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August 3, 2020

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 Changes to RAMP Rulemaking

Dear Mr. Bartling:

This letter provides the California Coast Crab Association's ("CCCA") comments in response to the California Department of Fish and Wildlife's ("CDFW") notice of proposed changes to the rulemaking implementing the Risk Assessment Mitigation Program ("RAMP") for the Commercial Dungeness Crab Fishery¹ ("Proposed Regulations"). This letter builds upon the detailed comment letter submitted by CCCA on June 29, 2020. As with CCCA's previous comments, the comments below are not concessions on any aspect of the Proposed Regulations nor should they be taken as CCCA's endorsement of CDFW's general approach. Except as otherwise stated below, CCCA firmly stands by, and restates by reference, all of the comments it provided on June 29, 2020.

CCCA appreciates CDFW's responsiveness to some of the comments provided by CCCA, and sincerely hopes that CDFW will satisfactorily address the balance of CCCA's comments. The RAMP regulations, and the related federal Endangered Species Act ("ESA") Section 10 permit and conservation plan, will govern the operations of the Fishery for years to come. It is therefore essential that CDFW get this right. The recommendations provided by CCCA, if adopted, would provide a regulatory framework that both protects ESA-listed species and allows the Fishery to remain economically viable.

Initially, CCCA would like to acknowledge the improvements CDFW has made to the Proposed Regulations. Specifically, CCCA supports the following changes to the Proposed Regulations:

¹Subsequent references shall be to the "Fishery."

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- The additions of new subsections (a)(4)(D) and (a)(4)(E). These additions are essential because they will ensure that (i) injuries or mortalities not caused by the Fishery are not attributed to the Fishery and (ii) entanglements by other fisheries are not attributed to the Fishery.
- The revisions and additions to subsection (a)(7) to reconfigure some of the Fishing Zones. As addressed in our earlier comments, these changes are necessary to avoid arbitrary and unfair closures of the fleet that fishes between Lopez Point and Point Conception.
- The elimination of the language “minimum of a” from various sections of the Proposed Regulations. CCCA appreciates CDFW’s clarification that a Fishery closure (in one or more Fishing Zones) is not the default management action to be taken. Rather, based on the facts and circumstances, the Director is to select the most appropriate management action.
- The elimination of the statewide closure in subsection (c)(2)(B)(1) and clarification that “for each Fishing Zone, the Director shall implement a management action as described in subsection (e) for the Zone(s).” Again, this change reinforces the essential principle that a closure is not the default under RAMP. Management actions must be tailored to the specific facts and circumstances.
- The revision to subsection (g)(2) to require compliance with the new electronic monitoring provisions starting in the 2023-24 fishing season. This delay will importantly provide the full fleet with necessary time to phase in this significant new requirement. However, it will still be difficult for the entire fleet to phase in by 2023-24. Accordingly, CCCA recommends that CDFW revise subsection (g)(2)(A) and (B) to state: “all vessels, or the number of vessels determined to be a representative sample of the fleet, . . .” This will give CDFW the flexibility to require that a representative sample of the fleet (as opposed to the entire fleet) be equipped with electronic monitoring.
- CCCA supports the addition of subsection (g)(4), which protects the confidentiality of monitoring data submitted by vessels.

CCCA strongly encourages CDFW to retain the changes identified above in the final version of the RAMP regulations, and appreciates these improvements. On the other side of the ledger, CCCA continues to have serious overall concerns with the Proposed Regulations. Below, we provide our comments on concerning elements of the proposed changes and hereby restate by reference our previous comments that CDFW has not addressed.

Serious Injury Determinations and Impact Scoring

The Amended Initial Statement of Reasons (“ISOR”) clarifies that the impact score calculation “will” be revised (presumably by CDFW) “after NOAA has completed its final determination of injury or mortality.” Amended ISOR at 12. However, the Amended ISOR apparently contradicts itself by stating that “the Department will not have discretion in modifying the score if NOAA provides updated information.” *Id.* (emphasis added). If CDFW has no discretion to modify the

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score, then how “will” the score be revised after NOAA has completed its final determination of injury or mortality? This needs to be clarified.

Relatedly, as discussed in our earlier comments, CDFW continues to misconstrue the Marine Mammal Protection Act’s (“MMPA”) standards and processes for assessing fishery interactions with marine mammals. Specifically, the Proposed Regulations should expressly recognize and address situations in which an entangled whale is untangled and released unharmed and free from all fishing gear. CDFW’s proposal fails in this regard. Indeed, NOAA’s Serious Injury Guidelines (at page 12)—which CDFW has expressly incorporated by reference into the Proposed Regulations—states that “[a]n animal that is fully disentangled would generally be considered not seriously injured, unless there is additional evidence of a serious injury.” (Emphasis added.) Under Sections 117 and 118 of the MMPA, a non-serious injury has zero legal ramifications and is quantitatively given a score of 0 on the National Marine Fisheries Service’s (“NMFS”) annual Stock Assessment Reports. *See* 16 U.S.C. §§ 1386, 1387. Non-serious injuries are not scored “closer to 0” as the Amended ISOR mistakenly states (at page 12).²

If, as the Amended ISOR states, CDFW intends for the impact score calculation to align with the MMPA and NMFS’s process for assessing “serious injury and mortality,” then CDFW must make the following modifications to the Proposed Regulations:

1. CDFW must include a provision stating that any marine mammal interactions resulting in a “non-serious injury” are given an impact score of 0. Scoring such interactions greater than 0 is directly contrary to the MMPA and, as detailed in CCCA’s previous comments, would create no regulatory incentive for fishermen to remove all gear from entangled whales.
2. CDFW must include a provision stating that any marine mammal interaction in which the animal is released unharmed and free of all gear is initially and by default counted as a “non-serious injury” and given an impact score of 0. This approach is consistent with NOAA’s Serious Injury Guidelines (*see supra*). It would be extremely unfair to the Fishery to score such interactions as .75 (for humpbacks) only to re-classify the score as 0 many months (or years) after NMFS completes its formal assessment of the interaction (and after the Fishery may have been closed as a result of the inflated impact score).

Marine Life Concentration Provisions

CCCA retains and restates by reference all of its objections to the marine life concentration provisions stated in our earlier comments. We have two additional comments in response to the CDFW’s proposed changes.

First, CDFW has modified the provisions of subsection (c)(2)(A)(4) to state that, for humpback

²Under NOAA’s Serious Injury Guidelines for large whales, other than circumstances involving suspected vessel strikes (inapplicable here), the only instance in which a possible non-serious injury is given a fractional score is when there is a “[c]onfirmed entanglement but insufficient information” to determine whether any injury was “serious.” When there is sufficient information—*i.e.*, an animal is released unharmed and free of all fishing gear and there are no indications of injury—NMFS determines that the interaction is non-serious and therefore “scored” as 0 for regulatory purposes.

and blue whales, the Director “shall implement a ~~Fishing Zone~~ Fishing Season closure delay or other management action.” We understand that CDFW’s intent is to clarify that a “delay” (not a “closure”) occurs when management actions are implemented before the season starts. However, by removing “Fishing Zone,” CDFW has implied a default situation in which the fishing season in all zones is delayed if the conditions of subsection (c)(2)(A)(4) are met. This is unacceptable and not consistent with CDFW’s intent. Subsection (c)(2)(A)(4) should be clarified to state that, for humpback and blue whales, the Director “shall implement a Fishing Season delay in the applicable Fishing Zone or other management action in the applicable Fishing Zone” when triggered. This is consistent with the overarching subsection (c)(2)(A)(4) language stating that CDFW must use “data to inform marine life concentrations under this subsection in each Fishing Zone(s).” (Emphasis added.)

Second, and relatedly, CDFW must clarify the definition for “Marine Life Concentrations” to state that “Marine Life Concentrations” “means measures of local abundance of Actionable Species (Humpback Whales, Blue Whales, and Pacific Leatherback Sea Turtles) within each Fishing ~~Zone~~ Grounds between Point Conception and the California/Oregon Border.” Without this clarification, the regulations could be misinterpreted to say that Marine Life Concentrations are calculated based on the entire area covered by the Fishery and not by Fishing Zone.

Improper Reference to California Ocean Protection Council “Goal”

At page 6, the Amended ISOR states: “In addition, as part of its Strategic Plan for 2020-2025, the California Ocean Protection Council adopted the goal to develop a statewide whale and sea turtle protection plan with a target of zero mortality. Since the zero-entanglement goal applies to all whales and sea turtles regardless of status under the ESA or MMPA, the Department is applying a broader definition for Actionable Species in recognition of this statewide goal.”

CCCA strongly objects to CDFW’s incorporation of the California Ocean Protection Council’s (“OPC”) goal in any form or for any purpose. The California State Legislature has delegated rulemaking authority to California state agencies, either by the California Constitution or by statute. *See* Cal. Gov. Code § 11342.1; *Bearden v. U.S. Borax, Inc.*, 41 Cal. Rptr. 3d 482, 487 (Ct. App. 2006) (“The authority of an administrative agency to adopt regulations is limited by the enabling legislation.”). The OPC is a cabinet-level oversight body (Cal. Pub. Res. Code § 35515(c)), not a state agency. Although the OPC has been tasked with various duties, including establishing policies to coordinate the collection, evaluation, and sharing of scientific data related to coastal and ocean resources among agencies and recommending to the legislature necessary changes in law to achieve the goals of the California Ocean Protection Act, the legislature has not delegated any formal rulemaking authority to the OPC. Cal. Pub. Res. Code § 35615.

By premising the Proposed Regulations on OPC’s goal, CDFW is acting outside its legislatively delegated authority and adopting as law the policy preferences of a non-state agency. *See* Cal. Gov. Code § 11342.1; *Bearden*, 41 Cal. Rptr. 3d at 487. This is particularly egregious given that the existing legislatively delegated authority for CDFW to issue the RAMP regulations expressly finds that “[t]he entanglement of marine life incident to the Dungeness crab fishery should be minimized to the fullest extent practicable.” Senate Bill No. 1309, Sec. 2(c). The goal of minimizing entanglement to “the fullest extent practicable” is plainly different than a “zero-entanglement” goal. Accordingly, any provisions of the Proposed Regulations that are premised

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upon the OPC's goal are without legislative authority and contrary to existing authority, and therefore unlawful.

We also want to emphasize that the RAMP regulations, and the related ESA Section 10 permit, are intended to secure full ESA compliance for the State of California. The OPC's goal, however, goes far beyond the standards established by the most marine mammal-protective federal statutes ever enacted—the ESA and the MMPA. Neither statute requires fisheries to have “zero entanglement” of marine mammals. The most protective standard contained in either of those statutes is the MMPA's aspirational goal of reducing marine mammal mortality and serious injuries (not “entanglements”) in commercial fisheries to “insignificant levels approaching a zero mortality and serious injury rate.” 16 U.S.C. § 1387(a)(1) (emphases added).

Holding the Fishery to the OPC's goal would be unprecedented in the history of U.S. fisheries and would subject the Fishery to a standard far more draconian (and impossible to achieve) than the already very-protective MMPA standard to which all other U.S. fisheries are subject. If the State of California wishes to eliminate its most economically important commercial fishery—to the benefit of other state and foreign fisheries that would make up for the lost supply—then the OPC's goal provides a clear path.

For all of the above reasons, CDFW must eliminate all references to the OPC's goal in the rulemaking documents and revise any elements of the Proposed Regulations that are based upon that goal.

Role of the Working Group

CCCA agrees that “the Working Group function is necessary to inform the management response” (Amended ISOR at 29), but also believes that the Proposed Regulations need to be improved to clarify the role of the Working Group with respect to the Risk Assessment process. Specifically, we propose the following modifications, which are consistent with recommendations made by the Working Group:

First, although the Proposed Regulations refer to the Working Group's role in in the process for formulating management actions, they do not clearly explain how the management action process relates to the Risk Assessment process. We believe it is important for the RAMP regulations to ensure that the Working Group's management action recommendation is specifically taken into account as part of the Risk Assessment process. We therefore propose that CDFW revise subsection (a)(12) to state:

“Risk Assessment” means the assessment of risk for potential entanglement of Actionable Species with California commercial Dungeness crab gear by the Director and includes the associated management action recommendation developed by the Working Group in cases of elevated risk.

Second, proposed subsection (b)(2) requires the Director to provide a notification of anticipated Risk Assessment to the Working Group and other stakeholders. However, it is not clear whether this notification should serve to convene the Working Group (versus simply notifying the Working Group of the initiation of a CDFW Risk Assessment). To resolve this ambiguity, the regulations should clarify that the Working Group is convened as part of the Risk Assessment process and specify at what point in the process this will occur. Our understanding is that CDFW

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intends to convene the Working Group when its monitoring of data indicates that risk is elevated. Accordingly, we propose that CDFW revise subsection (b)(2) to state:

If information indicates that risk is elevated, the Director will provide a minimum of 48 hours-notice of anticipated Risk Assessment to convene the Working Group and to notify any person who is subscribed to the Whale Safe Fisheries email list serve (visit the Whale Safe Fisheries webpage to subscribe: <https://wildlife.ca.gov/Conservation/Marine/Whale-Safe-Fisheries>). The notification will also provide all non-confidential data under consideration by the department.

Third, it is not clear under the Proposed Regulations what the Working Group should consider and review in developing its management action recommendation. Given the important role of the Working Group, the regulations should more clearly state the scope of the Working Group's role in determining management actions. We therefore propose that CDFW revise subsection (d) (1) to state:

Working Group management action recommendation based on its independent assessment considerations identified in this subsection and subsection (e) ~~and best available science made available to the department related to considerations identified in this section.~~

In the same vein, we also recommend that CDFW revise subsection (d) to state:

Management Considerations: The Director shall base decisions made under this section on best available science. In doing so, the Director will, to the maximum extent possible, seek and rely on scientific information relevant to a management issue, based on statistically valid data such that any conclusions drawn are reasonably supported and not speculative, and publicly available. The Director shall consider the following information to assess appropriate management action under subsection (e) if action under subsection (e) is specified by subsection (c):

Gear Identification

CDFW proposes to revise subsection (a)(4)(A) to eliminate CDFW's role in determining the fishery origin of gear involved in entanglements. For the reasons stated in our earlier comments, this is unreasonable and impractical. The Fishery has been and will continue to be managed by CDFW, not NMFS. CDFW is more knowledgeable and better positioned than NMFS to make determinations about fishery gear origin. CCCA urges CDFW to retain a role for itself—informed by the Working Group's expertise—in determining fishery gear of origin involved in whale entanglements.

Electronic Monitoring Reporting Frequency

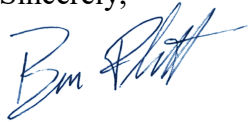
The proposed electronic monitoring provision (subsection (g)(2)(A)) states that “[e]lectronic monitoring systems must be capable of tracking and recording vessel location using GPS coordinates at a frequency of no less than one a minute during fishing operations.” In the Amended ISOR (at 39), CDFW maintains that “a once per minute ping rate will allow the Department to differentiate between transiting and setting gear.”

If a solar logger that reports at one-minute intervals is compliant with this proposed regulation, then CCCA believes this regulation is workable. However, if solar loggers do not comply with this regulation, and another system (such as VMS) is required, then this proposed regulation is unacceptable and financially prohibitive. Many vessels in the Fishery will not be able to absorb this cost and continue to make a profit. If CDFW is going to require VMS, or a comparably expensive system, then it must perform a new economic analysis for public review and comment. Additionally, as recommended above, CCCA suggests that CDFW include a provision that allows for the monitoring of a representative sample of the fleet, in the event all vessels are unable to phase-in by 2023.

* * *

In conclusion, CCCA appreciates this additional opportunity to provide the comments set forth above and reiterates all of its previous comments as well. We also reiterate our commitment to continue our 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.

Sincerely,



Ben Platt, President, on behalf of the *California Coast Crab Association Board of Directors*
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Crescent City, California

Bill Blue
F/V Brita Michelle
Morro Bay, California

Richard Axelson
F/V Lady René
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