

## DRIFT GILLNET FISHERY HARD CAPS UPDATE

The Council took final action in September 2015 on a proposal that included “hard caps” for selected protected species taken in the California/Oregon thresher shark/swordfish large mesh drift gillnet (DGN) fishery. Under this proposal the fishery would immediately close if a hard cap (i.e., limit) on mortality/injury were met or exceeded for certain protected species during a rolling 2-year period. These 2-year rolling hard caps would apply to 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. To determine whether a hard cap has been reached, National Marine Fisheries Service (NMFS) would count observed mortalities and injuries to these species during any 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.

NMFS published a proposed rule to implement the Council action on October 13, 2016 ([81 FR 70660](#)). On June 12, 2017 ([82 FR 26902](#)) NMFS withdrew the proposed rule based on further analysis of the proposed regulations prompted by public comment received through December 28, 2016 ([Agenda Item H.1.a, Supplemental NMFS Report 3, June 2017](#)). NMFS determined that the proposed hard cap regulations would have provided little additional benefit to these protected species beyond what has already been achieved under Endangered Species Act (ESA) and Marine Mammal Protection Act processes while creating significant short-term economic hardship for DGN fishery participants. NMFS concluded that the regulations would therefore not fulfill the purpose of the Council’s proposed action, “to conserve non-target species and further reduce bycatch, including incidental take of ESA-listed species and marine mammals, in the DGN fishery below levels currently permitted by applicable law while maintaining or enhancing an economically viable U.S. West Coast-based swordfish fishery.” Furthermore, NMFS found the proposed regulations to be inconsistent with Magnuson-Stevens Act National Standard 7, which states that, “conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.”

On July 12, 2017, Oceana filed an action in U.S. District Court against NMFS’s negative determination and withdrawal of the proposed regulations, arguing that NMFS exceeded its authority under 16 U.S.C. § 1854(b), which requires NMFS to publish final regulations and to consult with the Council on any revisions to the proposed regulations. On October 24, 2018, the Court granted Summary Judgment to the Plaintiffs and remanded to the agency for action consistent with the Order. The Court subsequently found that NMFS had not complied with its Order and on January 8, 2020, ordered NMFS to publish the final rule within 30 days. To comply, NMFS published the final rule on February 7, 2020 (Attachment 1).

NMFS will provide additional context for its actions in a report to the Council.

### **Council Action:**

**Review the Final Rule, Revisit Previous Council Recommendations, and Provide Guidance on Future Council Considerations.**

Reference Materials:

1. Agenda Item I.4, Attachment 1: Protected Species Hard Caps for the California/Oregon Large-Mesh Drift Gillnet Fishery, Final Rule (85 FR 7246).
2. Agenda Item I.4.a, NMFS Report 1.
3. If received, Public Comments are electronic only ([see e-portal](#)).

Agenda Order:

- I.4 Drift Gillnet Fishery Hard Caps Update Kit Dahl
- a. Reports and Comments of Management Entities and Advisory Bodies
  - b. Public Comment
  - c. **Council Action:** Review the Final Rule, Revisit Previous Council Recommendations, and Provide Guidance on Future Council Considerations

PFMC  
02/10/20