

DRIFT GILLNET FISHERY HARD CAPS

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. The rulemaking process for this proposal was protracted due to National Marine Fisheries Service’s (NMFS) decision to withdraw the proposed rule and subsequent litigation forcing implementation of regulations in early 2020. An account of this history was presented under [Agenda Item I.4](#) in March 2020. Further litigation resulted in an Opinion (*Burke, et al. v. Coggins*, Attachment 1) and Order from the Federal District Court for the District of Columbia that vacated the regulations on February 18, 2021. Both NMFS’ reason for withdrawing the proposed rule and the opinion in *Burke, et al. v. Coggins* rest on the conclusion that the hard caps regulations were inconsistent with National Standard 7 in the Magnuson-Stevens Fishery Conservation and Management Act (MSA), which states “[c]onservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.” NMFS’ rationale for this finding may be found in a June 9, 2017, letter to the Council ([Agenda Item H.1.a, Supplemental NMFS Report 2](#), June 2017). NMFS encouraged the Council to revisit its proposal to address consistency with legal mandates. At issue in the litigation resulting in publication of the regulations in 2020 was the Council’s opportunity to revisit its proposed action to address these deficiencies.

Attachment 2 is a December 28, 2016, letter from the Marine Mammal Commission commenting on the hard caps proposed rule. It describes a range of concerns about the hard caps approach to mitigation protected species bycatch. Those comments could help the Council in scoping a proposed action under this agenda item.

With the regulations vacated, the Council faces *status quo ante*. While not a blank slate, given NMFS’ findings as supported by the Court, at this stage the Council has the opportunity to revisit its original purpose “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 west-coast based swordfish fishery.” The Council could revise its rationale and/or identify other methods to achieve this purpose, or a related purpose, while taking into account the history recounted above, the current status of the DGN fishery, and its future prospects.

The attached Highly Migratory Species Management Team report includes a recommended revised purpose and need statement for the proposed action and an outline of measures to address the purpose and need. These measures could form the basis for the development of a range of alternatives for further analysis.

Council Action:

Adopt a Revised Proposed Action, Purpose and Need Statement, and Range of Alternatives, as Appropriate.

Reference Materials:

1. Agenda Item F.5, Attachment 1: Memorandum Opinion, United States District Court for the District of Columbia, *Gary Burke, et al. v. Wynn Coggins as acting Secretary, U.S. Department of Commerce*.
2. Agenda Item F.2, Attachment 2: December 28, 2016, Letter from Marine Mammal Commission Executive Director Rebecca Lent to Lyle Enriquez, National Marine Fisheries Service.
3. Agenda Item F.5.a, HMSMT Report 1.
4. If received, Public Comments are electronic only ([see e-portal](#)).

Agenda Order:

- F.5 Drift Gillnet Fishery Hard Caps Kit Dahl
- a. Reports and Comments of Management Entities and Advisory Bodies
 - b. Public Comment
 - c. Council Action: Adopt a Revised Purpose and Need Statement and Range of Alternatives, as Appropriate

PFMC
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