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Dr. Neil Jacobs  
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1315 East-West Highway  
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Mr. Chris Oliver  
Assistant Administrator for Fisheries  
National Oceanic and Atmospheric Administration  
1315 East-West Highway  
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Dear Acting Administrator Jacobs and Assistant Administrator Oliver:

With my support for the comments submitted by communities and organizations in Alaska, I write to urge you to provide additional analysis and greater consideration of the economic impacts of the proposed rule to designate critical habitat for the Mexico and Western North Pacific Distinct Population Segments (DPSs) of humpback whales in Alaska waters near Kodiak and the Aleutian Islands. Furthermore, I strongly urge you to exclude Southeast Alaska from the proposed critical habitat designation for the Mexico DPS. The National Marine Fisheries Service (NMFS) is in the process of designating critical habitat under the Endangered Species Act (ESA) for the threatened Mexico DPS, endangered Western North Pacific DPS, and endangered Central America DPS of humpback whales, pursuant to a 2018 settlement agreement.<sup>1</sup> Under NMFS's proposed rule,<sup>2</sup> Southeast Alaska (Unit 10) is included as part of the Mexico DPS critical habitat designation—despite the fact that this inclusion provides no meaningful conservation benefit to the Mexico DPS.

The Endangered Species Act (ESA) section 4(b)(2) states that critical habitat shall be designated and revised on the basis of the best scientific data available after taking into consideration economic impacts, impacts on national security, and any other relevant impacts of specifying particular areas as critical habitat.<sup>3</sup> After reviewing the proposed rule, I am concerned that the potential impacts of designating critical habitat in the active fishing regions included in Units 1-6 and Unit 8 have not been adequately analyzed or considered by NMFS. Additionally, by including Unit 10 in the recommended Mexico DPS humpback whale critical habitat, the proposed rule does not reflect an accurate and appropriate consideration of the best available science and of economic

<sup>1</sup> *Center for Biological Diversity et al. v. National Marine Fisheries Service, et al.*, No. 3:18-cv-01628-EDL (N.D. Cal.).

<sup>2</sup> 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)

<sup>3</sup> 16 U.S. Code § 1533(b)(2)(2012)

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impacts. Negative economic impacts of Unit 10's inclusion clearly outweigh any conservation benefits to Mexico DPS humpback whales, and by no means will Mexico DPS humpback whales face a risk of extinction as a result of excluding Southeast Alaska from the critical habitat designation. It is therefore imperative that you use the authority described under ESA section 4(b)(2) and delegated to the Assistant Administrator for Fisheries<sup>4</sup> to exclude from Unit 10 from Mexico DPS humpback whale critical habitat in the final rule.

**I. Including Unit 10 in the critical habitat designation provides no conservation benefit to Mexico DPS humpback whales**

While the critical habitat review team (CHRT) found that Unit 10 was of “medium” conservation value to Mexico DPS whales, we believe this rating does not reflect the best available science. Designating Unit 10 as critical habitat does not provide meaningful conservation benefits to Mexico DPS whales.

1. The best available science shows that Mexico DPS humpback whales have a mere 2% likelihood of migrating to Southeast Alaska or Northern British Columbia (BC).<sup>5</sup> This simple fact—that this area is used by an extremely minor, and ultimately insignificant proportion of the Mexico DPS—seems to have been given far less attention than appropriate in development of the proposed rule. The Draft Biological Report refers to this 2% likelihood, which functionally represents the summed probabilities of a Mexico DPS whale moving into either Unit 10 or a substantial area of BC waters outside the U.S. Exclusive Economic Zone, simply as “low.”<sup>6</sup> The report places undue emphasis instead on the proportion of whales in Unit 10 that were confirmed, by photographic matches of individually identifiable tail flukes, to have been seen in Mexico waters (8.5%) as part of the Structure of Populations, Levels of Abundance and Status of Humpbacks (SPLASH) study.<sup>7</sup> This raw match proportion is subject to bias and does not reflect the actual percentage of Southeast Alaska humpback whales that are members of the Mexico DPS, which has been estimated as about 6%.<sup>8</sup> This amounts to an extremely minor proportion (<5%) of the Mexico DPS, consistent with the *extremely low* probability of a humpback whale moving between Mexico and Southeast Alaska.<sup>9</sup> Much larger numbers of Mexico DPS whales are concentrated elsewhere.<sup>10</sup>

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<sup>4</sup> Department Organization Order 10-15 (5/24/04). NOAA Organization Handbook, Transmittal #34, May 31, 1993

<sup>5</sup> 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.

<sup>6</sup> National Marine Fisheries Service. May 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

<sup>7</sup> 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.

<sup>8</sup> Neilson, J.L., Gabriele, C.M. and Taylor-Thomas, L.F. 2018. Humpback whale monitoring in Glacier Bay and adjacent waters 2017: annual progress report. Natural Resource Report NPS/GLBA/NRR—2018/1660. US Department of the Interior, National Park Service, Fort Collins, Colorado, USA.

<sup>9</sup> Wade, P. R. 2017, at 9

<sup>10</sup> Id, at 9

2. The CHRT has conflated Mexico DPS whales with Hawaii DPS whales in Unit 10. This mistaken approach is how a region used by such a minor proportion of the Mexico DPS was assigned any meaningful conservation value for this specific population segment. The vast majority of humpbacks that feed in Southeast Alaska travel to Hawaii, not Mexico, for winter.<sup>11</sup> These Hawaii whales are not listed under the ESA. Evidence of their healthy population status was sufficiently robust to warrant examination of the humpback whale species-wide ESA listing, and the Hawaii DPS was subsequently identified and de-listed with great confidence (98%) that it was not at risk of extinction.<sup>12</sup> However, this proposed rule bases its analysis of Unit 10's importance to Mexico DPS whales on the feeding behavior of Hawaii DPS whales. The Draft Biological Report states that Unit 10 was drawn to include a humpback whale Biologically Important Area (BIA) in Southeast Alaska, and the presence of the BIA was a significant factor in scoring the unit's conservation value for the Mexico DPS.<sup>13</sup> The Southeast Alaska humpback BIA was delineated based on whale sightings from 1991 to 2009<sup>14,15</sup>—sightings of whales that are now known to nearly all be members of the Hawaii DPS. Whales feeding in this region are overwhelmingly not part of the Mexico DPS or any other ESA-listed DPS. Designating this region as critical habitat based on use by the Hawaii DPS severely undermines the delisting action NMFS took for this population segment just 4 years ago, while providing no conservation benefit to Mexico DPS whales.
3. There is scientific uncertainty as to whether the Mexico DPS is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. While NMFS originally stated that the Mexico DPS did not warrant listing under the ESA in its 2015 proposed rule to revise humpback whales' species-wide listing,<sup>16</sup> it listed the Mexico DPS as threatened in the final rule.<sup>17</sup> This change was based on a new, lower abundance estimate that was presented in a 2016 International Whaling Commission Scientific Committee paper.<sup>18</sup> The final rule stated this estimate, which was based on a spatial multi-strata (MS) model, was likely more accurate than an estimate from an alternative model (Chapman-Peterson) in the paper because the MS model used more sighting data and was less subject to bias from capture heterogeneity (i.e., variation in the likelihood of

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<sup>11</sup> Id., at 9

<sup>12</sup> 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)

<sup>13</sup> NMFS 2019. Draft Biological Report. pg 81

<sup>14</sup> Dahlheim, M.E., White, P.A. and Waite, J.M., 2009. Cetaceans of Southeast Alaska: distribution and seasonal occurrence. *Journal of Biogeography*, 36(3), pp.410-426.

<sup>15</sup> Ferguson, M.C., Curtice, C. and Harrison, J., 2015. 6. Biologically Important Areas for Cetaceans Within US Waters-Gulf of Alaska Region. *Aquatic Mammals*, 41(1), p.65-78.

<sup>16</sup> 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. 80 Fed. Reg. 22304 (April 21, 2015)

<sup>17</sup> 81 Fed. Reg. at 62260

<sup>18</sup> Wade, P. R., T. J. Quinn II, J. Barlow, C. S. Baker, A. M. Burdin, J. Calambokidis, P. J. Clapham, E. A. Falcone, J. K. B. Ford, C. M. Gabriele, D. K. Matilla, L. Rojas-Bracho, J. M. Straley, B. Taylor, J. Urbán R., D. Weller, B. H. Witteveen, and M. Yamaguchi. 2016. Estimates of abundance and migratory destination for North Pacific humpback whales in both summer feeding areas and winter mating and calving areas. IWC Scientific Committee Report SC/66b/1A/21.

photographically identifying or “capturing” a particular whale). However, the rule did not mention that the paper also included a third modeling approach (Chao), and that the study authors stated it was “more difficult to decide whether the Chao or MS estimates are better.”<sup>19</sup> The Chao model explicitly accounted for individual capture heterogeneity, unlike the MS model, which instead assumed that any bias from capture heterogeneity was canceled out by using data from both summer and winter (because capture likelihood may vary in different ways each season).<sup>20</sup> However, some behaviors and features that determine how easily individual whales can be successfully approached, photographed, and identified affect capture likelihood in similar ways in both seasons and were not completely controlled for by SPLASH survey protocols.<sup>21</sup> If summer and winter capture likelihoods are correlated, MS estimates are negatively biased, and Chao estimates that fully account for capture heterogeneity are more accurate. The Chao model also more directly addresses the question of how large the Mexico DPS is by using only winter data. The additional summer data in the MS model introduces more model terms and complication, and does not necessarily lead to a better abundance estimate for the Mexico DPS—which is defined by where animals spend winter only. The Chao model predicted that the Mexico DPS included 4,910 individuals, 50% more than the MS model abundance estimate (3,264) that led NMFS to list the Mexico DPS as threatened. While this MS estimate and a subsequent revision to it<sup>22</sup> have scientific validity, the Chao model does as well. There is a very reasonable chance that the Mexico DPS is significantly larger than NMFS stated in the listing rule, such that the DPS is *not* threatened with becoming endangered and would not benefit from additional conservation actions.

4. NMFS does not anticipate that designating critical habitat in Unit 10 will result in any new conservation actions or project modifications. While the proposed rule acknowledges uncertainty around future implications of designating critical habitat, it emphasizes that baseline conservation actions already prevent federal actions from destroying or adversely modifying the critical habitat of ESA-listed humpback whales.<sup>23</sup> Protections must be in place to prevent jeopardy to the whales themselves, and these include protections for the prey essential feature of the proposed critical habitat. As stated in the Draft Economic Analysis, “the conservation efforts identified by NMFS to avoid jeopardy would also result in avoiding adverse modification of critical habitat.”<sup>24</sup> Designating critical habitat in Unit 10 is unlikely to have conservation benefits for the very limited number of Mexico DPS whales in the region because it is unlikely to result in any additional conservation measures. The Draft Economic Analysis notes that analyzing the potential for adverse modification rather than

<sup>19</sup> Id., at 25

<sup>20</sup> Barlow, J., Calambokidis, J., Falcone, E.A., Baker, C.S., Burdin, A.M., Clapham, P.J., Ford, J.K., Gabriele, C.M., LeDuc, R., Mattila, D.K. and Quinn, T.J., 2011. Humpback whale abundance in the North Pacific estimated by photographic capture-recapture with bias correction from simulation studies. *Marine Mammal Science*, 27(4), pp.793-818.

<sup>21</sup> Smith, T.D., Allen, J., Clapham, P.J., Hammond, P.S., Katona, S., Larsen, F., Lien, J., Mattila, D., Palsbøll, P.J., Sigurjónsson, J. and Stevick, P.T., 1999. An ocean-basin-wide mark-recapture study of the North Atlantic humpback whale (*Megaptera novaeangliae*). *Marine Mammal Science*, 15(1), pp.1-32.

<sup>22</sup> Wade, P. R. 2017, at 8

<sup>23</sup> 84 Fed. Reg. at 54375

<sup>24</sup> Industrial Economics, Incorporated for NMFS. September 24, 2019. Economic Impacts Associated with the Designation of Critical Habitat under Consideration for Humpback Whales: Draft Report. pg 2-12

for jeopardy may be more “straightforward” and make consultations simpler, but will likely have no impact on outcomes.<sup>25</sup> Making NMFS’s work more straightforward is not a conservation benefit to the Mexico DPS.

## **II. Economic impacts of designating humpback whale critical habitat in Southeast Alaska were not properly described or taken into consideration.**

Southeast Alaska will experience significant economic impacts if designated as humpback whale critical habitat, and it risks facing costs that would be devastating to its small communities. Appropriate weighing of economic impacts vs. conservation benefits clearly shows that Unit 10 should be excluded from the designation.

1. If included as critical habitat, Unit 10 faces the highest economic costs overall of any area and the vast majority of costs to small entities. This rule’s Draft Economic Analysis shows that Unit 10 would bear 17-25% of all quantified, annualized costs of designating humpback whale critical habitat, as well as 75% of all costs to small businesses, small organizations, and small government jurisdictions.<sup>26</sup> The concentration of these costs in a unit that comprises just 13% of the 175,812 nmi<sup>2</sup> proposed critical habitat for the Mexico DPS—and is seasonally occupied by less than 5% of whales in this DPS—is alarming.
2. Costs to Unit 10 are unquestionably higher and more burdensome than stated in the Draft Economic Analysis. While the economic report concludes that Unit 10 would face an extreme proportion of the designation’s most impactful costs, it fails to reflect these costs and their effects in appropriate absolute terms. The only costs quantified were those of additional administrative effort that will be required to complete ESA section 7 consultations after the designation is finalized. For small entities, this was estimated to cost \$4,900 per year. This comes nowhere close to the total costs local governments and small businesses and organizations in Southeast Alaska would face with this additional regulatory hurdle. Expanded consultations lead to project time delays that come at great expense, as municipalities in Unit 10 have reported in public comment on this rule. Regulatory uncertainty will also undermine investment and may preclude activities and projects that would substantially benefit communities. If designation of critical habitat does result in new conservation measures beyond what is required to avoid jeopardy, costs will be higher still. Such measures could block or significantly reduce opportunities for commercial fishing, tourism, maritime transit, in-water construction, hatchery operations, and hydroelectric projects which are essential for the economic and cultural well-being of small communities in Southeast Alaska. This region is different than most of the coastal United States, and is almost completely under federal control. As a result, nearly all economic activity or resource development has a federal nexus requiring a permit, approval, or license from the federal government. With rural economies and no road connections, Southeast Alaska is especially vulnerable to harm from restrictions on seafood harvesting, vessel transit, and shoreline infrastructure. The Draft Economic Analysis admits that assuming critical habitat designation will not result in project modifications or fishery management changes may have caused *potentially major* underestimations of costs.<sup>27</sup> If these

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<sup>25</sup> Id, at 2-4

<sup>26</sup> Id, at 5-2

<sup>27</sup> Id, at 6-1

assumptions prove false and costs are indeed far larger than predicted, it will be economically devastating for Southeast Alaska.

3. NMFS did not appropriately weigh the economic impacts of critical habitat designation against conservation benefits. Rather than considering the economic impacts—both quantitative and qualitative—of designation in each unit and weighing them against conservation benefits, NMFS simply deemed all economic impacts “very low” based on estimates of direct administrative costs alone. The proposed rule emphasizes how low these costs are by comparing them to the estimated costs of other recent, similar critical habitat designations—but fails to note that those estimates accounted for potential project modifications, which were dismissed in this proposed rule as unlikely and too difficult to quantify. It is wrong for NMFS to ignore all economic impacts besides direct administrative costs in its cost-benefit assessment. The inevitable costs of time delays and regulatory uncertainty, as well as the possible, potentially enormous costs of new conservation measures, are extremely important. Yet they are given no mention in the Draft ESA Section 4(b)(2) Report’s weighing of economic impacts against benefits of designation.<sup>28</sup> A proper analysis would recognize total foreseeable costs of designation, perhaps through including an additional qualitative economic metric incorporating indirect costs, risks, and economic vulnerability. NMFS’s approach to weighing conservation benefits against economic impacts in this rule amounted to writing off all costs as insignificant and recommending exclusion of “low” conservation value areas based only on their conservation status. “Low” regions had essentially no conservation value and would have been unreasonable to include as critical habitat under any circumstances; their exclusion does not represent a sufficient consideration of economic impact. A valid consideration would result in exclusion of Unit 10—even if this unit did have moderate conservation value for the Mexico DPS—given the total costs and economic risks the region stands to face.

### **III. Potential economic impacts from future conservation actions were not explained, analyzed, or considered.**

Alaskans understand that designating critical habitat for a species may result in future restrictions to fisheries. This was the case in 1993, when NMFS designated critical habitat for Steller sea lions in the Gulf of Alaska, Bering Sea, and Aleutian Islands. At the time of the designation, NMFS noted in its proposed rule that the “direct economic and other impacts resulting from this proposed critical habitat designation are expected to be minimal.”<sup>29</sup> After the designation was finalized, however, NMFS and the North Pacific Fishery Management Council limited Alaska groundfish fisheries after concluding that these fisheries were likely to adversely modify SSL critical habitat.<sup>30</sup> These restrictions have resulted in higher costs for fishermen, additional regulatory burdens, and the closure of important fishing areas.

In its proposed rule to designate critical habitat for WNP and Mexico DPS humpback whales around Kodiak Island and in the Eastern Aleutians, NMFS notes that “the costs quantified in the

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<sup>28</sup> NMFS, September 2019. Draft ESA Section 4(b)(2) Report: In Support of the Proposed Designation of Critical Habitat for the Mexico, Central America, and Western North Pacific Distinct Population Segments of Humpback Whales (*Megaptera novaeangliae*). Pgs 22-28

<sup>29</sup> 58 Fed. Reg at 17188

<sup>30</sup> 68 Fed. Reg at 203



economic analysis include only the additional administrative effort associated with consideration of potential impacts to critical habitat” as part of NMFS’s Section 7 consultation duties. The rule also outlines the many activities with a Federal nexus that could invite restrictive conservation actions as a result of the designation, including commercial fishing. NMFS did not identify any probable conservation recommendations that would likely be made to avoid adverse modification of the proposed critical habitat as a result of activities like commercial fishing, but solicits “public comments and relevant data that would further inform this analysis.” Consistent with the comments submitted by coastal communities and fishing organizations that have been negatively impacted by other critical habitat designations, I urge you to engage closely with these stakeholders to evaluate, analyze, and consider the potential economic impacts of any future conservation actions that could result from this proposal and negatively affect Alaska’s fisheries.

#### IV. Conclusion

The ESA allows the Secretary (or delegated authority) to exclude any area from a critical habitat designation if the benefits of exclusion outweigh the benefits of inclusion, so long as it will not result the extinction of the species of concern.<sup>31</sup> It is extremely clear that Southeast Alaska should be excluded from the Mexico DPS humpback whale critical habitat designation. There are no relevant benefits of designating this region as critical habitat. Very few Mexico DPS whales feed in this area; it is unclear whether the Mexico DPS should be ESA-listed at all; and the designation is not expected to result in new, beneficial conservation measures. The negative impacts of designation, however, are severe. They include project time delays and regulatory uncertainty that would be very costly to isolated rural communities, which already face significant federal regulations related to protected resources. Similar impacts to communities on Kodiak Island and in the eastern Aleutians have not been adequately considered, especially with regard to future conservation actions affecting commercial fisheries. Should critical habitat designation lead to new conservation measures for Alaska’s fisheries, the costs to these communities could be massive. Southeast Alaska has raised its voice in opposition to designation based on residents’ informed, personal knowledge of the costs it would entail and of how little it would benefit ESA-listed whales. I add my voice to the urgent request that NMFS exclude Unit 10 from the Mexico DPS critical habitat designation, and provide additional analysis of the economic impacts of this designation on all Alaskan communities with rural fishery-based economies.

Sincerely,



Lisa Murkowski  
United States Senator

CC: The Honorable Wilbur Ross, Secretary of Commerce  
Governor Mike Dunleavy, State of Alaska  
Commissioner Doug Vincent-Lang, Alaska Dept. of Fish and Game

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<sup>31</sup> 16 U.S. Code § 1533(b)(2)(2012)