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VIA EMAIL (WhaleSafeFisheries@wildlife.ca.gov)

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

RE: CCCA Comments on Proposed RAMP Rulemaking

Dear Mr. Bartling:

This letter and the attachment provide the California Coast Crab Association's ("CCCA") comments in response to the California Department of Fish and Wildlife's ("CDFW") notice of proposed rulemaking implementing the Risk Assessment Mitigation Program ("RAMP") for the Commercial Dungeness Crab Fishery ("Proposed Regulations"). CCCA is a trade association that comprehensively and directly 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")—California's most economically important fishery. CCCA is the only trade association that solely represents the interests of the participants in the Fishery.

Initially, CCCA wants to make clear that its comments are *not* concessions on any aspect of the Proposed Regulations nor should they be taken as CCCA's endorsement of CDFW's general approach, which CCCA recognizes is constrained, to some degree, by the terms of the settlement agreement in *CBD v. Bonham*. CCCA also wants to make clear that it strongly believes that many of the terms, if not the general approach, of the RAMP regulations can and should be modified and improved in the anticipated Conservation Plan, which provides CDFW with substantially more flexibility. CCCA's comments are intended to be constructive and to improve the clarity, fairness, and application of the RAMP regulations, recognizing CDFW's current constraints.

CCCA acknowledges CDFW's responsiveness to *some* of CCCA's comments on the draft RAMP regulations that were earlier provided for the review of Working Group members. We appreciate the improvements made by CDFW, and we sincerely hope that CDFW will continue to make the substantial improvements that are still needed, as detailed in the comments below. We also appreciate the Proposed Regulations' emphasis on the role of the Working Group, and we agree that the Working Group's recommendations are "critical to informing the Director on management decisions." Initial Statement of Reasons at 23. As CDFW develops final RAMP regulations that are protective of both the California Commercial Dungeness Crab Fishery ("Fishery") and marine species, CCCA stands ready to continue to work cooperatively and productively with CDFW. It is essential—and required by law—that the final regulations strike the correct balance between the protection of species and a thriving, economically viable Fishery. As expressly declared by the Legislature: "[T]he Dungeness crab fishery is important to the state because it provides a valuable food product, employment for those persons engaged in the fishery, and economic benefits to the coastal communities of the state." Fish. & Game Code § 8280(a); *see id.* § 7056(i) and (j) (State must ensure that "[t]he fishery management system observes the long-term interests of people dependent on fishing for food, livelihood, or recreation" and that "adverse impacts of fishery management on small-scale fisheries, coastal communities, and local economies are minimized").

In addition, CCCA wants to emphasize here its overarching comment that the final RAMP regulations *must* allow for adaptability based on the best available science. As proposed, the regulations have strict numerical triggers and impact scores. Notwithstanding CCCA's objections to those triggers and impact scores (as described below), it is important that CDFW recognize that they are accurate only so long as they are supported by the best available science. As new information about gear interactions, whale populations, whale migrations, and other environmental data become available, the impact scores, triggers, and other numerical assumptions in the Proposed Regulations will not be consistent with the best available science as required by the Fish & Game Code. *See* Fish. & Game Code § 7056(g). The Proposed Regulations do not allow for this flexibility and must be revised to address this legally and scientifically fatal flaw. This will also be essential for implementation of the Conservation Plan, which will govern the Fishery for many years into the future.

Below, we have organized our specific comments to align with the regulatory sections in the Proposed Regulations for easy reference. These comments are followed by a final section that provides our comments on the Standardized Regulatory Impact Assessment.

I. DEFINITIONS

A. "Actionable Species"

The Proposed Regulations define "Actionable Species" as simply "Blue Whales, Humpback Whales, and Pacific Leatherback Sea Turtles." However, the RAMP regulations are required to address only certain species or distinct population segments ("DPS") that are listed under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, *et seq.* Indeed, the Settlement Agreement in *CBD v. Bonham* is expressly limited to ESA-listed species. Accordingly, the RAMP regulations must specifically identify the species by reference to the federal listing decisions to ensure applicability to only those species and DPSs. Without this specificity, unhelpful ambiguities will eventually arise as the RAMP regulations are applied.

Additionally, the final regulations should include a provision that removes a species or DPS from the “actionable species” definition if the species or DPS is delisted under the ESA. For example, if the Mexico DPS of humpback whales is delisted, then it should be removed from the “actionable species” definition and, in this instance, the definition should eliminate humpback whales entirely since all or the very substantial majority of Fishery interactions occur with Mexico DPS animals.

B. “Alternative Gear”

The Proposed Regulations inappropriately express a preference for “ropeless gear” in the “alternative gear” definition to the exclusion of other gears or methods that may be more effective. In fact, “ropeless gear” is the only gear specifically identified in the “alternative gear” definition. As CCCA has repeatedly explained, “ropeless gear” remains experimental and commercially unviable. CCCA strongly believes that the RAMP regulations must be designed to encourage testing and, if viable, adoption of simple and effective alternative gear arrangements. As two examples, the attachment to this letter summarizes the information CCCA has compiled for two promising alternative gear solutions—long-lining and yale grips. The “alternative gear” definition needs to account for these and other potential gear modifications. CDFW’s continued emphasis on “ropeless gear” is both unproductive and counter to the best available information, which suggests that simple, easily implementable solutions can dramatically reduce interactions with ESA-listed species.

We therefore recommend that CDFW either (1) eliminate the term “including but not limited to ropeless gear” from the “alternative gear” definition, or (2) revise the definition to state that “alternative gear” means “gear modifications and other gear innovations, including but not limited to, longlining, alternative riggings, alternative ropes or gear accessories such as yale grips, ropeless gear, pingers, or alternative fishing practices as authorized by the department pursuant to subdivision (h).” The “alternative gear” definition should include modified fishing *practices*, in any event, which may provide solutions in isolation or in concert with alternative gear implementation.

C. “Confirmed Entanglement with California Commercial Dungeness Crab Gear”

Presently, CDFW relies upon the National Marine Fisheries Service’s (“NMFS”) forensic assessment of an entanglement, and the confirmed entanglement definitions carry on this reliance. However, in the course of Working Group discussions, NMFS has stated that it is the *wrong agency* to accurately identify California Commercial Dungeness crab gear and that it will refuse to identify gear unless there is a clear buoy tag that identifies the Fishery. This limitation is unacceptable, particularly because there are multiple, reliable methods of identifying gear specific to the Fishery. And, indeed, CDFW regulates the Fishery—*not* NMFS. NMFS, of course, can *report* entanglements to CDFW, but CDFW must reach an evidence-based conclusion that the entanglement involved gear from the Fishery in order to qualify as a “Confirmed Entanglement with California Commercial Dungeness Crab Gear.”

Accordingly, CCCA continues to strongly urge CDFW to establish an Entanglement Review Board that utilizes California-specific expertise, including the expertise of Dungeness crab

fishermen, to identify entanglements in lieu of or in conjunction with the involvement of NMFS. CDFW is separately implementing regulatory measures that require distinct markings for each fixed gear fishery in California. These regulations should be specifically identified and incorporated in the RAMP regulations. CDFW should not rely on a federal agency that admits its limitations to make critical decisions for a Fishery that is managed at the state level by CDFW.

D. “Fishing Zone”

CDFW’s decision to move from a two-zone management model to a six-zone management model is an improvement, and we appreciate CDFW’s recognition that the Fishery can and should be effectively managed on the basis of geographic units. However, CCCA recommends that CDFW further refine the “Fishing Zone” definition to better correspond to patterns of fishing activity and whale distribution. Such refinements will aid continued data collection by allowing fine-scale data analysis and provide for more surgical management measures that are necessarily protective but allow fishing to occur that does not constitute a material threat.

CCCA therefore proposes that CDFW implement an eight (8) zone management model, as set forth below. The eight-zone model encompasses the same area as the six-zone model in the Proposed Regulations. However, each zone aligns more logically to fishing effort and ports.

Zone 1: From the California/Oregon border to Patrick’s Point

Zone 2: From Patrick’s Point to Delgado Canyon

Zone 3: From Delgado Canyon to Point Arena

Zone 4: From Point Arena to Pigeon Point

Zone 5: From Pigeon Point to Lopez Point

Zone 6: Lopez Point to Point Conception

Zone 7: Point Conception to the U.S. Mexico Border

Zone 8: “Pacific Leatherback Sea Turtle Foraging Area” from Point Arena (38° 57. 5' N. latitude) to Point Pinos (36° 38.314' N. latitude).

Presently, the majority of the data CDFW reviews, including landing data and aerial surveys, do not allow for fine-scale data analysis. Landing data and trap concentrations are based on “macro-blocks,” while aerial survey data is concentrated on the Central Management Area. Dividing the Fishery into the above eight zones will overlay a more precise grid upon which CDFW may collect and analyze data. As CDFW improves in its data collection abilities and subsequent fishery management, aligning management zones with the areas in which groups of vessels operate from and land catch will allow CDFW to better understand the interactions of the risk factors and how to effectively manage them at the necessary scale. If and when management measures are needed, this proposed model would allow CDFW to scale such measures in ways that align with the geographic units into which the Fishery divides itself.

Finally, we want to emphasize that the zone proposed by CDFW that extends from Lopez Point to US/Mexico Border would make management actions particularly disastrous for the Morro Bay-Avila-Santa Barbara fleet. That fleet typically operates in later-winter/springtime and CDFW's proposed delineation could result in zero fishing opportunities for crabbers from this area in any given year, depending on management triggers and actions. Crabs are rarely ever found south of Point Conception, but if certain numbers of whales are observed in that area, the result could be that the entire area *north* of Point Conception is also closed. This would be arbitrary and would have no conservation benefit because there would be no whales in the area north of Point Conception. Accordingly, even if CDFW does not adopt the eight-zone structure recommended above, there should be a single zone delineated for Lopez Point to Point Conception (and separately for Point Conception south to the Mexico border).

E. "Impact Score Calculation"

The definition for the "Impact Score Calculation" states that an impact score is "subject to revision after NOAA's final determination of injury or mortality." However, it is not apparent from the Proposed Regulations why NOAA's determination of "injury" has any relevance. Under the Proposed Regulations, the impact score changes based only on whether an interaction results in a mortality. For example, under the Proposed Regulations, a Confirmed Entanglement in California Commercial Dungeness Crab Gear involving a humpback whale results in a score of either 0.7 (animal is released alive) or 1.0 (animal is deceased). If NOAA's injury determination process is going to have any relevance, then CDFW must revise the impact scores for humpback whales to assign a value of 0.7 for "serious" injury determinations and a score of 0.0 for "non-serious" injury determinations. Similar changes should be made to the impact score definitions for blue whales. For purposes of the Marine Mammal Protection Act ("MMPA"), a "non-serious" injury does not count against a marine mammal stock's potential biological removal rate ("PBR") and, thus, a score of 0.0 for a non-serious injury is appropriate.

II. RISK ASSESSMENT SCHEDULE

Under proposed 14 C.C.R. § 132.8(b)(4), it is unclear how and when the Director must "perform an additional Risk Assessment when new information becomes available." The regulations must be revised to clarify that, when the fleet is restricted under a management action, it is imperative that the Director perform the additional assessment "immediately" upon new information becoming available and, if the information dictates a management change, then the Director must "expeditiously" lift or modify the restriction. Similar language was included in initial draft regulations provided to the Working Group, and CCCA is perplexed at why these important obligations were removed by CDFW. Indeed, CDFW confirms in its rulemaking documents that "any fishery closures are to be *minimized* in duration and extent, and *expeditiously* lifted when the risk has been abated." Notice of Proposed Changes in Regulation at 9 (emphases added); *see* Fish. & Game Code § 8276.1(c)(6) ("The director shall *expeditiously* lift any restriction in waters pursuant to this subdivision if the director determines, in consultation with the California Dungeness Crab Fishing Gear Working Group, that the significant risk of marine life entanglement in those waters has abated." (emphasis added)). The text of the regulations must be revised to correspond to CDFW's expressly stated intent.

III. TRIGGERS FOR MANAGEMENT ACTION

We appreciate that CDFW has presented a thoughtful approach to the process for implementing management measures that better aligns with potential risks. However, and respectfully, subsection (c) of the Proposed Regulations (“Triggers for Management Action”) still needs substantial improvements, and is arbitrary, lacking substantial evidence, and otherwise unlawful in a number of respects. As described below, CCCA provides recommendations to increase clarity and better tailor management actions to actual threats.

A. Unknown Gear Entanglements

CCCA remains *entirely and strongly* opposed to any management actions based upon entanglements with unknown gear as a general matter, whether in the RAMP Regulations or in the Conservation Plan. The Fishery—upon which many hard-working people stake their livelihoods—should not be punished based upon “unknown” information. CCCA has at least three specific objections to the “unknown gear” provisions (in addition to its general objection).

First, the Proposed Regulations penalize the Fishery with 0.5 of an entanglement even if California commercial crab gear is eliminated as a source of the entanglement (*i.e.*, the gear is “unknown” but it is known that the gear is not commercial crab gear). In such an instance, the Fishery would be made liable for an entanglement that was *known* not to interact with commercial crab gear. This is plainly arbitrary and unlawful.

Second, the 50% estimate of unknown interactions being attributed to the Fishery will significantly *decrease* as the new gear-marking program is implemented (and less gear becomes “unknown”).¹ However, as proposed, 50% of all interactions with “unknown gear” will still be attributable to the Fishery, which is both arbitrary and inaccurate. We also encourage CDFW to improve the gear marking regulations to require that commercial crab lines, in addition to buoys, be marked (as is done on the east coast). This will effectively eliminate commercial gear as a source of *all* unknown entanglements.²

Third, the Proposed Regulations do not allow for any adaptability in the “unknown gear” metric, which further emphasizes the arbitrary nature of the inflexible 50% figure. At a minimum, that number should be adaptable based on the best available information.

Clearly, the “unknown gear” provisions need to be addressed because they are arbitrary, lack

¹ Saez et al. (2020) simply *assumes* that 50% of all “unknown gear” interactions involve the California commercial Dungeness crab fishery based on the approximate proportion of all gears fished. But this assumption is not correct if California commercial gear is eliminated as a source of interactions (because of marking requirements) and it is also not based on all available data (because it relies only on certain years).

² CDFW must take all necessary steps to eliminate “unknown” gear through regulatory approaches such as gear-marking requirements and by undertaking necessary studies. *See* Fish. & Game Code § 7060(b) and (c) (“The department, to the extent feasible, shall conduct and support research to obtain essential fishery information for all marine fisheries managed by the state [and] . . . shall encourage the participation of fishermen in fisheries research within a framework that ensures the objective collection and analysis of data, the collaboration of fishermen in research design, and the cooperation of fishermen in carrying out research.”).

supporting evidence, and otherwise unlawful as proposed. CCCA recommends eliminating the “unknown gear” provisions entirely because all commercial crab gear will soon be readily identifiable. Alternatively, CDFW must revise the regulations to address the problems described above.

B. Impact Scoring

First, the Proposed Regulations provide no incentive for fishermen to attempt to release entangled whales alive and uninjured. As proposed, every whale entanglement “counts against” the Fishery, no matter what efforts are made to minimize the effects of an entanglement. The impact scoring system must be revised to incentivize actions that minimize the effects of entanglements. CCCA therefore recommends that confirmed entanglements with humpback or blue whales in which the animal is disentangled and released uninjured and with no gear attached be scored as *zero*. This is consistent with NMFS’s implementation of the MMPA, in which non-serious injuries do not count against PBR and are valued as zero for purposes of the negligible impact determination. Alternatively, if NMFS subsequently determines that an entanglement resulted in a non-serious injury, then the impact score should be revised accordingly to be zero.

Second, the Proposed Regulations’ presumption of mortality for any interaction with a blue whale is not based on the best available science, nor is it consistent with the proposed methodology for scoring whale interactions. NMFS itself recognizes—as set forth in its guidelines for assessing serious injury and mortality—that not every marine mammal interaction with fishing gear results in a mortality.³ Whales released alive with no gear attached are generally expected to survive. Whales released alive with gear attached have a likelihood to survive depending on the nature of the attached gear. There is no evidence—let alone “substantial evidence”—to support CDFW’s proposed presumption that each blue whale interaction results in mortality. CCCA therefore recommends that the blue whale impact scoring align with the proposed impact scoring for humpback whales—*i.e.*, an impact score of .7 for confirmed entanglements in which an animal is released alive *with gear attached* and an impact score of 1.0 for confirmed entanglements that result in mortality (and a score of zero for non-serious injury entanglements).

Third, CDFW’s presumption that any interaction with a leatherback sea turtle results in mortality is also contrary to the best available science and NMFS’s practice, and lacks any supporting evidence. CDFW has not identified a single instance in which a leatherback turtle interaction with California Dungeness Crab fishing gear resulted in a mortality.⁴ The fact is that it is nearly impossible for commercial crab gear to entangle a leatherback turtle because, among other

³ See Andersen, M. S., K. A. Forney, T. V. N. Cole, T. Eagle, R. Angliss, K. Long, L. Barre, L. Van Atta, D. Borggaard, T. Rowles, B. Norberg, J. Whaley, and L. Engleby. Differentiating Serious and Non-Serious Injury of Marine Mammals: Report of the Serious Injury Technical Workshop, 10-13 September 2007, Seattle, Washington. U.S. Dep. Commer., NOAA Tech. Memo. NMFS-OPR-39. 94 p.

⁴ The best available information indicates that there has only been a single observation of a leatherback entanglement with California commercial crab gear (among other non-commercial gear), which occurred in Monterey and a video showed the animal being released alive. There has also been an observed leatherback mortality entanglement with recreational crab gear that cannot be attributed to the commercial fishery.

reasons, turtles rarely feed where gear is deployed. Moreover, NMFS’s standard practice is to apply a mortality estimate for sea turtle interactions with fishing gear based upon the post-hooking mortality criteria.⁵ This approach is most consistent with the best available scientific information. Although crab fishing gear may interact with leatherback sea turtles in different ways than longline gear, it does not follow that *all* crab gear interactions with leatherback sea turtles result in mortalities. CCCA therefore recommends that any leatherback sea turtle interaction that results in the animal being released alive be scored as .5.

Finally, and relatedly, CDFW correctly recognizes that “encounters with Blue Whales and Pacific Leatherback Sea Turtles are rare.” Initial Statement of Reasons at 13-14. Consequently, the Fishery should not be penalized with an in-season closure for merely a single interaction with either of these species. Because interactions with these species are rare, the only management triggers that should be applied are those based on a three-year average, which better accounts for the impacts of rare interactions. Under the Proposed Regulations, the Fishery may be immediately closed in one or more Fishing Zones when a single blue whale or leatherback sea turtle interaction occurs, even if that is the *only* interaction to occur over a three-year (or five-year, or more) period. There is no basis in fact or science for such a result. Any management triggers for these very rare species interactions should be based *solely* on a three-year (or longer) running average.⁶

C. Marine Life Concentration Triggers

First, CCCA *strongly objects* to the inclusion of management triggers that would impose closures on the Fishery for “marine life concentrations” of leatherback sea turtles. The Fishery has a record of very minimal interactions with leatherback sea turtles, and closing the Fishery based upon their mere presence in large open-water areas is not consistent with that record, lacks any supporting evidence and is unnecessarily punitive. Moreover, *such a closure is not a term included in the CBD v. Bonham settlement agreement*. In fact, CCCA is aware of no U.S. fishery that is managed based upon the *presence* of ESA-listed sea turtles in a fishing area. Many U.S. fisheries operate within the ranges of ESA-listed sea turtles and are successfully managed to minimize interactions. Establishing a new, unsupported precedent of closing a fishery based merely on sea turtle *presence* will have dire ramifications for many U.S. fisheries. There is no basis to create such a precedent, particularly in the context of a fishery that has *extremely* minimal entanglements with leatherback sea turtles and no demonstrated material impact on the leatherback sea turtle species.⁷ CDFW’s proposal is arbitrary, contrary to the best available information, and lacks any evidence, let alone “substantial evidence.” This overly precautionary provision must be removed.

⁵ See, e.g., Ryder et al. 2006. *Report of the Workshop on Marine Turtle Longline Post-Interaction Mortality*. NOAA Tech. Memo. NMFS-F/OPR-29.

⁶ See, e.g., National Marine Fisheries Service, *Biological Opinion on the Federally Regulated Oil and Gas Program Activities in the Gulf of Mexico*, March 13, 2020, pp. 471-482, 602-613.

⁷ CCCA is concerned that CDFW’s proposed measures for leatherback sea turtles are being improperly influenced by NMFS in advance of any formal ESA Section 7 consultation. Any suggestion by NMFS about supposed “allowable” leatherback sea turtle interactions or other measures is *predecisional and unlawful*. The impact of the Fishery—if any—on leatherback sea turtles, and associated allowable incidental take, must first be evaluated through the ESA Section 7 consultation process.

Second, the *CBD v. Bonham* settlement agreement refers only to marine life concentration triggers for observations of 20 or more ESA-listed whales or 5 or more ESA-listed whales over a one-week period. Accordingly, there is no basis for any marine life concentration triggers less than these amounts by Fishing Zone. These numerical thresholds should apply equally to humpback whales and blue whales.

Third, notwithstanding the objections stated above, the proposed language for the consequence of exceedances of marine life concentration thresholds—“shall implement a Fishing Zone closure”—makes no sense for the Fall period because these scenarios occur during a time *before* “the Fishing Season opens statewide.” Also, with respect to the Fall period language, CDFW must insert a comma between “over a one-week period” and “within a single Fishing Zone” to make clear that the proposed single-count observation triggers for humpback whales (20) and blue whales (3) apply “within a single Fishing Zone.”

Fourth, notwithstanding the objections stated above and below, the proposed language for the Spring period does not specify whether the “data are unavailable” by Fishing Zone, as it does for the Fall period. This must be clarified to apply by Fishing Zone. Also, the “running average” provision for humpback whales needs to be revised to state that it applies over a one-week period. In addition, as with the Fall period provisions, a comma must be inserted between “over a one-week period” and “within a single Fishing Zone” to make clear that both the single observational trigger and the running average trigger apply *within a single Fishing Zone*.⁸

D. “Minimum” Fishing Zone Closures

CDFW’s proposed “minimum” fishing zone closures are unsupported and arbitrary. Specifically, CDFW proposes that “the Director shall implement *a minimum of* a Fishing Zone closure, or other management action as described in subsection (e)” (emphasis added). However, this language—by *mandating* a “minimum” of a Fishing Zone closure—effectively eliminates *all* other management actions listed in subsection (e). This, in turn, renders the “or other management action” regulatory language meaningless because the most extreme management action—a closure—has already been mandated as a “minimum.” This directly undermines CDFW’s statement that “[f]lexibility in the choice of a management response *is necessary* to ensure the Director can consider all timely and relevant information in formulating the most appropriate management response.” Initial Statement of Reasons at 16 (emphasis added). It also directly undermines CDFW’s statement that it “is *not* proposing an automatic closure” for either blue whale or leatherback turtle interactions. *Id.* at 17 (emphasis added).

Accordingly, the “minimum” language must be removed *for all species* and this term should state (for *all* species): “the Director shall implement, as appropriate, a management action described in subsection (e).” This language would still allow the Director to implement a Fishing Zone closure, if determined necessary, but it would also allow the flexibility to implement another management action under subsection (e), consistent with CDFW’s stated intent.

⁸ We agree that the Monterey Bay Whale Watch data should *not* inform quantitative triggers based on marine life concentrations. See Initial Statement of Reasons at 44. Such biased and unscientific data should not inform *any* triggers, whether quantitative or qualitative.

More broadly, there is no reason that the effective management of the Fishery should begin with presumed closures. This is consistent with the principle that informed decision-making should be based upon the best available scientific information and result in management measures tailored to that information. It is essential that the RAMP regulations provide for a clear “ramp-up” of management actions that begins with non-closure management measures and progresses, if necessary, to fishing zone closures. In short, flexibility is essential for compliance and consistency with existing statutory requirements. *See Fish. & Game Code § 7056(g)* (CDFW must ensure that “[f]ishery management decisions *are adaptive and are based on the best available scientific information and other relevant information . . .*”) (emphasis added).

E. Statewide Closures

CCCA is strongly opposed to the inclusion of *any* statewide closures in the RAMP regulations. A statewide closure is not contemplated by the *CBD v. Bonham* settlement agreement. And, if an extreme and unanticipated event were to occur that would require something more than a surgical management measure, then, at most, CDFW could consider closing more than one Fishing Zone, as appropriate. Accordingly, all statewide closure provisions should be eliminated from the regulations.

In addition, CDFW justifies the statewide closure for humpback whales as needed to “prevent further entanglements and *avoid violating the terms of the ITP.*” Initial Statement of Reasons at 16 (emphasis added). However, no ITP currently exists, and an ITP will not exist for likely several years. This statement therefore suggests that NMFS has instructed CDFW as to what take levels are or are not appropriate under Section 10 of the ESA. But those determinations will not be made until the full Section 10 process—including public involvement—is completed. Any instructions or indications from NMFS to inform these regulations are therefore *predecisional and unlawful*.

Finally, notwithstanding the above-stated objections, the sentence mandating the proposed statewide closure is unhelpfully ambiguous. If CDFW retains the statewide closure provision for humpback whales (to which CCCA is opposed), the provision should be revised as follows: “If an Impact Score Calculation of three (3) or more is reached during a single Fishing Season, the Director will close the remainder of the Fishing Season statewide.”

F. Calendar Year Triggers

The calendar year provisions create the very unacceptable prospect of the Fishery being subject to closures for consecutive seasons, which would decimate the Fishery. It bears emphasis that since CDFW has also included single-season entanglement triggers, there is no benefit gained from including the three-year averaging provisions (in the form proposed by CDFW). If CDFW is going to retain the calendar year triggers, then it should significantly reduce the number of in-season triggers and include provisions to eventually phase out in-season triggers.

Additionally, if the calendar year triggers are retained in the final regulations, then the regulatory text must be modified to clarify that (1) any management actions based on a calendar year trigger terminate at the end of the fishing season and (2) the triggers are recalculated and reevaluated each month. This will help to prevent consecutive, long-running closures. Finally, although CCCA questions the purpose of the three-year trigger (as proposed), we agree with the

consequence, which provides appropriate flexibility—*i.e.*, “the Director shall consult with NOAA and the Working Group. After consultation, the Director shall consider a management action(s) described in subsection (e).”

G. “Unavailable Data” Triggers

The Proposed Regulations unnecessarily penalize the Fishery for agency failures to collect data by allowing CDFW to delay the fishing season until December 31 if data “are unavailable” to inform management decisions. This element of CDFW’s proposal is arbitrary, overly precautionary, and unsupported by any evidence. It is also entirely unnecessary because the Proposed Regulations already include other measures—such as the impact score triggers—that safeguard against unacceptable incidental take levels.

Moreover, during the 2019-20 fishing season, CDFW exposed the limits of its ability to collect data, including real-time data for the area north of the Sonoma-Mendocino county line. CCCA encouraged CDFW to take advantage of a two-week-long clear weather window to complete aerial survey in the northern management area. Individual members reiterated the need for aerial survey data following the early March Risk Assessment. However, CDFW failed to provide marine life concentration data. For the successful management of the Fishery, CDFW must be more diligent in collecting necessary information. And, indeed, CDFW is required by law to do so:

(a) The Legislature finds and declares that for the purposes of sustainable fishery management and this part, *essential fishery information is necessary for federally and state-managed marine fisheries* important to the people of this state to provide sustainable economic and recreational benefits to the people of California. The Legislature further finds and declares that acquiring essential fishery information can best be accomplished through the ongoing cooperation and collaboration of participants in fisheries.

(b) The department, to the extent feasible, *shall conduct and support research to obtain essential fishery information* for all marine fisheries managed by the state.

(c) The department, to the maximum extent practicable and consistent with Section 7059, shall encourage the participation of fishermen in fisheries research within a framework that ensures the objective collection and analysis of data, the collaboration of fishermen in research design, and the cooperation of fishermen in carrying out research.

Fish. & Game Code § 7060 (emphases added); *see id.* § 7056(g).

There is no question that information that, when unavailable, operates to delay the opening of the State’s most economically important fishery is “essential fishery information.” Accordingly, CDFW *must* collect this essential information. And CCCA stands ready to assist. For example, CCCA has demonstrated its ability to provide useful and near real-time data to inform trap concentrations and fishing effort distribution. Consistent with the authorities quoted above, CDFW should partner with industry to ensure this data collection ability is fully integrated into the Risk Assessment process to ensure there is never “unavailable data.”

In sum, CDFW must have a substantial, non-arbitrary evidentiary basis for closing the Fishery. The mere unavailability of data does not satisfy that standard. Instead, CDFW must collect the necessary information and should utilize the Fishery, as appropriate, in doing so. If CDFW feels it must account for situations in which necessary data is truly unavailable, then the result should be that the Fishery opens as scheduled and may be subject to appropriate *non-closure* management measures only as absolutely necessary. Additionally, any measures addressing situations where data is unavailable should be effective for *7 days* instead of 15 days. Information can become available very quickly and, when it does, CDFW must act quickly to remove any management measures.

IV. MANAGEMENT CONSIDERATIONS

We agree that fishery-management decisions should be based on the best available science and relevant, non-speculative information. However, it is not clear what “statistically valid” means, as used in the Proposed Regulations. Does CDFW mean “statistically significant”? If so, what measure (such as *P* value) is CDFW using to determine significance? The phrase “statistically valid” should either be removed or revised and clarified to eliminate ambiguity.

In addition, the management considerations must consider the “economic impact to the Fleet and fishing communities” for *all* actions—not simply when CDFW is “deciding between management measures that equivalently reduce entanglement risk.” And, if a Fishing Zone closure is being considered, CDFW must evaluate economic impact to the vessels that fish in that zone. *See* Fish. & Game Code § 7056(j) (CDFW must ensure that “[t]he adverse impacts of fishery management on small-scale fisheries, coastal communities, and local economies are minimized.”).

V. MANAGEMENT ACTIONS AND NOTIFICATION PROCESS

Regarding the notification process for management actions, the regulations must require the Director to identify and explain the evidentiary basis for taking any management action that is not consistent with the majority recommendation by the Working Group. The Proposed Regulations correctly place a special emphasis on the role of the Working Group in informing the Director’s determinations regarding risk and management actions. *See* 14 C.C.R. § 132.8(b), (d)(1) (as proposed). The Initial Statement of Reasons explains:

Subsection (d)(1) emphasizes that the Director will consider recommendations from the Working Group when evaluating management actions. The Working Group is comprised of individuals who have first-hand knowledge and expertise of the fishery, ocean conditions, and Actionable Species. As such, their input will be critical to informing the Director on management decisions.

Initial Statement of Reasons at 23; *see also id.* at 10 (“considering the significant role the Working Group plays when the Director consults with them for management action decisions based on the Risk Assessment”), 11 (“input from this collaborative, multistakeholder advisory body will be included in Department decision-making”), 18 (“Consulting the Working Group recognizes the expertise and knowledge the group possesses and is necessary in evaluating why the take threshold was exceeded and developing recommended solutions.”).

The input and recommendations from the Working Group—expressly recognized as highly valuable in the Initial Statement of Reasons—are meaningless if the Director can simply ignore them without providing rational explanation supported by an evidentiary basis. Industry members who serve on the Working Group devote a substantial amount of time that they could otherwise use productively in their businesses. If the regulations cannot provide a meaningful, concrete role for Working Group recommendations—*i.e.*, by requiring deviations from Working Group recommendations to be explained and supported with evidence—then industry seriously questions the ongoing value of the Working Group and will revisit its participation.

VI. MANDATORY DATA REPORTING REQUIREMENTS

The proposed mandatory data reporting provisions require members of the fleet to collect and submit data to CDFW that are otherwise confidential and proprietary. The public disclosure of this data would place members of the fleet at a competitive disadvantage and otherwise create problems—both foreseen and unforeseen—for permit holders. This is precisely why the Magnuson-Stevens Fishery Conservation and Management Act contains strict provisions preserving the confidentiality of such data in federal fisheries. *See* 16 U.S.C. § 1881a(b). It is absolutely essential that CDFW include similar provisions in the RAMP regulations to preserve the confidentiality of any data required to be submitted by members of the fleet to CDFW. Those provisions must also make clear that such data cannot be disclosed by CDFW, NMFS, or other state or federal agencies in response to public records requests under either federal or state law.

Additionally, the one-minute frequency location reporting for electronic monitoring is unnecessary, very expensive, and unreasonable. The standard rate used in federally managed West Coast groundfish fisheries is at least 15 minutes. A similar rate should be used for electronic monitoring under the RAMP regulations.

VII. ALTERNATIVE GEAR

The development and implementation of *effective and practical* alternative gear and fishing practices will be important for minimizing incidental take of protected species. It is therefore essential that the deadlines for approval of alternative gear and fishing practices are strictly enforced. The proposed language stating that the Director “may decline” a request within 60 days is ambiguous and non-committal. The regulations must *require* the Director to make a decision within 60 days and the consequence for the Director’s failure to do so must be a default approval of the alternative gear request. If CDFW wants to encourage the development and use of alternative gear and fishing practices, then it needs to demonstrate that it is committed to eliminating bureaucracy and red tape.

In addition, as mentioned above, the attachment to this letter presents two promising alternative gear solutions—long-lining and yale grips. CCCA plans to formally propose these solutions to CDFW—either before or after the final RAMP regulations are issued. The final regulations should allow for easy implementation of modifications such as these. To the extent CDFW is going to require “research trials” for these and other modifications, such requirements should be flexible and should not present burdensome barriers to effective solutions.

VIII. STANDARDIZED REGULATORY IMPACT ASSESSMENT

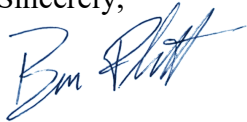
CCCA strongly disagrees with the conclusion that “[t]he proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states because west coast states with commercial Dungeness crab fisheries are developing or have similar mitigation programs in effect.” Initial Statement of Reasons at 47. CCCA incorporates by reference and agrees with the critical comments provided by the Department of Finance on April 3, 2020. CDFW’s responses to those comments are not evidence based, are non-specific, and do not sufficiently address the issues identified by the Department of Finance. CCCA objects to the Standardized Regulatory Impact Assessment (“SRIA”) on these bases and for the reason that the impacts identified by CDFW *are* significant to the fleet and to the state.

Additionally, CCCA disagrees that Oregon and Washington “are developing or have similar mitigation programs in effect.” Neither of those states have enacted, or are developing, measures that are comparable to the draconian management triggers and actions set forth in the Proposed Regulations.⁹ Among other differences, neither Oregon or Washington requires minimum default closures or imposes overly precautionary delays or closures. Absent evidence of such “similar” programs, there is no basis for the conclusion that the Proposed Regulations will not cause competitive disadvantages for the California fleet, and CDFW’s conclusion is therefore arbitrary, not supported by substantial evidence, and otherwise unlawful.

* * *

In conclusion, CCCA looks forward to its continued cooperative relationship with CDFW to ensure the RAMP regulations are protective of actionable species while allowing a robust and economically viable California Commercial Dungeness Crab Fishery. CCCA ultimately hopes to see the Fishery managed through a holistic approach to risk management that objectively takes account of all of the best available scientific information; leverages the industry’s proven ability to provide timely, comprehensive, and accurate data to inform risk assessment; and relies less on overly restrictive “hard number” triggers that may not take account of all information relevant to assessing true risk. CCCA also sincerely hopes that the unlawful aspects of the Proposed Regulations are appropriately remedied.

Sincerely,



Ben Platt, President, on behalf of the *California Coast Crab Association Board of Directors*
F/V Miss Heidi
Crescent City, California

⁹ See

https://www.dfw.state.or.us/MRP/shellfish/commercial/crab/docs/2020/Industry%20Notice%202020-0605_FINAL.pdf; https://wdfw.wa.gov/sites/default/files/2020-01/5_whale_ent_in_coastal_crab_fishery_jan_2020_revised.pdf.

Bill Blue
F/V Brita Michelle
Morro Bay, California

Geoff Bettencourt
F/V/ Miss Moriah
Morningstar Fisheries
Half Moon Bay, California

Scott Hockett
F/V/ Ace, F/V Blue Pacific, F/V Rita Marie
Noyo Fish Company
Ft. Bragg, California

Jonathan Gonzalez
Pacific Seafood – Eureka LLC
Eureka, California

Richard Axelson
F/V Lady Reneé
Morro Bay, California

Mark Gentry
F/V Rampaige
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Attachment

ALTERNATIVE GEAR: LONG-LINING & YALE GRIPS

I. LONG-LINING OF DUNGENESS CRAB TRAPS

Goal:

Greatly reduce the number of vertical lines in the fishery to allow crabbing to continue in the spring and early summer months during periods of whale migration in our traditional crab grounds.

Description:

Neutral buoyancy or leaded groundline, 3/8"-1/2" diameter, depending in size of the vessel and weight of traps. 6' ganions would be attached to groundline, one trap snapped to each ganion with a carabiner at either 50 or 100 fathoms apart, depending on depth of water being fished. By this method it insures a trap is landed on the boat before the next trap is lifted off the ocean bottom, reducing strain on power block, boat, groundline and boat hydraulics.

Buoy and groundline are stored on deck in a rope alley, totes or wound onto a reel while pulling gear. Traps are unsnapped from groundline ganion as longline is pulled and stacked on stern deck. When resetting longline, buoys and buoyline are trailed behind boat while traveling downcurrent and traps are snapped onto ganions as groundline trails off stern. Long lines can be set with a buoy line on one end or on both ends of the groundline.

Groundline and traps remain on bottom, safely away from migrating whales. Breakaway devices are spliced into buoy eyes and every 5-10 fathoms on buoy lines, to minimize potential of injury in the event of a whale becoming tangled in the buoy line, since only a short section of line would be left.

Cost:

1) Deck equipment:

Depending on sophistication and size of operation, this equipment can be adapted from existing power block set-up on a crab boat for as little as \$5,000 or upgrading to a modern complete trap-longlining system could be as much as \$50,000.

2) Rope:

All new line would cost approximately \$10k per 100 traps. However, many crabbers already use

neutral line on all their traps, so existing buoy lines could be tied or spliced together as a cheaper alternative to configuring longlines. Caribeener snaps are approximately \$1000 per 100, a flagpole/buoy setup (if flagpole required) would be \$100 per buoyline.

PROS:

1) *Huge reduction in vertical lines in the fishery:

- A. @ 10 traps per set, buoy line and buoys at each end: 80% reduction in vertical lines.
- B. @ 10 traps per set, (1) buoy line at one end: 90% reduction in vertical lines.
- C. @ 20 traps per set, buoy lines at each end: 90% reduction in vertical lines.
- D. @ 20 traps per set, (1) buoy line at one end: 95% reduction in vertical lines.

*Note:

At the time of the April 8, 2020 boat/trap survey conducted for the WWG risk assessment, there were 94 boats with 23,973 traps and 23,973 vertical lines deployed in California state waters. If these 94 boats were longlining, at the most there would have been 4,794 vertical lines; at the least, 1,199. If only 1/2 of the boats were in areas requiring alternative gear, there would be a reduction of vertical lines in that area equal to the values assigned in A.-D. above: 80-95% reduction.

2) Longlining is a proven, efficient and widely used method of commercial fishing worldwide.

3) Lost gear is easily retrieved with a grapple. Significant reductions of lost gear attributable to the crab fishery.

4) Crew requires less training than currently needed with established gear type for Dungeness crab.

5) Buoys do not submerge in heavy current as with existing, single buoy per trap geartype. Gear tending easier with longline, less abandoned gear.

CONS:

1) Not a practical solution for early-season fishing in congested gear areas, close to shore.

2) Communication between boat operators becomes more important so that gear is not set on top of other gear.

3) Initial cost to set-up may be prohibitive for some boat owners.

RECOMMENDATION:

Longlining may not be a "one-size-fits-all" solution, and it does not need to be. It would be most workable as a way to keep crabbing during the spring and early summer months in areas of increased seasonal whale migration. There are significantly less boats remaining in the fishery by springtime, so there is less congestion of crab gear, making longlining a viable option.

In the northern management zones north of Cape Mendocino, it would only be practical outside of 20-30 fathoms since most effort in the spring and early summer months is concentrated inside of 25 fathoms in this area and it can be more congested with gear, and humpback whales are not typically migrating or feeding inside of 40 fathoms in the northern part of the state.

As noted above, if even half of the gear was deployed in long lines, it would amount to 40-48% reduction in vertical lines. If all the gear in an area which would otherwise be closed was switched to longline, the amount of vertical lines could be reduced by 80-95%.

II. YALE GRIPS

Goal:

A whale interacting with crab gear easily breaks free with no injuries.

Description:

Yale grips are "breakaway" devices made of hollow, braided line. The crab buoy line is cut about 10 fathoms from the buoy and inserted in both ends of the Yale braid, an approximately 12-18" long sleeve. As the rope tightens, the sleeve stretches and tightly grips both ends of the crab buoy line. The braid is woven lightly into the existing crab buoy line at both ends to keep it in place. The existing grips are designed for Right Whales and have a tensile (breaking point) of 1700 lbs. Grips with the appropriate tensile strength for interaction with Humpback or Blue Whales may need to be developed for the Dungeness crab fishery.

The Yale grip requires that the "block man" operating the power block pull the line slowly until the grip is past the pulling sheave. Afterwards, the trap may be pulled at full speed. This would

require minimal retraining and require slightly longer time to run all traps than gear without Yale grips.

Cost:

The hollow braided line which makes a Yale grip comes in rolls, cut to preferred length. The material costs about .50 cents to make each grip, and is readily available at West Coast marine supply stores.

This gear modification can be achieved at an affordable cost to boat owner and no significant change in current method of fishing.

PROS:

- 1) Affordable for majority of permit holders.
- 2) Only small change in existing gear configuration required.
- 3) Entangled whale breaks away from line easily, avoiding serious injury.
- 4) Neutral line sinks safely to ocean floor, gear is lost but no longer a threat to migrating whales.
- 5) No vertical gear line reductions are necessary to protect migrating whales.
- 6) Studies and trials have already been conducted in similar trap fisheries showing potential effectiveness as a tool for mitigation.

CONS:

- 1) Requires some additional training of powerblock operator because first 10 fathoms must be pulled slower than is required without a breakaway in-line.
- 2) Some extra time required to get through all traps, but not more than a few extra seconds per trap.

RECOMMENDATION:

This is a promising possible gear modification, more testing will be required to determine the appropriate breaking point required to safely free an entangled Humpback or blue whale.