

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE REPORT ON
NATIONAL MARINE FISHERIES SERVICE LETTER REGARDING
DRIFT GILLNET HARD CAP REGULATIONS

The Washington Department of Fish and Wildlife (WDFW) would like to offer the following comments on the letter from Mr. Barry Thom, National Marine Fisheries Service (NMFS), dated February 15, 2019, to the Pacific Fishery Management Council (Council), regarding protected species hard caps for the drift gillnet (DGN) fishery. We initially provide comments on the characterization of the events that have occurred to date and clarification of the court's summary judgment order, which we believe are relevant to the options available for consideration; this is followed by comments specific to the need for revisions to the proposed regulations.

In general, WDFW is concerned that the description of events, NMFS' proposed next steps, and their stated reasons for them may not fully convey the court's findings and remand for action. Specifically, in the first paragraph NMFS states, "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." To clarify, the court ordered NMFS to follow the MSA, which includes two options for NMFS following the public comment period: 1) promulgate the Council's proposed regulations as is, or 2) revise the proposed regulations after consulting with the Council and prior to withdrawing them. Even though NMFS already withdrew the regulations, the court found that NMFS overstepped its authority by doing so and that NMFS' negative determination was arbitrary and capricious. Therefore, it is our understanding that adopting the actions described in the proposed regulations is still an option, and NMFS indicating that the court "ordered" them to consult with the Council on revisions could imply that revisions are the only option.

We have similar concerns with statements in the fifth and sixth paragraphs of NMFS' letter. In the fifth paragraph, NMFS explains that their negative determination was pursuant to MSA National Standard 7 and the results of the updated analyses, but again fails to mention that the court found that NMFS exceeded its authority under the MSA as well as the Administrative Procedures Act by making this negative determination. Additionally, in the sixth paragraph, NMFS builds upon this by referring to what NMFS and the Council should do "if NMFS makes a negative determination," which again, the court found to be arbitrary and capricious and, therefore, should not have been done in the first place.

Additionally, NMFS indicates more than once in the letter that they are *continuing* their consultation with the Council when the court found that NMFS had failed to consult with the Council, given that NMFS unilaterally made these decisions then informed the Council after the fact. Therefore, it would be more accurate to say that NMFS is *initiating* consultation with the

Council and, in our opinion, even more appropriate to acknowledge that they should have done that before taking these actions.

With regard to the basis for the proposed revisions, NMFS indicates that public comment prompted them to update their analyses with additional information that showed that the DGN fishery would experience significant adverse economic impacts in the event of a fishery closure, and that these impacts were not identified in the draft Regulatory Impact Review that accompanied the proposed rule. Setting aside the question of why this information was missing from the RIR it is unclear how its inclusion changes the outcome. The Council did not have an opportunity to consider or deliberate on the information. We understand that the information confirms the dependency of the DGN participants on the fishery and the economic losses that would result from a fishery closure, particularly one that lasted two years; however, we had that understanding prior to the inclusion of these new analyses. As the initiator of the motion for the hard caps for protected species, the hard caps were not proposed because we thought there would not be economic impacts if the fishery were to close; therefore, in our opinion, the updated analyses do not appear to shed new light relative to economic impacts. In our review of the letter NMFS sent the Council on June 9, 2017, the conclusions NMFS drew were speculative and perhaps even contradictory as the potential economic consequences are highly uncertain. We believe the incentives created by the hard caps would have worked, thus avoiding the closures that are causing this concern; however, we recognize that others may have different opinions about this. In any event, we believe the Council should have had the opportunity to deliberate as the trade-offs relative to benefits and economic consequences is a risk call for the Council.

Finally, it is unclear what exactly the proposed revisions are, how they specifically relate to the new analyses, and how they address NMFS' concerns with the Council's proposed regulations. In the fourth paragraph, NMFS indicates that the Council's proposed regulations to establish protected species hard caps "would have had minor beneficial effects" to protected species, but does not elaborate on why the benefits are characterized as "minor," which would be helpful to understand. However, in that same paragraph, NMFS also acknowledges that the DGN fishery "would not be expected to close often," which had been by design. As the Council discussed during its deliberations on hard caps, the intent was to select limits that addressed social concerns with protected species interactions and provide incentives to avoid and minimize bycatch and protected species interactions, while not setting them so low such that fishery closures would be triggered often.

Therefore, it seems like NMFS' concern is relative to the economic effects of the duration and geographic extent of potential DGN fishery closures, rather than how often closures may occur. In other words, the concern is relative to the action that results from attaining or exceeding the hard cap, but not the hard caps themselves nor the limits specified for those caps. If that is the case, then we would be open to the Council considering NMFS' recommendation at a future meeting.

Specifically, if the Council were to decide to schedule this for a future meeting, we would recommend that the scope of the Council's action be limited to revisions specific to the actions

that would be triggered upon attaining or exceeding one or more of the protected species hard caps. We believe that reconsidering the use of hard caps or the limits adopted by the Council would go beyond the reach of the new economic analyses. Further, for the reasons stated above, we also believe that “no action” (i.e., keeping the Council’s proposed regulations as previously adopted) is also consistent with the MSA and court order.