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UNITED STATES
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
1201 NE Lloyd Boulevard, Suite 1100
PORTLAND, OREGON 97232-1274

February 15, 2019

Mr. Philip Anderson, Chair
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 101
Portland, Oregon 97220-1384

Dear Mr.  Anderson:

In a November 7, 2018, ruling in the case of Oceana, Inc. vs. Ross (Case 2:17-cv-05146-RGK-JEM), the United States District Court for the Central District of California remanded to the National Marine Fisheries Service (NMFS) its decision to withdraw a proposed rule to establish hard caps (i.e., strict limits) on the incidental catch of certain protected species in the California/Oregon large-mesh drift gillnet (DGN) fishery. The court ordered NMFS to consult with the Pacific Fishery Management Council (Council) pursuant to Magnuson-Stevens Fishery Conservation and Management Act (MSA) Section 304(b)(1)(B) on potential revisions to the Council's proposed regulations. This letter continues and re-initiates the required consultation between NMFS and the Council to meet NMFS' obligation under the court's ruling.

In September 2015, the Council recommended that NMFS implement regulations for the DGN fishery that included two-year rolling hard caps on observed mortality and injury to certain protected species during the May 1 to January 31 fishing season. The Council transmitted its proposed regulations for implementing hard caps to NMFS on September 23, 2016. Under the proposed regulations, hard caps would have been established for five marine mammal species and four sea turtle species (collectively, "protected species"). When any of the caps were reached, the fishery would close for the rest of the fishing season, and possibly through the following season.

On October 13, 2016, NMFS published a proposed rule to implement the Council's recommendation to establish protected species hard caps, along with a draft Environmental Assessment (EA), an Initial Regulatory Flexibility Analysis (IRFA), and draft Regulatory Impact Review (RIR) (81 FR 70660). NMFS accepted public comment on these documents through December 28, 2016. In response to public comment, NMFS updated its analyses to consider additional information about the economics of the DGN fishery. The final analyses showed that, given DGN participants' dependency on the fishery, they would experience significant adverse economic impacts in the event of a fishery closure. These impacts were not identified in the draft EA, IRFA, or draft RIR.

Implementing the Council's proposed regulations to establish protected species hard caps for the DGN fishery would have had minor beneficial effects to target and non-target fish species and protected species at the cost of significant adverse economic effects to fishery participants in the event of closures. While the DGN fishery would not be expected to close often under the



Council's proposed regulations, the adverse economic effects to DGN participants in the event of any closure would be significant. NMFS' final analyses demonstrated that DGN participants are highly dependent on the fishery for their annual landings and revenue. Participants would have little opportunity to offset economic losses (e.g., by participating in other fisheries) during a DGN closure that could last for up to two fishing seasons and cover the entire area in which the DGN fishery operates.

Subsequently, pursuant to MSA National Standard 7 (i.e., conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication) and given the results of the updated analyses, NMFS made a negative determination on the Council's proposed regulations. On June 9, 2017, NMFS notified the Council of this determination (June 2017 Agenda Item H.1.a, Supplemental NMFS Report 2). NMFS then withdrew the proposed rule on June 12, 2017 (82 FR 26902).

MSA Section 304(b)(1)(B) requires that, if NMFS makes a negative determination on a Fishery Management Council's proposed regulations, that NMFS provide recommendations on revisions that would make the proposed regulations consistent with the fishery management plan, plan amendment, the MSA, and other applicable law. Accordingly, we recommend the Council consider revising its proposed hard caps regulations such that any management action would be expected to reduce the probability of protected species interactions in the DGN fishery, without significant economic effects such as those that are expected during a fishery closure of one or more fishing seasons. For example, the Council could minimize the adverse economic effects of its proposed regulations by specifying reduced time/area closures that would still allow DGN fishing in certain areas during the fishing season.

We welcome the Council's advice and opinions on these issues. If the Council would like to continue consultation on potential revisions to its proposed regulations, it could discuss this during its Future Council Meeting Agenda and Workload Planning agenda item, and schedule further consideration of hard caps for the DGN fishery at a future Council meeting. If you have any questions about this matter, please contact Lyle Enriquez, Highly Migratory Species Branch, at 562-980-4025 or lyle.enriquez@noaa.gov.

Sincerely,



Barry A. Thom
Regional Administrator

cc: F/WCR – Rumsey, Wulff
GC-SW – Feder, Kempton
Administrative file: 150414WCR2015SF00212:LE