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VIA EMAIL AND U.S. MAIL

August 30, 2018

The Honorable Edmund G. Brown Jr.  
c/o State Capitol, Suite 1173  
Sacramento, CA 95814  
governor@governor.ca.gov

Mr. Charlton "Chuck" Bonham  
Director  
California Department of Fish and Wildlife  
P.O. Box 944209  
Sacramento, CA 94244-2090  
director@dfg.ca.gov  
chuck.bonham@wildlife.ca.gov

Re: Senate Bill 1017

Dear Governor Brown and Director Bonham:

On behalf of the Ventura County Commercial Fishermen's Association ("VCCFA"),<sup>1</sup> we are writing to express our significant concern regarding Senate Bill 1017, relating to the permit transition program for the drift gill net shark and swordfish fishery ("DGN Fishery"). Our concerns regarding the bill are twofold. First, the bill is unlawful, and is preempted by the Magnuson-Stevens Fishery Conservation Act, 16 U.S.C. § 1801 *et seq.* ("MSA"). Second, the bill is unnecessary, and mischaracterizes the impacts of the DGN Fishery on marine wildlife. Thus, for the reasons set forth below, we request that you decline to provide your final approval for the bill or implement the bill, as appropriate.

**1. Senate Bill 1017 is Preempted by the MSA and Therefore Violates the Supremacy Clause of the U.S. Constitution.**

a. Background on Preemption

The Supremacy Clause, Article VI, Clause 2 of the U.S. Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

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<sup>1</sup> The Ventura County Commercial Fishermen's Association is a 501(c)(3) organization that promotes the regional efforts of fishing communities with the aim of improving the economic and biological sustainability of fisheries.

Preemption concerns the allocation of power between states and the federal government; that is, whether state law conflicts with valid federal law. Federal law may be preempted by the Constitution itself, or by a valid act of Congress. *McDermott v. State of Wisc.*, 228 U.S. 115, 132 (1913); *Savage v. Jones*, 225 U.S. 501, 533 (1912). Regulations duly promulgated by a federal agency have the same preemptive effect as a legislative enactment. *Hillsborough County, Fla. v. Automated Med. Labs.*, 471 U.S. 707, 713 (1985). A fishery management plan created pursuant to federal law may preempt. *City Of Charleston, S.C. v. A Fisherman's Best, Inc.*, 310 F.3d 155, 169 (4th Cir. 2002) (“*Fisherman's Best*”).

The ultimate touchstone of preemption is the intent of Congress. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). In general, a state law is preempted when “the state law stands as an obstacle to the accomplishments of the full purposes and objectives” of federal law. *Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 248 (1984).

There are two types of preemption: express and implied. There may be express preemption where Congress in express terms has declared its intention to preclude state regulation in a given area. At this time, VCCFA does not contend that express preemption exists with respect to Senate Bill 1017.

Implied preemption occurs where Congress, through the structure or objectives of federal law, has impliedly precluded state regulation in the area. *Fisherman's Best*, 310 F.3d at 169. There are two types of implied preemption: conflict and field.<sup>2</sup> Conflict preemption occurs when the federal and state enactments are directly contradictory on their faces. But state and federal laws need not be contradictory on their faces for federal laws to supercede. *Id.* State action may be struck down even if it does not prohibit the very act that federal law requires. It may be struck down if it is in “actual conflict” with precise and sufficiently narrow objectives that underlie the federal enactments. *Id.* Also, federal and state law conflict when it is impossible to comply with both state and federal law. *Id.* Direct conflict may be implied. *Id.* Conflict preemption may occur when Congress did not necessarily intend preemption of state regulation in a given area but the particular state law conflicts directly with federal law or stands as an obstacle to the accomplishment of federal objectives. *Id.*

b. The MSA Preempts Senate Bill 1017

The MSA has been described as: “[A] paradigm of multiple statutes and regulations, and varying governmental institutions, pervasive in depth, breadth and detail, in a regulatory system that Congress intends to be national in character. The system has been described as being as tightly regulated as atomic energy.” *Fisherman's Best*, 310 F.3d at 170. Pursuant to the MSA, regional councils representing geographical areas are key bodies—planners, expeditors, enforcers and liaison agencies. *Id.* at 168.

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<sup>2</sup> Field preemption may occur when the federal scheme of regulation of a defined field is so pervasive that Congress must have intended to leave no room for the states to supplement it. At this time, VCCFA does not assert that Senate Bill 1017 is subject to field preemption, but reserves the right to make this argument in the future.

Here, the council that oversees the DGN Fishery is the Pacific Fishery Management Council (“Council”), which operates under the authority of the Secretary of Commerce and the National Marine Fisheries Service (“NMFS”). Under the purview of the Council, the DGN Fishery is regulated and managed pursuant to the Highly Migratory Species (“HMS”) fishery management plan (“FMP”). The HMS FMP includes a permitting program that expressly authorizes the DGN Fishery to operate in federal waters, which includes waters between approximately 3 and 200 nautical miles off the coast of California.

There can be no question that the terms of Senate Bill 1017 conflict with, and are therefore preempted by, the MSA. Among other problematic provisions, the bill requires permittees that participate in the transition program “not to fish under a federal drift gill net permit” and “not to transfer or renew a federal drift gill net permit.” Senate Bill 1017 at Sec. 7. The bill therefore forbids access to the federal DGN Fishery, which conflicts on its face with the HMS FMP, which expressly authorizes such access. Likewise, the bill only allows permittees to land shark or swordfish with federally authorized deep set buoy gear. *See id.* Again, these provisions directly conflict with the HMS FMP, which expressly authorizes permittees to land shark or swordfish with federal authorized drift gill net gear.

In sum, it would be impossible for a holder of a federal DGN Fishery permit to comply with both federal law and Senate Bill 1017. Senate Bill 1017 is therefore preempted by the MSA and unlawful, as it violates the Supremacy Clause of the U.S. Constitution.

## **2. Senate Bill 1017 is Unnecessary.**

Senate Bill 1017 ignores the reality of the DGN Fishery. Specifically, the DGN Fishery is subject to, and complies with, all bycatch minimization measures required by federal law.<sup>3</sup> This includes not just the MSA, but also the Marine Mammal Protection Act and the Endangered Species Act (“ESA”). These statutes are precautionary and conservation-minded, and help make U.S. fisheries some of the most environmentally conscious and best managed in the world.

The DGN Fishery has also collaborated extensively with NMFS over the years to further reduce bycatch. Since 1990, the fishery has operated an observer program to effectively monitor bycatch, and has deployed devices such as acoustic pingers to ward off marine mammals from fishing gear. It has also established the Pacific Offshore Cetacean Take Reduction Plan to further reduce marine mammal interactions, and has implemented time/area closures to reduce interactions with endangered sea turtles. These measures have led to significant progress in reducing bycatch. For example, no ESA-listed marine mammals have been observed caught in the DGN Fishery since the 2010-2011 fishing season and no listed sea turtles have been observed caught since the 2012-2013 season.

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<sup>3</sup> The following discussion is based on a blog post by Mark Helvey, former Assistant Regional Administrator for Sustainable Fisheries with the NMFS Southwest Region in Long Beach, available at <https://www.savingseafood.org/opinion/mark-helvey-protect-californias-drift-gillnet-fishery/>.

Furthermore, should the DGN Fishery be shut down, which is the intent of Senate Bill 1017, it will only further increase reliance on imported seafood. Most foreign fisheries are less regulated and more environmentally harmful than U.S. fisheries. U.S. fishermen abide by the highest levels of environmental oversight relative to their foreign counterparts. Accordingly, U.S.-caught seafood comes at a fraction of the ecosystem impacts occurring abroad.

It is also important to note that the deep set buoy gear referenced in Senate Bill 1017 is experimental, and is not intended to replace drift gill net gear. To the contrary, it currently operates under an exempted fishing permit and is not fully authorized. Rather, it is still being studied, due in part to the fact that its environmental impacts are unknown. Furthermore, it is not considered an economically viable alternative to drift gill net gear because it cannot produce the volumes produced by the DGN Fishery. The inclusion of deep set buoy gear in Senate Bill 1017 ignores these realities.

### 3. Conclusion

For the foregoing reasons, VCCFA respectfully requests that you decline to provide your final approval for Senate Bill 1017, or to implement it at any point in the future. We are happy to discuss any of the issues set forth herein with you further, or to answer any questions.

Sincerely,



Ashley J. Remillard  
for Nossaman LLP

AJR:ajr

cc: Gavin Newsom, Lieutenant Governor of California  
John Ugoretz, California Department of Fish and Wildlife  
Elizabeth Helmers, California Department of Fish and Wildlife  
Chris Oliver, Assistant Administrator for Fisheries  
Samuel D. Rauch, III, Acting Deputy Assistant Secretary for International Fisheries  
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Heidi Taylor, NMFS West Coast Region, Sustainable Fisheries Division  
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Chuck Tracy, Executive Director, Pacific Fisheries Management Council  
Phil Anderson, Chairperson, Pacific Fisheries Management Council