



May 30, 2018

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

RE: Agenda Item, C.5 Reducing Regulation and Controlling Regulatory Costs

Dear Chair Anderson and Council members,

We submit the following comments in response to the National Marine Fisheries Service's request that the Pacific Fishery Management Council ("Council") review and take final action on a list of regulation proposed for elimination pursuant to Executive Order 13771 ("Reducing Regulation and Controlling Regulatory Costs"). We urge the Council to refrain from recommending the elimination of any current regulations that carry out provisions of the Magnuson-Stevens Fishery Management and Conservation Act ("MSA") and other applicable law, including the Endangered Species Act ("ESA") and Marine Mammal Protection Act ("MMPA"). We share the concerns expressed by Oceana, Pew Charitable Trusts, Wild Oceans, and Center for Biological Diversity in their May 30, 2018 letter on this topic. In addition, we emphasize that eliminating regulations necessary to carry out the Council's and NMFS's statutory responsibilities simply to satisfy the regulatory trading scheme of E.O. 13771 would not only be unwise, but flatly illegal.

Executive Order 13771 itself is unconstitutional. The E.O. violates the constitutional separation of powers by directing agencies to consider factors that go beyond and conflict with the statutory factors Congress has directed the agencies to consider in implementing federal statutes. The Constitution gives Congress the power to enact laws. While the President can sign or veto legislation, it is black letter constitutional law that he cannot unilaterally amend statutes. NMFS and the Council may only exercise the authority delegated to them by Congress and must adhere strictly to the limits on that authority. Nowhere has Congress authorized NMFS and the Council to adopt or eliminate regulations solely for the purpose of reducing costs to regulated industries. Instead, NMFS and the Council must enact (and maintain) any and all regulations necessary and appropriate to carry out their duties under the MSA, ESA, MMPA, and other applicable laws.

The laws that the Council and NMFS are charged with implementing have strict conservation mandates. The MSA requires fishery managers, first and foremost, to prevent overfishing and achieve optimum yield. 16 U.S.C. § 1851(a)(1). Courts have made clear that the MSA does not permit fishery managers to place short-term economic interests above the requirements of MSA National Standard 1. *See Nat. Res. Defense Council v. NMFS*, 421 F.3d 872, 879 (9th Cir. 2005); *Nat. Res. Defense Council v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000). In addition to setting an upper limit on human-caused serious injury and morality of marine mammals, the MMPA mandates that fishery managers comply with a zero mortality rate

goal, meaning that incidental mortality and serious injury of marine mammals from commercial fishing must be reduced to insignificant levels. 16 U.S.C. § 1387. The ESA requires fishery managers not only to ensure that the actions they authorize, fund, or carry out do not jeopardize the continued existence of listed species or adversely affect their critical habitat, but to affirmatively use their authority to protect and promote the recovery of listed species. 16 U.S.C. § 1536(a)(1) & (2). The Supreme Court has made clear that agencies may not sacrifice the protection of listed species for the sake of saving costs to industry. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174, 184 (1978) (finding that agencies are bound “to halt and reverse the trend toward species extinction, whatever the cost,” and to afford that task “the highest of priorities.”); *see also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698–99 (1995) (quoting *TVA* with approval). The President may not override these statutory duties by executive order; nor may fishery managers avoid them by relying on that executive order.

The E.O. is also unconstitutional because it directs agencies to violate and exceed their legal authority in violation of the President’s obligations under the Take Care Clause to faithfully ensure compliance with the law. The unconstitutionality of the E.O. is fully described in the plaintiffs’ motion for summary judgment in *Public Citizen v. Trump*, No. 17-253 (D.D.C. filed May 15, 2018) (ECF 16) (attached).

Because both E.O. 13771 itself and any reliance upon it are unconstitutional and otherwise unlawful, we urge the Council not to recommend the elimination of any regulations in reliance on the E.O. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Andrea A. Treece', with a long horizontal flourish extending to the right.

Andrea A. Treece
Staff Attorney, Oceans Program



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Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 101
Portland, OR 97220

RE: C.5 Reducing Regulation and Controlling Regulatory Costs

Dear Chair Anderson and Council members:

In response to Executive Order 13771- Reducing Regulation and Controlling Regulatory Costs, the National Marine Fisheries Service has asked the Pacific Fishery Management Council to review and take final action on a list of regulations proposed for elimination. We urge the Council to be cautious and thorough in its review of these regulations to be certain core fishery management, monitoring and conservation measures are not sacrificed. It would be irresponsible and arbitrary to eliminate such regulations without a full evaluation of their purpose and without public and environmental review. The Council should not support efficiencies that circumvent its public process and lead to impacts to marine wildlife, habitats and ocean ecosystems. Councils must develop fishery management measures that conserve our nation's fishery resources consistent with the Magnuson-Stevens Act. The Council should consider this obligation when it considers whether to recommend elimination of any of the identified regulations.

In reviewing the briefing book materials, it is not clear what the process is for eliminating regulations identified in Agenda Item C.5, Attachment 1 (June 2018) once the Council takes final action, nor is it clear in all cases what is the intent, or criteria for elimination. We note that some of the identified regulations are for issues that the Council has already taken final action on and are now moving forward in the rulemaking process (e.g. groundfish EFH/RCA's), some regulations are for issues just now entering the Council process (e.g. potential regulations that would amend the incidental catch allowance in the CPS live bait fishery), and others include issues that the Council has previously addressed and decided against changing (i.e., prohibition of a West Coast-based shallow-set longline fishery on the high seas).

We specifically request the Council reject elimination of regulations prohibiting a West Coast-based high seas shallow-set pelagic longline fishery. Lifting these regulations is unwarranted given the expected adverse ecological consequences and the numerous legal, policy, and scientific concerns it raises. We remind you that in 2009, when faced with the decision about whether to authorize a new high seas shallow-set longline fishery, the Council chose to adopt the “no action” alternative precisely for these reasons.¹

A West Coast-based high seas shallow-set longline fishery will increase bycatch and take and kill protected marine life. Sea turtles throughout the Pacific are hovering on the brink of extinction due in large part to incidental mortality associated with fishing. Two sea turtle populations—western Pacific leatherbacks and North Pacific loggerheads—are especially vulnerable to pelagic longline fisheries. Any additional impacts to these turtle populations are likely to exacerbate the decline in these populations. What is more, many species of protected marine mammals and seabirds would also be at risk from increased bycatch. There would be an increase in the bycatch of protected shark species, tunas and other fishes. Last, removing these regulations could result in violation of numerous federal laws, including the Endangered Species Act, Marine Mammal Protection Act, and Migratory Bird Treaty Act.

In conclusion, we urge the Council to carefully review all regulations identified in Agenda Item C.5, Attachment 1 and seek clarity on the specific regulations proposed for elimination and the process moving forward before taking final action. We urge you to reject any changes that weaken environmental regulations or your ability to responsibly manage for sustainable ocean fisheries. To this end, please reject the elimination of regulations prohibiting a West Coast-based high seas pelagic longline fishery.

Sincerely,

Ben Enticknap
Pacific Campaign Mgr. & Sr. Scientist
Oceana

Catherine Kilduff
Senior Attorney
Center for Biological Diversity

Paul Shively
Project Director, U.S. Oceans - Pacific
The Pew Charitable Trusts

Theresa Labriola
Pacific Program Director
Wild Oceans

¹ PFMC 2009. April 2009 Decision Document, Available: <http://www.pcouncil.org/wp-content/uploads/0409decisions.pdf> “The Council took final action to adopt the no-action alternative, which means the highly migratory species fishery management plan will not be amended to authorize a shallow-set longline fishery seaward of the West Coast Exclusive Economic Zone in the Pacific Ocean.”