



# United States Department of the Interior



## FISH AND WILDLIFE SERVICE

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SEP 12 2017

Michael Lidgard Acting Director  
Office of Water and Watersheds  
U.S. Environmental Protection Agency  
1200 Sixth Avenue, Suite 900  
Seattle, WA 98101-3140

Subject Biological Opinion for the General NPDES Permit for Offshore Seafood Processing Discharge within Federal Waters off the Coasts of Washington and Oregon (Permit Number WAG520000, FWS Reference No. 01EOFW00-2017-F-0495)

Dear Mr. Lidgard:

This is in response to your letter dated July 13, 2017, transmitting your evaluation of the impacts on the federally endangered short-tailed albatross (*Phoebastria albatrus*); and the federally threatened marbled murrelet (*Brachyramphus marmoratus*) from the proposed issuance of a National Pollutant Discharge Elimination System (NPDES) General Permit for offshore seafood processors in Federal waters off the Washington and Oregon Coast. In your letter and accompanying biological evaluation (Environmental Protection Agency, 2017), you made determinations that the project is likely to adversely affect the short-tailed albatross and may affect but is not likely to adversely affect the marbled murrelet. Your final correspondence was received in this office on July 13, 2017.

Regarding the murrelet, adverse effects are not expected because there is little spatial overlap of the proposed action with concentrations of marbled murrelets or their feeding areas and because murrelets tend to avoid vessels and fishing gear (Evans Mack, et al., 2002). Additionally, there have been no known interactions between trawl gear and murrelets. Therefore, we concur with your determination that the proposed action is not likely to adversely affect marbled murrelets, because adverse interactions with vessels and gear, and forage depletion are extremely unlikely to occur.

This document transmits the U.S. Fish and Wildlife Service's (USFWS) Biological Opinion (opinion) based on our review of the proposed general NPDES permit issuance within Federal waters off the coasts of Washington and Oregon. This opinion considers the effects of the proposed action on short-tailed albatross (albatross). This document was prepared in accordance with section 7 of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 et seq.)(ESA).

The proposed action was considered in the previously completed 2017 biological opinion on the Pacific Coast Groundfish Fishery (PCGF) (U.S. Fish and Wildlife Service, 2017). EPA is proposing activities that may cause take, which are a subset of the activities considered under the PCGF opinion. This biological opinion is a supplement to the PCGF opinion (enclosed), addressing only the effects of EPA's proposed issuance of the NPDES permit (see Description of the Proposed Action) and attributing the appropriate amount of incidental take anticipated from the proposed permit issuance.

This opinion is based on the following major sources of information:

- June 19, 2017, and July 13, 2017, letters and biological evaluation from EPA that address the effects of the proposed action on albatross and murrelets;
- December 12, 2016, Pacific Coast Groundfish Fishery (PCGF) (National Marine Fisheries Service, 2016);
- May 2, 2017, PCGF biological opinion (U.S. Fish and Wildlife Service, 2017);
- Recovery Plan for the Threatened Short-tailed Albatross (U.S. Fish and Wildlife Service, 2008);
- Short-tailed Albatross (*Phoebastria albatrus*) 5-Year Review (U.S. Fish and Wildlife Service, 2009; U.S. Fish and Wildlife Service, 2008);
- Marine Mammal, Seabird, and Sea Turtle Summary of Observed Interactions, 2002-2014 (Jannot, et al., 2017);
- Information in our files; and
- Informal consultation between EPA and USFWS staff.

## **BIOLOGICAL OPINION**

### **1. CONSULTATION HISTORY**

- We received notice and request for feedback on the information on listed species August 26, 2015, including Notice of Proposed Issuance of the NPDES General Permit for Offshore Seafood Processors in Federal Waters off the Washington and Oregon Coast (proposed permit) and associated documentation, including draft permit, and biological evaluation.
- On September 29, 2015, we provided comments regarding the proposed permit and provided our response that we would not concur with a determination that proposed project was "not likely to adversely affect" short-tailed albatross.
- Between October 2015 and June 2017, we informally consulted with EPA staff to consider options to conserve listed species, particularly short-tailed albatross in Oregon and Washington.
- On June 19, 2017, the EPA provided their draft biological evaluation and determination that the proposed project would not adversely affect listed species.

- On July 12, 2017, USFWS informed EPA that we did not concur with the determination of not likely to adversely affect listed species.
- On July 13, 2017, EPA revised their determination, concluding that the proposed project would adversely affect listed species, and provided a letter to the USFWS that requested formal consultation.

## **2. DESCRIPTION OF THE PROPOSED ACTION**

The proposed action is EPA's proposed issuance of the NPDES General Permit for Seafood Processors in Federal Waters offshore of the States of Washington and Oregon. These activities were generally described and considered in the PCGF biological opinion (U.S. Fish and Wildlife Service, 2017), which is attached for your reference. However, the specific activities associated with the proposed NPDES permit are described in greater detail below.

A detailed description of the action is provided in the biological evaluation (Environmental Protection Agency, 2017, pp. 9-30), and is hereby incorporated by reference. The term consultation will be ten years from completion, allowing for permit issuance, a 5-year implementation period, and future renewal processes, during which additional consultation needs will be addressed. In summary, the proposed permitted action is the at-sea discharge of fish wastes associated with the fisheries off the Oregon and Washington coast, consisting primarily of the Pacific Whiting Fishery (also known as the At-Sea Hake Fishery). Whiting are caught via trawl gear off the Oregon, Washington, and British Columbia coast. The fish are converted into headed and gutted fish, fillets, mince blocks, surimi (the basis for imitation crab), fishmeal, and fish oil. The proposed permit will address two sectors of the Pacific Whiting Fishery:

- Mothership fishery, where catcher vessels deliver their fish directly to motherships that operate in Federal Waters.
- At-sea catcher-processor fleet that both harvests and processes whiting at sea (again in Federal Waters).

These two sectors are regulated by National Marine Fisheries Service (NMFS), under the Pacific Coast Groundfish Fishery Management Plan and implementing regulations at 50 CFR Part 660. The Pacific Coast Groundfish Fishery, including the activities associated with the proposed action, has been addressed by a formal consultation and biological opinion (National Marine Fisheries Service, 2016; U.S. Fish and Wildlife Service, 2017). The biological opinion described the trawl activities associated with the proposed action (U.S. Fish and Wildlife Service, 2017, pp. pp. 7-10), and the description is incorporated by reference.

Although the Pacific Whiting Sector is implemented with only 16 vessels, these vessels produced over 22.5 million tons of waste discharged in 2016, primarily during May-June and September-November (Environmental Protection Agency, 2017, pp. pp. 11-13). Discharged wastes consist of solid and dissolved materials that cannot be processed by the onboard processing plant, and it is ground and pumped overboard with seawater.

Two categories of solid waste discharges are generated by seafood processing: ground and unground waste materials. The ground fish waste stream consists of processed raw fish and shellfish include heads, skin, scales, viscera, tail fins, shells discarded during cleaning and butchering operations, damaged fish, and unusable fish. Unground solid waste is comprised of

sea debris, prohibited species fish and bycatch species that are neither processed nor retained. Dissolved wastes include solubilized organic matter and nutrients leached from fish tissues after processing. Specific composition of this waste is described in the biological evaluation (Environmental Protection Agency, 2017, pp. 14-18) and is incorporated by reference.

As described in the biological evaluation (Environmental Protection Agency, 2017, p. p. 20), the Draft Permit proposes to authorize the discharge of the following pollutants:

1. Seafood processing wastewater and wastes, including the waste fluids, heads, organs, flesh, fins, bones, skin, chitinous shells, and stickwater produced by the conversion of aquatic animals from a raw form to a marketable form.
  - a. Treatment of waste solids. Permittees must send all solid seafood processing wastes through a properly maintained and operating grinder system designed and operated to grind solids to 0.5 inch or smaller prior to discharge. This 0.5-inch effluent requirement does not apply to (1) the calcareous shells of scallops, clams, oysters and abalones, (2) the calcareous shells (i.e., tests) of sea urchins, or (3) incidental catches of prohibited and by-catch species which are neither retained nor processed.
  - b. Utilization. Permittees must fully utilize to the extent practicable all treatment processes available on board their vessel, including but not limited to fishmeal and fish oil production.
  - c. Permittees must discharge effluents into hydrodynamically energetic waters with a high capacity of dilution and dispersion.
2. Wash-down water, which include disinfectants added to wash-down water to facilitate the removal of wastes and to maintain sanitary standards during processing or to sanitize seafood processing areas.
3. Sanitary wastewater must be discharged in accordance to U.S. Coast Guard regulations.
4. Other wastewater generated in the seafood processing operation, including, seafood catch transfer water, live tank water, refrigerated seawater, cooking water, boiler water, gray water, cooling water, refrigeration condensate, freshwater pressure relief water, clean-up water, and scrubber water.

Several permit conditions are proposed to minimize impacts to seabirds, including the short-tailed albatross. These permit conditions would be required of permittees and are consistent with the terms and conditions for trawl fisheries in the PCGF opinion (U.S. Fish and Wildlife Service, 2017, pp. pp. 47-49), including:

1. "In order to minimize the risk of short-tailed albatross interacting with trawl cables, Permittees shall consider the following management actions:
  - a. The use and effectiveness of streamer lines when using trawl gear;
  - b. The degree to which minimizing the aerial extent of trawl cables affects the risk of bird strike; and
  - c. Feasible offal management techniques that decrease attraction of short-tailed albatross to the vicinity of aerial lines.

- d. Implement measures that minimize the potential for short-tailed albatross interactions with trawl gear (based on NMFS research findings and investigations into trawl-associated mortality or injury, and as these albatross protection measures become available).”
2. To address USFWS concerns (U.S. Fish and Wildlife Service, 2015, p. p. 5) about storm petrels or other birds becoming disoriented by lights during nighttime operations, the EPA proposes to include the following requirement:
  - a. Lights used during night operations should be minimized as much as possible, and shielded and directed downward to the extent that is feasible.
3. EPA has also restricted discharge geographically to reduce impacts to seabirds and seasonally to minimize the contribution to hypoxic conditions (see Description of the Action Area).

### **3. DESCRIPTION OF THE ACTION AREA**

The proposed action area consists of the following, as described in the biological evaluation (Environmental Protection Agency, 2017, pp. pp. 20-24):

#### **3.1. Receiving Waters**

1. This General Permit authorizes discharges of pollutants into Federal Waters of the United States off the coasts of Washington and Oregon (i.e., seaward of 3 nautical miles (NM) from the coastal shoreline of Washington and Oregon), except where noted below.
2. Generally, Federal Waters off Washington and Oregon begin 3 NM from the state’s coastal shorelines. In the case of emergent offshore rocks and islands, the General Permit’s jurisdiction begins 3 NM seaward from the seaward shoreline of offshore rocks and islands. The greatest distance is off Port Orford Reef, where the boundary between state and Federal Waters begin approximately 8 NM from the mainland shoreline.

#### **3.2. Prohibited Areas**

Some areas are not authorized for discharge of pollutants (Figure 1):

1. Any state waters, including:
  - a. Bays, estuaries, and rivers.
  - b. Ocean waters within 3 NM of the west coasts of Washington and Oregon within 3 NM of the seaward boundary of emergent rocks and islands;
2. Any waters under the jurisdiction of Canada;
3. Any waters south of the Oregon/California border (42°00” N latitude);
4. Waters shallower than 100 meters in depth and shoreward during April 15 – October 15, unless the permittee can demonstrate that their discharge will not contribute to hypoxic conditions; and
5. Heceta/Stonewall Bank complex, where discharge is prohibited (year-round).

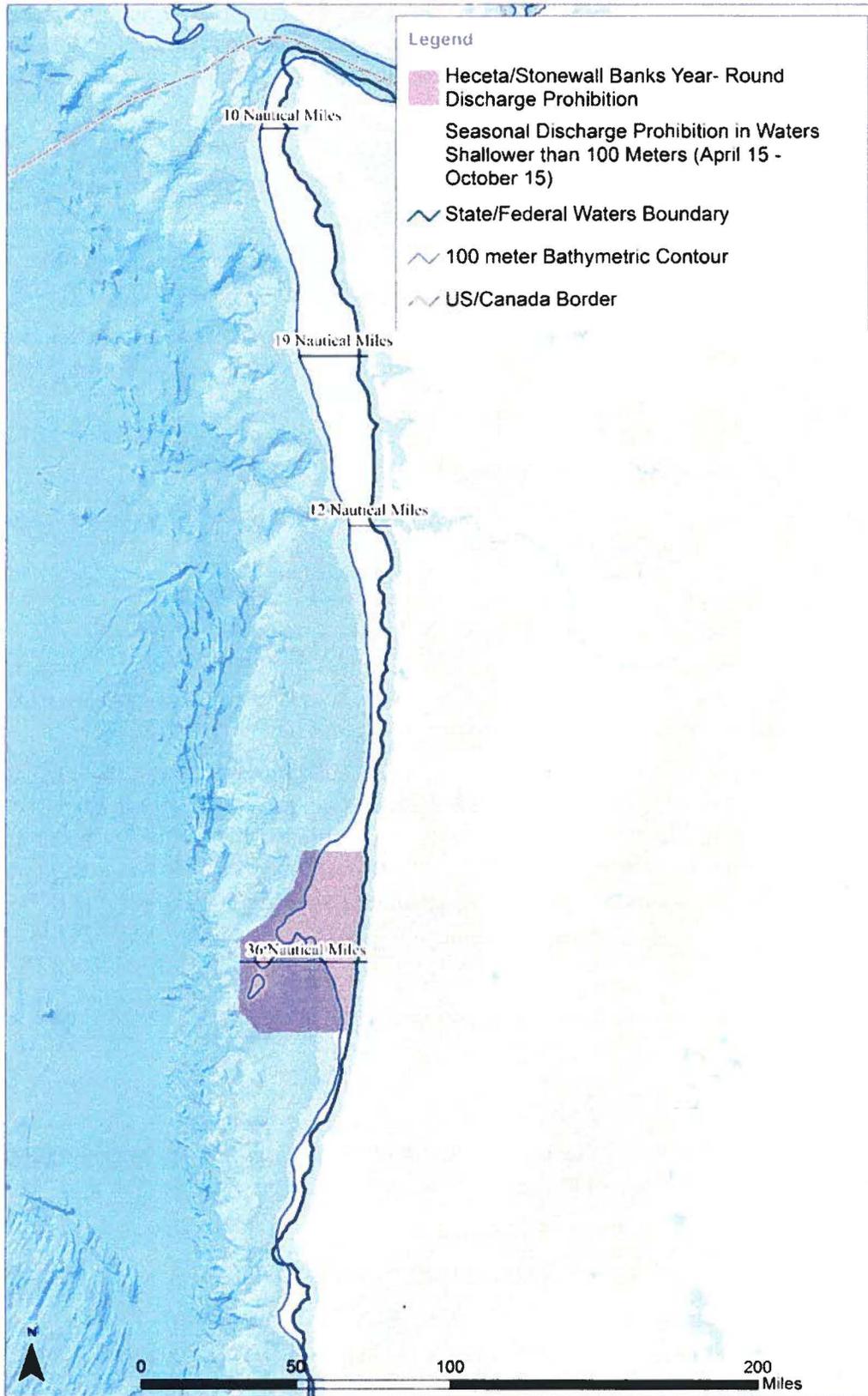


Figure 1. Areas where discharge is prohibited (EPA 2017).

#### **4. ANALYTICAL FRAMEWORK FOR THE JEOPARDY DETERMINATION**

The following analysis relies on four components to support the jeopardy determination for each of the species considered in this BO: (1) the Status of the Species, which evaluates the species' range-wide condition, the factors responsible for that condition, and its survival and recovery needs; (2) the Environmental Baseline, which evaluates the condition of the species in the action area, the factors responsible for that condition, and the role of the action area in the species survival and recovery; (3) the Effects of the Action, which determines the direct and indirect impacts of the proposed Federal action and the effects of any interrelated or interdependent activities on the species; and (4) Cumulative Effects, which evaluates the effects of future, non-Federal activities in the action area on the species.

In accordance with the implementing regulations for section 7 and Service policy, the jeopardy determination is made in the following manner: the effects of the proposed Federal action are evaluated with the aggregate effects of everything that has led to the listed species' current status and, for non-Federal activities in the action area, those actions likely to affect the spotted owl in the future, to determine if, given the aggregate of all of these effects, implementation of the proposed action is likely to cause an appreciable reduction in the likelihood of both the survival and recovery of the species in the wild.

The following analysis places an emphasis on using the range-wide survival and recovery needs of the species and the role of the action area in meeting those needs as the context for evaluating the effects of the proposed Federal action combined with other relevant effects. In short, a non-jeopardy determination is warranted if the proposed action is consistent with maintaining the role of habitat and the species population in the action area for the species' survival and recovery. The jeopardy determination is made on the range-wide scale of the species.

#### **5. STATUS OF THE SHORT-TAILED ALBATROSS**

The status of the short-tailed albatross is described in the PCGF biological opinion (U.S. Fish and Wildlife Service, 2017) and is hereby incorporated by reference.

#### **6. ENVIRONMENTAL BASELINE**

The environmental baseline is defined as, "the past and present impacts of all Federal, state or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State and private actions which are contemporaneous with the consultation in process [50 CFR 402.02]."

The proposed action area is entirely encompassed within the PCGF action area, and the activities described in this proposed permit are addressed in the PCGF biological opinion (U.S. Fish and Wildlife Service, 2017, pp. pp. 29-34). Therefore the status of the short-tailed albatross in the action area (U.S. Fish and Wildlife Service, 2017, pp. 29-31), the factors affecting the species within the action area (pp. pp. 31-34), and the aspects of the species recovery plan (p. p. 34) within the action area are incorporated by reference.

## **7. EFFECTS OF THE ACTION**

Effects of the action refer to the permanent or temporary direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated and interdependent with that action that will be added to the environmental baseline. Indirect effects are those that are caused by the proposed action, occur later in time, but are still reasonably certain to occur.

The direct and indirect effects of commercial fishing, specifically with trawl gear, and the associated impacts of offal discharge were described in the PCGF biological opinion (U.S. Fish and Wildlife Service, 2017, pp. pp. 37-40), and are incorporated by reference. In the documentation associated with the PCGF, estimates of potential mortality or injury of short-tailed albatross were made using a Bayesian model and records of observed take, fishing effort, and albatross population numbers (U.S. Fish and Wildlife Service, 2017, pp. calculated via the Bayesian model described in sections 6.3 and 6.4, pp. 40-39). The result was that a maximum estimate of 2.44 birds would be taken annually, primarily associated with longline gear. Mortality or injury of short-tailed albatross has not been observed with trawl gear. However, based on observations of black-footed albatross (Jannot, et al., 2017; U.S. Fish and Wildlife Service, 2017, pp. pp. 37-38), a small number of short-tailed albatross may be killed or injured by trawl gear. To account for the unknown, difficult to detect, mortality or injury associated with trawl gear, the total take estimate was rounded up to 2.5 birds/year (enumerated in the PCGF opinion as 5 birds/2-year period), or approximately 0.06 birds/year solely from trawl interactions. Therefore, the anticipated take associated with the trawl gear, and therefore the EPA's proposed action, was estimated at no more than six albatross in 100 years, or no more than one bird over the term of the action.

## **8. CUMULATIVE EFFECTS**

Cumulative effects include the effects of future State, Tribal, local or private actions that are reasonably certain to occur within the action area considered in this BO. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the Act.

The cumulative effects expected to occur within the action area were described in the PCGF biological opinion (U.S. Fish and Wildlife Service, 2017, pp. 44-45) and are incorporated by reference.

## **9. CONCLUSION**

The effects of the proposed action are a subset of those previously considered in the biological opinion on the PCGF. Therefore, the conclusion remains accurate for this related action:

After reviewing the current status of the short-tailed albatross, the environmental baseline for the action area, the effects of the proposed action on the short-tailed albatross, and the cumulative effects, it is the USFWS's biological opinion that the activity, as proposed, is not likely to jeopardize the continued existence of the short-tailed albatross.

Our findings are based on the following assumptions and factors: (1) the proposed action is likely to result in interactions between short-tailed albatross and PCGF causing injury or mortality to individuals from striking trawl cables or the sonar cable; (2) calculations of the rate

at which injuries or mortalities are likely to occur from all fishing sectors in the PCGF indicate that fewer than one short-tailed albatross are likely to suffer injury or death in the 10-year period in the action area; (3) other methods of fishing not covered by the NMFS Observer Program proposed to be implemented through the proposed action have a very low likelihood of adverse effects rising to the level of significant injury or death to the short-tailed albatross; (4) the estimated rate of injury or death of the species will not preclude the survival or recovery of the species, nor substantially delay the rate at which the species could recover in the absence of this injury or mortality. Furthermore, the anticipated injury or mortality associated with this action alone (and included in the PCGF opinion) is estimated at one albatross over the term of the action, and therefore, will have even less overall impact than the suite of fisheries-related impacts considered in the PCGF opinion; and (5) EPA has included measures to reduce the effects of the discharge of offal in the trawl fleet such as seasonal and geographic restrictions and other considerations to minimize seabird strike (see Description of the Proposed Action).

This conclusion is consistent with the Short-tailed Albatross Recovery Plan which states that the short-tailed albatross are not declining due to seabird bycatch in commercial fisheries (U.S. Fish and Wildlife Service, 2017, p. 19), including the recommendation to continue to collect bycatch information to contribute to detection of deleterious population-level effects (USFWS 2008) and exclude trawl fishing over the Heceta/Stonewall Banks complex.

### **INCIDENTAL TAKE STATEMENT**

Section 9 of the Act and Federal regulation pursuant to section 4(d) of the Act prohibit the take of endangered and threatened species, respectively, without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct. Harm is further defined by the USFWS to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass is defined by the USFWS as intentional or negligent actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2) of the Act, take that is incidental to and not intended as part of the agency action is not considered to be a prohibited taking under the Act provided that such taking is in compliance with the terms and conditions of this Incidental Take Statement.

The measures described below are non-discretionary, and must be undertaken by EPA so that they become binding conditions of any grant or permit issued to any applicant, as appropriate, for the exemption in section 7(o)(2) to apply. EPA has a continuing duty to regulate the activities covered by this Incidental Take Statement. If EPA (1) fails to assume and implement the terms and conditions or (2) fails to require cooperators to adhere to the terms and conditions of the Incidental Take Statement through enforceable terms that are added to the permit or grant document, the protective coverage of section 7(o)(2) may lapse. In order to monitor the impact of incidental take, EPA must report the progress of the action and its impact on the species to the USFWS as specified in this Incidental Take Statement. [50 CFR §402.14(i)(3)]

## **10. AMOUNT OR EXTENT OF TAKE**

The USFWS anticipates average estimated or observed take of no more than one short-tailed albatross over the 10-year term of the action, the issuance the NPDES General Permit for Seafood Processors in Federal Waters offshore of the States of Washington and Oregon. The incidental take is expected to be in the form of injury or mortality, due to collision or entanglement with trawl gear, including the third wire and warp cables.

## **11. EFFECT OF THE TAKE**

In the accompanying biological opinion, the USFWS determined that this level of anticipated take is not likely to result in jeopardy to the species.

## **12. REASONABLE AND PRUDENT MEASURES**

The USFWS believes the following reasonable and prudent measures (RPM) are necessary and appropriate for EPA to minimize take of short-tailed albatross:

- RPM 1. EPA shall minimize the risk of short-tailed albatross interacting with trawl cables. Because short-tailed albatross are vulnerable to striking aerial trawl cables, particularly in the catcher-processor fleet, minimization measures shall be explored and implemented to further reduce the likelihood that they interact with trawl gear.
- RPM 2. EPA shall request inclusion in the multi-stakeholder, Pacific Coast Groundfish Fisheries Endangered Species Working Group as an advisory body to the NMFS and USFWS for the purposes of reducing risk to listed species, including the short-tailed albatross. This group will work toward eliminating data gaps and facilitate adaptive management to minimize and avoid take of short-tailed albatross.
- RPM 3. EPA shall work with NMFS to monitor and report all observed, reported and estimated take of short-tailed albatross interactions with fishing vessels and trawl gear permitted, and evaluate and report on the efficacy of avoidance and minimization measures.
- RPM 4. EPA shall work with NMFS to facilitate the salvage of short-tailed albatross carcasses taken in the PCGF. Because of their rarity and unique life history traits, every effort should be made to retain short-tailed albatross carcasses for scientific and educational purposes.

## **13. TERMS AND CONDITIONS**

In order to be exempt from the prohibitions of section 9 of the Act, the EPA must comply with the following terms and conditions, which implement the reasonable and prudent measures, described above and required reporting/monitoring requirements. These terms and conditions are non-discretionary.

Terms and conditions include monitoring, review, reporting, (see 50 CFR 402.14(i)(3)) and disposition of specimens (see 50 CFR 402.14(i)(1)(v)).

### **13.1. T&C 1 for RPM 1**

To minimize the risk of short-tailed albatross interacting with trawl cables, EPA shall work with NMFS to:

- a. Provide pertinent assistance to the NMFS, as resources allow, for NMFS' investigation of the extent of take associated with trawl gear and new or improved management actions that minimize take as a result of interactions with trawl gear in the PCGF, and specifically associated with the discharge of offal. Management actions considered include:
  - i. The use and effectiveness of streamer lines when using trawl gear;
  - ii. The degree to which minimizing the aerial extent of trawl cables affects the risk of bird strike; and
  - iii. Feasible offal management techniques that decrease attraction of short-tailed albatross to the vicinity of aerial lines.
- b. Based on the research and findings of NMFS's investigations into trawl-associated mortality or injury, EPA shall work with NMFS to implement measures that minimize potential for short-tailed albatross interactions with trawl gear.

### **13.2. T&C 1 for RPM 2**

To request involvement PCGF Endangered Species Workgroup (ESA Workgroup), EPA shall provide a letter to NMFS at the time of permit issuance to formally request inclusion in the ESA Workgroup. This group convenes on a biennial basis and informally meets annually, as needed, to consider all new information, compliance with these terms and conditions, and results of take estimation. EPA shall participate in the ESA Workgroup, to the extent that agenda topics relate this this NPDES General Permit and to seafood processing wastewater discharges.

### **13.3. T&C 1 for RPM 3**

To ensure monitoring and reporting of all observed and reported interactions EPA shall work with NMFS to obtain information regarding trawl-related mortality or injury as soon as possible following the interaction.

### **13.4. T&C 2 for RPM 3**

EPA's reporting requirements shall be met by providing pertinent information to the NMFS in order to supplement the NMFS required PCGF biennial report to the USFWS. The supplemental information shall include any pertinent new data and/or effects of the permitted offal discharge on endangered or threatened species.

### **13.5. T&C 1 for RPM 4**

Report and continue to require observers and commercial fishers report all mortality and injury of short-tailed albatross to:

Office	Phone Number
Newport Field Office Supervisor, Newport Oregon	Weekdays: 541-867-4558, x. 237 Cell: 541-961-6904
Law Enforcement	503-682-6131

### 13.6. T&C 2 for RPM 4

EPA shall work NMFS to ensure the following short-tailed albatross disposition instructions are provided to permittees:

- a. If a dead, injured, or sick short-tailed albatross individual is located, call USFWS 503-231-6179 for handling and disposition instructions. If an observer is on board, they shall be responsible for the disposition of dead, injured, or sick birds; otherwise, the boat captain shall be responsible.
- b. Care should be taken in handling sick or injured specimens to ensure effective treatment and in the handling of dead specimens to preserve biological material in the best possible state for later analysis of cause of death. In conjunction with the care of sick or injured short-tailed albatross or preservation of biological materials from a dead animal, the boat captain or observer has the responsibility to carry out instructions provided by USFWS to ensure that the specimen is not unnecessarily disturbed.
- c. Live birds must be retained in a safe location. Release overboard shall occur if it looks normal and exhibits all of the following traits: the bird is capable of holding its head erect, and the bird responds to noise and motion stimuli; the bird breathes without noise; the bird can flap both wings, and it can retract the wings to a normal folded position on the back; and the bird is capable of elevating itself to stand on both feet, with its toes pointed in the proper direction (forward); and it is dry.
- d. Injured or sick albatross are to be retained in a safe location.
- e. Dead short-tailed albatross must be frozen immediately, with identification tags attached directly to the carcass, and a duplicate identification tag attached to the bag or container holding the carcass. Ideally, the specimen should be frozen at -40°F (-40°C). Identification tags must include all of the following information: species, date of mortality, name of vessel, location (latitude and longitude) of mortality, observer or captain's name (or both), and any band numbers and colors if the specimen has any leg bands. Leg bands must remain attached to the bird.
- f. If the bird is retained alive or dead, it must be surrendered as soon as possible as directed by the USFWS.

The USFWS believes that an average of one short-tailed albatross per 10-year period will be incidentally taken as a result of the proposed action. The reasonable and prudent measures, with their implementing terms and conditions, are designed to minimize the impact of incidental take that might otherwise result from the proposed action. If, during the course of the action, this level of incidental take is exceeded, such incidental take represents new information requiring reinitiation of consultation and review of the reasonable and prudent measures provided. The Federal agency must immediately provide an explanation of the causes of the taking and review with the USFWS the need for possible modification of the reasonable and prudent measures.

The USFWS will not refer the incidental take of any Federally listed migratory bird (in this case, short-tailed albatross) for prosecution under the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

#### 14. REINITIATION NOTICE

This concludes formal consultation on the actions outlined in your Biological Assessment. As provided in (50 CFR § 402.16), reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been maintained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agencies' action that may affect listed species or critical habitat in a manner or to an extent not considered in this BO; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in this BO; or (4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending re-initiation of formal consultation.

If you have any questions regarding this opinion, please contact Laura Todd at (541) 867-4558, x 237. Thank you for your commitment to conserving short-tailed albatrosses and other marine resources.

Sincerely,



Paul Henson, Ph.D.  
State Supervisor

Enclosure

cc:

USFWS-WFWO

USFWS-R1

USFWS-LE

USFWS-AFWO (Leah Kenney)

NMFS

ODFW

WDFW

## REFERENCES

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- Evans Mack, D., Raphael, M. G. & Laake, J. L., 2002. Probability of Detecting Marbled Murrelets at Sea: Effects of Single versus Paired. *The Journal of Wildlife Management*, 66(3), pp. 865-873.
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