



February 28, 2016

Pacific Fisheries Management Council
770 NE Ambassador Place, Suite 101
Portland, OR 97220

RE: Agenda Items J.6 Fishery Management Plan Amendment 5: Final Action
Authorizing Federal Drift Gillnet Permit

Dear Councilmembers,

This letter is written on behalf of hundreds of thousands of members represented by Turtle Island Restoration Network, Coastal Environmental Rights Foundation, Kurmalliance, Ocean Defenders Alliance, Animal Legal Defense Fund, The Leatherback

Trust, Center for Biological Diversity, Greenpeace, WildAid, Whale and Dolphin Conservation, WILDCOAST, Hollywood Divers, Los Angeles Underwater Explorers, Ghost Fishing, Endangered Habitats League and BlueVoice.org. We request the Pacific Fisheries Management Council (PFMC) not to take final action authorizing the federal drift gillnet permit. We remain greatly concerned that bycatch in the drift gillnet industry continues to kill endangered and protected species that are of great ecological significance. We are concerned that federalization of the drift gillnet fishery will not alleviate the environmental damage caused by the fishery and will make addressing this environmental damage more difficult.

California Should Retain Full Ability to Manage the Drift Gillnet Fishery

This fishery began in the 1970's as a state-managed fishery, and how the fishery is managed continues to impact California's marine ecosystem and economy. California has a proud history of being on the forefront of protecting the environment. Yet, California is the last state in our nation that allows drift gillnet fishing for swordfish. The fishery has been responsible for the deaths and injuries of thousands of marine mammals, as well as sea turtles and other ocean wildlife, including species protected by Federal law.¹

In response to the damage this fishery is causing to ocean wildlife, and in acknowledgement of available and more sustainable methods to catch swordfish, California legislators introduced bills in 2014 and 2016 to phase out the fishery.² The move to federalize the permits is in response to efforts by California citizens, through the California State Legislature, to address the high level of harm from drift gillnets.³

Federalization would severely limit California's ability to have input on the use of resources that overlap federal and state waters. While California Department of Fish & Wildlife will still be able to participate through the PFMC, its ability to make changes to the fishery will be diluted. The California state legislature, which acts as the voice of California citizens, would be cut out entirely from the management process for this fishery that impacts California citizens. Instead of attempting to limit the voices of Californian citizens, who are concerned about the deaths of thousands of marine mammals and other ocean wildlife off their coast, we request the PFMC to withdraw its support of federalization.

¹ National Oceanic and Atmospheric Administration, California/Oregon Drift Gillnet Fishery Catch Summaries, available at: http://www.westcoast.fisheries.noaa.gov/fisheries/wc_observer_programs/sw_observer_program_info/data_summ_report_sw_observer_fish.html

² Senate Bill 1114 (2016), available at http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_1101-1150/sb_1114_bill_20160511_amended_sen_v97.html; Assembly Bill 2019 (2014), available at: http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_2001-2050/ab_2019_bill_20140423_amended_asm_v98.html

³ Highly Migratory Species Management Team Report on Federalization of Permits for the Drift Gillnet Fishery, available at http://www.pcouncil.org/wp-content/uploads/2016/08/J5a_HMSMT_Rpt_DGN_SEPT2016BB.pdf

Significant state participation in managing the state's resources is appropriate and the opportunity for that participation should not be removed. Even the PFMC publication called "Navigating the Council Process, A Guide to the Pacific Fishery Management Council", acknowledges the role that California and its legislature plays in fisheries management. The guide explains that all states are involved in the fisheries management process "through their membership on the councils, *their legislatures* (emphasis added), and sometimes through research and enforcement."⁴

Even if the PFMC decides to support federalization of the fishery, now is not the appropriate time to move forward with federalization. The Trump administration has cast doubts on whether California should be allowed to keep environmental protections that differ from the executive branch's agenda.⁵ President Trump has shown blatant disregard for responsible environmental management through actions like his executive order requiring federal agencies to repeal two regulations for every new one issued.⁶

For example, one of the many environmental safeguards that could be damaged by the executive order to repeal two regulations for every new one issued is the Magnuson-Stevens Act (MSA), which allows the government to set rules for fisheries. As the Council is aware, fisheries that take place in federal waters require specific regulatory actions to open and close seasons, set catch limits and modify conservation measures.⁷ Federalizing the drift gillnet fishery under these circumstances is irresponsible and puts responsible resource management, and the wellbeing of our ocean ecosystem, at serious risk.

Federalizing the Drift Gillnet Fishery Will Significantly Impact the Environment

The National Marine Fisheries Service (NMFS) Report on Federal Drift Gillnet Permitting notes that NMFS does not anticipate significant environmental impacts as a result of federalizing the fishery. Specifically, the NMFS Report states that federalization "is purely an administrative action and is not expected to increase or decrease potential

⁴ Navigating the Council Process, A Guide to the Pacific Fishery Management Council, available at http://www.pcouncil.org/wp-content/uploads/Council_Guide.pdf

⁵ Los Angeles Times, California is right to fight trump. His idea of states' rights is clearly limited, available at: <http://www.latimes.com/politics/la-pol-sac-skelton-california-under-donald-trump-20170123-story.html>

⁶ The White House Office of Press Secretary, Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs, available at: <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling>

⁷ Grijalva Huffman Letter to Trump on Executive Orders Hurting Fisheries, available at <http://democrats-naturalresources.house.gov/imo/media/doc/Grijalva%20Huffman%20Letter%20to%20Trump%20on%20Executive%20Orders%20Hurting%20Fisheries%20Feb.%202%202017.pdf>

DGN fishing effort.”⁸ However, although NMFS does not expect an increase or decrease in fishing effort, the action will effectively preclude ongoing state legislative efforts to decrease the DGN fishing effort. Preventing the opportunity for future state action to reduce environmental impact will effectively be an environmental impact of the action to federalize the fishery. This environmental impact is a significant one, and one that should require appropriate analysis under the National Environmental Policy Act.

Further, in the Joint Report Between NMFS and CDFW, NMFS indicates that because “the rule would be largely administrative in nature” it anticipates that the action “might be covered under a Categorical Exclusion” and not require further environmental analysis to comply with NEPA.⁹ Reliance on a CE to satisfy NEPA requirements would be wholly inappropriate for this action due to the proposed action involving several Extraordinary Circumstances, including, without limitation, (1) adverse effects from the action on species or habitats protected by the ESA, the MMPA, the MSA, NMSA or the MBTA that are not negligible or discountable; (2) a potential violation of Federal, State or local law or requirements imposed for protection of the environment; and (3) highly controversial environmental effects.¹⁰ Lastly, the Joint Report Between NMFS and CDFW on the Federalization of DGN Permits indicates that a new biological opinion required under Section 7(a)(2) of the ESA for the DGN fishery is currently being prepared and is expected to be completed before a final NMFS decision.¹¹ We assert that NMFS must delay taking action to consider whether to federalize the limited entry system until after the new biological opinion is complete. The information from the new biological opinion is required to inform the decision of whether and how to federalize the fishery. Further, in the absence of such new biological opinion, NMFS’ statement that federalizing the DGN fishery “is not likely to result in any new actions or effects that would affect threatened or endangered species” is unsupported by any environmental analysis and cannot be relied upon by the PFMC in deciding whether or not to support federalization at this time.

In conclusion, federalizing drift gillnet permits does nothing to address the many concerns with this fishery. Instead, this action will only serve to remove an opportunity for public participation and oversight through the State of California. We request the PFMC withdraw its support for federalization of the drift gillnet fishery for swordfish and to commit to allowing California to maintain a stake in this fishery that impacts the State’s natural resources and its citizens.

⁸ National Marine Fisheries Service (NMFS) Report on Federal Drift Gillnet (DGN) Permitting (Mar. 2017) at 1.

⁹ Joint Report Between the National Marine Fisheries Service (NMFS) and California Department of Fish and Wildlife (CDFW) on the Federalization of Drift Gillnet (DGN) Permits (Mar. 2017) at 6 – 7.

¹⁰ See Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities (Dept. of Commerce/NOAA Jan. 13, 2017) at 4 – 5.

¹¹ NMFS/CDFW Joint Rept. at 7.

Sincerely,

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February 28, 2017

Mr. Herb Pollard, Chair
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 101
Portland, OR 97220

RE: Agenda Item J.6. Federal Drift Gillnet Permits

Dear Chair Pollard and Council members:

Oceana is writing to request postponed or conditioned final action to federalize the State of California drift gillnet permit program. Federal drift gillnet permits should only be issued upon implementation of the Council's preceding swordfish drift gillnet fishery management actions to establish protected species hard caps and 100 percent monitoring. We request federal drift gillnet permits be issued to active California drift gillnet fishermen only, that they be made non-transferable, and that the purpose and need for this action be modified to reflect a vision for a sustainable U.S. West Coast swordfish fishery that minimizes and avoids bycatch, rather than the articulated purpose of expediency and avoiding legislation.¹

At this meeting the Council is considering federalizing swordfish drift gillnet permits currently issued by the State of California. As described in the briefing book materials the State of California currently has a limited entry large mesh drift gillnet permit program. Oregon and Washington do not permit this gear type and large mesh drift gillnets are prohibited in state and federal waters off Washington due to a history of bycatch concerns. The need for federalizing the drift gillnet permits, as defined by the Highly Migratory Species Management Team, is to avoid the phase out or prohibition of this gear type through "state bills" that "add[] a degree of uncertainty" and may "impair the

¹ PFMC September 2016. Agenda Item J.5.a HMSMT Report, at 1. "The purpose of the proposed action is to rapidly and simply transition DGN permitting to MSA authority," and the stated need is to circumvent "state bills" that "have been introduced which would materially impair the Council's ability to manage the fishery."

Council's ability to manage the fishery.”² What may be more uncertain, however, in this time of deregulation and policy repeal is the current administration's intent to follow through on the Council's plan to sustainably manage the West Coast swordfish fishery.

We commend Council actions to minimize and control bycatch in the California drift gillnet fishery through protected species hard caps, performance standards, and enhanced monitoring. The National Marine Fisheries Service (NMFS) issued a proposed rule to establish protected species hard caps in the drift gillnet fishery, which when finalized, would implement the Council's September 2015 decision. The agency stated it plans to implement the Council recommended 100% monitoring requirements by 2018 — including removing the unobservable vessel exemption — in subsequent rulemaking. In addition to these pending actions, we are pleased to see that development of a range of alternatives for authorizing and permitting deep-set buoy gear is tentatively on the June agenda, with final action in September 2017.

While the Council is making great progress, these actions must be finalized before, and as a condition of, creating a federal limited entry drift gillnet permit system. As it stands there appears to be a rush to federalize the California permits, “as soon as possible after Council final action” with NMFS stating it will “begin preparing a rule package immediately”³ and that the action may be categorically excluded from analysis under the National Environmental Policy Act.

Therefore, we ask the Council to either table final action until the hard cap rule and 100% monitoring rule are finalized, or condition final action with direction to the agency to not advance the federal drift gillnet permit rulemaking until the earlier drift gillnet actions are finalized.

In addition, we offer the following recommendations on the proposed permit system and broader West Coast swordfish fishery management, in general:

1. **Amend the purpose and need** for this action to describe the Council's larger vision for a sustainable West Coast swordfish fishery. The purpose and need should reflect Council goals to minimize bycatch of finfish and protected species (including sea turtles, marine mammals, and seabirds), limit drift gillnet fishing effort, and develop a deep-set buoy gear fishery that acts as clean alternative gear type.

² Id.

³ PFMC March 2017. Agenda Item J.6 Attachment 1, at 1 and 6.

2. **Reduce latency.** Federal drift gillnet permits should only be issued to active California drift gillnet permit holders. In the 2015-16 season 74 California drift gillnet permits were issued, however, there have been 20 or fewer active fishermen in recent years.⁴ Federalizing all latent drift gillnet permits risks increasing drift gillnet fishing effort with great increases in bycatch.
3. **Make clear that no additional federal drift gillnet permits shall be issued after the initial limited allocation.** Cap the number of federal drift gillnet permits and if those permits are not renewed, or are otherwise retired (see #5), no additional federal drift gillnet permits should be issued.
4. **Make federal drift gillnet permits non-transferable.** Under the proposed provisions, a federal drift gillnet permit may be transferred after three years. In order to eventually sunset swordfish drift gillnets and to promote other gear that minimizes bycatch, we request the Council make federal drift gillnet permits non-transferable.
5. **Connect the federal drift gillnet permit program with authorization of deep-set buoy gear.** When the Council acts to authorize deep-set buoy gear later this year, initial permitting should be exclusive to those individuals who have developed and pioneered deep-set buoy gear and to active swordfish drift gillnet permit holders that are willing to exchange their permit for deep-set buoy gear permits. It is critical that the Council establish a permitting system that enables this voluntary trade-in option as an incentive to fish with clean gear. The deep-set buoy gear program should be limited entry and permits should be transferable so the market value of the permits can help compensate for the voluntary retirement of drift gillnet gear.
6. **Discontinue efforts to allow drift gillnets into the Pacific Leatherback Conservation Area (PLCA).** Pacific leatherback sea turtles are at great risk of extinction and drift gillnets are a major threat to their continued survival and recovery. The Council should discontinue consideration of any exempted fishing permits or boundary modifications that would allow this gear into the PLCA. A new scientific analysis found the temporal extent of the PLCA (August 15 to November

⁴ PFMC September 2016. Agenda Item J.5.a HMSMT Report, at 3, showing 20 or fewer fishermen over the past 5 years. Figures 1 and 2a.

15) is the “shortest and most effective for protecting the turtles while allowing fishing during low bycatch risk periods.”⁵ The authors concluded that a dynamic ocean management approach that would allow drift gillnets inside the PLCA while avoiding migrating and foraging leatherback sea turtles is not presently possible based on currently available data. Such an endeavor is greatly complicated by the highly variable nature of the California Current Ecosystem. Instead, alternative gear types like deep-set buoy gear show promise for profitably catching swordfish while avoiding protected species interactions.

7. **Support efforts to implement import provisions of the Marine Mammal Protection Act.** A 2016 NMFS rule aims to reduce marine mammal bycatch associated with international commercial fishing operations, by holding nations exporting fish and fish products to the U.S. to the same standards as U.S. commercial fishing operations. In a January 2017 notice,⁶ NMFS stated it is seeking information on the level of marine mammal mortality and serious injury in those foreign fisheries. Implementation of import provisions and facilitation of a transition from drift gillnets to clean gear can directly address market transfer theories or “conservation leakage,”⁷ rather than simply reducing U.S. conservation standards to the lowest common denominator.

Thank you for your commitment to transition to a clean U.S. West Coast swordfish fishery, including hard caps on bycatch, 100 percent monitoring, deep-set buoy gear authorization, and import prohibitions for swordfish fisheries not meeting U.S. marine mammal protection standards. In order to achieve the Council’s stated swordfish fishery management goals and actions, we request final rulemaking on preceding Council decisions prior to federalizing the State of California drift gillnet permit system.

Sincerely,



Ben Enticknap
Pacific Campaign Manager and Senior Scientist

⁵ Eguchi, T., S.R. Benson, D.G. Foley and K.A. Forney. 2016. Predicting overlap between drift gillnet fishing and leatherback turtle habitat in the California Current Ecosystem. *Fisheries Oceanography*. 26:1, 17-33

⁶ <https://www.federalregister.gov/documents/2017/01/10/2017-00201/list-of-foreign-fisheries>

⁷ Helvey et al. 2017. Can the United State have its fish and eat it too? *Marine Policy*. 75, 62-67.