



Via Email and Certified Mail/Return Receipt Requested

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**RE: Notice of Intent to Sue for Violations of Section 9 of the Endangered Species Act:
Causing the Take of Threatened and Endangered Humpback Whales, Blue Whales,
and Leatherback Sea Turtles in California Dungeness Crab Gear**

Dear Mr. Bonham, Mr. Shuman, Mr. Ross, and Mr. Oliver:

This letter serves as official notice by the Center for Biological Diversity (“Center”) of the intent to sue the California Department of Fish and Wildlife, its Director, and its Marine Region Manager (collectively, “Department”) for ongoing violations of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544. Specifically, the Department’s permitting, management, oversight, and authorization of the California commercial Dungeness crab trap fishery is causing take of federally threatened and endangered humpback whales (*Megaptera novaeangliae*), endangered blue whales (*Balaenoptera musculus*), and endangered Pacific leatherback sea turtles (*Dermochelys coriacea*), all in violation of Section 9 of the ESA, *id.* § 1538. This letter is being provided to you pursuant to the notice requirement of the ESA’s citizen suit provision, *id.* § 1540(g).

While California Dungeness crab gear has been entangling large whales for at least a decade, the problem has intensified in recent years. Fisherman, who are expressly prohibited from engaging in commercial Dungeness crab fishing without first obtaining permits from the Department, entangled a record number of whales in 2016, contributing to the third straight record-breaking year for entanglements along the U.S. West Coast. While whale entanglements are reported up and down the coast, the Monterey Bay area has recently had the highest number of reported whale entanglements. And at least one endangered leatherback sea turtle was also reported entangled in California Dungeness crab gear in Monterey Bay in 2016.

Every unauthorized entanglement of a humpback whale, blue whale, and leatherback sea turtle is prohibited under the ESA. Moreover, when whales and sea turtles get tangled up in crab gear, they can drown, or die of starvation, dehydration, or infection. These large animals can also drag heavy Dungeness crab traps hundreds of miles on migrations, sapping them of strength, and interfering with breathing, feeding, and reproducing. Continued entanglements not only threaten individual animals, they also threaten the recovery of imperiled humpback whales, blue whales, and leatherback sea turtles.

The Department's permitting, management, oversight, and authorization of the commercial Dungeness crab fishery causes these entanglements, which kill, injure, harm, harass, capture, and otherwise take threatened and endangered humpback whales, blue whales, and leatherback sea turtles. For example, the Department issues vessel permits, establishes the limit on how many crab traps can be used, and sets the opening and closing dates of the season, among other management activities. These affirmative acts of regulatory control by the Department subject it to Section 9 liability for entangling these threatened and endangered animals.

The Department must take immediate action to remedy the violations discussed in this letter. If the Department does not take such action within 60 days, we will pursue litigation over these claims.

I. The ESA's Prohibition on the Take of Listed Species

Congress enacted the ESA in 1973 to provide "a program for the conservation of . . . endangered species and threatened species" and "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."¹ To achieve these purposes, Section 4 of the ESA requires the Secretary of Commerce, through the National Marine Fisheries Service ("NMFS"), to list species as "endangered" or "threatened" when they meet the statutory listing criteria.² An "endangered" species is one "in danger of extinction throughout all or a significant portion of its range," and a "threatened" species is one "likely to become endangered in the near future throughout all or a significant portion of its range."³

Once a species is listed, the ESA provides a variety of procedural and substantive protections to ensure not only the species' continued survival, but also its ultimate recovery.⁴ Section 9 of the ESA prohibits any "person" from "taking" or causing take of any member of an endangered species, including endangered humpback whales, blue whales, and leatherback sea turtles.⁵ This take prohibition also applies to threatened humpback whales.⁶ The term "take" is broadly defined to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or

¹ 16 U.S.C. § 1531(b).

² *Id.* § 1533.

³ *Id.* § 1532(6) & (20).

⁴ *TVA v. Hill*, 437 U.S. 153, 155 (1978) ("Congress has spoken in the plainest words, making it clear that endangered species are to be accorded the highest priorities").

⁵ 16 U.S.C. § 1538(a)(1).

⁶ 50 C.F.R. § 223.213.

collect” or to attempt to engage in such conduct.⁷ The definition of “harass,” in turn, includes “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, including breeding, feeding, or sheltering.”⁸ In addition, “harm” is defined to “include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”⁹

“Take” includes both direct and indirect harm and it need not be purposeful.¹⁰ The take prohibition applies to any “person,”¹¹ including state, county, or municipal agencies and/or officials in their official capacity.¹² The ESA further makes it unlawful for any person, including state agencies and/or state officials in their official capacity, to “cause to be committed” the take of a listed species.¹³ Similarly, the failure to regulate in a way that avoids take of listed species can also constitute a prohibited Section 9 take.¹⁴

The ESA authorizes private enforcement of the take prohibition through a broad citizen suit provision. Specifically, “any person may commence a civil suit on his own behalf to enjoin any person, including . . . any . . . governmental instrumentality or agency . . . who is alleged to be in violation of any provision of [the ESA] or regulation issued under the authority thereof.”¹⁵ A plaintiff may seek to enjoin both present activities that constitute an ongoing take and future activities that are reasonably likely to result in take.¹⁶

A non-federal entity such as the Department can avoid potential liability for causing the incidental take of threatened and endangered species by applying for and receiving an incidental take permit (“ITP”) under Section 10 of the ESA.¹⁷ In exchange for permission to take a listed species pursuant to an ITP, the permit applicant must commit to implement a plan that “conserv[es]” (*i.e.*, facilitates the recovery of) the species.¹⁸ This plan is called a Habitat Conservation Plan (“HCP”) and it must delineate “the impact which will likely result from such taking” and the “steps the applicant will take to minimize and mitigate such impacts.”¹⁹

⁷ 16 U.S.C. § 1532(19); *see also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704-05 (1995) (finding that the ESA’s legislative history supports “the broadest possible” reading of the prohibition against take).

⁸ 50 C.F.R. § 17.3.

⁹ *Id.*

¹⁰ *Sweet Home*, 515 U.S. at 704.

¹¹ 16 U.S.C. § 1538(a)(1).

¹² *Id.* § 1532(13)

¹³ *Id.* § 1538(g).

¹⁴ *Animal Protection Inst. v. Holsten*, 541 F. Supp. 2d 1073, 1078-1080 (D. Minn. 2008).

¹⁵ 16 U.S.C. § 1540(g)(1)(A).

¹⁶ *National Wildlife Fed’n v. Burlington Northern Railroad*, 23 F.3d 1508, 1511 (9th Cir. 1994).

¹⁷ 16 U.S.C. § 1539(a)(1)(B).

¹⁸ *Id.* §§ 1539(a)(1)(B), (a)(2)(A); *see also Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 441-42 (5th Cir. 2001) (“[c]onservation’ is a much broader concept than mere survival” because the “ESA’s definition of ‘conservation’ speaks to the recovery of a threatened or endangered species” (emphasis added)).

¹⁹ 16 U.S.C. § 1539(a)(2)(A). In addition, a non-federal entity such as the Department can avoid potential liability for causing the incidental take of threatened and endangered whales through NMFS’s issuance of a take reduction

II. ESA-Listed Whales and Sea Turtles Entangled in California Commercial Dungeness Crab Gear

Whales and sea turtles have continually been entangled in gear used in the California Dungeness crab fishery. The Department permits commercial Dungeness crab fishermen to fish up to 174,025 traps each season,²⁰ creating a dangerous, and often deadly, obstacle course for whales and sea turtles off our coast. Entanglements can occur when the animals encounter the buoy lines that extend from a trap set on the ocean bottom to a buoy at the surface, or in the lines between buoys at or near the surface. The animals have been observed with line wrapped around their flippers, tails, mouths, and bodies. Entanglements can result in drowning, or if animals do not immediately drown, the remaining entangling line often impedes basic movement, feeding, and reproduction, causes chronic infection, damage to bone and muscle, and greater vulnerability to predators.

Entanglements due to California commercial Dungeness crab traps not only kill, injure, harm, capture, and otherwise take ESA-listed whales and sea turtles, they threaten the recovery of these imperiled species. For example, reducing human-caused injury and mortality, including entanglement in fishing gear, is one of the primary recovery actions identified in the recovery plan for the blue whale.²¹ Similarly, the recovery plan for the humpback whale states that entanglement in fishing gear is the most frequently identified source of human-caused injury or mortality to the species, and finds that such entanglements could slow, and perhaps prevent recovery.²² Moreover, in its recent decision to reclassify the globally listed endangered population of humpback whales into 14 distinct population segments (“DPS”), NMFS found the small Central America DPS, which feeds exclusively off California, is endangered, contains only 411 individuals, and at risk from continued entanglements.²³ Indeed, such a small population cannot sustain continued entanglements.²⁴ Additionally, NMFS determined the Mexico DPS to be threatened “in light of the continuing threat of fishing gear entanglements” and insufficient regulatory mechanisms to address such threats.²⁵ Finally, the recovery plan for the Pacific leatherback sea turtle states the number one priority for recovering the species is to eliminate all incidental take in U.S. fisheries.²⁶ Yet two have been reported entangled in fishing gear in 2015-2016 alone.²⁷

plan under the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. §§ 1387, 1371(a)(5)(E), and attendant Section 7 consultation, which would result in a biological opinion and incidental take statement, *id* § 1536(a)(2), (b)(4), (o)(2).

²⁰ 14 C.C.R. § 132.1; C. Juhasz, Introduction to California Commercial Dungeness Crab Fishery, Aug. 20, 2015, at 9, <http://www.opc.ca.gov/webmaster/ftp/pdf/whale-entanglement/P4-Aug-20-Whale-Entanglement-Discussion-CDFW-Whale-Entanglement-Informational-Workshop-Dungeness-Fishery.pdf>.

²¹ NMFS. 1991. Final Recovery Plan for the Humpback Whale (*Megaptera novaeangliae*).

²² NMFS. 1995. Recovery Plan for the Blue Whale (*Balaenoptera musculus*).

²³ 81 Fed. Reg. 62259, 62260 (Sept. 8, 2016).

²⁴ *See, e.g.*, 69 Fed. Reg. 30,857, 30,858 (June 1, 2004) (NMFS’s finding that death or serious injury of one individual of another large whale species with similarly small size could jeopardize the population).

²⁵ 81 Fed. Reg. at 62277.

²⁶ NMFS and FWS. 1998. Recovery Plan for U.S. Pacific Populations of the Leatherback Turtle (*Dermochelys coriacea*) at vi.

²⁷ NMFS, email on 2/22/17.

The entanglement of protected species by fisherman who have received Department permits and authorization to use Dungeness crab traps has occurred for over a decade, but has increased in recent years. In 2016 alone, confirmed reports of entanglements in California commercial Dungeness crab gear included 22 ESA-listed animals: 19 humpback whales, two blue whales, and one leatherback sea turtle.²⁸ In 2015, the California commercial Dungeness crab fishery entangled 8 humpback whales, according to confirmed reports.²⁹ Entanglements of ESA-listed whales also occurred in California commercial Dungeness crab gear in 2014, including one instance in which a pair of severed humpback flukes was found with two separate sets of crab gear attached.³⁰ And, based on information and belief, entanglements of ESA-listed species have occurred and are occurring in Dungeness crab gear in 2017. Reported entanglements represent only a portion of actual entanglements because many entanglements likely go unobserved.³¹

III. Violations of the ESA: The Department Is Causing the Unlawful Take of ESA-Listed Humpback Whales, Blue Whales, and Leatherback Sea Turtles

Given the central role the Department plays in allowing California commercial Dungeness crab fishing to occur, the agency is violating, and will continue to violate, Section 9 of the ESA. The ESA's take prohibition applies to any "person,"³² including state agencies and/or state officials in their official capacity.³³ The ESA further makes it unlawful for any person, including state agencies and/or state officials, to "cause to be committed" the take of a species.³⁴ Governmental entities are therefore liable under Section 9 of the ESA where those entities authorize a third party's conduct that results in, or is likely to result in, take of members of a listed species.³⁵

Here, the Department's acts and omissions in permitting, managing, overseeing, and authorizing the commercial Dungeness crab trap fishery has caused, and will continue to cause, unpermitted entanglements of the Central America DPS and Mexico DPS of humpback whales, of blue whales, and of Pacific leatherback sea turtles. Commercial Dungeness crab fishing activities are expressly prohibited unless authorized by the Department.³⁶ Thus, the actions and

²⁸ NMFS. 2016. West Coast Entanglement Summary: Overview of Entanglement Data. March 2017. http://www.westcoastfisheries.noaa.gov/mediacenter/WCR%202016%20Whale%20Entanglements_3-26-17_Final.pdf; NMFS, email on 2/22/17.

²⁹ NMFS. 2015. West Entanglements off the West Coast of the United States. March 2016. http://www.westcoastfisheries.noaa.gov/publications/protected_species/marine_mammals/cetaceans/whale_entanglement_fact_sheet.pdf; NMFS, 2015 Entanglement Data Spreadsheet; D. Lawson and L. Saez. 2017. Updates on whale entanglement reports in recent years.

³⁰ J. Carretta, et al. 2017. SOURCES OF HUMAN-RELATED INJURY AND MORTALITY FOR U.S. PACIFIC WEST COAST MARINE MAMMAL STOCK ASSESSMENTS, 2010-2014. NOAA-TM-NMFS-SWFSC-554.

³¹ See, e.g. 81 Fed. Reg. at 62301 (noting that reported entanglement figures "are likely to be underestimates, as not all entanglements are observed").

³² 16 U.S.C. § 1538(a)(1).

³³ *Id.* § 1532(13).

³⁴ *Id.* § 1538(g).

³⁵ *Strahan v. Cox*, 127 F.3d 4 155 (1st Cir. 1997); *Pac. Rivers Council v. Brown*, No. 02-243-BR, 2002 U.S. Dist. LEXIS 28121 (D. Or. Dec. 23, 2002); *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073 (D. Minn. 2008).

³⁶ Fish & G. Code § 8280.1(a)

omissions that are the legal cause of these entanglements include, but are not limited to: the Department's issuance of vessel permits that allow fishermen to fish with traps for Dungeness crabs;³⁷ the Department's establishment and implementation of a program that determines the maximum number of traps that fishermen can set each season;³⁸ the Department's annual decision of the final dates opening and closing the commercial Dungeness crab trap season;³⁹ and the Department's powers to regulate how gear is set in the water, collect fishery data, establish a lost gear recovery program to reduce traps in whale and sea turtle habitat, and to close any waters on an emergency basis if a fishery is operating in an unsustainable manner.⁴⁰

These and other acts and omissions in permitting, managing, overseeing, and authorizing the Dungeness crab fishery, individually and collectively, comprise regulatory control of the fishery by the Department, thereby making the Department liable under the ESA for causing the entanglements of endangered and threatened whales and sea turtles in commercial Dungeness crab gear.

IV. Conclusion

The Department has violated and continues to violate Section 9 of the ESA. The Department permits, manages, regulates, and authorizes the commercial Dungeness crab trap fishery in a manner that has resulted in, and is likely to continue to result in, violations of the ESA by entangling threatened and endangered whales and sea turtles. We ask you to end this continuing violation of the ESA by either no longer permitting the use of practices causing these entanglements, or obtaining an incidental take permit from NMFS and, in the meantime, using your authority to restrict, modify, or eliminate the use of commercial Dungeness crab gear in the whales' and sea turtle's primary habitat until the Department fully complies with the ESA.

Unless the Department takes action to remedy the legal violations discussed in this letter within 60 days, we will bring legal action to seek appropriate relief to protect threatened and endangered humpback whales, endangered blue whales, and endangered Pacific leatherback sea turtles from continued entanglements. If you have any questions about this notice, please feel free to contact me.

Sincerely,

/s/ Kristen Monsell

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³⁷ *Id.* §§ 8280.1, 8280.2.

³⁸ 14 C.C.R. § 132.1.

³⁹ Fish & G. Code §§ 8276.2, 8277.

⁴⁰ *Id.* §§ 8010, 7710, 9002.5.

cc: Chris Yates, Asst. Reg. Administrator, NMFS, Chris.Yates@noaa.gov