Appendix A

Notice of Preparation and
Public Scoping Comments

State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Marine Region
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GAVIN NEWSOM, Governor
CHARLTON H. BONHAM, Director

California Department of Fish and Wildlife
Notice of Preparation of a Draft Environmental Impact Report and Notice of Public Scoping Meeting: Conservation Plan for the California Commercial Dungeness Crab Fishery

Date: September 19, 2022

To: Responsible Agencies, Trustee Agencies, and Interested Persons

From: California Department of Fish and Wildlife

RE: Notice of Preparation of a Draft Environmental Impact Report: Conservation Plan for the California Commercial Dungeness Crab Fishery and Notice of Public Scoping Meeting

In accordance with the provisions of the California Environmental Quality Act (CEQA), the California Department of Fish and Wildlife (CDFW) has determined that the proposed Conservation Plan (CP) for the California Commercial Dungeness Crab Fishery and related regulatory actions will require preparation of an Environmental Impact Report (EIR). CDFW is seeking an incidental take permit (ITP) under Section 10 of the federal Endangered Species Act (ESA) for humpback whale (Central America Distinct Population Segment [DPS] and Mexico DPS), blue whale, and Pacific leatherback sea turtle ("Covered Species") to provide authorization of limited incidental take of Covered Species by the California commercial Dungeness crab fishery. CDFW is proposing to adopt and implement a CP, make regulatory changes to implement the CP, and approve an implementing agreement with the National Marine Fisheries Service (NMFS) to support issuance of the ITP. Together, these CDFW actions comprise the whole of the project subject to CEQA compliance. The reasonably foreseeable compliance responses to implement these actions are the sources of potential physical changes to the environment that will be reviewed in the EIR.

The purpose of this Notice of Preparation (NOP) is to provide an opportunity for the public, interested parties and public agencies to comment on the scope and proposed content of the EIR. This NOP initiates the CEQA scoping process. Documents related to this EIR will be available for review on CDFW's website at: https://wildlife.ca.gov/Notices

NOP Public Comment Period: September 19, 2022 to October 18, 2022

1 PROJECT BACKGROUND

Entanglement of large whales and sea turtles in fishing gear off the West Coast has been increasing in recent years (Saez et al. 2021). Blue whales (*Balaenoptera musculus*), and certain distinct population segments (DPS) of humpback whales (*Megaptera novaeangliae*), gray whales (*Eschrichtius robustus*), and killer whales (*Orcinus orca*), as well as Pacific leatherback sea turtles (*Dermochelys coriacea*) are protected under the ESA throughout their range. Trap gear from the California, Oregon, Washington, and tribal commercial Dungeness crab fisheries are known to cause entanglements with ESA-listed blue whales, certain DPS of humpback whales and gray whales, and Pacific leatherback sea turtles (Saez et al. 2021). Off the California coast, Entanglements with trap gear from the California commercial Dungeness crab fishery of humpback whales of the Central America DPS and Mexico DPS and grey whales of the Eastern North Pacific DPS are known to occur. While both DPS of humpback whales are ESA-listed species, the Eastern North Pacific DPS of gray whales was de-listed in 1994. Trap gear from the Oregon and Washington commercial Dungeness crab fisheries are also known to interact with certain DPS of killer whales (Saez et al. 2021); however, there is no evidence trap gear from the

California commercial Dungeness crab fishery causing entanglements with killer whales. Therefore, species of primary concern for entanglement in trap gear from the California commercial Dungeness crab fishery include blue whales, the Central America DPS and Mexico DPS of humpback whales, and Pacific leatherback sea turtles.

Primary management authority for the commercial Dungeness crab fishery rests with the California State Legislature, which has enacted several statutes governing fishing activity. Statutes (codified in Fish and Game Code [FGC]) and CDFW regulations (codified in Title 14 of the California Code of Regulations [14 CCR]) jointly provide the management framework for this fishery. Under current regulations, the CDFW Director's authority to restrict the commercial Dungeness crab fishery is limited to protecting human health (FGC Section 5523), reducing risk of marine life entanglement (FGC Section 8276.1(c) and 14 CCR Section 132.8), and avoiding low crab quality (FGC Section 8276.2). FGC Section 8276.1(b) requires CDFW, in consultation with the California Dungeness Crab Fishing Gear Working Group (Working Group) and other stakeholders, to adopt regulations establishing criteria and protocols to evaluate and respond to potential risk of marine life entanglement from the recreational and commercial Dungeness crab fisheries. The Working Group was convened by CDFW in September 2015 in partnership with the California Ocean Protection Council (OPC) and NMFS. The Working Group consists of commercial and recreational fishing representatives, environmental organization representatives, members of the disentanglement network, and state and federal agencies.

CDFW adopted regulations (14 CCR Section 132.8) that became effective on November 1, 2020, and established a risk assessment mitigation program (RAMP) for the commercial Dungeness crab fishery to protect actionable species—blue whales, humpback whales, and Pacific leatherback sea turtles. These regulations began governing fishing operations with the 2020-2021 fishing season and form the regulatory foundation of the proposed CP. As defined in regulation and further described below, the RAMP is a dynamic management framework that: establishes thresholds for determining if entanglement risk is elevated; specifies potential management actions; and requires use of the best available science when determining appropriate management actions by the CDFW Director. Under the *2018 Marine Life Management Act Master Plan*, CDFW has defined best available science as relevant, inclusive, objective, open, and timely scientific information (CDFW 2018). Under the RAMP, the Director is required to conduct a risk assessment at least monthly between November and the end of the fishing season and consider Working Group recommendations regarding appropriate management measures prior to implementation. The Working Group plays a role in the RAMP implementation by recommending management actions to the CDFW Director based on the Working Group members' relevant expertise.

In addition to the risk assessment and management action elements of the RAMP, 14 CCR Section 132.8 also contains provisions that relate to available data under subsection (d) and management actions under subsection (e). Subsection (g) specifies additional reporting requirements for all fishery participants. Subsection (h) establishes a process for CDFW certification of Alternative Gear. Collectively, the requirements and processes of each subsection in 14 CCR Section 132.8 constitute the RAMP. Enforcement of the RAMP falls primarily under the responsibility of CDFW's Law Enforcement Division. CDFW Officers are responsible for ensuring compliance with various management measures implemented under the RAMP, including time/area closures, vertical line reductions, and gear modifications. CDFW also receives law enforcement support from the United States (US) Coast Guard and NMFS Office of Law Enforcement.

Revisions to the RAMP are proposed as part of implementation of the CP and are discussed in Section 3.3 below.

2 PROJECT LOCATION

The project location (referred to henceforth as "project area") encompasses the entirety of the US Exclusive Economic Zone (EEZ) from the California/Oregon border in the north to the California/Mexico border in the south (Figures 1 and 2). Although the commercial Dungeness crab fishery occurs almost exclusively north of Point Conception (CDFW 2020), CDFW jurisdiction over the fishery extends throughout the entire EEZ off California's coast (16 U.S. Code Section 1856 note).

3 PROJECT DESCRIPTION

To support its application for an ITP under Section 10 of the ESA, CDFW has prepared a draft CP to monitor, minimize, and mitigate entanglements of specific ESA-listed whales and sea turtles ("Covered Species") in commercial Dungeness crab fishing gear off the coast of California. On December 1, 2021, CDFW released an updated draft CP for a 45-day public comment period (https://wildlife.ca.gov/Conservation/Marine/Whale-Safe-Fisheries#55999898-conservation-plan). In addition, CDFW is proposing to revise 14 CCR Section 132.8, the RAMP for the commercial Dungeness crab fishery to protect Covered Species. The revisions include a risk assessment schedule, revisions to triggers for management action, updates to categories of management considerations, and general updates for the process for notification of management actions, mandatory data reporting requirements, and a process for alternative gear authorization. Finally, CDFW is requesting a renewable ITP with allowable take levels for Covered Species. Covered Species are proposed to include the following ESA-listed species: blue whales, the Central America DPS and Mexico DPS of humpback whales, and Pacific leatherback sea turtles.

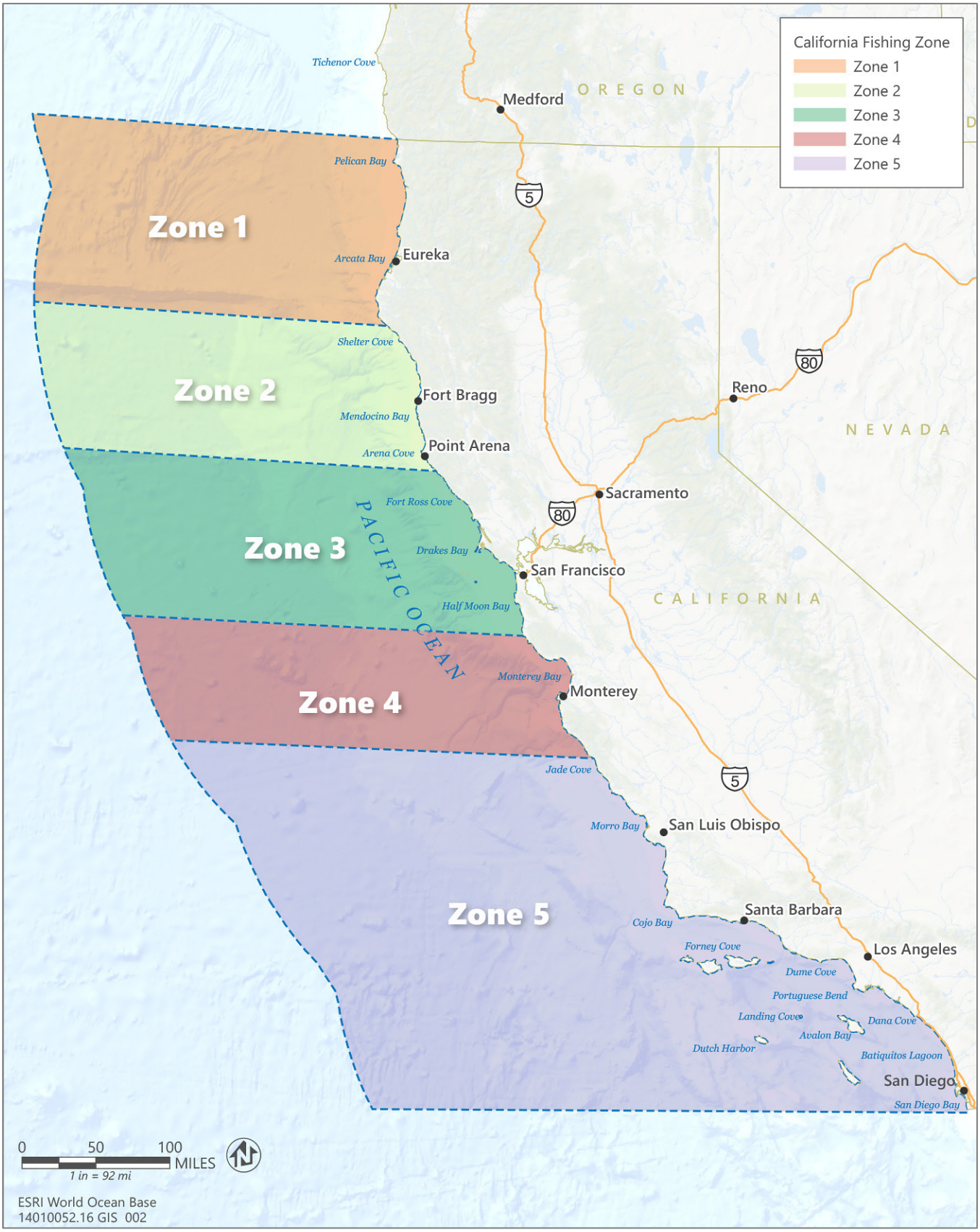
3.1 PROJECT OBJECTIVES

The goal of the project is to reduce take of Covered Species by the commercial Dungeness crab fishery to the maximum extent practicable by minimizing co-occurrence between Covered Species and commercial Dungeness crab trap gear across the project area. Specific objectives are to:

- minimize humpback whale, blue whale, and Pacific leatherback sea turtle entanglement risk from the commercial Dungeness crab fishery by restricting presence of actively fished vertical lines;
- reduce co-occurrence of humpback whale, blue whale, and Pacific leatherback sea turtle with lost or abandoned California commercial Dungeness crab gear throughout the project area;
- develop, evaluate, and require use of gear modifications which reduce severity if humpback or blue whales become entangled in commercial Dungeness crab gear; and
- support rapid entanglement response efforts which minimize the severity of large whale entanglements in gear from the commercial Dungeness crab gear.

Source: adapted by Ascent Environmental in 2022

Figure 1 Project Area



Source: adapted by Ascent Environmental in 2022.

Figure 2 California Fishing Zones

3.2 CONSERVATION PLAN

The CP describes a comprehensive strategy to monitor, minimize, and mitigate entanglements of blue whales, the Central America DPS and Mexico DPS of humpback whales, and Pacific leatherback sea turtles in commercial Dungeness crab fishing gear off the coast of California. Covered Activities addressed in the CP include activities associated with the existing commercial Dungeness crab fishery and are related to habitat consideration, gear configuration, fishing vessel permits and trap limits, monitoring of landing receipts, trap estimates, location of catch, fishery management areas and timing, and spatial trends in fishing activity. Specific Conservation Measures to reduce take of Covered Species in the CP include triggers for implementing management actions as part of the revised RAMP, implementation of best management practices, and implementation of a lost or abandoned commercial Dungeness crab trap gear retrieval program, as summarized below.

3.2.1 Triggers for Management Actions under the RAMP

The most protective management response CDFW can implement to prevent entanglements is a fishery closure where part or all of the project area is closed to commercial Dungeness crab trap gear. Therefore, the default action when a trigger is reached would be closure of one or more Fishing Zone(s) to traditional commercial Dungeness crab gear. However, the Director may select from alternatives based on the best available science related to the management considerations. Under the revised RAMP, management actions will be limited to prohibiting surface gear, depth constraints, vertical line/gear reductions, closure or delay of one or more Fishing Zone(s), and use of Alternative Gear (14 CCR Section 132.8 subd. (e)). Having a bounded range of options allows management responses to be both flexible and predictable. Should the best available science be insufficient to support alternative management responses, the default of a partial or statewide closure of the project area should provide a protective threshold to minimize entanglement risk.

3.2.2 Best Practices

In addition to the RAMP, the CP includes best practices to reduce take of Covered Species. Gear modifications that are likely to reduce entanglement severity are currently being evaluated or recommended for widespread use as best practices. The first Best Practices Guide for Minimizing Marine Life Entanglement was developed in fall 2015 and it was last updated in fall 2021 by the Working Group, with input and support from OPC, NMFS, and CDFW. The Best Practices Guide would continue to be updated on an as needed basis to incorporate new recommendations from the Working Group, Working Group Advisors, and agencies.

3.2.3 Retrieval of Lost or Abandoned Gear

The CP also includes regulatory updates to 14 CCR Section 132.8 addressing retrieval of lost or abandoned gear. CDFW adopted 14 CCR Section 132.7 in September 2019 implementing a lost or abandoned commercial Dungeness crab trap gear retrieval program. Under the terms of the program, qualified entities work with commercial trap fishermen to conduct on-the-water retrieval operations starting 15 calendar days after the scheduled season closure (FGC Section 8276) and continuing until September 30. Compensation for retrieval activities is provided either by the Dungeness crab vessel permitholder, in exchange for the retrieved trap, or by CDFW. Revisions to 14 CCR Section 132.8 would require Dungeness crab permit holders to include the number of lost traps in their bi-weekly Fishing Activity Reports.

3.3 PROPOSED REGULATORY CHANGES

The proposed regulation revises Section 132.8, Title 14, CCR to update the RAMP. The revisions proposed in Section 132.8 would do the following:

- Expand the extent of Fishing Zone 5 to include Pt. Conception to the US/Mexico Border (currently Fishing Zone 6).
- Revise management action triggers and considerations to be based on confirmed numbers of entanglements of a particular actionable species weighted by whether the confirmed entanglement was in California commercial Dungeness crab gear or unknown fishing gear.
- Clarify survey data to be used for assessing concentrations of actionable species in a fishing zone and how long to delay the fishing season if current survey data are unavailable.
- Revise management actions to eliminate use of fleet advisory notices encouraging voluntary efforts and/or measures to reduce risk of entanglements as a management action; authorize the Director to prohibit use of surface gear, except the main buoy during the fishing season within any of the fishing zones; and authorize the Director to prohibit commercial take or possession of Dungeness crab within any fishing zone or delay opening of the commercial Dungeness crab fishing season.
- Update how Dungeness crab permit holders submit bi-weekly reports to CDFW.
- Revise the deadlines when all CA commercial Dungeness crab fishing vessels are required to install an electronic system to monitor the location and movement of vessels; use hydraulic gear sensors to indicate fishing activity; and automatically transmit all location and fishing activity data to CDFW or an authorized agent.
- Define other conditions by which alternative gear may be authorized and require that the current list of authorized alternative gear include any conditions on use of the alternative gear.
- Define the information that must be included in bi-weekly fishing activity reports submitted to CDFW.
- Specify that it is unlawful to violate any restriction or fail to comply with any requirement of Section 132.8.

3.4 INCIDENTAL TAKE PERMIT

CDFW is requesting a 21-year term renewable ITP with the following allowable take levels of Covered Species by the California commercial Dungeness crab fishery: up to nine humpback whales every 3 years, up to one blue whale every 3 years, and up to one Pacific leatherback sea turtle every 10 years. Over the proposed ITP 21-year term, this would equate to a total of 63 humpback whales, seven blue whales, and two Pacific leatherback sea turtles. For purposes of determining whether these take thresholds have been reached, CDFW would also consider every two confirmed entanglements in Unknown Fishing Gear to constitute take of a single individual by the California commercial Dungeness crab fishery.

Based on initial consultation with NMFS during preparation of the CP, the proposed 21-year ITP duration would allow the ITP term to align with required Marine Mammal Protection Act authorizations that must occur every 3 years; provide sufficient time to implement the CP; and provide a measure of predictability for fishery participants.

4 POTENTIAL ENVIRONMENTAL EFFECTS

CDFW has determined based on preliminary review, in accordance with Section 15060 of the CEQA Guidelines, that an EIR should be prepared. As required by CEQA, the EIR will describe existing conditions and evaluate the potential environmental effects of the project and a reasonable range of alternatives, including the no-project alternative. It will address direct, indirect, and cumulative effects. The EIR will also discuss potential growth-inducing impacts and summarize significant and unavoidable environmental effects. The EIR will identify feasible mitigation measures, if available, to reduce potentially significant impacts. At this time, CDFW has identified a potential for environmental effects in the areas identified below.

Air Quality. Implementation of the project is not expected to result in construction-related emissions. The EIR will evaluate the potential for implementation of the CP and ITP to change operation-related emissions associated with the commercial Dungeness crab fishery.

Marine Biological Resources. Special-status wildlife species could potentially occur within the project area including Covered Species. Implementation of the project could result in disturbance of special-status species or their habitat. These issues will be evaluated in the EIR.

Cultural Resources and Tribal Cultural Resources. Any tribal or other cultural resources that are known or have the potential to occur in the project area will be assessed, and the potential impacts that may occur to known and unanticipated resources because of project implementation will be evaluated. The EIR will document the results of AB 52 consultation with Native American tribes and any agreements on mitigation measures for protection of California Tribal Cultural Resources.

Greenhouse Gases and Climate Change. This section will assess the potential for operation-related greenhouse gas emissions associated with changes to the commercial Dungeness crab fishery as a result of the CP and ITP. In addition, this section will qualitatively discuss potential climate change influences on the Dungeness crab fishery and whether those influences could alter the environmental impacts of implementing the CP and ITP.

Hazards and Hazardous Materials. This section will assess the potential for operation-related impacts related to hazards and hazardous materials due to changes in the commercial Dungeness crab fishery as a result of the CP and ITP.

Water Quality. This section will assess the potential for operation-related impacts to water quality including short-term and long-term water quality effects as a result of implementation of the CP and ITP.

5 PUBLIC SCOPING MEETING

CDFW will conduct a public scoping meeting on October 4, 2022, at 3:30 p.m. to inform interested parties about the project, and to provide agencies and the public with an opportunity to provide comments on the scope and content of the EIR.

The public scoping meeting will be held virtually via Zoom webinar. Participants must register in advance at the following link: https://us06web.zoom.us/webinar/register/WN_7zcaPdLbQyiynXT48G8ntg. After registering, participants will receive the meeting link via email to log into the webinar on October 4, 2022.

6 PROVIDING COMMENTS ON THIS NOTICE OF PREPARATION

Written comments on the NOP should be provided no later than 5:00 p.m. on October 18, 2022. Please send all comments to:

California Department of Fish and Wildlife
Attn: Ryan Bartling
3637 Westwind Blvd
Santa Rosa, CA 95403

Or via E-mail: Whalesafefisheries@wildlife.ca.gov (include "Conservation Plan – NOP Comments" in subject line)

If you are from an agency that will need to consider the EIR when deciding whether to issue permits or other approvals for the project, please provide the name of a contact person. Comments provided by email should include the name and mailing address of the commenter in the body of the email.

6.1 FOCUS OF INPUT

CDFW will rely on responsible and trustee agencies to provide information relevant to the analysis of resources within their jurisdiction. CDFW encourages input on the scope and content of the EIR, with a focus on the following topics:

- Scope of Environmental Analysis. Guidance on the scope of analysis for this EIR, including identification of specific issues that will require closer study due to the location, scale, and character of the CP and issuance of an ITP;
- Mitigation Measures. Ideas for feasible mitigation, including mitigation that could potentially be imposed by CDFW and that would avoid, eliminate, or reduce potentially significant or significant impacts;
- Alternatives. Suggestions for alternatives to the CP and ITP that could potentially reduce or avoid potentially significant or significant impacts; and
- Interested Parties. Identification of public agencies, public and private groups, and individuals that CDFW should notice regarding this project and the accompanying EIR.

7 REFERENCES

California Department of Fish and Wildlife. 2018 (February). *2018 Master Plan for Fisheries A Guide for Implementation of the Marine Life Management Act*. Available at: https://wildlife.ca.gov/Conservation/Marine/MLMA/Master-Plan. Accessed August 11, 2022.

———. 2020. Dungeness Crab, *Metacarcinus magister*, Enhanced Status Report.

CDFW. *See* California Department of Fish and Wildlife.

Saez L, Lawson D, DeAngelis M. 2021. Large whale entanglements off the U.S. West Coast, from 1982-2017. NOAA Technical Memorandum NMFS-OPR-63A. 50 p.

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From: Kraft, Kevin@CDCR <Kevin.Kraft@cdcr.ca.gov>
Sent: Tuesday, September 20, 2022 7:04 AM
To: Wildlife R7 Whale Safe Fisheries
Cc: Smith, Richard (SAC)@CDCR
Subject: cconservation plan-NOP comments

Been fishing for crab for over fifty years.Its a family tradition for me that brings the whole family together at the coast for quality time and eating the bounty of the sea.I understand the entanglement possibilities with marine life using ropes,specifically whales and turtles.with that said I would like to see more research and documentation of this with the sport (public) end of this.Surely the commercial fishing Industry impacts this issue far greater then us average “sport” guys.We all want to improve on techniques to avoid entanglements moving forward without closing or shortening fishing season.
Sincerely
Kevin Kraft

NATIVE AMERICAN HERITAGE COMMISSION

NAHC HEADQUARTERS
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NAHC.ca.gov

September 27, 2022

Ryan Bartling
California Department of Fish and Wildlife
Marine Region 7, Santa Rosa Field Office, 3637 Westwind Blvd
Santa Rosa, CA 95403

Re: 2022090320, Conservation Plan for the California Commercial Dungeness Crab Fishery Project, Del Norte, Humboldt, Los Angeles, Marin, Mendocino, Monterey, Orange, San Diego, San Francisco, San Luis Obispo, San Mateo, Santa Barbara, Santa Cruz, Sonoma, and Ventura Counties

Dear Mr. Bartling:

The Native American Heritage Commission (NAHC) has received the Notice of Preparation (NOP), Draft Environmental Impact Report (DEIR) or Early Consultation for the project referenced above. The California Environmental Quality Act (CEQA) (Pub. Resources Code §21000 et seq.), specifically Public Resources Code §21084.1, states that a project that may cause a substantial adverse change in the significance of a historical resource, is a project that may have a significant effect on the environment. (Pub. Resources Code § 21084.1; Cal. Code Regs., tit.14, §15064.5 (b) (CEQA Guidelines §15064.5 (b)). If there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment, an Environmental Impact Report (EIR) shall be prepared. (Pub. Resources Code §21080 (d); Cal. Code Regs., tit. 14, § 5064 subd.(a)(1) (CEQA Guidelines §15064 (a)(1)). In order to determine whether a project will cause a substantial adverse change in the significance of a historical resource, a lead agency will need to determine whether there are historical resources within the area of potential effect (APE).

CEQA was amended significantly in 2014. Assembly Bill 52 (Gatto, Chapter 532, Statutes of 2014) (AB 52) amended CEQA to create a separate category of cultural resources, "tribal cultural resources" (Pub. Resources Code §21074) and provides that a project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment. (Pub. Resources Code §21084.2). Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource. (Pub. Resources Code §21084.3 (a)). **AB 52 applies to any project for which a notice of preparation, a notice of negative declaration, or a mitigated negative declaration is filed on or after July 1, 2015.** If your project involves the adoption of or amendment to a general plan or a specific plan, or the designation or proposed designation of open space, on or after March 1, 2005, it may also be subject to Senate Bill 18 (Burton, Chapter 905, Statutes of 2004) (SB 18). **Both SB 18 and AB 52 have tribal consultation requirements**. If your project is also subject to the federal National Environmental Policy Act (42 U.S.C. § 4321 et seq.) (NEPA), the tribal consultation requirements of Section 106 of the National Historic Preservation Act of 1966 (154 U.S.C. 300101, 36 C.F.R. §800 et seq.) may also apply.

The NAHC recommends consultation with California Native American tribes that are traditionally and culturally affiliated with the geographic area of your proposed project as early as possible in order to avoid inadvertent discoveries of Native American human remains and best protect tribal cultural resources. Below is a brief summary of portions of AB 52 and SB 18 as well as the NAHC's recommendations for conducting cultural resources assessments.

Consult your legal counsel about compliance with AB 52 and SB 18 as well as compliance with any other applicable laws.

AB 52

AB 52 has added to CEQA the additional requirements listed below, along with many other requirements:

1. Fourteen Day Period to Provide Notice of Completion of an Application/Decision to Undertake a Project: Within fourteen (14) days of determining that an application for a project is complete or of a decision by a public agency to undertake a project, a lead agency shall provide formal notification to a designated contact of, or tribal representative of, traditionally and culturally affiliated California Native American tribes that have requested notice, to be accomplished by at least one written notice that includes:

- **a.** A brief description of the project.
- **b.** The lead agency contact information.
- **c.** Notification that the California Native American tribe has 30 days to request consultation. (Pub. Resources Code §21080.3.1 (d)).
- **d.** A "California Native American tribe" is defined as a Native American tribe located in California that is on the contact list maintained by the NAHC for the purposes of Chapter 905 of Statutes of 2004 (SB 18). (Pub. Resources Code §21073).

2. Begin Consultation Within 30 Days of Receiving a Tribe's Request for Consultation and Before Releasing a Negative Declaration, Mitigated Negative Declaration, or Environmental Impact Report: A lead agency shall begin the consultation process within 30 days of receiving a request for consultation from a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project. (Pub. Resources Code §21080.3.1, subds. (d) and (e)) and prior to the release of a negative declaration, mitigated negative declaration or Environmental Impact Report. (Pub. Resources Code §21080.3.1(b)).

- **a.** For purposes of AB 52, "consultation shall have the same meaning as provided in Gov. Code §65352.4 (SB 18). (Pub. Resources Code §21080.3.1 (b)).

3. Mandatory Topics of Consultation If Requested by a Tribe: The following topics of consultation, if a tribe requests to discuss them, are mandatory topics of consultation:

- **a.** Alternatives to the project.
- **b.** Recommended mitigation measures.
- **c.** Significant effects. (Pub. Resources Code §21080.3.2 (a)).

4. Discretionary Topics of Consultation: The following topics are discretionary topics of consultation:

- **a.** Type of environmental review necessary.
- **b.** Significance of the tribal cultural resources.
- **c.** Significance of the project's impacts on tribal cultural resources.
- **d.** If necessary, project alternatives or appropriate measures for preservation or mitigation that the tribe may recommend to the lead agency. (Pub. Resources Code §21080.3.2 (a)).

5. Confidentiality of Information Submitted by a Tribe During the Environmental Review Process: With some exceptions, any information, including but not limited to, the location, description, and use of tribal cultural resources submitted by a California Native American tribe during the environmental review process shall not be included in the environmental document or otherwise disclosed by the lead agency or any other public agency to the public, consistent with Government Code §6254 (r) and §6254.10. Any information submitted by a California Native American tribe during the consultation or environmental review process shall be published in a confidential appendix to the environmental document unless the tribe that provided the information consents, in writing, to the disclosure of some or all of the information to the public. (Pub. Resources Code §21082.3 (c)(1)).

6. Discussion of Impacts to Tribal Cultural Resources in the Environmental Document: If a project may have a significant impact on a tribal cultural resource, the lead agency's environmental document shall discuss both of the following:

- **a.** Whether the proposed project has a significant impact on an identified tribal cultural resource.

b. Whether feasible alternatives or mitigation measures, including those measures that may be agreed to pursuant to Public Resources Code §21082.3, subdivision (a), avoid or substantially lessen the impact on the identified tribal cultural resource. (Pub. Resources Code §21082.3 (b)).

7. Conclusion of Consultation: Consultation with a tribe shall be considered concluded when either of the following occurs:

a. The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource; or

b. A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached. (Pub. Resources Code §21080.3.2 (b)).

8. Recommending Mitigation Measures Agreed Upon in Consultation in the Environmental Document: Any mitigation measures agreed upon in the consultation conducted pursuant to Public Resources Code §21080.3.2 shall be recommended for inclusion in the environmental document and in an adopted mitigation monitoring and reporting program, if determined to avoid or lessen the impact pursuant to Public Resources Code §21082.3, subdivision (b), paragraph 2, and shall be fully enforceable. (Pub. Resources Code §21082.3 (a)).

9. Required Consideration of Feasible Mitigation: If mitigation measures recommended by the staff of the lead agency as a result of the consultation process are not included in the environmental document or if there are no agreed upon mitigation measures at the conclusion of consultation, or if consultation does not occur, and if substantial evidence demonstrates that a project will cause a significant effect to a tribal cultural resource, the lead agency shall consider feasible mitigation pursuant to Public Resources Code §21084.3 (b). (Pub. Resources Code §21082.3 (e)).

10. Examples of Mitigation Measures That, If Feasible, May Be Considered to Avoid or Minimize Significant Adverse Impacts to Tribal Cultural Resources:

a. Avoidance and preservation of the resources in place, including, but not limited to:

i. Planning and construction to avoid the resources and protect the cultural and natural context.

ii. Planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.

b. Treating the resource with culturally appropriate dignity, taking into account the tribal cultural values and meaning of the resource, including, but not limited to, the following:

i. Protecting the cultural character and integrity of the resource.

ii. Protecting the traditional use of the resource.

iii. Protecting the confidentiality of the resource.

c. Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places.

d. Protecting the resource. (Pub. Resource Code §21084.3 (b)).

e. Please note that a federally recognized California Native American tribe or a non-federally recognized California Native American tribe that is on the contact list maintained by the NAHC to protect a California prehistoric, archaeological, cultural, spiritual, or ceremonial place may acquire and hold conservation easements if the conservation easement is voluntarily conveyed. (Civ. Code §815.3 (c)).

f. Please note that it is the policy of the state that Native American remains and associated grave artifacts shall be repatriated. (Pub. Resources Code §5097.991).

11. Prerequisites for Certifying an Environmental Impact Report or Adopting a Mitigated Negative Declaration or Negative Declaration with a Significant Impact on an Identified Tribal Cultural Resource: An Environmental Impact Report may not be certified, nor may a mitigated negative declaration or a negative declaration be adopted unless one of the following occurs:

a. The consultation process between the tribes and the lead agency has occurred as provided in Public Resources Code §21080.3.1 and §21080.3.2 and concluded pursuant to Public Resources Code §21080.3.2.

b. The tribe that requested consultation failed to provide comments to the lead agency or otherwise failed to engage in the consultation process.

c. The lead agency provided notice of the project to the tribe in compliance with Public Resources Code §21080.3.1 (d) and the tribe failed to request consultation within 30 days. (Pub. Resources Code §21082.3 (d)).

The NAHC's PowerPoint presentation titled, "Tribal Consultation Under AB 52: Requirements and Best Practices" may be found online at: http://nahc.ca.gov/wp-content/uploads/2015/10/AB52TribalConsultation_CalEPAPDF.pdf

SB 18

SB 18 applies to local governments and requires local governments to contact, provide notice to, refer plans to, and consult with tribes prior to the adoption or amendment of a general plan or a specific plan, or the designation of open space. (Gov. Code §65352.3). Local governments should consult the Governor's Office of Planning and Research's "Tribal Consultation Guidelines," which can be found online at: https://www.opr.ca.gov/docs/09_14_05_Updated_Guidelines_922.pdf.

Some of SB 18's provisions include:

1. Tribal Consultation: If a local government considers a proposal to adopt or amend a general plan or a specific plan, or to designate open space it is required to contact the appropriate tribes identified by the NAHC by requesting a "Tribal Consultation List." If a tribe, once contacted, requests consultation the local government must consult with the tribe on the plan proposal. **A tribe has 90 days from the date of receipt of notification to request consultation unless a shorter timeframe has been agreed to by the tribe.** (Gov. Code §65352.3 (a)(2)).

2. No Statutory Time Limit on SB 18 Tribal Consultation. There is no statutory time limit on SB 18 tribal consultation.

3. Confidentiality: Consistent with the guidelines developed and adopted by the Office of Planning and Research pursuant to Gov. Code §65040.2, the city or county shall protect the confidentiality of the information concerning the specific identity, location, character, and use of places, features and objects described in Public Resources Code §5097.9 and §5097.993 that are within the city's or county's jurisdiction. (Gov. Code §65352.3 (b)).

4. Conclusion of SB 18 Tribal Consultation: Consultation should be concluded at the point in which:

a. The parties to the consultation come to a mutual agreement concerning the appropriate measures for preservation or mitigation; or

b. Either the local government or the tribe, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached concerning the appropriate measures of preservation or mitigation. (Tribal Consultation Guidelines, Governor's Office of Planning and Research (2005) at p. 18).

Agencies should be aware that neither AB 52 nor SB 18 precludes agencies from initiating tribal consultation with tribes that are traditionally and culturally affiliated with their jurisdictions before the timeframes provided in AB 52 and SB 18. For that reason, we urge you to continue to request Native American Tribal Contact Lists and "Sacred Lands File" searches from the NAHC. The request forms can be found online at: http://nahc.ca.gov/resources/forms/.

NAHC Recommendations for Cultural Resources Assessments

To adequately assess the existence and significance of tribal cultural resources and plan for avoidance, preservation in place, or barring both, mitigation of project-related impacts to tribal cultural resources, the NAHC recommends the following actions:

1. Contact the appropriate regional California Historical Research Information System (CHRIS) Center (https://ohp.parks.ca.gov/?page_id=30331) for an archaeological records search. The records search will determine:

a. If part or all of the APE has been previously surveyed for cultural resources.

b. If any known cultural resources have already been recorded on or adjacent to the APE.

c. If the probability is low, moderate, or high that cultural resources are located in the APE.

d. If a survey is required to determine whether previously unrecorded cultural resources are present.

2. If an archaeological inventory survey is required, the final stage is the preparation of a professional report detailing the findings and recommendations of the records search and field survey.

a. The final report containing site forms, site significance, and mitigation measures should be submitted immediately to the planning department. All information regarding site locations, Native American human remains, and associated funerary objects should be in a separate confidential addendum and not be made available for public disclosure.
b. The final written report should be submitted within 3 months after work has been completed to the appropriate regional CHRIS center.

3. Contact the NAHC for:
a. A Sacred Lands File search. Remember that tribes do not always record their sacred sites in the Sacred Lands File, nor are they required to do so. A Sacred Lands File search is not a substitute for consultation with tribes that are traditionally and culturally affiliated with the geographic area of the project's APE.
b. A Native American Tribal Consultation List of appropriate tribes for consultation concerning the project site and to assist in planning for avoidance, preservation in place, or, failing both, mitigation measures.

4. Remember that the lack of surface evidence of archaeological resources (including tribal cultural resources) does not preclude their subsurface existence.
a. Lead agencies should include in their mitigation and monitoring reporting program plan provisions for the identification and evaluation of inadvertently discovered archaeological resources per Cal. Code Regs., tit. 14, §15064.5(f) (CEQA Guidelines §15064.5(f)). In areas of identified archaeological sensitivity, a certified archaeologist and a culturally affiliated Native American with knowledge of cultural resources should monitor all ground-disturbing activities.
b. Lead agencies should include in their mitigation and monitoring reporting program plans provisions for the disposition of recovered cultural items that are not burial associated in consultation with culturally affiliated Native Americans.
c. Lead agencies should include in their mitigation and monitoring reporting program plans provisions for the treatment and disposition of inadvertently discovered Native American human remains. Health and Safety Code §7050.5, Public Resources Code §5097.98, and Cal. Code Regs., tit. 14, §15064.5, subdivisions (d) and (e) (CEQA Guidelines §15064.5, subds. (d) and (e)) address the processes to be followed in the event of an inadvertent discovery of any Native American human remains and associated grave goods in a location other than a dedicated cemetery.

If you have any questions or need additional information, please contact me at my email address: Cameron.Vela@nahc.ca.gov.

Sincerely,

Cameron Vela

Cameron Vela
Cultural Resources Analyst

cc: State Clearinghouse

PACIFIC COAST FEDERATION of FISHERMEN'S ASSOCIATIONS

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17 October 2022
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California Dept. of Fish & Wildlife
Attn: Ryan Bartling
3637 Westwind Blvd.
Santa Rosa, CA 95403

18 October 2022
Via Email in PDF format

Email to: Whalesafefisheries@wildlife.ca.gov

RE: D-Crab Conservation Plan – NOP Scoping Comments

Dear Ryan:

These are the PCFFA comments in response to the formal CEQA *Notice of Preparation* (NOP) (dated 19 Sept. 2022) of a Draft Environmental Impact Report (EIR), and respond to your Department's specific NOP request for CEQA scoping comments. We are therefore commenting in this letter primarily "on the scope and proposed content of the EIR" now in preparation, as requested in the NOP.

Unfortunately, the most recent draft of the Conservation Plan (CP) available to the public for review in this process dates all the way back to the December, 2021, *Draft Conservation Plan for California's commercial Dungeness Crab Fishery* ("Draft CP"). We understand from your public scoping meeting presentation on 4 October 2022, however, that the Dec. 2021 Draft CP has undergone considerable internal changes since then. The public does not yet have, however, any since-updated Draft CP to review or comment upon other than the Dec. 2021 version, so our comments here will be addressing that Dec. 2001 Draft CP document.

On 31 January 2022, PCFFA provided extensive written comments outlining the various flaws, gaps and ambiguities in the Dec. 2021 Draft CP, and making suggested changes. Those written comments were submitted informally for the Department's consideration at that time, since no formal CEQA process was then underway. Since a formal CEQA process has now begun with the publication of the NOP, PCFFA thus reiterates and restates those 31 January 2022 written

comments for the record in this formal CEQA process by attachment of those written comments to these scoping comments below.

Attachment 1 are the 31 January 2022 PCFFA written comments then submitted. Please include them in the Administrative Record for this CEQA proceeding as attachments to this scoping comments letter.

Additional Scoping Comments

Establishing Appropriate Environmental Baselines:

(1) Considering Past D-Crab Gear Entanglement History: Designating the environmental baseline as required under CEQA should include noting the number of confirmed entanglements in California Dungeness crab gear of Covered Species[1] over at least the past 20 years. This means expanding on the data listed in the Draft CP at Tables 4-1 through 4-3 (pp. 46-47) to include at least 20 years of data. This data will more clearly show that historically such entanglements were typically rare, except in the unprecedented years of 2015 and 2016 in which catastrophic ocean conditions associated with "the Blob" ocean heatwave caused massive and unprecedented disruptions of ocean food chains. Unfortunately, that ocean heatwave and the ecological chaos it generated forced migrating humpback whales to forage much further inshore, where they then ran straight into more highly concentrated than usual Dungeness crab trap operations forced to concentrate in much smaller ocean areas due to heatwave-triggered domoic acid restrictions over most of the rest of the California coastline. This was a "perfect storm" of bad events that had never occurred before and has not recurred since. But that it did occur at all activated the fishing industry to deal with this problem as quickly and effectively as possible.

These 20-year plus entanglement statistics will also show that since 2017, and the broad adoption by the industry first of various voluntary but nearly industry-wide Dungeness gear "best management practices" and other actions, and then the concentrated efforts of the California Dungeness Crab Fishing Gear Working Group ("Working Group") that led to RAMP, that the actual number of confirmed entanglements of Covered Species in the California Dungeness fishery has actually gone down substantially even from pre-2015 historic baselines. In short, our industry has, on multiple fronts, diligently led efforts to reduce whale entanglements throughout our Dungeness fisheries, and can be proud of what it has accomplished since 2017. Acknowledging and documenting the benefits of those numerous industry-lead entanglement reduction efforts since 2017, especially as compared to the disasters of 2015 and 2016, is only fair and will also put the number of entanglements that currently do occur into their proper environmental baseline perspective. *In short, what the industry is doing through RAMP and the Working Group to reduce California Dungeness crab fishery entanglements of Covered Species has largely succeeded.*

[1] "Covered Species" as defined in the NOP include the following ESA-listed species: blue whales; the Central America DPS and the Mexico DPS of humpback whales, and; Pacific leatherback turtles.

(2) Accounting for Cumulative Covered Species Impacts: Unfortunately, ocean injury (including mortality) of Covered Species is a classic cumulative impacts problem. By far the leading cause of whale injuries, including mortalities at sea, are *ship strikes*, not Dungeness fishing gear entanglements. The number of confirmed ship strikes affecting Covered Species for at least the past 20 years should also be documented and described in a comparable table as part of the CEQA environmental baseline in this process. While this is in no way an excuse for the fishing industry to do less than it can to minimize its own entanglement problems, in the face of much higher mortalities from ship strikes than from fishing gear entanglements it is clear that much more can be done to prevent ship-strike injuries as well. Reducing ship-strike impacts would reduce the cumulative population-level impacts on these species as a whole. In any event, ship strike injuries (including mortalities) are a real threat to Covered Species and therefore must also be accounted for and described under CEQA as part of the environmental baseline. There are also other human-induced mortalities that whale populations, as apex predators, are vulnerable to, including (particularly among Puget Sound orca populations) PCB and other human-produced toxic chemical bioaccumulation effects that can greatly reduce both whale fitness and fertility. Natural diseases and natural predation also take a toll and also need to be counted in the environmental baseline as well.

(3) Accounting for Non-Dungeness Gear and Non-California Entanglement Events: Another part of the environmental baseline that should be described under CEQA includes the impacts on Covered Species of entanglements in non-Dungeness crab fishery gear, and also from incidents that may involve entanglement events occurring in Mexico, Oregon, Washington, Canada and/or Alaska, including all other places besides California waters. These are all impacts that are real, but which are not under the control of people fishing in California. These impacts need to instead be teased out of the data so that their causes outside of California agency control can be factored into cumulative impacts.

(4) Describing the Environmental Impacts of Dungeness Fisheries: Existing California's Dungeness fisheries themselves form an important part of the environmental baseline, and both the positive and negative environmental impacts of this fishery should be delineated as part of that baseline. Among the positive impacts of this fishery are that D-crab fisheries preferentially and sustainably harvest the aggressive (and cannibalistic!) mature adult male crabs from crab nursery areas, thus removing them as a major predator on juvenile crabs in that nursery area. Female crabs are not retained, but thrown back to assure adequate breeding stocks. In this way the Dungeness crab fishery is not only biologically fully sustainable (i.e., preferentially harvesting only mature adult males but leaving juveniles and females) but contributes to increasing the replacement rates of populations of crabs generally within fished areas. These routine Dungeness fishery management conservation measures should be included in the environmental baseline.

Accounting for Additional Ocean Impacts of So-called "Pop-up" Alternative Gear:

(1) Alternative Gear Testing Programs: Several environmental groups continue to advocate for automated, "ropeless" or "pop-up" gear configurations, some of which are under serious

consideration. However, so far none of this supposedly alternative gear has proven physically nor economically feasible under actual and often harsh ocean harvest conditions, as CDFW noted in its Draft CP on pp. 117-118. All proposed "alternative gear" needs to be thoroughly tested, of course, including under in-fishery and real-life ocean conditions. Methods and a process for conducting rigorous scientific field tests of these proposed alternative gear types need to be written into the Draft CP or they may not be pursued or funded.

(2) Alternative Gear Failure Rates and Environmental Impacts: So far, field-tested "ropeless" or highly automated "pop-up" gear has, among other faults, also been shown to have much higher failure and drift/loss rates at sea as compared to more traditional gear. This means that if widely deployed, then larger numbers of this "alternative" gear would surely become lost or abandoned and thus potentially contribute to more "ghost gear" entrapments of sea life on the sea floor, not to mention becoming a long-term ocean pollution problem. Since there are no ropes tied to "ropeless" gear with which to locate them or pull them up (depending on the model), this also makes them much harder to retrieve when they drift at sea. Additionally, highly computerized ropeless and pop-up gear, when lost at sea, contains a number of potentially toxic computer, battery and heavy metal components that could, if in mass use, become pollution problems in themselves. Also, the average service turnaround time (time to retrieve, empty and redeploy) for the average conventional crab pot is about 1 minute. The electronically controlled "ropeless" and "pop-up" gear tested to date has an at-sea service turnaround time on the order of 8 to 15 minutes, depending on the model. This means that to service this alternative gear in actual operation will take between 8 to 15 times longer in terms of fuel costs and time. Additional diesel fuel use means additional greenhouse gas impacts. Also, an ocean surface covered with multiple "pop-up" devices could also create a serious navigation hazard. These environmental impacts of likely higher rates of use of "ropeless" or "pop-up" gear equipment, with its higher rates of gear failures and losses, all need to be accounted for as an environmental impact of any alternative gear programs.

Accounting for Increasing Whale Populations Generally:

(1) Projecting Whale Population Growth: The current proposed incidental take permit restrictions for entanglement encounters with humpback whales particularly (i.e., up to nine humpback whales every 3 years) are already extremely strict and rigorous. But these already tight "take limits" are also running up against the fact that populations of humpback whales that are Covered Species under the Draft CP are also rapidly increasing in numbers – and thus in-fishery gear encounters will almost certainly increase in the future, even with all other factors being the same. This amounts to unfairly punishing the fishing industry for doing a good job of protecting whales! The EIS should account for increasing populations of Covered Species, and forecast what those populations would likely be, if population growth continues at current rates (as we all hope it will), over the next 21 years of the term of the ITP. Some sort of adaptive-management based periodic reassessment and flexible resetting of allowed "take" limits so that those limits can be adjusted in light

of whale population growth needs to be part of the final CP and embedded into the ITP itself.

(2) Scaling of Covered Species "Take' Limits by Population: If the proposed "take" limits are legally difficult to adjust (either because of rigidities in the CP itself requiring a separate formal rule-making to make an adjustment, or in the ITP itself requiring formal reconsultation) then when whale populations significantly increase, as is highly likely, this creates the tragic consequence of potentially triggering more and more fisheries closures (with all the associated and often devastating socioeconomic consequences for fishery-dependent communities) the more the protected whale populations *increase*! This is not a good conservation mechanism nor good management. We urge you to build in an automatic adjustment mechanism to both the CP and the ITP that requires: (a) annual assessments and estimates of total populations for Covered Species; (b) at least a once every three years adaptive management process to review the Covered Species "take" limits and to adjust them to be less restrictive if whale populations significantly increase above designated biological thresholds, without having to go through a formal (and time consuming) new rule-making amendment process. In this regard, we were pleased to hear at the Department's 4 October 2022 NOP Scoping Workshop that formal "adaptive management" procedures were being included in the final CP in the form of a formal review and rethinking of its conservation measures every three years. Given that ocean conditions are changing at a more rapid pace than ever, this once-every-three-years adaptive management review process is necessary and prudent.

Periodic Reassessments of the Percentages of Unknown Gear Entanglements that are Attributed to the California Dungeness Fishery:

(1) 50% Unknown Gear Attribution is Not Well Based in Data: Another problem that the Draft CP created, as discussed in the PCFFA written comments attached, is the rigid and poorly justified attribution system more or less carried over by rote from the Settlement Agreement, and now part of the regulations, of 50% of all unknown gear entanglements to the California Dungeness crab fishery. As noted particularly in the PCFFA comments by people who actually participated in those negotiations, this "50% attribution rate" was nothing more than a "wild guess" at the time of Settlement negotiations, and had no scientific basis whatsoever. While some basis for a 50% allocation was attempted in the December, 2021 Draft CP, loosely based on the total California Dungeness fishery percentage of "lines in the water" as between the three US states, this too is nothing more than a very rough guess. And as PCFFA's earlier comments attached note, as more and more uniform by-state gear marking systems are mandated, fewer and fewer entanglement incidents will likely be attributed to "unknown gear." Any entanglements that are *truly* unidentifiable are also less and less likely to be from California Dungeness fisheries where full gear marking is now required.

(2) Flexibly Adjusting Unknown Gear Attributions: Similar to the "adaptive management" mechanism discussed above, we also urge you to build in an automatic adjustment mechanism to both the CP and the ITP that, as any science-based attribution of unknown

> gear entanglements to CA Dungeness crab fisheries requires, provides for: (a) annual reassessments and estimates of how many entanglements were truly from unknown gear; (b) a method for adjustments to the attribution percentage rate from unknown gear entanglements attributed to the CA Dungeness crab fishery out of the total of unknown gear entanglements, in such a way that it can be done without having to go through a formal (and time consuming) new rule-making amendment process each time. As a suggestion, this unknown gear attribution rate rule could be rewritten in the final CP so its specified original rate of 50% could be changed by decision of the CDFW Director, based on the then-best available science and after consultation with the Working Group. That sort of management flexibility is required for effective adaptive management, especially under the current rapidly changing ocean regimes we see today.

Numerous other Draft CP plan comments and suggestions that are not specifically related to "scoping" issues are included for the record in Attachment 1, and incorporated by reference herein as though set forth fully in these comments.

Thanks for the opportunity to comment, and we at PCFFA look forward to working with the Department on making sure the implementation of the RAMP program, the final Conservation Plan and the Biological Opinion and ITP that will result are well managed and feasible, are based on the best available science, and allow our valuable California fisheries to continue to serve high-quality Dungeness crabs to America's tables.

Sincerely,

Glen Spain
NW Regional Director
For PCFFA

PCFFA D-crab CP scoping comments (10-17-22)

Attachment 1

31 January 2022 PCFFA written comments
on the Draft CP

PACIFIC COAST FEDERATION of FISHERMEN'S ASSOCIATIONS

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January 31, 2022

California Department of Fish and Wildlife

Submitted via email to: WhaleSafeFisheries@wildlife.ca.gov

RE: Updated Draft Conservation Plan for California's Commercial Dungeness Crab Fishery dated December 1, 2021

The Pacific Coast Federation of Fishermen's Associations ("**PCFFA**") is pleased to offer the following comments on the California Department of Fish and Wildlife ("**CDFW**") December 1, 2021 - *Updated Draft Conservation Plan for California's Commercial Dungeness Crab Fishery* ("**Draft CP**"). PCFFA is the largest organization of commercial fishermen and women on the West Coast, many of whom own small businesses. For forty years, we have been leading the industry in protecting the rights of individual fishermen and fighting for the long-term survival of commercial fishing as a productive livelihood and way of life. PCFFA represents local fishermen's associations from Santa Barbara, California to Alaska.

We very much appreciate that CDFW took the comments we submitted in 2020 into account when developing the Draft CP. Having said that, we still have some concerns about the Draft CP and the implications thereof. We present our comments in two sections. The first will provide general comments on the Draft CP and the future operation of the California Commercial Dungeness Crab fishery ("**the Fishery**") in general. The second will be more targeted comments on specific sections of the Draft CP.

GENERAL COMMENTS ON THE DRAFT CP

Overall Readability

There are undefined acronyms used throughout the document. A front-space Table of Abbreviations would be much appreciated, especially for the non-technical reader. An early on index to tables and figures would be similarly helpful.

Timing of the release of the Draft document

We acknowledge CDFW was under no obligation to release the Draft CP before submitting to NOAA and we appreciate CDFW's transparency in seeking feedback on the document before submitting. The Draft CP was released on December 1, 2021. This unfortunately also coincided with the opening of the commercial Dungeness crab fishery in Fishing Zones 1, 2, 5 and 6. Commercial harvesters in Zone 4 started to set their gear at 8:01AM on December 13; and in Zone 3 at 8:01AM on December 26. Blessed with favorable ocean conditions and a high price, many commercial fishermen and other fishing community members who stand to potentially be impacted by the Draft CP were unable to read the document and fewer had the necessary time to develop comments on the contents of the Plan by the comment deadline.

We understand that this will not be the only opportunity for fishery participants to comment on the contents of the Draft CP. Because issuance of the Incidental Take Permit ("**ITP**") is a decision to be made by NOAA/NMFS, NMFS will release the Draft CP and a draft Environmental Impact Statement for a 60-day public comment period. CDFW will also release an environmental review under the California Environmental Quality Act for public comments on the environmental impact of the CP.

Unknown gear types

Under the Draft CP "CDFW will also consider every two confirmed entanglements in Unknown Fishing Gear * * * to constitute take of a single individual by the California commercial Dungeness crab fishery." We have concerns related to: (1) the 50% attribution rate being fixed into the Draft CP; (2) the precedent being set here, namely the California Dungeness crab fishery being held accountable for entanglements which cannot be attributed to the Fishery; and (3) potential impacts of this.

50% attribution rate being fixed into the Draft CP

While the Draft CP is somewhat vague in how CDFW arrived at the 50% attribution rate, the rationale appears to be loosely related to the number of vertical lines deployed within the Fishery relative to other fisheries operating off California. This is confirmed in the Amended Initial Statement of Reasons for the regulations implementing the Risk Assessment and Mitigation Program ("**RAMP**"), which reads:

> "Because not all Confirmed Entanglements can be attributed a fishery of origin, it was necessary to address how entanglements in Unknown Fishing Gear would be considered under the RAMP. Entanglements which can be attributed to other fisheries will not lead to a restriction for the commercial Dungeness Crab fishery. However, entanglements in Unknown Fishing Gear that may involve commercial Dungeness crab gear will be included in Impact Score Calculations. This is based on a recent NMFS summary of entanglements (Saez et al. 2020) which quantified the proportion of entanglements which could be attributed to a gear type or specific fishery. Considering the proportion of entanglements of known origin already attributed to commercial Dungeness crab, and the fact that the amount of trap gear deployed by the commercial Dungeness crab fishery is higher than any other state trap fishery, the Department expects that up to 50% of those entanglements in Unknown Fishing Gear are likely to be from California commercial Dungeness crab gear. The Department's Impact Score Calculations therefore weigh such entanglements at 50% of the corresponding entanglement confirmed in California commercial Dungeness Crab gear.[1]"

However, this attribution rate is apparently taken directly from the 3/27/19 Settlement Agreement in CBD vs. Bonham, (Dkt. 72) at Appendix A, Sec. 2, b, ii:

> "a confirmed entanglement of a whale in an unknown gear type or a whale of unknown species shall count as 0.5 entanglement."

This is a very harsh rule! But it should be noted that this 0.5 attribution rate in the Settlement Agreement was simply a compromise number that came out of a hotly negotiated settlement and was NOT based on any scientific or statistical analysis at the time. However, that number has now apparently been picked up in the CP, although still without any support in the science, and with no consideration, at all, of major changes in the Fishery under RAMP and new "Best Management Practices" that since 2019 have greatly reduced the number of entanglements in the Dungeness fishery.

But then in Section 5.2.1.1.3, CDFW acknowledges that with increasing implementation of numerous Dungeness crab and other trap fishery universal gear marking programs, not just in California but also in Oregon and Washington, that the proportion of total entanglements that are attributed to "unidentified fishing gear" are likely to decrease, and that in fact Objective 4a of CDFW Conservation Plan is to reduce the overall percentage of total entanglements that must be attributed to "unknown fishing gear" down to 25% by the end of the permit period.

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[1] Amended Initial Statement of Reasons for Regulatory Action (2020), page 18. See - 132.8 ISOR RAMP (ca.gov)

In short, if this Conservation Plan is successful, not only the percentage of total entanglements that must be attributed to Unknown Fishing Gear will decrease (due to better gear marking and avoidance measures), but the actual proportion of Unknown Fishing Gear causing entanglements as between California Dungeness Fisheries and other fisheries (including unmarked gear from Mexico) will also likely change, making the proposed "50% rule" overly restrictive.

We contend that a "lines in the water" rationale based on historic datasets is no longer valid because RAMP is designed to ensure D Crab lines are NOT in the water when the risk of entanglement is deemed to be elevated. As one fisherman noted, "Our traps now are deployed at the lowest risk time of year, every year since RAMP, to minimize entanglement risk. We hold our openers off until the whales have gone south and we close our season early when they return. In essence a vertical line isn't or SHOULDN'T be deemed equal in the presumed assumption of entanglement risk. Therefore the 50% of unknowns shouldn't be the threshold in the Draft CP." **We agree and propose a solution below**.

Precedent being established

We are unaware of any other fishery which is held accountable for actions which cannot be attributed to that fishery. The Draft CP, in essence, does just that. As noted above, we understand it is possible that <u>some portion</u> of entanglements with unknown gear could reasonably be attributed to the Fishery; but given recent and likely legislative and regulatory actions, including changes in best management practices, that have already greatly reduced the co-occurence of Dungeness fisheries and whales, it is at least equally possible that far fewer future entanglements with unknown gear types will involve California fishing gear.

Potential impacts

The information contained in Section 4.1.3 of the Draft CP illustrates this concern. According to that Section, during 2019 and 2020 four humpback whales were entangled in California commercial Dungeness crab gear. There were an additional 10 humpback whale entanglements reported off California in unknown gear types. Under the Draft CP 50% attribution rate, this would amount to an additional five humpback whales being attributed as taken by the Fishery. The Draft CP seeks permission for the Fishery to take "up to 9 humpback whales every 3 years." Using just the 50% attribution factor, the Fishery would have taken the total amount allowed under the Draft CP in just two years. We assume this would result in severe restrictions on the Fishery in the third year to ensure the terms of the ITP were not breached.

We strongly object to the Fishery being held accountable for interactions which cannot be attributed to it. We also understand this may be better stated as a future goal for the Fishery. It is worth noting, once again, that since implementation of the RAMP, the percentage of entanglements which can be attributed to the Fishery <u>has dropped</u>

dramatically. In 2021, for example, there were eleven confirmed whale entanglements reported in California - eight of these identified to specific fisheries (zero of which involved the Fishery). This means that for 2021, 72% of the reported entanglements could be attributed to a fishery which is not the California Commercial Dungeness crab fishery. To assume that 50% of the entanglements which cannot be identified to a specific fishery are attributable to the Fishery is arbitrary as it does not take into account the current state of the Fishery given multiple changes designed to minimize whale interactions.

To the extent the Fishery is held accountable for entanglements with unknown gear types, we believe the attribution factor should be dynamic and based on recent data. For example, it could be a rolling average where the attribution factor would be the percentage of all identifiable entanglements attributed to the Fishery. If we assume 10 entanglements in a year which can identified to a specific fishery and 2 of those can be attributed to the Fishery, then the attribution factor for that year would be 0.2 (or 20%), meaning that "CDFW will also consider every five confirmed entanglements in Unknown Fishing Gear * * * to constitute take of a single individual by the California commercial Dungeness crab fishery." Note - we are not proposing the language be changed in Section 4.2 to the preceding sentence; but offer it for illustrative purposes only. We would, however, propose the language in Section 4.2 be reworded as follows:

> "CDFW acknowledges that a proportion of confirmed entanglements in Unknown Fishing Gear, as defined in Section 5.2.1.1.3, will be attributed to the California commercial Dungeness crab fishery. The attribution factor would be a rolling average, over the most recent three years, equal to the percentage of all non-Unknown Fishing Gear entanglements attributed to the California commercial Dungeness crab fishery."

In any event, until more study is done on this issue, this attribution rate should also be specifically stated as adjustable if new data indicate that a different attribution rate would be more equitable or appropriate, as part of the adaptive management process. Making this attribution rate adjustable based on success of the CP also gives the fleet a strong economic incentive to stay the course set by the CP, and to reduce encounters as much and as fast as possible. A fixed rate of 0.50 as proposed would not do that and would be seen as merely punitive.

Discretion to Director

In our June 29, 2020, comments on the proposed regulations for the implementation of the RAMP we indicated we had "serious concerns about the amount of discretion the proposed rule would grant to the Director and the subjective manner in which that discretion could operate according to the proposed regulatory framework." We continue to have these concerns as the role of the Director is described in the Draft CP. We continue to believe that where appropriate, additional language should be considered which provides more certainty and clarity to all interested parties.

Evolving role of the California Dungeness Crab Fishing Gear Working Group ("WWG")

In October of 2017, CDFW was sued by the Center for Biological Diversity ("CBD"). CBD alleged that CDFW "has caused and is causing the " illegal 'take' of threatened and endangered humpback whales, endangered blue whales, and endangered Pacific leatherback sea turtles ." PCFFA intervened in the lawsuit. In March of 2019, the parties entered into a Settlement Agreement ("Agreement").

The Agreement tasked the WWG with providing "any RAMP risk assessment and management recommendation to the Director and settlement parties." The WWG was, at one time, responsible for providing management recommendations to the Director based on a number of factors which were eventually codified by regulatory language implementing the RAMP.

Over the intervening years, the role of the WWG has shifted. CDFW now provides an Initial Assessment of Risk and a Proposed Management Action before the WWG meets. The WWG is free to offer its own Assessment of Risk and Proposed Management Action(s) which the Director is required to consider before making his final determination and taking any management action.

As noted in the WWG's current charter[2], the WWG serves as an advisory body to the CDFW Director. Chapter 6 of the Draft CP implies that future adaptation of the Conservation Program will be based on an adaptive management framework. There is a very real fear amongst industry participants that the WWG lacks proper empowerment to be active and meaningful participants in the adaptive management process. Additional clarity is necessary to give WWG members, and stakeholders reliant upon those members, assurances that the WWG is empowered to be active and meaningful participants in the process. PCFFA remains committed to the WWG and stands willing to work with CDFW in accomplishing these goals.

In Section 7.2, on page 115, the Draft CP includes the following, "Going forward, CDFW anticipates the Working Group will participate in at least 12 meetings a year throughout the term of the permit. CDFW anticipates the Working Group will remain engaged throughout the permit term and considers their time and travel expenses to be an in-kind contribution towards CP implementation."

We suggest that CDFW prioritize funding to compensate fishery participant members of the WWG. Fishermen are not salaried and their taking time away from fishing results in a financial loss. Other members of the WWG are salaried professionals who are paid by their organizations to participate. Fishermen, on the other hand, are being asked to take time away from income producing activities (fishing) to participate in the process. This may greatly limit their ability to participate.

[2] Working Group Charter - October 2021 (ca.gov)

Ambiguity in differentiating commitments versus aspirations

We are concerned about the lack of specificity regarding what is aspirational and what is a commitment. For example, Section 5.1 identified a number of Biological Goals and Objectives. Goal 4[3] addresses instances of unidentified gear entanglements of Covered Species reported off California. We are fully supportive of this Goal and would hope that by the end of the permit term, entanglements in unidentified fishing gear will be less than 25% of the total number of confirmed Covered Species entanglements reported off California. We are unclear, however, if this is merely aspirational or if this is a commitment? If this is a commitment, what are the repercussions if this Goal is not achieved?

There are many other items which could be either aspirations or commitments and we believe clarification would be helpful to industry, managers, stakeholders and the public as to which is which.

TARGETED COMMENTS BASED ON SPECIFIC SECTIONS OF THE DRAFT CP

Page 7 - Section 1.3.1 – misstates the jeopardy consideration

The Draft CP states, "Before issuing an ITP under Section 10, NMFS must comply with the consultation requirements in Section 7 (16 USC § 1536 subds. (a) and (b)) to ensure issuing the permit **will not** jeopardize the continued existence of the listed species or result in the destruction or adverse modification of any designated critical habitat. (emphasis added)"

16 USC § 1536(a)(2) requires the Secretary to insure "any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") **is not likely** to jeopardize the continued existence of any endangered species or threatened species…." We suggest modifying the language in the Draft CP to include the correct standard regarding jeopardy.

Page 8 - 1.3.3 Marine Mammal Protection Act - misstates MMPA policy

The Draft CP states, "MMPA establishes a national policy of preventing additional decline and supporting rebuilding and recovery of marine mammal populations." The NOAA Fisheries website on Marine Mammal Protection Act Policies, Guidance, and Regulations describes the policy as follows, "The MMPA set forth a national policy to prevent marine mammal species and population stocks from diminishing, as a result of human activities,

[3] "To reduce instances of unidentified gear entanglements of Covered Species reported off California through improved standardized gear marking for all trap gear fisheries. By the end of the permit term, the proportion of confirmed entanglements reported off California which NMFS categorizes as occurring in unidentified fishing gear will be no more than 25% of the total number of confirmed Covered Species entanglements reported off California."

beyond the point at which they cease to be significant functioning elements of the ecosystems of which they are a part.[4]" We suggest including this language.

Page 50 - 4.3.1 Anticipated Impacts of Taking Blue Whales and Humpback Whales

At the outset, we appreciate CDFW using updated population estimates of Blue Whales and Humpback whales provided by the 2020 Tech Memo from Calambokidis and Barlow. We note those estimates were also included in the 2021 Draft Marine Mammal Stock Assessment Reports published in the Federal Register on October 25, 2021[5]. The public comment period for the Draft closed on January 24, 2022 and at the time this comment was written the final 2021 Marine Mammal Stock Assessment Reports had not yet been released.

The Methodology for calculation of NITs, as described on Page 52, is appropriate. In this section, it was explained that:

> "CDFW considered two methods for evaluating the DPS-specific impact of the requested take level (nine humpback whales per three-year period). The first method assumes that all entangled humpback whales off California belong to the most endangered DPS, i.e., all entangled whales are from the Central America DPS. However, given the best available science regarding the distribution of both DPS (including the known presence of Mexico DPS humpback whales off California), CDFW considers this to be an unreasonable assumption that would excessively constrain Covered Activities. Therefore, CDFW uses a second method as follows:
>
> > Three-year request take amount* average mortality & serious injury* proportion of Humpbacks off CA = DPS-specific 3-year total removal"

We strongly support the CDFW's approach. Assuming that each and every whale entangled in California waters is ONLY from the smaller population of endangered Central America DPS, each time and always, is simply not reasonable. The statistical chances of this happening by random chance are miniscule. The use by CDFW of a proportional allocation in accordance with the actual proportion of DPS1/DPS2 that is observed makes much more sense, both statistically and as a matter of good conservation policy.

Page 61 - Chapter 5 - Conservation Program

We support the dual goals of the Program as identified by CDFW, "In developing this CP, CDFW was guided by the dual goals of minimizing take of Covered Species to the maximum extent practicable and maintaining an economically viable commercial Dungeness fishery."

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[4] Marine Mammal Protection Act Policies, Guidance, and Regulations | NOAA Fisheries

[5] Draft 2021 Pacific SARS.pdf (noaa.gov)

We appreciate the clear statement of these dual purposes. Both are important, and the CDFW's creation and implementation of RAMP, its increased emphasis on science-based and real-time, data-driven management measures, as well as the successful efforts of the fleet itself to implement best management practices that have resulted in significantly fewer entanglements have all demonstrated that both of these goals are not only compatible but also achievable.

Pages 61 – 65 - Section 5.1 - Biological Goals and Objectives

Regarding modeling versus real-time data-driven mitigation measures, we appreciate the Objective 1d emphasis on creating best available science models for predicting future whale distribution and abundance:

> "Once these models have been deemed best available science by CDFW and/or NMFS, CDFW will incorporate model outputs into future assessments of marine life entanglement risk under Cal. Code Regs., Tit. 14 § 132.8 subd. (c) and (d)."

However, we also note that having real-time field data is always going to be vitally important in shaping effective avoidance mitigation measures. Models are, at best, incomplete and often too simplistic in projecting complex behavior, and often require years of improvements and calibration with real-time data to assure their reasonable reliability. Also, particularly with climate change impacts becoming more and more prevalent in ocean ecosystems, models (inevitably based on past data hindcasting) may no longer match real world events. The whale entanglement disasters of 2015 and 2016, for instance, could not have been predicted by any then current whale abundance or distribution models simply because the ocean heat wave "blob" that caused them was unprecedented in the record. The Draft CP recognized this problem:

> "Given the uncertainty regarding future co-occurrence dynamics, CDFW will conduct routine assessments of marine life entanglement risk based on robust, real-time information (Objective 1a-1d) rather than relying on static closures based on historical patterns." [pg.65]

Our worry, frankly, is that these necessary, real-time, whale behavior monitoring programs could lapse for lack of funding, because of poor weather conditions, changes in management or budget priorities or any number of other causes. The default state, if there is no information on which to base a risk assessment, will apparently be closures:

> "The default management action is a Fishing Zone closure." [Pg. 73]

Fisheries closures based on absence of data would be highly disruptive as well as unacceptable to the many fishing families, coastal communities and businesses that depend on the Dungeness crab fishery for their livelihoods. We therefore urge you to "bake in" a robust program of real-time whale abundance and migratory data collection methods into the Draft CP as well as into the CPs supporting regulations and ITP. If those real-time data collection programs are mandatory, they will be much easier to adequately fund and defend in the annual budgeting process.

We appreciate CDFW's attempt to provide for various real-time, marine life concentration data collection systems as discussed in Pages 75 (from Sec. 5.2.1.2) through 79. We also appreciated CDFW's statement that:

> "Specifically, species distribution models currently under development by the NMFS Southwest and Northwest Fisheries Science Centers will predict either relative abundance or absolute density values for humpback and blue whales. [Page 77]
>
> "The availability of data within and across Fishing Zones will be considered when implementing a management action. If data are unavailable for an individual Fishing Zone, CDFW may rely on historical patterns or data from an adjacent Fishing Zone." [Pg. 82]

Pages 75-79; 82: 5.2.1.2. Marine Life Concentrations

We appreciate CDFW's attempt to provide for various real-time, marine life concentration data collection systems as discussed in Pages 75 (from Sec. 5.2.1.2) through 79. We also appreciated CDFW's statement that:

> "Specifically, species distribution models currently under development by the NMFS Southwest and Northwest Fisheries Science Centers will predict either relative abundance or absolute density values for humpback and blue whales. [Page 77]

"The availability of data within and across Fishing Zones will be considered when implementing a management action. If data are unavailable for an individual Fishing Zone, CDFW may rely on historical patterns or data from an adjacent Fishing Zone." [Pg. 82]

Page 80 - Section. 5.3.3.3 - Management Measure Effectiveness

We are glad to see a robust commitment from CDFW to track and measure the effectiveness of mitigation and avoidance measures that are likely to occur. This kind of effectiveness tracking is essential to good management.

Page 81-82 - Section 5.2.2.4 - Economic Impacts

We are gratified to see this section included, as an acknowledgment of the need to minimize the costs to our fleet of whatever mitigation measures are available. We are glad to see that assessing economic impacts to the fleet from management actions implemented under RAMP "is a priority for CDFW." There may be many ways to minimize future entanglements, but it only makes sense to achieve the maximum benefit we can at the minimum economic cost to those who are directly affected by closures and curtailed seasons. If we can achieve the same conservation benefits through cheaper means, this will help reduce the "frictional costs" of achieving our mutual conservation goals.

Page 90, 117-118 - Ropeless Gear

> We would be remiss if we did not also thank CDFW for their comments regarding Ropeless Fishing Gear. This gear type is simply not feasible in its present stage of development, and may never be, but is only one of many potential improvements in operations and gear that could minimize entanglements as well as mortalities. We encourage fishery participants to test alternative gear types and configurations, and integrating that effort into this CP is very much appreciated.

This concludes our written comments. We apologize for the lack of thoroughness of these comments. As noted above, the timing of the Draft CP's release hindered our members from engaging in the process. We hope to be able to provide more detailed comments when NOAA publishes the document as part of the ITP application process.

Sincerely,

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California Coast Crab Association • 900 Northcrest Drive, #130• Crescent City, CA 95531

October 18, 2022

VIA EMAIL (whalesafefisheries@wildlife.ca.gov; ryan.bartling@wildlife.ca.gov)

California Department of Fish and Wildlife, Marine Region
Attn: Ryan Bartling, Sr. Environmental Scientist
3637 Westwind Blvd.
Santa Rosa, CA 95403

Mr. Bartling:

Thank you for the opportunity to provide comments on the California Department of Fish and Wildlife's ("CDFW") Notice of Preparation of a Draft Environmental Impact Report ("EIR") for the Conservation Plan for the California Commercial Dungeness Crab Fishery. The California Coast Crab Association ("CCCA") represents the interests of the fishermen, vessel owners, and processing companies who participate in and rely upon the California Dungeness crab commercial fishery (the "Fishery"), which is our state's most economically important fishery.

In a letter to CDFW dated January 31, 2021, CCCA provided detailed comments on the Draft Conservation Plan ("Draft CP"), which are equally relevant to CDFW's scoping process for the Draft EIR. For efficiency, we have attached those comments to this letter, along with the two enclosures that were provided with that letter. We request that CDFW consider all of these comments as part of the scoping process. Below, we briefly emphasize the importance of certain issues addressed in those comments, as well as additional issues.

1. It is essential that the final CP, incidental take permit ("ITP"), and EIR be based upon the best scientific and commercial data available. This includes (but is not limited to) all current and relevant data and information about the Fishery and humpback whale abundance and distribution. The EIR should also fully disclose all data concerning the significant and substantial increase in humpback whale abundance during which time the Fishery continued to operate without any apparent population-level impact.

2. The Draft CP addresses the "dual goals of minimizing take of Covered Species to the maximum extent practicable *and maintaining an economically viable commercial Dungeness*

crab fishery." Draft CP at 61 (emphasis added). Accordingly, the EIR must include a detailed, comprehensive, and complete evaluation of all of the economic and social impacts of the CP, ITP, and revised RAMP regulations, particularly measures that result in partial or full Fishery closures. The public will not be able to determine if this important goal of the Draft CP is satisfied without a detailed economic assessment.

3. The EIR should examine all feasible management options that can be implemented short of partially or completely closing the Fishery, particularly in light of CDFW's expressed goal of "maintaining an economically viable commercial Dungeness crab fishery." In this vein, we request that CDFW consider the longlining proposal described in the attached letter and the second enclosure to that letter, and evaluate longlining as an alternative in the EIR.

4. Relatedly, it bears emphasis that the implementation of "ropeless" gear is *not* feasible and should not be considered as an alternative in the EIR.[1] The problems associated with ropeless gear are detailed in the attached letter and the first enclosure to that letter. To the extent the EIR discusses ropeless gear, we ask that CDFW consider all of those comments.

5. When evaluating the impacts of the Fishery, CDFW should attribute only interactions *known* to be caused by commercial Dungeness crab gear to the Fishery. Implementation of new state gear-marking requirements will soon allow CDFW to accurately assign responsibility for all unknown gear entanglements. The implications of the gear-marking should also be discussed in the EIR.

6. CCCA continues to object to closures being the "default" management action when other actions are available to reduce potential risks. Fishery closures do not maintain the purpose of the Fishery and would be economically devastating for the fleet, or portions of the fleet, and the communities that depend on the Fishery. Early closures are particularly devastating and should not be imposed when other management actions are available to minimize Fishery impacts and maximize conservation benefits. As indicated above, the economic and social impacts of such closures should be disclosed and evaluated in detail in the EIR.

7. The Draft CP states that CDFW may delay the Fishery's fall opening date or close spring fishing early on a precautionary basis when marine life concentrations exceed certain thresholds *or when survey data is not available*. CCCA continues to object to Fishery closures based on the unavailability of data. The EIR should identify all data gaps and comprehensively examine how the unavailable data can be obtained. It should also fully disclose and evaluate the impacts of not obtaining the data.

[1] The Draft CP correctly acknowledges that ropeless gear is "an impracticable alternative," citing concerns regarding gear conflict, enforceability, implementation costs, and compatibility with Fishery operations. Draft CP at 117-18.

8. Although CCCA will comment in more detail when proposed revisions to the RAMP regulations are released by CDFW,[2] CCCA objects to the elimination of fleet advisory notices encouraging voluntary efforts and/or measures as a possible management action. Such advisory mechanisms are used in a variety of management schemes, including under HCPs and ITPs. This measure has been used effectively in the Fishery and should be retained.

9. CCCA is extremely concerned by CDFW's proposal to combine fishing zones 5 and 6. Again, CCCA will comment in more detail on that proposal when proposed revisions to the RAMP regulations are released, but combining those two fishing zones will create a disproportionately large zone, which, in turn, creates a serious risk of a zone-based closure that affects a disproportionately large swath of the Fishery. The serious, negative ramifications of potentially combining zones 5 and 6 must be disclosed and evaluated in detail in the EIR.

Thank you for your consideration of these comments. Please do not hesitate to contact me should you have any questions.

Sincerely,

Ben Platt
President, CCCA

Enclosure

[2] CCCA reserves the right to raise any and all objections to the proposed revisions to the RAMP regulations when they are released and notes the difficulty in providing scoping comments on those revisions before they have been proposed.

ATTACHMENT

info@cacoastcrabassociation.org

California Coast Crab Association • 900 Northcrest Drive, #130• Crescent City, CA 95531

January 31, 2022

VIA EMAIL (whalesafefisheries@wildlife.ca.gov; ryan.bartling@wildlife.ca.gov)

California Department of Fish and Wildlife, Marine Region
Attn: Ryan Bartling, Sr. Environmental Scientist
3637 Westwind Blvd.
Santa Rosa, CA 95403

Mr. Bartling:

Thank you for the opportunity to provide comments on the California Department of Fish and Wildlife's ("CDFW") December 2021 Draft Conservation Plan for California's Commercial Dungeness Crab Fishery ("Draft CP"). The California Coast Crab Association ("CCCA") represents the interests of the fishermen, vessel owners, and processing companies who participate in and rely upon the California Dungeness crab commercial fishery (the "Fishery"), which is our state's most economically important fishery.

Although CDFW's comment deadline was extended by two weeks to January 31, 2022, the comment period overlapped with the Fishery's primary fishing period when the vast majority of our members are at sea. This has limited our ability to undertake meaningful review and engagement, particularly on technical, economic, and operational issues on which our members have knowledge and expertise. We are therefore disappointed with the timing of the Draft CP public comment period and CDFW's refusal to extend the comment period further to allow more time for engagement by the fishing industry. Nevertheless, we appreciate the work CDFW has put into this Draft CP and are providing our initial feedback in the comments below. We ask that CDFW continue to engage CCCA and its members as it revises the Draft CP in anticipation of submitting a final conservation plan ("CP") to the National Marine Fisheries Service ("NMFS").

Overall, the Draft CP is well organized and better describes CDFW's intended conservation measures and biological objectives than the May 2020 draft. CCCA supports CDFW's intent to request a 21-year renewable incidental take permit ("ITP"),[1] which will provide sufficient time

[1] Draft CP at 27.

for mitigation measures to be evaluated and improved over the term of the permit, as well as CDFW's reliance on Calambokidis and Barlow (2020) for humpback whale abundance estimates.[2] CCCA also appreciates that the Draft CP was developed by CDFW with the "dual goals of minimizing take of Covered Species to the maximum extent practicable *and maintaining an economically viable commercial Dungeness crab fishery*."[3] Many of our comments below are directed to the economic impracticability of the Draft CP's measures.

In the sections that follow, CCCA raises our members' serious concerns regarding a number of critical issues in the Draft CP and respectfully requests that CDFW resolve these issues before it submits a CP for consideration under NMFS's Endangered Species Act ("ESA") Section 10 permitting regulations.

COMMENTS

A. Overly vague decision-making, delegation, and adaptive management measures are inconsistent with statutory and regulatory assurances.

Several fundamental components of the Draft CP are inconsistent with a key purpose of ESA Section 10, which is to provide certainty to those undertaking conservation activities regarding the future measures that will and will not be required to protect ESA-listed species. As background, the purpose of a Section 10 permit is not only to authorize take of listed species, but to incentivize long-term CPs and provide assurances to those making funding or operational commitments that no further mitigation measures will be required for the term of the permit.

As explained in the Conference Report on the 1982 ESA amendments adopting the Section 10 permit provision:

> The Committee intends that the Secretary may utilize this provision to approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species *and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan*.[4]

[2] *Id.* at 37, 51. Calambokidis and Barlow (2020) represents the best scientific and commercial data available regarding humpback whale abundance estimates. CDFW acknowledges this in relying on those estimates in the Draft CP. *See id.* at 51. Accordingly, CDFW is also obligated to begin using Calambokidis and Barlow (2020) in estimating abundance for purposes of implementing the Risk Assessment and Mitigation Program now, as it represents the best available science.

[3] *Id.* at 61 (emphasis added).

[4] H.R. Rep. No. 835, 97th Cong., 2d Sess. 29, 30 (1982), reprinted in 1982 U.S.C.C.A.N. 2860, 2871 (emphasis added).

NMFS has since memorialized this concept of "No Surprises" assurances in its Section 10 conservation planning regulations.[5] For measures that are unforeseen, NMFS's regulations contemplate – consistent with congressional intent – that no new restrictions on the use of land, water, or other resources will be imposed.[6]

These assurances are enjoyed not only by CDFW as the master permit applicant and eventual permit holder, but are also owed to members of the Fishery who implement and are covered by a CP. In their 2019 conservation planning handbook, NMFS and the U.S. Fish and Wildlife Service explained how No Surprises assurances are shared by those subject to a governmental permit applicant's jurisdiction. In such cases

> individuals subject to the applicant's jurisdiction can receive incidental take authorization as they comply with the applicant's regulatory mechanisms.…
>
> … The Services negotiate an HCP with the central authority so that that authority receives an incidental take permit as the master permittee. Eligible applicants in the permit area can receive incidental take authority *and No Surprises assurances* through the master permit….[7]

CCCA's members are therefore owed the same regulatory assurances regarding limitations on future restrictions and commitments as any ITP holder.

Consistent with those assurances, the Draft CP should clearly articulate how any future changes will be addressed.[8] Instead, the Draft CP's open-ended adaptive management program creates significant uncertainty and undermines intended assurances. In fact, CDFW acknowledges that it has not even decided on a decision-making support tool and says it will "continue to engage with decision support tool developers" to assess the utility of different decision-making tools.[9] In addition, the Draft CP refers to evaluating the effectiveness of mitigation measures, but does not describe the triggers that will prompt reconsideration of measures that are ineffective, unnecessary, or impracticable, or describe how any resulting changes will be made.[10] These omissions are directly contrary to NMFS's instructions that "[w]henever an adaptive

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[5] 50 C.F.R. § 222.307; *see* USFWS and NMFS, *Habitat Conservation Plan Assurances ("No Surprises") Rule*, 63 Fed. Reg. 8859, 8859-60 (Feb. 23, 1998).

[6] 50 C.F.R. § 222.307(g)(3)(ii).

[7] NOAA Fisheries and U.S. Department of the Interior, Habitat Conservation Planning and Incidental Take Permit Processing Handbook at 3-10 to 3-11 (Dec. 21, 2016) ("HCP Handbook"), https://fws.gov/endangered/esa-library/pdf/HCP_Handbook.pdf (emphasis added).

[8] 50 C.F.R. § 222.307(g)(1), (2).

[9] Draft CP at 107.

[10] *Id.* at 80-81.

management strategy is used, the approved [CP] must outline the agreed-upon future changes to the operating conservation program."[11]

Furthermore, while CCCA supports the concept of having the Working Groupmake management recommendations under the Draft CP, it is unclear how the Working Group will reach agreement on those recommendations, when those recommendations will have immediate effect or require Director review, and under what circumstances the Director will follow or not follow such recommendations.[12] The lack of detail regarding decision-making in a CP that relies on adaptive management creates significant uncertainty for the Fishery and undermines Congress' goal of providing certainty and assurance to those undertaking conservation measures for ESA-listed species.

In addition to these concerns, the Draft CP's descriptions of changed and unforeseen circumstances are not consistent with the above authorities and instead contain vague commitments to work with NMFS and "determine whether amendments to the CP" are warranted to address changes in species' status.[13] Certain amendments, in turn, can be made by CDFW and NMFS "without any prior public notice or comment period."[14] The Draft CP even states that unforeseen circumstances will be addressed by working with NMFS to "evaluate additional actions as appropriate."[15] Collectively, these provisions do not confer the assurances contemplated by Congress and the Section 10 implementing regulations. The Draft CP must be revised to provide clarity regarding what specific future restrictions or additional mitigation

[11] HCP Handbook at 10-27; *id.* at 10-29 ("Before we issue a permit, there must be a clear understanding and agreement between the Services and the permittee as to the range of adjustments to the management actions that might be required as a result of any adaptive management provisions.").

[12] Draft CP at 80. For example, while the Draft CP refers to Working Group recommendations being considered by the Director, it also says that some measures could be adopted "without any additional authorization by CDFW." *See id.* at 91. Because Working Group recommendations have the potential to become requirements of the federal Section 10 permit, it is incumbent on CDFW to clarify how the Working Group will make decisions, when Working Group recommendations will have immediate effect, and when Working Group recommendations must be acted on by the Director. CCCA believes the Working Group is an important source of expertise, and that the Director should defer to Working Group recommendations – provided the Fishery is adequately represented among the group's members. These details should be memorialized in the CP. Importantly, if the Director does not defer to Working Group decisions, it will be difficult for Fishery members to justify the time and expense of participating in a process that lacks any practical effect. Similarly, we are concerned that the tremendous time commitment could limit Fishery members from participating in the future and ask that CDFW consider compensating Working Group members for their participation.

[13] *Id.* at 109.

[14] *Id.* at 107. This includes "minor" changes to survey, monitoring, reporting, or analytical protocols. *Id.* Other changes will require a 45-day comment period, but may still then be adopted with written approval of CDFW and NMFS, and without the agreement of Fishery members who are ultimately responsible for implementing the conservation measures. *Id.* at 108.

[15] *Id.* at 110.

measures may and may not be imposed and how those decisions will be made in an adaptive management framework.[16]

B. A 0.25 mortality and serious injury goal is arbitrary and inconsistent with law.

One goal of the Draft CP is to reduce incidents of mortality and serious injury ("MSI") for humpback and blue whales to 0.25 by the end of the ITP's term.[17] Related objectives include using gear modifications and best management practices to change fishing practices in order to meet .25 MSI. However, the Draft CP articulates no basis for the .25 MSI goal, and fails to explain how a reduction in MSI to .25 is necessary or practicable, pursuant to ESA Section 10. Indeed, based on CDFW staff's comments in its January 7, 2022 public meeting, it appears that CDFW conducted *no analysis whatsoever* in choosing .25 MSI as a key goal of the CP.

A CP must articulate biological goals, and those goals must be both based on the best scientific and commercial data available and achievable.[18] Here, there is no indication that a .25 MSI goal is necessary or appropriate to meet the ESA Section 10 conservation obligations or that it is a practicable goal that can be achieved by the Fishery. The Fishery is not aware of similarly extreme MSI goals being incorporated into other conservation plans to satisfy the ESA Section 10 requirements. Instead, the goal appears to be arbitrary from a conservation perspective and intended to meet unrelated state policy goals,[19] rather than tailored to the requirements of an ESA Section 10 permit. This is an inappropriate use of the CP process.[20] As CDFW is aware, the Draft CP must be designed to address the goals and requirements of Section 10 of the ESA, and cannot be used to turn state policy goals into binding regulatory requirements without going through state legislative and regulatory proceedings.

C. The Draft CP inappropriately attributes unidentified gear entanglements to the Fishery.

The Draft CP's humpback mitigation measures – including economically damaging Fishery closures – are triggered by the number of Fishery-related entanglements that occur.[21] In implementing these measures, CDFW plans to assign half of all unknown gear entanglements to

[16] *See* 50 C.F.R. § 222.307(g); *see also, supra*, note 11.

[17] Draft CP at 63-64 (describing Goal 2).

[18] 50 C.F.R. § 222.307(b)(5) (conservation plans must be based on the best scientific and commercial data available); HCP Handbook at 9-1 to 9-11; *id.* at 9-11 ("Objectives must be achievable. If you cannot determine how to achieve an objective, you must discard or rewrite it.").

[19] Draft CP at 61, 97. The Draft CP explains that it is the California Ocean Protection Council's goal to move toward "zero annual [mortality and serious injury] from entanglement" for all state-managed fisheries, and that, "[w]hile meeting this target is not an explicit goal of this CP, it underpins many of the precautionary elements detailed in this Chapter." *Id.* at 61.

[20] Goal and objective development "should be based on biological needs for meeting the permit issuance criteria and insulated from other pressures," such as state policy goals. HCP Handbook at 9-11.

[21] Draft CP at 72-74.

the Fishery when calculating total entanglements under the Draft CP.[22] This assumption is purportedly based on the relative abundance of vertical lines in the Fishery as compared to other trap fisheries.[23] Although it may be appropriate to make assumptions about potential unknown gear entanglements when *estimating anticipated take levels* in limited circumstances in which the Fishery cannot be ruled out as a potential source of the entanglement,[24] it is inappropriate to impose closures and other management measures on the basis of gear entanglements that cannot affirmatively be attributed to the Fishery.[25]

The CP's mitigation measures must be based on the best available science and must be measures that the Fishery can undertake to minimize or mitigate for any ESA-listed species take *caused by the Fishery*.[26] Instead of guessing at the percentage of unknown gear entanglements that might reasonably be assigned to the Fishery, CDFW should attribute only interactions *known* to be caused by commercial Dungeness crab gear to the Fishery. Implementation of new state gear marking requirements – potentially even before approval of a Final CP – will soon allow CDFW to accurately assign responsibility for all unknown gear entanglements.[27] With the impending availability of this data, it is not reasonable to assign unknown gear to the Fishery without credible scientific data supporting such assignments. To ensure that the Draft CP is based on the best available science and is reasonably tailored to address Fishery-related impacts, CDFW should revise the Draft CP to assign responsibility for gear entanglements based solely on clear evidence from state gear marking data.

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[22] *Id.*

[23] *Id.* at 49. Several of the Draft CP's sections cross-cite each other as providing additional explanation for how this conclusion was reached, but following those references does not bring the reader to a greater understanding of how CDFW arrived at the 50% attribution rate.

[24] For the two-year period of 2019 to 2020, CDFW estimates there were a total of nine humpback whale entanglements purportedly associated with the Fishery (four confirmed, and five attributed from unknown gear). *Id*. CCCA does not object to using unknown gear attribution *only* for purposes of developing overall take estimates for evaluation of potential impacts. In addition, CCCA supports CDFW's use of the 2019-2020 period to estimate average annual entanglement numbers given the unusual nature of ocean conditions during the 2015-2017 period, which resulted in abnormally high entanglement numbers, and the fact that such unprecedented conditions are not likely to be repeated. The Draft CP provides a strong rationale for using this period to develop a take estimate. *See, e.g., id.* at 28-31, 46-48.

[25] NMFS must be reasonably certain that a take will be caused by the covered action, and the CP must provide a "rational basis for a finding of take." HCP Handbook at 3-3 (citation omitted); *see generally id.* at 3-2 to 3-3 (citing *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv*., 273 F.3d 1229, 1244 (9th Cir. 2001)).

[26] *Id.*

[27] *See* Draft CP at 49.

D. Closures are not economically practicable and should not be the "default" management action.

The Draft CP states that when an entanglement occurs, CDFW will implement a management action to limit further co-occurrence between covered species and the Fishery, and that "[t]he default management action is a Fishing Zone closure."[28] The Draft CP goes on to describe other potential management measures, but implementation of those alternative measures appears to be entirely discretionary on the part of CDFW's Director.[29]

CCCA objects to closures being the "default" management action when other actions are available to reduce potential risks. As CDFW is aware, NMFS may only issue an ITP after finding that CDFW "will, to the maximum extent *practicable*, minimize and mitigate the impacts of such taking."[30] The CP's measures are not practicable if they do not "maintain the purpose" of the Fishery[31] and allow the Fishery to continue operating "at a reasonable financial standing comparable to other like [entities]."[32] Fishery closures do not maintain the purpose of the Fishery and would be economically devastating for the fleet, or portions of the fleet, and the communities that depend on the Fishery. In fact, CDFW acknowledges that "[a]n early end to the season would disproportionately impact vessels that traditionally harvest through the spring and early summer months."[33] Accordingly, early closures are not "reasonably capable of being accomplished" by the Fishery,[34] and should not be imposed when other management actions are available to minimize Fishery impacts and maximize conservation benefits.

In addition, the Draft CP states that the Fishery will close statewide for the remainder of a season if three humpback whale entanglements occur, notwithstanding that CDFW is requesting authorization under ESA Section 10 for a total of *nine* takes over *three* years. Adoption of a three-year take limit is a reasonable approach to managing interactions that can vary from year to year, but instituting a default closure at three entanglements directly contradicts that purpose and is effectively the same as authorizing an annual take limit. Moreover, the Draft CP states that

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[28] *Id.* at 73.

[29] *Id.*

[30] 16 U.S.C. § 1539(a)(2)(B)(ii) (emphasis added).

[31] HCP Handbook at 9-35 (there are no more practicable options if the applicant "cannot adjust their project to reduce impacts and still maintain project purposes").

[32] *Id.* at 9-33; *see Nat'l Wildlife Fed'n v. Norton*, No. CIV-S-04-0579, 2005 WL 2175874, at *17-18 (E.D. Cal. Sept. 7, 2005) (defining term "maximum extent practicable"); *see also* HCP Handbook at 9-33 (citing *Norton*); *id.* at 9-28 (the maximum extent practicable standard is met if measures "represent the most the applicant can practicably accomplish").

[33] Draft CP at 116.

[34] *See Norton*, 2005 WL 2175874, at *18 (explaining that a measure does not need to be "totally infeasible" or "impossible" to be rejected as impracticable, and that the term "practicable" "has the more nuanced meaning of 'reasonably capable of being accomplished'").

three humpback entanglements in one year would suggest that the Risk Assessment and Mitigation Program ("RAMP") is not working to reduce takes;[35] however, CDFW is requesting a total of nine takes over three years (including unknown gear attributed the Fishery) *in anticipation of the conservation measures being successful*.[36] Three entanglements per year would be *entirely consistent* with those conservatively developed, conservation-based take levels – not inconsistent or in exceedance of authorized levels. Accordingly, CDFW should impose management measures in a given year only if the average annual number of anticipated incidental takes (three) has been *exceeded*.

E. It is unreasonable to implement Fishery delays and spring closures on a "precautionary basis."

The Draft CP states that CDFW may delay the Fishery's fall opening date or close spring fishing early on a precautionary basis when marine life concentrations exceed certain thresholds *or when survey data is not available*.[37] It is arbitrary and inconsistent with ESA Section 10 to impose extreme management measures like Fishery delays and spring closures when there are no reliable data demonstrating that it is necessary and appropriate to do so.[38] Moreover, unpredictable, periodic delays and early closures have a significant adverse economic impact on Fishery participants. As noted above, the Draft CP acknowledges that closing in the spring is not economically practicable.[39] Similarly, CDFW correctly rejects a permanent delayed start measure because "fishery participants would no longer provide crab for the Thanksgiving and Christmas holidays, eliminating key markets that support economic viability of the fishery."[40] To ensure the long-term economic survival of the Fishery – and thus ensure the practicability of the Final CP – CDFW must limit the use of delayed openings and early closures as a management action and cannot lawfully implement such measures when there are no reliable data to support such a measure.

Relatedly, CDFW commits to conducting monthly marine mammal concentration surveys from October to December and March to June by year five of the ITP.[41] Given CDFW's reliance on

[35] Draft CP at 74.

[36] *Id.* at 49 (explaining that CDFW is requesting fewer takes than the three-year average suggests – *i.e.*, nine instead of 13.5 – because "CDFW anticipates full implementation of the Conservation Plan will further reduce overall entanglement rates").

[37] *Id.* at 76 (providing for fall or spring closures "[i]n the absence of current marine life concentration survey data").

[38] 50 C.F.R. § 222.307(b)(5) (conservation plans must be based on the best scientific and commercial data available).

[39] *See, supra*, note 33 and accompanying text.

[40] Draft CP at 116.

[41] *Id.* at 77.

these surveys for implementing onerous management measures, CDFW must commit to monthly surveys immediately, and not wait until year five of the ITP.

F. Pop-up gear requirements are not practicable and may not be imposed under any circumstance.

The Draft CP acknowledges that pop-up (or "ropeless") gear is "an impracticable alternative," citing concerns regarding gear conflict, enforceability, implementation costs, and compatibility with Fishery operations.[42] CCCA agrees with this finding and submitted comments to CDFW on November 9, 2021 regarding the impracticable, infeasible, and uneconomic nature of pop-up gear systems. Those comments are attached and hereby incorporated by reference.

Despite CDFW's clear finding that pop-up gear is impracticable, the Draft CP continues to include pop-up gear as a potential alternative gear system that could be imposed on spring fishing in certain circumstances.[43] As CDFW is aware, however, imposition of a gear system that CDFW itself recognizes as impracticable would be inconsistent with ESA Section 10's practicability requirement. Furthermore, intervening steps such as hosting biennial meetings with gear manufacturers[44] or using an alternative gear-adoption process do not shield CDFW from the fundamental requirement to include *only* practicable conservation measures in the Draft CP. Accordingly, pop-up gear must be eliminated as a potential conservation measure as there is no legal basis to support its inclusion.

G. Longlining is a safe, practicable and effective management tool to reduce vertical lines while allowing fishing in certain areas.

CCCA has developed a proposed longlining mitigation test for the Fishery, which is enclosed as an attachment to these comments. Use of longlining gear (multi-trap trawls) on a voluntary, limited basis has the potential to drastically reduce vertical lines when whales are present and help avoid onerous and impracticable Fishery closures. Unfortunately, the Draft CP declines to adopt the use of multi-trap trawls as a potential management measure,[45] a decision that should be reconsidered for the reasons provided herein.

As an initial matter, the Draft CP explains that state law (A.B. 3337) prohibits the use of multi-trap trawls in the Northern Management Area ("NMA") and indicates that this was due to concerns regarding overcapitalization and excessive early season fishing effort. While it is fair to say that the legislature adopted A.B. 3337, including section 9012 which prohibits longlining, in order to "slow and spread-out production of commercial Dungeness crab over a longer period,"

[42] *Id.* at 117-18.

[43] *Id.* at 88-89.

[44] *Id.* at 89-90.

[45] *Id.* at 90, 117.

this was done to "assure the crab harvested are of good quality."[46] The overall purpose of the legislation was to *protect the Dungeness crab fishery* due to its importance in providing "a valuable food product, employment for those persons engaged in the fishery, and economic benefits to the coastal communities of the state."[47] Evaluating longlining as an alternative gear option for purposes of avoiding economically impracticable Fishery closures would be *consistent* with those purposes.[48] In addition, since passage of A.B. 3337 in 1994, CDFW has implemented a limited entry permit for the Fishery, and the Fishery has adopted strict tiered trap limits. Longlining restrictions are therefore no longer necessary to slow production, ensure harvest quality, or protect the Fishery, making the restrictions in A.B. 3337 ripe for reconsideration.

In addition to the statutory restriction, CDFW asserts that while longlining would reduce vertical lines, "any entanglements which then occur may be more severe than an entanglement with a single trap."[49] First, this concern is speculative. Second, this concern can be addressed through implementation of breakaway buoy-line setups. Coupled with a drastic reduction in vertical lines, longlining in certain areas and under certain circumstances would result in an overall decrease in risks to marine mammals. Indeed, the American lobster and Jonah crab fisheries have used longlining successfully, coupled with "weak links," to reduce whale entanglements for many years.[50]

CDFW also notes that some Working Group members have described gear conflict and human safety as reasons for avoiding use of longlining.[51] While no gear proposal will receive unanimous support from all Fishery participants, there is no basis on which to conclude that longlining would compromise human safety. Longlining is one of the most common methods of commercial fishing worldwide, and has proven to be a reliable, effective, practical, and relatively safe gear type. In addition, any potential gear conflicts can be addressed with depth restrictions, as described in CCCA's proposed longlining effectiveness test.

For all of these reasons, CCCA urges CDFW to (1) facilitate legislative changes necessary to remove longlining restrictions in the NMA, (2) implement the enclosed longlining effectiveness test proposal, and (3) incorporate longlining as a management tool in the CP. These steps will reduce vertical lines and allow the Fishery to continue operating in areas and at times when whales are expected to co-occur with the Fishery.

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[46] Senate Water, Parks & Wildlife Committee, Bill Analysis on A.B. 3337 (1993-1994 Regular Session) June 28, 1994.

[47] 1994 Cal. Legis. Serv. Ch. 973 (A.B. 3337) (West).

[48] To implement such a change, CCCA recommends that CDFW ask the Dungeness Crab Task Force to consider such legislative changes and provide its recommendations to the Joint Committee on Fisheries and Aquaculture.

[49] Draft CP at 90.

[50] *See* 50 C.F.R. § 229.32(c)(2)(i), (c)(2)(iv), and table 10 (requirements for "multi-trap trawls" in the American lobster and Jonah crab fisheries).

[51] Draft CP at 90.

H. CDFW must coordinate with Fishery participants before assuming funding contributions.

The Draft CP states that the Fishery "will likely need to allocate funding to cover program costs," including transitioning to an industry-funded model for electronic vessel location monitoring.[52] CDFW also states that it will "facilitate participation of commercial fishing vessels" in aerial- and vessel-based surveys for entanglement detection.[53] It is unclear whether CDFW intends for the Fishery to pay for such surveys or conduct them, and whether the Fishery's "facilitated participation" will be voluntary or mandatory. CCCA has no knowledge of CDFW discussing this funding or participation with Fishery members to determine the practicability of such measures, which is required by ESA Section 10. In fact, Fishery participants generally lack the funds to support such measures or the time to conduct them. Moreover, Fishery members are unlikely to be willing to conduct enforcement monitoring. CCCA urges CDFW to begin discussing these anticipated funding and participation measures with Fishery members to ensure that they are practicable, consistent with the requirements of ESA Section 10.

I. The Fishery objects to the Draft CP's reliance on electronic location monitoring equipment for all vessels.

The Draft CP describes the RAMP rule's requirement that Dungeness crab vessels using alternative gear must have electronic vessel location monitoring systems and states that this requirement "will be extended" to all Fishery vessels in the 2024-25 season under the Draft CP's Objective 1(c).[54] CCCA has serious concerns regarding the confidentiality of location data and the imposition of broad electronic monitoring locations. These confidentiality concerns are well founded, as vessel fishing locations are considered trade secrets, and even aggregated or anonymized data could be misappropriated for other purposes. Although state and federal agencies can mark such data as confidential and attempt to decline their release to the public, neither CDFW nor NMFS have provided assurances that such data will not be used for purposes beyond those described in the Draft CP, or described how such data will be protected from inadvertent public release. CCCA requests a dialogue with the agencies to discuss the agencies' plans for limiting access to such data (even within the agency) and ensuring that that such data will not be intentionally or inadvertently disclosed in any form or used for other purposes.

J. The Draft CP's proposed entanglement detection program lacks detail and should not involve use of third party "partners."

The Draft CP states that it will rely on existing NMFS entanglement data from opportunistic reporting, but will augment those reports by 2024 by establishing a statewide entanglement

[52] *Id.* at 115.

[53] *Id.*

[54] *Id.* at 83.

detection program.[55] There are insufficient details provided in the Draft CP for CCCA to meaningfully evaluate the proposed program; however, what details are provided raise serious concerns. For example, CDFW states that the program would rely on "a network of partners" to participate in training and conduct track-line surveys, and that it plans to recruit partners from environmental organizations, among others.[56] The referenced "training" would require having just one individual on a survey platform take a free, online training course.[57] While some non-governmental organizations may have the expertise and objectivity to function as a neutral monitor capable of accurately identifying most gear, CCCA is concerned that the program could effectively place regulation of the Fishery (*i.e.*, the ability to trigger Fishery closures) into the hands of third parties that are generally opposed to the Fishery and therefore biased. This concern is heightened due to the Draft CP's attribution of half of all unidentified gear to the Fishery. For these reasons, CCCA urges CDFW to reconsider the details of its intended entanglement detection program. It is inappropriate and unlawful for biased third parties to be responsible for data collection that directly triggers management actions.

K. The Draft CP significantly overstates trap loss rates.

The Draft CP includes new language regarding anticipated trap loss numbers and rates, asserting that "Fishery participants have commonly estimated annual gear loss of 5-10%."[58] CCCA disputes this number, for which CDFW provides no citation. In fact, CCCA's members typically describe losses of closer to 1.5 percent, while losses of up to 5 percent would be considered possible, but infrequent. The Draft CP cites the rate of replacement tag requests in support of a higher trap loss rate; however, as CDFW acknowledges, tags can be requested by Fishery participants for any reason, and do not necessarily indicate that a trap was lost.[59] CCCA requests that CDFW revise the CP to recognize that actual losses are more likely to be 1.5 percent. CDFW should continue to refine its methodology to ensure more accurate lost gear estimates.

CONCLUSION

CCCA respectfully requests that CDFW revise the Draft CP to address the Fishery's concerns regarding economic practicability, to provide meaningful No Surprises assurances, and to ensure the Final CP complies with ESA Section 10 and NMFS's implementing regulations and guidance. CCCA stands ready to work with CDFW to maximize the efficacy and practicability of the Final CP's conservation measures.

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[55] *Id.* at 69.

[56] *Id.* at 70.

[57] *Id.*

[58] *Id.* at 93.

[59] *Id.* ("there are a variety of limitations with this approach (e.g., lost tags do not necessarily equate to lost traps at sea)").

Thank you for your consideration of these comments. Please do not hesitate to contact me should you have any questions.

Sincerely,

Ben Platt
President, CCCA

cc: Sonke Mastrup, Program Manager, Marine Region (sonke.mastrup@wildlife.ca.gov)

Mary Loum, Attorney, Office of the General Counsel (mary.loum@wildlife.ca.gov)

Penny Ruvelas, Long Beach Office Branch Chief - Protected Resources Division, NMFS (penny.ruvelas@noaa.gov)

Encls: Letter from Ben Platt (CCCA) to Charlton Bonham (CDFW) dated November 9, 2021

CCCA Proposed Longlining Mitigation Test for the California Commercial Dungeness Crab Fishery

Attachments

(1) Letter from Ben Platt (CCCA) to Charlton Bonham (CDFW) dated November 9, 2021

(2) CCCA Proposed Longlining Mitigation Test for the California Commercial Dungeness Crab Fishery

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November 9, 2021

Charlton H. Bonham, Director
California Department of Fish and Wildlife
Director's Office
P.O. Box 944209
Sacramento, CA 94244-2090

Dear Mr. Bonham:

The California Coast Crab Association ("CCCA") provides the comments below in response to the California Department of Fish and Wildlife's ("CDFW") consideration of alternative fishing gear, including "ropeless" (also known as "pop-up") gear, for the California commercial Dungeness crab fishery ("Fishery"). CCCA represents commercial crab fishermen and crab buyers in advocating for science-based management and policy development that ensures a robust, sustainable Fishery and provides for the continued economic survival of the Fishery and Fishery-dependent coastal communities.

As you know, CDFW is in the process of developing a Conservation Plan ("CP") for its management of Fishery. The CP is intended to support CDFW's anticipated application to the National Marine Fisheries Service ("NMFS") for an incidental take permit ("ITP") for humpback whales, blue whales and Pacific leatherback sea turtles, each of which is protected under the Endangered Species Act ("ESA"). The draft CP provided to NMFS for review on May 15, 2020 includes a summary of "alternative gear" measures that CDFW may certify consistent with its Risk Assessment and Mitigation Program ("RAMP").[1] The goal of any such measure, according to the draft CP, is to decrease potential encounters between gear and protected marine species by minimizing the time vertical lines and surface gear are in the water.[2]

Unfortunately, as outlined in the comments below, ropeless gear is not practicable or economically feasible, increases operational and safety risks, and will lead to a significant increase in lost gear which, in turn, is likely to *increase* risks to marine life rather than decrease those risks. For all of these reasons, and because NMFS cannot approve a CP that is not practicable and that may increase risks to protected species, CDFW should remove consideration of ropeless gear from the CP.

[1] *See* CDFW, *Draft Conservation Plan for California's Commercial Dungeness Crab Fishery*, at 55 (May 15, 2020) (available at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=179066&inline) (last visited Oct. 19, 2021) ("Draft CP"); *see also* 14 C.C.R. § 132.8 (RAMP rules).

[2] Draft CP at 55-56.

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COMMENTS

As CDFW is aware, the CP is being developed consistent with the RAMP, but must ultimately be approved by NMFS in order for NMFS to issue an ITP to CDFW. NMFS, in turn, may only approve the CP after finding that CDFW "will, to the maximum extent *practicable*, minimize and mitigate the impacts of such taking."[3] The CP's measures are not practicable if they represent more than the fishery can feasibly undertake, within the fleet's available means, to minimize or mitigate for any take of ESA-listed species.[4] Specifically, changes to the Fishery are only practicable if they can be done while "maintain[ing] the purpose" of the Fishery[5] and allowing the Fishery to continue operating "at a reasonable financial standing comparable to other like [entities]."[6] To be rejected as impracticable, a measure does not need to be "totally infeasible" or "impossible;" the term practicable "has the more nuanced meaning of 'reasonably capable of being accomplished.'"[7] Under these standards, which NMFS must consider in evaluating CDFW's final CP and application for an ITP, ropeless gear must be rejected as impracticable.

The concept of ropeless gear has received significant attention in recent years from well-meaning but uninformed regulators, non-governmental organizations, and the public. In fact, however, pop-up traps have proven to be unworkable in every fishery in the United States where testing has already occurred. For example, although pop-up gear manufacturers have asserted a two to five percent failure rate, fishermen in the California Dungeness crab and Maine lobster fisheries who have tested prototypes have reported an approximately 20 percent retrieval failure rate.[8]

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[3] 16 U.S.C. §1539(a)(2)(B)(ii) (emphasis added).

[4] *See National Wildlife Federation v. Norton*, 2005 WL 2175874, *17-18 (E.D. Cal., 2005) (defining term "maximum extent practicable"); *see also* NOAA Fisheries and U.S. Department of the Interior, Habitat Conservation Planning and Incidental Take Permit Processing Handbook at 9-33 (Dec. 2016) ("HCP Handbook") (citing *Norton*); *id.* at 9-28 (the maximum extent practicable standard is met if measures "represent the most the applicant can practicably accomplish.").

[5] HCP Handbook at 9-35 (there are no more practicable options if the applicant "cannot adjust their project to reduce impacts and still maintain project purposes").

[6] *Id.* at 9-33.

[7] *Norton* at *18; *id.* ("Ultimately this question is not a matter of arithmetic based on firm figures and projections but a judgment call given the uncertainties of the real estate market and the various other factors that affect development costs and rewards.").

[8] This is consistent with a 16-30% failure rate that was reported in a study conducted by the University of New Brunswick. *See* J. Terhune, *An evaluation of at-sea field trials of a ropeless lobster fishing method in LFA 34* (Nov. 27, 2018), https://www.coldwaterlobster.ca/wp-content/uploads/2020/03/An-Evaluation-of-At-Sea-Field-Trials-for-Ropeless-Fishing-Gear.pdf.

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This is primarily due to the gear's failure to reliably "release" in order to rise to the surface and to weather conditions that cause traps to drift and lodge on the ocean floor. With approximately 57,000 crab pots in the water at any given time, this could result in an astounding 11,400 lost pots every time that gear is retrieved, using actual prototype testing loss rates. This would represent an astounding increase in lost gear compared to existing gear – much of which is later retrieved because, unlike failed pop-up buoys, existing buoys are visible on the surface. Even using the manufacturers' reported failure numbers, an average of 1,140 to 2,850 pots would be lost *every time* gear is retrieved, which are also astounding numbers.

In addition, there are important questions regarding the efficacy of ropeless gear alternatives in reducing the risk of marine life entanglements. Despite its name, this gear is not truly ropeless. All such gear would have buoy lines packed in the trap with a time-release or electronic release trigger which may deploy or partially deploy at a later date due to galvanic corrosion of release mechanisms and the turbulence of winter storms. Although fishing vessels would make an effort to collect previously unretrievable gear once the buoy line deploys, it is likely that some buoys will remain deployed for long periods while weather prevents retrieval, or will be difficult to locate regardless of weather, or will migrate to areas where fishing does not occur and remain uncollected. Even if some lost traps are later retrieved, it is easy to imagine the compounding risks of up to 20 percent of traps being lost *on every set*, creating a swiftly growing tangle of lines and traps, plastic, and corroding electrical transponders on the ocean floor. The potential impacts to ESA-listed humpback whales, sea turtles, and other marine species of switching from existing gear to proposed ropeless gear must be fully studied and understood *before* any alternative gear is either incentivized or imposed as a requirement.

Moreover, pop-up traps are currently estimated to cost between $720 and $2500 per device. This represents a total of $360,000 to $1,255,000 per vessel for the initial switch to pop-up gear assuming a 500-trap allotment – a total investment for the Fishery of between $41 and $142 million. Additionally, at a 20 percent loss rate per set, fleet members could see replacement costs of $72,000 to $250,000 *each time the gear is retrieved* (representing recurring replacement costs across the Fishery of up to $28.5 million each time gear is retrieved). While smaller vessels would bear the greatest hardship, these costs would effectively close the entire Fishery because even its most successful members operate on a thin margin and cannot absorb even a fraction of the magnitude of these anticipated costs. Even if the equipment were more affordable, there are important questions about whether smaller vessels would have the necessary deck space, crew, or familiarity with high-tech systems to survive a transition to ropeless fishing. It is likely that such a requirement would create incentives for consolidation within the Fishery, which would impact the fleet's diversity and have an inequitable impact on smaller fishing operations.

In addition to being unreasonably costly and inequitable, ropeless gear raises important concerns regarding operational and safety risks. On average, it takes one to two minutes to pull a

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Dungeness crab trap using the current buoy and rope system. This allows even the largest of permit holders to pull traps and reset within one day. Reduced time on the water improves the chances of safely returning to port with live product. In addition, quick gear retrieval is critical for risk mitigation. When severe weather approaches, or whales and other marine-life are present, gear can be removed or reset to prevent interaction. By comparison, ropeless gear retrieval is detrimentally slow. All trials have resulted in a 10 to 15 minute retrieval rate *per trap*, at best. Given the number of permitted pots (up to 500 per boat), this would increase time on the water by tenfold. This additional time creates safety risks, increases the time necessary to get live product to port, inhibits the ability to move gear when needed, and prevents quick removal of gear when severe weather arises.

Finally, as a practical matter, because ropeless gear is effectively hidden from surface view, ropeless gear may be adversely impacted by (and interfere with the usual activities of) bottom trawlers operating in the same areas as the Fishery. Similarly, because their full location cannot be seen from the surface, ropeless gear requirements would frustrate CDFW's enforcement of recently passed mandatory line markings. These requirements are intended to help protect the marine environment, including strict boundaries around Marine Protected Areas and in areas closed to fishing due to elevated domoic acid levels.

For the reasons stated above, CCCA respectfully requests that CDFW remove ropeless gear from consideration as a component of the final CP application package to NMFS, as NMFS will be unable to approve gear measures that are not practicable, increase operational and safety risks, and are likely to increase risks to the very marine species that the CP aims to protect.

Thank you for your consideration of these comments. Please do not hesitate to contact me should you have any questions.

Sincerely,

Ben Platt
President, CCCA

cc: Sonke Mastrup, Program Manager, Marine Region (sonke.mastrup@wildlife.ca.gov)
Mary Loum, Attorney, Office of the General Counsel (mary.loum@wildlife.ca.gov)
Penny Ruvelas, Long Beach Office Branch Chief - Protected Resources Division, NMFS (penny.ruvelas@noaa.gov)

Proposed longlining mitigation test
for the California commercial Dungeness crab fishery

The California Coast Crab Association ("CCCA") has developed this proposed three-year, voluntary longlining mitigation test for consideration by the California Department of Fish and Game ("CDFG") and National Marine Fisheries Service ("NMFS") (together, the "Agencies"). The Agencies are currently in discussion regarding development of a draft Conservation Plan ("CP") that would apply to members of the California commercial Dungeness crab fishery ("Fishery") and that would provide incidental take coverage under the Endangered Species Act ("ESA") to both CDFW and members of the Fishery.[1]

For the CP to be approved by NMFS, CCCA understands that CDFW must include measures to minimize and mitigate for the anticipated impacts of the Fishery on ESA-listed species to the maximum extent practicable.[2] To be practicable, measures must be feasible for the Fishery to undertake and should not offset more than the Fishery's total impact.[3] Unfortunately, the Fishery-wide closures that are contemplated in CDFW's draft CP to protect migrating humpback whales (*i.e.*, closing the Fishery in spring under certain circumstances) would not meet the purpose of the Fishery as currently proposed because closures would prevent fishing during the important spring crabbing season. Such closures would be particularly devastating financially to members of the Fishery who crab in spring.

To address the impracticability of the Fishery closures contemplated in the draft CP, CCCA proposes instituting a three-year test of the effectiveness of longlining at reducing the risk of humpback whale exposures to vertical lines. Longlining would involve stringing together multiple crab pots with a buoy on either end of the line, allowing lines to lay on the seafloor, out of the path of any whales that may be in the area. Stringing just 10 pots together with a vertical buoy line at either end would result in an 80 percent reduction of vertical lines for the set. CCCA proposes using a maximum of 30 pots per line to ensure that gear can be safely and efficiently retrieved.[4]

Members of the Fishery would be invited to participate in this voluntary program, allowing those members to fish utilizing longlining gear when overall interaction numbers would

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[1] *See* CDFW, *Draft Conservation Plan for California's Commercial Dungeness Crab Fishery*, at 55 (May 15, 2020) (available at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=179066&inline) (last visited Oct. 19, 2021).

[2] 16 U.S.C. § 1539(a)(2)(B)(ii).

[3] *See National Wildlife Federation v. Norton*, 2005 WL 2175874, *17-18 (E.D. Cal., 2000) (defining term "maximum extent practicable"); *see also* NOAA Fisheries and U.S. Department of the Interior, Habitat Conservation Planning and Incidental Take Permit Processing Handbook at 9-33 (Dec. 2016) ("HCP Handbook") (citing *Norton*); *id.* at 9-28 (the maximum extent practicable standard is met if measures "represent the most the applicant can practicably accomplish.").

[4] CDFW and CCCA could also explore whether one buoy could safely be used instead of two, which would further reduce vertical lines to 90 percent in the example provided.

otherwise require a Fishery closure under CDFW's Risk Assessment and Mitigation Program ("RAMP") regulations.[5] To minimize concerns regarding setting longlining gear on top of other gear, longlining would be limited to areas outside of 30 fathoms and where humpback whales are expected to be migrating, and would only be used in spring to coincide with periods of lower fishing effort in order to avoid gear congestion.

Vessels participating in the test would incur the costs of making necessary vessel modifications and purchasing longlining gear. Ultimately, if longlining is adopted more broadly, these costs can reasonably be borne by members of the Fishery, whereas closures cannot. Moreover, longlining should not increase the incidence of lost gear – in fact, gear may be easier to retrieve and less likely to be lost. In addition, longlining would not require intensive crew training because the gear is easy to use and involves less splicing and fewer buoys to rig.

[5] 14 C.C.R. § 132.8.

Oceana – Earthjustice – Natural Resources Defense Council – Endangered Habitats League – Center for Biological Diversity – Turtle Island Restoration Network – Ocean Defenders Alliance

October 18, 2022

Mr. Ryan Bartling
California Department of Fish and Wildlife, Marine Region
20 Lower Ragsdale Drive, Suite 100
Monterey, CA 93940

Submitted electronically: WhaleSafeFisheries@wildlife.ca.gov

RE: Comments on Notice of Preparation of a Draft Environmental Impact Report: Conservation Plan for the California Commercial Dungeness Crab Fishery

Dear Mr. Bartling,

On behalf of the undersigned conservation organizations and our members and supporters in California and along the West Coast, we submit the following comments to the California Department of Fish and Wildlife (CDFW) on the Notice of Preparation of a Draft Environmental Impact Report for its Draft Conservation Plan (CP) for the California Commercial Dungeness Crab Fishery. Our organizations represent the public interest in maintaining the health of marine wildlife and the biodiversity of the California coast, and collectively have decades of experience in developing mitigation measures to reduce and avoid the entanglement of marine life in fixed gear fisheries.

The Draft CP supports CDFW's incidental take permit (ITP) application to authorize take of threatened and endangered humpback whales, endangered blue whales, and endangered leatherback sea turtles in the California Dungeness crab fishery. Pursuant to the California Environmental Quality Act (CEQA), CDFW has determined that the proposed CP for the California commercial Dungeness crab fishery and related regulatory actions will require preparation of an Environmental Impact Report (EIR). In keeping with CDFW's request for comments, we provide recommendations on the scope of environmental impacts the EIR should analyze, as well as alternatives it should consider.

Overall CEQA Considerations

CEQA is intended to provide for the long-term protection and enhancement of the state's environment.[1] CEQA requires that an "EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects to be considered in the full environmental context."[2] CEQA defines "significant effect on the environment" as "a substantial, or potentially substantial, adverse

[1] Pub. Res. C. § 21001(a)-(d).
[2] CEQA Guidelines, § 15125(c), (emphasis added).

change in the environment."[3] In this instance, implementation of a robust, scientifically supported, well-enforced CP and ITP should minimize the California commercial Dungeness crab fishery's impact on the environment and provide a model for lessening the impacts of other state-managed trap fisheries. We recommend CDFW clarify the definition of the "project" to encompass the authorization and operation of the California commercial Dungeness crab fishery under the proposed CP and ITP. This will help stakeholders to understand the respective impacts of various alternatives and help the agency properly consider relative impacts of project alternatives and mitigation measures.

Scope of Impacts to be Analyzed

Coastwide cumulative impacts on covered species

For purposes of this EIR, CDFW must consider the impacts of the California commercial Dungeness crab fishery in the context of other fishery impacts as well as other sources of human-caused mortality such as vessel strikes. CEQA requires that an EIR address cumulative impacts "when the project's incremental effect is cumulatively considerable."[4] The EIR must therefore identify all existing and likely future projects that contribute to the same cumulative impacts as the proposed project. Cumulative impacts are defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts."[5] In addition, CEQA requires analysis of effects on "ecosystems," the boundaries of which are not defined by state lines.[6] Therefore, the EIR must analyze environmental effects occurring both within California and outside of it.

While the California commercial Dungeness crab fishery is responsible for approximately half the trap gear deployed by California fisheries, it is one of multiple fisheries that entangle and otherwise adversely affect whales and leatherback sea turtles along the West Coast.[7] The EIR must account for cumulative impacts of coastwide entanglements on covered species as it evaluates the impacts of California's commercial Dungeness crab fishery. A growing body of evidence shows that as many as 50 percent of humpback whales off the West Coast have been entangled in fishing gear, while only 5 to 10 percent of those entanglements were reported.[8] In

[3] Pub. Res. C. § 21068.
[4] CEQA Guidelines § 15130; *see also* CEQA Guidelines § 15355.
[5] CEQA Guidelines § 15355.
[6] CEQA Guidelines § 15358(a)(2).
[7] CDFW should also consider requesting a lower incidental take limit for humpback whales as a means to address the fact that the species is subject to take by other fisheries and concerns about attributing entanglements in unknown fishing gear to the Dungeness crab fishery.
[8] Robbins, J., Barlow, J., Burdin, A.M., Calambokidis, J., Gabriele, C., Clapham, P., Ford, J., LeDuc, R., Mattila, D.K., Quinn, T., Rojas-Bracho, L., Straley, J., Urban, J., Wade, P., Weller, D., Witteveen, B.H., Wynne, K. and Yamaguchi, M. 2007. Comparison of humpback whale entanglement across the North Pacific Ocean based on scar evidence. Unpublished report to the Scientific Committee of the International Whaling Commission. Report number SC/59/BC; Lauren Saez, Dan Lawson, Monica DeAngelis,

order to ensure the EIR considers the impacts of the project when added to other ongoing impacts and environmental changes, the EIR should examine both confirmed entanglements and an estimate of unobserved entanglements, as well as other sources of mortality.

The EIR's analysis should include updated estimates of the portions of the humpback whales observed off California that originate from the Mexico and Central American DPSs. Until continuing data collection can provide a more complete and recent delineation of these stocks and their relative abundance, CDFW should manage risk in a precautionary manner to protect the most vulnerable ESA-listed populations. The EIR should also examine how changing ocean conditions over the 21-year term of the CP may affect the covered species, their movements, and the risk of entanglement over time.

Impacts on species not covered by the ITP

In order to fully evaluate the effects of the fishery as it operates under the CP, the EIR should also examine effects on species that are not included in the ITP. These species include ESA-listed Western North Pacific gray whales, which are known to occur off the California coast, and southern resident killer whales, whose critical habitat extends south of Monterey Bay.

Other Impacts

Implementation of a strong, science-based CP will likely offer substantial benefits that should be explored in the EIR. For example, requiring the fishery to use technology that enables CDFW to access real-time information on the location of fishing gear is likely to reduce lost and abandoned gear, facilitate enforcement of closed areas and other fishing restrictions, and reduce time and fuel spent on patrols.

The EIR should also analyze the benefits of increased whale populations. In addition to supporting wildlife watching businesses and community interests, whales play an important role in carbon storage and nutrient transport. Through their feeding activities, humpbacks and other large whales move nitrogen from the euphotic zone to the photic zone where it facilitates the growth of phytoplankton. Whales also contribute nutrients through buoyant fecal plumes that promote phytoplankton growth near the surface.[9] That phytoplankton growth takes up carbon

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Elizabeth Petras, Sarah Wilkin, Christina Fahy. 2013. Understanding the co-occurrence of large whales and commercial fixed gear fisheries off the west coast of the United States. NOAA-TM-NMFS-SWR-044. September 2013; Calambokidis, J. et al. (2008). SPLASH: Structure of Populations, Levels of Abundance and Status of Humpback Whales in the North Pacific. Seattle, WA: U.S. Dept of Commerce - Western Administrative Center, 57; Calambokidis, J. et al. (2020). Insights into entanglements from whale population monitoring. Presentation to West Coast Entanglement Science Workshop, August 25, 2020. hiips://www.opc.ca.gov/webmaster/_media_library/2020/10/M.1-S.2_Calambokidis_Marine-Life.pdf.

[9] Roman J, McCarthy JJ (2010) The Whale Pump: Marine Mammals Enhance Primary Productivity in a Coastal Basin. PLoS ONE 5(10): e13255. https://doi.org/10.1371/journal.pone.0013255; Martin A, Pearson H, Saba G, Olsen EM. Integral functions of marine vertebrates in the ocean carbon cycle and climate change mitigation. One Earth 4: 680-693. https://doi.org/10.1016/j.oneear.2021.04.019.

through photosynthesis and provides food for zooplankton and other animals at the base of the food web. Whales also consume and store large amounts of carbon in the form of krill and fish, playing an important role in ecosystem function and nutrient cycling.[10]

Alternatives to be Analyzed

The analysis of alternatives to the proposed project lies at "[t]he core of an EIR."[11] In this analysis, the EIR must consider a reasonable range of alternatives that would avoid or substantially lessen this impact while feasibly attaining most of the Project's basic objectives.[12] CEQA requires agencies to adopt environmentally superior alternatives or feasible mitigation measures to substantially decrease or avoid otherwise significant adverse environmental impacts of the proposed project.[13] If a feasible alternative exists that will meet the project's objectives while reducing or avoiding its significant environmental impacts, the project may not be approved.[14] For purposes of this EIR, CDFW should consider all feasible alternatives that reduce or avoid the fishery's impacts on whales and sea turtles, as well the environment as a whole. The EIR should thus evaluate a range of alternatives for minimizing entanglements, including developing and eventually requiring the use of ropeless fishing gear, and adjusting season lengths, in addition to continuing with the current approach embodied in the Risk Assessment and Mitigation Program (RAMP).

The Draft CP currently discusses ropeless gear as an alternative gear and notes that CDFW plans to host biennial workshops to foster gear innovation and collaboration. While this is a good step, the EIR should analyze alternatives that include widespread development and use of ropeless gear, particularly during times of year when entanglement risk is elevated. Current research and development efforts are producing rapid improvements in ropeless gear, such that it will likely be ready for scaled up use off the U.S. West Coast in the near future. Ropeless gear has been tested in California, on the U.S. and Canadian East Coast, and in other regions globally and has been shown to be reliable, identifiable, enforceable, and detectable.[15] Fishermen who have participated in the trials demonstrated significant improvements in retrieval and redeployment efficiency over time.

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[10] Savoca et al. 2021. Baleen whale prey consumption based on high-resolution foraging measurements. Nature 599: 85–90 *and* Clapham, P.J. 2016. Managing leviathan: Conservation challenges for the great whales in a post-whaling world. Oceanography 29(3):214–225, http://dx.doi.org/10.5670/oceanog.2016.70.

[11] *Citizens of Goleta Valley*, 52 Cal. 3d at 564; *see also* Pub. Res. Code § 21002.1(a) ("The purpose of an environmental impact report is . . . . to identify alternatives to the project . . . .").

[12] *See* § 21100(b)(4); CEQA Guidelines § 15126.6(a).

[13] Pub. Res. Code §§ 21002, 21081(a); CEQA Guidelines, §§ 15002(a)(3), 15021(a)(2), 15091(a)(1).

[14] Pub. Res. Code § 21002.

[15] *See, e.g.*, reports at https://ropeless.org/relevant-publications-and-reports/; Oceana presentations to Dungeness Crab Fishing Gear Working Group and Gear Innovations Project Team, e.g., https://www.opc.ca.gov/webmaster/_media_library/2018/08/ropeless-trials-update7-30-18.pdf.

Ropeless gear offers many significant benefits. In addition to reducing entanglements, it could offer a means to continue fishing during times when areas are closed to conventional surface buoy-line gear, and reduce poaching, gear loss and associated marine debris, and navigational hazards, which are all associated with buoys lines at the surface.

These benefits stand in contrast to the drawbacks of other proposals for reducing entanglement risk. While much effort has been allocated to exploring gear modifications and innovations to avoid entanglements,[16] the only proven method to date is to eliminate the vertical lines through the use of ropeless gear.[17] Evidence has shown that other proposed means for reducing entanglement risk in Dungeness crab gear do not effectively reduce entanglement risk or the harm resulting from entanglements. These means include the use of pingers, breakaway lines, and reliance on "best practices," which are voluntary and non-enforceable.[18] Studies have shown that pingers are ineffective for large whales, and that weak links or reduced breaking strength line do not reduce the number of entanglements, nor do they reduce the risk of sublethal effects that may accumulate to population-level harm.[19] While best practices such as removing slack from lines and reducing surface gear may help reduce entanglement risk, they do not eliminate risk from vertical lines and risk reduction is difficult to quantify.

Season-length adjustments are another alternative that should be evaluated along with ropeless fishing gear. To that end, the EIR should analyze an alternative that would restrict the season for fishing using conventional vertical line gear to the period when entanglement risk is low and authorize the use of ropeless gear during the rest of season. This alternative would preserve fishing opportunities during higher risk times while protecting the covered species and conserving state resources spent on the extremely resource-intensive risk assessment process currently used in the fall and early spring.

To support the analysis of this alternative and others, the EIR should examine recent data on marine life concentrations to identify any patterns in whale migration timing or aggregation locations that could inform factors like season opening and closing dates, or areas where entanglement risk is particularly high.

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[16] National Marine Fisheries Service and Pacific States Marine Fisheries Commission: Forensic Review Workshop Report: Reviewing the Gear Involved in West Coast Whale Entanglements. August 29-30, 2018. https://habitat.psmfc.org/wp-content/uploads/2018/10/Forensic-Review-Workshop-Report.pdf
[17] Lebon, K.M. and R.P. Kelly. 2019. "Evaluating alternatives to reduce whale entanglements in commercial Dungeness Crab fishing gear," Global Ecology and Conservation 18:e00608 https://doi.org/10.1016/j.gecco.2019.e00608
[18] *Id.*
[19] See for example Werner, T.and K. McLellan-Press. 2017. Global Assessment of Large Whale Entanglement and Bycatch Reduction in Fixed Fishing Gear. Final Grant Report to NOAA under Award #NA15NMF4630357. 86 pp.

Lastly, the EIR should consider the impacts of continuing with the current approach to addressing entanglement risk in California. Relying on real-time monitoring regimes as the basis for determining season closures and other management actions has proven challenging. This approach has the laudable goal of both minimizing entanglement risk and impacts to the fishery. However, it has proven extremely resource-intensive and, in practice, has not resulted in timely responses to real-time increases in entanglement risk. While closures have likely prevented some entanglements, there has been a significant lag of nearly a month between the time management triggers are reached and management responses are implemented. The EIR should consider ways to improve the responsiveness of this approach and compare it to alternative approaches in terms of CDFW resource use, including the ability to use resources to address conservation needs in other fisheries, and actual reduction in entanglement risk.

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Thank you for your time and consideration. Please don't hesitate to contact us if you would like to discuss any of these comments in more detail.

Sincerely,

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