September 6, 2016

Agenda Item J.5.b
Supplemental Public Comment 2
September 2016

Herb Pollard, Chair
Pacific Fishery Management Council
1100 NE Ambassador Place, #101
Portland, Oregon 97220

RE: Agenda Item J.5 - Federal Drift Gillnet Permit Amendment

Dear Chair Pollard and Council members:

We write in regards to the federalization of drift gillnet (DGN) permits currently administered by the State of California. Given the DGN fishery is conducted solely in federal waters, we support this action. However, we have concerns over the way the Council proposes to transfer permit authority without consideration of alternatives that would reduce latent capacity or otherwise meet bycatch reduction goals. Therefore, we offer recommendations to align with the Council's obligations under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and National Environmental Policy Act (NEPA). Specifically, we ask the Council to develop a more comprehensive range of alternatives (ROAs) that includes options to address bycatch in the DGN fishery through a reduction in latent permits and opportunities for current permit holders to trade in their permits for deep-set buoy gear permits.

Federalizing DGN permits is a management measure under the MSA. As such, it must comply with the MSA's National Standards, including minimizing bycatch. 16 U.S.C. 1851(a). Yet the Council moved to fast-track the federalization of DGN permits without giving consideration to how the federalization would address latent permits, how DGN permits could be tied to a deep-set buoy gear fishery or what the appropriate number of permits might be to meet bycatch reduction goals. Federalizing all of the state DGN permits without considering future management implications and additional alternatives that meet MSA standards would fall far short of fulfilling the Council's management responsibilities.

An agency must "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values." 40 C.F.R. § 1501.2; *Andrus v. Sierra Club,* 442 U.S. 347, 351, 99 S.Ct. 2335, 60 L.Ed.2d 943 (1979). The fundamental purpose of NEPA is to ensure that agency actions are taken only after full consideration of their potential impacts. An essential part of that

analysis is to consider a reasonable range of alternatives to the action the agency is considering. 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1502.14(d).

An agency may not predetermine the outcome of its analysis by constraining the range of alternatives it considers. Nor may an agency decline to analyze alternatives simply because doing so would take more time. *See Oregon Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1099-1100 (9th Cir. 2010) (striking down a decision by the Army Corps of Engineers to not consider alternatives other than "no action" and "preferred" because it would have involved additional planning or lead time: "But rejecting these measures before performing any of this analysis turns the NEPA process on its head. Rather, the whole point of NEPA is to require the Corps to open its eyes and consider options other than its initially preferred method.").

In a case similar to this situation, *W. Watersheds Project v. Abbey*, the agency analyzed four alternatives for renewing grazing permits on federal land, all of which maintained the permits at present levels. 719 F.3d 1035, 1040-41 (9th Cir. 2013). The agency argued that renewing the permits would allow for future management improvements and would not cause any ill effects on the environment. The court disagreed, finding that the agency's decision to simply re-adopt the same level of grazing without considering any reductions or whether continued grazing was fully consistent with governing law violated NEPA. *Id.* at 1050-53.

To meet these requirements, we ask that the Council analyze additional alternatives to federalizing the DGN permits. The Council's Swordfish Management and Monitoring Plan detailed several actions that would "limit fishing effort in the DGN fishery."[1] These are reasonable alternatives that should be analyzed for this proposed action including actions that would:

- Implement a federal limited entry permit for the DGN fishery. Possession of this federal limited entry permit would be required to fish with DGN gear in federal waters.
- Determine the appropriate number of federal limited entry permits based on the bycatch reduction goal.
- Develop appropriate qualification criteria to obtain the federal permit.
- Consider how a federal limited entry permit could facilitate transitioning DGN fishery participants to other gear types. For example, a limited entry permit could be designed to include endorsements for more than one gear type or to encourage swapping a DGN permit for a permit for another fishery/gear type.

[1] Pacific Coast Swordfish Fishery Management and Monitoring Plan, September 2015 Draft, p. 4.

- Investigate mechanisms to compensate state permit holders that do not qualify for a federal permit.[2]

The Highly Migratory Species Management Team (HMSMT) has previously provided data that would be useful in determining appropriate criteria for a federal limited entry DGN fishery such as the annual landings of swordfish and the total number of active and latent permits[3]. For instance, at least 31 permits have been latent for more than 15 years.[4] Retiring these latent permits would promote the MSA's bycatch minimization standards by ensuring that the permits are not used to expand DGN fishing effort in the future. It would also be consistent with National Standard 4, in that retiring latent permits would be fair and equitable, and reasonably calculated to promote conservation. Linking latent permit retirement with transitioning to more selective gear would support continued fishing opportunities.

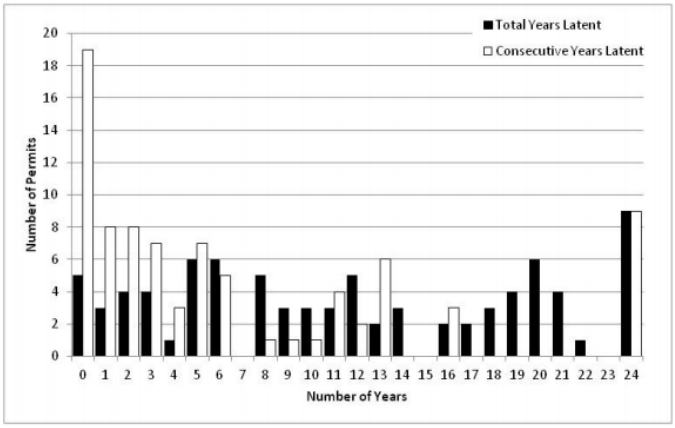

Figure 1. DGN Permit Latency 1990-2013 for permits issued in 2011
Source: HMSMT Report March 2014 citing California's Commercial Fisheries Information System

As recognized by the California Department of Fish and Wildlife and NOAA Fisheries in their June 2014 report to Council, "[a] concern about latent permits and excess capacity in general is that the issue represents available but unused opportunity for fishing vessels to participate in a fishery. If these latent permits were to suddenly start fishing, it certainly would put pressure on the swordfish population, but more importantly, may pose greater risks to protected species."[5] These are valid considerations that should be addressed and analyzed in the FMP amendment process. The reasons given for rejecting additional alternatives that would reduce capacity are not significant enough to forgo analysis of other alternatives at this time. The inclusion of a reasonable range of

[2] *Id*.
[3] *See* HMSMT Report, March 2014 and HMSMT Report, September 2016.
[4] HMSMT Report, March 2014, Figure 6, p 12.
[5] http://www.pcouncil.org/wp-content/uploads/E2b_SUP_NMFS-CDFW_Rpt_JUNE2014BB.pdf, p.3.

alternatives that would fully inform the Council's decision making is integral to fisheries management under the MSA and NEPA.

The Council has not yet adopted a purpose and need statement for this action and, therefore, it is not appropriate to assume that the Council intends to move forward with federalizing DGN permits expeditiously. It is unclear what benefit quickly federalizing the DGN permits provides when compared to the conservation benefits that could be gained by analyzing additional alternatives to the all or nothing approach proposed by the HMSMT.

While we agree that a federal permit could "give the Council more control over participation in the fishery over the long term,"[6] it appears that holders of a federal DGN permit would still need to obtain a state general gillnet permit.[7] Therefore, it is unclear how this action would meet the HMSMT's draft purpose and need statement[8] as the California state legislature could still act. It is also unclear how this action is necessary and appropriate as required by the MSA, 16 U.S.C. 1852(h)(8), when it does nothing to further the conservation or management of this fishery. These questions should be resolved prior to the Council initiating an FMP amendment to federalize the DGN permits.

In conclusion, we ask the Council to expand the range of alternatives for federalizing the DGN permits currently held by the state of California to include alternatives that would address latent capacity in the fishery and provide options for permit trade-ins. Thank you for your consideration of these comments. We look forward to a robust discussion of potential alternatives at the September meeting.

Sincerely,

Andrea A. Treece
Earthjustice

Paul Shively
The Pew Charitable Trusts

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[6] September 2016, Agenda Item J.5: Federal Drift Gillnet Permit Amendment Situation Summary, p.1.
[7] September 2016, Agenda Item J.5.a, HMSMT Report, p. 4 ("It is the HMSMT's understanding that if the Council decides to federalize the state DGN permits and California, as a result, ceases to issue the current permits, permit holders for the new Federal DGN endorsement would still be required to hold a California-issued state general gillnet (GGN) permit.")
[8] September 2016, Agenda Item J.5.a, HMSMT Report, p. 4 ("The purpose of the proposed action is to rapidly and simply transition DGN permitting to MSA authority. This would provide the Council more control over future management measures including DGN permit transfer provisions, permit qualifications, and participation. The proposed action is needed to better-coordinate DGN management under the HMS FMP. Leaving permitting with the state adds a degree of uncertainty, as state bills can and have been introduced which would materially impair the Council's ability to manage the fishery.")