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United States Senate

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COMMITTEES

ARMED SERVICES
COMMERCE, SCIENCE, AND TRANSPORTATION
ENVIRONMENT AND PUBLIC WORKS
VETERANS' AFFAIRS

Dr. Neil Jacobs
Acting Assistant Secretary for Oceans and Atmosphere
National Oceanic and Atmospheric Administration

Dear Dr. Jacobs,

I write to express serious concern regarding the National Marine Fisheries Service, Office of Protected Resource's overly expansive proposed critical habitat designation in Alaska for Humpback Whales. As a result of a 2018 settlement agreement, NMFS is in the process of designating critical habitat for the threatened Mexico Distinct Population Segment (DPS), endangered Western North Pacific DPS, and endangered Central America DPS of humpback whales.[1] Alaska is home to abundant waters along its coasts, which, in some cases, serve as feeding grounds for humpback whales. Maintaining high quality habitat for not only ESA listed species, but all species, is necessary. Even in the absence of a critical habitat designation, humpback whale abundance in the North Pacific appears to be increasing,[2] which speaks to existing management provisions being a success. For the Mexico DPS, the proposed rule would designate 175,812 square nautical miles as critical habitat, though this DPS is listed as threatened with a high level of uncertainty. The following lays out my concerns regarding the unsupported and unnecessarily large area proposed for critical habitat designation in this proposed rule.[3]

1. Economic impacts

Economic cornerstones for Alaska include oil and gas production, tourism, and fisheries. Consequentially, Alaska is also highly reliant on functional marine transportation, ports, and harbors for both industry and the state's numerous islanded communities that are only accessible by boat or plane. Additional layers of regulation and federal oversight may create an increased burden on residents of small coastal communities. Within this proposal, the analysis of economic impacts does not discuss significant costs in both lost opportunities and in future consultations that may result due to the proposed critical habitat designation.

The potential impacts to Alaskans' livelihoods from this rule must be considered beyond what is captured in this analysis. To this point, I would remind you of Alaska's past experience with the Steller sea lion critical habitat designation in 1993.[4] That rule stated, "the direct economic and other impacts resulting from this proposed critical habitat designation are expected to be minimal."

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[1] *Center for Biological Diversity et al.* v. *National Marine Fisheries Service, et al.*, No. 3:18–cv–01628–EDL (N.D. Cal.).
[2] Calambokidis, J. et al. 2008. SPLASH: Structure of Populations, Levels of Abundance and Status of Humpback Whales in the North Pacific. Cascadia Research. For U.S. Department of Commerce, Western Administrative Center, Seattle, WA. AB133F-03-RP-00078.
[3] Endangered and Threatened Wildlife and Plants: Proposed Rule to Designate Critical Habitat for the Central America, Mexico, and Western North Pacific Distinct Population Segments of Humpback Whales. 84 Fed. Reg. 54354 (October 9, 2019).
[4] Federal Register Volume 58, No. 61, April 1, 1993, at 17181.

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Experience tells us that impacts related to Steller sea lion fishing closures were not minimal, and to date the costs associated with maintaining harbor infrastructure under this critical habitat designation continues to be a burden. As additional regulations can be applied across all critical habitat areas designated, without regard for negative impacts, evaluation of conservation 'savings,' or assessment of costs to activities such as commercial fishing, it is essential that the economic analysis accurately reflects those potential impacts.

Additionally, in December, the North Pacific Fishery Management Council was forced to close the Gulf of Alaska federal Pacific Cod fishery for 2020 due to Steller sea lion mandates regarding potential competition for prey, Pacific Cod in this case. The impacts of these past critical habitat designations show that it is paramount for critical habitat to be designated only in areas with clear, high conservation savings. Designated areas must demonstrate conservation benefits that are clearly additive to recovery for the species. I believe that this proposed rule creates undue burden on Alaskans with diluted and uncertain conservation benefits. Nowhere in the analysis is there an acknowledgement or discussion of potential fishery closure costs that could result from critical habitat designation.

In particular, the economic impacts of designating Mexico DPS critical habitat in Unit 10 on Southeast Alaskan residents and businesses may be significant in comparison to other areas in Alaska. According to the Draft Economic Analysis, Unit 10 would bear up to 25% of all quantified, annualized costs of designating critical habitat for the Mexico humpback whale DPS, along with 75% of the costs to small businesses, organizations and small governmental jurisdictions[5]. The conservation benefits in Unit 10, an area seasonally occupied by a minimal percentage of Mexico DPS humpback whales, does not offset the concentration of costs that is predicted. Unit 10 should be entirely excluded from the rule.

2. Conservation value uncertainty.

The NMFS conclusion that designating critical habitat will ultimately be beneficial is flawed given the vast areas proposed for designation. Including such a vast area dilutes the conservation value of the designated area proposed. The primary feeding grounds for the Mexico DPS are along the coasts of California, Oregon, and Washington,[6] however, the proposed habitat designation is largely located in waters off of Alaska. This places a disproportionate burden on Alaskans. As a part of the Mexico DPS critical habitat designation, NMFS's proposed rule includes Units 4, 6, and 10, which are categorized as having a medium conservation value rating – without scientific research showing these units offer a higher rate of use by the Mexico DPS resulting in a high or very high conservation value. I urge you to exclude those areas from the Mexico DPS critical habitat designation. Inclusion of Unit 6, even when the Draft Biological Report states that humpback whale densities are relatively low, shows that the analysis is weighted toward inclusion of critical habitat areas that are unnecessary. Additionally, some units are italicized to indicate a

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[5] Id, at 5-2.

[6] Calambokidis, J., E. A. Falcone, T. J. Quinn, A. M. Burdin, P. J. Clapham, J. K. B. Ford, C. M. Gabriele, R. Leduc, D. K. Mattila, L. Rojas-Bracho, J. M. Straley, B. L. Taylor, J. Urbán-Ramirez, R. D. Weller, B. H. Witteveen, M. Yamaguchi, A. Bendlin, D. Camacho, K. Flynn, A. Havron, J. Huggins, and N. Maloney. 2008. SPLASH: Structure of Populations, Levels of Abundance and Status of Humpback Whales in the North Pacific. *Cascadia Research.* For U.S. Department of Commerce, Western Administrative Center, Seattle, WA. AB133F-03-RP-00078.

high level of uncertainty in the conservation rating given. **I suggest a final determination that reduces the area being designated. At the very least, excluding units with high levels of uncertainty for any DPS and Units 4, 6, and 10 (medium value) from the critical habitat designated under the Endangered Species Act (ESA) for the Mexico Distinct Population Segment (DPS) of humpback whales is warranted and appropriate.**

There is, again, particularly strong rationale to exclude Unit 10, Southeast Alaska, from the proposed habitat designation for the Mexico DPS in consideration of the 2% likelihood that Mexico DPS humpback whales migrate to Southeast Alaska or Northern British Columbia[7]. As explained in the Draft Biological Report,[8] this low likelihood represents the proportion of Mexico DPS moving into either Unit 10 or Northern British Columbia – much of which are waters outside the U.S. Exclusive Economic Zone and outside the scope of what this proposed rule can encompass.

I would also highlight the remarkable recovery of the Hawaiian DPS. This DPS makes up the majority of humpbacks that feed in Southeast Alaska and are not listed under the ESA. In fact, it is the Hawaiian DPS's healthy population status that led to an examination of the humpback whale species-wide ESA listing, where the Hawaiian DPS was then identified and de-listed.[9] I highlight this because the proposed habitat designation for the Mexico DPS bases the importance of Unit 10 on presence of a humpback whale Biologically Important Area (BIA) – which was a significant factor in the unit's medium conservation value scoring for the Mexico DPS. The Draft Biological Report also states that "the relative predicted probability of movement to this area by the Mexico DPS is low for this general area." **Humpback whales feeding in Unit 10 are primarily not the Mexico DPS and as such, designating critical habitat here does not provide a meaningful conservation benefit to Mexico DPS humpback whales.**

3. Prey species definition is vague.

The proposed rule defines prey species as "primarily euphausiids and small pelagic schooling fishes of sufficient quality, abundance, and accessibility within humpback whale feeding areas to support feeding and population growth." In discussing prey species, the Draft Biological Report then goes on to identify small pelagic fish, such as northern anchovy, Pacific herring, and Pacific sardine as critical prey. The Draft Biological Report later states that humpback whales also consume fish species such as juvenile pollock and Atka mackerel in some areas of Alaska. **Additional clarification on what species and life stages fall under critical prey must be articulated, as that will be necessary for future ESA Section 7 consultations.** Without this articulation, NMFS could interpret critical prey species inconsistently. This specificity has the potential to drastically change future impacts to fisheries.

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[7] Wade, P. R. 2017. Estimates of abundance and migratory destination for North Pacific humpback whales in both summer feeding areas and winter mating and calving areas revision of estimates in SC/66b/IA21. IWC Scientific Committee Report SC/A17/NP/11.

[8] National Marine Fisheries Service. Mat 2019. Draft Biological Report for the Proposed Designation of Critical Habitat for the Central America, Mexico, and Western North Pacific Distinct Population Segments of Humpback Whales (*Megaptera novaeangliae*). Pg 95.

[9] Endangered and Threatened Wildlife and Plants: Endangered and Threatened Species; Identification of 14 Distinct Population Segments of the Humpback Whale (*Megaptera novaeangliae)* and Revision of Species-Wide Listing. 81 Fed. Reg. 62260 (September 8, 2016).

4. Critical habitat outer limits are overly expansive.

This proposed rule draws the outer limits of some units along the 2,000 m isobath, while the outer limits of other units are drawn at 1,000 m isobath. An outer limit of 2,000 m isobath is excessive given the coast oriented feeding behavior of humpback whales. **Units included in the final rule should not extend beyond 1,000 m isobath.**

5. Long term monitoring plan.

Alaska is currently experiencing high variability in its marine environment and scientific projections remain limited in their ability to inform resilience efforts for marine mammal populations. Data on whale migration and DPS populations must be strengthened, as we find ourselves now in a situation where Alaskan communities are placed under economic burden due to a lack of data and poorly understood habitat correlations with potentially zero conservation savings to show for it. The data used in this proposed habitat designation is largely outdated and relies heavily on extrapolations on DPS movements and foraging behavior. **Long-term monitoring efforts are essential in understanding and identifying appropriate critical habitat for effective conservation and recovery of humpback whales.**

Conclusion.

It is clear that the area proposed as critical habitat for humpback whales is overly expansive and poorly supported due to a lack of data. Significant negative impacts can be expected as a result of designating the majority of the Gulf of Alaska's coastline, along with significant parts of the Aleutian Islands and Bering Sea. Under the ESA, exclusion of areas from a critical habitat designation is allowed if the benefits of exclusion outweigh the benefits of inclusions and the species of concern does not risk extinction as a result.[10] Area exclusion considerations are appropriate, particularly in regard to the Mexico DPS, as it is not endangered and there is significant uncertainty in its threatened listing. In considering relevant benefits of designating critical habitat, only areas with an associated conservation rating of high or very high, with a high level of certainty, should be considered for designation as critical habitat areas. There are fundamental flaws in the analysis for this proposed rule that undermine a critical habitat designation's conservation objectives. In closing, the lack of data, along with the potential economic burdens that could result from this action should be better understood before this rule is implemented and Alaskans are forced to endure the results.

Sincerely,

Dan Sullivan
United States Senator

CC:

[10] 16 U.S. Code § 1533(b)(2)(2012).

The Honorable Wilbur Ross, Secretary of Commerce
Dr. Lisa Manning, National Marine Fisheries Service
Governor Mike Dunleavy
Commissioner Doug Vincent-Lang, Alaska Department of Fish and Game