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March 18, 2001

Jim Lone, Chair, and Members of the Council
Pacific Fishery Management Council
2130 SW Fifth Avenue, Suite 224
Portland, Oregon 97201

Re: Los Angeles Commercial Fishermen's Association,
Request for Withdrawal of Rule-making Recommendation on
Huntington Flats, California

Dear Chairman Lone and Members of the Council:

Thank you for giving the Los Angeles Commercial Fishermen's Association (LACFA) the opportunity to bring the Council up to date on the Huntington Flats matter. The members of LACFA have asked me to provide you with this update and to explain why, in light of changed circumstances, the Council should modify the position it adopted on this matter in October 1997.

A discussion of these points is attached. Also accompanying this submittal is a set of enclosures, A through G. Various letters and declarations have been submitted to Council staff for the record but, in the interest of conciseness, have not been included in our materials for Council reading.

Sincerely,



Mary L. Hudson
for
Los Angeles Commercial Fishermen's Association

Wednesday, April 4, 2001

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**L.A. Commercial Fishermen submittal on
Request for reconsideration of
PFMC recommendation on set net
regulation for Huntington Flats**

I. OVERVIEW

Action Requested:

LACFA requests the Council to withdraw its October 1997 recommendation that the National Marine Fisheries Service adopt a rule closing federal waters at Huntington Flats to use of set nets for commercial take of groundfish.

Current Status:

NMFS' proposed rule closing Huntington Flats to commercial set net fishing for groundfish was published on May 19, 2000. NMFS has taken no further formal action on the proposed rule.

Fishing by the set net vessels at Huntington Flats has continued under federal court order since November 1996. The court has permanently enjoined the State of California from barring these boats from Huntington Flats based on the preemption of state law by federal regulations which allow set net fishing in that area. If NMFS' proposed rule is allowed to become final, the basis for preemption will be eliminated and the State will be free to move to exclude the boats from these federal waters.

Summary of Background:

This issue goes back to legislation proposed in 1989 (AB 1) to close state waters south of Santa Barbara to the use of gill and trammel nets for commercial fishing. The California Department of Fish and Game (CDFG) opposed the bill on grounds that it addressed allocation rather than resource protection and management issues, and that dislocated fishers would be put out of business or forced into waters where they would most likely impact rockfish fisheries. In its analysis of the bill, CDFG also explained that it was working on specific area closures and a gill net limited entry program (since adopted) that would better address the issues. See Enclosure C, page 5, where these and other reasons for the Department's opposition are stated.

After the bill died in the Legislature, its sponsor (Assemblywoman Doris Allen, deceased) converted it to a state initiative measure, Proposition 132, and mounted a well funded campaign to portray it as a conservation measure. After the measure passed, CDFG dropped its opposition

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and began efforts to expand the domain of the state initiative.¹ First CDFG tried to enforce the set net ban throughout federal waters but was stopped by a federal court on the basis that the state law was preempted by NMFS regulation allowing set nets. At the same time, CDFG asked the Council to determine that the set net closure was consistent with the Groundfish FMP, but the Council found instead that it was inconsistent. CDFG then tried to enforce the ban at Huntington Flats, which was specifically mentioned in Proposition 132. Again, in November 1996, state enforcement was stopped by a federal court order saying the state was preempted by the federal regulations. CDFG then requested the Council to recommend that NMFS amend its regulations to mirror the California initiative measure. This change would sweep away the basis for preemption. In October 1997, after several hearings, the Council voted as CDFG had requested, resulting in NMFS' May 2000 publication of a proposed rule to close Huntington Flats to set nets.²

Overview of LACFA and Huntington Flats:

The LACFA fleet is a small but vigorous component of the Pacific Coast commercial fishing fleet. LACFA is made up of about family-owned 25 fishing vessels operating out of San Pedro.³ The boats are mostly family owned and operated and are in the 26-to-38 foot range.⁴ Using bottom-set nets with large mesh (in the 6-to-8 ½-inch range), they fish on a mix of federally managed groundfish, state-managed fin fish with an emphasis on halibut, and other species, supplying live and dead catch principally to local markets, processors, and restaurants. The set net fleet and most of its active fishers have long histories in the San Pedro fishing community and are a vital part of the local economy.⁵

The LACFA boats that have survived the steadily shrinking access to fishing grounds are

¹ Proposition 132, the so-called Marine Resources Protection Act of 1990, was codified in relevant part at California Fish and Game Code section 8693(b)(4), which bars use of gill nets to take rockfish and lingcod at Huntington Flats.

² 65 Fed. Reg. 31871. The proposed rule is bundled with three other proposed closures in federal waters. Unlike the proposal for Huntington Flats, the other three are based on a showing of adverse impacts on marine mammals and/or birds. LACFA raises no objections to these other proposals.

³ LACFA's numbers have diminished by about 50 boats in recent years, due mainly to closure of state waters to set nets under Proposition 132.

⁴ LACFA believes that one or two set net vessels which do not belong to LACFA members may be fishing at Huntington Flats. This information follows up on a question asked by a Council member during public comment session on March 6, 2001.

⁵ Many letters of support from local buyers, markets, and suppliers speak of the importance to San Pedro of keeping this fishing fleet viable. These letters, as well as various declarations and other materials mentioned below, have been submitted to Council staff but, in the interest of keeping the Council's reading packet short, are not included in LACFA's material for Council reading.

now heavily dependent on Huntington Flats. Most, if not all of them that fish at or near a full-time level operate mainly at Huntington Flats. It is hard to get exact information, but indications are that many of them fish there exclusively. Because of the small size and condition of these vessels, the distance to other fishing grounds, the risks of going there, and the very limited fishing opportunities within even theoretical steaming range, most of these boats would not survive loss of access to Huntington Flats. Conversion to other gear is not feasible for most because of limited size, configuration, and the economic need to keep operations on a one-person basis. A few could be expected to invest in increased capacity and range and make the transition into deeper water fisheries.

Huntington Flats covers approximately 32 square miles of federal waters. It is a relatively shallow area lying seaward of Los Angeles Harbor from 3 miles to between 6 and 11 miles, generally ending along the 35-fathom contour. It is bordered and transected in some areas by vessel traffic lanes heavily used by large ships. Enclosure A.

**Summary of Changed Circumstances Since 1997 Which Warrant
Withdrawal of the Council's Request to Change the Rules:**

A rethinking of this matter and reversal of the Council's recommendation is justified based on many significant changes in relevant circumstances. Discussion of these is provided below. In summary, they are as follows:

- Heightened Importance of Preserving Healthy Fisheries as 1996 Sustainable Fisheries Act is Implemented. Council action to preserve any segment of the Pacific Coast commercial fleet which targets healthy stocks and uses low impact gear has become critically important at this time of depleted stocks, increased restrictions, and economic crisis in the fishery.
- Rockfish decline. New information about declining rockfish stocks shows the need to protect against new fishing pressure on these stocks, rather than to increase pressure.
- Strategic Plan. The Council has adopted a Strategic Plan for the groundfish fishery. Closing out the set net fishers at Huntington Flats would be contrary to some basic principles of the new Strategic Plan.
- Change in LACFA Catch. The proportion of groundfish in LACFA vessel landings has increased significantly since 1997.
- Absence of User Conflict. Predictions about user conflicts at Huntington Flats have proved unfounded. Cooperative and harmonious conditions have prevailed between commercial and recreational fishers as set net fishing has continued under court order.

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- Entry of Consent Decree. LACFA and CDFG have entered into a consent decree under which the federal court has permanently enjoined the State from enforcing its set net ban at Huntington Flats. Enclosure G. The court order puts an end to long-standing legal issues and provides a way of finally resolving the Huntington Flats dispute -- unless NMFS reopens the dispute by changing the federal regulation.
- Legal Weakness of Rule Change Revealed. Publication of NMFS' rule-making documents in May 2000 showed the lack of legal support for the proposal, including conflicts with virtually all of the National Standards.

II. DISCUSSION

1996 Sustainable Fisheries Act and the Need to Preserve Healthy Fisheries. In the last four years, as implementation of the 1996 amendments to the Sustainable Fisheries Act (SFA) got underway, the Council has had to transition into near-crisis management, as news of stock depletions, excess harvest capacity, conflicts with protected species, and necessary closures have become the stuff of each meeting. In this context, the little San Pedro gill net fleet is unusual. It has modest landings of stocks which mainly appear to be healthy. It fishes with a clean gear, free from marine mammal or bird conflicts and bycatch or discard wastage, close to home where nets can be pulled daily and high quality fish are delivered to eager local markets. Under the existing circumstances, there is no incentive for these boats to gear up for greater capacity and put further pressure on stocks. This is a group of fishers with deep roots in one of the quintessential fishing communities on the West Coast. Given the Council's new knowledge about depleted stocks and bottom habitat damaged by mobile gear, this should be one of the last fisheries to be considered for regulatory extinction.

The proposal to close Huntington Flats to this group of boats has nothing to do with conservation of either fish stocks or marine mammals or birds. NMFS has now published its acknowledgment of this point in connection with the rule-making, explaining:

“[A]t Huntington Flats, the primary emphasis [of the rule-making] was on public concern for state species, particularly California halibut, rather than protected species or targeted groundfish.”⁶

NMFS's concession echoes CDFG's own statement to the Council in 1996 that “the bird and mammal issue has not been an issue in that [Huntington Flats] area.” Enclosure E, p. 5. Nor would this proposal result in conservation of fish stocks. As NMFS also concedes, the proposal

⁶ 65 Fed. Reg. 31872 (May 19, 2000). NMFS did argue that discard wastage was occurring because the set net fishers were forced by state law to discard the state-managed fish. This is erroneous. Because of the federal court rulings on preemption, no such discard occurs. Declarations submitted to NMFS and Council staff by LACFA members confirm that virtually all marketable fish taken at Huntington Flats is retained.

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includes no provision to reduce catch limits by the amount once taken by the set netters. Their share simply would become available to the commercial trawlers who fish at Huntington Flats as well as the recreational fishers.

The new imperatives for Council management under the SFA require a fresh look at old decisions. The Huntington Flats decision deserves reversal in light of the new realities of fisheries management by the Council.

Rockfish Decline. Knowledge about decline in rockfish stocks has increased dramatically since 1997. The Council and NMFS work urgently to adopt and implement rebuilding plans for depleted rockfish species. At the same time, the Huntington Flats closure, by NMFS and CDFG's own accounting, will force dislocated boats out into deeper waters. As far back as 1989, CDFG understood that this would result in added pressure on the offshore rockfish fishery. Enclosure C, p. 5. NMFS' recent analysis of the proposed regulation's economic impacts (Initial Regulatory Flexibility Analysis) relies on the assumption that boats closed out of Huntington Flats will be able to fish in nearby deeper waters. Declarations submitted to NMFS by LACFA fishers confirm their experience that the main species available in deeper waters close to Huntington Flats are rockfish. In light of new evidence of overfishing of rockfish species, a decision such as this to increase pressure on these stocks is insupportable.

Strategic Plan. The Council's Huntington Flats recommendation deserves reconsideration in light of the new Strategic Plan for the groundfish fishery. Each of the following allocation principles contained in the Plan points to the need for reversal of the Council's recommendation:

#6. Community economic impacts and the benefits and costs of allocation should be fairly distributed coast-wide. Allocations should attempt to avoid concentration and assure reasonable access to nearby resources. The diversity of local and regional fisheries, community dependency on marine resources and in processing capacity, and infrastructure will be considered in Council allocation decisions.

#7. Council changes to allocations between sectors and/or gears within sectors should not encourage or result in increased capitalization (investment) and capacity (need or ability to increase harvest).

#8. Impacts to habitat and recovery of overfished stocks will be considered when allocation changes are made.

#9 Council capacity reduction measures will consider and attempt to minimize transfer of effort into other fishery sectors potentially complicating allocation issues for Council managed fisheries....

The Plan represents a comprehensive vision for responding to the economic hardship and uncertainty being experienced as groundfish landings decline. Any decision to change the

existing allocation of resources at Huntington Flats should be taken in light of the principles and long-term goals of this Plan. That can happen only if the Council's recommendation is pulled back.

Change in LACFA Catch. LACFA landings of federally managed groundfish have changed in the years since the Council's recommendation. Based on landing receipt data from seven of LACFA's most active boats during 1996 - 1999, the changes include an increased proportion of groundfish, a diminished proportion on halibut and other state-managed species, and increased landings of underutilized species. The percentage of groundfish landings for these boats ranged between 11 and 67 percent of total landings for the three years. Groundfish species being taken are principally soupfin shark, leopard shark, dogfish, kingfish, sole, lingcod, cabezon, ratfish, skates, and a relatively small component of yellowtail and other rockfish. One of the boats, the 38-foot Sandy Bea, targets dogfish most of the time and has developed a strong market for use of the fish in research and teaching institutions across the country. Others species landed include California halibut, white seabass, black seabass, pacific mackerel, sculpin, thresher shark, white croaker, and hake.

While California halibut continues to be the most commonly landed species for most of the boats, this provides no legal or practical reason for NMFS to extinguish the federal component of the fishery. As with most small fishing businesses, the flexibility for these boats to move from one fishery to another, responding to seasonal and market factors is essential to economic survival.⁷ Such flexibility is commonplace among West Coast fishing vessels. Many, if not most boats fishing for federally managed salmon and groundfish part of the year also fish for Dungeness crab, California halibut, or other state-managed species at other times. A system which totaled up the number of state fish versus the number of federal fish landed from an area, with the winner taking regulatory control, would produce instability, uncertainty, and conflict. The Council's Strategic Plan does not contemplate such a system of management.

Absence of User Conflicts. Concerns about user conflicts at Huntington Flats have proved unfounded. Since November 1996, as the LACFA boats fished under protection of federal court order, they and the recreational boating interests in the area have cooperated in working out ways of sharing the resources. Relations have been harmonious. User conflicts that existed around the time of Proposition 132 have long since been solved through a state limited entry program gill and trammel net fisheries, and through area closures where shown to be warranted on a case-by-case basis. See Enclosure C, p. 6.

Effect of Consent Decree. As a result of the consent decree entered last December, the U. S. District Court for Northern California has permanently enjoined CDFG from enforcing the State's set net ban at Huntington Flats. Enclosure G. The court order is based on the preemptive effect of the existing federal regulations which allow set nets. The court order will remain

⁷ In declarations submitted to NMFS and council staff, LACFA members describe precisely this pattern of operation.

controlling and provide a way of finally resolving the Huntington Flats dispute, unless NMFS reopens the dispute by changing the federal regulation. That action would likely reopen litigation and involve the Council and NMFS in new rounds of legal proceedings.

Legal Weaknesses of the Rule Change Revealed by NMFS' Analysis. With the proposed rule, NMFS published an Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/IRFA). This document stunningly displays the absence of legal foundation for the proposal. These "support" documents show the proposal to be in conflict with virtually all of the national standards and to find support in none of them, to wit:

NS # 1: The objective of preventing overfishing will not be furthered by the new regulation and may be undercut by it. The EA identifies no overfishing on affected stocks. The measure contains no provision to reduce harvest of affected stocks, but *de facto* reallocates the set net harvest to other fishers. Pushing the set net boats out into deeper water will force those that can make the transition to target more on rockfish, which provide one of the few stocks available to set nets in the deeper waters. Given the depleted condition of many of these stocks, forcing the set net boats into deeper waters would violate NS 1.

NS # 2: The requirement for basing management measures on best scientific information is not met. The EA/IFRA contains very little scientific information, and none that supports a conclusion to close Huntington Flats to set nets. In 1991, when considering the CDFG proposal to close the whole EEZ to set nets under the banner of Proposition 132, the Council's Scientific and Statistical Committee made the following report:

"The SSC was not presented with convincing scientific information to justify the prohibition of rockfish gill nets on conservation grounds. As the SSC stated in April, the Groundfish Management Team report indicates that elimination of the rockfish gill net fishery would not be an effective rockfish conservation measure. Reports based on the California Department of Fish and Game observer program off central California indicate that incidental catches of sea birds and marine mammals by rockfish gill nets are minor. [Reference is to 1984, 1986, and 1987 Progress Reports on the Central CA Gill and Trammel Net Investigations.]

"In accordance with our obligation to review the consistency of proposed actions with the National Standards, as outlined in the Council's operating procedures, the SSC believes that the proposed ban would not be (1) based on the best scientific data available (National Standard 2), (2) fair and equitable to all such fishermen (National Standard 4a), and (3) reasonably calculated to promote conservation (National Standard 4b).

In 1990, commenting on AB 1, the Proposition 132 precursor, CDFG was reported in legislative committee to have this to say: "According to the [DFG], this measure would eliminate major commercial gill and trammel net fisheries in Southern California, without the benefit of any biological evidence or demonstrated need to impose such restrictions." (Assembly Committee on Water, Parks, and Wildlife, Digest on AB 1, p. 6, January 9, 1990. See also

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Enclosure C, p. 5 (CDFG analysis of AB 1.): “We feel strongly that available biological resource information warrants continued use by both sport and commercial users.”

The NMFS documents show that the passage of time has not brought any new science to bear on these issues. The proposal still does not meet the test of NS 2.

NS # 3: The proposal is said to represent federal coordination with the state to support management of state species throughout their range, both inside and beyond state waters. NS 3 is cited. This reasoning stands the principle on its head. NS 3 is concerned with management of federal species under an FMP and therefore with federal species as a unit, not with state-managed species. It is well known that the recreational fishery at Huntington Flats takes substantial numbers of federally managed fish, including rockfish, lingcod, skates, Pacific sandab, Dover sole, and others. Under a proper application of NS 3, it is these federal stocks, and not the state-managed species, which would be candidates for management as a unit throughout their range. That has been the case under the existing regulatory scheme, and properly so. Interagency cooperation is admirable, but it is not an objective warranting waiver of federal law.

NS # 4: The proposed rule would allocate fishing privileges from one group of fishermen to another. Accordingly, it is required by NS 4 to be fair and equitable to all such fishermen. Clearly it fails this test. Where one group would be shut out of their last remaining good fishing ground, a large area rich with shallow water fish and close to home, and offered the uncertain possibility of an inadequate number of distant fishing berths with doubtful fishing value and certainty of hazards, the deal is not fair or equitable. NS 4 also requires that any such allocation measure be reasonably calculated to promote conservation. The EA/IFRA provides not a shred of evidence that it does.

NS # 5: This requires consideration, where practicable, of efficiency in utilization of fishery resources and bars economic allocation as its sole purpose. No purpose other than economic allocation has been identified here. And on the efficiency issue, it is hard to think of a more contrary proposal than this one. Closing out a successful, highly efficient near-port fishery and relocating it to distant territory (even if that could be done) would increase all operating costs, decrease abundance and quality of product, and cut off supply of live fish to eager markets. Not to mention the decreased harvest efficiency that goes with tending nets far from home port.

NS # 6: The proposal does not allow for variations among, and contingencies in, fisheries, resources, and catches, as required by this standard. The proposed regulation would exchange the nearshore mix of possible target species for only one or two, and exchange proximity to port which allows short and frequent trips for distant and hazardous fishing grounds. Clearly margin of flexibility for meeting contingencies and variations in fishing opportunity and market demand would be greatly reduced.

NS # 7: Obviously harvest costs would go up if the vessels were required to travel to more distant fishing grounds, contrary to this standard.

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NS # 8: This standard looks to a management measure's impacts on fishing communities. San Pedro has already been buffeted by the decimation of its commercial fishing base. The remaining gill net fleet enjoys a special niche, both as a prime supplier of fresh and live fish to restaurants and markets, and as the embodiment of families and traditions deeply rooted in that place. Throughout the struggle against Proposition 132, boat builders and repairmen, restaurant operators, marine suppliers, fish buyers, and other members of the fishing community have come forward with letters, personal testimony, and contributions to try to save this fishing fleet and head off the new economic blow that would come with its demise. Much of this material is in the record of the Council's consideration of Proposition 132-related matters and more has recently been submitted to NMFS as part of the rule-making record.. The EA/IFRA and NMFS' Supplementary Information on the proposed rule give no evidence of having taken these considerations into account in its decision to propose the rule. These requirements of NS 8 can be moderated by conservation requirements, but as noted, this measure has no conservation purpose or effect.

NS # 9: This standard calls for minimizing bycatch and, where that can't be avoided, for minimizing mortality of bycatch. As noted, there is no issue here about incidental catch of marine mammals or birds. Nor is there an issue about regulatory discards, as explained above. The EA/IFRA makes some other vague references to bycatch, or possible future bycatch, but there is no evidence that it is occurring or will occur. On the contrary, the evidence provided by the LACFA vessels is that, under the SFA's new and more stringent section 1802 definition of bycatch, the standard is being met at an exceptionally high level. What the proposed rule could do, however, is increase the level of bycatch in the harvest of Huntington Flats stocks formerly harvested by the set net boats. Because neither trawl gear nor hook and line can avoid catching undersized fish, and some mortality occurs with fish thrown back, the overall rate of bycatch and mortality in this sector could go up. Similarly, bycatch and mortality could well increase with the set nets placed in deeper, more distant water and tended with less frequency.

NS # 10: The EA/IFRA gives no indication that this standard concerning safety of human life at sea has been considered in connection with the proposed rule. Increased risk would come to fishers aboard the small set net vessels fishing in deeper waters because of two factors. One set of risks would involve these small vessel's vulnerability to heavy weather and the added time to safe harbor if they were fishing beyond 35 fathoms (starting about 9 miles out). Another is that the area contemplated by NMFS as available fishing grounds, where Huntington Flats slopes off beyond 35 fathoms, is in the vessel traffic lanes heavily used by ships accessing Los Angeles and Long Beach Harbors. Enclosure A.

NEPA and RFA. In addition to the failure show the proposed rule's consistency with the National Standards, the NMFS documents also show a failure to undertake even minimally adequate analysis of environmental and economic impacts. The EA/IRFA analysis states conclusions that such impacts won't occur, but fails to provide supporting evidence or reasoning. Plainly, significant impacts of both kind are likely to occur. Adverse effects on sensitive rockfish resources, increased pressure on Huntington Flats stocks, increased wastage from moving commercial fishing farther off-shore -- these and a number of other adverse impacts discussed

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invalidate the a no significant environmental impact conclusion that NMFS has drawn. Consequently, an environmental impact statement is warranted under the National Environmental Policy Act and should have been prepared.

Similarly, NMFS's conclusion that there will be no significant economic impact is clearly wrong, as the record abundantly shows. The supporting explanation falls far short of requirements of the Regulatory Flexibility Act for disclosure and analysis of economic impacts on small businesses.

III. CONCLUSION

Since the Council's 1997 recommendation on Huntington Flats, voter initiatives affecting marine resources have been passed in several states. It is time for the Council to pull back and reconsider the wisdom of allowing federal fishery management to be governed by state voter initiative. The template for federal management decisions is set by federal law against a backdrop of Congressional concern for larger-than-local values. The need for a perspective focused on regional and national interests has been the mainspring of fishery management under the Magnuson Act and the Magnuson-Stevens Act. Ballot box proposals which affect federal fisheries have served, and will continue to serve such special interests as oil producers, anti-tribal advocates, sport fishers, commercial fishers, wood products producers, shippers, and more. Some of the proposals may be good, and some may not. Once enacted, all will bind the state agencies, and the stage will be set for pressure at regional fishery councils to bring the federal regulations into conformity. For some thoughtful comments on this issue and its relationship to the Huntington Flats situation, please see the letter of Pacific Federation of Fishermen's Associations, Enclosure F.

It is plain that the proposed closure of Huntington Flats has no justification beyond the values of yielding to local interests who want to see gill net boats out of this fish-rich piece of federal waters. In advocating for this measure, CDFG has done what it apparently perceives it must do as the representative of local interests to the Council. However, under the federal authorities that govern the Council, the regional and national interests must prevail. In light of currently available information, those authorities as well as good fisheries management principles to which the Council is devoted call reconsideration and reversal of the Council's old recommendation to NMFS on Huntington Flats.

End