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Memorandum

From: Noah Oppenheim & Glen Spain

To: Larry Collins

Re: SB 1309 policy development and discussions with CDFW

Dt: 6/1/2018

Per your request yesterday, we are providing some background information on the development of Senate Bill 1309 and a rationale for PCFFA's position.

1. Litigation

On October 3, 2017 the Center for Biological Diversity filed suit in the SF Federal District Court alleging that, among other claims, the State of California was and is violating §9 of the Endangered Species Act (ESA) by allowing the Dungeness crab fishery to take listed marine mammals during normal fishing operations without a federal incidental take permit. The ESA prohibits take of listed species. Such take has been documented by the National Oceanic and Atmospheric Administration. On February 28, 2018, PCFFA and IFR moved to intervene in the lawsuit on behalf of the defendants, the State of California. That motion was granted, and both organizations are now participating in that case as Defendant-Intervenors. The proceedings in the case are currently stayed until Oct. 1 pending settlement negotiations between parties.

CBD has sought, among other remedies, to compel the State to obtain an incidental take permit for the Dungeness crab fishery. Obtaining such a permit would likely require the establishment of a Take Reduction Team (TRT) under §118 of the Marine Mammal Protection Act. TRTs are required to submit take reduction plans within six months of establishment and first convention. Such plans must seek to reduce incidental take of marine mammals to levels below the 'potential biological removal' limits within six months and to 'insignificant levels approaching a zero mortality and serious injury rate' within five years. The NOAA Office of Protected Resources Website contains a useful summary of the TRT process, attached below.

The State of California had been engaged in settlement discussions with CBD, as have PCFFA/IFR. We believe that these settlement discussions may lead to the acceptance by the plaintiffs of an alternative approach to the mitigation of whale entanglements in the crab fishery.

We believe that the establishment of a federal TRT for the California Dungeness crab fishery, essentially federalizing Dungeness crab management state-wide, is undesirable. We further believe that the California Dungeness Crab Fishing Gear Working Group, established on September 21, 2015, and defined by its most recent charter, is the organization that would best serve the interests of our members who participate in the fishery with respect to implementing an effective take reduction program. We believe that action in the form of state legislation is required if a TRT is to be avoided and the Working Group is to play a stronger role in any entanglement mitigation programs for the fishery.

2. Legislation

Senate Bill 1309 (McGuire), the Fisheries Omnibus Bill of 2018, was introduced on February 16, 2018. As introduced, the bill included a section (§5) allowing the Director of CDFW to close areas of the Dungeness crab fishery on an emergency basis upon the unanimous recommendation of the Working Group.

On April 12, 2018, the Senate Natural Resources and Water Committee analysis conveyed the views of the Committee consultant that the requirement in §5 of a unanimous recommendation by the Working Group predicated the Director's authority to implement closures would be unprecedented in state law and could present a conflict of interest. The analysis recommended amending the bill to remove the §5 unanimous recommendation requirement or the replacement of the section with 'intent language'.

On April 23, 2018, §5 of SB 1309 was amended to replace the subsections authorizing closures and requiring unanimous Working Group recommendations with 'intent language'.

On May 25, 2018, SB 1309 as amended received a 'do pass' recommendation from the Senate Appropriations Committee and on May 30, 2018, SB 1309 passed the Senate (38 Ayes to 0 Noes).

It is our belief that legislation authorizing the implementation of CDFW's authority to implement closures and other less onerous regulatory changes to the Dungeness crab fishery for the purposes of marine mammal take mitigation would be required in order to satisfy the Plaintiffs' demands for settlement purposes. If this authority is not granted through legislation it is unlikely that CBD would accept settlement terms and would pursue their complaint in Federal Court, leading to a trial and a potential judgment against the State compelling it to obtain an incidental take permit and the eventual establishment of a TRT.

It is our further belief that such legislation must include adequate protections for the commercial fishery against implementation of closures that could cause adverse economic harm to our members.

We also believe that such legislative protections must include requirements for consultation with the Working Group and other fisheries stakeholders before, during, and after the implementation of any such closure; the minimization of the extent and duration of closed areas; adequate consideration of safety of life at sea and logistical and economic impacts to fishing operations; the reopening of closed areas as quickly as possible; and adequate notice to impacted stakeholders ahead of the implementation of any such closures.

We believe that the use of Potential Biological Removal, a scientifically determined level of take that a marine mammal stock can withstand before it is demographically compromised, is a useful metric to be considered in order to inform the preliminary authority to implement closures before the Working Group's procedures are finalized.

Attachment 1

Marine Mammal Take Reduction Program¹

Purpose

Take reduction plans (Plans) help recover and prevent the depletion of **strategic** marine mammal stocks that interact with **Category I and II fisheries**. (Section 118 of the **Marine Mammal Protection Act (MMPA)** specifies that we develop and implement take reduction plans.)

A strategic stock is one which is:

- listed as endangered or threatened under the **Endangered Species Act (ESA)**
- declining, and likely to be listed as threatened under the ESA
- listed as depleted under the MMPA
- experiencing direct human-caused mortality that exceeds the stock's "**Potential Biological Removal (PBR) level**"

Goals

The immediate goal of take reduction plans is to reduce, within six months of its implementation, the incidental mortality or serious injury of marine mammals from commercial fishing to less than the PBR level.

The long-term goal is to reduce, within five years of its implementation, the incidental mortality and serious injury mortality of marine mammals from commercial fishing operations to insignificant levels, approaching a **zero mortality and serious injury rate**, taking into account the economics of the fishery, the availability of existing technology, and existing state or regional fishery management plans.

Process

We convene take reduction teams (Teams) to develop the plans. Teams consist of a balance of representatives from the

- fishing industry
- fishery management councils
- state and Federal resource management agencies
- scientific community

¹ Accessed at http://www.nmfs.noaa.gov/pr/interactions/trt/marine_mammal_take_reduction_program.html on 5/31/18

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- conservation organizations

Once we establish and convene a Team (and publish notice in the *Federal Register*), the Team has 6 months to reach consensus on a Plan and then submit it to NMFS. NMFS then has 60 days to publish a draft Plan, including any proposed changes to the plan. The public then has an opportunity to review and provide comments on both the Plan and the proposed regulations for implementing the Plan.

If a Team cannot reach consensus on a draft plan, the Team can document the range of possibilities considered and both majority and minority views. If a Team does not submit a draft Plan, NMFS has 8 months from the date the Team was formed to develop a proposed Plan and implementing regulations. NMFS may use the Team's deliberations as the basis for a Plan.

After the close of the comment period on a proposed Plan and implementing regulations, NMFS has 60 days to publish a final Plan and final regulations to implement that Plan.

After each Plan is finalized, the Team and NMFS meet periodically to monitor implementation of the plan.

Content

Each take reduction plan must include:

- A review of the final **stock assessment report** for each marine mammal addressed by the Plan and any substantial new information
- An estimate of the total number and, if possible, age and gender, of animals from the stock that is incidentally killed or seriously injured each year during the course of commercial fishing operations, by fishery
- Recommended regulatory or voluntary measures for the reduction of incidental mortality and serious injury
- Recommended dates for achieving the specific objectives of the plan