Agenda Item C.3.c
Supplemental Public Comment 2
June 2005

Subject: No Exemptions to the CA Gillnet Closures
From: clschubert@speakeasy.net
Date: Thu, 08 Sep 2005 12:40:57 -0800
To: donald.mcisaac@noaa.gov, Kit.Dahl@noaa.gov
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CC: Dr. Kit Dahl
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Dear Dr. McIsaac and Dr. Dahl:

On September 20th, the Pacific Fisheries Management Council will be considering a proposal to grant exemptions to a small number of gillnet fishers to a measure that closes a large area of the California coast to gillnet fishing that injures and kills large numbers of endangered sea turtles, sharks, billfish and marine mammals. Most at risk is the leatherback sea turtle which now teeters on the brink of extinction in the Pacific Ocean. I urge you to reject this proposal.

Most at risk from this proposal is the critically endangered leatherback sea turtle. Estimated to be 100 million years old, scientists now warn that it could go extinct in the Pacific in the next 5-30 years unless efforts are made to reduce the threat of being injured or killed by longlines and gillnets. The number of female nesting Pacific leatherbacks has declined by 95% since 1984. The US Pacific Coast is an important migratory route and foraging area for leatherback sea turtles.

These rules are crucial for protecting the leatherback and other marine species from being injured or killed by gillnets and longlines. Eliminating rather than strengthening protections for these critically endangered turtles would be a huge and possibly irreversible mistake.

In 2001, NOAA Fisheries also closed waters off Monterey Bay, California, and in the vicinity north to the 45ï¿½ N latitude intersect with the Oregon Coast from August 15 through November 15 in response to the threat of a lawsuit. The region north of Point Conception had recently been closed during El Nino years as the result of another lawsuit in 2002 to protect loggerhead turtles, another species facing threat of extinction due to mortality caused by industrial fishing.

Known as "curtains of death" because they catch and kill everything in their path, large gillnets (also known as driftnets) were banned by the United Nations on the high seas in 1991. Along with sea turtles, gillnets also injure or kill sperm whales, humpback whales, fin whales, Steller sea lions and other threatened and endangered species.

This year, 1,007 scientists from 97 countries and 281 non-governmental organizations from 62 countries delivered a letter to the United Nations urging it to implement a moratorium on industrial longline and gillnet fishing in the Pacific.

There is no excuse for taking a step back on restricting the use of gillnets or longlines. The first ones to pay the price for allowing more of these curtains of death will be sea turtles and other endangered marine wildlife. I urge you to reject this proposal to grant exemptions to the closures and maintain existing protections for sea turtles in place.

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CENTER FOR BIOLOGICAL DIVERSITY

CALIFORNIA AND PACIFIC OFFICE

protecting endangered species and wild places through science, education, policy, and environmental law

Via Electronic Mail

September 13, 2005

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RE: Agenda Item C-3: Proposed Council Operating Procedure (COP) for Approving Exempted Fishing Permits for Highly Migratory Species

Dear Mr. McIsaac:

On behalf of the Center for Biological Diversity and the Turtle Island Restoration Network I submit the following comments regarding Agenda Item C-3 of the September 2005 meeting of the Pacific Fishery Management Council ("PFMC" or "Council"), the Proposed Council Operating Procedure ("COP") for Approving Exempted Fishing Permits for Highly Migratory Species ("HMS"). 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 September meeting.

While the agenda item before the Council refers only to the proposed adoption of a Council operating procedure ("COP") for approving HMS exempted fishing permit applications, it is clear from the agenda summary as well as the comments of the Highly Migratory Species Management Team ("HMSMT") that the driving force for the proposed action is a desire by the HMSMT to reestablish the California/Oregon Drift-Gillnet Fishery in areas in which the fishery is currently precluded. Similarly, although not specifically mentioned in the Council's briefing book documents, there is ample evidence in the record that a further purpose of the COP is to develop a mechanism that would allow the reopening of the California-based longline fishery for swordfish. By linking the proposed COP to specific exempted fishing proposals, particularly proposals as legally problematic as those for the drift-gillnet and longline fisheries, the Council has rendered what could have been a relatively straightforward procedural rulemaking into one that is fundamentally flawed and will almost certainly result in legal challenge. We believe that the only lawful course for the Council to follow if it chooses to pursue adoption of a COP for HMS exempted fishing permits is to reject the draft COP as developed by the HMSMT and restart the procedure independent of any pending proposals or plans to reopen all or portions of

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the drift-gillnet and longline fisheries. Moreover, the Council should not adopt any "interim" procedure as proposed by the HMSMT to allow the more rapid approval of exempted fishing permits for the drift-gillnet fishery. To continue on the present course would render the Council's actions, and any National Marine Fisheries Services ("NMFS") approval and implementation of the Council's decisions, highly unlawful in violation of the procedural and substantive mandates of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") (16 U.S.C. § 1801 *et seq.*), the National Environmental Policy Act ("NEPA") (42 U.S.C. § 4321 *et seq.*), the Endangered Species Act ("ESA")(16 U.S.C. § 1531 *et seq.*), the Marine Mammal Protection Act ("MMPA")(16 U.S.C. § 1361 *et seq.*), and the Migratory Bird Treaty Act ("MBTA")(16 U.S.C. § 706 *et seq.*).

As the Council is, or should be aware, the California/Oregon Drift-Gillnet Fishery is currently operating in violation of the ESA, MMPA and MBTA. Any decisions by the Council and/or NMFS that result in the expansion of this fishery into currently closed areas will be met by litigation seeking not just to prevent the expansion of the fishery, but likely also the complete closure of the fishery until and unless it can be operated in a manner consistent with applicable law.[1]

The California/Oregon Drift-Gillnet Fishery entangles and kills ESA-listed marine mammals and sea turtles. It must therefore be operated in a manner consistent with the procedural and substantive mandates of the ESA or not at all. This fishery is currently operating without any take authorization for ESA-listed marine mammals. Take can be authorized via a biological opinion 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 pursuant to Section 101(a)(5)(E) of the MMPA, 16 U.S.C. § 1371(a)(5)(E), to the Drift-Gillnet Fishery 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. 64670. 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 Drift-Gillnet Fishery, or for that matter any fishery under the HMS FMP. Unfortunately, the Drift-Gillnet 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 Section 9 of the ESA. Continued operation of the Drift-Gillnet Fishery, and certainly any expansion of the fishery into currently closed areas, violates the provisions of the ESA prohibiting such take. Until and unless the fishery as a whole (including any proposed exempted fishing) receives a lawful Section 101 authorization pursuant to the MMPA, we believe that the fishery must be suspended.

[1] It is our understanding that the California-based longline fishery is currently non-operational. The shallow set component of the fishery was closed via the final HMS FMP in conjunction with a NMFS ESA rulemaking (69 Fed. Reg. 18444 and 69 Fed. Reg. 11540) while the small remaining tuna component of the fishery was closed due to overfishing concerns regarding the bigeye tuna (70 Fed. Reg. 52324). Needless to say, we believe that any reopening of the longline fishery via exempted fishing permit or otherwise would also violate the ESA, MMPA and MBTA.

Any proposal to allow the Drift-Gillnet Fishery into areas occupied by the critically endangered leatherback sea turtle would violate Sections 7 and 9 of the ESA. In the original Drift-Gillnet biological opinion, NMFS had the following to say about any further mortality to the leatherback:

> 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). NMFS then concluded that the estimated annual mortality of leatherbacks from the Drift-Gillnet Fishery would likely jeopardize the species. NMFS therefore proposed as a Reasonable and Prudent Alternative ("RPA") a seasonal closure to the Drift-Gillnet 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 and instituted the current closure. 66 Fed. Reg. 44549. 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. § 660.713.[2] Since the October 2000 biological opinion for the Drift-Gillnet 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.

Fortunately, the seasonal closure to the Drift-Gillnet Fishery for the protection of the leatherback sea turtles appears to be effective. The past three years of observer data show no bycatch of leatherback sea turtles.[3] It would be criminal for the Council and NMFS to undue 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.

The continued authorization of the Drift-Gillnet Fishery under the FMP (and under any proposed exempted fishing permit) also violates 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

[2] Similar closures were required south of Pt. Conception in El Nino years to avoid loggerhead sea turtles. NMFS has yet to actually invoke these closures even when other branches of the agency have declared the existence of El Nino conditions.

[3] We hope this does not simply reflect the unfortunate fact that there so few leatherback sea turtles left in the Pacific.

U.S.C. § 1387(b)(1). NMFS has defined ZMRG by regulation as ten percent of Potential Biological Removal ("PBR"). The fishery's take of marine mammal species remains above this threshold. For example, in the most recent Draft Pacific Stock Assessment Reports (dated May 2005) 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 PBR. Take of sperm, humpback and fin whales also remains well above 10% of PBR, thereby exceeding the definition of ZMRG. Because April 30, 2001 has come and gone without the Drift-Gillnet Fishery reaching ZMRG, the continued authorization, or any expansion, of this fishery violates the MMPA.[4]

As mentioned above, we believe that the Drift-Gillnet Fishery as currently authorized is violating the MBTA. Obviously, any exempted fishing permit allowing an expansion of the fishery 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, 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 the Drift-Gillnet Fishery, the northern fulmar, is included in the list of migratory birds protected by the MBTA. See 50 C.F.R. § 10.13 (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 harm occurring "by any means or in any manner," and is not limited to, for example, poaching. See e.g., U.S. v. Moon Lake Electric Association, 45 F. Supp. 2d 1070 (1999) and cases cited therein. Indeed, the federal government itself has successfully prosecuted under the MBTA's criminal provisions those who have unintentionally killed migratory birds. 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 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. The Council and NMFS however have not obtained, much less applied for such a

[4] Because levels of marine mammal take violate the MMPA, the fishery cannot be considered "otherwise lawful" as required to receive incidental take authorization under the ESA. Similarly, the fishery's take of the northern elephant seal, a species listed as "fully protected" under California law, a status that precludes the authorization of incidental take under state law, also renders the fishery unlawful and ineligible for ESA take authorization.

permit authorizing any take by the Drift-Gillnet Fishery (or any other fishery under the HMS FMP).

NMFS and the Council cannot dispute that the Drift-Gillnet Fishery kills birds protected under the MBTA. We believe that until such take is permitted, NMFS cannot lawfully allow any fishing that is likely to result in death of such species. 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 conclusions to the contrary will not survive legal scrutiny.

As the above makes clear, we believe that the current Drift-Gillnet Fishery is operating in violation of the ESA, MMPA and MBTA. If the Council and NMFS wish to reopen the regulatory process for the Drift-Gillnet Fishery in an attempt to allow fishing in areas in which it is currently prohibited, we believe that the likely result will be something quite different- a court ruling suspending the entire Drift-Gillnet Fishery until the fishery complies with all applicable laws.

While we believe that any exempted fishing permit for the Drift-Gillnet Fishery would be legally untenable because of the substantive requirements of the ESA, MMPS, MBTA, and MSA, we also believe that the adoption of the draft COP and any interim procedures for approval of any exempted fishing permits for drift-gillnets, 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, the Council and NMFS have completely reversed this process. The Council, or at least the HMSMT, has decided it wishes to allow drift-gillnet fishing in the area currently closed to such fishing to protect leatherback sea turtles. The record on this point is undisputable. The Council now is going through the charade of a public process to set up procedures to allow this to happen. Yet the outcome is apparently predetermined; regardless of what the draft COP procedures will be, exempted fishing permits for drift-gillnets will be rushed through the approval process in an attempt to allow such fishing by next season. Such prejudging of the outcome completely taints the NEPA process and is unlawful (see Metcalf v. Daley, 214 F.3d 1135, 1143 (9th Cir. 2000)). The Council and NMFS must prepare an Environmental Impact Statement ("EIS") that analyzes the proposed COP and any alternatives, prior to any decision to adopt the COP, or reopen the fishery. Additionally, because the reopening of the Drift-Gillnet Fishery is a stated purpose of the draft COP and any interim protocol, any environmental review document for the COP and interim protocol must analyze the entire action, including the environmental effects of the Drift-Gillnet Fishery. To approve the draft COP and any interim protocol without such analysis would result in the illegal segmentation of the action in violation of NEPA.

In sum, we believe that the path the Council has embarked upon is improper and unlawful, and if pursued will only result in litigation and likely further limitations on the current Drift-Gillnet Fishery. We believe that the Council should reject the draft COP submitted by the HMSMT, and direct the HMSMT to re-draft the COP independent of any plans to authorize the Drift-Gillnet Fishery as an exempted fishery in the current closed areas. The Council should refrain from approving any interim protocol to accommodate the HMSMT's stated goal of reopening the existing closures. Only when a lawful COP is approved and in effect (following proper NEPA compliance) should the Council and NMFS consider any applications for exempted fishing. We believe that neither drift-gillnet nor longline fishing could lawfully be approved as exempted fishing under any rational procedure consistent with the requirement of the MSA, ESA, MMPA, MBTA and other applicable law.

Thank you for the opportunity to comment.

Sincerely,
/s/
Brendan Cummings
Marine Biodiversity Program Director
Center for Biological Diversity

cc Dr. William Hogarth, NMFS