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Submitted via First Class Mail and Email

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Re: NOAA's unlawful decision to provide federal funding assistance to industrial ocean fish farms without requisite environmental reviews

Under Secretary Friedman:

On behalf of Friends of the Earth, Center for Biological Diversity, Center for Food Safety, Food and Water Watch, and Recirculating Farms Coalition, we are writing concerning the National Ocean and Atmospheric Administration's (NOAA) unlawful decision to provide federal funding assistance to industrial ocean fish farm in domestic waterways without first conducting any environmental reviews or consultations.¹ We would like to take this opportunity to remind NOAA of its statutory duties (1) to conduct environmental review of the projects receiving funding assistance pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*; and (2) to conduct proper consultations as to whether the projects receiving funding assistance might affect species listed under the Endangered Species Act (ESA) 16 U.S.C. § 1531, *et seq.*²

We are aware that NOAA is placing a high priority on legitimizing and advancing the commercial, net pen aquaculture of finfish in marine waters. This is essentially the equivalent of allowing concentrated animal feedlot operations in our oceans, which have devastating environmental, socio-economic, and public health harms. NOAA has already attempted to open waters in the Gulf of Mexico for permitting such activities, the legality of which is currently

¹ NOAA, "Grant Funds Available for Regional Aquaculture Pilot Projects" (Dec. 1, 2017) <https://www.fisheries.noaa.gov/feature-story/grant-funds-available-regional-aquaculture-pilot-projects>; NOAA, "National Sea Grant College Program 2018 Ocean, Coastal and Great Lakes National Aquaculture Initiative" (Dec. 14, 2017) <https://www.grants.gov/web/grants/view-opportunity.html?oppId=299412>. As indicated at the end of this letter, we are sending copies to each of the Fisheries Commissions and the National Sea Grant College Program.

² The Marine Mammal Protection Act, 16 U.S.C. § 1361, *et seq.*, and the Migratory Bird Treaty Act, 16 U.S.C. § 703, *et seq.*, also raise serious concerns associated with these funding and grant programs. NOAA must also ensure that it has fulfilled all of its applicable obligations pursuant to these laws prior to handing out federal funding assistance.

under litigation.³ In the meantime, NOAA is boldly continuing to financially support industrial ocean fish farming under the guise of “scientific research;” however, these research facilities are openly planning to concurrently pursue commercial operation permits for their sites.⁴

The purpose of this letter is to remind NOAA of its legal duties to fulfill NEPA and ESA processes – and those of other applicable laws – prior to funding industrial ocean fish farming, and to inform the agency that the undersigned organizations are considering taking legal action through all available means to ensure that these obligations are properly fulfilled.

NEPA review is necessary before NOAA or any Fisheries Commissions may dispense funding to industrial ocean fish farming operations. Prior to handing out *any* federal funding assistance to applicants pursuing offshore marine finfish aquaculture projects, NOAA must first undertake environmental review pursuant to NEPA. NEPA is the “basic national charter” for protecting the environment, intended to minimize risk to human health and safety, assure beneficial uses of the environment without degradation, and balance resource uses with high standards of living. 42 U.S.C. § 4331 *et seq.*; 40 C.F.R. § 1500.1. NEPA ensures consideration of these policy goals by requiring federal agencies, including NOAA, to follow specific procedures in evaluating the environmental consequences of their projects prior to taking certain actions. *See* 42 U.S.C. § 4332(C).

Environmental harm from industrial ocean fish farms is both significant and proven. The most harmful (and most popular) method of marine finfish farming involves growing massive populations of finfish in net pens, pods, and cages that allow unrestricted exchange between the facility and the surrounding ocean ecosystem. These methods are highly risky, as they allow for the free discharge of untreated fish waste, excess feed, anti-foulant chemicals and heavy metals from the industrial infrastructure, agricultural drugs such as antibiotics, pests, and diseases. This effluent flows directly into the water and settles onto the ocean floor, which causes ocean acidification and eutrophication. These conditions directly harm the health of coral and shellfish, among other marine life, and lead to the creation of algal blooms and dead zones.

These net pen operations are also highly susceptible to harsh, marine weather conditions, increasing the risk of spilling farmed fish populations into the surrounding waters. These escapes are catastrophic for native wildlife, especially other finfish species due to increased competition for food and spawning grounds, and risk of genetic degradation from interbreeding. Net pens also attract predators and other species to congregate around fish cages, which then get entangled in nets, harassed by acoustic deterrents, and more easily hunted. In March 2017, an industrial net pen operation in Hawaii (which was partially funded by NOAA) caused the death of an endangered monk seal, which was found entangled in the nets.⁵

³ *Gulf Fishermen's Assoc. et al. v. Nat'l Marine Fisheries Serv.*, No. 16-1271 (E.D. La filed Feb. 12, 2016).

⁴ *See* Julia Stevens, Kampachi Farms, LLC., *Velella Epsilon: Pioneering Offshore Aquaculture in the Gulf of Mexico* (Nov. 2, 2017) <http://www.kampachifarm.com/blog/2017/11/2/velella-epsilon-pioneering-offshore-aquaculture-in-the-gulf-of-mexico> (“Kampachi Farms also intends to start discussions with State and Federal agencies and the local community about pioneering an application for a commercial aquaculture permit in the Gulf of Mexico. As part of the Sea Grant project, this process will be documented as a reference for future applicants.”).

⁵ Caleb Jones, USA Today, *Rare Monk Seal Dies in Fish Farm off Hawaii* (Mar. 17 2017), available at <https://www.usatoday.com/story/news/nation/2017/03/17/rare-monk-seal-dies-fish-farm-off-hawaii/99295396/>.

Pursuant to NEPA, agencies generally must undertake environmental review for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). NOAA acknowledges that issuing financial assistance awards and grants – such as the two funding programs at issue here – qualifies as a major Federal action subject to NEPA obligations:

If NOAA has sufficient decision-making authority to approve or deny financial assistance awards, impose conditions on the award (other than standard administrative conditions), or ongoing authority to substantially control or otherwise direct the non-Federal action after the financial assistance award is made, then NEPA compliance is necessary prior to the issuance of the financial assistance award. When considering the proposed action of issuing a financial assistance award under NEPA, the decision maker must consider the impacts of the activities to be funded by the award.⁶

Given the exceptional potential for disruption of the environment caused by industrial ocean fish farms, NEPA review is required prior to NOAA’s funding of these underwater feedlots.

ESA consultation is also likely to be triggered by providing federal funding to industrial ocean fish farming operations. Prior to handing out any federal funding assistance to applicants pursuing offshore marine finfish aquaculture projects, NOAA must first determine whether it must complete mandated consultations pursuant to the ESA. Indeed, given the breadth of coverage of NOAA’s funding programs here, and the vast number of protected species present in each region, it would seem that NOAA will be legally obligated to go beyond making this determination and conduct formal ESA consultations for each of the industrial ocean fish farming projects that will receive funding.

The ESA was enacted to conserve the ecosystems on which threatened and endangered species depend, and to conserve and recover those species so that they no longer require the protections of the ESA. 16 U.S.C. § 1531(b); 16 U.S.C. § 1532(3) (defining conservation as “the use of all methods and procedures which are necessary to bring any endangered...or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary”). Threatened and endangered species are to be “afforded the highest of priorities.” *Tennessee Valley Authority v. Hill*, 47 U.S. 153, 174 (1978). Congress intended that endangered species be given priority even over “primary missions” of federal agencies. *Id.* at 185.

Section 7(a)(2) of the ESA requires federal agencies to ensure that any of their activities, including the granting of licenses and permits, will not jeopardize the continued existence of threatened or endangered species or adversely modify a species’ critical habitat. *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 692 (1995) (citing 16 U.S.C. § 1536(a)(2)); 50 C.F.R. § 402.14(a). To accomplish this goal, the action agency must first determine whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species or designated or proposed critical habitat may be present,

⁶ NOAA, Manual, *Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities* (Jan. 13, 2017) <http://www.nepa.noaa.gov/docs/NOAA-NAO-216-6A-Companion-Manual-01132017.pdf>.

the action agency typically must prepare a “biological assessment” to determine whether the listed species *may* be affected by the proposed action. *Id.* (emphasis added). The biological assessment must generally be completed within 180 days. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(i). Action agencies must formally consult with FWS whenever their actions “may affect listed species or critical habitat.” 50 C.F.R. § 402.14(a). Whether an action affects a listed species or habitat is determined by considering the direct, indirect, and cumulative effects of the agency action, after identifying the environmental baseline, and interrelated or interdependent acts. 50 C.F.R. § 402.02; *see Riverside Irr. Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1991) (stating that the agency must consider incidental and indirect effects on the listed species). Agency “action” consists of “all activities or programs of any kind authorized, *funded*, or carried out, in whole or in part, by Federal agencies in the United States. . . . Examples include, but are not limited to ... (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or *grants-in-aid*; or (d) actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02 (emphasis added). Section 7 applies to “actions in which there is discretionary Federal involvement or control.” *Id.* at § 402.03.

NOAA seeks to provide funding assistance to marine finfish aquaculture projects located along each of the U.S. coastlines (Atlantic, Pacific, and the Gulf of Mexico) as well as in the Great Lakes.⁷ The breadth of marine life in these areas is vast, with at least 159 species under NOAA’s specific jurisdiction, and NOAA must take great care to consult whether any ESA-listed species could be affected by a funded project.⁸ For example, the Gulf of Mexico is home to a multitude of ESA-protected species, including, but certainly not limited to, a variety of sea turtles, whales, the Gulf sturgeon, Smalltooth sawfish, and the recently-listed giant manta ray.⁹ The Great Lakes region hosts a number of protected species, including birds like the Piping plover and Rufa Red knot, amphibians such as the Lake Erie water snake, shellfish like the Northern riffleshell Rayed bean, and Snuffbox, and plants, including the Dwarf lake iris and Fassett’s locoweed. The Pacific coast is home to a number of ESA-protected species as well, including Pacific salmon species and other fish such as Abalone, yelloweye rockfish, and the Scalloped hammerhead shark, a number of marine mammals including whales, seals, and sea lions, and various sea turtles.¹⁰ Finally, the range of ESA-protected species along the Atlantic coast include the Atlantic salmon, Shortnose and Atlantic sturgeon, the Blue, Fin, Humpback, North Atlantic Right, Sei, and Sperm

⁷ *See, e.g.,* NOAA, *Grant Funds Available for Regional Aquaculture Pilot Projects* (Dec. 1, 2017) <https://www.fisheries.noaa.gov/feature-story/grant-funds-available-regional-aquaculture-pilot-projects> (announcing availability of federal funds for finfish aquaculture projects through the Atlantic, Gulf, and Pacific States Marine Fisheries Commissions); NOAA, National Sea Grant College Program 2018 Ocean, Coastal and Great Lakes National Aquaculture Initiative (Dec. 14, 2017) <https://www.grants.gov/web/grants/view-opportunity.html?oppId=299412> (describing competition for grants of federal funds to the “U.S. ocean, coastal and Great Lakes aquaculture sector” for, *inter alia*, “the aquaculture of ocean, coastal, or Great Lakes fish”).

⁸ NOAA Fisheries, Endangered and Threatened Marine Species under NMFS’ Jurisdiction (last visited Dec. 20, 2017) <http://www.nmfs.noaa.gov/pr/species/esa/listed.htm>.

⁹ NOAA Fisheries Services, Southeast Regional Office, An Overview of Protected Species in the Gulf of Mexico (Feb. 2012), http://sero.nmfs.noaa.gov/protected_resources/outreach_and_education/documents/protected_species_gom.pdf; *see also* NOAA, Endangered and Threatened Wildlife and Plants; Final Rule to List the Giant Manta Ray as Threatened under the Endangered Species Act, 83 Fed. Reg. 2,916 (Jan. 22, 2018).

¹⁰ NOAA Fisheries, West Coast Region, Species Lists (last visited Dec. 20, 2017) http://www.westcoast.fisheries.noaa.gov/protected_species/species_list/species_lists.html.

whale species, and the Green Sea, Hawksbille, Kemp's Ridley, Leatherback, and Loggerhead turtle species.¹¹

NOAA announced that it intends to provide grants and financial aid to industrial ocean fish farming projects, which have been proven to directly impact and change the ocean ecosystem. Therefore, the agency is legally obligated under ESA to first ensure that these industrial activities will not jeopardize the continued existence of the many threatened and endangered species living in these ocean ecosystems, or adversely modify those species' critical habitats.

In conclusion, until NOAA fulfills its obligations under ESA and NEPA – and potentially additional laws – regarding the impact of industrial ocean fish farming, it may not provide *any* federal funding assistance to support related projects or facilities. Should NOAA move forward with dispensing funds through the Aquaculture Pilot Project or Sea Grant program without first complying with its legal duties under ESA and NEPA, the undersigned organizations are considering taking legal action against the agency for these violations. We are actively awaiting your timely response to this letter within 30 calendar days, and if you have any questions about this communication, please do not hesitate to contact us directly.

Sincerely,

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¹¹ NOAA Fisheries, Greater Atlantic Region, Species Listed under the Endangered Species Act (last visited Dec. 20, 2017) <https://www.greateratlantic.fisheries.noaa.gov/protected/soc/garsppresenttable01192016.pdf>.

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