



*Via electronic and certified mail*

August 11, 2014

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**RE: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act and Marine Mammal Protection Act Related to the California Drift Gillnet Fishery**

Dear Assistant Administrator Sobeck and Regional Administrator Stelle:

On behalf of the Center for Biological Diversity (the "Center"), Oceana, and Turtle Island Restoration Network ("TIRN"), this letter serves as a sixty day notice of intent to sue the National Marine Fisheries Service ("NMFS") over violations of Sections 2, 7, and 9 of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, for actions and inactions related to the management and regulation of the California Drift Gillnet Fishery ("Fishery"). Specifically, NMFS's authorization of the Fishery without a valid permit to take endangered whales violates the agency's duties under the ESA. Emergency regulations that are necessary to reduce the risk of sperm whale mortality expired August 6, 2014.<sup>1</sup> Absent these regulations, NMFS' authorization to take sperm whales under the Marine Mammal Protection Act ("MMPA") is invalid. Accordingly, the continuing operation of the Fishery without necessary authorizations under the ESA and MMPA is unlawful. We ask NMFS to remedy this legal deficiency by either finalizing permanent regulations at least as strong as the Emergency Regulations or closing the Fishery by August 15, 2014.

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<sup>1</sup> Fisheries Off West Coast States; Highly Migratory Fisheries; California Drift Gillnet Fishery; Sperm Whale Interaction Restrictions, 79 Fed. Reg. 29377 (May 22, 2014).

In 2013, NMFS determined that regulations to reduce the risk of sperm whale mortality and serious injury were necessary to meet the conditions of MMPA section 101(a)(5)(E), “thereby allowing NMFS to provide incidental take authorization under the ESA and MMPA for the 2013-2014 fishing season.”<sup>2</sup> The regulations included mandatory vessel monitoring systems and observer requirements (pre-trip notification and a 100% deep water closure unless a NMFS-certified observer was on board) and would have immediately shut down the fishery throughout the remainder of the rule’s effective period in the event of a serious injury or mortality of a sperm whale.<sup>3</sup> The expiration of these regulations means that NMFS cannot ensure that the risk of sperm whale takes is negligible or below the stock’s Potential Biological Removal (“PBR”) level of 1.5 animals.<sup>4</sup> PBR sets the limit of how many animals may be removed from a stock from human causes without adverse population level impacts. Thus, NMFS’s continued operation of the Fishery without the temporary regulations poses an imminent risk of unauthorized incidental take of endangered sperm whales, in violation of the procedural and substantive mandates of the ESA and the MMPA, 16 U.S.C. §§ 1361-1423h.

To cure these violations, NMFS must either issue permanent regulations that reduce the risk of mortality or serious injury of sperm whales or close the fishery. NMFS should act promptly before August 15, 2014, when the fishing effort begins in earnest.<sup>5</sup>

## **Background**

Section 9 of the ESA prohibits any “person” from “taking” threatened and endangered species.<sup>6</sup> The term “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>7</sup> Incidental take is defined as take that is incidental to, and not for the purpose of, the carrying out of an otherwise lawful activity.<sup>8</sup> Such take can only be authorized under an Incidental Take Statement (“ITS”). NMFS cannot authorize incidental takes of endangered marine mammals through an ITS alone, but must also authorize the take under the MMPA.<sup>9</sup>

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<sup>2</sup> National Marine Fisheries Service, Marine Mammal Protection Act Section 101(a)(5)(E) Negligible Impact Determination CA/OR/WA Fin Whale CA/OR/WA Humpback Whale CA/OR/WA Sperm Whale at 56 (Aug. 21, 2013).

<sup>3</sup> National Marine Fisheries Service, Fisheries Off West Coast States; Highly Migratory Fisheries; California Drift Gillnet Fishery; Sperm Whale Interaction Restriction, 78 Fed. Reg. 54548, 54550 (Sept. 4, 2013), renewed May 22, 2014 through August 5, 2014 (79 Fed. Reg. 29377 (May 22, 2014)).

<sup>4</sup> Taking of Threatened or Endangered Marine Mammals Incidental to Commercial Fishing Operations; Issuance of Permit, 78 Fed. Reg. 54553 (Sept. 4, 2013).

<sup>5</sup> See 79 Fed. Reg. 29377, 29378 (stating that the “core of the DGN fishery, and virtually all of the contemporary fishing effort, takes place from August 15 through January 31”).

<sup>6</sup> 16 U.S.C. § 1538.

<sup>7</sup> *Id.* § 1532(19)

<sup>8</sup> *Id.* § 1539(a)(1)(B).

<sup>9</sup> *Id.* §1536(b)(4)(C)(iii) [ESA]; *Id.* § 1371(a)(5)(E) [MMPA].

The MMPA places a moratorium on the taking of marine mammals, and only under limited exceptions may NMFS allow take incidental to commercial fishing operations.<sup>10</sup> Specifically, MMPA section 101(a)(5)(E) requires that for endangered or threatened marine mammals, NMFS must make a finding that any incidental mortality or serious injury from commercial fisheries will have a negligible impact on such species or stock. Therefore, NMFS may only authorize incidental take of endangered marine mammals when it has authorized take under both the MMPA and the ESA.

In 2010, two sperm whales were observed entangled by the Fishery, one dead and one seriously injured. NMFS extrapolated these observed takes to 16 estimated sperm whale takes—exceeding PBR many times over even when averaged over a 5-year period, consistent with proposed guidelines, and the agency’s own practice, for preparing stock assessment reports under section 117 of the MMPA.<sup>11</sup> This triggered a requirement to reinitiate consultation under the ESA. On May 2, 2013, NMFS issued a biological opinion. NMFS could not, however, authorize take under the ESA “[u]ntil the proposed action receives authorization for the incidental taking of marine mammals under section 101(a)(5)(E) of the MMPA.”<sup>12</sup> Subsequently, NMFS convened the Pacific Offshore Cetacean Take Reduction Team because emergency regulations were necessary to reduce the risk of mortality and serious injury to sperm whales. The emergency regulations required:

- Immediate closure of the fishery if one sperm whale is determined to have been killed or seriously injured in the fishery;
- Vessel Monitoring Systems on all drift gillnet vessels; and
- A closure of areas deeper than 1,100 fathoms unless the vessel has an observer.<sup>13</sup>

These provisions were required for NMFS to determine that the Fishery would have a negligible impact on the California/Oregon/Washington sperm whale stock.<sup>14</sup>

On September 4, 2013, NMFS made a negligible impact determination and issued the MMPA authorization in reliance on the emergency regulations to reduce risk to sperm whales.<sup>15</sup>

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<sup>10</sup> 16 U.S.C. § 1371(a) (“There shall be a moratorium on the taking and importation of marine mammals . . . during which time no permit may be issued for the taking of any marine mammal . . . except in the following cases”).

<sup>11</sup> See 16 U.S.C. § 1386; 77 Fed. Reg. 3450 (Jan. 24, 2012) (requesting comments on proposed guidelines for assessing marine mammal stocks); <http://www.nmfs.noaa.gov/pr/sars/species.htm> (last checked Aug. 7, 2014) (publishing sperm whale stock assessment reports for eight years ranging from 1999-2012).

<sup>12</sup> National Marine Fisheries Service, Biological Opinion on the continued management of the drift gillnet fishery under the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species at 124 (May 2, 2013)(without MMPA authorization, “the incidental takes of marine mammals described below are not exempt from the ESA taking prohibitions pursuant to section 7(o) of the ESA.”).

<sup>13</sup> National Marine Fisheries Service, Marine Mammal Protection Act Section 101(a)(5)(E) Negligible Impact Determination CA/OR/WA Fin Whale CA/OR/WA Humpback Whale CA/OR/WA Sperm Whale at 56 (Aug. 21, 2013).

<sup>14</sup> *Id.*

In turn, NMFS issued an ITS authorizing take of marine mammals under the ESA in reliance on the MMPA authorization and emergency regulations.<sup>16</sup> That ITS specified that if the emergency regulations expired without issuance of permanent regulations, then the take authorizations under the MMPA and ESA would lapse.<sup>17</sup> On May 22, 2014, NMFS issued a notice extending the emergency regulations through August 5, 2014.<sup>18</sup> In this notice, NMFS stated, “[t]his renewing action is necessary to ensure that the conservation measures continue to provide protection for sperm whales until permanent measures are in place.”<sup>19</sup>

To date, NMFS has not issued a proposed permanent regulation to replace the emergency regulation nor did NMFS extend the emergency regulation for the full 186 days allowed for by the Magnuson Stevens Act.<sup>20</sup> Therefore, NMFS’ continued operation of the Fishery is occurring without valid MMPA or ESA authorizations.

### **Violations of the ESA**

NMFS is in violation of Section 9 of the ESA for causing take of sperm whales through the operation and management of the Fishery. Since the expiration of the emergency regulations that reduce risk to sperm whales expired August 6, 2014, the Fishery is operating without an MMPA permit or negligible impact determination. Without an MMPA permit, NMFS cannot authorize take under the ESA, either. Accordingly, the exemptions for incidental take under section 7(o)(2) no longer apply.<sup>21</sup> Moreover, now that the temporary regulations have expired, the Fishery operations are the same as those that caused the two observed takes of sperm whales in 2010 in violation of the ESA. The operation of the Fishery creates an imminent probability of taking endangered sperm whales.

NMFS is responsible for these violations under the ESA. The court in *Strahan v. Cox* stated that “the [ESA] not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking . . . [A]

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<sup>15</sup> Taking of Threatened or Endangered Marine Mammals Incidental to Commercial Fishing Operations; Issuance of Permit, 78 Fed. Reg. 54553 (Sept. 4, 2013).

<sup>16</sup> National Marine Fisheries Service, Consideration of Potential Impacts from the Temporary Rule for Emergency Action to Modify the 2013-2014 California Thresher Shark/Swordfish Drill Gillnet (DGN) Swordfish Fishery under the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species and the Issuance of a Permit and Negligible Impact Determination under Section 101 (a)(S)(E) of the Marine Mammal Protection Act to the California Thresher Shark/Swordfish Drift Gillnet and Washington/Oregon/California Sablefish Pot Fisheries (Aug. 21, 2013).

<sup>17</sup> *Id.* at 19 (Revised Incidental Take Statement).

<sup>18</sup> National Marine Fisheries Service, Fisheries Off West Coast States; Highly Migratory Fisheries; California Drift Gillnet Fishery; Sperm Whale Interaction Restrictions, 79 Fed. Reg. 29377 (May 22, 2014).

<sup>19</sup> *Id.*

<sup>20</sup> 16 U.S.C. § 1855(c)(3)(B).

<sup>21</sup> *Id.* § 1536(o).

governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.”<sup>22</sup>

Additionally, NMFS has failed to include measures necessary to comply with the MMPA in the Fishery’s biological opinion. Section 7(a)(2) of the ESA requires federal agencies to “[e]nsure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species . . . determined . . . to be critical.”<sup>23</sup> To accomplish this goal, agencies must consult with the delegated agency of the Secretary of Commerce or Interior whenever their actions “may affect” a listed species.<sup>24</sup> After consultation, NMFS issues a written statement – the incidental take statement of the biological opinion – that in the case of marine mammals “specifies those measures that are necessary to comply with section 1371(a)(5) of this title [the MMPA’s section 101(a)(5)] with regard to such taking.”<sup>25</sup> The biological opinion on the Fishery contains only measures for monitoring incidental take, vessel monitoring, and skipper education.<sup>26</sup> It lacks a hard cap that would close the fishery if a sperm whale is killed or injured, and it lacks the closure of the area deeper than 1,100 fathoms to unobserved vessels, the area where the sperm whales are most likely to occur. Vessel monitoring, intermittent observer coverage and education fail to limit and control the risk of possible sperm whale takes leading to serious injury and mortality. Accordingly, NMFS has failed to incorporate into the biological opinion measures necessary to comply with the MMPA, such as those in the emergency regulations, to ensure only a negligible impact on endangered whales.

NMFS is also violating sections 2(c), 7(a)(1), 7(a)(2) and of the ESA because the agency has not used its authorities to further the conservation of listed species. Specifically, NMFS is violating these provisions by failing to issue permanent regulations to reduce the risk of incidental sperm whale mortality in the California drift gillnet fishery. Section 2(c) of the ESA establishes that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.”<sup>27</sup> The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”<sup>28</sup> Similarly, Section 7(a)(1) of the ESA directs that the Secretary review “other

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<sup>22</sup> *Strahan v. Coxe*, 127 F.3d 155, 163 (1<sup>st</sup> Cir. 1997).

<sup>23</sup> 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

<sup>24</sup> *Id.*

<sup>25</sup> 16 U.S.C. 1536(b)(4)(C)(iii).

<sup>26</sup> National Marine Fisheries Service, Biological Opinion on the continued management of the drift gillnet fishery under the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species at 124 (May 2, 2013).

<sup>27</sup> 16 U.S.C. § 1531(c)(1).

<sup>28</sup> *Id.* § 1532(3).

programs administered by him and utilize such programs in furtherance of the purposes of this Act.”<sup>29</sup>

### **Conclusion**

For the foregoing reasons, the Fishery is operating in violation of the ESA and the MMPA. If NMFS does not act within 60 days to correct the violations described in this letter, our organizations intend to pursue litigation in federal court against NMFS. An appropriate remedy that would prevent litigation would be for NMFS to issue permanent regulations immediately that reduce the risk of sperm whale mortality and serious injury from the Fishery to an equal or greater extent than did the recently expired emergency regulations. If you have any questions, wish to meet to discuss this matter, or feel this notice is in error; please contact me at (415) 436-9682, ext. 308, or [miyoko@biologicaldiversity.org](mailto:miyoko@biologicaldiversity.org). Thank you for your concern.

Sincerely,

/s/ Miyoko Sakashita

Miyoko Sakashita

Senior Attorney, Center for Biological Diversity

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<sup>29</sup> 16 U.S.C. § 1536(a)(1).