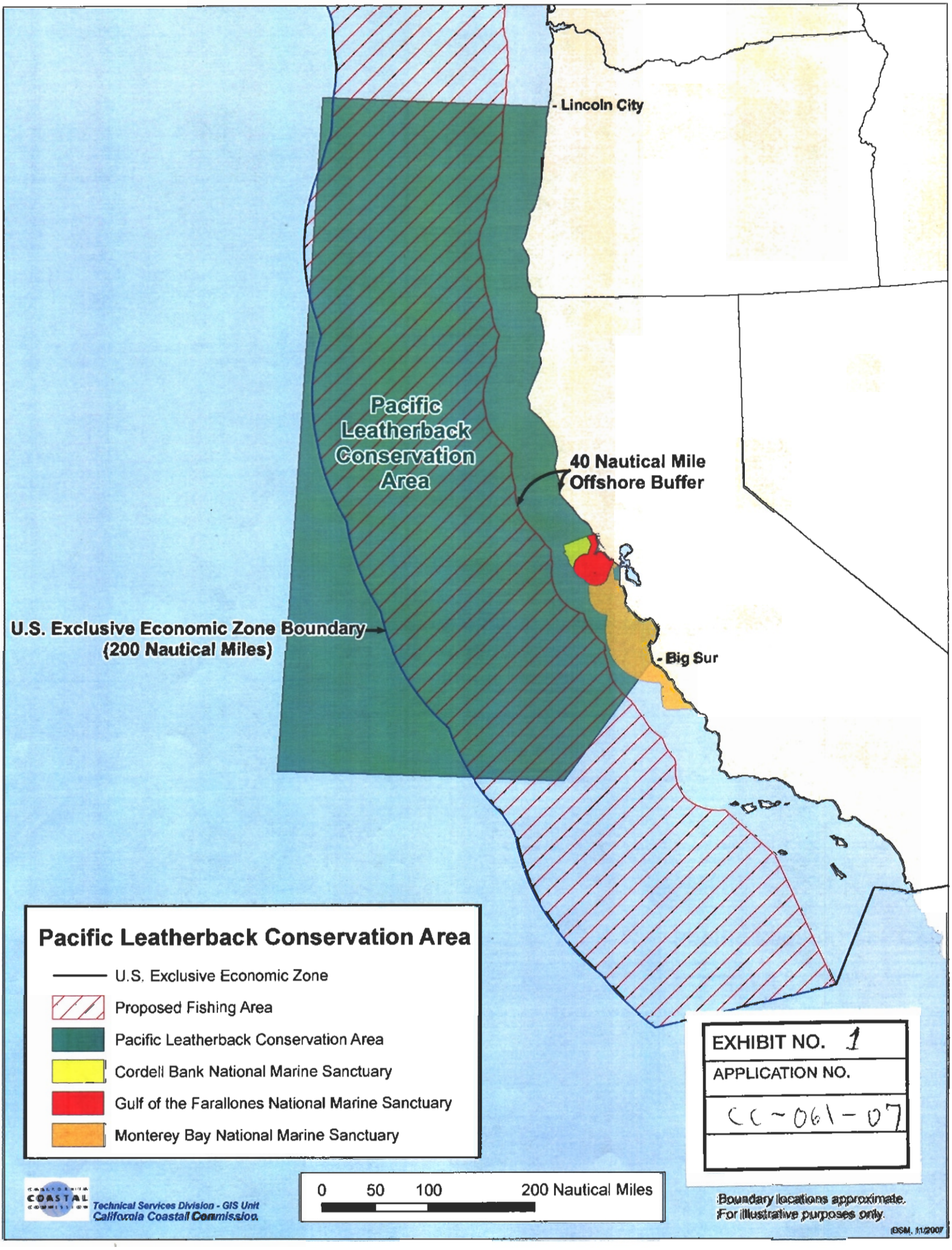


EXHIBIT NO. 1

APPLICATION NO.

CC-061-07

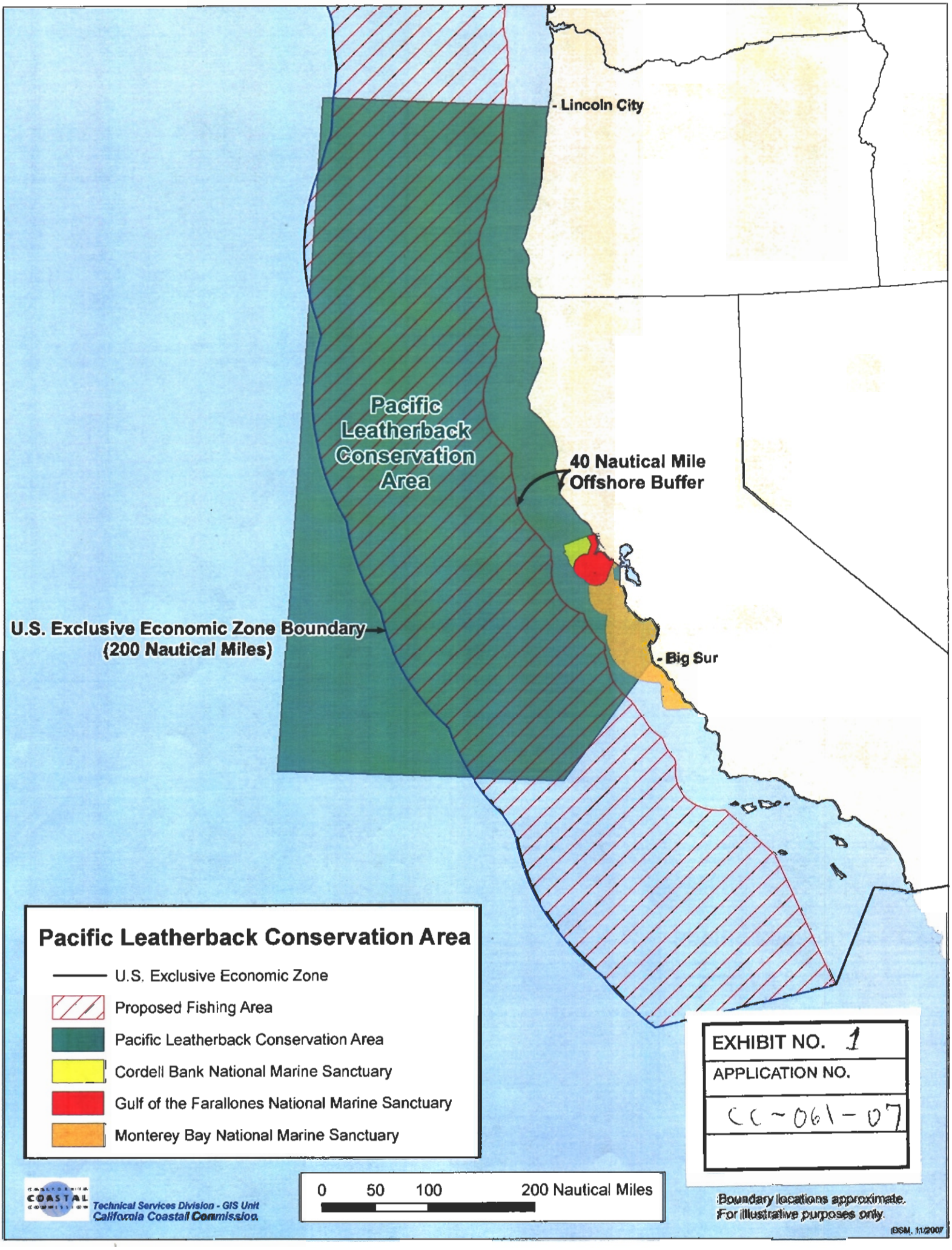


EXHIBIT NO. 1

APPLICATION NO.

CC-061-07

Previous 30 n.mi. boundary

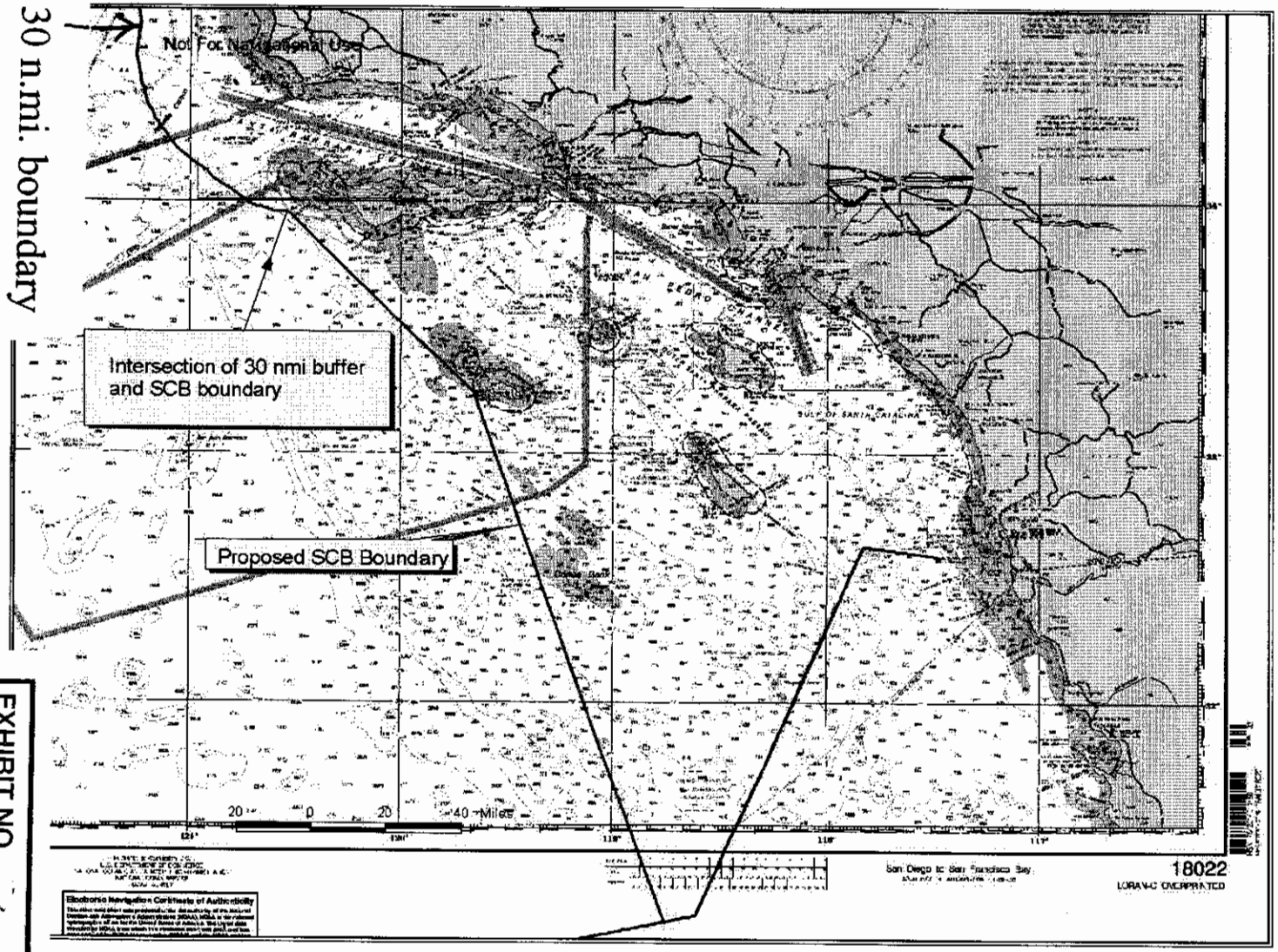
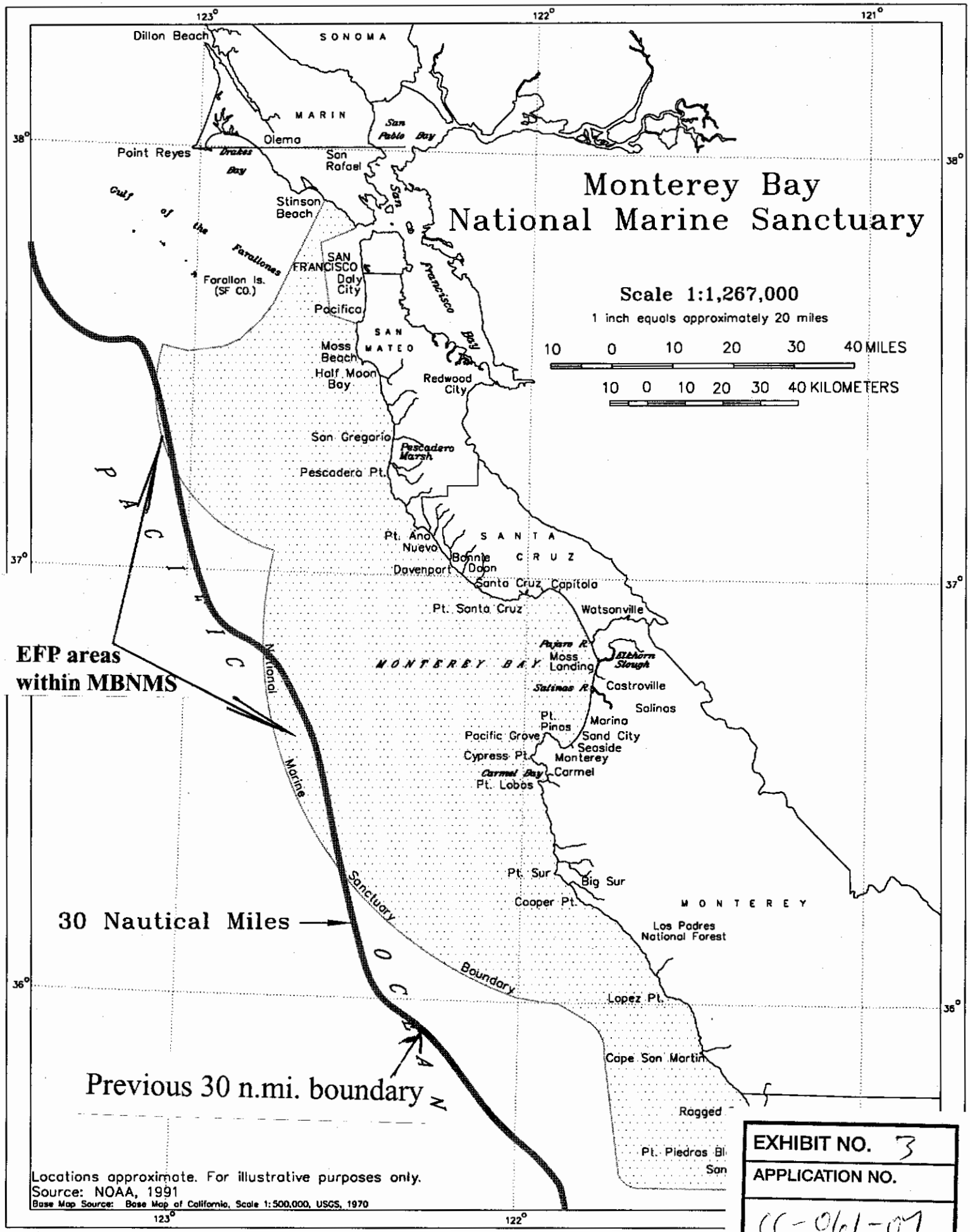


EXHIBIT NO. 2
APPLICATION NO. 2-06-007

2–1. Boundary line for the Southern California Bight. North of the indicated intersection fishing is prohibited within 30 nmi of the mainland shore.



Locations approximate. For illustrative purposes only.
Source: NOAA, 1991
Base Map Source: Base Map of California, Scale 1:500,000, USGS, 1970

California Coastal Commission
Technical Services Division

EXHIBIT NO. 3
APPLICATION NO.
CC-061-07

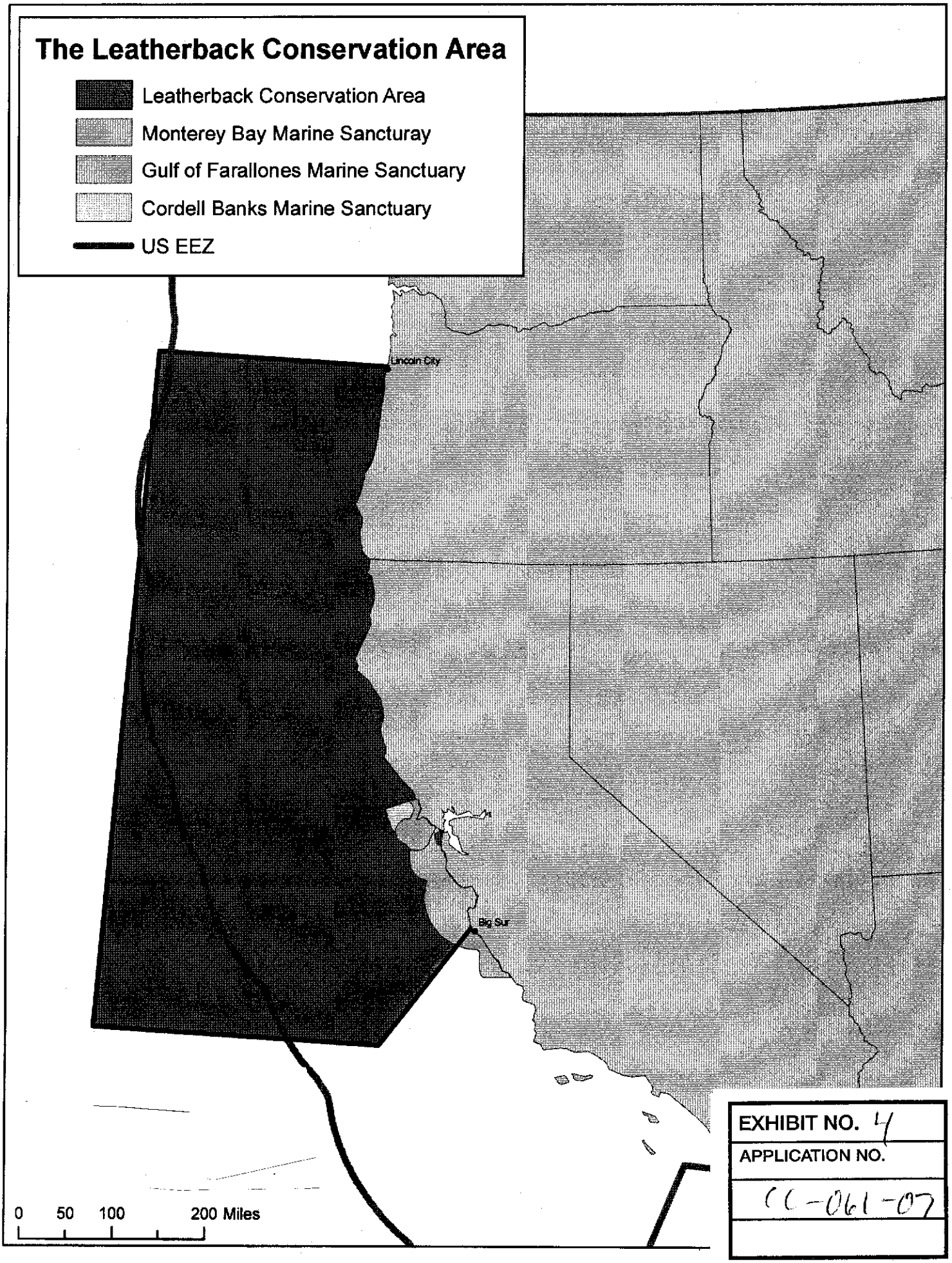


EXHIBIT NO. 4

APPLICATION NO.

CC-061-07

An Evaluation of the Proposed Shallow-Set Longline Exempted Fishing Permit's Consistency to the California Coast Act.

National Oceanic and Atmospheric Administration (NOAA)
National Marine Fisheries Service
Southwest Region
Long Beach, California 90802

I. INTRODUCTION

Staff from the California Coastal Commission requested NOAA's National Marine Fisheries Service (NMFS) prepare an analysis that examines the consistency of a proposal for an exempted fishing permit (EFP) to policies of the California Coastal Act (CCA). The EFP would allow a single longline fishing vessel to conduct an exempted fishery targeting broadbill swordfish (*Xiphias gladius*) in the exclusive economic zone (EEZ) off California and up to central Oregon. The use of longline gear within the west coast EEZ is currently prohibited. The Commission's request asks that the analysis focus particularly on Sections 30230, 30234, and 30234.5 of the CCA.

This document responds to the first section, "marine resource: maintenance" (Section 30230), by demonstrating that the shallow-set longline (SSLL) gear identified in the proposed EFP will maintain the marine environment to a degree that falls within the range of impacts affected by the harpoon and drift gillnet (DGN) fisheries authorized by the State of California to commercially fish for swordfish. The analysis will also address the other sections identified by staff, "commercial fishing and recreational boating facilities" (Section 30234) and the "economic, commercial, and recreational importance of fishing" (Section 30234.5).

The document begins by providing background information on the proposed action as well as the environmental effects of the California swordfish fisheries. The intent of this section is to provide the reader a context for the swordfish fishery and the demand for this product in the United States. The analysis then describes the current methods allowed to commercially fish for swordfish by the State of California as well as the proposed action in terms of impacts to living marine resources.

II. BACKGROUND

According to Federal regulations, a NMFS Regional Administrator may authorize, "for limited testing, public display, data collection, exploratory, health and PFMCty, environmental cleanup, and/or hazard removal purposes, the target or incidental harvest of species managed under an FMP or fishery regulations that would otherwise be prohibited" (50 CFR 600.745(b)). The EFP would authorize the harvest of management unit species using a gear type currently prohibited within the west coast EEZ, for the purpose of: (1) limited testing of a gear type with imposed measures and procedures intended to limit the incidental take of species listed under the Endangered Species Act (ESA) to a level that would not jeopardize their continued existence and, (2) determine if

EXHIBIT NO. 5
APPLICATION NO.
CC-061-07

the resulting fishery is economically viable. Once sufficient information is gathered by means of the EFP to determine whether and how the fishery may be prosecuted, regulatory action may be proposed to effect a permanent change applicable to fishery participants as a whole, based on the measures applied as part of the EFP.

Proposed Action: The proposed action would issue an EFP to allow one vessel to SSLL fish in the EEZ off of Oregon, and California from September to December in 2007. Under terms and conditions of the EFP, the vessel would target swordfish using SSLL gear. Fishing with longline gear is currently prohibited in the West Coast EEZ under the HMS FMP and Federal regulation at 50 CFR 660.712(a). To target swordfish, longline gear is set at a shallower depth (<100 m) than for tunas. For this reason it is termed "shallow set" as opposed to "deep set" when targeting tunas, where the gear is set in the deeper thermocline zone (~300–400 m). Furthermore, the FMP prohibits targeting swordfish with longline gear (shallow setting) west of 150° W. longitude (see 50 CFR 660.712(b)). Regulations under the Endangered Species Act (ESA) (50 CFR 223.206(d)(9)) prohibit targeting swordfish with longline gear on the high seas east of 150° W. longitude in order to avoid jeopardizing the continued existence of ESA listed sea turtles.

Swordfish occur throughout the Pacific Ocean between about 50° N latitude and 50° S latitude. They are caught mostly by the longline fisheries of Far East and Western Hemisphere nations. Lesser amounts are caught by gillnet and harpoon fisheries and are caught infrequently by recreational fishermen. The stock structure of swordfish is not well known in the Pacific. There are indications that there is only a limited exchange of swordfish between the Eastern Pacific Ocean (EPO) and the central and western Pacific Ocean. Hinton (2003) concluded that there are northern and southern stocks of swordfish in the EPO, with the boundary between the stock distributions occurring at 5° S latitude, and there may at times be some mixing of stocks from the central Pacific with the northeastern stock. The northeastern stock appears to be centered off California and Baja California, Mexico, recognizing that there may be movement of a northwestern Pacific stock of swordfish into the EPO at various times.

The lack of contrast in the standardized catch and effort series in the northern and southern regions of the EPO suggests that the fisheries that have been taking swordfish in these regions have not been of a magnitude sufficient to cause significant responses in the populations. In addition, catches in the region have been fairly stable since 1989, averaging about 3,700 mt in the northern region and 8,400 mt in the southern region annually. Based on these considerations, it appears that swordfish are not overfished in the northern and southern regions of the EPO (Hinton, *et al.* 2004). Swordfish stocks have not been declared overfished or undergoing overfishing nor are there currently quotas or harvest guidelines in place under the HMS FMP.

Recent International Scientific Committee (http://isc.ac.affrc.go.jp/) analyses of swordfish stocks in the North Pacific (north of 10° N latitude and west of 130° W longitude), based on CPUE indices from Japanese longline vessels, show declining trends (ISC, 2004). These trends are mainly driven by declines in the northwest portion

of the study area (north of 10° N latitude and west of 170° E longitude), and their proximate cause is not known at present (e.g., changes in stock abundance, environmental variability, and/or fishing practices).

III. THE SWORDFISH FISHERIES

Swordfish is a highly esteemed seafood recognized worldwide for its white meat and mild taste and is the focus of many commercial fisheries (Vojkovich and Barsky, 1998). Between 1989 and 2005, the U.S. annual demand for swordfish (i.e., U.S. landings plus imports) ranged from 10,948 metric tons (mt) to 23,114 mt, averaging 16,556 mt. During this period, U.S. landings averaged 6,444 mt (about 39 percent of demand), and imports averaged 10,111 mt (61 percent). Landings of swordfish in the United States has shown a general pattern of decline from the early 1990s through the early 2000s, with landings in 2005 of 3,039 mt at only 28 percent of the record landings of 10,851 recorded in 1993. In contrast, the share of U.S. swordfish demand supplied by imports increased from 35 percent in 1993 to 77 percent of the total in 2005. In 2005, U.S. imports of swordfish were 10,187 mt, valued at about $77 million. Singapore, Panama, Canada, and Chile are the dominant suppliers of imports. Over the entire period from 1989 through 2005, imports increased from rough parity with U.S. landings to over three times domestic landings in recent years.

1. Harpoon

California's harpoon fishery for swordfish developed in the early 1900s. Prior to 1980, harpoon and hook-and-line gears were the only methods of take authorized to commercially harvest swordfish. At that time, harpoon gear accounted for the majority of swordfish landings in California ports. In the early 1980s, a limited entry DGN fishery was authorized by the State Legislature and soon afterward drift gillnets replaced harpoons as the primary method for catching swordfish, and the number of harpoon permits decreased from a high of 246 in 1982 to a low of 23 in 2001 (Table 1).

A. Effort: Harpoon fishing effort typically occurs in the SCB from May to December, peaking in August, depending on weather conditions and the availability of fish in coastal waters. Some vessel operators work in conjunction with a spotter airplane to increase the search area and to locate swordfish difficult to see from the vessel. This practice tends to increase the catch-per-unit-effort (CPUE) compared to vessels that do not use spotter planes.

For the period 1981-2004, swordfish landings in California have ranged from 267 mt in 1981 to 16 mt in 1991. Since 1990, landings have averaged 86 mt (Figure 1 and Table 2). The ex-vessel revenue ranged from $1.5 million in 1986 to $148,029 in 1991 (PFMC, 2005). In 2005, 24 harpoon vessels landed 74 mt of swordfish compared to 28 vessels that landed 69 mt in 2004 (Figure 1 and Table 2) (PFMC, 2006). Fishing effort was concentrated in coastal waters off San Diego and Orange Counties in the southern California Bight and landings occurred May through December, peaking in August.

Harpoon vessel fishing trips vary according to fishing success, fish carrying capacity, and preservation capability, and are largely confined to a relatively small area, the Southern California Bight (Coan et al. 1998). Fish are sighted either finning or jumping at the surface or swimming just beneath the surface. Since sightings are of fish on or near the surface, good weather conditions and calm seas favor fishing (Coan et al., 1998). Because the harpoon fishery is highly dependent on suitable environmental conditions to be able to locate and harpoon swordfish on the surface, the fishery cannot be readily transported to other locations lacking these conditions. Consequently, due to the low catch rates in the fishery, and the greater efficiency of the DGN fishery, increases in the fleet size or catch do not seem feasible.

Ex-vessel value: The ex-vessel revenue for 2005 was $782,920 compared to $669,955 in 2004 (see Table 1). Because harpoon vessels spend less time on the water and are a low-volume fishery, their catch is often fresher than drift-gillnet-caught fish, so markets tend to pay more for harpooned fish. The average ex-vessel price-per-pound for harpooned fish was $7.84 compared to $3.41 for DGN caught fish in 2005 (PFMC, 2006). Harpooned swordfish support domestic seafood restaurant businesses and is advertised as a bycatch-free fishery.

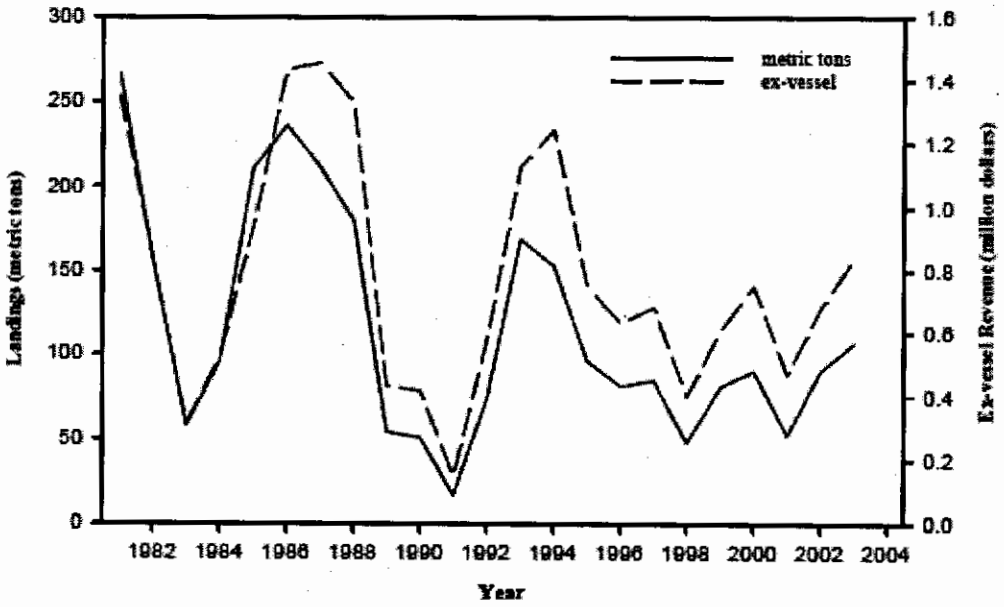


Figure 1. California commercial landing of swordfish by harpoon fishery, 1981-2004.

Table 1. Annual number of vessels, landing (round mt), and ex-vessel revenue for swordfish in California by the harpoon fishery, 1981-2004.

Year	Vessel (number)	Landing (mt)	Ex-vessel[1] (dollar)	Year	Vessel (number)	Landing (mt)	Ex-vessel[1] (dollar)
1981	187	267	1,350,973	1993	42	169	1,129,601
1982	246	158	841,765	1994	49	153	1,242,991
1983	88	58	313,735	1995	38	96	752,189
1984	110	96	524,872	1996	30	81	633,027
1985	96	211	935,845	1997	31	84	683,866
1986	112	236	1,434,837	1998	26	48	398,933
1987	97	211	1,455,414	1999	30	81	607,877
1988	82	180	1,328,332	2000	25	90	750,533
1989	44	54	432,232	2001	23	52	468,289
1990	49	51	416,989	2002	29	90	678,934
1991	32	16	148,029	2003	34	107	838,754
1992	47	74	581,146	2004	28	69	669,060

[1]Ex-vessel revenues are nominal values (not adjusted for inflation). Source: PacFin, extracted August 2005.

B. Environmental Impacts:

a. Bycatch Reduction and the Magnuson-Stevens Act: The deliberate fishing nature of harpoon gear is such that bycatch is expected to be low. Neither the California Department of Fish and Game (CDFG) nor NMFS have an observer program for this fishery. Logbook data from harpoon vessels is collected but only record effort and number of swordfish is reported. Based on reports from harpoon fishers, there are some economic discards associated with shark or sea lion damage to harpooned fish. The overall total is not known, but based on the comments of harpoon fishermen, it is assumed to be probably less than one fish per vessel during the season.

b. Protected Species Interactions: There are no records or observations of interactions with any endangered marine mammal or sea turtle species. Similarly, there are no records or observations nor any evidence to suggest there would be any interactions between harpoon gear and sea birds.

2. Drift Gillnet Fishery

The harpoon fishery was the only legal swordfish gear until the late 1970s when incidental catches of pelagic sharks in the set net fishery prompted a small number of fishing vessel owners to experiment with large-mesh nets targeting thresher shark off southern California (Hanan et al., 1993). The fishery evolved rapidly as fishing techniques and gear improved and the market demand for sharks increased. Soon it was discovered that the drift gillnets were more cost effective in terms of fuel economy and yielded greater catches of swordfish than with harpoon gear. Swordfish was also worth nearly four times the dockside value of sharks (Bedford 1987; Holts 1988) and by the early 1980s, swordfish became the primary target species for the fleet.

The California Legislature enacted legislation in 1980 that established a non-transferable, limited entry permit system that required logbooks and observers as well as imposed gear restrictions. When the fishery was folded into the federal HMS FMP in 2004, all federal conservation and management measures in place under the MMPA and ESA and all state regulations for the fishery were adopted with the exception of the existing limited entry program which still remains today under the State of California's authority. The Council concluded at the time the FMP was being prepared that it was premature to federalize the

states' limited entry programs which at that time avoided an increase in federal costs and administrative burdens.

A. Effort: For the period 1981-2004, the number of DGN vessels landing swordfish declined from 228 in 1985 to 43 in 2004 (PFMC, 2005). Since 1984, annual landings and ex-vessel revenues have been declining in general, averaging 354 mt and $2.5 million, respectively (Figure 2 and Table 2). Most swordfish landed supports domestic seafood restaurant businesses. Since 1984, the number of permits has declined from a high of 251 in 1986 to a low of 90 in 2005; however, only 38 vessels participated in the swordfish fishery in 2005 (PFMC, 2006) (Table 2). Annual fishing effort has also decreased from a high of 11,243 sets in the 1986 fishing season to 1,043 sets in 2005. Industry representatives attribute the decline in vessel participation and annual effort to regulations implemented to protect threatened and endangered marine mammals and sea turtles.

Ex-vessel value: In 2005, 38 DGN vessels landed 220 mt of swordfish compared to 43 vessels that landed 175 mt in 2004 (Table 2–9). Landings occurred at ports from San Diego to Monterey and the majority occurred from October to December. Over 85 percent of the reported effort occurred in the SCB. The ex-vessel revenue was $1.2 million in 2005 compared to $1.0 million in 2004 (Table 2). Most of the swordfish landed in California supports domestic seafood restaurant businesses.

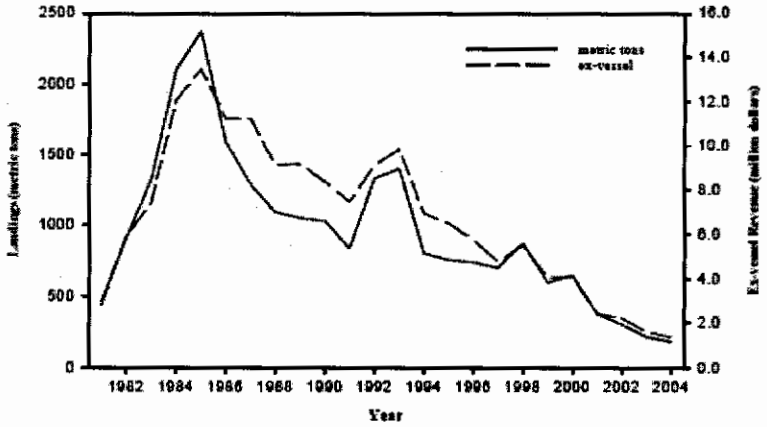


Figure 2. California commercial landings of swordfish by DGN fishery, 1981-2004 (from PFMC, 2005).

Table 2. Annual number of vessels, limited entry permits, landings (round mt), and ex-vessel value for swordfish and common thresher shark landed in California by the DGN fishery, 1981-2004 (from PFMC, 2005).

			Swordfish		Common Thresher	
Year	Vessel (number)	Permit (number)	Landing (mt)	Ex-vessel[1] (dollar)	Landing (mt)	Ex-vessel[1] (dollar)
1981	118	-	270	1,609,959	917	1,302,515
1982	166	-	208	1,450,243	650	1,147,990
1983	193	-	242	1,381,237	421	283,782
1984	214	226	286	1,590,026	915	245,463
1985	228	229	197	1,150,726	1,095	304,391
1986	204	251	78	546,727	451	105,229
1987	185	218	6	53,901	393	9,245
1988	154	207	1	4,820	393	444
1989	144	189			460	1,430
1990	134	183			335	
1991	114	165	51	524,282	569	20,214
1992	119	149	60	349,626	285	4,672
1993	123	117	162	1,331,728	245	42,645
1994	138	162	760	6,568,631	272	831,132
1995	117	185	682	5,889,173	207	586,845
1996	111	167	708	5,495,001	241	760,720
1997	108	120	655	4,511,924	249	744,913
1998	98	148	847	5,322,810	281	811,912
1999	84	136	585	3,954,968	152	470,793
2000	78	127	631	3,957,374	155	486,827
2001	69	114	351	2,234,679	273	764,804
2002	50	108	298	2,173,786	218	626,306
2003	43	99	198	1,483,895	241	664,460
2004	43	96	175	1,300,805	66	186,256

[1]Ex-vessel revenues are nominal values (not adjusted for inflation). Source: PacFin, extracted August 2005.
Additional processing information: significant swordfish and shark landings by drift gillnet gear prior to 1994 have been mis-assigned to California entangling net, trammel net, several trawl, encircling net, set gillnet, and unknown gears, and therefore are not reported here.

B. Environmental Impacts:

a. Non-Target Catch: NMFS has operated an at-sea observer program in the DGN fishery since July 1990,[1] which has enabled reliable estimates of non-target interactions and catch rates because the observers normally monitor 100 percent of the gear retrieval and catch. For the time period 1990–96, the annual DGN set coverage by observers ranged from 8–11 percent while the coverage has averaged roughly 20 percent for the period of 1996-present. The observer programs have also provided data on bycatch.

NMFS defines non-target catch as both DGN incidental catch retained for personal use and/or sale, and DGN catch that is discarded, whether it's dead or alive. These discards, sometimes referred to as bycatch, include both economic discards (e.g., blue sharks) and/or regulatory discards (e.g., protected species). The definitions currently in use for terms such as bycatch, discards, and incidental catch are not standardized for the most part across fisheries, hence NFMS uses the general term "non-target catch" to avoid confusion.

As shown in Tables 3 and 4 for total catch and disposition of the DGN fishery south and north of Point Conception, respectively, a good proportion of non-target catch is kept.

[1] CDFG operated an observer program in the DGN fishery from 1980-1990 as required under state legislation.

Conversely, for bycatch, the common mola and blue shark compose the majority of this catch with most molas returned alive but with much less success for blue sharks.

Table 3. Total catch and disposition of DGN major non-target species south of Pt. Conception for the years 1997-2005. (Source: NMFS Observer Program records.)

	All Years South Pt Conception						
Common Name	Total Catch	Kept	% Kept	Returned Alive	Returned Dead	% Returned Dead	Returned Unknown
Bonito, Pacific	734	330	45.0	21	367	50.0	16
Fish, Unidentified	224	8	3.6	7	195	87.1	14
Hake, Pacific	30	1	3.3	12	17	56.7	0
Louvar	306	267	87.3	1	38	12.4	0
Mackerel, Bullet	2,870	883	30.8	6	1,830	63.8	101
Mackerel, Pacific	3589	1,053	29.3	71	2,443	68.1	22
Marlin, Blue	49	2	4.1	0	46	93.9	1
Marlin, Striped	356	58	16.3	4	282	79.2	12
Mola, Common	28,856	95	0.3	26,949	1,146	4.0	666
Opah	2,820	2,711	96.1	4	103	3.7	2
Pomfret Pacific	42	26	61.9	1	15	35.7	0
Remora	39	0	0.0	36	1	2.6	2
Shark, Bigeye Thresher	263	228	86.7	1	34	12.9	0
Shark, Blue	7,672	85	1.1	2491	4,613	60.1	483
Shark, Common Thresher	3,671	3,654	99.5	10	5	0.1	2
Shark, Pelagic Thresher	77	75	97.4	0	2	2.6	0
Shark, Shortfin Mako	5,254	5,001	95.2	99	152	2.9	2
Stingray, Pelagic	272	2	0.7	207	49	18.0	14
Swordfish, Broadbill	6,188	6,013	97.2	0	174	2.8	1
Tuna, Albacore	2,152	1,716	79.7	0	435	20.2	1
Tuna, Bigeye	12	12	100.0	0	0	0.0	0
Tuna, Bluefin	1,270	1,111	87.5	0	157	12.4	2
Tuna, Skipjack	5,301	2,478	46.7	29	2,791	52.7	3
Tuna, Yellowfin	433	370	85.5	0	62	14.3	1
Yellowtail	71	69	97.2	0	1	1.4	1
Total	72,551	26,248		29,949	14,958		1346
Percent		36.2		41.3	20.6		1.9

Table 4. Total catch and disposition of DGN major non-target species north of Pt. Conception for the years 1997-2005. (Source: NMFS Observer Program records.)

	All Years North Pt Conception						
	Total Catch	Kept	% Kept	Returned Alive	Returned Dead	% Returned Dead	Returned Unknown
Bonito, Pacific	13	7	53.8	0	5	38.5	1
Fish, Unidentified	206	9	4.4	6	184	89.3	7
Hake, Pacific	227	8	3.5	6	212	93.4	1

Louvar	407	343	84.3	1	60	14.7	3
Mackerel, Bullet	51	1	2.0	0	46	90.2	4
Mackerel, Pacific	1707	536	31.4	17	1,149	67.3	5
Marlin, Blue	1	0	0.0	0	1	100.0	0
Marlin, Striped	17	2	11.8	0	15	88.2	0
Mola, Common	12,989	22	0.2	11,851	293	2.3	823
Opah	1,051	1,018	96.9	3	29	2.8	1
Pomfret Pacific	436	280	64.2	3	149	34.2	4
Remora	70	1	1.4	66	1	1.4	2
Shark, Bigeye Thresher	202	177	87.6	1	22	10.9	2
Shark, Blue	13,205	44	0.3	4,163	8,384	63.5	614
Shark, Common Thresher	1,519	1,509	99.3	1	9	0.6	0
Shark, Pelagic Thresher	0	0	0.0	0	0	0.0	0
Shark, Shortfin Mako	1,218	1,192	97.9	8	14	1.1	4
Stingray, Pelagic	44	0	0.0	30	10	22.7	4
Swordfish, Broadbill	8,357	8,308	99.4	0	35	0.4	14
Tuna, Albacore	13,955	11,778	84.4	13	2,147	15.4	17
Tuna, Bigeye	8	8	100.0	0	0	0.0	0
Tuna, Bluefin	2,394	2,248	93.9	0	135	5.6	11
Tuna, Skipjack	3,487	1,203	34.5	0	2,284	65.5	0
Tuna, Yellowfin	35	33	94.3	0	2	5.7	0
Yellowtail	1	1	100.0	0	0	0.0	0
Total	**61,600**	**28,728**		**16,169**	**15,186**		**1,517**
Percent		**46.6**		**26.2**	**24.7**		**2.5**

b. Protected Species Interactions:

i. Marine Mammals: All marine mammals in the waters of the United States are protected under the Marine Mammal Protection Act (MMPA). The MMPA and its implementing regulations set out strict guidance for monitoring marine mammal stocks and estimating human impacts on these stocks. All of the marine mammal species listed in Table 5 are known to have been encountered in the DGN fishery, although takes have generally declined since implementation of the Pacific Ocean Take Reduction Plan (TRP) in 1997. Since the implementation of the TRP (62FR 51805), overall cetacean entanglements have dropped considerably (77 percent) (Barlow and Cameron 2003), and the recommendation to lower the net within the water column was based on proven bycatch reduction of marine mammals in other gillnet fisheries. Significant changes in the water temperature regimes off the West Coast were also observed over this time frame with waters generally colder since 1999. This shift in the ocean temperature regime almost coincides with the implementation of the TRP and it is not well understood if the reduction in levels of mortality and serious injury are due to the effectiveness of TRP measures, a change in the "normal" distribution of protected species, or a combination of the two. In addition, the effectiveness of pingers on certain marine mammals is unknown.

Three marine mammal species are of particular concern related to the DGN fishery: humpback whales, short-finned pilot whales, and sperm whales.

Table 5. Observed takes of marine mammal species in the DGN fishery, with and without pingers, 1990 through 2005.

Species	Number of individual animals observed taken in the DGN fishery		
	All observed sets 1990-2004	Nets without pingers	Nets with pingers
	7,221 observed sets	3,831 observed sets	3,390 observed sets
Dolphins			
bottlenose	3	3	0
long-beaked common	14	8	6
short-beaked common	327	215	112
northern right whale	65	43	22
pacific white-sided	28	21	7
Risso's (Grampus)	33	24	9
striped	1	1	0
Porpoise			
Dall's	22	21	1
Whales			
killer whale	1	1	0
short-finned pilot whale	12	11	1
pygmy sperm whale	2	2	0
sperm whale	8	6	2
Beaked whales			
Baird's	1	1	0
Cuviers	21	21	0
Hubb's	5	5	0
Mesoplodont	2	2	0
Stejneger's	1	1	0
humpback	3	1	2
fin	1	0	1
gray	3	0	3
minke	3	2	1
Pinnipeds			
Steller sea lion	2	2	0
northern elephant seal	112	95	17
California sea lion	153	69	84

ESA listed species are in italics

ii. Sea Turtles: A number of marine turtle species are found off Oregon and California: leatherback, loggerhead, green, and olive ridley sea turtles. Of these, leatherbacks are most commonly taken in the DGN fishery north of Point Conception based upon observer

records from NMFS's observer program since 1990 (Table 6). Loggerhead sea turtles have not been observed incidentally taken in the DGN fishery north of Point Conception. Juvenile loggerheads generally remain in the warmer waters off the coast of Baja California, Mexico, where their primary prey species, the pelagic red crab, occur in high concentrations. All but one observed takes of loggerheads in the DGN fishery occurred south of Point Conception during El Niño years. There has been only one observed take of a green turtle and one observed take of an olive ridley in the DGN fishery since 1990. Generally, both greens and olive ridleys are found in warm waters, greater than 18° C and the only observed takes of these species both occurred during a period of increased sea surface temperature south of Point Conception, in November 1999. The higher SST likely attracted these species and others into the area to feed. The only observed takes of a fin whale and minke whale also occurred in the same area in November 1999.

Table 6. Number of observed takes of sea turtles in the DGN fishery, 1990-2005.

Species	Number Taken
Turtle, Green/Black	1
Turtle, Leatherback	23
Turtle, Loggerhead	15*
Turtle, Olive Ridley	1

*All but one of the takes occurred during El Niño years.

iii. Birds: Take of seabirds is extremely rare in the DGN fishery. Only northern fulmars and Cassin's auklets have been observed taken. Some of the smaller alcids that dive to depths where DGNs may be set are quite small (7 to 9 inches) and therefore unlikely to be entangled in the 14-inch or greater mesh size of the DGN fishery. Northern fulmars have been encountered in this fishery, however very rarely.

In 7,208 observed sets in the DGN fishery, 31 northern fulmars have been observed taken, 20 south of Point Conception and 11 north of Point Conception. Of the 31 observed takes, only five were observed mortalities or injuries, the remaining 26 birds were recorded as released alive. Only one Cassin's auklet was observed taken, it was a mortal take by a DGN vessel fishing south of Point Conception.

In 2005, five northern fulmars were entangled in a DGN net set. All of the fulmars were released alive and unharmed. These results are considered consistent with the previous fifteen years of observer data, suggesting that the likelihood of mortality or injury of northern fulmars in the DGN fishery is very low.

C. Longline Fishery

Commercial pelagic longline fishing has never been permitted within the California EEZ and as such there are no longline fishery dependent records to draw upon to predict potential impacts to protected species. There is, however, a number of existing U.S. domestic pelagic SSLL fishery that can be used to approximate impacts. These include the Hawaii based SSLL, the California based SSLL (that operated outside the west coast

EEZ) and the Atlantic SSLL. All relevant fisheries were reviewed to analyze and predict the suite of potential species and magnitude of interactions that may occur under the proposed action.

2. Environmental Impacts:

a. Non-target Catch:

Impacts to target, non-target, and prohibited finfish species are anticipated to be reflected in increased catches of these species, which are a function of the estimates of change in effort in the EEZ off California for this proposed EFP.

Projected catches of target, non-target, and prohibited finfish species are presented in Table 7 utilizing the Hawaii-based SSLL observer records as a proxy for longline vessels utilizing circle hooks and mackerel-type bait outside the EEZ. As mentioned previously, it is uncertain if the proposed EFP catches will be similar to the catch rates observed in the Hawaii-based SSLL fishery given the disparate areas fished and the dissimilar oceanographic features between the more coastal, temperate California Current System and the more tropical off-shore waters near Hawaii.

Catch estimates are provided for the low (400 hooks) and high (1,200 hooks) effort estimates that the applicant supplied in the EFP application. These estimates are then multiplied across the maximum number of sets per trip (14) and total trips (4) to come up with projected maximum take in numbers of animals. An additional column, providing catch estimates for 1,000 hooks per set, is included based on the applicant's best guess of probable average hooks-per-set of effort once he gains experience in the fishing method and area. The projected EFP catch does suggest that, similar to the DGN fishery, the incidental catch of non-target species that could be retained for personal use and/or sale of economically valuable species will occur.

Table 7. Projected EFP catch in numbers of animals using Hawaii-based SSLL observer records for trips utilizing circle hooks and mackerel-type bait outside the EEZ.[2]

Species	Projected EFP catch (no.) for trips utilizing circle hooks (h) and mackerel-type bait			
	CPUE	22,400 h	56,000 h	67,200 h
	(catch/1000 h)	400 h X 14 sets X 4 trips	1000 h X 14 sets X 4 trips	1200 h X 14 sets X 4 trips
Swordfish	17.16	384.3	960.7	1152.9
Albacore	1.06	23.7	59.2	71.0
Bigeye tuna	1.57	35.1	87.7	105.3
Yellowfin tuna	0.16	3.7	9.1	11.0
Pacific Bluefin	0.00	0.0	0.0	0.0
Skipjack tuna	0.07	1.5	3.7	4.4
Tunas and mackerels	0.02	0.3	0.8	1.0
Blue shark	12.64	283.2	707.9	849.5
Shortfin mako shark	0.88	19.6	49.0	58.8

[2] Based on 161 trips and 2,133,096 hooks of observed effort.

Unid mako sharks	0.05	1.2	3.0	3.6
Unid sharks	0.00	0.0	0.0	0.0
Bigeye thresher shark	0.02	0.5	1.4	1.6
Pelagic thresher shark	0.00	0.0	0.1	0.1
Unid thresher sharks	0.01	0.1	0.3	0.4
Striped marlin	0.85	19.0	47.5	57.0
Blue Marlin	0.18	4.1	10.2	12.3
Black Marlin	0.00	0.0	0.0	0.0
Shortbill spearfish	0.11	2.6	6.4	7.7
Unid billfishes	0.02	0.4	1.0	1.2
Pelagic stingray	0.09	2.1	5.3	6.4
Remora	0.43	9.7	24.2	29.0
Longnose Lancetfish	1.27	28.4	70.9	85.1
Snake mackerel	0.32	7.2	18.0	21.6
Unid. fish	0.02	0.5	1.3	1.5
Escolar	1.66	37.2	92.9	111.5
Dorado	3.50	78.4	196.0	235.2
Oilfish	0.23	5.1	12.8	15.4
Wahoo	0.07	1.7	4.2	5.0
Sickle Pomfret	0.13	3.0	7.5	9.0
Pacific Pomfret	0.00	0.0	0.0	0.0
Common Mola	0.01	0.2	0.6	0.7
Opah	0.08	1.8	4.6	5.5

Using the highest potential effort scenario (67,200 hooks), coupled with the observed CPUE estimates presented in Table 7, the proposed action would harvest in order of magnitude an estimated 1,153 target swordfish, 850 blue sharks, 235 dorado, 105 bigeye tuna, 59 shortfin mako sharks, and 57 striped marlin. U.S. longline bigeye tuna catches in the Pacific are subject to an annual quota of 500 mt. The catch of bigeye tuna under this EFP would be monitored for accounting and compliance with the annual quota and would therefore be a part of conservation measures established by the Inter-Amercian Tropical Tuna Commission (http://www.iattc.org/HomeENG.htm) and implemented by NMFS. Striped marlin impacts would be capped at 12 fish as recommended by the PFMC. In addition, given that striped marlin distribution and abundance increases in the more tropical waters targeted by the Hawaii-based SSLL fishery, the actual catch of striped marlin under the proposed action should be less in the more temperate, coastal habitat that will be fished in the proposed action area. Further, Southern California Billfish Club catch records for recreationally caught striped marlin report for the most part reflect marlin captured in the SCB, which will be a closed area under the terms and conditions of the proposed action. The peak striped marlin catches in the SCB occur in September, coinciding with a series of major recreational billfish tournaments.

There are high catch rates of blue shark in HMS fisheries targeting swordfish, including the West Coast DGN fishery and SSLL fisheries prosecuted by Hawaii-based and (in the past) California-based vessels. The use of circle hooks and other mitigation measures, as would be required under the EFP, does not appear to reduce blue shark catch rates but does appear to increase survivorship. Hawaii SSLL observer records for trips utilizing

circle hooks, mackerel-type bait, and de-hooking pliers (162 trips, June 2005 -March, 2006), indicate that approximately 95 percent of captured blue sharks were released alive. Estimated blue shark mortality under the EFP, however, would represent a small incremental increase in overall fishing mortality.

b. Protected Species Interactions:

i. Marine Mammals: All marine mammals that may be found in the action area are listed in Table 8. As previously described, there has not been a longline fishery in the West Coast EEZ so there are no observer records or logbooks from which to draw conclusions on which marine mammals may be affected by the proposed action. However, observer records dating back to 1990 in the DGN fishery are available and they were reviewed as a first step in understanding marine mammal exposure to the proposed fishery. In both the historic DGN and proposed longline fishery, gear is set at night and allowed to soak overnight and both gears are fished to target primarily swordfish. The two fisheries overlap temporally, with most DGN activity occurring from September 1 though December 31, the same time period as the proposed longline EFP fishery.

There are however, two key differences between the two. First, fishing under the longline EFP would occur at least 30 miles offshore of California in waters north of Point Conception and west of the southern California Bight south of Point Conception whereas the DGN fishery does occur within 30 nm of shore.

The second difference is that the DGN observer records likely do not reflect likely takes in the proposed longline EFP (Table 8). Entanglements in gillnets is usually attributed to marine mammals being unable to detect the net and becoming entangled. By contrast, marine mammal takes in longlines are generally attributed to depredation by odontocetes, either feeding on the bait or fish caught on the hooks, although entanglements are also possible (Gilman *et al.* 2006a). Entanglements of large baleen whales have been recorded in the Hawaii based SSLL fishery although they are not common (Forney 2004). There have been no observed interactions in the Atlantic SSLL, where effort overlaps, spatially and temporally with marine mammals. Observer records from California, Hawaii, and the Atlantic suggest that marine mammal entanglements of most species are generally quite low in longline fisheries.

Table 8. Marine mammals observed taken in the DGN fishery.

Species	Number observed taken
Beaked Whale, Baird's	1
Beaked Whale, Cuviers	21
Beaked Whale, Hubbs'	5
Beaked Whale, Mesoplodont	2
Beaked Whale, Stejneger's	1
Beaked Whale, Unidentified	3
Dolphin, Bottlenose	3
Dolphin, Long-Beaked Common	14
Dolphin, Northern Right Whale	65
Dolphin, Pacific White-sided	28
Dolphin, Risso's	33

Dolphin, Short-Beaked Common	327
Dolphin, Striped	1
Dolphin, Unidentified Common	21
Porpoise Dall's	22
Sea Lion, California	153
Sea Lion, Steller	2
Seal, Northern Elephant	112
Whale, Fin	1
Whale, Gray	3
Whale, Humpback	3
Whale, Killer	1
Whale, Minke	3
Whale, Pygmy Sperm	2
Whale, Short-finned Pilot	12
Whale, Sperm	8

Based upon the available information, NMFS anticipated that small numbers of a few marine mammal species may be taken during the proposed action, these include: California sea lions, northern elephant seals, short-beaked common dolphins, Risso's dolphins, northern right whale dolphins, and Cuvier's beaked whales.

In order to assess what may happen to animals that encounter the SSLL gear, observer records from other longline fisheries were reviewed. In the California SSLL fishery, outside the EEZ, three marine mammals have been observed entangled in gear (two Risso's dolphins and one unidentified dolphin) and of these, one was killed. In the Hawaii-based shallow set longline fishery since 2004 with the implementation of new gear requirements, all of the marine mammals were recorded as injured and one killed. In the Hawaii-based shallow set longline fishery targeting swordfish prior to 2004, there were 16 observed entanglements of marine mammals. The species observed taken were Risso's dolphin, short-finned pilot whale, sperm whale, spinner dolphin, bottlenose dolphin, short-beaked common dolphin. Ten of the 16 takes were considered serious injuries, one was a mortality (at time of entanglement) and five of the entanglements were not serious injuries (Forney 2004), thus over two-thirds of the entanglements resulted in serious injuries or mortalities. In the Atlantic, the mortality/serious injury rates varied among marine mammal species, but were on average around 50 percent (NMFS 2006a). This rate of serious injury/mortality may serve as the best estimate available for this proposed EFP.

While it is not possible to quantify the number of marine mammals of each species that may be affected by the proposed fishery, based upon marine mammal take rates in other SSLL fisheries and the biology, abundance, and distribution of the species, the number of individuals taken is likely to be quite low, likely in the range of one to ten depending on the species and their responses to the gear. Based upon observed rates in other SSLL fisheries, it is likely that approximately 50 percent of marine mammals takes in the proposed fishery will result in a serious injury/mortality.

ii. Sea Turtles: Four species of marine turtles may be found in the area of the proposed action: leatherback turtle (*Dermochelys* coriacea), loggerhead turtle (*Caretta caretta*), olive ridley (*Lepidochelys olivacea*), and green turtle (*Chelonia mydas*).

The likelihood of sea turtle take under the proposed action is quite low. Based upon observer records from the DGN fishery, other SSLL fisheries, and the biology and distribution of the species, a small number of leatherbacks may be exposed to and affected by the proposed action. To evaluate the likelihood of leatherback mortalities, a review of Hawaii observer records since the implementation of mitigation measures in 2004 was reviewed and is provided in Table 9. The changes in hookings rates and interactions appear related to changes in the hook type and bait (18/0 circle hooks with a 10 degree offset and mackerel bait). Similar results were recorded in the Atlantic SSLL fishery and experiments testing alternative gear types in the Northeast Distant waters off the east coast of Canada and the U.S. While the precise reason for the change in hookings is still under investigation, the results are encouraging, particularly for hardshelled turtles (i.e., loggerhead, olive ridley, and green).

Table 9. Changes in sea turtle hookings observed in Hawaii-based SSLL fishery, before and after implementation of bycatch mitigation measures in 2004.

Turtles observed taken	Deeply hooked	Ingested hook	Lightly hooked	Entangled
Before regulations				
Leatherback (n=31)	0	10%	84%	6%
Hardshelled (n=180) Loggerhead (n=163)	60%	0	38%	2%
After regulations				
Leatherback (n=10)	0	0	100%	0
Loggerheads (n=27)	0	22%	63%	15%

Observer records from the SSLL fishery in the Atlantic and experiments conducted in the Northeast Distant waters were also reviewed, to aid understanding the likely impacts to turtles when using modified SSLL gear, as proposed in the SSLL EFP. In both fisheries, leatherback sea turtle take rates were low, immediate mortality was nearly zero, and calculated post-hooking mortalities (developed using the matrix in Table 10) was very low. Observer records from the SSLL fishery just outside the California EEZ were examined and again supported the assertion that very few leatherbacks are likely to be taken in the SSLL EFP.

As noted above, it is difficult to estimate the likely bycatch of sea turtles under this proposed action. However, based upon observer records detailed above and a review of the biology and distribution of sea turtles that may be in the proposed action area, the level of take is expected to be low with consequent very low levels of post-hooking mortalities. Leatherbacks are the species most likely to be affected by this action. Loggerheads are unlikely to be affected. The all but one of the observed takes of loggerheads in the DGN occurred during El Niño events or periods of unusually warm

water (NMFS 2001) and all occurred outside of the area of the proposed EFP fishery. It is not possible at this time to know whether an El Niño may occur during the fall of 2007 or whether warm water conditions observed over the past two years in the West Coast EEZ will occur in 2007, although the most recent climate models suggest that an El Nino is unlikely to develop in late 2007.

There has been only one observed take of a green turtle and one observed take of an olive ridley in the DGN fishery since 1990. Generally, both greens and olive ridleys are found in warm waters, greater than 18° C, which is warmer than the targeted SST identified by the applicant. Further, the only observed takes of these species both occurred in southern California during a period of a warm water intrusion from Baja, California, Mexico, is believed to have brought individual sea turtles into the SCB. Take of these two sea turtles species in fisheries in the west coast EEZ is extremely low, particularly in the areas of the proposed action, outside the SCB, where SSTs are generally lower than the preferred temperatures for greens and olive ridleys. It is unlikely that greens or olive ridleys will be affected by the proposed action.

iii. Sea Birds

Due to the nature of pelagic longline operations and the fishing area under consideration for the proposed action, the only seabirds potentially impacted by this proposed fishery are the black-footed albatross (BFAL, *Phoebastria nigripes*), the Laysan albatross (LAAL, *P. immutabilis*) and the short-tailed albatross (STAL, *P. albatrus*). The brown pelican (*Pelecanus occidentalis*) and Cassin's auklet (*Ptychoramphus aleuticus*) also occur in the proposed action area, but are not likely to be affected, as these species are not known to interact with pelagic longline fishing gear and nighttime setting will reduce the chance these species will interact with the gear.

U.S.-based pelagic longline swordfish and tuna fisheries in the vicinity of the Hawaiian Islands have the potential to affect albatrosses. NMFS observer records from 1994–2000 (based on four percent observer coverage) estimate an average take of 1,380 BFAL and 1,163 LAAL per year. No takes of STAL in any U.S.-based pelagic longline fishery have been reported. When the Hawaii-based swordfish longline fishery reopened on a limited basis in 2004 with new fishing requirements (e.g., deploying sets no earlier than one hour after local sunset and ending deployment no later than one hour before local sunrise; using large 18/0 circle hooks; 100 percent observer coverage; using thawed and blue-dyed bait) observers documented 10 BFAL and 71 LAAL captured in this fishery with 2,133,096 hooks observed. The proposed action would be expected to take one BFAL, two LAAL, and zero STAL. Neither BFAL or LAAL are listed under the ESA. The 2004 USFWS biological opinion on the HMS FMP does not expect that STAL would be taken by any of the HMS fisheries.

IV. CONSISTENCY TO COASTAL ACT

a. <u>Section 30230</u> Marine resources; maintenance

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

The proposed action would primarily affect biodiversity and ecosystem function through the removal of target, non-target, and protected species. Fish removals under the proposed action would represent a very minor proportion of the biomass of these species and would have a remote likelihood of adversely affecting biodiversity and ecosystem function. Fishing mortality by the single vessel that would be authorized to fish in 2007 represents a very minor proportion of total fishing mortality on target and non-target finfish species. Swordfish catches by all vessels in the Eastern Pacific Ocean are in the range of 11,000–20,000 mt annually (PFMC 2006, IATTC 2006) while, according to the EFP application, catches under this EFP would be 7–18 mt (15,000–40,000 lbs).[3] Bycatch of non-target species (which is likely to be principally blue sharks) would also constitute a minor component of the larger Pacific-wide catches. As noted previously, approximately 95 percent of captured blue sharks were released alive in the Hawaii SSLL based on observer records for trips utilizing circle hooks, mackerel-type bait, and de-hooking pliers (162 trips, June 2005 -March, 2006). Consequently, NMFS estimates that blue shark mortality under the EFP would represent a small incremental increase in overall fishing mortality. Therefore, it is reasonable to conclude that granting the EFP for 2007 would not have significant effects on target or non-target stocks.

Longline gear is known to incidentally catch and entangle threatened and endangered marine mammals, sea turtles and seabirds. This is true of any fishing gear that relies on hooking or entanglement to catch targeted species. There is no doubt that authorization of the EFP would increase the risk of a take of one of these protected species. Marine mammal species considered most likely to be affected by this action, California sea lion, northern elephant seal, short-beaked common dolphin, Risso's dolphin, northern right whale dolphin, and Cuvier's beaked whales are all from stocks that are not listed on the ESA nor considered depleted under the MMPA. Very low levels of take of animals from these stocks are anticipated under the proposed EFP. When combined with existing known threats to these stocks such as ship strikes, exposure to toxins, pollution, loss of habitat or prey, and underwater sound, it is not expected that the proposed action will change the status of these species or trigger concern over the stocks' status.

Leatherbacks are most likely to be affected by the proposed action and likely only a few individuals. General threats to Pacific sea turtles include poaching of eggs, killing of females at nesting beaches, human encroachment (development), beach erosion, and microclimate-related impacts at nesting sites, low hatchling success, and incidental capture in fisheries. Very low or no mortalities are anticipated, thus the proposed action

[3] However, distinct stocks are recognized south and north of the equator in the EPO. Catches north of the equator account for somewhat less than half of the EPO total.

is unlikely, within the context of other effects, to change the status of leatherbacks in the Pacific.

Lastly, it is known that seabirds are killed in longline fisheries. However, other longline fisheries such as the domestic longline fisheries in Alaska and Hawaii have implemented mitigation measures that have substantially reduced incidental seabird mortality. Mitigation measures from these fisheries will be incorporated into the proposed EFP, as applicable and appropriate, as part of the term and conditions of the proposed EFP.

A key question which this EFP would help address is whether longline fishing subject to gear restrictions and continuous monitoring represents an economically and environmentally superior alternative to either DGN or harpoon gear for fishing within the West Coast EEZ. The EFP is intended to gather information for assessing the viability of longline fishing as an alternative to DGN fishing. Based on what is known about the environmental impacts of the other two swordfish fisheries and what is known about longline gear in other areas, it is NMFS position that longline gear falls somewhere between the range of impacts characteristic of the harpoon and DGN fisheries. In other words, NMFS believes that the longline gear proposed for this action is less selective than harpoon gear but more selective than DGN (Figure 3). Exactly where the SSLL lies between the range of impacts is not known at this time. A key purpose of this EFP would be to begin collecting necessary information to make that determination.

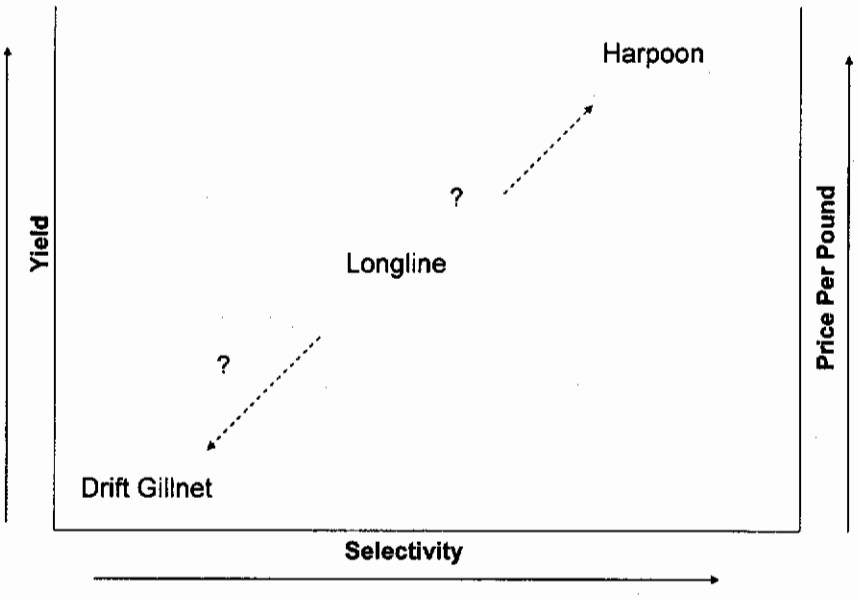


Figure 3. Conceptual model of where longline fishing occurs relative to the DGN and harpoon fisheries in terms of selectivity (e.g., environmental impacts), catch per unit effort, and price per pound.

Some might suggest that due to the high selectivity of harpoon gear, this should be the primary gear type used for catching swordfish. NMFS does not believe that harpoon gear offers a realistic alternative as it is a low volume fishery. Catch rates in the DGN fishery are 2-3 times higher than in the harpoon fishery (Coan et al., 1998). In addition, DGN vessels use less fuel in finding and pursing their catch, do not rely on spotter planes, and DGN vessels can supplement their swordfish catches with non-target species. (Coan et al., 1998). Even if harpoons were the preferred gear type, the number of vessels required to provide commercial quantities of swordfish would undoubtedly create serious congestion problems in the southern California Bight. User conflicts would most likely occur with recreational fishing vessels.

It is known that harpoon caught swordfish do provide a premium ex-vessel price with the average price-per-pound, more than double that of DGN caught swordfish (PFMC, 2006). However, local processors in the Los Angeles area note that longline caught swordfish can also command a price closer to that of harpoon caught swordfish (Chris Fanning, pers. comm. with local San Pedro and Terminal Island fish buyers on July 12, 2007). Harpoon caught swordfish average $6-8 per lb, with highs of $11 per lb for best quality and first of the season. This fishery commands the highest quality and best price. Trips are relatively short and fish handled well and come in with best color, thus highest demand from discriminating seafood restaurants. For the DGN fishery, swordfish average $3-4 per lb and also obtain a lower demand from retailers and restaurants and poorest quality despite relatively shorter trip duration. Net marks and long overnight soaks in net resulting in lower quality once brought on board. Based on past experience, local fish buyers pay around $3-5 per lb for longline caught swordfish with the higher price going to the most recently caught fish from the top of the fish hold and around $3 per lb for the older, lower quality fish caught further away from coast and from the beginning of month long or more trips. These fish buyers also noted that a proportion of longline fish come up alive, and thus better quality to begin with.

In terms of long range consistency with the California Coastal Act, NMFS believes that if the EFP is conducted it could provide valuable information for forming the basis for potentially converting the DGN fishery to the more selective longline fishery. To make that determination, additional information would need to be collected in future years under controlled conditions of additional EFPs until there is sufficient information to determine whether a regulatory change is justified. Any future fishing activities of this nature would be subject to additional rigorous environmental review to evaluate potential effects. However, the long term benefits of identifying and implementing a gear type that provides a more environmentally conservative way to target swordfish off California while minimizing risk to protected species cannot be overlooked and remains consistent with the objectives of the Coastal Act.

Section 30234 Commercial fishing and recreational boating facilities: *Facilities serving the commercial fishing and recreational boating industries shall be protected and, where feasible, upgraded. Existing commercial fishing and recreational boating harbor space shall not be reduced unless the demand for those facilities no longer exists*

or adequate substitute space has been provided. Proposed recreational boating facilities shall, where feasible, be designed and located in such a fashion as not to interfere with the needs of the commercial fishing industry.

The vessel that would participate in the EFP currently works out of a southern California harbor. The continued success of his fishing operations including the development of a longline fishery for highly migratory species increases the likelihood of maintaining the demand commercial fishing infrastructure at his home port as well as any California port he chooses to land his catch. As was shown in Figures 1 and 2, the number of commercial fishing vessels in both the harpoon and DGN fisheries continues to decline as economic practicalities and management actions restrict their success. An opportunity to identify a new fishery that may be more selective for targeting swordfish could maintain and may even increase the current demand for commercial boating facilities.

Section 30234.5 Economic, commercial, and recreational importance of fishing: *The economic, commercial, and recreational importance of fishing activities shall be recognized and protected.*

The proposed action would likely have a long-term beneficial socioeconomic impact, if it demonstrates that longline fishing conducted under restricted conditions to mitigate adverse impacts to protected species is an economically viable activity. In the short term, prosecution of the EFP could generate revenue for the applicant, some of which would have community income impacts in terms of purchase of fuel, supplies and other inputs. In the long term, it may provide an alternative to the current DGN fleet for converting to an alternate, more conservative fishing style. If sufficient information is gathered by means of the proposed EFP to determine whether and how the fishery may be prosecuted, regulatory action may be proposed to effect a permanent change applicable to fishery participants as a whole, based on the measures applied as part of the EFP. NMFS does not see this swordfish fishery actually expanding, but rather, converting from one gear type to another. Consequently, the economic and commercial importance of the swordfish fishery would remain intact and may even resurge to more moderate levels of fishing activity.

V. REFERENCES

Barlow, J. and G. A. Cameron. 2003. Field experiments show that acoustic pingers reduce marine mammal bycatch in the California drift gillnet fishery. Mar. Mammal Sc. 19(2):265-28.

Bedford, D. W. 1987. Shark management: a case history – The California pelagic shark and swordfish fishery. Pg. 161-171. In: S. Cook (ed.) Sharks – an inquiry into biology, behavior, fisheries, and use. Oregon State Univ. Extension Service.

Coan AL, Vojkovich M, Prescott D 1998. The California Harpoon Fishery for Swordfish, *Xiphias gladius*. In: Barret I, Sosa-Nishizaki O, Bartoo N (eds) Biology and fisheries of swordfish, *Xiphias gladius*. Papers from the

International Symposium on Pacific Swordfish, Enseneda, Mexico, 11-14 December 1994. U.S. Dep. Commer., NOAA Tech. Rep. NMFS 142, 276p.

Forney, K.A. 2004. Estimates of Cetacean Mortality and Injury in two U.S. Pacific Longline Fisheries, 1994-2002. National Marine Fisheries Service, Southwest Fisheries Science Center. Administrative Report LJ-04-07. October 2004.

Gilman, E., N. Brothers, G. McPherson, P. Dalzell. 2006a. A review of cetacean interactions with longline gear. J. Cetacea Res. Manage. 8(2): 215-223. 2006.

Gilman, E., D. Kobayashi, T. Swenarton, P. Dalzell, I. Kinan, N. Brothers. 2006b. Analyses of observer data fro the Hawaii-based longline fishery. WCPFC-SC2-2006/EB IP-1.

Hanan DA, Holts DB and Coan AL 1993. The California drift gill net fishery for sharks and swordfish 1981-82 through 1990-91. California Dept. Fish and Game Fish Bull 175, 95pp.

Hinton, M. G. 2003. Status of swordfish stocks in the eastern Pacific Ocean estimated using data from Japanese tuna longline fisheries. Mar. Fresh. Res., 54 (4): 393-399.

Hinton, M. G., W. H. Bayliff, and J. Suter. 2004. Assessment of swordfish in the eastern Pacific ocean, 5th Meeting of the Scientific Working Group, La Jolla, CA, May 11-13, IATTC SAR-5-05-SWO.

Holts. D. 1988 . Review of U.S. west coast commercial shark fisheries. Mar. fish. Rev. 50:1-8.

IATTC (Inter-American Tropical Tuna Commission). 2006. Fishery Status Report No. 4, Tunas and billfishes in the Eastern Pacific Ocean in 2005. Inter-American Tropical Tuna Commission, La Jolla, California. Document IATTC-74-04: 82-83.

ISC 2004. Report of the swordfish working group. Interim Sci. Comm. for Tuna and Tuna-like species in the North Pacific Ocean, ISC/04/Plenary/7.

NMFS (National Marine Fisheries Service). 2006. Draft Atlantic Pelagic Longline Take Reduction Plan. National Marine Fisheries Service. Southeast Regional Office, St. Petersburg, FL. June 2006.

PFMC (Pacific Fishery Management Council). 2005. Status of the U.S. West Coast fisheries for highly migratory species through 2005, Stock Assessment and Fishery Evaluation. Pacific Fishery Management Council, Portland, OR. October 2005.

PFMC (Pacific Fishery Management Council). 2006. Status of the U.S. West Coast fisheries for highly migratory species through 2005, Stock Assessment and Fishery Evaluation. Pacific Fishery Management Council, Portland, OR. September 2006.

Ryder, C.E., T.A. Conant, and B.A. Schroeder. 2006. Report of the Workshop on Marine Turtle Longline Post-Interaction Mortality. U.S. Dep. Commerce, NOAA Technical Memorandum NMFS-F/OPR-29, 36 p.

Vojkovich, M., and K. Barsky. 1998. The California-based longline fishery for swordfish, *Xiphias gladius*, beyond the U.S. Exclusive Economic Zone, in I. Barrett, O. Sosa-Nishizaki, and N. Bartoo (eds) 1998. biology and fisheries of swordfish, *Xiphias gladius*. Papers from the International Symposium on Pacific Swordfish, Ensenada, Mexico 11-14 December 1994. U.S. Dep. Commer., NOAA Tech. Rep. NMFS 142, 276p.

Federation of Independent Seafood Harvesters

PO Box 352
Bridgewater Corners, VT 05035

July 20, 2007

Peter M. Douglas,
Executive Director
California Costal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Subject: Exempted Fishing Permit application for longline fishing in the U.S. Exclusive Economic Zone off the California coast by Pete Dupuy

Dear Mr. Douglas:

The Federation of Independent Seafood Harvesters (FISH) is a non-profit association of California commercial fishermen primarily engaged in the drift gillnet (DGN) swordfish fishery. FISH advocates for sound, science-based fishery management policy and practice through its long-time participant in domestic and international highly migratory species (HMS) fishery management forums. Also, FISH continually strives to mitigate unintentional impacts to untargeted finfish, marine mammals, sea turtles, and sea birds. FISH is a member of the Pacific Offshore Cetacean Take Reduction Team (POCTRT), and the Pacific Scientific Review Group, and has donated over $30,000 to help fund the work of the *Asociacion Sudcaliforniana de Protecion al Medio Ambiente y a la Tortuga Marina*, a Mexican conservation organization developing leatherback sea turtle incubation methods and providing protection for nesting females returning to *Aguas Blancas* beach in Baja. It is in regard to exploring new strategies to mitigate unintentional marine resource impacts that FISH supports the above referenced Exempted Fisheries Permit (EFP), submitted by FISH member Pete Dupuy to the Pacific Fishery Management Council (PFMC) at their November, 2005 meeting.

The California Costal Act planning and management polices require the protection of marine resources (§30230), while recognizing the commercial importance of fishing activities (§30234.5). Striking this balance is also consistent with federal management policies and protections: the PFMC's HMS Fishery Management Plan's (FMP) goals and objectives; the ongoing work of the POCTRT under section 118 of the Marine Mammal Protection Act (MMPA) to reduce incidental serious injury or mortality to marine mammals, and compliance with the stringent provisions of the Endangered Species Act (ESA). The National Marine Fisheries Service (NMFS) is the federal agency charged with ensuring such protections are adhered to, and they possess the resources and

EXHIBIT NO. 6
APPLICATION NO.
CC-061-07

expertise required to make such determinations. As such, a Coastal Zone Management Act consistency determination by the NMFS regarding this issue should be accorded maximum deference.

The DGN fishery has been in decline since the 1997 implementation of regulatory measures to protect marine mammals, including some listed under the ESA as endangered or threatened species. That decline has been exacerbated since the 2000 closure of nearly half of the DGN fishery's traditional fishing grounds to protect leatherback sea turtles. The potential loss of the DGN fishery due to these regulatory measures is a matter of grave concern under California's continuing policy and responsibility to foster and promote growth in employment, productivity and income using all practical means within its power consistent with its needs and obligations and other essential considerations of state policy, and seek the assistance and cooperation of industry, labor, and the federal and local government for the purpose of creating and maintaining the general conditions under which there will be afforded useful employment opportunities, including self-employment, for all those qualified persons willing and seeking work (Government Code §15900).

This HMS fishery faces serious conservation challenges, with the potential to put everybody out of business, unless this fishery is adaptable to a more bycatch friendly alternative. The longline EFP proposing the use of single vessel for a four-month period to test the economic feasibility of pelagic longline as a substitute for DGN gear as a first step in determining if there is an alternative to DGN for the harvest of HMS that reduces bycatch impacts on finfish, marine mammals, and sea turtles explores such an alternative. Switching from DGN to longline may be the solution to this problem. Longline is proven to be more bycatch friendly than DGN. In the Southern California Bight, a study evaluating an experimental drift longline shark fishery found that: "This drift longline gear appeared to bring in less bycatch than the California drift gill net fishery. Observers recorded a total of 9 species captured on drift longline gear, whereas 71 species were documented from the drift gill net fishery. Unlike fish caught in drift gill nets, most of the longline bycatch can be released alive." (O'Brien, Sunada 1994[1])

There is no doubt that longline is an economically viable HMS fishing gear. Longline is the predominant gear type used to harvest HMS worldwide, including a U.S. high-seas fishery based in Hawaii. As a practical and safety matter, high-seas fishing (beyond the 200 mile limit of the Exclusive Economic Zone) require a vessel of 70 to 100 feet in length. Vessels in the DGN fishery range from 40 to 60 feet in length. Because this EFP explores the possibility of converting existing DGN vessels to longline, such fishing must take place in the area where the DGN fishery has historically operated. However, unless longline gear produces at a level comparable to DGN production, the bycatch advantage is moot. This EFP explores whether longline gear produces at a level comparable to DGN. This comparison addresses the fact that the out-of-pocket cost of deploying longline gear is much greater that the equivalent cost of deploying DGN gear. For

[1] A Review Of The Southern California Experimental Drift Longline Fishery For Sharks, 1988-1991, John W. O'Brien and John S. Sunada, CalCOFI Rep., Vol. 35, 1994.

longline, the deployment cost of bait, lightsticks, and gear loss averages $1.00 a hook, $1,000.00 for a 1,000 hook set, or $14,000.00 for a 14 set trip. Therefore, production levels must be high enough to offset the added overhead. There is no equivalent deployment cost for DGN gear. Also, unlike DGN gear, once a longline hook loses its bait, or catches an unmarketable fish, that hook is no longer productive. The DGN fishery has historically had high levels of blue shark bycatch, although bycatch mortality of blue shark is greatly reduced with longline gear, the fact that a blue shark occupies a hook precludes that hook from catching a swordfish. These are the economic viability considerations this EFP seeks to answer.

The use of pelagic longline gear, although not a specifically authorized commercial gear under California law, is not new to California. As early as 1955 and 1956, the California Department of Fish and Game conducted research cruises to fish for tuna with longline gear. In 1968, and again in 1981, the NMFS conducted similar research. The Fish and Game Commission has previously authorized experimental longline fishing in 1979, 1987, and 1988-91.

It is California Fish and Game Commission policy to protect and preserve marine mammals, and sea turtles threatened with extinction or significant decline, including a directive for the Department of Fish and Game to work with all interested persons, agencies and organizations to protect and preserve these resources; as well as a policy to cooperate with local, state, and federal agencies and with all interested persons, groups or organizations in every way to further the aims and purposes of fish and game conservation, preservation, propagation, protection, management and administration. Both of these policies exemplify the purpose and intent of the EFP at issue.

The Marine Life Management Act (MLMA) sets California's policy on marine living resources—to ensure the conservation, sustainable use, and restoration of California's marine living resources (§7050), and California's policy on marine fisheries (§7055) with the primary goal of sustainability (§7056). Unlike some natural resource laws that call for balancing various objectives without indicating any priority, the MLMA places sustainability above other objectives of the act. In this regard, the purpose and intent of the EFP in balancing the HMS Fishery Management Plan's goals of providing a long-term, stable supply of high-quality, locally caught fish to the public, minimizing economic waste and adverse impacts on fishing communities, and providing viable and diverse commercial fishing opportunity for HMS are not achieved at the expense of sustainability. On the contrary, the purpose and intent of the EFP is to increase sustainability by seeking to develop alternative fishing methods to reduce adverse impacts to finfish, marine mammals, and sea turtles so as to promote the conservation, preservation, propagation, and protection of these living marine resources. MLMA policy also exemplifies the purpose and intent of the proposed EFP.

Policy under the California Endangered Species Act—to conserve, restore, and enhance any endangered species or any threatened species (§2052)—also exemplifies the purpose and intent of the proposed EFP. The EFP seeks to test alternative fishing methods and/or gear to eliminate or reduce the incidental mortality of sperm whales, humpback whales,

fin whales, loggerhead sea turtles and leatherback sea turtles, all listed as endangered or threatened species. Further, under this act, it is California policy that all state agencies, boards, and commissions shall utilize their authority in seeking to conserve endangered or threatened species (§2055).

Directly on point, we find that under California law, where a fishery is closed or restricted due to the need to protect a fishery resource, it shall be the policy of the Department and the Commission to assist and foster the development of alternative fisheries or alternative fishing gear for those commercial fishermen affected by the restrictions, closures, or resource losses (§7712). As previously stated, the DGN fishery has been in decline since the 1997 implementation of regulatory measures to protect marine mammals. That decline has been exacerbated since the 2000 implementation of closures to protect sea turtles. These restrictions and closures are the exact reason this EFP—seeking to develop alternative fishing methods and/or gear—is proposed.

Accordingly, the proposed EFP is not only consistent with California's Costal Act planning and management polices, California's Government and Fish and Game codes, California's Endangered Species Act, California's Marine Life Management Act, and California's Fish and Game Commission policies; it is also consistent with federal management law and policies under the HMS FMP, the MMPA and the ESA.

I hope that this information is helpful.

Respectfully,

Chuck Janisse,
On behalf of the Federation of Independent Seafood Harvesters

cc: Rod McInnis, NMFS
Pete Dupuy

STATE OF CALIFORNIA—THE RESOURCES AGENCY

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400

Tu 3

DATE: December 10, 2002

TO: Coastal Commissioners and Interested Public

FROM: Peter M. Douglas, Executive Director
Sarah Christie, Legislative Coordinator

SUBJECT: RESOLUTION SUPPORTING THE CONSERVATION OF SEA TURTLES

Note: This information can be accessed through the Commission's World Wide Web Homepage at www.coastal.ca.gov

I. BACKGROUND

At the Coastal Commission's November, 2002 meeting, members of the international non-profit organization Wildcoast asked the Commission to adopt a resolution in support of efforts to protect California's sea turtles, and provided staff with a draft resolution. Wildcoast is conducting a public education campaign to raise awareness of the fact that California's coastal waters support four different species of endangered sea turtles, and highlight some of the human-induced threats to species survival. The Commission directed staff to prepare a resolution reflecting those concerns for the December meeting.

II. NATURAL HISTORY

Four of the world's seven species of sea turtles frequent the California Coast and are listed as endangered or threatened pursuant to the US Endangered Species Act. These include the Olive Ridley (Lepidochelys olivacea), Loggerhead (Caretta caretta), Leatherback (Dermochelys coriacea) and the Green (Chelonia mydas). These species migrate between California and Central America, Japan, Indonesia and Mexico, respectively. Leatherback turtles are the largest living reptile on earth, and the most critically endangered.

EXHIBIT NO. 7
APPLICATION NO.
CC-061-07

Sea turtles are among the longest lived of all reptiles, with some species living up to 100 years. They reach reproductive maturity between 15-30 years of age, and require remote, sandy beaches for digging shallow nests and laying their eggs. It is estimated that 1 in 3,000 eggs will produce an individual that will mature to reproductive age.

Sea turtles are nomadic, and regularly traverse the world's oceans, routinely traveling thousands of miles between feeding and nesting grounds. Sea turtles feed on a variety of jellyfish, crustaceans, mollusks, plankton, algae, urchins, starfish, sponges and fish, depending on the species.

III. ENVIRONMENTAL CONCERNS

According to a report by the National Academy of Sciences, shrimp trawling kills an average of 150,000 sea turtles per year. Long line fishing kills another 40,000. Ingestion of plastic debris, brine discharge, ocean pollution, commercial harvesting of turtle eggs and loss of beach nesting habitat due to development also contribute to accelerating population decline worldwide.

Of these various factors, shrimp trawling is by far the most detrimental to turtle populations. By-catch of sea turtles can be reduced by 97% by the installation of a Turtle Exluder Device (TED), a simple grate placed at the mouth of the net that allows shrimp, but not turtles, to pass into the net. All US shrimpers are required to use shrimp nets outfitted with TEDs.

In 1995, the US Endangered Species Act was amended to require all nations that export shrimp to the US to have laws requiring similar devices on shrimp nets. As a result, 16 countries followed suit, in order to comply with the "Turtle-Shrimp Law" and gain access to the US market. However, four nations challenged the law before the World Trade Organization as an unfair barrier to free trade. A WTO panel concluded that within the WTO charter, environmental protection provisions cannot be invoked if they interfere with the overall goal of increasing free trade. The State Department responded to this ruling by revising the Turtle-Shrimp law to weaken its provisions.

Although all seven species of sea turtles are listed as endangered, threatened or vulnerable pursuant to the Endangered Species Act or international conservation treaties, scientists project that the leatherback could go extinct within the next decade, followed by others if immediate steps are not taken to protect existing populations and critical habitat. Because of their global migratory patterns, sea turtle conservation will depend on international cooperation.

IV. RECOMMENDED ACTION

Staff recommends that the Commission adopt the attached resolution supporting the conservation of sea turtles and urging members of the public and responsible agencies to take appropriate actions that contribute to conservation goals.

STATE OF CALIFORNIA—THE RESOURCES AGENCY

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400

RESOLUTION BY THE

CALIFORNIA COASTAL COMMISSION

IN SUPPORT OF THE CONSERVATION OF ENDANGERED SEA TURTLES

Whereas: The California Coastal Commission was established by the People of California through initiative statute in 1972 and made permanent in 1976 by the California Legislature as the State's principal coastal management agency with diverse responsibilities, including but not limited to, "...ensur(ing) conformity with the provisions of...(the California Coastal Act),...to protect regional, state and national interests in assuring the maintenance of the long-term productivity and economic vitality of coastal resources necessary for the well-being of the people of the state...;"

Whereas: The California Coastal Act also provides that in order "...to avoid long-term costs to the public and a diminished quality of life resulting from the misuse of coastal resources, to coordinate and integrate the activities of the many agencies whose activities impact the coastal zone, and to supplement their activities in matters not properly within the jurisdiction of any existing agency, it is necessary to provide for continued state coastal planning and management through a state coastal commission;"

Whereas: California's coastal waters provide critical habitat for four of the seven species of sea turtles, including leatherback, loggerhead, olive ridley and green sea turtles;

Whereas: All of the world's sea turtle species are listed as endangered, threatened or vulnerable pursuant to the US endangered Species Act or international treaties;

Whereas: Sea turtles are part of California's natural heritage and marine biodiversity, are valued and appreciated by people of all cultural backgrounds, and as such possess inestimable intrinsic value to current and future generations;

Whereas: All species of sea turtles migrate through the world's oceans and are sensitive to pollution, thermal discharge, industrial fishing techniques, and habitat loss on a global scale;

Whereas: Longline fishing and shrimp trawling without Turtle Excluder Devices (TED) kills approximately 190,000 turtles every year;

Whereas: The illegal trade in turtle meat, particularly in Southern California, violates both United States and Mexican law and is contributing to the decline of Pacific sea turtle species;

Whereas: The World Trade Organization's rejection of the United States' requirement that all shrimp exported to the U.S. must be "turtle-safe" has perpetuated the needless slaughter of sea turtles world wide by removing the economic incentives for international shrimp trawlers to install TEDs in their nets;

Whereas: Consumer habits, government actions and human activities along the California coast affect the integrity of coastal ecosystems upon which sea turtles depend for life;

Therefore be it Resolved: That the California Coastal Commission hereby expresses its commitment to conserve these magnificent and long-lived creatures by ensuring to the maximum extent possible that California's coastal waters shall remain biologically productive and healthy enough to support viable populations of sea turtles;

Be it Further Resolved: That the California Coastal Commission urges the United States Fish and Wildlife Service to work closely with Mexican law enforcement and resource agencies to halt the illegal trade in endangered sea turtle meat and byproducts;

Be it Further Resolved: That the California Coastal Commission urges consumers and retailers to follow sustainable seafood guidelines such as those published by the Audubon Society and the Monterey Bay Aquarium. These guidelines identify seafood choices that are harvested in sustainable numbers and in a manner that does not result in turtle by-catch;

Be it Further Resolved: That the California Coastal Commission urges the public and responsible government agencies to reduce the discharge of trash into ocean waters and marine debris that contributes to sea turtle mortality through accidental ingestion and entrapment;

Be it Further Resolved: That the California Coastal Commission commends and encourages lawful efforts by non-governmental organizations to challenge the World Trade Organization's interpretation of the international TED policies that are contributing to global declines in sea turtle populations.

Sara Wan, Chair
California Coastal Commission

Date

Dave Potter, Vice-Chair
California Coastal Commission

Date

STATE CAPITOL
P.O. BOX 942849
SACRAMENTO, CA 94249-0006
(916) 319-2006
FAX (916) 319-2106

DISTRICT OFFICE
3501 CIVIC CENTER DRIVE , SUITE 412
SAN RAFAEL, CA 94903
(415) 479-4920
FAX (415) 479-2123

Assembly
California Legislature

JARED HUFFMAN
ASSEMBLYMEMBER, SIXTH DISTRICT

COMMITTEES
CHAIR, ENVIRONMENTAL
SAFETY AND TOXIC MATERIALS
APPROPRIATIONS
UTILITIES AND COMMERCE
WATER, PARKS AND WILDLIFE

March 15, 2007

Dr. William Hogarth, Director
NOAA Fisheries Service
1315 East West Highway, SSMC3
Silver Spring, MD 20910

Mr. Donald McIsaac, Executive Director
Mr. Donald K. Hansen, Chair
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 200
Portland, OR 97220

Dear Dr. Hogarth, Mr. McIsaac, Mr. Hansen, and members of the Council:

As the state Assemblymember for the 6th District in California, my district includes hundreds of miles of coastline. It is my duty to safeguard and protect the natural beauty of the Northern California coastline and the creatures that live there. I'm writing to you today because I'm concerned about the proposed exempted fishing permits (EFP) to expand the swordfish/thresher shark drift-gillnet fishery into current time/area closures and to develop a pelagic swordfish longline fishery within the Exclusive Economic Zone (EEZ). I urge you to deny both EFPs.

There is ample evidence that issuing these EFPs could have a significant impact on the endangered leatherback sea turtle and other marine wildlife. As you know, the California coast has been closed to swordfish pelagic longlining for 30 years and portions of the California and Oregon coastline have been closed to drift-gillnet fishing since 2001 to protect leatherback sea turtles which seasonally inhabit the waters off our coast. The Pacific leatherback sea turtle population has already plummeted from 91,000 in 1980 to currently fewer than 2,300 annual nesting females. If you allow pelagic longline sword fishing and drift-gillnet fishing back into these protected areas, it will place the critically endangered leatherback at greater risk of extinction, and place other protected and endangered marine species at risk.

EXHIBIT NO. 8
APPLICATION NO.
1-06-07

Before we allow an animal species to be lost forever, I hope you'll continue to enforce the important conservation measures that have been hard-fought and are effective in protecting highly vulnerable species. The existing closures comply with domestic and international conservation mandates and are consistent with the best available scientific information. Both drift-gillnet fishing and longline sword fishing are highly indiscriminate fishing methods that have devastating effects on the marine environment. For this reason, the United Nations banned drift-gillnet fishing on the high seas in 1991, and California has had a ban on swordfish pelagic longlining for 30 years. We should do nothing less than honor these protections.

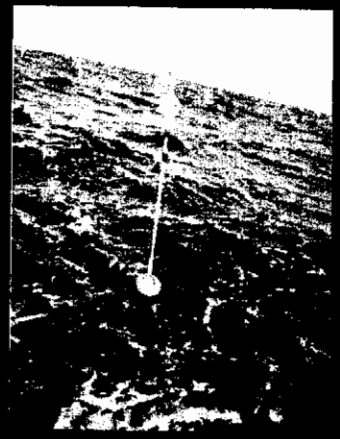
Please do your part to protect our coastline and deny these EFPs. Thank you for your consideration, and please do not hesitate to contact me with any questions.

Sincerely,

Jared Huffman, Assemblymember
6th District

JH/dmg

Typical Longline Gear



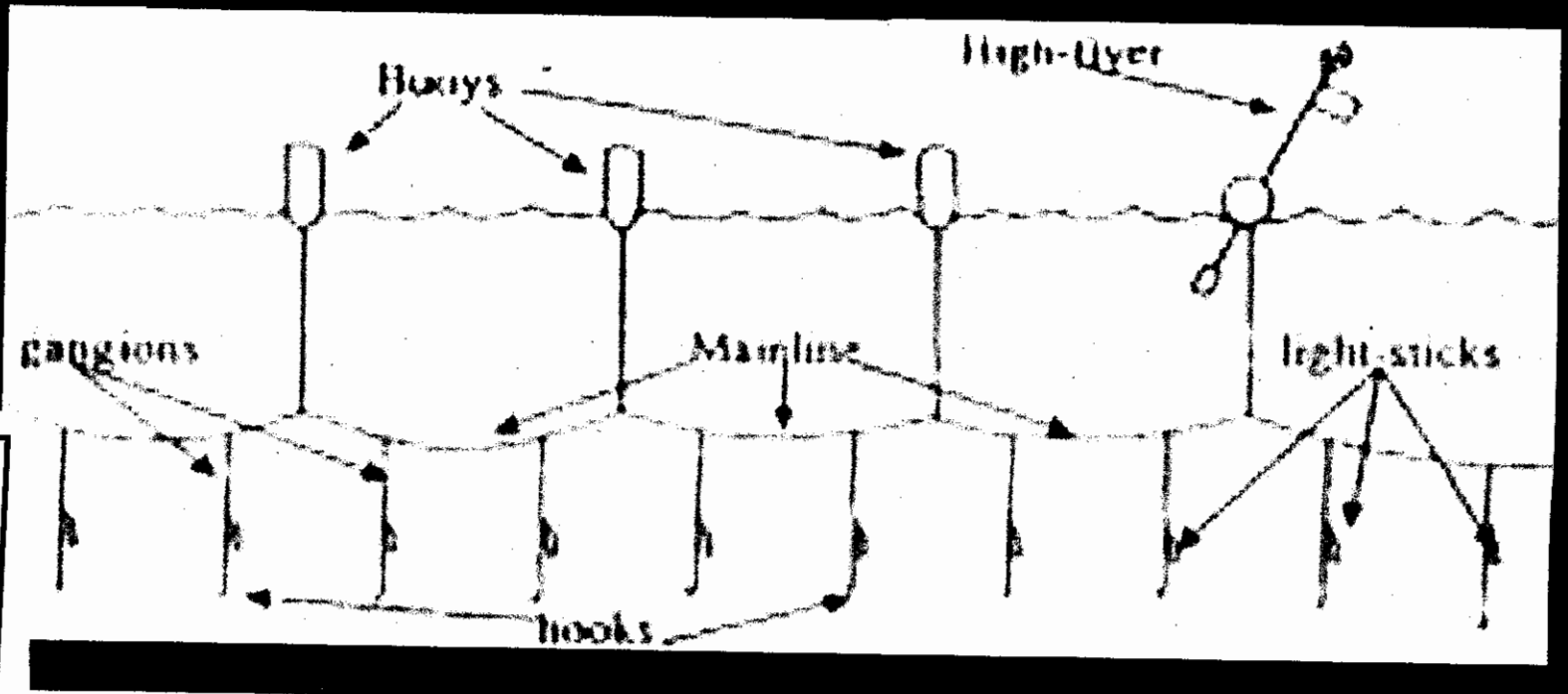
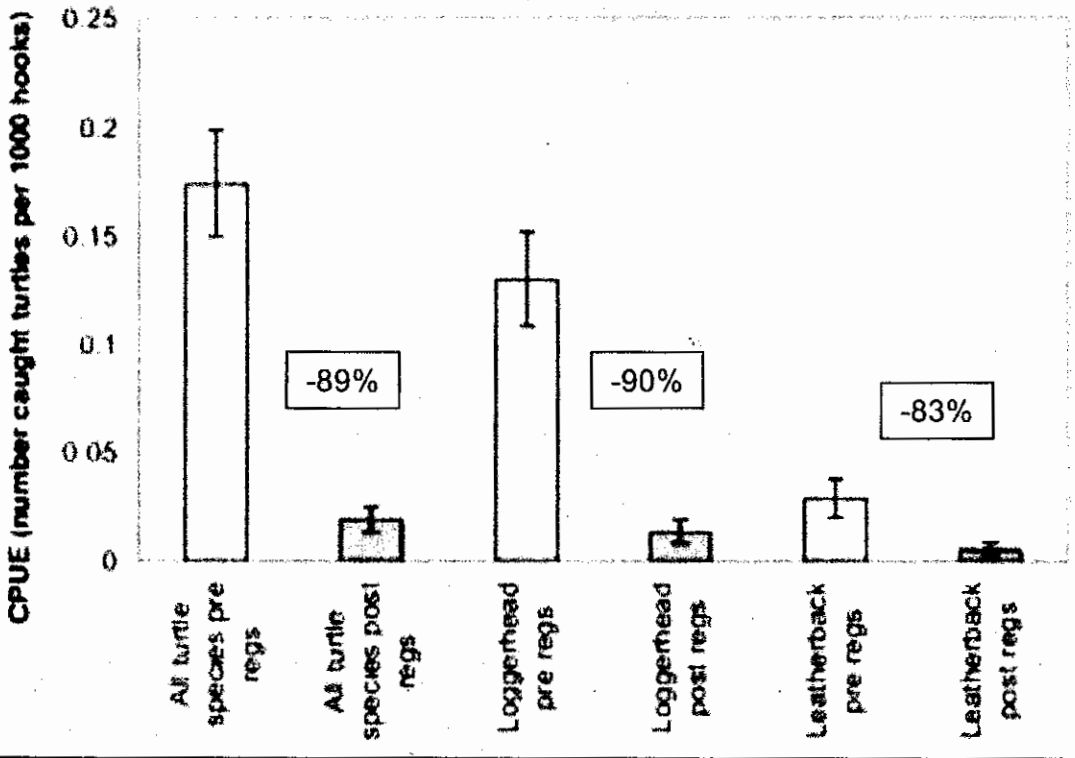


EXHIBIT NO. 9
APPLICATION NO.
CC-061-07

Sea Turtle Interactions (CPUE)
Pre- and Post- Hawaii Regulations



Gilman et al. 2006

EXHIBIT NO. 10
APPLICATION NO. CC-06107

CENTER *for* BIOLOGICAL DIVERSITY *Because life is good.*

Via Electronic Mail

July 25, 2007

Peter Douglas, Executive Director
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219
Ph:(415) 904-5200
Fax: (415) 904-5400

RE: CD-041-07 (National Marine Fisheries Service). Consistency Determination Regarding a Proposed Exempted Fishing Permit to allow Pelagic Longline Fishing in the Ocean Waters off California.

Dear Mr. Douglas and Members of the Commission:

Thank you for the opportunity to comment on the pending consistency determination, currently calendared for the August, 2007 meeting of the California Coastal Commission (Agenda Item F 4e: CD-041-07), regarding a proposal by the National Marine Fisheries Service/NOAA Fisheries ("NMFS") to issue an Exempted Fishing Permit ("EFP") which would allow a pelagic longline vessel to set longline gear targeting swordfish within the U.S. Exclusive Economic Zone ("EEZ") off California from September through December, 2007, notwithstanding the fact that existing state and federal law prohibit the setting of such gear in the California EEZ. In short, the Center for Biological Diversity, among many others,[1] believes that the proposed EFP, which would place the critically endangered Pacific leatherback sea turtle and other imperiled species at risk, must be rejected as inconsistent with the Marine Resource Policies of the California Coastal Management Program ("CCMP") and Chapter 3 of the California Coastal Act.

[1] The proposed EFP has been percolating through the approval process of the Pacific Fisheries Management Council ("PFMC") and NMFS for approximately two years. Over the course of that time, the overwhelming majority of individuals and organizations participating in the process have come out strongly in opposition to issuance of the permit. Comment letters in opposition to the permit were submitted to NMFS and/or the PFMC from over a dozen conservation organizations including the Sea Turtle Restoration Project, Oceana, Ocean Conservancy, Natural Resources Defense Council, Defenders of Wildlife, Humane Society, and numerous others. Recreational fishing organizations, including the Billfish Foundation, the Recreational Fishing Alliance, International Gamefish Association, and the International Big Fish Network also commented in opposition to the proposal. Several California public officials including State Senator Carole Migden, State Assemblymember Jared Huffman, United States Senator Barbara Boxer and Congresswoman Lynn Woolsey wrote letters in opposition. Additional opposition came from independent seabird and sea turtle scientists as well as over 5000 members of the public. Finally, as longline fishing in California state waters, as well as landing longline-caught fish from within the EEZ, is prohibited under state law, the California representative from the Department of Fish and Game who sits on the PFMC has also consistently voted against the EFP. Other than the permit applicant and NMFS, there is a near consensus that the EFP should not be issued.

EXHIBIT NO. 11
APPLICATION NO.
CC-061-07

The specifics of the EFP, the regulatory context in which it is proposed, and the significant adverse consequences to the various species likely to be of hooked, entangled and killed pursuant to it are described in detail in our recent letter to NMFS commenting on the proposed EFP. That letter, which is appended to the end this letter, also describes the numerous legal short-comings of the EFP under various federal laws. As such, in this letter we will limit our discussion to the EFP as it relates to the relevant provisions of the CCMP and Coastal Act.

The proposed EFP is inconsistent with, at a minimum, Sections 30230, 30240, 30220 and 30234.5 of the Coastal Act. Section 30230 of the Coastal Act provides:

> Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Similarly, Section 30240 provides:

> (a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas.

Numerous marine resources and "species of special biological or economic significance" and "environmentally sensitive habitat values" protected by the Coastal Act are threatened by the proposed permit. These include Endangered Species Act ("ESA") protected marine mammals, sea turtles and seabirds, and rare and declining fish such as sharks and billfish.

While potential impacts to each these species are significant, of greatest concern to our organization is the Pacific leatherback sea turtle and its foraging grounds off California. As described in our attached letter to NMFS, Pacific leatherbacks have declined from over 100,000 nesting females in the 1980s to fewer that 5000 today. The primary cause of the Pacific leatherback decline, and the greatest threat to the species' continued existence, is entanglement and drowning in longline fishing gear. The IUCN considers leatherback sea turtles to be Critically Endangered, the most imperiled category for any species. The species is listed as Endangered under the federal ESA.

While leatherback sea turtles do not nest in California, the waters off the central and northern California coasts are critically important foraging grounds for the species. Each year, from late summer through fall, an average of over one hundred female leatherback turtles journey from nesting beaches in Indonesia to feed on jellyfish and related species in the waters off California. Satellite-tagged turtles have been tracked to the Jamursba-Medi population in Indonesia, which is considered the most important remaining population of leatherbacks in the Pacific. Recognizing the importance of California waters to leatherbacks, in 2001 NMFS designated the Pacific Leatherback Conservation Area and banned drift-gillnet fishing in the area when turtles were likely to occupy it. See 66 Fed. Reg 44549 (August 24, 2001). It is in this

same area, at the very time when leatherbacks are most likely to be in the region, that the proposed longline fishing under the EFP will occur.

Recently, NMFS scientists published a study reinforcing the importance of California waters to leatherbacks and the pressing need to protect the species within these waters.

> Ultimately, successful conservation efforts for leatherback turtles must include both nesting beach protection and mitigation of at-sea threats in foraging areas and along migratory routes. This study has demonstrated that waters off central California are a critical foraging area for one of the largest remaining Pacific nesting populations.[2]

The status of the Pacific leatherback is so precarious, that NMFS itself has repeatedly acknowledged that the death of a single adult turtle is significant and that any additional mortalities are not sustainable. See, e.g., 2000 Drift-Gillnet Biological Opinion at 94 and 100 ("any additional impacts to the western Pacific leatherback stocks are likely to maintain or exacerbate the decline in these populations" and "given the total mortality from other human activities, and assuming such mortality rates persist, additional leatherback mortalities caused by the CA/OR drift gillnet fishery are probably not sustainable."). Even if leatherback takes from the proposed EFP are "few" as NMFS wishfully projects, until and unless overall mortality to leatherbacks is drastically reduced, any impacts from the EFP are simply not sustainable.[3]

In December 2002, the California Coastal Commission approved a resolution "in Support of the Conservation of Endangered Sea Turtles." In the resolution the Commission noted the importance of sea turtles to California:

> Sea turtles are part of California's natural heritage and marine biodiversity, are valued and appreciated by people of all cultural backgrounds, and as such possess inestimable intrinsic value to current and future generations.

After noting the threat that longline fishing poses so sea turtles, the Commission asserted a commitment to conserve these imperiled species:

> That the California Coastal Commission hereby expresses its commitment to conserve these magnificent and long-lived creatures by ensuring to the maximum extent possible that California's coastal waters shall remain biologically productive and healthy enough to support viable populations of sea turtles.

Given their status as Endangered under the ESA, Critically Endangered under IUCN criteria, and their explicit recognition by the Commission in the 2002 resolution, there can be no

---

[2] Benson et al., *Abundance, Distribution, and Habitat of Leatherback Turtles (Dermochelys coriacea) off California, 1990-2003*, 105 Fish. Bull. 2007. [in press].

[3] The precise number of leatherback sea turtles that will be hooked, entangled, and/or killed by the EFP are difficult to discern as NMFS has not provided actual estimates in any of its readily available materials accompanying the EFP proposal. However, given fishing under the EFP will be in waters that NMFS itself acknowledges are critically important for the species, take is likely to be significantly higher than extrapolations based on Hawaiian or Atlantic longline fishing efforts.

reasonable dispute that Pacific leatherback sea turtles are a "species of special biological or economic significance" protected under Section 30230 of the Coastal Act, and that their foraging waters off California, as delineated by the Pacific Leatherback Conservation Area, constitute an area with "environmentally sensitive habitat values" protected under Sections 30240.

Moreover, given it is undisputed that fishing under the proposed longline EFP would likely hook and/or entangle leatherback sea turtles in the Pacific Leatherback Conservation Area, and that any such take is not sustainable, we do not see how the proposed EFP can be considered consistent with the marine resources policies of the CCMP and Coastal Act.

While the proposed EFP's impacts on the Pacific leatherback sea turtle standing alone provide more than sufficient grounds for determining the proposal is inconsistent with the policies of the Coastal Act, longline fishing under the EFP will also affect many more species than just the leatherback. For example, loggerhead sea turtles, which in the North Pacific are nearly as endangered as leatherbacks, also are at risk from longline fishing under the EFP. While leatherbacks are primarily found in central and northern California waters, loggerheads are more closely linked to the warmer waters of southern California. Nevertheless, loggerheads were frequently caught in the former high seas California-based longline fishery, and have also been taken by the drift-gillnet fishery outside of southern California waters. Impacts to this species could be significant as well.

Although the short-tailed albatross is the only currently ESA-listed seabird put at direct risk by the EFP, both the black-footed and Laysan albatross are expected to be caught and killed by fishing under the EFP. The black-footed albatross is listed as Endangered on the IUCN RedList and is the subject of a pending ESA listing petition by our organization. The Laysan albatross is considered Vulnerable by the IUCN. Each of these species is a "species of special biological or economic significance" protected under Section 30230 of the Coastal Act, and their foraging waters off California constitute an area with "environmentally sensitive habitat values" protected under Sections 30240.[4]

The short-finned pilot whale is another special status species likely to be harmed by the EFP. Under the Marine Mammal Protection Act, sustainable levels of injury and mortality are defined in terms of Potential Biological Removal ("PBR"). In short, annual take above PBR is biologically unsustainable (not to mention unlawful). PBR for the short-finned pilot whale is currently calculated at 0.98 animals per year.[5] Annual take from existing fisheries is estimated at 1, which already exceeds PBR. The proposal for additional take from the EFP would exceed sustainable levels and therefore violate not just the MMPA but also Section 30240 of the Coastal Act.[6]

---

[4] See, e.g. Hyrenbach et al. 2005. *Use of marine sanctuaries by far-ranging predators: commuting flights to the California Current System by breeding Hawaiian albatrosses*. Fish. Oceanogr. 15:2, 95–103.

[5] NMFS's most recent estimates of PBR and fisheries-related mortality are contained in the draft 2007 Stock Assessment Reports, available at http://www.nmfs.noaa.gov/pr/sars/draft.htm.

[6] In its recent *An Evaluation of the Proposed Shallow-Set Longline Exempted Fishing Permit's Consistency to the California Coast Act*, on page 14 NMFS states regarding marine mammal bycatch that "There have been no observed interactions in the Atlantic SSLL, where effort overlaps, spatially and temporally with marine mammals." This is simply not the case. The Atlantic longline fishery is currently estimated to kill an average of 86 short-finned

In addition to its unacceptable impacts on sea turtles, seabirds and marine mammals, the EFP will also adversely impact fish protected by the Coastal Act. Both Section 30220 and 30234 of the Act protect recreational fishing. Specifically, Section 30234.5 provides that:

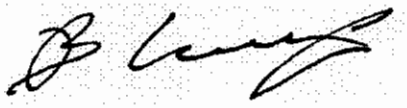
> The economic, commercial, and *recreational* importance of fishing activities shall be recognized and protected.

Longline fishing is a non-selective fishing method that catches and kills numerous non-target species. Many of these species, such as striped marlin, bluefin tuna and various sharks, are of importance to California's recreational fishing industry. The negative impact of longline fishing on recreational fishing resources is one of the primary reasons that longlining has to date been prohibited in California state waters and the EEZ, having been banned under state law for 30 years, and prohibited under the federal regulations adopting the 2004 Fishery Management Plan for Highly Migratory Species. See 67 Fed. Reg. 18444 (April 7, 2004). Recreational fishing interests have consistently opposed the proposed EFP. See footnote 1, supra. The proposed EFP therefore runs afoul of these provisions of the Coastal Act as well.[7]

In sum, the proposed EFP is inconsistent with multiple provisions of the Coastal Act. It is a poorly conceived end run around existing law and regulation that would provide no useable data and would put numerous protected species at unnecessary risk. The California Coastal Commission should reject it as inconsistent with the policies and principles of the Coastal Act.

Thank you for your concern.

Sincerely,



Brendan Cummings
Center for Biological Diversity
P.O. Box 549
Joshua Tree, CA 92252

---

pilot whales each year. See http://www.nmfs.noaa.gov/pr/sars/draft.htm. Of any marine mammal, the short-finned pilot whale is the species most likely to be harmed, both individually, and at a population level, from the EFP.

[7] Even though the EFP is for the purported purpose of stimulating a new commercial fishery, it is still inconsistent with the provisions Section 30234.5 addressing commercial fisheries, as it would compete with, and adversely impact, the sustainable zero-bycatch harpoon fishery for swordfish. Additionally, because some of the unavoidable bycatch species from the EFP are already overfished or undergoing overfishing (e.g. bigeye, albacore and yellowfin tuna), catch of the species under the EFP might result in additional restrictions on existing commercial fisheries targeting these species.

CENTER for BIOLOGICAL DIVERSITY Because life is good.

Via Facsimile and Electronic Mail

July 13, 2007

Dr. William Hogarth
Assistant Administrator for Fisheries
National Oceanographic and Atmospheric Administration
1315 East-West Highway
Silver Springs, MD 20910
E-mail: bill.hogarth@noaa.gov

Rodney R. McInnis, Regional
Administrator, Southwest Region,
NMFS, 501 West Ocean Blvd., Suite
4200, Long Beach, CA 90802–4213.
Fax: (562) 980–4047
E-mail: LonglineEFP.SWR@noaa.gov

RE: RIN 0648–XA73: Proposed Exempted Fishing Permit to allow Pelagic Longline Fishing in the EEZ off California and Oregon.

Dear Dr. Hogarth and Mr. McInnis:

The Center for Biological Diversity, the Sea Turtle Restoration Project/Turtle Island Restoration Network and Oceana submit these comments regarding the proposed issuance by the National Marine Fisheries Service/NOAA Fisheries ("NMFS") of an Exempted Fishing Permit ("EFP") which would allow a pelagic longline vessel to set longline gear for swordfish within the U.S. Exclusive Economic Zone ("EEZ") off California and Oregon from September through December, 2007, notwithstanding the fact that existing law and regulation prohibit the setting of such gear anywhere in the West Coast EEZ. See 72 Fed. Reg. 32618 (June 13, 2007). In short, our organizations believe the proposed EFP must be denied. Issuing the EFP would be wholly incompatible with the Highly Migratory Species Fishery Management Plan ("HMS FMP") governing such fisheries as well as with the purposes of the Pacific Leatherback Conservation Area, which was incorporated into the HMS FMP to provide additional protections for critically endangered Pacific leatherback sea turtles. In addition to being utterly misguided as a matter of policy and science, issuance of the EFP would be illegal, as doing so would violate the Endangered Species Act ("ESA")(16 U.S.C. § 1531 et seq.), Marine Mammal Protection Act ("MMPA")(16 U.S.C. § 1361 et seq.), Migratory Bird Treaty Act ("MBTA")(16 U.S.C. § 703 et seq.), National Marine Sanctuaries Act (16 U.S.C. § 1431 et seq.), Magnuson-Stevens Fishery Conservation and Management Act ("MSA") (16 U.S.C. § 1801 et seq.), Coastal Zone

Management Act ("CZMA") (16 U.S.C. § 1451 et seq.), and the National Environmental Policy Act ("NEPA") (42 U.S.C. § 4321 et seq.).

THE 2007 LONGLINE EFP MUST BE DENIED

I. BACKGROUND

A. The Pacific Leatherback Sea Turtle

The leatherback sea turtle (*Dermochelys coriacea*) is the largest of the sea turtles, weighing between 700 and 2,000 pounds as an adult, and ranging from 4 to 8 feet in length. While other sea turtles have hard shells, the leatherback has a rubbery shell. Sea turtles have swum the world's oceans for over 100 million years. Having outlived the dinosaurs, the leatherback is, in effect, the last survivor of the age of giant reptiles.

The species feeds primarily on jellyfish, and is capable of diving to depths greater than 3,000 feet. In the eastern Pacific the leatherback sea turtle nests along beaches in Mexico and Costa Rica. The species also nests in the western Pacific in New Guinea, Indonesia, Malaysia, the Solomon Islands, and Australia. Leatherbacks that visit the west coast of the United States are from the western Pacific population and have been tracked back to nesting beaches in Indonesia and New Guinea.

Numbering over 100,000 nesting females as recently as the 1980s, the species is in rapid decline with current estimated of only 2-5000 nesting females.[1] In 2000, an article published in the preeminent scientific journal *Nature*, predicted extinction of leatherbacks in the Pacific within decades.[2] The primary cause of the leatherback decline, and the greatest threat to its continued existence, is entanglement and drowning in longline fishing gear.[3] The leatherback sea turtle is listed as endangered under the ESA throughout its range.

Notwithstanding the species' perilous condition, Pacific leatherbacks continue to be caught and killed in U.S. fisheries. However, as a result of advocacy and litigation, leatherback mortality has been essentially eliminated from California-based fisheries.[4] Several of those efforts and subsequent NMFS decisions are relevant to the current longline EFP.

In March 2000, the Center for Biological Diversity and Turtle Island Restoration Network brought suit against NMFS for violations of the ESA and MMPA related to the Drift-Gillnet ("DGN") Fishery. In response, on October 23, 2000, NMFS issued a new Biological Opinion for the DGN Fishery. NMFS also at this point issued a permit under Section 101 of the

---

[1] Lewison, R. *et al.*, 2004. Quantifying the effects of fisheries on threatened species: the impact of pelagic longlines on loggerhead and leatherback sea turtles, *Ecology Letters* 7:221.

[2] Spotila et al. 2000. Pacific leatherback turtles face extinction. *Nature* 405:529-530.

[3] Id.

[4] Several California gillnet fisheries that have not been subject to observer coverage are suspected of interacting with leatherbacks, but such take has not been recently documented.

MMPA authorizing the DGN Fishery to take ESA-listed marine mammal species. 65 Fed. Reg. 64670. The new Biological Opinion concluded that the DGN Fishery would likely jeopardize both the loggerhead and leatherback sea turtles. With regard to the leatherback sea turtles, NMFS concluded that the projected take of the species from the DGN Fishery, would jeopardize the species because any further mortality to leatherbacks from the western Pacific nesting population equated to jeopardy:

> 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).

As required by Section 7(b) of the ESA, 16 U.S.C. § 1536(b), NMFS proposed a reasonable and prudent alternative that would avoid jeopardy to the leatherback. Id. The reasonable and prudent alternative required that a seasonal closure of the DGN Fishery be implemented north of Point Conception in the fall. Specifically, the Biological Opinion states:

> By August 1, 2001, NMFS, or the states of California and Oregon, must implement regulations to close an area to drift gillnets from Point Conception, California (34°27'N), north to 45°N, and west to 129°W, from August 15th to October 31st.

Id. at 102. While NMFS illegally delayed the implementation of this closure, on August 24, 2001, after receiving a notice of intent to sue from the Center for Biological Diversity and Turtle Island Restoration Network, NMFS finally implemented a modified version of the required closure through an interim final rule. 66 Fed. Reg 44549.[5]

The closure ultimately implemented by NMFS runs from August 15 to November 15 each year and extends from Point Sur (364°18.5'N) in California to 45°N on the Oregon Coast.

[5] The Biological Opinion also required a similar time/area closure to protect loggerhead sea turtles. NMFS failed to meet this requirement of the Opinion as well, and only implemented the closure over a year late following litigation by the Center for Biological Diversity and Turtle Island Restoration Network. See 67 Fed. Reg. 78388 (Dec. 24, 2002).

Since the leatherback closure went into effect, no leatherback sea turtles have been observed taken in the DGN Fishery.

In April 2004, NMFS finally promulgated regulations implementing the long overdue FMP for HMS fisheries on the West Coast. 69 Fed. Reg. 18453. Through these regulations, NMFS incorporated the existing leatherback and loggerhead closures into the FMP regulations.[6] See 50 C.F.R. § 660.713(c)(1). The February 4, 2004 Biological Opinion for the FMP reached its no jeopardy conclusion for the leatherback based on the premise that the leatherback closure would remain in effect.

The regulations implementing the HMS FMP refer to the leatherback closure area as the Pacific Leatherback Conservation Area. This area has been repeatedly recognized by scientists as one of the most important leatherback foraging areas in the Pacific. The significance of this area was summed up in a recent study.

> Ultimately, successful conservation efforts for leatherback turtles must include both nesting beach protection and mitigation of at-sea threats in foraging areas and along migratory routes. **This study has demonstrated that waters off central California are a critical foraging area for one of the largest remaining Pacific nesting populations.** Fortunately, threats such as coastal gillnet and longline fisheries that may incidentally catch leatherback turtles have largely been eliminated within our nearshore study area, although pelagic driftnet and longline fisheries remain along the migratory pathways to and from the coast (e.g., Spotila et al., 1996; Carretta et al., 2005). Continued efforts to identify and characterize Pacific foraging areas are critical for mitigating at-sea threats, monitoring population trends, and, ultimately, for the successful recovery of Pacific leatherback turtle populations.

Benson et al. 2007[7]. It is within this area that the EFP would authorize longline fishing.

B. Pelagic Longline Fishing off California

Pelagic longline fishing involves the use of a monofilament line that stretches from 20 to upwards of 60 miles from a vessel and is set to given depth depending on the target species. Attached to the longline are additional lines to which are attached weights and baited hooks. A single longline fishing vessel may deploy several thousand hooks at one time.

In addition to the target species, usually swordfish, tunas, and sharks, longline gear catches non-target and undersized fish, sharks, sea turtles, marine mammals, and seabirds. Sea turtles, marine mammals, and seabirds all get caught on the baited hooks of longlines, or are

---

[6] While the leatherback closure remained the same, the loggerhead closure was modified somewhat from the previous ESA regulation. The loggerhead closure was modified yet again on June 8, 2007. 72 Fed. Reg. 31756.

[7] Benson et al 2007, Abundance, distribution, and habitat of leatherback turtles (*Dermochelys coriacea*) off California, 1990-2003, Fishery Bulletin, Volume 105, 2007

entangled in the lines, and being air breathers, subsequently drown. Those that do not immediately drown often suffer serious injury, such as hook ingestion, condemning them to a slower death by starvation, internal bleeding, or infection.

Longlining for swordfish within the California EEZ has been prohibited since at least 1977 when the State of California promulgated regulations declaring that "Swordfish may be taken only with hand-held hook and line or handthrusted harpoon." 14.C.C.R. § 107.[8] Pelagic longlining more generally was prohibited by Fish and Game Code § 9028 which banned hook and line fishing gear longer than 900 feet. However, swordfish and other longline-caught fish caught outside the EEZ could be landed in California if a declaration indicating such intent was filed with the Department of Fish and Game prior to departure. F&G Code § 8113.

In light of this regulatory scheme effectively prohibiting longlining in the EEZ off California, but allowing the landing of longline-caught fish from outside the EEZ, the California-based longline fleet has historically been rather small, with most U.S. longline fishing in the Pacific being based out of Hawaii rather than California. From the 1980s to late 1990s, the California-based longline fleet fluctuated in size from about two to a couple dozen boats.

However, in November of 1999, the Court in Center for Marine Conservation, et al., v. National Marine Fisheries Service, et al., (Civ. No. 99-00152 DAE)(D. Hawaii) issued an injunction restricting longline fishing under the Hawaii FMP throughout much of the North Pacific. The injunction was designed to reduce sea turtle mortality, primarily to leatherbacks from shallow-set longlining targeting swordfish. In March 2001, NMFS issued an ESA Section 7 Biological Opinion on the Hawaii FMP and concluded that continued operation of the FMP would jeopardize the continued existence of the leatherback, loggerhead, and green sea turtles. NMFS subsequently modified the Hawaii FMP, virtually eliminating for several years the Hawaii-based longline fishery for swordfish.

Subsequent to the Hawaii injunction and modification of the Hawaii FMP, numerous boats from Hawaii relocated to California, with up to 48 vessels operating out of California in 2000. Due to the fact that West Coast HMS fisheries were not subject to an FMP at that time, these vessels operated subject to virtually no federal regulation. Nevertheless, the California-based longline fishery caught and killed numerous federally protected species.

From August 1995 through 1999, California-based longline fishing vessels self-reported numerous interactions with sea turtles. Thirty-five leatherback, twenty-one loggerhead, nineteen olive ridley, and twelve green sea turtles were reported caught during this period. The self-reports of bycatch from this period also report the take of over one hundred albatross, a Hawaiian monk seal and an unidentified sea lion. From October 2001 to March 2003 NMFS placed limited observers on some of the California-based longline fishing vessels. These observers, monitoring only a fraction of the fishing effort, recorded entanglements of 23 loggerhead sea

[8] A separate provision of the Fish and Game Code, Section 8561, allowed fishing for swordfish with drift-gillnet gear, subject to numerous restrictions. These restrictions were largely carried over into federal regulations with the adoption of the HMS FMP in 2004.

turtles, 2 leatherback sea turtles, and 1 olive ridley sea turtle. In August 2003, NMFS predicted (based on prior observer data and assuming that fishing effort remained the same as in 2002) that the California-based longline fishery was entangling 174 loggerhead sea turtles (47 killed) and 53 leatherback sea turtles (14 killed) each year.

In light of the high level of sea turtle take occurring in the California-based longline fishery, and given that NMFS was unwilling to enforce the ESA while the Council was years behind schedule in finalizing the HMS FMP and bringing the fishery under federal management, in March 2000, the Center for Biological Diversity and Turtle Island Restoration Network filed suit under the ESA seeking to force NMFS to engage in Section 7 consultation on permits issued to California-based longline fishers pursuant to the High Seas Fishing Compliance Act of 1995 ("HSFCA")(16 U.S.C.§ 5501 *et seq.*).

In August 2003, the Ninth Circuit ruled that NMFS was violating the ESA with regards to its management of the California-based longline fishery. Turtle Island Restoration Network, et al., v National Marine Fisheries Service, 340 F.3d 969 (9th Cir. 2003).

Shortly after the court ruled that the California-based longline fishery was operating in violation of the ESA, the Council and NMFS finally issued the long-overdue HMS FMP and accompanying regulations. 69 Fed. Reg. 18444 (April 7, 2004). The FMP brought the California-based longline fishery under federal management, re-affirmed the long-standing state prohibition against longlining in the EEZ, and included a provision prohibiting shallow-set longlining west of 150° W long. 50 C.F.R. § 660.712(2). However, in its biological opinion for the FMP, NMFS concluded that allowing shallow-set longlining east of 150° W long. would jeopardize the loggerhead sea turtle. NMFS therefore issued a reasonable and prudent alternative ("RPA") requiring the prohibition of shallow-set longlining east of 150° W long. NMFS instituted this closure pursuant to its authorities under the ESA. 69 Fed. Reg. 11540 (March 11, 2004); 50 C.F.R. § 223.206(d)(9).

Following the FMP and corresponding ESA regulations, most of the California-based longline fishers relocated to Hawaii where the formerly closed swordfish fishery was set to reopen with new management restrictions. A few vessels continued to fish intermittently from California using deep-set longlines to catch tuna outside the EEZ. However, deep-set longlining for tuna (either by California or Hawaii-based vessels) has been seasonally suspended east of 150° W long. to address overfishing of bigeye tuna. 71 Fed. Reg. 38297 (July 6, 2006). Similarly, the Hawaii-based swordfish longline fishery exceeded the authorized take of ESA-listed sea turtles and was closed for the remainder of 2006. 71 Fed. Reg. 14416 (March 22, 2006).[9]

[9] While the closures of the deep-set longline fishery east of 150° W long., as well as of the Hawaii shallow-set longline fishery are both theoretically temporary measures, given the status of bigeye tuna and the dubious success of the mitigation measures for the Hawaiian fishery, we do not believe that the reopening of either of these fisheries is lawful.

C. The Proposed 2007 Longline Exempted Fishing Permit

On June 13, 2007 NMFS published in the Federal Register a notice regarding potential issuance of an EFP that would allow pelagic longline fishing within the EEZ off California and Oregon for the first time since the widespread adoption of this gear type.

> The EFP would exempt a single vessel from following the gear and fishing restrictions at 50 CFR 660.712(a) implementing the HMS FMP that prohibit owners and operators of vessels registered for use of longline gear from using longline gear to fish for or target HMS within the U.S. EEZ.

72 Fed. Reg. 32618.

According to the EFP application, the "purpose of this EFP is to conduct a small scale (1 vessel) pelagic longline fishery within the West Coast EEZ to determine if longline gear is an economically viable HMS harvest substitute for drift gillnet (DGN) gear." EFP App. at 1. The application describes the scale, location and duration of the EFP as follows.

> EFP fishing will not occur within 30 miles of the coastline, or within the southern California bight. Each trip will consist of about 14 sets, approximately 14,000 hooks per trip (1,000 hooks per set x 14 sets). This EFP proposes 4 trips (56,000 hooks) during the period September thru December.

EFP App. at 6. However, the notice by NMFS states that rather than a limit of 1000 hooks per set, "no more than 1,200 hooks can be deployed per set." 72 Fed. Reg. 32618. This equates to a total of 67,200 hooks that could be deployed under the EFP.

With regard to protected species bycatch, for most species the proposed EFP either defers the setting of caps to a later date or sets no caps at all.

> The Council recommended that the applicant be subject to a interaction cap of one short-finned pilot whale and 12 striped marlin, and not fish off the state of Washington. The Council also recommended that the fishery be managed through limits on the amount of incidental take of protected species that may be exposed to and adversely affected by this action that are to be established based upon section 7 consultations under the Endangered Species Act by NMFS for marine mammals and sea turtles and by the U.S. Fish and Wildlife Service for seabirds. If any one of the limits set by these consultations is reached by the fishery authorized by the EFP, the permit would be immediately revoked.

72 Fed. Reg. 32618. Take limits for leatherback and loggerhead sea turtles, humpback, sperm and fin whales, Southern Resident killer whales, Steller sea lions, Guadalupe fur seals, and short-tailed albatross will presumably be set prior to the issuance of the EFP as a result of ESA

consultations.[10] However, there are apparently no take limits for numerous species likely to be exposed to the fishery such as the black-footed albatross, which has been petitioned for and is undergoing review for ESA-listing; white sharks, which are protected by state law; bigeye, albacore and yellowfin tuna, all of which are subject to overfishing; long-beaked common dolphins, which are a strategic stock under the MMPA because take exceeds sustainable levels; northern fur seals, which are listed as depleted under the MMPA; and northern right whale dolphins which are subject to take from existing fisheries at levels above the MMPA's zero mortality rate goal ("ZMRG"). Take of any of these species would exceed important legal and/or biological thresholds.

Despite the scale of effort to be authorized under the EFP, there is no experimental design to meet the EFP's stated purpose. The permitee will simply be allowed to fish with otherwise prohibited gear in an otherwise closed area until he either completes the authorized number of sets, decides based on unstated criteria that such fishing is not "economically viable", or exceeds largely unspecified caps for protected species interactions. In short, the proposed EFP will place critically endangered leatherback sea turtles at needless risk, add additional fishing pressure on species already subject to overfishing, unlawfully take species protected by the ESA, MMPA, MBTA, and state law, yet provide no meaningful data. As detailed below, issuing the proposed EFP in not only nonsensical, it is patently illegal.

II. Violations of Law

Issuance of the proposed longline EFP by NMFS would violate, at a minimum, seven federal laws. Additionally, we believe that engaging in the fishing activities described in the EFP application, absent lawfully issued permits (some of which we understand neither the applicant has requested nor NMFS intends to issue or seek) would likely subject the applicant to civil and criminal liability for knowing violations of federal law. Each of these violations is outlined briefly below. Given these significant and largely insurmountable legal problems with the proposed EFP, it must be denied.

A. Violations of the ESA

Longline fisheries are known to hook, entangle, and kill ESA-listed sea turtles, marine mammals, and seabirds. As such, issuance of the proposed Longline EFP by NMFS would violate Sections 2, 4, 7, 9 and 10 of the ESA. Additionally, fishing under the EFP by the applicant would violate Section 9 of the ESA, subjecting the applicant to civil and criminal liability under the statute.

While our most immediate concerns regarding ESA-listed species are related to the critically endangered leatherback sea turtle, issuance of or and fishing under the EFP would also compromise the recovery of numerous other listed species, including, but not limited to, the

[10] As described infra, we do not believe that any take of ESA-listed species can be authorized for this EFP. Moreover, the deferment of setting such caps until after the public process for commenting on the EFP violates both the MSA and NEPA.

loggerhead, green and olive ridley sea turtles, humpback, sperm, blue, sei, fin and North Pacific right whales, Southern Resident killer whales, Steller sea lions, Guadalupe fur seals, and short-tailed albatross.

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." 16 U.S.C. § 1531(c)(1). 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." 16 U.S.C. § 1532(3). Similarly, Section 7(a)(1) of the ESA directs that the Secretary review "...other programs administered by him and utilize such programs in furtherance of the purposes of the Act." 16 U.S.C. § 1536(a)(1).

Section 4 of the ESA calls for the preparation of a recovery plan for every species listed under the Act. Recovery plans establish recovery goals and objectives, describe site-specific management actions recommended to achieve those goals, and estimate the time and cost required for recovery. 16 U.S.C. §1533(f). Section 4(f) specifically requires that NMFS both "...develop and implement plans (hereinafter...referred to as 'recovery plans') for the conservation and survival of endangered species and threatened species..." 16 U.S.C. § 1533(f) (emphasis added). Drafting a recovery plan is not sufficient to comply with this statutory mandate. Consistent with the intent that recovery plans actually be implemented, Congress required that recovery plans "...incorporate...(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species." 16 U.S.C. § 1533(f)(1)(B)(i).

In 1998, NMFS approved a final recovery plan for the Pacific leatherback.[11] In the recovery plan NMFS acknowledges both the importance of the west coast to leatherbacks and the threat that longline and other fisheries pose to the species.

> It is clear that incidental catch poses a very great threat in pelagic foraging and transit areas and the coastal feeding grounds and migratory corridors that probably exist along the west coast of the United States and south into Mexico.

Recovery Plan at 24. In terms of required actions to protect the leatherback, NMFS acknowledges the need for closed areas such as the Pacific Leatherback Conservation Area and HMS FMP's ban on pelagic longline fishing within the EEZ.

> Finally, closing areas or seasons when fisheries and turtle interactions are highest can limit impacts to turtle populations.

[11] NMFS and FWS. 1998. Recovery Plan for U.S. Pacific Populations of the Leatherback Turtle (*Dermochelys coriacea*).

Recovery Plan at 37.

Issuing the Longline EFP and allowing such gear into critical leatherback foraging areas would violate the recommendation of the recovery plan, as well as NMFS's affirmative conservation mandates under the ESA. As such, doing so would violate Sections 2(c), 4(f) and 7(a)(1) of the ESA.[12]

Section 7(a)(2) of the ESA requires federal agencies to "insure 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 . . . ." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). 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. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Where, as here, NMFS is both the acting agency and the delegated wildlife agency for purposes of the listed species in question, different branches of NMFS must undertake internal consultation with each other. For species under the jurisdiction of the U.S. Fish and Wildlife Service, such as the short-tailed albatross, NMFS must also consult with that agency as well.

At the completion of consultation NMFS issues a Biological Opinion that determines if the agency action is likely to jeopardize the species. If so the opinion must specify a Reasonable and Prudent Alternative ("RPA") that will avoid jeopardy and allow the agency to proceed with the action. 16 U.S.C. § 1536(b).

As described above, in the 2000 Biological Opinion on the DGN Fishery, NMFS had the following to say about any further mortality to western Pacific leatherbacks:

> Therefore, any additional impacts to the western Pacific leatherback stocks are likely to maintain or exacerbate the decline in these populations....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.

DGN Biological Opinion at 94. (Emphasis added). NMFS then concluded that the estimated annual mortality of leatherbacks from the DGN Fishery would likely jeopardize the species. NMFS therefore proposed as an RPA a seasonal closure of the DGN 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 which 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. Since the October 2000 biological opinion for the DGN Fishery, the status of the leatherback in the Pacific has further declined.[13] We

[12] NMFS would also be violating these provisions with regard to all other listed species potentially affected by the EFP as well.

[13] Fortunately, the seasonal closure of portions of the DGN 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.

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. Therefore, any proposal, such as through the Longline EFP, to allow fishing with longline gear in areas occupied by the critically endangered leatherback sea turtle would violate Sections 7(a)(2) of the ESA.[14]

In addition to the Longline EFP's impacts on the leatherback sea turtle, fishing pursuant to such a permit also puts at risk the loggerhead sea turtle. NMFS instituted the closure of shallow-set longlining east of 150° W long. in part to protect the North Pacific loggerhead sea turtles. 69 Fed. Reg. 11540 (March 11, 2004); 50 C.F.R. § 223.206(d)(9). North Pacific loggerhead have also declined by upwards of 80% in recent decades, and are likely approaching the perilous state of the leatherback.[15]

The issuance of the Longline EFP would also likely violate the ESA based on impacts to the short-tailed albatross. Self-reports of seabird interactions with the former California-based longline fishery acknowledged take of 100 albatross of various species. Dozens of albatross were also observed taken in the handful of trips with actual observer coverage. It is therefore reasonable to assume that short-tailed albatross are likely to be entangled and killed if pelagic longline fishing is allowed off of California. Given the imperiled status of the short-tailed albatross, we do not believe than any additional take authorization for the species can be lawfully granted.

The ESA also prohibits any "person" from "taking" threatened and endangered species. 16 U.S.C.§ 1538. The definition of "take", found at 16 U.S.C.§ 1532(19), states,

> 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.

In a case dealing with fisheries, the Court ruled "the statute 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. We believe that...a 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" Strahan v. Coxe, et al, 127 F.3d 155 (1st Cir. 1997). As such, the take prohibition applies to NMFS as the authorizing agency, and the applicant as the person directly engaged in the activity likely to result in prohibited take.

Violations of Section 9 of the ESA are subject to civil penalties, forfeiture of fishing vessels, and criminal penalties of fines and imprisonment. 16 U.S.C.§ 1540(a), (b) and (e).

---

[14] While the leatherback currently has no critical habitat designated in the Pacific, it is clear that the area defined by the Pacific Leatherback Conservation Area meets the statutory definition of critical habitat. We believe such area must promptly be so designated and protected as such under the ESA.

[15] On July 12, 2007, the Center for Biological Diversity and Turtle Island Restoration Network petitioned NMFS to uplist the North Pacific loggerheads from threatened to endangered status.
See http://www.biologicaldiversity.org/swcbd/press/loggerhead-07-12-2007.html

It is our understanding that NMFS is engaging in consultation pursuant to Section 7 of the ESA regarding issuance of the EFP. As such, at the conclusion of consultation, take will likely be authorized pursuant to Section 7(o) of the ESA for listed sea turtles and seabirds.[16] However, take of ESA-listed marine mammals can only be issued in conjunction with take authorization under the MMPA. See discussion in MMPA section infra. It is our understanding that NMFS and the applicant have knowingly and willfully chosen to forgo seeking any such take authorization for ESA-listed marine mammals. As such, if any ESA-listed marine mammal interacts with the fishery, both NMFS and the applicant will have violated Section 9 of the ESA and be subject to the civil and criminal penalties thereunder. See also 16 U.S.C.§ 1538(g) ("It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offence defined in this section.").

The Longline EFP directly puts at risk several species of ESA-listed marine mammals. Both sperm whales and humpback whales have observed entangled in identical fishing gear used by Hawaii-based pelagic longlining vessels. Killer whales are likewise known to interact with and become entangled in longline fishing gear. The Southern Resident population of killer whales (*Orcinus orca*) was recently listed as endangered, and is known to seasonally occur in the range of the proposed EFP. Additionally, Steller sea lions and Guadalupe fur seals also may overlap with the proposed EFP and are subject to entanglement. Given the known and frequent interactions of longline fisheries with humpback whales, sperms whales, and killer whales we do not see why NMFS and the applicant would chose this reckless and illegal path.

Additionally, the EFP is, by its own admission, for the purposes of determining "environmental effects, including the potential impacts to protected species." 72 Fed. Reg. 32618. As such, any take occurring from the EFP cannot be considered "incidental", and authorized under Section 7(o) of the statute, but is instead part of the purpose of the action and could therefore only be authorized, if at all, under Section 10(a) of the ESA. 16 U.S.C. § 1539(a). This is not to say that the proposed EFP meets any rational definition of good science (see MSA discussion infra), or complies with the issuance criteria of Section 10(a), rather, it is to point out that NMFS and the applicant cannot carry out an action for the claimed purposes of "data gathering" without complying with the provisions of the ESA specifically set up to address such efforts.

Finally, given the closure of shallow-set longlining east of 150° W long. was promulgated pursuant to NMFS's authorities under the ESA, rather than under the MSA, we do not see how an EFP issued under the MSA could lawfully be issued in direct contravention of ESA regulations prohibiting such fishing. See 69 Fed. Reg. 11540 (March 11, 2004); 50 C.F.R. § 223.206(d)(9). If the permit applicant for the EFP wishes to fish in contravention of ESA regulations, the applicant must also apply for a permit under Section 10 of the ESA. As mentioned above, our understanding is that the applicant has not done so. Moreover, we do not

[16] While we expect NMFS and FWS to issue such take authorization, we do not believe that the underlying basis for such authorization is lawful.

see how the standards of Section 10 could possibly be met by the proposed activities. The EFP must be rejected as inconsistent with the intent and letter of the ESA.

B. Violations of the MMPA

The Longline EFP cannot be issued without also violating the MMPA. Fishing under the proposed EFP would hook, entangle and kill ESA-listed marine mammals as well as numerous non-listed marine mammal species. It must therefore be operated in a manner consistent with the procedural and substantive mandates of the ESA and MMPA or not at all. Take of such species can be authorized via an incidental take statement issued pursuant to Section 7 of the ESA only if such take is also authorized pursuant to Section 101 of the MMPA. See 16 U.S.C. §§ 1371(a)(5)(E) and 1536(b)(4)(C). As discussed above, it is our understanding that no take authorization for ESA-listed marine mammals is being sought, even though such take is highly likely to occur. Issuance of the EFP, and fishing pursing to it, would therefore violate the MMPA. As with the ESA, engaging in a knowing violation of the MMPA caries substantial civil and criminal penalties. See 16 U.S.C. §§ 1375 (fines and imprisonment) and 1376 (forfeiture of vessels).

In short, the decision by the applicant and NMFS to forgo permitting under the MMPA constitutes a knowing violation of the statute. Absent such a permit, the EFP cannot lawfully be issued or implemented.[17]

The issuance of the proposed EFP would also violate 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 U.S.C. § 1387(b)(1). NMFS has defined ZMRG by regulation as ten percent of Potential Biological Removal ("PBR"). The likely take of marine mammal species under the EFP would exceed this threshold.

Both the Hawaii and Atlantic pelagic longline fisheries are categorized as Category 1 fisheries on the 2007 List of Fisheries, while the remnant California-based deep-set longline fishery is listed as a Category 2 fishery. Only the Atlantic longline fishery has a take reduction team to address marine mammal bycatch. It would be unwise and unlawful to allow an additional marine-mammal killing fishery to operate without a take reduction team prior to at least initiating the take reduction process for these other two longline fisheries. Additionally, a Category 1 or 2 fishery is by definition taking marine mammals at levels above ZMRG. Given the statutory deadline for reaching ZMRG has already passed, we do not believe that issuing an EFP that would result in take of stocks of marine mammals where mortality and serious injury are already above ZMRG is consistent with the ZMRG mandate of the MMPA.

[17] The decision by NMFS and the applicant to willfully disregard this provision of the MMPA is presumably due to the fact that it is highly unlikely that the necessary "negligible impact" finding prerequisite to such a permit can lawfully be made for several of the species most likely to interact with pelagic longline gear deployed pursuant to the EFP.

The most likely species of marine mammals to be taken by fishing pursuant to the Longline EFP are Risso's dolphins and short-finned pilot whales. Pilot whales are the most frequent marine mammal species encountered by the Atlantic longline fishery. There is no reason to believe that they would not also be taken by a similar fishery off California. Take of pilot whales from the DGN Fishery is already above PBR, and is of course well over ZMRG. In the draft 2007 Pacific Stock Assessment Reports, PBR for the short-finned pilot whale is 0.98. The ZMRG level for pilot whales would therefore equate to fewer than one animal taken every ten years. Take of this species from existing fisheries already exceeds PBR, yet the proposed EFP would authorize over ten years worth of take in a single fishing season by a single vessel. This is simply inconsistent with the MMPA. Similarly, take of long-beaked common dolphin is well over PBR, yet the EFP proposes no limits on bycatch of the species. Take of sperm, humpback and fin whales, as well as of northern right whale dolphins also remains well above 10% of PBR, thereby exceeding the definition of ZMRG. NMFS cannot lawfully authorize new and additional take of marine mammal for which take levels already exceed the PBR and ZMRG thresholds of the MMPA.

Rather than issue an EFP that authorizes additional take over lawful levels, NMFS should instead take action under its authorities under the MMPA to reduce marine mammal take from existing fisheries. It has not done so, and therefore cannot issue the EFP.

C. Violations of the MBTA

Issuance of the EFP, and fishing pursuant to it, would violate the MBTA. 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 longline fisheries in the North Pacific are albatrosses and fulmars. These are included in the list of migratory birds protected by the MBTA. See 50 C.F.R. § 10.13 (list of protected migratory birds).

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." The MBTA 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. Neither NMFS nor the applicant have obtained, much less applied for such a permit authorizing any take for longline fishing pursuant to the EFP.

NMFS cannot dispute that the longline fishing kills birds protected under the MBTA. As previously mentioned, self-reports of seabird interactions with the former California-based longline fishery acknowledged take of 100 albatross of various species. Dozens of albatross were also observed taken in the handful of trips with actual observer coverage. We believe that until such take is permitted, NMFS cannot lawfully allow any fishing, including that which would be authorized by the EFP, which is likely to result in the deaths of members of such species.[18]

While the short-tailed albatross is ESA-listed and take can be authorized pursuant to that statute, of equal or greater concern here is the black-footed albatross. This species has been listed as Endangered by the IUCN and is under review for ESA listing. It is regularly seen off the California coast and is almost certain to be caught and killed by longline fishing pursuant to the EFP. Absent a permit under the MBTA authorizing the take of the black-footed albatross and other migratory birds, the EFP cannot lawfully be issued.

D. Violations of MSA

Issuance of the proposed EFP would also violate the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") and its implementing regulations. NMFS has promulgated regulations governing the issuance of EFPs. See 50 C.F.R. § 660.745.[19] Under these regulations, NMFS may authorize fishing that would otherwise be prohibited by an FMP only in very limited circumstances. Specifically, NMFS may only authorize such fishing for "limited testing, public display, data collection, exploratory, health and safety, environmental cleanup, and/or hazard removal purposes." 50 C.F.R. § 660.745(b).

---

[18] 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.

[19] Under the 2006 amendments to the MSA, NMFS was required to promulgate new regulations governing the issuance of EFPs. NMFS has not done so within the timeframes mandated by the statute. Until and unless NMFS issues new EFP regulations to comply with this statutory mandate, we do not believe any EFP can be lawfully issued. Nevertheless, the proposed EFP violates existing regulations as well.

The proposed EFP is requested to "determine if longline gear is an economically viable HMS harvest substitute for drift gillnet (DGN) gear." EFP App. at 1. Additionally, the EFP is for the purposes of determining "environmental effects, including the potential impacts to protected species." 72 Fed. Reg. 32618. This does not meet the regulatory criteria for issuance as it does not fall within the categories enumerated at 50 C.F.R. § 660.745.

Even if the stated purposes of the EFP could be considered valid reasons for issuance of an EFP, the EFP as proposed simply is not designed to meet these purposed. The Scientific and Statistical Committee of the PFMC explicitly acknowledged as much in its review of the EFP

> The SSC notes that the proposed EFP pertains to operation of a single vessel which would be fishing with longline gear in an area without corresponding drift gillnet fishing for comparison of finfish and prohibited species bycatch between the two gear types. Few constraints are imposed to limit where the vessel will operate, and no experimental design is proposed to test the hypothesis that longline gear would offer an improvement in bycatch rates over drift gillnet fishing gear. Average bycatch values are inadequate to evaluate bycatch impacts. Bycatch events are typically rare and spatially correlated. As such, the problem is one of estimating the statistical probability of a rare event (i.e. a longline set with large bycatch). **Data collected from a single vessel operating under an EFP would not be adequate for this purpose**.

SSC April 2007 Report (emphasis added).

NMFS's regulations for the issuance of an EFP also require the agency to publish in the Federal Register notice of receipt of an EFP application, a brief description of the proposal, and the intent of NMFS to issue the EFP. 50 C.F.R. § 660.745(b)(3). While NMFS has published a notice of the EFP, the notice itself fails to comply with these criteria. The regulations specifically require NMFS to publish notice of "the intent of NMFS to issue an EFP." 50 C.F.R. § 660.745(b)(3). Instead, the notice is more ambiguous:

> The Regional Administrator has also made a preliminary determination that the activities authorized under the EFP would be consistent with the goals and objectives of the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP). However, further review and consultation is necessary before a final determination is made to issue the EFP.

72 Fed. Reg. 32618. Nowhere does the notice state that NMFS actually intends to issue the permit. If and when NMFS makes such a determination and develops such an intent, it must recirculate the notice for public comment consistent with the regulations.

E. Violations of National Marine Sanctuaries Act

The proposed EFP also is in apparent violation of the National Marine Sanctuaries Act ("NMSA") (16 U.S.C. § 1431 et seq.). Among the purposes of the NMSA are "to maintain the natural biological communities in the national marine sanctuaries, and to protect, and, where appropriate, restore and enhance natural habitats, populations, and ecological processes." 16 U.S.C. § 1431(b)(3). To achieve these purposes, the NMSA requires that "Federal agency actions internal or external to a national marine sanctuary, including private activities authorized by licenses, leases, or permits, that are likely to destroy, cause the loss of, or injure any sanctuary resource are subject to consultation with the Secretary." 16 U.S.C. § 1434(d)(1)(A) (emphasis added). This consultation provision requires the agency proposing the action to provide a written statement describing the action and the potential effects on sanctuary resources no later than 45 days before the final approval of the proposed action. 16 U.S.C. § 1434(d)(1)(B). The action agency must follow the recommendations of the Secretary to avoid injury to any sanctuary resource or otherwise act to prevent and mitigate damage to such resources. 16 U.S.C. §§ 1434(d)(2), 1434(d)(3) & 1434(d)(4).

Three National Marine Sanctuaries, the Monterey Bay, Gulf of Farallones, and Cordell Bank National Marine Sanctuaries are adjacent to the area subject to the EFP. The leatherback sea turtle as well as the marine mammals, seabirds and fish that will likely be caught pursuant to the EFP are all resources protected by these sanctuary designations. The proposed EFP would clearly "destroy, cause the loss, or injure" these resources. We are unaware of any action by NMFS to comply with either the consultation provision of the NMSA or its substantive requirements. Absent such compliance, the proposed EFP cannot lawfully be issued.[20]

F. Violations of Coastal Zone Management Act

The proposed EFP also is being processed in apparent violation of the Coastal Zone Management Act ("CZMA") (16 U.S.C. § 1451 et seq.). CZMA requires that

> [A]ny applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the

[20] The proposed Longline EFP states that "EFP fishing will not occur within 30 miles of the coastline, or within the southern California bight." This language is vague enough that it does not completely foreclose fishing within designated marine sanctuaries. Any EFP issued must include such geographical limitations so as to explicitly preclude its operation with any National Marine Sanctuary. Moreover, fishing need not occur within sanctuary boundaries to impact sanctuary resources. The leatherback and other specie that regularly visit these sanctuaries would still have to run the gauntlet of the over 67,000 longline hooks set in their path under the EFP.

> applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data.

16 U.S.C. § 1456(c)(3)(A). The sea turtles, seabirds, marine mammals, and fish that will be caught and killed by under the proposed EFP are all "natural resources" protected by California's Coastal Management Program. Hooking, entangling and killing these animals clearly "affects" these resources triggering the consistency requirement of CZMA. We are unaware of the appropriate CZMA consistency certification in the application materials for the Longline EFP. Absent such a certification and evidence of California's concurrence in that determination, the EFP application must be rejected as violative of CZMA.

G. Violations of NEPA

While we believe that the proposed EFP is legally untenable because of the substantive requirements of the ESA, MMPA, MBTA, NMSA, CZMA and MSA, we also believe that the issuance of any such EFP 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, NMFS has apparently completely reversed this process. NMFS has decided it wishes to allow pelagic longline fishing in the area currently closed to such fishing to protect numerous species. 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).

In addition to the flawed timing of the NEPA analysis, NMFS's most significant violation of NEPA is its failure to prepare a full Environmental Impact Statement ("EIS") for the EFP. Under NEPA:

> an EIS must be prepared if "substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor." To trigger this requirement "a plaintiff need not show that significant effects will in fact occur," raising "substantial questions whether a project may have a significant effect is sufficient."

Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149-50 (9th Cir. 1998) (citations omitted) (emphasis in original).

In its processing of the Longline EFP, we assume NMFS will rely on the same infirm EA as considered by the PFMC in its decision to recommend the EFP. However, NMFS's statement in this regard is, as usual, incoherent and ambiguous.

> In accordance with NOAA Administrative Order 216–6, an appropriate National Environmental Policy Act document will be completed prior to the issuance of the EFP. A draft environmental assessment on the EFP was presented to the Council and public in April 2007. Further review and consultation is necessary before a final determination is made to issue the EFP.

72 Fed. Reg. 32618. So rather than inform the public as required by NEPA as to what actual NEPA document the agency will rely upon, NMFS simply mentions the existence of an EA used by the Council. If NMFS intends to rely upon this EA, it needs to explicitly state such intentions and recirculate the document for public comment.

Nevertheless, assuming NMFS adopts the EA prepared for the Council, this EA is itself, highly deficient. This EA itself explicitly or implicitly acknowledges that several of the Council on Environmental Quality ("CEQ") "significance" factors triggering the need to prepare an EIS are met by the Longline EFP. See 40 C.F.R. § 1508. CEQ factors triggered by the Longline EFP, included but are not limited to, whether the action involves "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands [and] ecologically critical areas," id. at § 1508.27(b)(3) (leatherback foraging areas); "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial," id. at § 1508.27(b)(4) (numerous comments in opposition); "[t]he degree to which the action may establish a precedent for future actions with significant effects or represent a decision in principle about a future consideration," id. at § 1508.27(b)(6) (the stated purpose of the EFP is to create a longline fishery); "the degree to which the action is related to other actions with . . . cumulatively significant impacts," id. at § 1508.27(b)(7) (the numerous impacts on the leatherback throughout its range); the "degree to which the action may adversely affect an endangered or threatened species," id. at § 1508.27(b)(8) (longlines previously found to jeopardize the leatherback); and whether "the action threatens a violation of Federal . . . law or requirements imposed for the protection of the environment." Id. at § 1508.27(b)(10) (violates ESA, MMPA, MBTA, NMSA, CZMA and MSA). Any of these factors, standing alone, is sufficient to require preparation of an EIS. Ocean Advocates v. United States Army Corps of Engineers, 402 F.3d 846, 865 (9th Cir. 2005). For the Longline EFP, all of these factors require the preparation of an EIS.

Even if the requirement triggering an EIS were not met, the EA is inadequate in its own right. This was recognized by the Council's Scientific and Statistical Committee.

> The SSC did not find adequate information in the Environmental Assessment to evaluate the biological risks of the proposed EFP.

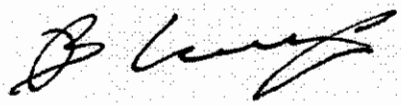
SSC April 2007 Report. Similarly, for the reasons described above with regard to violations of other laws, the EA utterly fails to adequately analyze impacts on ESA-listed species, target and bycatch fish species, marine mammals, seabirds, marine sanctuaries, and numerous other resources affected by the proposed EFP.

In sum, reliance on an EA for the Longline EFP is completely at odds with the letter and spirit of NEPA. Rather than cast aside compliance with NEPA in its rush to accommodate the applicant in time for the upcoming fishing season, if NMFS wishes to consider pelagic longline fishing within the West Coast EEZ, it must do so only in a careful manner after preparation of an EIS. We therefore believe that the only lawful course for NMFS to follow at this point is to either select the No Action Alternative in the Draft EA, or to forgo action until the completion of a full EIS that analyzes a full range of alternatives.

III. CONCLUSION

As the above makes clear, we believe that issuance of the Longline EFP would violate numerous statutory provisions, including the ESA, MMPA, MBTA, MSA, NMSA, CZMA, and NEPA. We therefore recommend that NMFS reject the proposed EFP. Denying the EFP is also consistent with the call put out by over 1000 international scientists from more than 100 countries and 300 non-governmental organizations from 62 countries calling on the U.N. to institute an immediate moratorium on pelagic longline fishing in the Pacific until measures can be put in place that protect the leatherback.[21] Thank you for your concern.

Sincerely,



Brendan Cummings
Center for Biological Diversity
P.O. Box 549
Joshua Tree, CA 92252

[21] See http://www.seaturtles.org/press_release2.cfm?pressID=261.

TURTLE ISLAND RESTORATION NETWORK
POB 400/40 Montezuma Avenue • Forest Knolls, CA 94933 USA
Ph. +1 415 488 0370 ext. 106• Fax +1 415 488 0372
karen@seaturtles.org • www.seaturtles.org

July 25, 2007

Mark Delaplaine
Federal Consistency Manager
California Coastal Commission
45 Fremont Street
Suite 2000
San Francisco, CA 94105-2219

Dear Mr. Delaplaine,

RE: Agenda Item CD-041-07 – Consistency determination for Longline EFP

The Turtle Island Restoration Network (TIRN) submits the following comments regarding the California Coastal Commission's scheduled consistency determination for the National Marine Fisheries Service regarding an Exempted Fishing Permit application for longline fishing in the U.S. Exclusive Economic Zone (EEZ) off the California coast by Mr. Peter Dupuy.

TIRN commends the California Coastal Commission on their decision to undertake a federal consistency determination on the abovementioned permit. Our organization has consistently opposed the issuance of this permit due to the threat pelagic swordfish longline fishing in the EEZ along the U.S. west coast would have on protected and endangered species including marine mammals, seabirds and the Pacific leatherback and loggerhead populations.

Of particular concern is the proposal that the EFP applicant be allowed to undertake pelagic longline fishing within the Leatherback Conservation Area, a critical habitat area for the critically endangered Pacific leatherback sea turtle that extends from Point Sur, California to the mid-Oregon coast, and up to 300 miles offshore[1]. Pacific leatherbacks are listed by the World Conservation Union (IUCN) as "Critically Endangered" on the Red List of Threatened species, having declined by 95% in just over the last two decades[2]. Scientists have predicted they could go extinct within the next few decades if immediate efforts are not taken to decrease impacts on this population, in particular from the incidental capture by drift gillnet and pelagic longline fishing gear[3,4].

[1]NMFS 2006, *Endangered Species Act Section 7 Consultation Biological Opinion. Issuance of an exempted fishing permit to allow the use of drift gillnet gear in an area and time closure that is currently prohibited under the Fishery Management Plan for the U.S. West Coast Highly Migratory Species*, Long Beach, CA: NMFS Southwest Region, 2006, 67.
[2]Spotila, J. R. et al, "Pacific leatherback turtles face extinction," *Nature* 405 (2000): 529-530.
[3]Crowder, L, "Leatherback's survival will depend on international effort," *Nature* 405 (2000): 881.
[4]Spotila, J. R. et al, " Worldwide population decline of Dermochelys Coriacea," *Chelion Conservation and Biology* 2:2 (1996): 209-222.

Printed on 100% post-consumer recycled paper

EXHIBIT NO. 12
APPLICATION NO.
CC-061-07

Pelagic longline fishing for swordfish within the California EEZ has been prohibited since at least 1977 by the State of California, with this ban extended in 1991 to include all pelagic longline fishing gear longer than 900 feet in length. In 2004 the National Marine Fisheries Service incorporated this historical state ban into their Highly Migratory Species Fishery Management Plan, which currently prohibits any pelagic longline fishing within the EEZ off the U.S. west coast, and includes a provision prohibiting shallow-set longlining fishing west of 150° W long. 50 C.F.R. § 660.712(2). NMFS extended these protections to also prohibit shallow-set swordfish longlining east of 150° W long. These extensive bans by NMFS, primarily to protect endangered sea turtles, demonstrates the vulnerability of these species to the impacts of longline fishing.

As a result of advocacy and litigation, and the subsequent implementation of protections, including but not limited to those mentioned above for pelagic longline fishing, leatherback mortality has effectively been decreased to at or near zero in California-based fisheries.

The National Marine Fisheries Service and Pacific Fishery Management Council have received overwhelming opposition from various sectors to the issuance of the EFP to allow longline fishing within California and Oregon's EEZ. A summary of this response is outlined below and highlights the desire by the public, legislators, scientific and NGO community to keep the current prohibitions in place on longline fishing within California's EEZ to protect its coastal resources and endangered and protected species:

- 6,000 + letters from the public to NMFS and the PFMC opposing the longline EFP;
- 120+ scientists submitting a coalition letter opposing the longline EFP
- Letters of opposition from the following California State and U.S. legislators:
    - Senator Barbara Boxer
    - Congresswoman Lyn Woolsey
    - California State Senator Carole Migden
    - California State Assembly Member Jared Huffman
- Letters of opposition from over 20 environmental and recreational fishing NGO's including:
    - Turtle Island Restoration Network
    - Center for Biological Diversity
    - The Ocean Conservancy
    - Oceana
    - Greenpeace
    - Natural Resources Defense Council
    - Defenders of Wildlife
    - Humane Society of the United States
    - The Leatherback Trust
    - International Big Fish Network, Inc.
    - International Game Fish Association
    - Animal Protection Institute
    - Animal Welfare Institute
    - The Billfish Foundation

Printed on 100% post-consumer recycled paper

- The Recreation Fishing Alliance
- United Anglers of Southern California
- Heal the Bay
- Snorkel Bob Foundation
- Brown & Associates
- Save Our Leatherbacks Operation

Thank you for your time and efforts once again for implementing a federal consistency review on the proposed longline EFP. The sea turtles, seabirds, marine mammals, and fish that will be caught under the proposed EFP are all "natural resources" protected by California's Coastal Management Program. Hooking, entangling and killing these animals clearly "affects" these resources triggering the consistency requirement of CZMA.

Please find following copies of the comment letters submitted by California's legislators to the NMFS and PFMC opposing this EFP. I would be happy to forward you copies of any of the other comment letters listed above if you would like to request these.

The commitment of the California Coastal Commission to the protection of California's rich and diverse coastal resources is greatly appreciated.

Sincerely,

Karen Steele
Campaign Coordinator

Printed on 100% post-consumer recycled paper

BARBARA BOXER
CALIFORNIA

COMMITTEE
COMMERCE, ...
AND TRANSP...
ENVIRONM...
AND PUBLIC ...
FOREIGN REL...

United States Senate
HART SENATE OFFICE BUILDING
SUITE 112
WASHINGTON, DC 20510-0505
(202) 224-3553
http://boxer.senate.gov/contact

April 2, 2007

Dr. William Hogarth, Director
NOAA National Marine Fisheries Service
1315 East West Highway, SSMC3
Silver Spring, MD 20910

Mr. Donald McIsaac, Executive Director
Mr. Donald K. Hansen, Chair
Pacific Fisheries Management Council
7700 NE Ambassador Place, Suite 200
Portland, OR 97220

Dear Dr. Hogarth, Mr. McIsaac, Mr. Hansen and members of the Council:

I am writing to express my strong concerns about two proposed exempted fishing permits (EFP) before you. One EFP is for an expansion of the current drift-gillnet fishery into the Leatherback Conservation Area. The second EFP is for a new long line fishery for swordfish within the Exclusive Economic Zone (EEZ). I urge you to deny both of these EFP proposals in their current form.

Only six years ago, the Leatherback Conservation Area was established off portions of the California and Oregon coasts to protect critical feeding grounds for the endangered Pacific leatherback sea turtle. There were 91,000 nesting females in 1980. Fewer than 2,300 nesting female Pacific leatherback sea turtles remain. Drift-gillnet fishing was determined to have a significant impact on this sea turtle population. Although drift-gillnet technology has recently improved in reducing marine mammal deaths, there still remains a problem in bycatch of the endangered sea turtle. Before the drift gillnet fishery is allowed to expand into the Leatherback Conservation Area, I recommend the fishery be required to undergo a legitimate experiment to prove sea turtle bycatch is no longer a problem. I oppose expansion of the drift-gillnet fishery until such a solution can be demonstrated.

California has historically never had a long line swordfish fishery -- I do not see the need to open a long line fishery now. Long line fishing creates significant bycatch and overfishing problems.

Approving the EFP proposals before you would put the endangered Pacific leatherback sea turtle at grave risk of extinction and place other threatened and endangered marine species in serious jeopardy. I urge you to deny these EFPs and continue the important marine protections in place today. Current conservation measures have been very effective at protecting threatened and endangered marine species. It is crucial that we honor these protections and sustain our coastline's rich biodiversity.

Thank you for your attention to this important matter. I look forward to hearing from you regarding your decisions.

Sincerely,

Barbara Boxer

Barbara Boxer
United States Senator

1700 MONTGOMERY STREET
SUITE 240
SAN FRANCISCO, CA 94111
(415) 403-0100

312 NORTH SPRING STREET
SUITE 1748
LOS ANGELES, CA 90012
(213) 894-5000

501 I STREET
SUITE 7-600
SACRAMENTO, CA 95814
(916) 448-2787

2500 TULARE STREET
SUITE 5-290
FRESNO, CA 93721
(559) 497-5109

600 B STREET
SUITE 2240
SAN DIEGO, CA 92101
(619) 239-3884

291 NORTH E ST...
SUITE 230
SAN BERNARDINO, ...
(909) 383-4525

PRINTED ON RECYCLED PAPER

STATE CAPITOL
P.O. BOX 942849
SACRAMENTO, CA 94249-0006
(916) 319-2006
FAX (916) 319-2106

DISTRICT OFFICE
3501 CIVIC CENTER DRIVE, SUITE 412
SAN RAFAEL, CA 94903
(415) 479-4920
FAX (415) 479-2123

Assembly
California Legislature

JARED HUFFMAN
ASSEMBLYMEMBER, SIXTH DISTRICT

COMMITTEES
CHAIR, ENVIRONMENTAL SAFETY AND TOXIC MATERIALS
APPROPRIATIONS
UTILITIES AND COMMERCE
WATER, PARKS AND WILDLIFE

RECEIVED
MAR 2 0 2007
PFMC

March 15, 2007

Dr. William Hogarth, Director
NOAA Fisheries Service
1315 East West Highway, SSMC3
Silver Spring, MD 20910

Mr. Donald McIsaac, Executive Director
Mr. Donald K. Hansen, Chair
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 200
Portland, OR 97220

Dear Dr. Hogarth, Mr. McIsaac, Mr. Hansen, and members of the Council:

As the state Assemblymember for the 6th District in California, my district includes hundreds of miles of coastline. It is my duty to safeguard and protect the natural beauty of the Northern California coastline and the creatures that live there. I'm writing to you today because I'm concerned about the proposed exempted fishing permits (EFP) to expand the swordfish/thresher shark drift-gillnet fishery into current time/area closures and to develop a pelagic swordfish longline fishery within the Exclusive Economic Zone (EEZ). I urge you to deny both EFPs.

There is ample evidence that issuing these EFPs could have a significant impact on the endangered leatherback sea turtle and other marine wildlife. As you know, the California coast has been closed to swordfish pelagic longlining for 30 years and portions of the California and Oregon coastline have been closed to drift-gillnet fishing since 2001 to protect leatherback sea turtles which seasonally inhabit the waters off our coast. The Pacific leatherback sea turtle population has already plummeted from 91,000 in 1980 to currently fewer than 2,300 annual nesting females. If you allow pelagic longline sword fishing and drift-gillnet fishing back into these protected areas, it will place the critically endangered leatherback at greater risk of extinction, and place other protected and endangered marine species at risk.

Printed on Recycled Paper

Before we allow an animal species to be lost forever, I hope you'll continue to enforce the important conservation measures that have been hard-fought and are effective in protecting highly vulnerable species. The existing closures comply with domestic and international conservation mandates and are consistent with the best available scientific information. Both drift-gillnet fishing and longline sword fishing are highly indiscriminate fishing methods that have devastating effects on the marine environment. For this reason, the United Nations banned drift-gillnet fishing on the high seas in 1991, and California has had a ban on swordfish pelagic longlining for 30 years. We should do nothing less than honor these protections.

Please do your part to protect our coastline and deny these EFPs. Thank you for your consideration, and please do not hesitate to contact me with any questions.

Sincerely,

Jared Huffman, Assemblymember
8th District

JH/dmg

CAPITOL OFFICE
STATE CAPITOL
ROOM 2032
SACRAMENTO, CA 95814
(916) 651-4003

DISTRICT OFFICE
SAN FRANCISCO
455 GOLDEN GATE AVENUE
SUITE 14800
SAN FRANCISCO, CA 94102
(415) 557-1300

MARIN / SONOMA
3501 CIVIC CENTER DRIVE
ROOM 425
SAN RAFAEL, CA 94903
(415) 479-4920

SENATOR.MIGDEN@SEN.CA.GOV

California State Senate

SENATOR
CAROLE MIGDEN
THIRD SENATE DISTRICT

MAJORITY WHIP

COMMITTEES
PUBLIC SAFETY
CHAIR
NATURAL RESOURCES AND WATER
JOINT COMMITTEE ON LEGISLATIVE BUDGET
SELECT COMMITTEE ON CALIFORNIA'S WINE INDUSTRY
SELECT COMMITTEE ON CALIFORNIA HORSE RACING
SELECT COMMITTEE ON CALIFORNIA INFRASTRUCTURE

March 5, 2007

Dr. William Hogarth, Director
NOAA Fisheries Service
1315 East West Highway, SSMC3
Silver Spring, MD 20910

RECEIVED
MAR 12 2007
PFMC

Mr. Donald Mclsaac, Executive Director
Mr. Donald K. Hansen, Chair
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 200
Portland, OR 97220

Dear Dr. Hogarth, Mr. Mclsaac, Mr. Hansen, and members of the Council:

As the state Senator for the 3rd District in California, my district includes the Pacific coastline from just south of Bodega Bay to the Golden Gate. It is my duty to safeguard and protect the natural beauty of the Northern California coastline and the creatures that live there. I'm writing to you today because I'm concerned about the proposed exempted fishing permits (EFP) to expand the swordfish/thresher shark drift-gillnet fishery into current time/area closures and to develop a pelagic swordfish longline fishery within the Exclusive Economic Zone (EEZ). I urge you to deny both EFPs.

There is ample evidence that issuing these EFPs could have a huge impact on the endangered leatherback sea turtle and other marine wildlife. As you know, the California coast has been closed to swordfish pelagic longlining for 30 years and portions of the California and Oregon coastline have been closed to drift-gillnet fishing since 2001 to protect leatherback sea turtles which seasonally inhabit the waters off our coast. The Pacific leatherback sea turtle population has already plummeted from 91,000 in 1980 to currently fewer than 2,300 annual nesting females. If you allow pelagic longline swordfishing and drift-gillnet fishing back into these protected areas, it will place the critically endangered leatherback at greater risk of extinction and other protected and endangered marine species at risk.

Before we allow an animal species to be lost forever, I hope you'll continue to enforce the important conservation measures that have been hard-fought and are effective in protecting highly vulnerable species. The existing closures comply with domestic and international conservation mandates and are consistent with the best available scientific information. Both drift-gillnet fishing and longline swordfishing are highly indiscriminate fishing methods that have devastating effects on the marine environment. For this reason, the United Nations banned drift-gillnet fishing on the high seas in 1991, and California has had a ban on swordfish pelagic longlining for 30 years. We should do nothing less than honor these protections.

Please do your part to protect our coastline and deny these EFPs. Thank you for your consideration, and please do not hesitate to contact me with any questions.

Sincerely,

Carole Migden
State Senator, 3rd District

BirdLife INTERNATIONAL

Home
About BirdLife
BirdLife Partnership
Regional Work
News
Action
Action Index
Campaigns
Conservation Science
Action on the Ground
Advocating Change
Developing Capacity
Building Awareness
Publications
How to Help
Data Zone

BirdLife Species Champions appeal
Donate to this groundbreaking initiative so that together we can turn the tide on bird extinctions.

Seabird bycatch mitigation measures

How are birds caught?

During the setting of longlines birds scavenge the baits attached to hooks before the bait can sink. Once hooked, birds are drawn underwater by the sinking longline and drown. Most of the birds that are vulnerable to being caught have learned to follow boats ever since commercial fishing began, feeding on the discards and bait.

What can be done?

There are two ways of keeping birds from being hooked. One is to keep the birds away from the hooks, by using a bird-scaring device such as a streamer line.

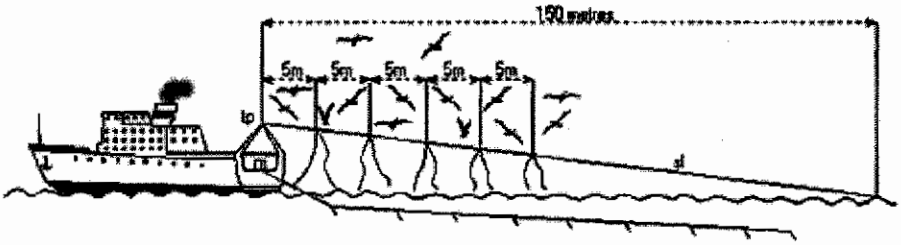


Figure 1. Streamer line designed by CCAMLR to discourage birds from scavenging baits during the deployment of longlines, showing the towing point (tp) and streamer line (sl). Designs should vary according to the fishery and the vessel. Redrawn from a diagram by John Cox.

The second avenue is to keep the baited hooks away from the birds – most of the vulnerable birds predominantly feed during the day, so ensuring that fishermen only set their lines at night is very effective. Making sure that the bait sinks as quickly as possible means that the birds have less time to scavenge and are thus less likely to get hooked. Below is a list of measures aimed at reducing seabird bycatch – if you know of any other effective measures please email us with the details:

- Line should be set at night time
- An approved streamer line should be deployed during all line-setting operations. The streamer line should be deployed directly above the main line, unless two

Graham Robertson/Al

A drowned Wandering A caught on a longline

EXHIBIT NO. 13
APPLICATION NO.
CC-061-07

streamers are used in which case they must be deployed on either side of the main line

Zoom In

- The main line and branch lines must be properly weighted to ensure optimal sinking rates
- Dumping of offal should take place on the opposite side to where line hauling occurs
- A bait-throwing device which shoots the baited hooks clear of propeller turbulence may be effective (this has not been proven and may throw the bait out of the area covered by the streamer line)
- All bait should be properly thawed – frozen bait floats and is available to the birds for a longer time
- Whole fish with a swim bladder should not be used as bait (air in bladder causes bait to float)
- Deck lighting kept to the minimum (without compromising crew safety)
- All deck lights should be directed inboard
- Dumping of offal should not take place during line setting
- All hooks should be removed from offal and from the fish-bycatch before these are dumped; i.e. no hooks discarded

None of these measures alone will solve the problem. Implementing them all has been proven to bring bird catch rates down to biologically safe levels without seriously affecting the catching of fish.

It is essential that records be kept of fishing effort, fish catches and unwanted fish and seabird bycatches. Without these data there is no way of knowing how serious a problem birds are for a particular fishery. This means that the fishery may continue to catch birds unnecessarily, when some simple and inexpensive changes to fishing practices could bring about rapid changes for the birds.

Next Page » International agreements

Contact Us | Feedback | Jobs | Privacy Policy | Terms and Conditions

DESIGNED BY Quinn Interactive

© 2006 BirdLife International. *Working together for birds and people.*

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Southwest Region
501 West Ocean Boulevard, Suite 4200
Long Beach, California 90802- 4213

AUG 0 6 2007

Mr. Peter Douglas
Executive Director
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Dear Mr. Douglas:

Thank you for the questions presented in your letter dated July 23, 2007 pertaining to NOAA's National Marine Fisheries Service (NMFS) Consistency Determination for the exempted fishing permit (EFP) application for a single vessel to shallow-set longline fish for swordfish in the U.S. Exclusive Economic Zone (EEZ) off the California coast. Responses to those questions are provided as an attachment to this letter.

It is apparent from your questions that bycatch in fisheries is of paramount concern. I would like to remind you that reducing bycatch is a top priority of NMFS and remains a central challenge for the agency. NMFS has several strong mandates for fish and protected species bycatch reduction, including the Magnuson-Stevens Fishery Conservation and Management Act, the Endangered Species Act, and the Marine Mammal Protection Act. These statutes and their accompanying regulations hold NMFS to standards consistent to those advocated by the California Coastal Act. I am confident that you will see in our response to the staff's questions that we have applied those same standards in our review of the proposed EFP.

Thank you for the opportunity to provide further information regarding the proposed EFP application. If you have any questions regarding our responses, please feel free to contact Mark Helvey, Assistant Regional Administrator for Sustainable Fisheries Division, at (562) 980-4040 or Mark.Helvey@noaa.gov.

Sincerely,

Rodney R McInnis

Rodney McInnis
Regional Administrator

Attachment

EXHIBIT NO. 14
APPLICATION NO.
CC-061-07

National Marine Fisheries Service Response to California Coastal Commission Questions Pertaining to the Shallow-Set Longline Exempted Fishing Permit Application

1. How close to Farrallon Islands is the 30 mile eastern boundary from the permit area?

At the request of the applicant, the shoreward boundary line where no fishing will be allowed has been changed from 30 nm to 40 nautical miles (nmi) from the nearest point of the mainland and to stay outside of all National Marine Sanctuary waters. There is an estimated 26 nm separation between the 40 nm boundary line and the Farallon Islands and 13 nm from the boundary line to the Sanctuary outer boundary line (see Figure 1 attached).

2. How much of the permit area is within the Monterey Bay National Marine Sanctuary? Why is NOAA not proposing to prohibit the fishing within the Sanctuary? What effect would such a prohibition in this very small area (compared to the total permit area) have on the likely success of the experiment?

As mentioned above, the boundary line has been changed and the potential fishing areas of the proposed EFP are outside of the Sanctuary boundary (see Figure 2 attached). The applicant has informed NOAAs National Marine Fisheries Service that he will also fish outside the boundaries of all National Marine Sanctuaries. Please note that with the exception of some bottom trawling closures to protect "essential fish habitat" and the Rockfish Conservation Areas established by the Pacific Fishery Management Council (PFMC) in federal waters, state and federally authorized commercial and recreational fishing is allowed within all of California's National Marine Sanctuaries.

3. When will the revised Environmental Assessment be available?

The Environmental Assessment (EA) is anticipated to be available in late August and will be posted on the NMFS Southwest Region website (http://swr.nmfs.noaa.gov/).

4. When will responses to public comments on the Draft Environmental Assessment (DEA) be available?

Responses to public comments will be included in an appendix to the final EA. NMFS is currently reviewing the comments and revising the EA based upon comments received.

5. When will the Biological Opinion be available?

The draft biological opinion has been completed and is undergoing internal review. We anticipate that the biological opinion will be finalized by the end of August.

6. When will the results of the consultation with the U.S. Fish and Wildlife Service on effects on seabirds be available?

NMFS expects consultation to be completed by the end of August.

7. When will the results of coordination with NOAA Sanctuaries be available?

If NOAA Sanctuaries formally submits comments, they will be included along with other public comments, in an appendix to the final EA. If comments are submitted, NMFS anticipates receiving them on or around August 10.

8. The Pacific Fishery Management Council (PFMC) recommended (as described in NMFS' Federal Register Notice of June 13, 2007) that: *"... the applicant be subject to a interaction cap of one short-finned pilot whale and 12 striped marlin, and not fish off the state of Washington. The Council also recommended that the fishery be managed through limits on the amount of incidental take of protected species that may be exposed to and adversely affected by this action that are to be established based upon section 7 consultations under the Endangered Species Act [ESA] by NMFS for marine mammals and sea turtles and by the U. S. Fish and Wildlife Service for seabirds. If any one of the limits set by these consultations is reached by the fishery authorized by the EFP, the permit would be immediately revoked."* Alternative 3 analyzed in the DEA also states there will be caps for sea turtles, marine mammals, and seabirds. However, we do not know what the caps will be and how they will be determined. Also, it is unclear from our discussions with NMFS whether caps will be included for all ESA-listed species, or whether the consequence of an unexpected take of a listed species will, rather than invoke a cessation of activity, simply result in re-initiation of consultation with NMFS. Please inform us as to what the numerical caps will be, how they will be determined, and whether caps will be set for ESA listed species that NMFS does not anticipate will be taken.

As NMFS relayed to Coastal Commission staff in a meeting held on July 19, and as stated in the DEA, NMFS does not anticipate the take of any ESA listed species other than leatherback sea turtles. Additional text is being added to the DEA, as necessary, to clarify the methodology and utilization of the best available commercial and scientific data that NMFS used in determining anticipated takes. The PFMC proposed that caps be issued for ESA listed species consistent with the Incidental Take Statement (ITS) issued as part of the biological opinion on the proposed EFP. NMFS intends to follow through with this recommendation and set the EFP take cap at the level prescribed by the ITS. Although the Biological Opinion and ITS have not been finalized, we expect that the ITS likely will be for leatherback sea turtles only, so there will be no cap on other ESA listed species as no other species are considered likely to be taken. The cap will be incorporated as the condition of the permit.

In the event of an unexpected take of an ESA-listed species not covered in NMFS' ITS for this proposed action, NMFS would be required to reinitiate consultation. As described in 50 CFR 402.16, reinitiation of formal consultation is required when the amount or extent of the incidental take statement is exceeded. If a take occurs, NMFS will evaluate the situation such as the stock status of the species involved, the seriousness of the interaction, and the condition and fate of the marine mammal or sea turtle involved. Based on that information, NMFS would make an immediate determination whether to terminate the EFP while undergoing reinitiation of ESA section 7 consultation.

9. How will NMFS justify allowing a cap of even one short finned pilot whale, given that: (a) the Potential Biological Removal ("PBR") rate, which quantifies the maximum number of animals that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimal sustainable population, for the West Coast stock (California/Oregon/Washington), is less than one animal; (b) this species' annual fishing mortality is already at one animal (i.e., it already exceeds the PBR); and (c) this species is a Strategic Stock[1]?

The current PBR for the CA/OR/WA stock of short-finned pilot whales is 1.2. The current draft 2007 Pacific Stock Assessment Report includes a revised PBR of 0.9. However, this is still in draft form and NMFS does not base its decision-making process on information that has not been completely vetted through an extensive review process. The current mean annual mortality of this stock of short finned pilot whales is one animal per year, based upon a five year average. In the most recent Stock Assessment Report (Carretta et al., 2007), the one observed mortality of a short finned pilot whale in the CA/OR drift gillnet fishery (DGN) in 2003 was extrapolated to five, since the level of coverage was 20 percent. Thus it is assumed that five short finned pilot whales were taken and this is averaged over five years in which no whales were observed taken in four of the five years. Hence, five whales divided by the five years assessed (1999-2003) yields one whale per year, the annual estimated mortality.

If one whale is observed killed or seriously injured during fishing operations authorized by the EFP (although this is considered very unlikely), that one take would be added to the five (extrapolated value), so the five year total (2003-2007) would be six whales, which divided by five yields an annual estimated average mortality of 1.2. NMFS does not anticipate that a serious injury or mortality of a short finned pilot whale will occur during fishing operations authorized under the proposed EFP. In making its recommendation to cap the take of short finned pilot whales at one serious injury or mortality, the PFMC was being conservative in its recommendation and mindful of the current low PBR for this stock.

10. How soon before an El Niño event (which would significantly increase the likelihood of loggerhead turtles in the area) could such an event be predicted? In the event of an El Niño, would loggerhead caps be triggered and/or would the time and area closure for the Loggerhead Conservation Area be instituted?

The El Niño triggered loggerhead conservation area closure is not relevant to the proposed EFP. The closure applies only during June, July and August in the Southern California Bight (SCB) east of 120° West longitude. The applicant has not expressed an interest in fishing during the summer months or within the SCB.

11. If drift gill netting is currently seasonally banned (8/15 – 11/15) in the Leatherback Conservation Area, why would NMFS not impose a similar ban on longline fishing? Why not limit the permitted area to south of the conservation area, and/or to post-

[1] Carretta, J.V., et al. 2007. Draft U.S. Pacific Marine Mammal Stock Assessments. NOAA. NMFS. Southwest Fisheries Science Center.

11/15 only within the conservation area? What effect would this type of restriction have on the likely success of the experiment?

Fishery managers have three types of approaches for reducing bycatch: selectivity, deterrence and avoidance. Selectivity refers to a fishing method's enhanced ability to target and capture organisms by size and species during the fishing operation allowing non-targets to be released unharmed. This is normally achieved by gear modification such as what has been achieved in the pelagic longline fisheries over the last several years. Deterence methods strive to dissuade or alert approaching organisms to the gear such as acoustic pinger devices used in the drift gillnet fishery. Lastly, avoidance approaches include the establishment of time/area closures for protecting species utilizing specific areas at certain times of the year. The Leatherback Conservation Area is an avoidance strategy.

The Leatherback Conservation Area was established specifically to address anticipated leatherback turtle takes in the DGN fishery and was required under the biological opinion written for the DGN in 2000 based upon an analysis that estimated anticipated takes and mortalities of leatherbacks. In other words, NMFS identified an area known to be utilized by leatherback turtles at certain times of the year and established this particular time/area closure. NMFS has no information to suggest what degree of leatherback take and mortality will occur in the SSLL EFP will occur. In fact, NMFS is looking at the gear modifications proposed for this EFP that NMFS scientists have developed (i.e., 18/0 circle hooks with no offset and the use of mackerel baits) as the primary approach for reducing bycatch including sea turtles in the California Current. NMFS has no information to support transferring a bycatch reduction strategy for one gear tyle (i.e., DGN) to another (i.e., pelagic longlines). Observations from modified shallow-set longline fisheries in the Pacific and the Atlantic demonstrate reductions of leatherback bycatch ranging from 65 percent to 85 percent over historical SSLL fishing. Leatherback mortalities associated with this gear type are estimated to be quite low (approximately 13.1 percent in experiments conducted in the Atlantic). Estimated mortality using DGN gear is approximately 70 percent.

The purpose of the EFP is to initially assess whether shallow-set longline gear using the latest gear modifications is a cost-effective alternative to reducing bycatch in the California and Oregon swordfish fishery. Currently, no such information exists on how this gear, specifically designed to reduce bycatch, will operate under: 1) different environmental conditions relative to bycatch and, 2) economic conditions relative to current swordfish fishing practices in the proposed action area. Restricting the proposed EFP from the Leatherback Conservation Area would severely hamper the applicant from harvesting a potentially productive area for swordfish and certainly curtail any economic incentive to continue the EFP.

At the request of the applicant, NMFS has been reviewing fishery dependent data, oceanographic conditions, and known distributions of ESA listed species that may occur in the action area, to provide guidance on measures to limit interactions between the proposed SSLL EFP and marine mammals and sea turtles. These measures may include areas to avoid fishing when turtle densities are likely to be high. This approach is consistent with

management measures used in the Hawaii based shallow-set longline fishery.

12. What will the data generated by the EFP tell us that would be statistically useful? We note that the PFMC's Scientific and Statistical Committee (SSC) advised the PFMC that because the EFP is not taking place in an area where drift gillnet fishing occurs, it will not be possible to compare bycatch rates between the two, which is purportedly the reason for the EFP. Further, no experimental design has been included to test the hypothesis that longline gear generates less bycatch than gillnet gear. Lastly, any results obtained from the EFP will not be useful for estimating the probability of longline gear generating bycatch because it is a single vessel and would not be statistically valid for that purpose. What, then, is NMFS planning to pursue as follow-up research to build on this, even if NMFS does establish economic viability? In other words, how will the results of the proposed EFP be used to make future decisions? What criteria will be examined and what benchmarks are being set to determine success or failure? How, in fact, will economic viability be determined or defined?

If approved by NMFS, this tightly controlled EFP would be considered a trial, and thus the collection of preliminary biological and socio-economic information would be useful in determining the best course of action in regards to future management of West Coast-based swordfish fisheries operating under the fishery management plan for West Coast highly migratory species (HMS FMP). No information currently exists on how shallow-set longline gear utilizing circle hooks and mackerel bait will perform in the California and Oregon EEZ. This area has the potential to be economically productive fishing grounds that would be beneficial to U.S. fishermen as well as West Coast processors and the port infrastructure supporting them.

Several of the HMS FMP management goals address the desire to provide a long-term, stable supply of high-quality, locally caught fish to the public. The goals and objectives strive to promote conservation and sustainable use of HMS fisheries utilized by West Coast-based fishermen who contribute to the food supply, economy, and health of the nation; minimize economic waste and adverse impacts on fishing communities to the extent practicable when adopting conservation and management measures; and provide viable and diverse commercial fisheries for HMS based in West Coast ports, giving due consideration for traditional participants in the fisheries. NMFS believes that exploring the option of examining an alternative gear type targeting swordfish off of California and Oregon addresses the goals and objectives outlined in the HMS FMP.

NMFS is viewing the EFP as a precautionary first step in a multi-phase process to assist in constructing future management decisions. Specifically, fishing in the area under the EFP would provide preliminary information on: the economic viability of fishing for swordfish using modified SSLL gear, circle hook performance, and a first look at target and bycatch species composition. Further, information would be generated for allowing some preliminary comparison of the ratios of bycatch to unit weight of swordfish caught between the two fisheries.

NMFS receognizes that collecting statistically valid information as part of this EFP is not a realistic option at this time given, among other things, the large number of vessels and the logistical requirements needed to conduct such an experiment. Until NMFS believes it has collected sufficient preliminary information under this proposed EFP, it is not prepared to design a comprehensive experiment or propose a potential management framework for development of this particular fishery.

Evaluating the success of the proposed EFP could be measured in two ways. First, success may be evaluated in terms of the degree and condition of unmarketable bycatch discarded during the EFP as well as the degree of interactions with marine mammals, sea turtles, seabirds, and other marine resources relative to the amount of swordfish landed. Second, success could be evaluated by examining the difference between the applicant's operating costs and the ex-vessel revenues of his landed catch. Success will also be measured based on the willingness of the applicant to reapply for an EFP in 2008. NMFS would consider the collection of any new fisheries-dependent information as a successful first step towards providing much needed data to address the uncertainties and risk involved.

NMFS is also aware of the highly controversial and charged nature that this EFP and previous discussions on a shallow-set longline fishery (e.g., discussion held during the development of the HMS FMP) have created in California. NMFS also realizes that any effort to develop an experiment that would require several vessels and that is likely not politically acceptable in California at this time. Consequently, NMFS believes that by taking this first step to gather preliminary information in a very limited and controlled fishery trial, NMFS may obtain some information to better inform members of the public.

13. If a cap is reached early, little or no economic information would be gathered. If this occurs, what would NMFS' 'next step' be in its strategy to replace drift gill net (DGN) fishing with shallow set long line (SSLL) fishing (or other alternatives)? If this effort is one part of an overall strategy, what is the overall strategy?

If a cap was reached early and the EFP terminated for the remainder of 2007, NMFS would evaluate the situation and determine the appropriate course of action, which may include a range of actions from a recommendation to abandon the concept of a SSLL fishery all the way to discussing what gear modifications or adaptations may be needed to prevent future bycatch occurrences. It is important to note that the bycatch gear technology and bycatch reduction measures (circle hooks and mackerel bait) that would be used in this proposed EFP have been successfully implemented in other U.S. fisheries and have been successfully transferred to other shallow-set longline fishing nations. However, there is no guarantee that what has been successfully implemented under different oceanographic regimes will necessarily be successful in the California Current oceanographic regime in terms of target catch and/or bycatch reduction. It is for this reason that NMFS is looking at this proposed EFP trial as an initial assessment of shallow-set longline gear as a cost effective alternative to reducing bycatch in the West Coast swordfish fishery. With that as its long range objective, NMFS' only strategy at this time is to collect new information on this gear type in a very limited and tightly controlled effort within the West Coast EEZ.

14. What alternative strategies are available to reduce demand for swordfish, educate fishermen, or develop more selective fishing techniques?

NMFS is not advocating, nor is aware of, any alternative strategies to reduce the demand for swordfish and is somewhat perplexed by the question. Swordfish stocks have neither been declared overfished nor have they been determined to be experiencing overfishing in the Northern and Sothern regions of the EPO (Hinton et al., 2004). Additionally, there are no quotas or harvest guidelines in place under the HMS FMP that would require NMFS to implement management strategies to reduce fishing effort or demand.

It should be noted that there is a high consumer demand for swordfish. Between 1989 and 2005, the U.S. annual demand for swordfish (i.e., U.S. landings plus imports) ranged from 10,948 metric tons (mt) to 23,114 mt, averaging 16,556 mt. During this period, U.S. landings averaged 6,444 mt (about 39 percent of demand) and imports averaged 10,111 mt (61 percent). Landings of swordfish in the United States have shown a general pattern of decline from the early 1990s through the early 2000s, with landings in 2005 of 3,039 mt at only 28 percent of the record landings of 10,851 recorded in 1993. In contrast, the share of U.S. swordfish demand supplied by imports increased from 35 percent in 1993 to 77 percent of the total in 2005. In 2005, U.S. imports of swordfish were 10,187 mt, valued at about $77 million. Singapore, Panama, Canada, and Chile are the dominant suppliers of imports. Over the entire period from 1989 through 2005, imports increased from rough parity with U.S. landings to over three times domestic landings in recent years. NMFS anticipates that with populations continuing to grow and the demand for fishery resources increases, swordfish demand will continue globally.

With regard to more selective techniques that can meet consumer demand, NMFS has demonstrated that selective fishing technologies can be developed that are capable of reducing unintended ecological impact of pelagic longlining while maintaining effective harvesting efficiency (Watson et al., 2005)[1]. The technologies developed in these NMFS studies are being proposed in the EFP.

In regards to educating fishermen, the EFP applicant has agreed to participate in a NMFS conducted pre-season workshop to receive training and guidance in the most up-to-date techniques and methodologies to reduce unwanted bycatch and to maximize bycatch discard survivability. This workshop will draw upon effective bycatch reduction strategies that have been employed in other fisheries both in the U.S. and abroad.

15. Does NMFS consider the only realistic alternative to be allowing the EFP to be the import of swordfish from fisheries with potentially higher levels of protected species bycatch? Why is the US harpoon fishery, which has virtually no bycatch, not a feasible less environmentally damaging alternative? Please provide data that would allow this alternatives analysis.

[1] Watson, J.W., Epperly, S.P., Shah, A.K., and Foster, D.G. 2005. Fishing methods to reduce sea turtle mortality associated with pelagic longlines. Canadian Journal of Fisheries and Aquatic Sciences. 62:965-981.

The U.S. harpoon fishery does not have the growth potential to take-over as the sole swordfish harvesting gear in the U.S. EEZ to meet current demand. Without the ability to cover the U.S. demand, imports from foreign sources, whose fleets operate under less stringent management and conservation measures, would fill the void thereby exacerbating the regional bycatch problem. The expansion limitations include, among others, a narrow band of favorable waters and time periods for sighting and harpooning swordfish (i.e., basking swordfish in the SCB), the negative economic constraints based on increased fuel consumption and operational costs for this gear type, and the narrow market niche for the product.

Besides the DGN fishery, harpoons and shallow-set longlines are the only other known gears used to harvest swordfish. Harpoon vessel fishing trips vary according to fishing success, fish carrying capacity, and preservation capability and are largely confined to a relatively small area encompassed by the SCB. Fish are sighted either finning or jumping at the surface or swimming just beneath the surface. Since sightings are of fish on or near the surface, good weather conditions and calm seas are required for successful fishing. Swordfish caught by harpoon fill a high-end market niche, different from swordfish caught by DGN or longline gear. The harpoon fishery is very selective and operates with practically no bycatch, however, because the fishery is highly dependent on suitable environmental conditions for locating swordfish on the surface, the fishery cannot be readily transported to other locations lacking these conditions (i.e., north of Point Conception). Consequently, due to the low catch rates in the fishery and the greater efficiency of the DGN fishery (see Table 1) NMFS believes that increases in the fleet size or catch of this boutique-market fishery for replacing the DGN fishery is neither feasible nor realistic.

While not as selective as harpoon gear, NMFS finds that ever since the agency adopted new bycatch reduction technologies and measures, shallow-set longline gear has become exceedingly more selective. This fact has been substantiated by NMFS' own research as well as the research of others and has been extensively published in peer-reviewed scientific journals (see footnote 1).

Table 1: West Coast Total and West Coast Harpoon Swordfish Landings (round mt)[2].

Year	Total Swordfish Landings	Harpoon Swordfish Landings	% Harpoon to Total Landings
1990	1,236	65	5.26%
1991	1,029	20	1.94%
1992	1,546	75	4.85%
1993	1,767	169	9.56%
1994	1,700	157	9.24%
1995	1,161	97	8.35%

[2] SAFE Document "Status of the U.S. West Coast Fisheries for Highly Migratory Species through 2005; Stock Assessment and Fishery Evaluation" (September 2006), Pacific Fishery Management Council, Portland, OR.

1996	1,191	81	6.80%
1997	1,459	84	5.76%
1998	1,408	48	3.41%
1999	2,033	81	3.98%
2000	2,657	90	3.39%
2001	2,195	52	2.37%
2002	1,714	90	5.25%
2003	2,135	107	5.01%
2004	1,186	69	5.82%
2005	294	73	24.83%

16. What information is available to NMFS, based on the fisheries as currently regulated, comparing adverse effects of drift gillnet fishing with longline fishing for swordfish? In other words, what data are available to support the statement that, "... longline gear is more selective than drift gillnet gear? (DEA p.2). Please provide a comparison of bycatch by species for each swordfish fishery.

Comparable DGN and shallow-set longline fisheries data are not available as these two fishing gears have not operated with complete spatial and temporal overlap to make statistically valid comparisons of bycatch rates. Similarly, there have been no controlled experiments set up to gather data this data. In the Atlantic, however, a DGN and the longline fishery occurred in similar areas, although over different time scales during the 1990's. The Atlantic longline fishery included both shallow-set and deep-set longline gear. The rates of marine mammal bycatch in these two fisheries were addressed in the Atlantic Offshore Cetacean Take Reduction Plan (TRP) published on November 22, 1996. The DGN fishery was observed at much higher levels than the longline fishery. One year of comparable data was available within the TRP for the year of 1993. Total marine mammal mortalities are estimated for both fisheries and provided in the Table 2 below.

Table 2. Estimated mortalities in the Atlantic drift gillnet and longline fisheries in 1993.

	Sets	Estimated marine mammal mortalities	CPUE	Observer coverage
Longline	11,538	51	.003	5.3%
DGN	232	354	1.53	42%

It is important to note that the Atlantic DGN gear did not incorporate measures to reduce marine mammal interactions (e.g., pingers, long extenders). Also, much of the DGN effort occurred in the summer and took place in a very concentrated period of time (10 to 14 days) until the total allowable catch was reached. Most of the effort occurred in an area of high pilot whale and Risso's dolphin densities (off Cape Hatteras in the mid-Atlantic Bight). Observer records from the DGN fishery indicate that up to 20 species of marine mammals were taken while only five species of marine mammals were observed taken in the longline fishery. The Atlantic pelagic longline fishery targeted swordfish, tunas, and sharks and was not necessarily limited to shallow-sets.

17. Please define, "...excessive protected species and bycatch interactions." (DEA p.3)

The sentence in reference was elaborating on the rationale for the proposed EFP. The full sentence reads "The EFP would allow preliminary test fishing to gauge impacts and determine whether this type of fishing is an economically viable substitute to fishing with DGN gear and can be prosecuted without excessive protected species and bycatch interactions." As discussed in our previous responses, protected species interactions center around the takes of ESA-listed species and MMPA regulated species such as short finned pilot whales that have low PBR's. The proposed EFP will incorporate take caps for the ESA-listed species thereby addressing any excess take that might occur otherwise. The probability of interaction with any MMPA-regulated species is very low for this action based on the best available science. The impacts that the proposed action will have on the bycatch of non-target finfish is addressed in the DEA. Given the bycatch reduction methodologies being employed as part of the EFP (i.e., circle hooks, mackerel bait, shark de-hooking devices), the rate of survivorship for released species has increased over conventional longline gear and operations.

18. What is the basis for the assumption that the only alternative to the EFP is to rely on imports from fisheries with potentially higher levels of protected species bycatch due to less stringent environmental regulations, given that NMFS has maintained in Federal Register Vol. 69, No. 48/ March 11, 2004, that: *"Although there is a possibility that fishing effort may shift to foreign nations, at this time, there are no data to support this claim. Moreover, there are no data that show that longline fishing by foreign vessels have higher sea turtle interaction rates."*? Are these statements mutually inconsistent, or can they be reconciled?

Shallow-set longlining with circle hooks and mackerel bait has been demonstrated to reduce sea turtle bycatch rates by 65 percent to 90 percent, depending upon species and fishery. Also, the use of circle hooks has been shown to affect the manner in which sea turtles are caught in gear and reduce hook ingestion. These changes in how interactions occur have also lead to lower post-hooking mortalities. There are many countries that continue to fish using "J" style hooks, which has demonstrated high sea turtle interaction rates and higher post-hooking mortality. The United States currently does not restrict the importation of swordfish based on longline fishing gear used by a particular country. In addition, the level and quality of observer coverage and enforcement is highly variable in many countries that import swordfish into the U.S. market compared to the consistent and high quality programs employed by the U.S. to monitor U.S. fishermen and fisheries.

19. U.S. swordfish imports rose only 10.5% in the 4 years since various Pacific regulations were implemented (2001-2004) over the time period when the SSLL was closed in Hawaii, as compared to the 4 years prior to the Pacific regulations (1997-2000). What is the Hawaii SSLL percentage of total U.S. production? What does this relatively small increase during this period imply for increases in imports if U.S. DGN were replaced by harpoon fishing? Also, if the transition from the DGN to SSLL were to occur in the West Coast EEZ, what is the estimated increase in Pacific and US landings, and how would this compare to current and historical import rates?

The import data in Table 3-16 of the DEA demonstrates that total U.S. imports from 1997 to 2000 were 60,037 mt, and fell back to a level of 53,286 mt over the period from 2001 to 2004, for an overall *drop* in imports of 11.2 percent over the period.

The following table shows Hawaii SSLL production as a percentage of total U.S. production.

Table 3. Hawaii SSLL production as a percentage of total U.S. production.

Year	HI Catch	Imports	HI Share
	(metric tons)		
1989	285	6,813	4.2%
1990	1,596	7,476	21.3%
1991	3,951	7,171	55.1%
1992	4,937	6,883	71.7%
1993	6,117	5,838	104.8%
1994	3,365	4,379	76.8%
1995	2,668	4,681	57.0%
1996	2,663	5,140	51.8%
1997	2,885	15,598	18.5%
1998	3,267	16,282	20.1%
1999	3,106	13,843	22.4%
2000	2,958	14,314	20.7%
2001	308	13,698	2.3%
2002	321	15,712	2.0%
2003	147	13,150	1.1%
2004	237	10,726	2.2%
2005	1,563	10,187	15.3%

The idea that DGN could be "replaced" by harpoon fishing is questionable on economic and technical grounds. Evidence on the economic side is provided by the negligible change in West Coast EEZ harpoon production which occurred in response to the 2001 regulatory limits that eliminated California-Oregon DGN effort from August 15 to November 15 in the Pacific sea turtle conservation area to the north of Point Conception and closed the Hawaii shallow-set longline swordfish fishery. The resulting drop in DGN and longline swordfish production created an opportunity for harpoon effort to increase as a substitute, *provided it was an economically viable alternative.*

The available evidence (including personal communication with a processor) suggests that instead, imports increased as a *share* of U.S. swordfish demand, while no significant increase in the harpoon share of demand ensued. The following table displays the percentage breakdown of U.S. swordfish demand over the period from 1994-2005 by West Coast landings (DGN, high seas longline and harpoon), Hawaii pelagic longline landings and imports. As the table demonstrates, the demand share of imports increased substantially in the wake of the 2001 limits on West Coast DGN and Hawaii longline

production. The level of harpoon production increased as well, but off such a low base (less than one percent of overall U.S. swordfish demand) as to have negligible impact.

Table 4. Share of West Coast and Hawaii swordfish landings 1994-2005

Year	WC Longline	WC DGN	WC Harpoon	HI Longline	Other U.S.	Imports
1994	7.9%	11.3%	1.3%	28.6%	13.7%	37.2%
1995	3.4%	10.7%	0.9%	24.4%	17.9%	42.8%
1996	4.0%	11.7%	0.7%	23.7%	14.2%	45.7%
1997	3.6%	5.9%	0.4%	13.1%	6.5%	70.6%
1998	2.4%	6.7%	0.2%	14.1%	6.1%	70.4%
1999	7.4%	4.8%	0.4%	14.6%	7.8%	65.0%
2000	9.3%	4.5%	0.4%	13.3%	8.3%	64.1%
2001	10.8%	4.4%	0.3%	1.7%	6.5%	76.3%
2002	7.1%	3.4%	0.5%	1.6%	7.4%	80.0%
2003	10.7%	3.4%	0.6%	0.8%	8.4%	76.0%
2004	7.1%	2.5%	0.5%	1.8%	8.5%	79.6%
2005	0.2%	3.6%	0.6%	11.8%	6.9%	77.0%

One likely reason for the limited increase in harpoon production in response to the drop in West Coast DGN and Hawaii longline production is that harpoon-caught swordfish is a fundamentally different product from the price and quality standpoints. The average real ex-vessel price of West Coast harpoon-caught swordfish over the period from 1994-2005 was $4.16, compared to respective average prices of $1.94 for West Coast longline catch and $1.80 for DGN catch. The persistently higher price of harpoon-caught swordfish compared to DGN or longline catch suggests that it is more expensive to catch and consume, yet a limited number of high-end consumers are willing to pay more for the quality premium. Hence harpoon-caught swordfish is more of a luxury product than a potential substitute for reduced DGN and longline production.

Table 5. Average real ex-vessel price of West Coast caught swordfish.

Year	Longline	DGN	Harpoon
1994	$2.40	$2.36	$4.57
1995	$2.12	$2.35	$4.27
1996	$2.04	$2.05	$4.16
1997	$1.76	$1.78	$4.23
1998	$1.99	$1.75	$4.36
1999	$2.06	$1.80	$3.85
2000	$2.18	$1.75	$4.07
2001	$1.81	$1.43	$4.34
2002	$1.52	$1.60	$3.62
2003	$1.59	$1.41	$3.77
2004	$1.69	$1.71	$4.49
2005	$2.09	$1.63	$4.18
Average	$1.94	$1.80	$4.16

The other reason that increased harpoon production is not feasible as a replacement to reduced DGN and LL production is technical, related to the necessary conditions to successfully fish with harpoon gear. See the discussion of this point in context of the response to Question 15.

With regard to the last part of Question 19, there is no way to accurately predict the effect of a transition from DGN to SSLL in the West Coast EEZ on Pacific and U.S. landings, given that there is no data on SSLL fishing in the West Coast EEZ on which to base such an assessment. However, given the likelihood that any such a transition from DGN to SSLL would involve limits on allowable effort, a limited number of permits, and bycatch mitigation measures, the level of Pacific and U.S. landings would effectively be limited by regulatory controls. Further, any increase in Pacific and U.S. SSLL landings would likely be offset by a decrease in DGN catch and imports, both because of a phasing out of DGN effort in favor of increased longline effort, and to the extent that LL catch acted as a substitute for DGN catch and imports.

20. Is there a way to compare catch rates and/or mortality rates of blue sharks, the primary bycatch for long-lines, with drift gill net blue shark catch/mortality rates? What is the current status of this species? What are the greatest threats to the health of this species?

NMFS has collected blue shark catch rate data for the DGN fishery in its observer program since 1990. The proposed EFP would allow the collection of longline data to allow for a comparison of blue shark catch rates between longline and DGN gear in the EEZ. NMFS is currently undertaking a pilot project to assess the post-release survivability of blue sharks caught in the DGN fishery using pop-off satellite archival tags but this information is preliminary.

A primary threat to the health of the species is bycatch mortality, which may be lower in a longline fishery than in a DGN fishery. Based on the most recent stock assessment[3] North Pacific blue sharks are not overfished, nor is overfishing occurring.

There are high catch rates of blue shark in HMS fisheries targeting swordfish, including the West Coast DGN fishery and SSLL fisheries prosecuted by Hawaii-based and (in the past) California-based vessels. Based on NMFS observer records, approximately 65 percent of blue sharks captured in the DGN fishery were determined to have been dead, or will likely die, upon discard. The use of circle hooks and other mitigation measures, as would be required under the EFP, does not appear to reduce blue shark catch rates but does appear to increase survivorship. Hawaii SSLL observer records for trips utilizing circle hooks, mackerel-type bait, and de-hooking pliers (162 trips, June 2005 -March, 2006); indicate that approximately 95 percent of captured blue sharks were released alive. The bycatch reduction savings with SSLL gear have been significant in similar fisheries and, coupled with major

[3] Kleiber, P., Takeuchi, Y. and Nakano, H. 2001. Calculation of plausible maximum sustainable yield (MSY) for blue shark (*Prionace glauca*) in the north Pacific, SWFSC Admin. Rep. H-01-02 and Dept. of Commerce.

improvements in sea turtle bycatch rates, demonstrate why NMFS believes the SSLL gear to be a superior gear for targeting swordfish in the U.S. West Coast EEZ. Estimated blue shark mortality under the EFP would represent a very minor incremental increase in overall fishing mortality.

21. What is the economic viability for a fishery (e.g., the Hawaii SSLL) that is routinely closed early due to meeting caps? Do not early closures of SSLL due to meeting caps trigger the same concerns that transitioning to the harpoon type of fishery would (i.e., increasing reliance on foreign (and arguably less-protective) imports)?

The Hawaii shallow-set longline fishery is not routinely closed. The Hawaii shallow-set longline fishery began operations under take cap management in May 2004 and concluded the year without reaching the take cap. The fishery successfully completed the full 2005 season without reaching the take caps. In 2006, however, the fishery was closed on March 20th because takes of loggerheads had reached the annual cap of 17 animals. The fishery in 2006 did not follow normal patterns of effort and an unusually high level of effort was made in the first quarter, which is a time of high interactions rates, or CPUEs with loggerheads. The Hawaii fishing industry, in conjunction with NMFS, is exploring ways to better manage fishing effort during periods of anticipated high loggerhead presence.

For 2007, the turtle interaction limits have not been reached. The Hawaii fishery is now in its typically slow summer period, and few boats are active. When the swordfish are once again available to Hawaii-based vessels in the fall, the shallow-set fishery is expected to become more active again.

The caps established in the Hawaii shallow-set longline fishery were based upon the Incidental Take Statement (ITS) in the biological opinion prepared for that action. Exceeding caps established by an ITS is not unexpected, since the ITS is based upon the mean projected interactions, thus roughly 50 percent of the time, takes will be higher than the mean and 50 percent of the time, takes will be lower than the mean. One approach for providing more assurance that the caps would not be exceeded is to base the cap (and ITS) and the high end of a confidence interval around the mean. This approach was taken in the Hawaii based deep-set longline consultation in setting the ITS (there is no cap in this fishery). .

22. Is there a biologic basis for the area described as the southern California Bight in DEA Figure 2-1, which depicts the southern California Bight, or is this strictly a political boundary (e.g., to avoid the Channel Islands Sanctuary, state waters around San Nicolas Island, and to avoid conflicts with recreational fishing)?

This delineation was proposed by the applicant to avoid user conflicts between commercial and recreational fishermen (e.g., harpoon vs. longline; longline vs. recreational). Given the proximity of the SCB to major urban centers which support substantial marine recreational fisheries and eco-tourism, it was deemed appropriate to prohibit EFP operations within the SCB. There are pronounced species distribution and abundance differences inside and

outside of the SCB which are driven in part by the biology, oceanography, and climatology of the system.

23. Please list the seabird impact reduction measures that will be included?

NMFS has recently implemented effective seabird mitigation measures in U.S. pelagic longline fisheries. Many of these measures were developed in the Hawaii longline fishery as a result of a 2000 U.S. Fish and Wildlife Service (USFWS) Biological Opinion on the fishery's effects on the short-tailed albatross. These measures were incorporated into the PFMC's HMS FMP in 2004 for longline vessels fishing out of West Coast ports.

The following terms and conditions, taken from the 2004 HMS FMP for longline vessels fishing East of 150° W longitude but outside the EEZ, would also be included in the permit:

- Longline deployment must begin at least one hour after local sunset and be completed no later than local sunrise;
- Use completely thawed bait to fish for Pacific pelagic management unit species;
- Retain sufficient quantities of offal for the purpose of discharging the offal strategically in an appropriate manner;
- Remove all hooks from offal prior to discharging the offal;
- Discharge fish, fish parts (i.e., offal), or spent bait while setting or hauling longline gear on the opposite side of the vessel from where the longline is being set or hauled; and
- Attach a weight of at least 45 g to each branch line within 1 m of the hook.

NMFS is currently consulting with the USFWS on whether the preferred suite of seabird mitigation measures are the most appropriate for inclusion as terms and conditions of the EFP.

24. Why is there a cap for striped marlin? How was it set?

A take cap for striped marlin was submitted to NMFS as one of several risk-averse EFP conservation measures recommended by the PFMC. Although the best available information indicates a low level of anticipated striped marlin bycatch based on proposed EFP effort levels, the PFMC felt that addressing potential bycatch concerns for such a recreationally important species like striped marlin was justified. The cap was set based on review of catch records from the Southern California Billfish Club as well as projected EFP catch based on historic catch levels from the Hawaii SSLL fishery observer program records for those years following circle hook and mackerel bait gear implementation (February 2004 to the present). The final recommendation of a 12 fish cap employed a somewhat qualitative and very conservative rendering of these records.

Conclusion

In closing, NMFS would like to emphasize that reducing bycatch is a top priority of NMFS and remains a central challenge for the Agency. NMFS has several strong mandates for fish and protected species bycatch reduction, including the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Endangered Species Act (ESA), and the Marine Mammal Protection Act (MMPA). We believe that these statutes and their accompanying regulations hold NMFS to standards consistent to those advocated by the California Coastal Act.

With the reauthorization of the MSA, in 1996, Congress amended MSA in part to define the term "bycatch" as well as to require that bycatch be minimized to the extent practicable. "Bycatch," as defined by the MSA (16 U.S.C. § 1802 (2)), "means fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. "Economic discards" are "fish which are the target of a fishery, but which are not retained because of an undesirable size, sex, or quality, or other economic reason." "Regulatory discards" means "fish harvested in a fishery which fishermen are required by regulation to discard whenever caught, or are required by regulation to retain but not sell." National standard 9 of the MSA requires that "conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch" (16 U.S.C. § 1851(9)). Sec. 303 of the MSA expands on this requirement by stating that fishery management plans are required to "establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority (A) minimize bycatch and (B) minimize the mortality of bycatch which cannot be avoided" (16 U.S.C. § 1853(11)).

The recently amended MSA (i.e., the Magnuson-Steven Fishery Conservation and Management Reauthorization Act of 2006 (P. L. 109-479)) further addresses bycatch reduction. The bill requires the Secretary of Commerce, in cooperation with Fishery Management Councils and other affected interests, to establish regionally-based reduction engineering programs. The programs should be designed to develop technological devices and engineering changes to minimize bycatch, seabird bycatch, bycatch mortality, and post-release mortality in federally-managed fisheries. NMFS believes that an eventual transition from drift gillnets to what it believes to be a more conservative pelagic fishery gear or longlines, moves the Agency in the direction further addressing bycatch reduction.

Another statute holding NMFS to standards consistent with the California Coastal Act is the ESA. This statute requires the Federal government to protect and conserve species and populations that are endangered, or threatened with extinction, and to conserve the ecosystems on which these species depend. The bycatch reduction requirements of the ESA follow from Section 9(a)(1)(B) and 9(a)(1)(C) of the ESA, which prohibit the take of endangered species within the United States or the territorial sea of the United States, and on the high seas, respectively. "Take" is defined by the ESA as "to harass, harm,

pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct" (16 U.S.C. 1536(18)). ESA Sections 4, 6, 7, and 10 provide mechanisms for the limited take of ESA-listed species. Of particular relevance for fisheries bycatch is Section 7, which provides that "Each Federal agency shall...insure 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 destruction or adverse modification of habitat of such species . . ."(16 U.S.C. §1536(a)(2)). NMFS is confident that the Section 7 biological opinion and the accompanying incidental take statement when completed will ensure adequate protections to its trust resources currently listed under ESA. Finally, in cooperation with the U.S. Fish and Wildlife Service, NMFS is undertaking similar consultation and expects that the management measures that will be included in the terms and conditions of the permit (response to Question 23), will also provide adequate protections to seabirds.

Lastly, the MMPA seeks to maintain populations of marine mammals at optimum sustainable population levels, principally by regulating the take of marine mammals. Under the MMPA, "take" is defined as "to harass, hurt, capture, or kill, or attempt to harass, hurt, capture, or kill any marine mammal." This includes fishing-related mortality and serious injury. Although the MMPA prohibits the take of marine mammals, it provides exceptions to the prohibition for incidental mortality and serious injury in the process of commercial fishing activities as stated in our response to Question 9.

Section 118 of the MMPA requires that NMFS classify each U.S. fishery according to whether it has a frequent (Category I), occasional (Category II), or remote (Category III) likelihood of incidental mortality and serious injury to marine mammals. Participants in Category I or II fisheries are required to register with NMFS, take on board an observer if requested by NMFS to do so, and to comply with all applicable TRP regulations. All fishermen, including those participating in Category III fisheries, are required to report the incidental mortality and serious injury of a marine mammal should it occur. NMFS currently classifies pelagic longline fishing off California as a Category II fishery.

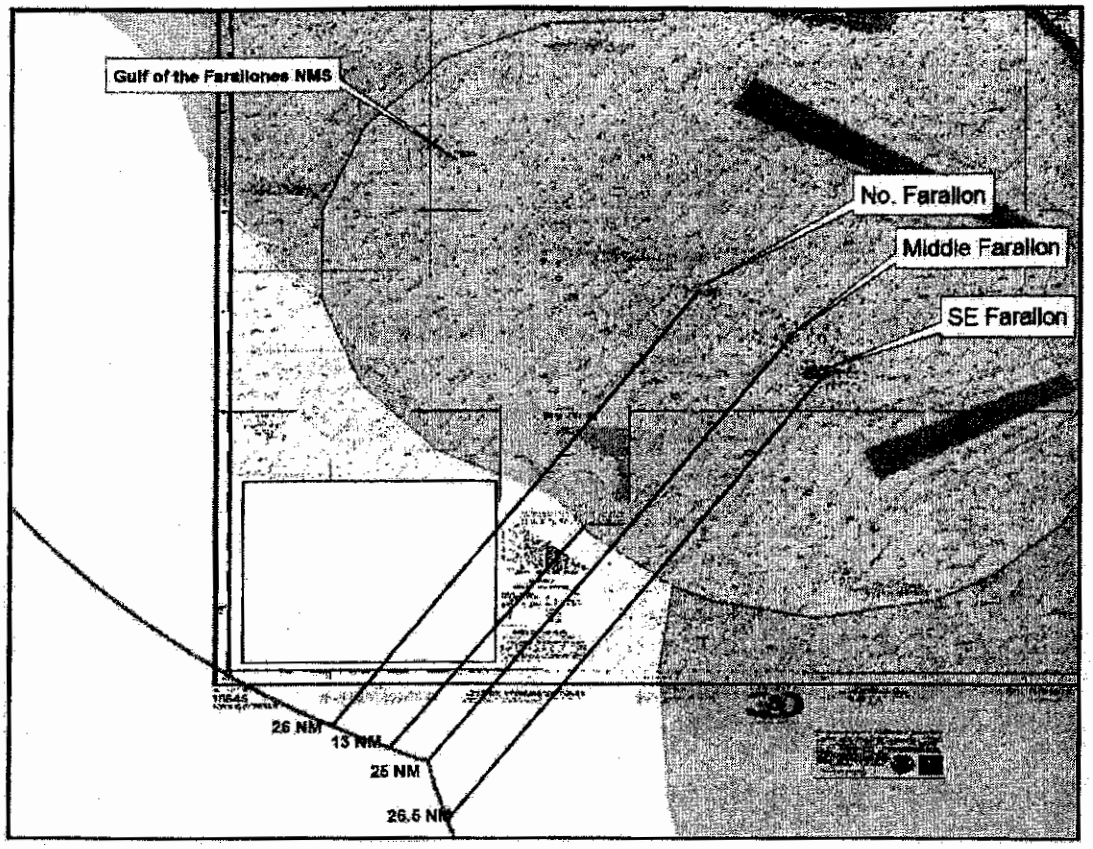


Figure 1. Estimated distance from Farallon Islands and Farallon Islands National Marine Sanctuary to proposed shoreward boundary of EFP.

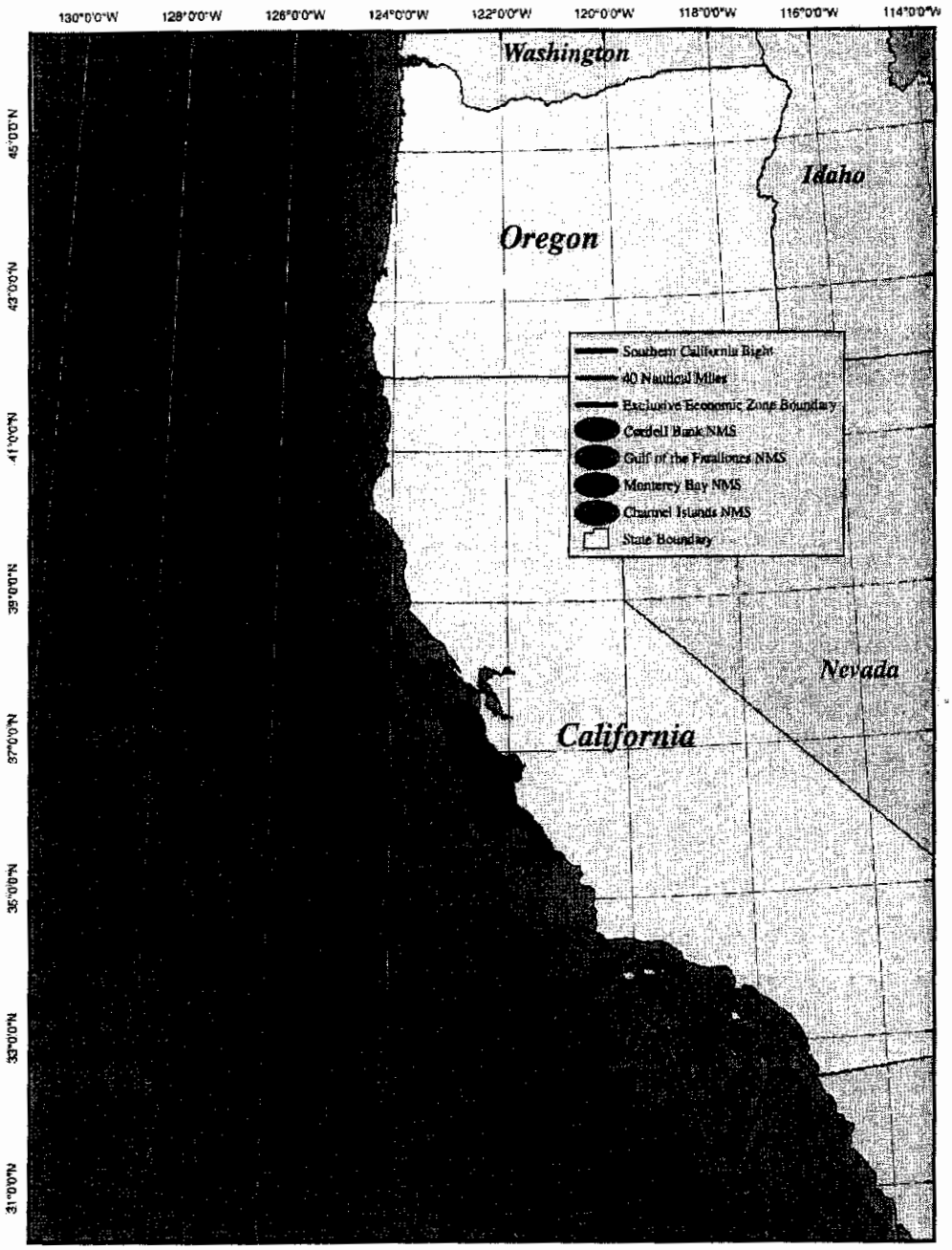


Figure 2. Proposed boundary of proposed shallow-set longline EFP. Green line represents 40 nautical mile shoreward boundary; grey represents EEZ; black line represents SCB boundary.

CC-061-07

Ocean Pacific Seafood

18212 Rosita St.
Tarzana, CA 91356
(818) 343-9927
Fax (818) 881-5003
E-mail: LaPazKD@aol.com

September 22, 2007

Peter M. Douglas,
Executive Director
California Coastal Commission
45 Fremont St., Suite 2000
San Francisco, CA 94105-2219

Subject: Coastal Zone Management Act required consistency certification for an exempted fishing permit application to the National Marine Fisheries Service by Pete Dupuy for hook and line gear pelagic longline fishing in a portion of the U.S. exclusive economic zone off the California coast.

Dear Mr. Douglas:

Pursuant to the National Ocean and Atmospheric Administration office of Ocean and Coastal Resources Management's authorization for your review of the above referenced exempted fishing permit (the "Fishing Permit") for consistency with the enforceable policies of the California Coastal Act as specified by Coastal Zone Management Act (the "Coastal Management Act") regulations found at 15 CFR part 930, subpart D, I submit that the proposed activity complies with the enforceable policies of California's approved management program and will be conducted in a manner consistent with this program.

The California Coastal Commission had mistakenly reviewed (CD-041-07) this Fishing Permit for consistency with California's enforceable policies as a federal activity instead of a federally permitted activity conducted by a non-federal applicant. The data and information presented by the National Marine Fisheries Service (the "Fishery Service") during this previous review is still relevant although I present the following additional data and information for your consideration.

In February 2006, I applied to the Fishery Service for the proposed Fishing Permit to allow limited hook and line gear fishing for swordfish with a configuration typically used in shallow-set pelagic longline fisheries. Fishing would be conducted by a single vessel under specified conditions within a portion of the West Coast Exclusive Economic Zone (the "EEZ"). In April 2007, the Pacific Fishery Management Council (the "Pacific Council") approved this Fishing Permit after an extensive and critical review by a team of government and public scientific and fishery management experts in an open and transparent public process. In June 2007, the Fishery Service published a Notice in the Federal Register [1] that they had made a preliminary determination that this Fishing

[1] Federal Register Vol. 72, NO. 113, June 13, 2007

EXHIBIT NO. 15
APPLICATION NO.
CC-061-07

Permit warrants further consideration and requested comments. This led to the California Coastal Commission's petition to review this activity for consistency.

The overarching purpose and intent of this proposed Fishing Permit is to explore the feasibility of switching from drift gillnet gear as used in the California/Oregon shark/ swordfish drift gillnet fishery (the "Driftnet Fishery) to a hook and line gear pelagic longline swordfish fishery (the "Permit Fishery") within a portion of the area traditionally fished by Driftnet Fishery vessels in order to reduce the level of bycatch [2] and/or bycatch mortality that occurs in that fishery.

Potential impacts from this proposed activity is mitigated as much as possible. Only a single vessel is used. There will be 100% observer coverage. Fishing is restricted to a four-month period. Fishing effort is limited to 56,000 hooks. And, caps will be set for maximum allowable takes for species of concern that immediately revoke the Fishing Permit if exceeded.

Regarding potential impacts from this Permit Fishery, the uses of hook and line as a fishing gear takes many forms. Some forms employ single hooks, and some employ a whole range of numbers of hooks. Depending on the fishing purpose (e.g. recreational or commercial) and target species (surface, pelagic or demersal), hook and line uses and configurations range from being relatively stationary in the water to moving through it, and can be employed anywhere in the water column from the bottom to the surface. Regardless of a specific hook and line configuration that may be employed in any specific fishery circumstance, the business end of this generic gear is a fishhook that is attached to a line. Any biological resource impacts resulting from the use of this generic gear will occur in any specific area regardless of the specific hook and line configuration or fishing purpose employed.[3]

Fishing activities aimed at bycatch reduction fulfill U.S. obligations and responsibilities under international, and federal law. United States' obligations and responsibilities under international law include compliance with a United Nations agreement [4] concerning highly migratory species which requires nations to minimize pollution, waste, discards, catch by lost or abandoned gear, catch of non-target species, and to the extent practicable, the development of selective environmentally safe and cost effective fishing gear and techniques.

---

[2] The term bycatch means fish that are harvested in a fishery, but that are not sold or kept for personal use (50 CFR §600.350(c)). As used throughout this document, this term also applies to the incidental capture of other protected species such as marine mammals, sea turtles, and sea birds.

[3] The Coastal Management Act specifies that uniformity be required to ensure that states are not applying policies differently, or in a discriminatory way, among various entities for the same type of project or similar purpose (Federal Register Vol. 65, No. 237, December 8, 2000). An objection to the use of longline gear because of environmental impacts could be viewed as a discriminatory application of policy unless all pelagic hook and line use was also prohibited.

[4] The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, ratified by the U.S. in 1996.

This obligation is also reflected in Article 5(e) of the 2000 Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean which states: "adopt measures to minimize waste, discards, catch by lost or abandoned gear, pollution originating from fishing vessels, catch of non-target species, both fish and non-fish species, (hereinafter referred to as non-target species) and impacts on associated or dependent species, in particular endangered species and promote the development and use of selective, environmentally safe and cost-effective fishing gear and techniques."

This obligation is again reflected in Article VII (1)(g) of the 2003 Antigua Convention [5] which states: "adopt appropriate measures to avoid, reduce and minimize waste, discards, catch by lost or discarded gear, catch of non-target species (both fish and non-fish species) and impacts on associated or dependent species, in particular endangered species." And Article VII (1)(k) which states: "promote, to the extent practicable, the development and use of selective, environmentally safe and cost-effective fishing gear and techniques and such other related activities, including activities connected with, *inter alia*, transfer of technology and training."

In order to effectuate U.S. obligations and responsibilities specified by these international agreements, the Pacific Council, under authority of the Magnuson-Stevens Fishery Management Act (the "Fisheries Act"), developed and enacted the Highly Migratory Species Fishery Management Plan (the "Fishery Plan") in 2004.[6] The intended effect of this enactment is to establish federal management of U.S. fisheries for Pacific tunas, sharks, billfish, swordfish, and other highly migratory species in commercial and recreational hook and line, drift gillnet, harpoon, and purse seine fisheries in the U.S. EEZ off the coasts of Washington, Oregon, and California and (for U.S. vessels) in adjacent high-seas waters. Regulations enacted under the Fishery Plan prevent overfishing of highly migratory fish stocks to the extent practicable and achieve optimum yield for U.S. fisheries involved while minimizing bycatch and protected species interactions consistent with the Fisheries Act and other applicable law. The Fishery Plan implements consistent management of these fisheries with respect to the states, other fishery management councils, and international agreements. The Fishery Plan promotes the long-term economic health of highly migratory fish fisheries.[7]

Recent amendments to the Fishery Plan [8] reiterate that this federal management action provides the vehicle to address issues of regional, national, and international concern such as have been raised about the status of highly migratory fish stocks, essential fish habitat, and bycatch of fish and protected species in fisheries for highly migratory fish. International and U.S. policies reflect these concerns. The 1995 Agreement on Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish

---

[5] Convention for the Strengthening of the Inter-American Tropical Tuna Convention Established by the 1949 Convention Between the United States of America and the Republic of Costa Rica

[6] 50 CFR Parts 223, 224, and 660. Fisheries Off West Coast States and in the Western Pacific; Highly Migratory Species Fisheries; Final Rule. Federal Register/Vol. 69, No. 67 April 7, 2004

[7] Federal Register Vol. 69, No. 67, April 7, 2004

[8] Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species, Amendment 1, 2007.

Stocks provides that nations will cooperate in regional management bodies to establish and ensure compliance with conservation measures for highly migratory fish stocks. The 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High-Seas, adopted by the Food and Agriculture Organization of the United Nations (the "FAO"), requires nations to maintain a registry of authorized vessels fishing on the high-seas and ensure that such vessels are marked for identification and that they report sufficient information on their fishing activities. The High-Seas Fishing Compliance Act is the domestic legislation enacted in 1995 to implement the FAO Agreement. The FAO also was the forum for the negotiation of a non-binding "Code of Responsible Conduct of Fisheries" which establishes principles for national and international fishery management. The final text of this code was negotiated in September 1995 and the Fishery Service has completed an implementation plan for the U.S. In 1999, the FAO adopted an International Plan of Action for the Conservation and Management of Sharks, which encourages nations to assess the status of shark stocks within their EEZs and those fished on the high seas. The U.S. has developed a National Plan of Action for Conservation and Management of Sharks, and the Fishery Plan aids by focusing research and data collection efforts to support the National Plan. Within the U.S., the Fisheries Act requires regional fishery management councils to describe and identify essential fish habitat, minimize to the extent practicable adverse effects on habitat caused by fishing, and identify other actions to encourage conservation and enhancement of habitat. The Fisheries Act requires that conservation and management measures, to the extent practicable, minimize bycatch and to the extent that bycatch cannot be avoided, minimize the mortality of such bycatch. Finally, the Marine Mammal Protection Act, Endangered Species Act and Migratory Bird Treaty Act provide protections for marine mammal, sea turtle,[9] and sea bird resources. The Fishery Plan is the mechanism by which these critical issues can be addressed in an open process and with the advice of all concerned.[10]

As this information regarding U.S., federal, and regional obligations and responsibilities make abundantly clear, a purpose such as is embodied in the proposed Fishing Permit (to explore the feasibility of switching from drift gillnet gear to hook and line gear as a potential method to reduce existing levels of bycatch and/or bycatch mortality) is an activity that is a U.S. obligation and responsibility under international law, as well as a statutory obligation and responsibility under federal law.

The development of the proposed Fishing Permit took place over a 12-year span. In order to better understand this evolution as a reaction to bycatch concerns and regulatory changes, a somewhat detailed explanation of a rather complicated Driftnet Fishery background follows.

Prior to the development and implementation of the Fishery Plan, the Driftnet Fishery was developed and regulated under California law. Before introduction of this fishery,

---

[9] Sea turtles are considered a "fish" under the Fisheries Act, and are also subject to Fisheries Act standards and regulations (50 CFR §600.10).

[10] Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species, Amendment 1, 2007.

swordfish in California could only be taken commercially by hand-held harpoon and there was no fishery for large pelagic sharks. The Driftnet Fishery evolved from a small nearshore experiment in the late 1970s into a major California fishery. Driftnet gear is usually deployed or "set" each evening, remains attached to the vessel and drifts with the vessel overnight. The set is completed when the net is pulled each morning. Driftnet Fishing effort peaked in the 1986-87 season [11] with over 11, 000 sets, quickly declined to about 4,500 sets by 1990, and has averaged about 3,500 sets per year through 1998. Nets are constructed of three strand twisted nylon. The minimum allowed stretched mesh size is 14 inches, but is typically 16 to 22 inches, with an average of 19 inches. Net length is limited to 6000 feet or less. Net width is not limited, but is typically between 100 and 150 feet. Relatively high valued landings of all species harvested in this fishery have averaged about 1,500 metric tons from 1994-1999. The ex-vessel value of the fishery ranged between almost $5 million to more than $6 million during this time period. Swordfish provided the largest share of total ex-vessel revenue, ranging from $2.7 million to almost $5 million. Most of the fleet's product is sold in the fresh fish market, where it primarily provides high quality, locally caught fish for the white tablecloth restaurant trade.[12]

Fish bycatch in the Driftnet Fishery has not been a stock status concern for any species. During the eleven-year period from 1991-2002, observer data show that albacore, skipjack tuna, blue shark, and common mola were the major bycatch fish species taken in the Driftnet Fishery. The bycatch of albacore is associated with economic discards.[13] The high total discard rates (discards/total catch) for significant bycatch species such as common mola (> 99%), blue shark (> 99%), and skipjack (> 60%) are associated with the lack of marketability or low prices paid for the fish. An estimated 97% of the common mola and 36% of the blue sharks are released alive. For the period 1992 to 1998, average Driftnet Fishery dead discard rates per set for the major bycatch fish species were: striped marlin 0.15; albacore 0.77; skipjack tuna 2.15; blue shark 6.21; and common mola 0.53.[14]

However, marine mammal bycatch in the Driftnet Fishery has been a long-standing stock status concern. Based on Fishery Service observer data, average annual marine mammal mortality in the Driftnet Fishery for the period 1990 through 2000 is 1.3 fin whales, 2.5 gray whales, 1.3 sperm whales, 99.8 California sea lions, 25.3 northern elephant seals, 2.3 common dolphins, 10.5 long beak common dolphins, 103 short beak common dolphins, 5 Dall's porpoise, 23 northern right whale dolphins, 4.3 Pacific white sided dolphins, 4.5 Risso's dolphins, and 1.5 short-finned pilot whales.[15]

---

[11] The Driftnet Fishery season runs from May 1 to the following January 31. The fishery is closed from February 1 thru April 30. Data is often compiled by year which would include January from the previous season and May thru December of the following season.

[12] Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species, Amendment 1, 2007, pp 57-62.

[13] Albacore is a marketable fish discards are only fish that are either small or heavily damaged by sharks and/or sea lions.

[14] Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species, Amendment 1, 2007, Appendix C, p. 16

[15] Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species, Amendment 1, 2007, Appendix D, pp.15-16.

The 1994 amendments to the Marine Mammal Protection Act established a new regime to manage the conservation of marine mammals. An individual Stock Assessment Report for each marine mammal stock occurring in U.S. waters was mandated. Each Stock Assessment Report contains a population estimate for that stock. It calculates the number of individuals that can be removed from a stock without inhibiting a stock's ability to grow (this number is called the Potential Biological Removal level). It lists the sources and levels of human and non-human caused mortality or serious injury to a stock, and determines if the annual level of mortality or serious injury rise above a stock's Potential Biological Removal level. Each year, the Fishery Service also compiles and updates a list of fisheries categorizing them according to their level of marine mammal mortality or serious injury. A fishery is Category I if mortalities or serious injuries to one or more marine mammal stocks are 50% or more above the Potential Biological Removal level. A fishery is Category II if mortalities or serious injuries are less than 50% of the Potential Biological Removal level, but more that 10% of that level. And a fishery is Category III if mortalities or serious injuries are 10% or less of the Potential Biological Removal level. For Category I fisheries, the Marine Mammal Protection Act calls for the establishment of a Take Reduction Team in order to formulate a Take Reduction Plan that makes recommendations to the Fishery Service for reducing marine mammal mortality or serious injury by a fishery to below the Potential Biological Removal level for all stocks within 6 months.

The Driftnet Fishery was categorized as a Category I fishery in 1994 because mortality or serious injury was above the Potential Biological Removal level for seven marine mammal stocks. Consequently, the Fishery Service convened the Pacific Offshore Cetacean Take Reduction Team (the "Pacific Take Team") in February 1996 to develop the Pacific Offshore Cetacean Take Reduction Plan (the "Pacific Take Reduction Plan") for the Driftnet Fishery. The Pacific Take Team investigated many marine mammal take reduction strategies. Two gear-switching strategies were considered: Substitution of harpoon gear for drift gillnet gear, and substitution of pelagic longline for drift gillnet gear. Substituting harpoon gear would have eliminated marine mammal interactions, but it was not judged feasible by the Pacific Take Team because the area available to the harpoon fishery is limited and would not provide enough swordfish production to be a profitable fishery for the existing number of Driftnet Fishery vessels. Although pelagic longline is the predominate gear configuration used to harvest swordfish worldwide, and substituting this gear in place of drift nets would have reduced marine mammal mortality or serious injury considerably.[16] The Pacific Take Team did not recommend this

[16] Substitution of drift gillnet gear for pelagic longline gear occurred in the North Atlantic swordfish fishery because, with the two gears fishing side by side, longline was deemed to be a more selective, environmentally safe and cost effective fishing gear. The 1998 federal rule proposing this substitution states: "The proposed rule is intended to reduce the take of marine mammals in the Atlantic swordfish fishery. Observer and vessel logbooks indicate that, in the Atlantic swordfish fishery, driftnet gear results in a significantly higher rate of take of protected marine mammals relative to other gear (i.e. pelagic longline and harpoon)" (Federal Register Vol. 63, No. 202, October 20, 1998). The final rule enacting this substitution reiterates: " The intent of the rule is to reduce marine mammal bycatch in the swordfish driftnet fishery while increasing the net benefits to the nation." This was accomplished by converting the Atlantic

strategy because of implementation problems for the California managed the Driftnet fishery. No convenient or reliable mechanism existed to recommend to the Fishery Service that California authorize a pelagic longline fishery to replace the Driftnet Fishery.[17]

In August 1996, the Pacific Take Reduction Plan recommended four strategies to reduce marine mammal takes: 1) Require net buoy extenders to be a minimum of 36 feet long thereby keeping the top of the submerged driftnet to a minimum of 36 feet below the surface thereby allowing a space for surface swimming marine mammals to pass over a net. 2) Conduct experiments on the use of pingers (electronic devices that produce a high-frequency "ping") to reduce marine mammal entanglements by alerting them to the presence of the net. 3) Recommend a freeze on the issuance of new Driftnet Fishery permits so as not to increase existing levels of effort. And 4), require Driftnet Fishery permit holders to attend mandatory skipper education workshops conducted by the Fishery Service annually to share information and observations regarding marine mammal take reduction efforts. After the 1996-97 driftnet fishing season, the pinger experiment demonstrated that driftnet vessels using pingers had a 78% reduction in the level of cetacean entanglements compared to driftnet vessels that did not use pingers. The use of pingers was mandated for the entire fleet (at an initial cost for the pingers of $1,500 that each fisherman paid out of his own pocket), as well as the minimum net depth requirement of 36 feet, and mandatory skipper workshops when final regulations implementing the Pacific Take Reduction Plan were enacted in October 1997.

The linkage between the Marine Mammal Protection Act and the Endangered Species Act has been an important factor in Driftnet Fishery management. Ironically, for all the success the Pacific Take Reduction Plan had in reducing marine mammal interactions in the Driftnet Fishery (it was so effective at reducing marine mammal interactions the Driftnet Fishry was reclassified from a Category I to a Category II fishery in 2004 [18]), because of this linkage, this fishery has since had drastic restrictions imposed that may lead to its complete collapse.

One of these linkages occurs because implementation of the Pacific Take Reduction Plan in 1996 was a "federal action." Pursuant to Section 7(a) of the Endangered Species Act each federal agency undertaking an action that might adversely affect a species listed as

---

swordfish driftnet permits to Atlantic pelagic longline permits (Federal Register Vol. 64, No. 17 January 27, 1999).

[17] Final Draft, Pacific Offshore Cetacean Take Reduction Plan, August 1996.

[18] Subsequently, the Driftnet Fishery was again classified as Category I because pilot whale takes were over 50% of the Potential Biological Removal level. This fact is not due to a biological condition of the stock. Rather, it occurs because the pilot whale is a trans-boundary stock that occupy a warm-water habitat further south and only occurs in the southern California area during warm-water events. When marine mammal surveys are done during cold-water years, there is no pilot whale presence so the population estimate is low which results in a low Potential Biological Removal level. There was 1 observed pilot whale take five years ago that extrapolates to 5 takes because observer coverage is 20% of the total effort. This mortality, because it is averaged over time, is reduced year by year. In 2008, the mortality will average out to zero. With the stroke of the clock, the pilot whale will go from a Potential Biological Removal level of over 50% to under 10%. This whole situation is not due to a biological condition, it's due to eccentricities in the way the Marine Mammal Protection Act regulations deal with trans-boundary stocks.

threatened or endangered must consult with the Secretary to insure that the agency action is not likely to jeopardize the continued existence of that species or result in the destruction of that species' critical habitat. Because the federal action is issuance of the Pacific Take Reduction Plan by the Fishery Service, the Fishery Service consults with itself to make these determinations. A Consultation under the Endangered Species Act results in the preparation by the Fishery Service of a Biological Opinion that addresses whether jeopardy or adverse modification of critical habitat is likely. The Endangered Species Act requires that the Fishery Service use "the best scientific and commercial data available" in determining if an agency action is likely to jeopardize the continued existence of any protected species or result in the destruction or adverse modification of its critical habitat. If the Fishery Service finds that an agency action is likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat, then the agency is required to suggest a reasonable and prudent alternative that can be taken to mitigate jeopardy. In developing the reasonable and prudent alternative, the Fishery Service must use the best scientific and commercial data available.

Because the Driftnet Fishery interacts with Endangered Species Act listed species of marine mammals and sea turtles, the Fishery Service conducted a formal Section 7 Consultation on the fishery in connection with the issuance of the Pacific Take Reduction Plan resulting in the issuance of a Biological Opinion, together with an Incidental Take Statement, in September 1997. The 1997 Biological Opinion concluded that the Driftnet Fishery was not likely to jeopardize any listed species. The Incidental Take Statement allowed for 18 incidental captures and 3 mortalities per year of loggerhead sea turtles, and 30 incidental captures and 19 mortalities per year of leatherback sea turtles. The Fishery Service concluded that, because there are numerous other natural and human-induced causes of sea turtle mortality and because the take level in the fishery is so low, the overall impact of the fishery on sea turtle populations was likely not substantial.

The 1997 Biological Opinion noted that in the period 1990 to 1995, 15 leatherback sea turtles were observed entangled in the Driftnet Fishery. Thirty-three percent (5 out of 15) of the leatherbacks were entangled in the upper one-third of the net. Because 7 leatherbacks were observed entangled during the sets that deployed <36 foot net buoy extenders, the estimated entanglement rate with <36 foot extenders is 0.005 leatherbacks per set (7/1,337). Furthermore, since 10 leatherbacks were observed entangled during sets that deployed extenders >=36 feet during the same period, the estimated entanglement rate on sets that used >=36 foot extenders is 0.004 leatherbacks per set (10/2,648). Therefore, one less leatherback turtle is entangled every 1,000 sets that use extenders that are >=36 feet in length. For these reasons, requiring that the top of a submerged drift gillnet be set at least 36 feet below the surface of the water should allow some leatherbacks to swim over the net and avoid entanglement and, therefore, average take levels are expected to decrease.[19]

Another of the linkages between the Marine Mammal Protection Act and the Endangered Species Act, that occurs because the Driftnet Fishery incidentally takes marine mammal

[19] 1997 Formal Section 7 Consultation on Final Regulations to Implement the Pacific Offshore Cetacean Take Reduction Plan, pp. 24-25.

species that are listed under the Endangered Species Act, is that a permit under Marine Mammal Protection Act section 101(a)(5)(E) must be obtained to authorize the lawful incidental taking of those species. Such a permit may be issued if: 1. The incidental mortality and serious injury from commercial fisheries will have a negligible impact on a species or stock. 2. A recovery plan has been developed or is being developed for such species or stock pursuant to the Endangered Species Act. 3. A monitoring program is established under section 118(d) of the Marine Mammal Protection Act. 4. Vessels are registered in accordance to section 118(c) of the Marine Mammal Protection Act. 5. A take reduction plan has been developed or is being developed for such species or stock under section 118(f) of the Marine Mammal Protection Act.

The Fishery Service has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably likely to adversely affect the species or stock through effects on annual rates of recruitment or survival. In practice, when incidental mortality or serious injury is below the Potential Biological Removal level for an Endangered Species Act listed marine mammal species or stock, such mortality and serious injury would have no more than a negligible impact on that species or stock.

On October 24, 2000, the Fishery Service issued a Marine Mammal Protection Act section 101(a)(5)(E) permit to allow the incidental, but not intentional, taking of four stocks of endangered or threatened marine mammals (fin whales, humpback whales, sperm whales, and Steller sea lions) in the Driftnet Fishery.[20] This permit may be suspended or revoked if the level of take should change and become likely to result in an impact that is more than negligible.

Once again, because the issuance of the section 101(a)(5)(E) permit is a "federal action," the Fishery Service conducted another formal Section 7 Consultation and Biological Opinion on the Driftnet Fishery. On October 23, 2000, the Fishery Service issued the 2000 Biological Opinion that concluded that the Driftnet Fishery was likely to jeopardize the continued existence of Pacific leatherback and loggerhead sea turtles. As required when a jeopardy opinion is made, the Fishery Service selected a reasonable and prudent alternative to reduce the incidental taking of leatherback and loggerhead sea turtles to avoid jeopardy. The reasonable and prudent alternative selected by the Fishery Service (the "Jeopardy Alternative") involves extensive time/area closures. The time/area closure selected to avoid jeopardy to loggerhead sea turtles by the Driftnet Fishery closes the entire area east of 120° West longitude to the fishery from June 1 through August 31 during a forecasted or occurring *El Nino* event off the coast of southern California. The time/area closure selected to avoid jeopardy to leatherback sea turtles by the Driftnet Fishery [21] closes to the fishery the area bounded by straight lines connecting the

---

[20] Federal Register Vol. 65, No. 210, October 30, 2000.

[21] The Fishery Service innocently called this time/area closure the "Pacific Leatherback Protection Area" for ease of description. However, this name has been hijacked by anti-fishing organizations and the time/area restriction has been mischaracterized as being established to protect a "critical leatherback foraging area" with the implication that it applies to any activity in this zone that might impact leatherback sea turtles. In reality, as discussed in detail below, this time/area restriction only applies to the Driftnet Fishery, and the validity of its overzealous establishment is fraught with controversial and possibly illegal practices.

following coordinates in the order listed: Point Sur at 36° 18.5' North latitude, to 34° 27' North latitude 123° 35' West longitude, to 34° 27' North latitude 129° West longitude, to 45° North latitude 129° West longitude, to the point where 45° North latitude intersects the Oregon coast from August 15 through November 15.

In the period from 1990 to 2000, Driftnet Fishery observers recorded 23 leatherback takes resulting in 14 mortalities, and 14 loggerhead takes resulting in 3 mortalities. All loggerhead takes occurred in the summer months, in a compact area within the Southern California Bight south of San Clemente Island, during *El Nino* event years.[22]

For the period from 1990 to 2000, the Fishery Service estimates the rate of entanglement (per 1000 sets) for leatherbacks at 4.12. More recent data show that, for the three-year period 1997 through 1999, when the Pacific Take Reduction Plan was in place requiring the top of a submerged drift gillnet to be a minimum depth of 36 feet below the surface, the average annual rate of entanglement estimated by the Fishery Service for leatherback sea turtles was 2.3 per 1,000 sets.

This level of take contrasts, for example, with the Gulf of Mexico shrimp fishery, in which the Fishery Service estimated in the 1980s that 47,000 sea turtles were caught annually and 11,000 were killed, and with the Hawaii tuna and swordfish fishery, where the Fishery Service recently established an acceptable incidental take level of 955 sea turtles per year, with 194 mortalities. Additionally, the level of leatherback mortality in the Driftnet Fishery pales in comparison with mortality in other Pacific Ocean basin fisheries. For example, the Fishery Service expects 2,866 leatherback turtles to be taken in other Pacific fisheries over the next three years, of which 2,163 and 1,699, respectively, are expected to die.[23] Prior to 1992, when they were banned by United Nations resolution, foreign, high-seas driftnet fisheries were estimated to have killed between 2,500 and 9,000 sea turtles per year. Foreign fisheries currently impacting sea turtles include the Japanese tuna fishery in the Western Pacific and South China Sea, South American fisheries, and the Federated States of Micronesia tuna fishery. In 1990, it was estimated that the Japanese tuna fishery captured 21,200 turtles a year, with 12,300 mortalities. It has also been estimated that, in Peruvian and Chilean swordfish operations alone, a minimum of 2,000 leatherbacks are killed annually.[24]

The 2000 Biological Opinion premises its finding that the Driftnet Fishery is likely to jeopardize the continued existence of Pacific leatherback sea turtles on what it expressly

---

[22] Since the terms of the proposed Fishing Permit excludes fishing inside of the Southern California Bight, impacts to sea turtles relative to this consistency certification are confined to leatherback sea turtles.

[23] 2000 Section 7 Consultation on Issuance of Marine Mammal Protection Act 101(a)(5)(E) Permit and the Continued Implementation of the Pacific Offshore Cetacean Take Reduction Plan for the Drift Gillnet Fishery, pp. 92-95

[24] 2000 Section 7 Consultation on Issuance of Marine Mammal Protection Act 101(a)(5)(E) Permit and the Continued Implementation of the Pacific Offshore Cetacean Take Reduction Plan for the Drift Gillnet Fishery, pp. 43-44

characterizes as a "worst case" analysis of incidental captures and mortalities.[25] The 2000 Biological Opinion determined that during the 10-year period from 1990 to 2000 the annual number of observed leatherback entanglements has fluctuated from a maximum of 5 to a minimum of zero, and notes that no pattern, either environmentally, or fishery related can be found to explain these fluctuations. The Biological Opinion determined that the worst-case scenario (5 observed entanglements in 1995 out of 572 observed sets) produced an entanglement rate of .009 leatherbacks per set. This Biological Opinion also estimated that 3,000 Driftnet Fishery sets would occur annually. Using a .009 entanglement rate, this level of effort would result in 27 leatherback entanglements with 17 mortalities per year. The Incidental Take Statement for the 2000 Biological Opinion allows for 3 leatherback entanglements or 2 mortalities per year, and concludes that the estimated level of leatherback entanglement or mortality in the Driftnet Fishery jeopardizes their continued existence. In so doing, it relies upon a single year's observed takes without regard for the historical performance of the fishery from 1990 to 2000, and without giving any credit for reductions in incidental leatherback capture and mortality over the three-year period from the implementation of the Pacific Take Reduction Plan to issuance of the 2000 Biological Opinion in contrast to the Fishery Service's findings in the 1997 Biological Opinion.[26]

Given the relative insignificance of the fishery in terms of Pacific basin-wide fisheries impacts on leatherback sea turtles, the 2000 Biological Opinion nowhere explains how the management measures embodied in the Jeopardy Alternative can contribute in any meaningful way to the survival and recovery of the Pacific ocean populations of leatherback sea turtles [27] or whether there might be alternatives that could achieve the same reduction of takes and incidental mortality at less cost to the industry.[28]

At the same time, the 2000 Biological Opinion does not take into account the beneficial effects on Pacific leatherback and loggerhead sea turtle populations associated with the

---

[25] 2000 Section 7 Consultation on Issuance of Marine Mammal Protection Act 101(a)(5)(E) Permit and the Continued Implementation of the Pacific Offshore Cetacean Take Reduction Plan for the Drift Gillnet Fishery, pp. 94-97

[26] This is especially puzzling because the Fishery Service changed the way they estimated marine mammal morality and serious injury after implementation of the Pacific Take Reduction Plan to account for diminished marine mammal entanglements after 1997.

[27] Fishery Service Scientists have found that all the leatherbacks found off California originate from one Indonesian nesting beach population estimated to be between 1,000 and 2,000 females. The annual average leatherback population off California is 178. The sex ratio off California is two females for each male. Consequently, the average leatherback population off California is between 0.1 and .06 of the population from which leatherbacks frequenting California originate.

[28] Some alternatives to the selected Jeopardy Alternative were later discussed in an Administrative Memo to the 2000 Biological Opinion. Among these alternatives, substituting harpoon gear for drift net gear was considered. The Fishery Service determined that the harpoon fishery occurs mostly in waters off southern California during August and September. In addition, harpoon fishing is not practical or feasible in rough waters, such as those occurring in the waters north of Point Conception. Therefore, the Fishery Service did not recommend converting drift gillnet to harpoon. Also, substituting longline for drift net gear was considered. Like the Pacific Take Team, the Fishery Service determined that because the use of a pelagic longline configuration was not authorized under California law, only larger vessels would be able to fish outside of the EEZ, and therefore did not recommend converting drift gillnet gear to this hook and line gear.

termination after 1992 of the foreign, high-seas drift gillnet fisheries, the institution in 1999 of extensive closures in the Hawaii tuna and swordfish fishery and the increasing use of the turtle excluder device in global shrimp fisheries. Furthermore, the 2000 Biological Opinion assumes that 100% of the turtles taken in the fishery come from nesting populations in one region, the Pacific, and it only considers effects of the fishery on "Pacific populations" of turtles. Thus, the Fishery Service's jeopardy findings are not based on the impact of the fishery on the turtle population actually listed under the Endangered Species Act [29] but instead upon the alleged impact of the fishery on a subset of the listed population. In addition, the 2000 Biological Opinion never explains what has changed in either the Fishery Service's understanding of sea turtle biology or the operation and impact of the Driftnet Fishery to warrant different conclusions regarding jeopardy than the Fishery Service reached at the end of 1997.

In response to the time/area closure for leatherbacks, Dr. Benjamin Gallaway conducted an independent scientific analysis of data contained in the 2000 Biological Opinion. Dr. Gallaway identified four questionable areas in the Biological Opinion's analysis: 1) The population status of leatherbacks in the Western Pacific is substantially underestimated. 2) The temporal/spatial risk of leatherback interaction with the Driftnet Fishery does not correspond with the overbroad time/area restriction that was imposed. 3) Estimated levels of leatherback mortality were based on 3,000 driftnet sets annually even though the fishery had not seen anywhere near that level in recent years. 4) A sharp decline in leatherback take rate corresponding with implementation of Pacific Take Reduction Plan regulations was not considered.[30]

Based on Dr. Gallaway's analysis, the Fishery Service was asked to conduct a reevaluation of the 2000 Biological Opinion. They claimed they had no authority to do a reevaluation. They said that a new Biological Opinion would be done at such time as a new "federal action" involved the Driftnet Fishery. The Pacific Council's Fishery Plan was being developed at this time, and it was assumed that the Biological Opinion required for the Fishery Plan would also include a new evaluation of the Driftnet Fishery based on the best scientific and commercial data available. This did not happen. Despite objections, the Fishery Service said the Biological Opinion for the Fishery Plan would evaluate the Driftnet Fishery with the leatherback time/area closure in place. Driftnet fishermen petitioned the Pacific Council to reframe the Fishery Plan's Driftnet Fishery management action by either specifically requesting that the Biological Opinion's scope of review consider the Driftnet Fishery according to the best scientific and commercial data available but without the leatherback time/area closure in place, or, more directly, remove the leatherback time/area closure from the Fishery Plan's proposed Driftnet Fishery regulations, thereby ensuring an evaluation of the Driftnet Fishery according to the best scientific and commercial data available. However, the Pacific Council did not

[29] Leatherback sea turtles are listed under the Endangered Species Act as one global population.

[30] The Fishery Service's observer data records .0047 leatherback takes per Driftnet Fishery set from 1990 to implementation of the Pacific Take Reduction Plan in 1997. For the period 1998 to 2000, the leatherback take rate was .0013 per Driftnet Fishery set. If the post Pacific Take Reduction Plan leatherback take rate were applied to 1,766 sets (actual 2000 effort), total annual leatherback takes would have been 2.3 (.0013 x 1,766) which is below the 2000 Biological Opinion's incidental take allowance of 3. A no jeopardy finding would have resulted, and no time/area closure and resultant Driftnet Fishery damages would have occurred.

reframe the proposed Driftnet Fishery management actions, and the Section 7 Consultation and Biological Opinion for the Fishery Plan simply carried forward the results of the 2000 Biological Opinion.

Eighty four percent of the Driftnet Fishery's yearly effort occurred in the closed area during the time period the closure is in effect. Since imposition of the time/area closure, the Driftnet Fishery is in steep decline. In 2000, before the leatherback time/area closure was implemented, 81 driftnet vessels made 1,766 sets. The following year, 2001, after implementation of the time/area closure, 65 vessels made 1,665 sets. In 2002, 54 vessels made 1,482 sets. In 2003, 46 vessels made 1,467 sets, and in 2004, 36 vessels made 1,084 sets. Besides the effect to the Driftnet Fishery caused by loss of important traditional fishing grounds, the fishery continually operates under threat of complete closure. A single observed mortality of a sperm, humpback, or fin whale, all of which have been previously taken in the Driftnet Fishery, would revoke the Marine Mammal Protection Act §101(a)(5)(E) permit. [31] Apart from obligations to reduce bycatch under international and federal law, given this level of vulnerability, the Driftnet Fishery would be well served if an alternative fishery with less environmental impact were available. [32] This proposed Fishing Permit is an important first-step toward such an alternative.

In 2001, the Pacific Council began development of the Fishery Plan. The transition of the Driftnet Fishery from state management to federal management opened up an opportunity to explore a pelagic longline fishery inside the EEZ as an alternative to the Driftnet Fishery. This option was not available when the fishery was managed under California law. An EEZ longline fishery was proposed and adopted as a management alternative, and analyzed in the 2003 combination Fishery Management Plan/Environmental Impact Statement document. Under this alternative, longline fishing would be allowed as a gear choice alternative to driftnet fishing. It would authorize a limited entry pelagic longline fishery for tunas and swordfish within the EEZ, with effort and area restrictions,[33] to evaluate pelagic longline gear as an alternative to drift gillnet gear to reduce bycatch, or bycatch mortality and protected species interactions, and

---

[31] Under current Marine Mammal Protection Act guidelines, fishery takes above the Potential Biological Removal level for any Endangered Species Act listed marine mammal would prohibit issuance, or revoke an existing §101(a)(5)(E) permit. With observed Driftnet Fishery takes extrapolated five times (one observed take equals 5 takes), the Potential Biological Removal level is 2.1 for sperm whales, 3.1 for humpback whales, and 3.2 for fin whales. Any single observed mortality of any of these endangered whales exceeds the Potential Biological Removal level.

[32] Part of the reason an alternative harpoon fishery is unsuitable as a Driftnet Fishery replacement is because this fishery was never a viable commercial enterprise. Typically harpoon fishermen are part-time and are concerned about maintaining a lifestyle and living standard they have already achieved within the fishery. High volume production is not necessary to their economic survival, nor are they interested in making major new investments in the fishery. They would prefer to see the fleet remain a large number of small businesses like their own. Few of these fishermen break-even. The economic viability of the fishery is not necessarily threatened by factors that would substantially decrease their income. Most full-time commercial fishermen have not yet attained their living standard goals and want substantial profits through high production in order to increase their income and improve their operations. (Draft Fishery Management Plan for Pacific Coast Billfish and Oceanic Shark Fisheries, Pacific Fishery Management Council, 1981)

[33] Proposed restrictions would limit effort to a maximum of 10 vessels (that could be adjusted up or down after yearly review). Area restrictions would prohibit fishing within 25 miles of the coastline north of Point Conception, and inside of the Southern California Bight.

determine if a pelagic longline fishery is an economically viable substitute for the Driftnet Fishery.[34]

Although pelagic longline swordfish and tuna fishing outside the EEZ has been conducted by California and Hawaii based vessels since the early 1990s, waters where the Driftnet Fishery occurs, within the EEZ, especially the outer waters of this zone, are cooler and less saline that the more inshore waters, and are also cooler and less saline than oceanic waters beyond the EEZ. The broad California Current, which carries colder, fresher water equatorward along the coast, dominates the EEZ. It is broader in the north and narrower in the south, extending approximately to the outer EEZ boundary south of 40° North latitude, although its position and intensity can shift seasonally and from year to year with shifts in the Subarctic or California Front. Shoreward it mixes with plumes of cold, more saline upwelled water in the north, or warm countercurrent and gyre water of the Southern California Bight in the south. Seaward, the more oceanic waters of the Transition Zone, the Subarctic Front at the Zone's northern boundary, and to the south and west, waters of the North Pacific Central Water Mass bound the California Current. Off Southern California, the California Current serves as a cold water barrier between the warmer, more tropical waters of the Southern California Bight inshore of the Santa Rosa-Cortez Ridge, and the warmer oceanic waters to the west beyond the EEZ boundary. Thus species taken by pelagic longline fishing beyond the EEZ boundary (e.g., former California and current Hawaii based pelagic longline fisheries), or in former longline operations within the EEZ but further inshore (e.g., the 1988-91 blue shark-mako shark experimental fishery) may not be representative of catches and species interactions that may occur in the proposed fishery.[35]

Because California never authorized a pelagic longline fishery [36] the only data available to determine what the species impacts or interactions within the EEZ might be are from one experimental longline shark fishery that occurred in the Southern California Bight. A study to evaluate this shark fishery found that the longline gear appeared to bring in less bycatch than the Driftnet Fishery. Observers recorded a total of 9 species captured on longline gear, whereas 71 species were documented from the Driftnet Fishery.[37] Also, further substantiating that hook and line gear produces less bycatch mortality that drift gillnet gear, this study stated: "Unlike fish caught in drift gill nets, most of the longline bycatch can be released alive."

Comparing what is known about marine mammal, sea turtle and finfish bycatch in the Driftnet Fishery to what is known about such takes in longline fisheries, it can be

---

[34] Chapter 9, pp 59-60, Fishery Management Plan/Environmental Impact Statement for West Coast Fisheries for Highly Migratory Species, 2003

[35] Chapter 9, p 61, FMP/EIS for West Coast Fisheries for HMS, 2003

[36] Under California law, it is unlawful to use or operate or assist in using or operating any net, trap, line, spear, or appliance except as provided in this chapter (California Fish and Game Code §8603). In other words, if a fishery/gear configuration is not specifically authorized under California law, it may not be conducted.

[37] A Review Of The Southern California Experimental Drift Longline Fishery For Sharks, 1988-1991, John W. O'Brien and John S. Sunada, CalCOFI Rep., Vol. 35, 1994, p. 227

reasonably concluded that takes and/or mortalities of marine mammals will be substantially reduced with longline gear.[38] Sea turtle mortalities,[39] if not overall takes, will also be substantially reduced with longline gear; and finfish bycatch, and/or mortality (especially unmarketable shark) will be substantially reduced with longline gear.[40] There is little question that pelagic longline gear has less of an environmental impact on sea turtles, marine mammals, and finfish bycatch.[41] The only question to be answered is whether or not pelagic longline gear is economically viable as a substitute for driftnet gear. The Fishery Plan's EEZ longline management alternative would have authorized a fishery to answer this question.

Although there is no doubt that pelagic longline is an economically viable fishing gear for harvesting swordfish on the high-seas, as a practical matter, fishing beyond the EEZ requires a vessel of 70 to 100 feet in length. Vessels in the Driftnet Fishery range from 40 to 60 feet in length. Because the EEZ longline management alternative explores the possibility of converting existing driftnet vessels to longline, such fishing must take place in the California Current, the area where the Driftnet Fishery has historically operated. However, unless longline gear produces at a level comparable to Driftnet Fishery production, the bycatch advantage is moot. Exploring the economic viability of a longline fishery within the EEZ involves the fact that the out-of-pocket cost of deploying longline gear is much greater that the equivalent cost of deploying driftnet gear. For longline, the deployment cost of bait, lightsticks, and gear loss averages $1.00 a hook, or $1,000.00 for a 1,000-hook set, or $14,000 for a 14 set trip. Therefore, production levels must be high enough to offset the added overhead. There is no equivalent deployment cost for driftnet gear. Also, unlike driftnet gear, once a longline hook loses its bait, or catches an unmarketable fish, that hook is no longer available for marketable production. The Driftnet Fishery has historically had high levels of blue shark bycatch, although bycatch mortality of blue shark is greatly reduced with longline gear, the fact that a blue shark occupies a hook precludes that hook from catching a swordfish or other marketable species. These are the economic viability questions that needed to be answered.

Despite the recommendation of the Pacific Council's Fishery Plan Development Team to adopt this EEZ longline management alternative, the Pacific Council thought the

---

[38] "Gear switching from drift net to longline will likely result in a significant reduction in cetacean and pinniped takes (especially mortalities from those takes)." (Chapter 9 p. 64, Fishery Management Plan/Environmental Impact Statement for West Coast Fisheries for Highly Migratory Species, 2003

[39] "Takes with longline gear would be less likely to result in mortality compared with driftnet gear." (Chapter 9 p. 65, Fishery Management Plan/Environmental Impact Statement for West Coast Fisheries for Highly Migratory Species, 2003

[40] "Survivability is generally higher with hooking versus net entanglement." (Chapter 9 p. 68, Fishery Management Plan/Environmental Impact Statement for West Coast Fisheries for Highly Migratory Species, 2003)

[41] In the Driftnet Fishery, bycatch mortality most often occurs from drowning because animals captured in the drift gillnet are either not able to get to the surface if air breathers, or not able to move enough to provide water passage over gills. With longline, marine mammals or sea turtles can get to the surface to breathe, and fish are free to move enough to provide water passage over their gills. Consequently longline bycatch mortality is generally much lower than with drift gillnet gear.

proposed action was too untested to adopt through regulation. Instead, they chose a management alternative that prohibited pelagic longline gear within the EEZ pending the application and approval of an Exempted Fishing Permit to test the gear under controlled conditions.[42]

In February 2006, in response to the Pacific Council's decision, I applied for the proposed Fishing Permit. The original proposal is for a single vessel to fish with newly developed pelagic longline gear.[43] This configuration consists of a main line strung horizontally across 50 to 100 kilometers of ocean, supported at appropriate intervals by 18-meter deep vertical float lines connected to surface floats. Descending from the main line is some number (2-25) of 24-meter deep branch lines, each ending in a single baited hook. Longline gear configuration will be consistent with regulations enacted for the Hawaii longline shallow-set swordfish fishery found at 50 CFR §660.33(d) and (g).[44] For targeting swordfish, hooks used will only be offset circle hooks sized 18/0 or larger, with a 10° offset. Only mackerel-type bait will be used. From 400 to 1,200 hooks may be deployed per set. Fishing will not occur within 30 miles of the coastline, or within the Southern California Bight. Each trip will consist of about 14 sets, approximately 14,000 hooks per trip (1,000 hooks per set x 14 sets). This Fishing Permit proposes 4 trips (for a total of 56,000 hooks) during the period September thru December for a one-year period with the option for continuing it on an annual basis for up to three years pending Pacific Council review and evaluation. Federal fishery observers will observe 100% of fishing. Sea bird avoidance requirements, [45] and sea turtle take mitigation requirements, [46] will be employed. A Fishery Service-approved shark de-hooking device will also be utilized.

After a critical and extensive review of the proposed Fishing Permit,[47] in an open and transparent public process, supported by a team of government and public scientific and fishery management experts, this proposed Fishing Permit was approved with modifications [48] by the Pacific Council in April 2007 and passed on to the Fishery

---

[42] Chapter 9 pp 54-55, Fishery Management Plan/Environmental Impact Statement for West Coast Fisheries for Highly Migratory Species, 2003

[43] "NOAA Fisheries believes that the results of research in the Atlantic Ocean demonstrates clearly that there are alternative gear and bait combinations available to longline fishing that significantly reduce sea turtle interactions and consequent injury to or mortality of sea turtles. The research concluded that encounters with leatherback and loggerhead turtles in the Atlantic Ocean can be reduced by 65 to 90 percent by switching the type of hook and bait from the traditional "J" style hook with squid to a large, circular hook with mackerel. In addition, the nature of hookings is less damaging as the large hooks are far less likely to be deeply swallowed and lethal. In addition, new dehooking and release devices and techniques have been developed, further reducing the likelihood of major injury to or death of turtles." (April 2004 letter from NMFS SW Regional Administrator Rod McInnis to Pacific Fishery Management Council chair Donald Hansen)

[44] This was later modified from the original Fishing Permit by including use of lightsticks.

[45] 50 CFR § 660.712(c)(1-17)

[46] 50 CFR §660.712(b)

[47] In light of the fact that, outside of the time/area closure, the Driftnet Fishery has had zero leatherback takes in the seven years since the time/area closure has been in effect where the 2000 Biological Opinion estimated that 21 takes would have occurred in this time period, the Fishery Service now admits that the leatherback time/area closure was too drastic and has indicated that different alternatives will be considered. One such alternative is embodied in this proposed Fishing Permit.

Service to issue the permit In June 2007, the Fishery Service published a Notice in the Federal Register [49] that they had made a preliminary determination that this Fishing Permit warrants further consideration and requested comments.[50]

This entire fishery background, evolution, and related detail—leading up to and framing the genesis of this proposed Fishing Permit—provides a context to review foreseeable coastal effects. I submit the following findings relating foreseeable coastal effects of the proposed Fishing Permit to consistency with California's relevant enforceable policies.

The purpose and intent of this proposed Fishing Permit is to explore the feasibility of switching from drift gillnet gear to hook and line gear in order to reduce the level of bycatch and/or bycatch mortality that occurs in the Driftnet Fishery. As such, this activity is consistent with California's enforceable policies to the extent that there are effects to the coastal area from enhancement of such fish, marine mammal, or sea turtle stocks. Enhancement of those marine resources through bycatch reduction is consistent with California policies specifying: "Marine resources shall be maintained, enhanced, and where feasible, restored." (CPRC §30230).

Besides, the enhancement of marine resources occurring from a reduction in bycatch, enhancement of leatherback impacts will specifically occur due to a marked decrease in bycatch mortality when compared to the Driftnet Fishery,[51] as well as a substantial reduction in leatherback takes Pacific wide by avoiding a situation where a market void for swordfish will be filled by imports from unregulated foreign fleets that will kill greater numbers of leatherbacks than would ever be allowed under U.S. law. [52]

This proposed activity is also consistent with California's enforceable policies stating that "The economic, commercial, and recreational importance of fishing activities shall be

---

[48] Modifications imposed by the Pacific Council include a prohibition on fishing off the Washington coast, and interaction caps of 1 short-finned pilot whale, 12 striped marlin, as well as caps on the takes of Endangered Species Act listed species to be determined in the Section 7 Consultations conducted by the Fishery Service for marine mammals and sea turtles, and by the U.S. Fish and Wildlife Service for seabirds. If any one of the limits set by the Pacific Council, the Fishery Service, or the Fish and Wildlife Service is reached, the Fishing Permit will be revoked immediately.

[49] Federal Register Vol. 72, NO. 113, June 13, 2007

[50] Although not contained in the Federal Register Notice, I have increased the no-fishing zone along the coastline north of Point Conception from 30 miles to 40 miles, and far enough west of the outer Channel Islands south of Point Conception to avoid state waters and any interaction with NOAA Marine Sanctuaries.

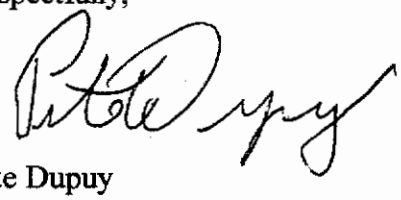
[51] In light of the California Coastal Commission's recent finding that an Exempted Fishery Permit allowing the Driftnet Fishery to fish within the leatherback time/area closure is consistent with California's enforceable policies, what possible justification could there be for a contrary finding regarding the Permit Fishery?

[52] Efforts at protection in one or more nations can shift harvests of swordfish, and hence incidental takes of sea turtles, to harvests of other nationalities, a production leakage. Attempted protection of sea turtles and the subsequent production leakage might well not change sea turtle mortality rates, since swordfish harvests from non-protecting nations can replace the diminished harvests or protecting nations through the active import market, a trade leakage. (Ahmed, M. and D. Squires, Performance and Technology Standards in International Environmental Agreements: Potential Lessons for Sea Turtle Conservation and Recovery. 2003.)

recognized and protected" (CPRC §30234.5), and to "maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes" (CPRC §30230). The Driftnet Fishery is failing due the imposition of controversial restrictions enacted in the name of protecting sea turtles. Consequently, the loss of Driftnet Fishery swordfish production will be substituted with swordfish imports from foreign fisheries. This will lead to an increase in sea turtle impacts from unregulated foreign swordfish fisheries, as well as a reduction in U.S. swordfish quota share from international fishery regulators.

This concludes my presentation of required data and information pursuant to 15 CFR §930.58 in support of my consistency certification for the proposed Fishing Permit.

Respectfully,



Pete Dupuy

cc: Dianne Feinstein, U.S. Senator
Barbara Boxer, U.S. Senator
Elton Gallegly, U.S. Congressman
Lois Capps, U.S. Congressman
Rod McInnis, National Marine Fisheries Service
Donald Hansen, Pacific Fishery Management Council
Richard Rodgers, President, California Fish & Game Commission
Zeke Grader, Executive Director, PCFFA

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
Silver Spring, Maryland 20910

RECEIVED
AUG 13 2007
CALIFORNIA
COASTAL COMMISSION

AUG - 7 2007

Mr. Peter M. Douglas
Executive Director
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, California 94105-2219

Re: California's Request to Review an Application to the National Marine Fisheries Service for Exempted Fishing Permit for Longline Fishing

Dear Mr. Douglas:

Thank you for your request to review an application by Mr. Peter Dupuy to the National Oceanic and Atmospheric Administration's (NOAA's) National Marine Fisheries Service (NMFS) for an Exempted Fisheries Permit (EFP) for longline fishing in the Exclusive Economic Zone (EEZ) adjacent to and outside California's three nautical mile (n.m.) territorial sea. Specifically, you request Office of Ocean and Coastal Resource Management (OCRM) approval to review Mr. Dupuy's application for the EFP as an unlisted "federal license or permit activity" under the Coastal Zone Management Act (CZMA) § 307(c)(3)(A) and NOAA regulations at 15 C.F.R. § 930.54 (2007). For the reasons set forth in this letter, OCRM approves your request.

OCRM finds that the California Coastal Commission's (CCC's) request to review Mr. Dupuy's application as an unlisted activity was timely. In reviewing the environmental documentation provided, OCRM finds that longline fishing proposed by Mr. Dupuy has reasonably foreseeable effects on California's coastal uses or resources and therefore CCC's request to review the project as an unlisted activity is approved. This finding does not address whether the activity is consistent with California's Coastal Management Program (CCMP); it merely authorizes the CCC's review under CZMA § 307(c)(3)(A) and NOAA regulations at 15 C.F.R. part 930, subpart D. OCRM notes, however, that the purpose of the EFP is to conduct an exploratory test to determine if targeting swordfish with shallow set longlines (SSLL) is economically feasible and to gather bycatch data. Thus, Mr. Dupuy may acquire useful or important data concerning use of SSLL for swordfish. OCRM, therefore, encourages the CCC to consider the benefits that may result from Mr. Dupuy's EFP.

Accordingly, Mr. Dupuy must provide the CCC with a consistency certification pursuant to the CZMA (16 U.S.C. § 1456(c)(3)(A)) and 15 C.F.R. part 930, subpart D. The State must complete its review within six months from the original notice of Mr. Dupuy's application to NMFS or within three months from receipt of Mr. Dupuy's consistency certification and accompanying necessary data and information, whichever period terminates last.[1] NMFS may not authorize Mr. Dupuy's EFP until the requirements of 15 C.F.R. part 930, subpart D have been met.

[1] *See* 15 C.F.R. § 930.54(e) (2007).

EXHIBIT NO. 6
APPLICATION NO.
CC-061-07

Printed on Recycled Paper

BACKGROUND

States with federally-approved Coastal Management Programs (CMPs) list in their CMP those federal license or permit activities subject to a state's review under the CZMA federal consistency requirement, 16 U.S.C. § 1456(c)(3)(A).[2] An unlisted activity is an activity that requires a federal license or permit, but is either (1) not listed in a state's CMP, or (2) is listed, but the proposed project is located outside a state's coastal zone and the state has not described a geographical location outside its coastal zone where consistency applies.[3] For unlisted activities, in or outside the coastal zone, a state CMP must notify the applicant, the relevant Federal agency, and OCRM that it intends to review the activity. A state must make this notification within thirty days of receiving notice of the license or permit application to the Federal agency; otherwise a state waives its right to review the unlisted activity. The waiver does not apply where the state office charged with implementing an approved CMP does not receive notice of the application.

OCRM must approve or decline to allow a state's review of the unlisted activity for consistency. The applicant and Federal agency have fifteen days from receipt of a state's request to provide comments to OCRM. OCRM will make a decision usually within thirty days of receipt of a state's request. The sole basis for OCRM's decision will be whether the proposed activity will have reasonably foreseeable effects on any land or water use or natural resource of the coastal zone. The Federal agency may not authorize the activity unless OCRM denies a state's request or, if OCRM approves a state's request, the state concurs with the applicant's consistency certification. If a state objects to the consistency certification and the applicant appeals the state's objection to the Secretary of Commerce, pursuant to 15 C.F.R. part 930, subpart H, and the Secretary overrides the state's objection, then the Federal agency may authorize the activity. OCRM may also have to determine, as a threshold matter, whether the procedural requirements for unlisted activity review have been met.

In this case, Mr. Dupuy's proposes to use SSLL in areas outside California's coastal zone (*i.e.*, outside three n.m.) in Federal waters of the EEZ, in areas 30-200 n.m. from shore and an area directly adjacent to the three n.m. coastal zone boundary around San Nicholas Island. California needs OCRM approval to review the proposed project as an unlisted activity because the CCC does not list permits issued by NMFS under the Magnuson-Stevens Fisheries Conservation and Management Act (Magnuson-Stevens Act) in its federally-approved CMP.

DISCUSSION

1. The Timeliness of the CCC's Notice to Review Mr. Dupuy's EFP Application as an Unlisted Activity

The CCC provided timely notice of their intent to review the EFP as an unlisted activity pursuant to 15 C.F.R. § 930.54. A state may be put on notice of a federal license or permit application through either actual or constructive notice. Constructive notice is provided if it is published in

[2] *See* 15 C.F.R. § 930.53(a).
[3] *See* 15 C.F.R. §§ 930.53, 930.54.

an official federal public notification document or through an official state clearinghouse.[4] For either form of notice, the notice shall contain sufficient information for the state CMP agency to learn of the activity, determine the activity's geographic location, and determine whether coastal effects are reasonably foreseeable.[5]

On May 23, 2007, the CCC received a letter from NMFS providing a "consistency determination" as a Federal agency activity under CZMA § 307(c)(1) and 15 C.F.R. part 930, subpart C concerning the same EFP at issue here.[6] This letter generally described the activity, the geographic location and coastal effects. However, the letter provided insufficient notice to the CCC of an unlisted federal license or permit activity under CZMA § 307(c)(3)(A) and 15 C.F.R. part 930, subpart D, because the letter concerned a Federal agency activity by NMFS. The CCC apparently relied on NMFS' submission. As such, the CCC proceeded to review the activity under 15 C.F.R. part 930, subpart C – not subpart D. We find that the CCC's reliance was reasonable and therefore conclude the May 23, 2007, letter did not provide constructive or actual notice to the CCC.

After the June 13, 2007, publication of NMFS' Federal Register notice for the EFP application,[7] the CCC then realized the matter was likely the subject of a federal license or permit activity under NOAA regulations – not a Federal agency activity to be undertaken by NMFS. The CCC confirmed this understanding through discussions with OCRM.

Federal agencies should not submit consistency determinations as a Federal agency activity for federal license or permit activities; rather, applicants for Federal permits must submit consistency certifications or, if it is an unlisted activity, a state must seek OCRM approval to review the activity. Upon learning that NMFS' consistency determination was invalid, the CCC promptly filed its unlisted activity review request with the applicant, NMFS, and OCRM on July 13, 2007, to review the permit application under the CZMA § 307(c)(3)(A) and 15 C.F.R. part 930, subpart D.

II. Whether the Proposed Activity Has Reasonably Foreseeable Effects on Any Land or Water Use or Natural Resource of California's Coastal Zone

A state requesting to review an unlisted activity must show that there are reasonably foreseeable effects on land or water uses or natural resources of that state's coastal zone. The CCC's July 13, 2007, letter demonstrates the existence of reasonably foreseeable coastal effects. Based on information submitted by California, OCRM notes the following regarding coastal effects.

First, the proposed activity is currently prohibited within both California waters and the West Coast EEZ due to documented adverse impacts associated with this type of long-line fishery.[8]

---

[4] 15 C.F.R. § 930.54(a)(2).

[5] *Id.*

[6] Letter from R. McInnis, Regional Administrator, NMFS, to P. Douglas, Executive Director, CCC (May 23, 2007).

[7] *Application for Exempted Fishing Permit*, 72 Fed. Reg. 32,618-32,619 (June 13, 2007).

[8] *See Application for Exempted Fishing Permit*, 72 Fed. Reg. at 32,618.

The proposed activity would occur within areas adjacent to state waters and other areas of the EEZ. The CCC unlisted activity request identifies wildlife impacts to a number of coastal zone species, including endangered species and marine mammals. These impacts are reasonably foreseeable if the EFP is issued.[9]

In making its coastal effects evaluation, the CCC relied extensively on NMFS' Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species, NMFS' 2004 Endangered Species Act (ESA) Biological Opinion regarding impacts to sea turtles from SSLL, and NMFS' National Environmental Policy Act (NEPA) Draft Environmental Assessment (Draft EA). Based on this information, the CCC identifies seabirds and forty-nine species of finfish, many of which are species of the coastal zone (or coastal resources) and species which are commercially and recreationally harvested (a coastal use), which may be affected by SSLL through the process of bycatch. OCRM, therefore, finds it is reasonable to assume that fishery stocks of the coastal zone and the EEZ could be affected by the activity.

Second, the CCC also identifies marine mammals and reptile species that migrate in and out of the California coastal zone that could be impacted as "takes" through entanglement in longline fishing gear. These species include, in part, leatherback sea turtles, olive ridley sea turtles, humpback whales, sperm whales, short-finned pilot whales, and risso's dolphin. A particular concern noted by the CCC is the impact to the endangered population of leatherback turtles that frequents the Gulf of Farallones and Monterey Bay in relatively large numbers.[10] As evidence of this, a report compiled by the CCC cites data from the non-profit Center for Biological Diversity indicating the waters off of central California serve as a critical foraging area for one of the largest remaining Pacific nesting populations of leatherbacks.[11]

Third, a Pacific Fishery Management Council's (Council) recommendation further supports a finding that the CCC's evaluation of reasonably foreseeable effects is warranted. The Council has stated that:

> the fishery be managed through limits on the amount of incidental take of protected species that may be exposed to and adversely affected by this action that are to be established based upon section 7 consultations under the Endangered Species Act by NMFS for marine mammals and sea turtles and by the U.S. Fish and Wildlife Service for seabirds. If any one of the limits set by these consultations is reached by the fishery authorized by the EFP, the permit would be immediately revoked. The EFP would require 100 percent NMFS observer coverage for all fishing under the EFP.[12]

---

[9] Letter from P. Douglas, Executive Director, CCC, to D. Kennedy, Director, OCRM of July 13, 2007, at 3.

[10] CCC, Staff Report and Recommendations on Consistency Determination (May 30, 2007), at 25.

[11] *Id.* at 22.

[12] *Application for Exempted Fishing Permit*, 72 Fed. Reg. at 32,618.

In addition, "NMFS is engaged in formal consultation [under ESA § 7] to determine if the proposed action is likely to jeopardize the continued existence and recovery of any endangered or threatened species or result in the destruction or adverse modification of critical habitat."[13] This need for review and consultation suggests the possibility of foreseeable effects on California's coastal zone.

OCRM did not receive comments from the applicant or NMFS on the CCC unlisted activity review request. However, NMFS has prepared an analysis entitled *An Evaluation of the Proposed Shallow-Set Longline Exempted Fishing Permit's Consistency to the California Coast Act* (provided to OCRM by the CCC). While NMFS' analysis concludes the potential impacts of the proposed EFP are generally not significant, for purposes of the CCC's request to review the proposed activity, NMFS' analysis provides sufficient justification for finding that there are reasonably foreseeable effects resulting from the activity. Whether those effects render the activity inconsistent with the enforceable policies of the California CMP is for the CCC to determine during the course of its CZMA review authorized by OCRM's approval of this unlisted activity request.

Please contact David Kaiser, Senior Policy Analyst, OCRM, at 603-862-2719, or Kerry Kehoe, Federal Consistency Specialist, OCRM, at 301-563-1151, if you have any questions.

Sincerely,

David Kennedy
Director

cc: Peter Dupuy
Ocean Pacific Sea Food
18212 Rosita St
Tarzana, CA 91356

Rodney R. McInnis
Regional Administrator
Southwest Region
National Marine Fisheries Service
501 West Ocean Blvd., Suite 4200
Long Beach, CA 90802

[13] *Id.*