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Supplemental NMFS/CDFW Report  
November 2016)

JOINT REPORT BETWEEN THE NATIONAL MARINE FISHERIES SERVICE (NMFS)  
AND CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE (CDFW)  
ON THE FEDERALIZATION OF DRIFT GILLNET (DGN) PERMITS

**I. Introduction**

The Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP) adopted all federal conservation and management measures already in place under the Marine Mammal Protection Act, Endangered Species Act, and all State of California gear restrictions and time/area closures.<sup>1</sup> However, the HMS FMP did not incorporate the States' large-mesh DGN limited entry (LE) programs. Currently, the State of California has an active limited entry program, the State of Oregon no longer issues permits, and DGN fishing is prohibited off the State of Washington. In March 2014, the Pacific Fishery Management Council (Council) requested that NMFS provide a report in June 2014 outlining solutions on “transitioning the swordfish fishery under [Magnuson-Stevens Fishery Conservation and Management Act] authority, including federal permit options that would replace the current California State permit regime.”<sup>2</sup>

In November 2014, the Council tasked the Highly Migratory Species Management Team (HMSMT) with preparing a purpose and need statement, goals, and objectives for a Drift Gillnet Management and Monitoring Plan,<sup>3</sup> and expanded the scope of the plan to be the “Swordfish Management and Monitoring Plan (SMMP)” in March 2015.<sup>4</sup> The draft SMMP, submitted in September 2015, outlined various actions to be taken under the plan, including the implementation of a federal LE permit for the DGN fishery.<sup>5</sup>

The Council tasked the HMSMT to develop a range of alternatives for a federal DGN permit program in June 2016,<sup>6</sup> and, in September 2016, the Council adopted the following Range of Alternatives:<sup>7</sup>

- **No action alternative (status quo):** The Council would not move forward with creating a federal DGN permit. DGN permitting would continue under the State of California Limited Entry permit program.
- **Alternative 1:** Federalization of DGN permitting as currently issued by the State of California. As soon as possible after Council final action, only fishers authorized to fish

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<sup>1</sup> [Joint NMFS/CDFW Report, June 2014 Council Meeting](#)

<sup>2</sup> [March 2014 Council Meeting Decision Summary Document](#)

<sup>3</sup> [November 2014 Council Meeting Decision Summary Document](#)

<sup>4</sup> [March 2015 Council Meeting Decision Summary Document](#)

<sup>5</sup> [Draft Swordfish Management and Monitoring Plan, September Briefing Book 2015](#)

<sup>6</sup> [June 2016 Council Meeting Decision Summary Document](#)

<sup>7</sup> [September 2016 Council Meeting Decision Summary Document](#)

with large mesh DGN gear under state law would be entitled to a NMFS commercial highly migratory species (HMS) permit endorsed for DGN. This would mean that fishers who hold valid state DGN permits on the date of Final Rule publication would be eligible to possess an HMS permit DGN endorsement. Permits could only be transferred to a new owner once every three years.

Since September, NMFS and CDFW staff have met to discuss specific details on the plan, recognizing the goal of a seamless transition from a state to a federal permit program. There are differences in administrative procedures between the two agencies, and substantial progress has been made to minimize the practical effects of these differences. This report provides an outline of the current California LE DGN permitting system, an overview of the federal HMS permit endorsement program, the management measures that could be included in a federal DGN permit program, and an implementation timeline.

## **II. California Limited Entry Drift Gillnet Permit**

Prior to the 1980s, commercial take of swordfish was only permitted by hook and line or harpoon under a California issued swordfish permit. In the 1970s, gill and trammel nets were used to harvest thresher shark off California, and while targeting of swordfish was prohibited, swordfish caught incidental to thresher shark were allowed to be kept and sold. As the gill and trammel net fishery expanded, participants found that swordfish was not only profitable, but preferred over thresher shark. Since Fish and Game Code (FGC) already limited the directed commercial take of swordfish to hook and line and harpoon gears and there was concern over the large number of vessels using gill and trammel nets, the legislature established new LE permits in 1982 for the large-mesh DGN fishery targeting swordfish and sharks. The new LE permits were separate from, but in addition to, the LE permit required for any type of gillnet fishing (Hanan, 1993).<sup>8</sup> At that time, more than 200 vessels were actively fishing for thresher shark and swordfish, but the California legislature capped the large-mesh fishery to not exceed 150 permits once attrition reduced the fleet to that number.

### *Permit Specifics*

California commercial fishing permits are issued annually for the fishing year, which lasts from April 1 to March 31 of the following year. If not renewed annually, the permits expire and cease to exist after the one-year renewal period has passed (however, a permit holder can petition the Fish and Game Commission to have their permit reinstated within a year of expiration under specific circumstances). LE DGN permits currently cost \$460.50 per year, an amount which is adjusted annually. A swordfish permit, which authorizes commercial hook and line or harpoon take, is provided to DGN permittees at no cost. If it were purchased separately, the swordfish permit would also cost \$460.50.

In total, 74 DGN permits were issued for the 2015-16 season; 66 permits have been renewed for 2016-17, and eight permit holders have until the end of the current permit season (i.e., March 31, 2017) to renew, but they will incur substantial late fees (up to \$589). DGN permits are issued to an individual, and a vessel must be specified on the permit each year. FGC specifies that the permit holder must be on board the vessel during any DGN fishing activity. One vessel transfer

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<sup>8</sup> Hanan, Doyle A., Hoks, David B., & Coan, Jr., Atilio L. 1993. Fish Bulletin 175: The California Drift Gillnet Fishery for Sharks and Swordfish, 1981-82 through 1990-91.

per permit per year is allowed. There is no citizenship or residency requirement to possess a California DGN permit.

#### *Transfer Provisions*

DGN permits may be transferred to another individual only under the following circumstances:

- The current permit holder must have held the DGN permit for a minimum of three years or provide a current letter from a qualified doctor stating that he/she suffers from a serious illness/permanent disability to the extent that he/she can no longer earn a livelihood from commercial fishing.
- If the permittee dies, provided his/her heirs or estate submit a transfer request (accompanied by a copy of the death certificate) within six months of death.
- Upon dissolution of marriage if the permit is held as community property.

For any transfer of a DGN permit, the transferee must (1) hold a California commercial fishing license, (2) hold a California General Gillnet (GGN) permit or acquire a GGN permit concurrently with receiving the DGN permit (see below), and (3) pay a DGN permit transfer fee of \$1,500.

The DGN permit also has a temporary substitution provision, which allows a permit holder to designate another individual to fish under their permit for up to 15 days per year (this does not apply to the GGN permit). CDFW staff reviewed records from 2011 through 2016, and this provision has not been used in that time period (records do not exist prior to 2011).

#### *GGN Permit Specifics*

Like the California DGN permit, the GGN permit is LE and has the same season and permitting parameters. This permit is needed to fish any type of gillnet (except herring) off California, including DGN. While the GGN permit authorizes the white sea bass, California halibut, yellowtail, and other similar nearshore gillnet fisheries, FGC also specifies it as a requirement for possession of a DGN permit. For the 2015-16 permit season, 126 GGN permits were issued; 117 are currently renewed for the 2016-17 season, and nine permits could still be renewed by the end of the season upon payment of substantial late fees.

Similar to the DGN permit, the GGN permit may be transferred for a \$100 fee; however, transfer criteria are more stringent. The permit must be held by the current permit holder for a minimum of 20 years and the permit holder must have demonstrated landings in at least 15 of the last 20 years. The transferee must hold a current California commercial fishing license and demonstrate knowledge of the fishery in one of two ways – the permit holder must either pass a proficiency examination administered by CDFW, or they must have worked as a crewmember for at least 12 months on vessels using gillnets or trammel nets, with at least 180 days at sea on those vessels during the five year period prior to the date of application.<sup>9</sup>

### **III. Federal Endorsement Program**

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<sup>9</sup> Experience must be substantiated by submitting copies of logbooks or a notarized statement by the owner/operator of the vessel(s) on which the experience was acquired. The applicant must prove the experience was obtained while holding a valid California commercial fishing license

The HMS fisheries are regulated by gear type and method of harvest, assigned as endorsements associated with the HMS permit. The regulations apply to all U.S. vessels that fish for HMS within the U.S. West Coast exclusive economic zone (EEZ), between 3 and 200 nautical miles, along the coasts of Washington, Oregon, and California. The regulations also apply to U.S. vessels that target HMS on the high seas (seaward of the EEZ) and land fish in Washington, Oregon, or California.

U.S. commercial vessels that fish for HMS within the U.S West Coast EEZ or on the high seas and land their fish in Washington, Oregon, or California must have an HMS permit. HMS permit applications are designed to provide information to determine the eligibility of an applicant and identify the fishery the applicant intends to fish in. Fisheries are identified by gear types: DGN, purse seine, pelagic longline, troll/jig (hook-and-line), harpoon, and bait boat. Permittees are only authorized to fish using gears endorsed to the permit assigned to a vessel; multi-gear permits are granted. Endorsement issuance is based on permittee information that reflects potential HMS fishing efforts and compliance with HMS gear regulations.

The HMS permit is a federal open access permit and is valid only for the vessel for which it is registered and is non-transferrable. If the permitted vessel is sold, the new owner of the vessel must apply for a new HMS permit. If an existing permit holder wishes to use a new vessel, the permittee must apply for a new HMS permit to register with the new vessel. The HMS permit must be kept onboard the vessel and presented to enforcement officers upon request. Permits are valid for two years from the date of issuance, expire on the last day of the permit owner's birth month, and permit issuance currently requires a \$30 processing fee.

#### **IV. Proposed New Federal DGN Permit Provisions**

Alternative 1 in the Range of Alternatives the Council adopted in September 2016 specifies who would be eligible to receive a "NMFS commercial HMS permit endorsed for drift gillnet." Following discussions with NMFS permitting staff, a dedicated DGN permit issued to an individual rather than a commercial HMS permit endorsed for DGN gear valid for use on the vessel may be the most effective tool to allow for a simple transition of the permit from state to federal authority. For example, the 3-year transfer provision of Alternative 1 does not conform to current HMS permit transfer provisions (HMS permits and their gear endorsements are non-transferable). Additionally, creating a LE DGN permit endorsement on the current HMS permit would create inconsistency among the various gear endorsements and could lead to unnecessary confusion among permit holders. Furthermore, the effective period of the state permit is yearly (April - March), while the federal HMS permit is valid for a two-year period expiring in the month of the permittee's birth date. Therefore, creating a dedicated federal DGN permit separate from the HMS permit, rather than adding requirements to the DGN endorsement of the existing HMS permit, may be the most straightforward administrative process for transferring from a state to a federal permit system.

NMFS would implement management measures below when creating the federal LE DGN permit. The Council could then make changes to the management measures associated with a federal permit at a later date under the HMS FMP framework process, as outlined in Chapter 5 of the 2016 HMS FMP.

- Upon publication of NMFS' final rule to establish the federal DGN permit, all California DGN permit holders would be eligible to apply for and receive a federal DGN permit. If a 2017-2018 state permit renewal application is not received by CDFW or postmarked by March 31, 2018, the permit holder will not be eligible to receive a 2018-2019 federal DGN permit.
- Thereafter, the deadline for receipt or postmark of a federal DGN permit renewal application would be April 30 of the permit year (i.e., April 30, 2018 for 2018-2019 fishing season). Federal DGN permits must be renewed yearly. These proposed renewal deadlines for the federal DGN permit differ from the state permit renewal deadlines but are consistent with procedures for other federal permits.
- A DGN permit that is allowed to expire will not be renewed unless the permit owner requests reissuance by July 31 (three months after the renewal application deadline) and NMFS determines that failure to renew was proximately caused by illness, injury, or death of the permit owner. If the permit expires, it will be forfeited and NMFS will not reissue the permit to anyone. Similar to above, this provision differs from terms specified for the state DGN permit and imposes a shorter renewal window period and does not provide a mechanism to appeal for reinstatement in the event of a failure to renew.
- A permittee must hold a federal DGN permit for three or more years before it is eligible to be transferred.<sup>10</sup> NMFS would not charge a processing fee for permit transfers. This provision will extend across both state and federal permit programs (e.g., if a permit holder held a state LE DGN permit for two years and a federal LE DGN permit for one year, the permit may be transferred).
- A DGN permit will be issued to an individual and assigned to a specific vessel. A permittee may assign the permit to another vessel once per permit year (April 1 to March 31).
- The permit holder must be aboard the vessel and in possession of a valid DGN permit when engaged in DGN fishing activity.
- A permittee may have any person serve in their place on the permittee's vessel and engage in DGN fishing activity for not more than 15 calendar days in any one year.<sup>11</sup> A permittee shall notify NMFS of a substitution at least 24 hours prior to the commencement of the trip.
- The federal DGN permit would require a yearly processing fee which would likely be less than the current fee of the CDFW DGN permit. The processing fee would be determined by the service costs needed to process a permit request.

In order to be initially eligible for a new federal DGN permit, the permittee must have a state commercial fishing license and a valid federal HMS permit, which requires that an applicant be a citizen of the United States.<sup>12</sup> The current list of state DGN permit holders contains multiple non-U.S. citizens. In order to ensure that all fishers authorized to fish with DGN under California state law would be entitled to a federal LE DGN permit, as stated in Alternative 1, NMFS may

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<sup>10</sup> A permittee may also transfer their DGN permit in the case of serious illness or permanent disability, death, or dissolution of marriage if the permit is held as community property.

<sup>11</sup> A longer period may be allowed in circumstances of serious illness.

<sup>12</sup> Additionally, 50 CFR 660.707 states that "a person eligible to own a documented vessel under the terms of 46 U.S.C. 12102(a) may be issued...an HMS permit." 46 U.S.C. 12103 clarifies eligibility requirements, stating that an eligible owner must be a U.S. citizen.

include a one-time exemption for these current, non-U.S. citizen participants to allow them to hold an HMS permit and federal DGN LE permit. However, upon implementation of the federal DGN permit program, permits may not be transferred to non-U.S. citizens.

MSA Section 303(b)(6) states that any FMP may establish a limited entry program in order to achieve optimum yield, provided that the following criteria are considered: 1) present participation in the fishery; 2) historical fishing practices in, and dependence on, the fishery; 3) the economics of the fishery; 4) the capability of fishing vessels used in the fishery to engage in other fisheries; 5) the cultural and social framework relevant to the fishery and any affected fishing communities; 6) the fair and equitable distribution of access privileges in the fishery; and 7) any other relevant considerations. At the time it was first developed and approved, the FMP acknowledged the existence of the California LE entry system and explicitly approved its continued operation. Federalizing this program in accordance with Alternative 1 would not substantially change the status quo for the regulated community – there would be no exclusion of current fishermen or re-allocation of fishing privileges – but would merely continue an existing limited entry program. Creating a federal LE DGN permit would not limit present participation, modify existing effort, or alter catch composition, totals, or revenues. Additionally, this action would not alter cultural and social frameworks relevant to fishing communities, nor would it reallocate the distribution of access privileges as the action is administrative in nature and simply places the fishery under federal authority.

## **V. Federal Process and Timeline**

Section 6.2.5 (*Permits*) of the March 2016 HMS FMP<sup>13</sup> states that the creation of a limited entry permit system would require an amendment to the existing FMP: “no limited entry systems are proposed at this time. Implementation of a limited entry program would require a plan amendment.” If implemented, this and other language in the FMP would need to be amended to reflect the existence of a federal limited entry program under 2016 HMS FMP Section 6.2.1 (*Drift Gillnet Fishery Management Measures*). Future permit requirements could be modified under the framework procedures described in Section 5.1 (*Framework Procedures*). An FMP amendment is also necessary so that the State of California can begin its conformance process, as described in the September 2016 CDFW Report.<sup>14</sup> Upon finalization of an FMP amendment, the Council would transmit the FMP amendment to NMFS to review for approval, disapproval, or partial approval.

If NMFS approves the measure to transition the current California DGN permit system to a federal permit system, it would be responsible for implementing, administering, and enforcing the management program. NMFS would begin preparing a rule package immediately. The rule package would include, most notably, a proposed and final rule, including the opportunity for public comment. During the process, industry members, and the public would have opportunity to comment on the proposed rule. All comments would be addressed and incorporated as appropriate into the final rule.

Prior to final Council action, NMFS would begin preparing a National Environmental Policy Act (NEPA) analysis to determine the impact of the action on the affected environment. As the rule would be largely administrative in nature, rather than a change in effort, action area, or fishing

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<sup>13</sup> <http://www.pcouncil.org/wp-content/uploads/2016/03/HMS-FMP-Mar16.pdf>

<sup>14</sup> [http://www.pcouncil.org/wp-content/uploads/2016/09/J5a\\_Sup\\_CDFW\\_Rpt\\_DGN\\_SEPT2016BB.pdf](http://www.pcouncil.org/wp-content/uploads/2016/09/J5a_Sup_CDFW_Rpt_DGN_SEPT2016BB.pdf)

practices in the DGN fishery, it could be expected that the action might be covered under a Categorical Exclusion, and therefore not require an Environmental Assessment or Environmental Impact Statement. However, NMFS would conduct the appropriate scoping procedures and consult with NOAA General Counsel to ensure that the appropriate NEPA analysis is conducted.

Section 7(a)(2) of the Endangered Species Act requires interagency consultation on activities that may affect any listed species. These consultations are designed to assist Federal agencies in fulfilling their duty to ensure federal actions do not jeopardize the continued existence of a species or destroy or adversely modify critical habitat. The most recent DGN Biological Opinion, completed by NMFS' Protected Resources Division in 2013, and effective until September 2016, analyzed the continued management of the fishery under the HMS FMP and determined that the expected level of anticipated take is not likely to result in jeopardy to protected species.<sup>15</sup> Transitioning the California DGN permit system to a federal program is not likely to result in any new actions or effects that would affect threatened or endangered species because transitioning the permit program to federal authority will have no practical effect on fishing effort, participation, or the fleet size or composition. A new biological opinion on the DGN fishery is currently being prepared, and is expected to be completed before a final NMFS decision on whether to federalize the limited entry system.

NMFS could anticipate implementing regulations taking effect prior to March 2018 in order to coincide with the timing of CDFW DGN permit renewals. If implemented after the CDFW renewal date, current California DGN permit holders would be required to pay for both a state permit and a federal permit for the 2018-19 season. This target date also gives permit holders time to renew or transfer their permits before publication of the final rule, while also providing NMFS and CDFW with ample time to take the necessary steps in transitioning the permit program from state to federal authority.

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<sup>15</sup> 2013 BiOp: [https://pcts.nmfs.noaa.gov/pcts-web/dispatcher/trackable/SWR-2012-3020?overrideUserGroup=PUBLIC&referer=%2fpcts-web%2fpublicAdvancedQuery.pcts%3fsearchAction%3dSESSION\\_SEARCH](https://pcts.nmfs.noaa.gov/pcts-web/dispatcher/trackable/SWR-2012-3020?overrideUserGroup=PUBLIC&referer=%2fpcts-web%2fpublicAdvancedQuery.pcts%3fsearchAction%3dSESSION_SEARCH)