

NATIONAL MARINE FISHERIES SERVICE (NMFS) REPORT ON DRIFT GILLNET
 (DGN) HARD CAPS

Background

In September 2015, the Council recommended regulations for the DGN fishery that included two-year rolling hard caps for protected species, based on observed mortality and injury (M&SI) during the May 1 to January 31 fishing season. These caps would be established for five marine mammal species and four sea turtle species (see Table 1 below). When any of the caps are reached, the fishery will close until the two-year rolling sum of M&SI to all species falls below their hard cap values. This would result in a closure for the rest of the fishing season and possibly through the following season.

Table 1. Rolling two-year hard cap values under the Council’s Final Preferred Alternative

Species	Two-Year Observed M&SI 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-finned pilot whale	4
Bottlenose dolphin	4

NMFS published a proposed rule to implement the Council’s recommendation in the Federal Register on October 13, 2016 ([81 FR 70660](#)). NMFS accepted public comment on the proposed rule and associated draft Environmental Assessment, Initial Regulatory Flexibility Analysis, and draft Regulatory Impact Review through December 28, 2016.

Following public comment on the proposed rule and associated analyses, NMFS conducted further analysis of the economic effects of the action. This new analysis indicated significant adverse short-term economic effects that were not identified at the proposed rule stage. Citing inconsistency with the purpose and need for the action and Magnuson-Stevens Fishery Conservation and Management Act (MSA) National Standard 7 (i.e., conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication), NMFS withdrew the proposed rule on June 12, 2017. This prompted litigation challenging the withdrawal, citing NMFS’ initial determination under MSA §304(b)(1)(A) that the

proposed regulations comported with applicable law. In October 2018, the court found that NMFS had exceeded its authority under the MSA and the Administrative Procedure Act by making a negative determination on the regulations after the proposed rule stage. Thus, the court remanded to NMFS for further action. In advance of scheduled discussion on the matter at the March 2020 Council meeting, the plaintiff moved to enforce the order, and on January 8, 2020, the court ordered NMFS to publish a final rule for hard caps by February 7, 2020.

Final Rule on DGN Hard Caps

NMFS published the final regulations in the Federal Register ([85 FR 7246](#)) on February 7, 2020. MSA §304(b)(3) requires that NMFS shall consult with the Council before making any revisions to the proposed regulations. Because the Council was not scheduled to discuss DGN hard caps until its March 2020 meeting, NMFS did not have an opportunity to consult with the Council on revisions to the regulations before the court's deadline. Therefore, NMFS published the hard caps regulations as they were originally proposed, without changes to the regulatory text. As stated in the rule, NMFS intends to review all options for addressing the economic impacts to DGN fishery participants, consistent with MSA's National Standards, through a separate rulemaking, beginning with engagement of the Council to propose revisions through the Council's normal process. NMFS is soliciting public comment on the final rule to gather information that can be used to develop such a separate rulemaking.