

We have scheduled a scoping webinar for October 20, 2016 at 5:00 p.m. during which we will take and discuss scoping comments on future Jonah crab regulations. Please use the link and call in information provided below:

- Webinar: <https://noaaevents.webex.com/noaaevents/onstage/g.php?MTID=ed272b501b73da9f75dff6eb36ca49229>,
- Webinar access code: Meeting123,
- Telephone Number: 877-661-2084,
- Participant Code: 613780.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: October 6, 2016.

**Samuel D. Rauch III,**

Deputy Assistant Administrator for  
Regulatory Programs, National Marine  
Fisheries Service.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 660

[Docket No. 160728670-6904-01]

RIN 0648-BG23

#### **Fisheries off West Coast States; Highly Migratory Fisheries; California Drift Gillnet Fishery; Protected Species Hard Caps for the California/Oregon Large-Mesh Drift Gillnet Fishery**

**AGENCY:** National Marine Fisheries  
Service (NMFS), National Oceanic and  
Atmospheric Administration (NOAA),  
Commerce.

**ACTION:** Proposed rule; request for  
comments.

**SUMMARY:** NMFS is proposing  
regulations under the authority of  
Section 303(b) of the Magnuson-Stevens  
Fishery Conservation and Management  
Act (MSA) to implement an immediate  
closure of the California thresher shark/  
swordfish drift gillnet (DGN) (mesh size  
≥14 inches) fishery if a hard cap (*i.e.*,  
limit) on mortality/injury is met or  
exceeded for certain protected species  
during a rolling 2-year period. The  
length of the closure would be  
dependent on when—during the 2-year  
period—the hard cap is reached.

**DATES:** Comments on the proposed rule  
and supporting documents must be  
submitted in writing by November 28,  
2016.

**ADDRESSES:** You may submit comments  
on this document, the draft  
Environmental Assessment (EA), draft  
Regulatory Impact Review (RIR) and

Initial Regulatory Flexibility Analysis  
(IRFA), identified by NOAA-NMFS-  
2016-0123, by any of the following  
methods:

- **Electronic Submission:** Submit all  
electronic public comments via the  
Federal e-Rulemaking Portal. Go to  
[http://www.regulations.gov/](http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-0123)  
#!docketDetail;D=NOAA-NMFS-2016-  
0123, click the “Comment Now!” icon,  
complete the required fields, and enter  
or attach your comments.
- **Mail:** Submit written comments to  
Lyle Enriquez, NMFS West Coast  
Region, 501 W. Ocean Blvd., Suite 4200,  
Long Beach, CA 90802. Include the  
identifier “NOAA-NMFS-2016-0123”  
in the comments.

**Instructions:** Comments must be  
submitted by one of the above methods  
to ensure they are received,  
documented, and considered by NMFS.  
Comments sent by any other method, to  
any other address or individual, or  
received after the end of the comment  
period, may not be considered. All  
comments received are a part of the  
public record and will generally be  
posted for public viewing on  
[www.regulations.gov](http://www.regulations.gov) without change.  
All personal identifying information  
(*e.g.*, name, address, etc.) submitted  
voluntarily by the sender will be  
publicly accessible. Do not submit  
confidential business information, or  
otherwise sensitive or protected  
information. NMFS will accept  
anonymous comments (enter “N/A” in  
the required fields if you wish to remain  
anonymous).

Copies of the draft EA, draft RIR,  
IRFA, and other supporting documents  
are available via the Federal  
eRulemaking Portal: [http://](http://www.regulations.gov)  
[www.regulations.gov](http://www.regulations.gov), docket NOAA-  
NMFS-2016-0123 or by contacting the  
Regional Administrator, Barry Thom,  
NMFS West Coast Region, 1201 NE  
Lloyd Blvd., Portland, OR 97232-2182,  
or [RegionalAdministrator.WCRHMS@](mailto:RegionalAdministrator.WCRHMS@noaa.gov)  
[noaa.gov](mailto:noaa.gov).

**FOR FURTHER INFORMATION CONTACT:** Lyle  
Enriquez, NMFS, West Coast Region,  
562-980-4025, or [Lyle.Enriquez@](mailto:Lyle.Enriquez@noaa.gov)  
[noaa.gov](mailto:noaa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

The DGN fishery for swordfish and  
thresher shark (14” minimum mesh size)  
is federally managed under the Federal  
Fishery Management Plan for U.S. West  
Coast Fisheries for Highly Migratory  
Species (HMS FMP) and via regulations  
of the states of California and Oregon to  
conserve target and non-target stocks,  
including protected species that are  
incidentally captured. The HMS FMP

was prepared by the Pacific Fishery  
Management Council (Council) and is  
implemented under the authority of the  
MSA by regulations at 50 CFR part 660.

The DGN fishery has been subject to  
a number of seasonal closures. Since  
1982, it has been closed inside the  
entire U.S. West Coast exclusive  
economic zone (EEZ) from February 1 to  
April 30 of each year. In 1986, a closure  
was established within 75 miles of the  
California mainland from June 1  
through Aug 14 of each year to conserve  
common thresher sharks; this closure  
was extended to include May in 1990  
and later years. In 2001, NMFS  
implemented two Pacific sea turtle  
conservation areas on the U.S. West  
Coast with seasonal DGN restrictions to  
protect endangered leatherback and  
loggerhead sea turtles. The larger of the  
two closures spans the EEZ north of  
Point Conception, CA (34°27’ N.  
latitude) to mid-Oregon (45° N. latitude)  
and west to 129° W. longitude. DGN  
fishing is prohibited annually within  
this conservation area from August 15 to  
November 15 to protect leatherback sea  
turtles. A smaller closure was  
implemented to protect Pacific  
loggerhead turtles from DGN gear from  
June 1–August 31 of each year during a  
forecasted or occurring El Niño event,  
and is located south of Point  
Conception, CA, and east of 120° W.  
longitude (72 FR 31756). The number of  
active vessels in the DGN fishery has  
remained under 50 vessels since 2003,  
and there has been an average of 20  
active vessels per year from 2010  
through 2015.

Since 1990, NMFS has targeted 20  
percent observer coverage of the DGN  
fishery each year, per recommendations  
from the Southwest Fisheries Science  
Center (NMFS 1989). NMFS’ fleet-wide  
observer coverage target has been 30  
percent since 2013. Since some DGN  
vessels are unobservable due to safety or  
accommodations requirements, the  
observable vessels are observed at a rate  
higher than 30 percent to attain the  
fleet-wide 30 percent coverage. Four to  
six DGN vessels have been unobservable  
during each fishing season from 2011 to  
present.

##### **Council Background**

In March 2012, the Council tasked  
NMFS with determining the steps  
needed to implement protected species  
hard caps in the DGN fishery. Originally  
concerned with sea turtle interactions,  
the Council expanded its scope to  
include marine mammals at its June  
2014 meeting. At that meeting, the  
Council directed its Highly Migratory  
Species Management Team (HMSMT) to  
begin developing a range of alternatives

to establish hard caps on high-priority protected species (*i.e.* sea turtles and marine mammals) incidentally caught in the DGN fishery. In September 2014, the Council selected a Range of Alternatives and Preliminary Preferred Alternative (PPA); however, the HMSMT identified implementation issues with the Council's PPA, and an additional PPA, identified as the California Department of Fish and Wildlife (CDFW) PPA, was selected in March 2015. In June, the Council added a 2-year hard cap sub-option to the Council hard cap PPA and the CDFW hard cap PPA, and an additional alternative that modified the CDFW PPA was added in September 2015. This alternative contained 2-year rolling hard caps based on observed mortality/injury; the Council selected this alternative as its Final Preferred Alternative (FPA).

#### Proposed Regulations for Hard Cap Limits

The implementation of hard caps is intended to manage the fishery under the MSA to protect certain non-target species. Its purpose is not to manage marine mammal or endangered species populations, but rather to enhance the provisions of ESA and the MMPA under MSA Section 303(b)(12) and National Standard 9. This proposed rule would implement the Council's FPA, which would establish 2-year rolling hard caps on observed mortality and injury to fin, humpback, and sperm whales, leatherback, loggerhead, olive ridley, and green sea turtles, short-fin pilot whales, and bottlenose dolphins in the DGN fishery. The definition of injury is taken from the NMFS West Coast Region Observer Program field manual. Observers record protected species released as Alive, Injured, or Dead. Observer program staff reviews observer data forms and notes to make a final determination of the condition of entangled protected species. To determine whether a hard cap has been reached, NMFS would count observed mortalities and injuries to these species during the current DGN fishing season (May 1 through January 31) and the previous fishing season. If a cap were reached, the DGN fishery would close until the 2-year (*i.e.* two fishing seasons) mortality and injury for all species is below their hard cap value. The DGN fishery would then re-open on May 1 of the subsequent fishing season. The Council recommended hard cap values for when the DGN observer coverage level is less than 75 percent; the Council will revisit hard cap values when observer coverage becomes greater than 75 percent.

TABLE 1—PROPOSED PROTECTED SPECIES HARD CAPS FOR DRIFT GILLNET FISHERY

Species	Rolling 2-year hard cap
Fin Whale .....	2
Humpback Whale .....	2
Sperm Whale .....	2
Leatherback Sea Turtle .....	2
Loggerhead Sea Turtle .....	2
Olive Ridley Sea Turtle .....	2
Green Sea Turtle .....	2
Short-fin Pilot Whale (CA/OR/WA stock) .....	4
Bottlenose Dolphin (CA/OR/WA stock) .....	4

#### Fishery Closure Procedures

NMFS will report observed protected species mortalities and injuries to help participants in the DGN fishery plan for the possibility of a hard cap being reached. If, as determined by NMFS, the DGN fleet meets or exceeds a hard cap during a rolling 2-year period, the fishery will be closed. NMFS will publish a notice in the **Federal Register** announcing the specified beginning and end dates of the closure. Upon the effective date identified in the **Federal Register** Notice, a DGN vessel may not be used to target, retain on board, transship, or land any additional fish using DGN gear in the U.S. West Coast EEZ during the period specified in the announcement. Any fish already on board a DGN fishing vessel on the effective date may be retained on board, transshipped, and/or landed, to the extent authorized by applicable laws and regulations, if they are landed within 4 days after the effective date. NMFS will notify vessel owners/operators of the closure by Vessel Monitoring System communication to the fleet stating when large-mesh drift gillnet fishing is closed. Notification will also be made by postal mail and a posting on the NMFS regional Web site.

#### Classification

Pursuant to section 304(b)(1)(A) of the MSA, the NMFS West Coast Regional Administrator has determined that this proposed rule is consistent with the HMS FMP, other provisions of the MSA, and other applicable law, subject to further consideration after public comment.

There are no new collection-of-information requirements associated with this action that are subject to the Paperwork Reduction Act (PRA), and existing collection-of-information requirements still apply under the following Control Numbers: 0648–0593. Notwithstanding any other provision of

the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection-of-information subject to the requirements of the PRA, unless that collection-of-information displays a currently valid Office of Management and Budget control number.

NMFS prepared a draft EA for the proposed regulations that discusses the impact on the environment as a result of this rule. The proposed action will have minor beneficial environmental impacts on target, not-target, and protected species and negative economic impacts to the DGN fleet. All of the proposed alternatives would result in a negative economic impact; however, the Council's FPA would result in a limited economic impact when compared to the other alternatives (a more detailed explanation can be found in the IRFA). A copy of the draft EA is available from NMFS (see **ADDRESSES**).

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

On December 29, 2015, the National Marine Fisheries Service (NMFS) issued a final rule establishing a small business size standard of \$11 million in annual gross receipts for all businesses primarily engaged in the commercial fishing industry (NAICS 11411) for Regulatory Flexibility Act (RFA) compliance purposes only (80 FR 81194, December 29, 2015). The \$11 million standard became effective on July 1, 2016, and is to be used in place of the U.S. Small Business Administration's (SBA) current standards of \$20.5 million, \$5.5 million, and \$7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing (NAICS 114119) sectors of the U.S. commercial fishing industry in all NMFS rules subject to the RFA after July 1, 2016. *Id.* at 81194.

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A summary of the analysis follows. A copy of this analysis is available from NMFS (see **ADDRESSES**).

There are currently 73 individual permit holders with valid California Department of Fish and Wildlife drift gillnet permits; however, many permits remain inactive. On average, 20 vessels

participated in the fishery each year from 2010 through 2015. In 2015, 18 vessels participated in the fishery with total landings equaling 96 metric tons (mt) (round weight), about 5.3 mt on average per vessel. Total landings included 18 mt of common thresher shark, 6 mt of shortfin mako shark, 66 mt of swordfish, and 5 mt of tunas. All participants in the fishery are considered small businesses since average annual per vessel revenues persist well below the \$11 million threshold.

The Council considered six alternatives for protected species hard caps for the DGN fishery before selecting Alternative 6 as their FPA. Compared to the baseline, the proposed regulatory action (*i.e.*, based on Alternative 6) would result in a \$4,596 annual loss per vessel based on a DGN fleet size of 20 vessels. These potential adverse economic effects of the proposed regulations appear to be limited. DGN effort is variable over the course of a fishing season, as vessels may choose to fish for salmon, albacore, and other marketable species based on abundance and environmental conditions, which may mitigate some of the anticipated economic losses. If vessel operators are successful in reducing the frequency of hard cap species catch in the future, the DGN fishery would close less often. However, given the many existing regulatory measures to reduce protected species interactions in the DGN fishery to minimal levels, the degree to which further take reductions can be realized through fishermen's deliberate effort to avoid reaching caps cannot be determined.

Action Alternatives 1 through 4 were estimated to produce fewer costs to the fleet than the FPA; however, these alternatives presented significant implementation challenges. The evaluation of the fishery against hard caps in each of these Alternatives was based on an estimated mortality and serious injury (M&SI) calculation derived from observer coverage levels. The current NMFS process under the MMPA for making M&SI determinations is an extensive and multi-step process that takes months to complete and occurs at the end of each calendar year. It was deemed that this process, therefore, would not be responsive enough to inseason interactions with protected species. NMFS would have to create an expedited M&SI assessment process to make a more timely determination, which would have further delayed this action. Additionally, observer coverage rates for the DGN fishery vary between and

within fishing seasons. This makes it difficult to determine the coverage rate at the time an interaction occurs and then extrapolate observed M&SI for comparison to the hard caps. Similarly, using a generalized observer coverage rate is problematic because DGN vessels often participate in multiple fisheries based on environmental factors and the presence of different species. This adds to the variation in observer coverage levels over the course of a fishing season. Lastly, because fishing effort has been low compared to historical levels, a small change in observed fishing effort can have a potentially big effect on the observer coverage rate if unobserved effort does not change commensurately.

In response to the identified implementation issues with Alternatives 1 through 4, the CDFW proposed Alternative 5 with two sub-Alternatives. Based on Alternative 5 sub-option 1, the DGN fishery would be expected to meet or exceed a hard cap seven out of thirteen fishing seasons, using historical observations (there is, however, less fishing effort in recent years, so the fishery would be expected to close fewer than seven times under this Alternative). Using Alternative 5 sub-option 2, the fishery would be expected to close in 14.6 percent of simulated seasons, with the possibility of closing for more than one full fishing season. While Alternative 5 would produce greater beneficial effects to target, non-target, and protected species than the other alternatives, the results of the economic analysis indicate that it would have the greatest economic impact and not be conducive to supporting an economically viable swordfish fishery. The Council's FPA, Alternative 6, is the least costly alternative of those that did not present significant implementation issues.

NMFS considers all entities subject to this action to be small entities as defined NMFS' size standards. The small entities that would be affected by the proposed action are all U.S. commercial DGN vessels that may be used in the California/Oregon large-mesh DGN fishery. Because each affected vessel is a small business, the proposed rule has an equal effect on all of these small entities. Therefore, the proposed action will impact all these small entities in the same manner. This rulemaking is not anticipated to have a significant economic impact on a substantial number of small entities, or place small entities at a disadvantage to large entities.

#### List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Reporting, and recordkeeping requirements.

Dated: October 6, 2016.

**Samuel D. Rauch III,**  
Deputy Assistant Administrator for  
Regulatory Programs, National Marine  
Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 660 is proposed to be amended as follows:

#### PART 660—FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 continues to read as follows:

**Authority:** 16 U.S.C. 1801 *et seq.*, 16 U.S.C. 773 *et seq.*, and 16 U.S.C. 7001 *et seq.*

■ 2. In § 660.702, add the definition for "Injury" in alphabetical order to read as follows:

#### § 660.702 Definitions.

\* \* \* \* \*

*Injury*, when referring to marine mammals and sea turtles, means the animal has been released with obvious physical injury or with attached fishing gear.

\* \* \* \* \*

■ 3. In § 660.705, add paragraphs (tt) and (uu) to read as follows:

#### § 660.705 Prohibitions.

\* \* \* \* \*

(tt) Fish with a large-mesh drift gillnet (mesh size  $\geq 14$  inches) in the U.S. West Coast Exclusive Economic Zone during the time the fishery is closed pursuant to § 660.713(h)(2)(ii).

(uu) Retain on board, transship, or land any fish caught with a large-mesh drift gillnet (mesh size  $\geq 14$  inches) later than 4 days after the effective date of a drift gillnet fishery closure and before the drift gillnet fishery re-opens pursuant to § 660.713(h)(2)(ii).

■ 4. In § 660.713, add paragraph (h) to read as follows:

#### § 660.713 Drift gillnet fishery.

\* \* \* \* \*

(h) Limits on protected species mortalities and injuries.

(1) Maximum 2-year hard caps are established on the number of sea turtle and marine mammal mortalities and injuries that occur as a result of observed interactions with large-mesh drift gillnets (mesh size  $\geq 14$  inches) deployed by vessels registered for use under HMS permits. Mortalities and injuries during the current fishing season (May 1 through January 31) and the previous fishing season are counted towards the hard caps. The mortality and injury hard caps are as follows:



Species	Rolling 2-year hard cap
Fin Whale .....	2
Humpback Whale .....	2
Sperm Whale .....	2
Leatherback Sea Turtle .....	2
Loggerhead Sea Turtle .....	2
Olive Ridley Sea Turtle .....	2
Green Sea Turtle .....	2
Short-fin Pilot Whale (CA/OR/ WA stock) .....	4
Bottlenose Dolphin (CA/OR/WA stock) .....	4

(2) Upon determination by the Regional Administrator that, based on data from NMFS observers or a NMFS Electronic Monitoring program, the fishery has reached any of the protected species hard caps during a given 2-year period:

(i) As soon as practicable, the Regional Administrator will file for publication at the Office of the Federal Register a notification that the fishery has reached a protected species hard cap. The notification will include an

advisement that the large-mesh drift gillnet (mesh size  $\geq 14$  inches) fishery shall be closed, and that drift gillnet fishing in the U.S. West Coast Exclusive Economic Zone by vessels registered for use under HMS permits will be prohibited beginning at a specified date and ending at a specified date. Drift gillnet fishing will then be allowed beginning May 1 of the year when observed mortality and injury of each species during the previous May 1 through January 31 fishing season is below its hard cap value. Coincidental with the filing of the notification, the Regional Administrator will also provide actual notice that the large-mesh drift gillnet (mesh size  $\geq 14$  inches) fishery shall be closed, and that drift gillnet fishing in the U.S. West Coast Exclusive Economic Zone by vessels registered for use under HMS permits will be prohibited beginning at a specified date, to all holders of HMS permits with a drift gillnet endorsement via VMS communication, postal mail, and a posting on the NMFS regional Web site.

(ii) Beginning on the fishery closure date published in the **Federal Register** and indicated by the Regional Administrator in the notification provided to vessel operators and permit holders under paragraph (h)(2)(i) of this section, and until the specified ending date, the large-mesh drift gillnet (mesh size  $\geq 14$  inches) fishery shall be closed. During the closure period commercial fishing vessels registered for use under HMS permits may not be used to target, retain on board, transship, or land fish captured with a large-mesh drift gillnet (mesh size  $\geq 14$  inches), with the exception that any fish already on board a fishing vessel on the effective date of the notice may be retained on board, transshipped, and/or landed, to the extent authorized by applicable laws and regulations, provided such fish are landed within 4 days after the effective date published in the fishing closure notice.

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