined ZMRG by regulation as ten percent of Potential Biological Removal ("PBR"). The likely take of marine mammal species under the EFP would exceed this threshold.

Both the Hawaii and Atlantic pelagic longline fisheries are categorized as Category 1 fisheries on the 2007 List of Fisheries, 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 marine mammal killing fishery to operate without a take reduction team prior to or in lieu of 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 issuing an EFP that would result in take of stocks of marine mammals where mortality and serious injury are already above ZMRG is consistent with the ZMRG mandate of the MMPA.

The most likely species of marine mammals to be taken by fishing pursuant to the Longline EFP are Risso's dolphins and short-finned pilot whales. Pilot whales are among 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. Take of pilot whales from the DGN fishery is already above PBR, and is of course well over ZMRG. In the draft 2007 Pacific Stock Assessment Reports, PBR for the short-finned pilot whale is 0.98. The ZMRG level for pilot whales would therefore equate to fewer than one animal taken every ten years. Take of this species from existing fisheries already exceeds PBR, yet the proposed EFP would authorize over ten years worth of take in a single fishing season by a single vessel. This is simply inconsistent with the MMPA. Similarly, take of long-beaked common dolphin is well over PBR, yet the EFP proposes no limits on bycatch of the species. Take of sperm, humpback and fin whales, as well as of northern right whale dolphins also remains well above 10% of PBR, thereby exceeding the definition of ZMRG. NMFS cannot lawfully authorize new and additional take of marine mammal for which take levels already exceed the PBR and ZMRG thresholds of the MMPA.

Rather than issue an EFP that authorizes additional take over lawful levels, NMFS should instead take action under its authorities under the MMPA to reduce marine mammal take from existing fisheries. It has not done so, and therefore cannot issue the EFP.

C. Violations of the MBTA

Issuance of the EFP, and fishing pursuant to it, would violate the 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 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 Fishing 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. E.g., United States v. Corbin Farm Service, 444 F. Supp. 510, 532-534 (E.D. Cal.), affirmed, 578 F.2d 239 (9th Cir. 1978), United States v. PMC 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), affirmed, 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 what, in what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, 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. Neither NMFS nor the applicant have obtained, much less applied for such a permit authorizing any take for longline fishing pursuant to the EFP.

NMFS cannot dispute that the longline fishing kills birds protected under the MBTA. As previously mentioned, self-reports of seabird interactions with the former California-based longline fishery acknowledged take of 100 albatrosses of various species. Dozens of albatrosses 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 might be authorized by the EFP, which is likely to result in the deaths of members of such species.11

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 pursuant to the EFP. Absent a permit under the MBTA authorizing the take of the black-footed albatross and other migratory birds, the EFP cannot lawfully be issued.

D. Violations of MSA

Issuance of the proposed EFP would also violate the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") and its implementing regulations. NMFS has promulgated regulations governing the issuance of EFPs, see 50 C.F.R. § 660.745.12 Under these regulations, NMFS may authorize fishing that would otherwise be prohibited by an FMP only in very limited circumstances. Specifically, NMFS may only authorize such fishing for "limited testing, public display, data collection, exploratory, health and safety, environmental cleanup, and/or hazard removal purposes." 50 C.F.R. § 660.745(b).

11 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. As NMFS is or should be aware, in 2001 an Interior Solicitor's Opinion concluded that the MBTA does in fact apply in the U.S. EEZ. NMFS's conclusion to the contrary will not survive legal scrutiny.

12 Under the 2006 amendments to the MSA, NMFS was required to promulgate new regulations governing the issuance of EFPs. NMFS has not done so within the timelines mandated by the statute. Until and unless NMFS issues new EFP regulations to comply with these statutory mandates, we do not believe any EFP can be lawfully issued. Nevertheless, the proposed EFP violates existing regulations as well.

The proposed EFP is requested to "determine if longline gear is an economically viable HMS harvest substitute for drift gillnet (DGN) gear." EFP App. at 1. Additionally, the EFP is for the purposes of determining "environmental effects, including the potential impacts to protected species." 72 Fed. Reg. 32618. This does not meet the regulatory criteria for issuance as it does not fall within the categories enumerated in 50 C.F.R. § 660.745.

Even if the stated purposes of the EFP could be considered valid reasons for issuance of an EFP, the EFP as proposed simply is not designed to meet these purposes. The Scientific and Statistical Committee of the FFWMC explicitly acknowledged as much in its review of the EFP.

The SSC notes that the proposed EFP pertains to operation of a single vessel which would be fishing with longline gear in an area without corresponding drift gillnet fishing for comparison of finfish and prohibited species bycatch between the two gear types. Few constraints are imposed to limit where the vessel will operate, and no experimental design is proposed to test the hypothesis that longline gear would offer an improvement in bycatch rates over drift gillnet fishing gear. Average bycatch values are inadequate to evaluate bycatch impacts. Bycatch events are typically rare and spatially correlated. As such, the problem is one of estimating the statistical probability of a rare event (i.e. a longline set with large bycatch). Data collected from a single vessel operating under an EFP would not be adequate for this purpose.


NMFS's regulations for the issuance of an EFP also require the agency to publish in the Federal Register notice of receipt of an EFP application, a brief description of the proposal, and the intent of NMFS to issue the EFP. 50 C.F.R. § 660.745(b)(2). While NMFS has published a notice of the EFP, the notice itself fails to comply with these criteria. The regulations specifically require NMFS to publish notice of "the intent of NMFS to issue an EFP." 50 C.F.R. § 660.745(b)(3). Instead, the notice is more ambiguous:

The Regional Administrator has also made a preliminary determination that the activities authorized under the EFP would be consistent with the goals and objectives of the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP). However, further review and consultation is necessary before a final determination is made to issue the EFP.

72 Fed. Reg. 32618. Nowhere does the notice state that NMFS actually intends to issue the permit. If and when NMFS makes such a determination and develops such an intent, it must recirculate the notice for public comment consistent with the regulations.

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E. Violations of National Marine Sanctuaries Act

The proposed EFP also is in apparent violation of the National Marine Sanctuaries Act ("NMSA") (16 U.S.C. § 1431 et seq.). Among the purposes of the NMSA are "to maintain the natural biological communities in the national marine sanctuaries, and to protect, and, where appropriate, restore and enhance natural habitats, populations, and ecological processes." 16 U.S.C. § 1431(b)(3). To achieve these purposes, the NMSA requires that "Federal agency actions internal or external to a national marine sanctuary, including private activities authorized by licenses, leases, or permits, that are likely to destroy, cause the loss of, or injure any sanctuary resource are subject to consultation with the Secretary." 16 U.S.C. § 1434(d)(1)(A) (emphasis added). This consultation provision requires the agency proposing the action to provide a written statement describing the action and the potential effects on sanctuary resources no later than 45 days before the final approval of the proposed action. 16 U.S.C. § 1434(d)(1)(B). The action agency must follow the recommendations of the Secretary to avoid injury to any sanctuary resource or otherwise act to prevent and mitigate damage to such resources. 16 U.S.C. §§ 1434(d)(2), 1434(d)(3) & 1434(d)(4).

Three National Marine Sanctuaries, the Monterey Bay, Gulf of Farallones, and Cordell Bank National Marine Sanctuaries are adjacent to the area subject to the EFP. The leatherback sea turtle as well as the marine mammals, seabirds and fish that will likely be caught pursuant to the EFP are all resources protected by these sanctuary designations. The proposed EFP would clearly "destroy, cause the loss, or injure" these resources. We are unaware of any action by NMFS to comply with either the consultation provision of the NMSA or its substantive requirements. Absent such compliance, the proposed EFP cannot lawfully be issued.21

F. Violations of Coastal Zone Management Act

The proposed EFP also is in apparent violation of the Coastal Zone Management Act ("CZMA") (16 U.S.C. § 1431 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 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 under the proposed EFP are all "natural resources" protected by California's Coastal Management Program. Hooking, entangling and killing these animals clearly "affects" these resources triggering the consistency requirement of CZMA. We are unaware of the appropriate CZMA consistency certification in the application materials for the Longline EFP. Absent such a certification and evidence of California's concurrence in that determination, the EFP application must be rejected as violative of CZMA.

G. Violations of NEPA

While we believe that the proposed EFP is legally untenable because of the substantive requirements of the ESA, MPPA, MBTA, NMFS, CZMA and MSA, we also believe that the issuance of any such EFP would also violate the environmental review provisions of NEPA. NEPA's fundamental purposes are to guarantee that: (1) agencies take a "hard look" at the environmental consequences of their actions before these actions occur by ensuring that the agency has, and carefully considers, detailed information concerning significant environmental impacts; and (2) agencies make the relevant information available to the public so that it may also play a role in both the decisionmaking process and the implementation of that decision. See, e.g., 40 C.F.R. § 1500.1. In this instance, NMFS has apparently completely reversed this process. NMFS has decided it wishes to allow pelagic longline fishing in the area currently closed to such fishing to protect numerous species. Such prejudging of the outcome completely taints the NEPA process and is unlawful. See Mertola v. Daley, 214 F.3d 1135, 1143 (9th Cir. 2000).

In addition to the flawed timing of the NEPA analysis, NMFS's most significant violation of NEPA is its failure to prepare a full Environmental Impact Statement ("EIS") for the EFP. Under NEPA:

an EIS must be prepared if "substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor." To trigger this requirement a plaintiff need not show that significant effects will in fact occur, raising "substantial questions whether a project may have a significant effect is sufficient."

Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149-50 (9th Cir. 1998) (citations omitted) (emphasis in original).

In its processing of the Longline EFP, we assume NMFS will rely on the same informal EA as considered by the IFMC in its decision to recommend the EFP. However, NMFS's statement in this regard is, as usual, incoherent and ambiguous.
In accordance with NOAA Administrative Order 216-6, an appropriate National Environmental Policy Act document will be completed prior to the issuance of the EFP. A draft environmental assessment on the EFP was presented to the Council and public in April 2007. Further review and consultation is necessary before a final determination is made to issue the EFP.

72 Fed. Reg. 32618. So rather than inform the public as required by NEPA as to what actual NEPA document the agency will rely upon, NMFS simply mentions the existence of an EA used by the Council. If NMFS intends to rely upon this EA, it needs to explicitly state such intentions and recirculate the document for public comment.

Nevertheless, assuming NMFS adopts the EA prepared for the Council, this EA is itself, highly deficient. This EA explicitly or implicitly acknowledges that several of the Council on Environmental Quality ("CEQ") "significance" factors triggering the need to prepare an EIS are met by the Longline EFP. See 40 C.F.R. § 1508. CEQ factors triggered by the Longline EFP include, but are not limited to, whether the action involves "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands [and] ecologically critical areas," id. at § 1508.27(b)(3) (leatherback foraging areas); "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial," id. at § 1508.27(b)(4) (numerous comments in opposition); "[t]he degree to which the action may establish a precedent for future actions with significant effects or represent a decision in principle about a future consideration," id. at § 1508.27(b)(6) (the stated purpose of the EFP is to create a longline fishery); "the degree to which the action is related to other actions with . . . cumulatively significant impacts," id. at § 1508.27(b)(7) (the numerous impacts on the leatherback throughout its range); the "degree to which the action may adversely affect an endangered or threatened species," id. at § 1508.27(b)(8) (longlines previously found to jeopardize the leatherback); and whether "the action threatens a violation of Federal . . . law or requirements imposed for the protection of the environment." Id. at § 1508.27(b)(10) (violates ESA, MMPA, MBTA, NMSA, CZMA and MSA). Any of these factors, standing alone, is sufficient to require preparation of an EIS. Ocean Advocates v. United States Army Corps of Engineers, 402 F.3d 846, 865 (9th Cir. 2005). For the Longline EFP, all of these factors require the preparation of an EIS.

Even if the requirement triggering an EIS were not met, the EA is inadequate in its own right. This was recognized by the Council's Scientific and Statistical Committee.

The SSC did not provide adequate information in the Environmental Assessment to evaluate the biological risks of the proposed EFP.

SSC April 2007 Report. Similarly, for the reasons described above with regard to violations of other laws, the EA utterly fails to adequately analyze impacts on ESA-listed species, target and bycatch fish species, marine mammals, seabirds, marine sanctuaries, and numerous other resources affected by the proposed EFP.

In sum, reliance on an EA for the Longline EFP is completely at odds with the letter and spirit of NEPA. Rather than cast aside compliance with NEPA in its rush to accommodate the applicant in time for the upcoming fishing season, if NMFS wishes to consider pelagic longline fishing within the West Coast EEZ, it must do so only in a careful manner after preparation of an EIS. We therefore believe that the only lawful course for NMFS to follow at this point is to either select the No Action Alternative in the Draft EA, or to forgo action until the completion of a full EIS that analyzes a full range of alternatives.

III. CONCLUSION

As the above makes clear, we believe that issuance of the Longline EFP would violate numerous statutory provisions, including the ESA, MMPA, MBTA, MSA, NMSA, CZMA, and NEPA. We therefore recommend that NMFS reject the proposed EFP. Denying the EFP is also consistent with the call put out by over 1,000 international scientists from more than 100 countries and 300 non-governmental organizations from 62 countries calling on the U.N. to institute an immediate moratorium on pelagic longline fishing in the Pacific until measures can be put in place that protect the leatherback.22 Thank you for your concern.

Sincerely,

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