

June 10, 2019

Mr. Barry Thom, West Coast Regional Administrator
National Marine Fisheries Service
1201 NE Lloyd Boulevard, Suite 1100
Portland, OR 97232

Mr. Phil Anderson, Chair
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 101
Portland, OR 97220

RE: Agenda Items J.1 NMFS Report and J.4 Drift Gillnet Performance Metrics Review

Dear Mr. Thom, Chair Anderson and Council members:

Several years ago, in recognition of continued bycatch concerns raised by the public and state and federal elected officials, the Pacific Fishery Management Council (Council) expressed its intent to transition the California large-mesh drift gillnet swordfish fishery using tools available to it under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). In September 2015, the Council acted to create a new management framework for this fishery designed to minimize and avoid bycatch, set clear standards and accountability, and incentives to change fishing behavior. This included hard caps for nine marine mammals and sea turtles that are endangered and/or had low potential biological removals, performance objectives for finfish and other marine mammals, the removal of the unobservable vessel exemption, and direction to achieve 100% fishery monitoring in 2018.¹ The National Marine Fisheries Service (NMFS), however, contravened the will of the Council by failing to implement hard caps and observer coverage recommendations.

Today the fishery continues to operate without full accountability. Observer coverage has consistently remained below the 30% target first identified by NMFS in 2011², and significantly below the 100% level recommended by the PFMC in 2015 (figure 1). The fishery has failed to achieve bycatch performance metrics each year since they were adopted without consequence. The fishery largely operates without Annual Catch Limits due to international exemptions. NMFS withdrew the proposed hard cap rule, which violated the Administrative Procedure Act and the MSA.³

¹ PFMC 2015. Council meeting record, September 11-16, 2015. Available: http://www.pcouncil.org/wp-content/uploads/2015/12/September_2015_Final_CouncilMtgRecord.pdf

² NMFS 2011. U.S. National Bycatch Report, first edition, at 359. Available: <https://repository.library.noaa.gov/view/noaa/4361>

³ *Oceana v. Ross*. (October 24, 2018) U.S. District Court of Central California District of California. Available: http://usa.oceana.org/sites/default/files/593/oceana_drift_gillnet_case_ruling.pdf

The failure to establish a new framework for the drift gillnet fishery that moves forward toward responsible management with minimal bycatch has spurred state and federal lawmakers to act. In 2018 California passed legislation ([Senate Bill 1017](#)) to implement a transition program whereby state drift gillnet permits will be phased out over a four year period, and drift gillnet fishermen will be financially compensated if they voluntarily to turn in their nets and permits. Federal legislation ([Driftnet Modernization and Bycatch Reduction Act](#); S. 906 and H.R. 1979) has also been introduced to phase out the use of indiscriminate large mesh driftnets like the ones used target swordfish off the coast of California.

While the Council and NMFS discuss drift gillnet management, we offer the following observations and recommendations:

1. The priority of the Council and NMFS should be to authorize deep-set buoy gear for targeting swordfish; switching from unselective drift gillnets to clean gear will prevent deadly interactions with marine mammals and sea turtles that occur with drift gillnets.
2. NMFS must issue a final hard cap rule as proposed by the Council in September 2015. If NMFS desires to revise the proposed rule, however, then we support scheduling consultation for the September Council meeting. We urge the Council to reaffirm its September 2015 decision in any such consultation, and further describe how it is consistent with federal law, as per previous reports and statements by the States of California (attached) and Washington.⁴ The time and resources put into developing the hard cap regime represented years of effort and stakeholder input. The decision made by the Council at that time must be respected in order to uphold the integrity of the Council process.
3. NMFS must implement the Council recommendations for 100% monitoring of the DGN fishery and remove the unobservable vessel exemption by requiring all vessels to carry an observer when requested as a condition of maintaining their federal permit. In June 2018, the Council reaffirmed its preferred alternative for 100% monitoring adopted in September 2015.⁵
4. In March 2018 NMFS stated that the Protected Resources Division was developing a new Biological Opinion on the drift gillnet fishery by Spring of 2018 which would include a new analysis on potential observer bias using vessel monitoring system data to analyze if unobserved trips fish in different areas than vessels with observers.⁶ NMFS also reported it was conducting an electronic monitoring (EM) study of the drift gillnet fishery. The Council should request the findings of the NMFS EM study and an update on the timeline for a new Biological Opinion including an analysis of the observer effect.

⁴ WDFW 2019. Agenda Item J.C Supplemental WDFW Report 1. Available: https://www.pcouncil.org/wp-content/uploads/2019/02/J1c_Supp_WDFW_Rpt1_Hardcaps_MAR2019BB.pdf

⁵ PFMC 2015. Available: <https://www.pcouncil.org/2015/09/38641/california-large-mesh-drift-gillnet-fishery-management-final-preferred-alternatives/>

⁶ NMFS 2018. Available: https://www.pcouncil.org/wp-content/uploads/2018/03/11a_Sup_NMFS_Rpt3_Draft_Increased_Monitoring_Analysis_031218_Mar2018B.pdf

With respect to the review of performance metrics:

5. Whether to set performance metrics using ratio estimation or regression tree methodology is unnecessary with 100% monitoring.
6. To date bycatch performance metrics have been entirely ineffective; finfish and/ or marine mammal metrics have been exceeded each year since implemented. The only action taken by the Council in response to these exceedances has been to revise the methodology for setting performance metrics and estimating bycatch and, additionally the Council has attempted to remove California sea lions, northern elephant seals and smooth hammerhead sharks – a CITES listed species⁷ – from the list of performance metric species. The removal of these species occurred without public notice that the Council was considering revising the list of species, after the bycatch performance metrics were exceeded, and without any legitimate rationale.
7. In the 2018-19 fishing year the fishery caught an estimated **15 smooth hammerhead sharks** and **15 megamouth sharks**, exceeding the annual performance metric of four hammerhead sharks and two prohibited shark species, respectively, using the ratio estimation method. Smooth hammerheads are the only species of hammerhead shark caught in the DGN fishery during the base period of 2004-2013, so the Council clearly intended them to be included in the list of performance metric species.
8. We request the Council maintain consistency with its current performance metric approach and intent:
 - a. Use the same base period of 2004-2013 to establish new performance metrics;
 - b. Maintain the original list of species as adopted by the Council in 2015, including smooth hammerheads, California sea lions, and northern elephant seals.
 - c. Use the 10-year high annual regression tree estimates over this period as the performance standard (see table 1, attached);
 - d. Evaluate the fishery performance every two years based on current annual regression tree estimates;
 - e. Reaffirm the Council's original intent that a single year of exceeding the performance metrics is the trigger for considering implementation of additional management measures. If the Council chooses to use a multi-year average to assess performance standards, the performance standards must be set based on the 10-year average, not the 10-year maximum bycatch level for each species.
 - f. Establish an automatic mechanism through which exceeding any single performance metric triggers the HMSMT to develop and provide to the Council for immediate consideration a range of alternative management measures to ensure bycatch does not exceed performance metrics.

One hundred percent monitoring of the drift gillnet fishery – as repeatedly recommended by the PFMC - will provide the most accurate picture of the impact of the fishery on non-target species and will eliminate the management uncertainty in bycatch rates, particularly for rare species.

⁷ In 2013 five shark species—oceanic whitetip; porbeagle; and great, scalloped, and smooth hammerhead sharks—and two species of manta ray were added to Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

Even with implementation of the Pacific leatherback and loggerhead conservation areas and numerous gear requirements such as acoustic pingers, this fishery continues to have one of the highest bycatch rates in the country. The discard rate since implementation of the Pacific Leatherback Conservation Area in 2001 is 60%,⁸ and the fishery continues to take rare and endangered species.⁹ Ultimately, we request NMFS and the PFMC work to transition this fishery consistent with the approach and timeline established in California SB 1017. Until that occurs, actions to increase accountability in this fishery and further reduce bycatch must be taken including hard caps, 100% monitoring and effective and enforceable performance metrics.

Sincerely,



Ben Enticknap
Pacific Campaign Manager and Senior Scientist

Attached: CDFW (June 12, 2017). Statement in response to NMFS' decision to withdraw proposed regulations on drift gillnet hard caps in the swordfish fishery.

⁸ NMFS Observer Program Data 2001-2019.

http://www.westcoast.fisheries.noaa.gov/fisheries/wc_observer_programs/sw_observer_program_info/data_summary_report_sw_observer_fish.html

⁹ Carretta, J.V., J.E. Moore, and K.A. Forney. 2018. Estimates of marine mammals, sea turtles, and seabird bycatch from the California large-mesh drift gillnet fishery: 1990-2016. NOAA PSRG-2018-07 12 February 2018.

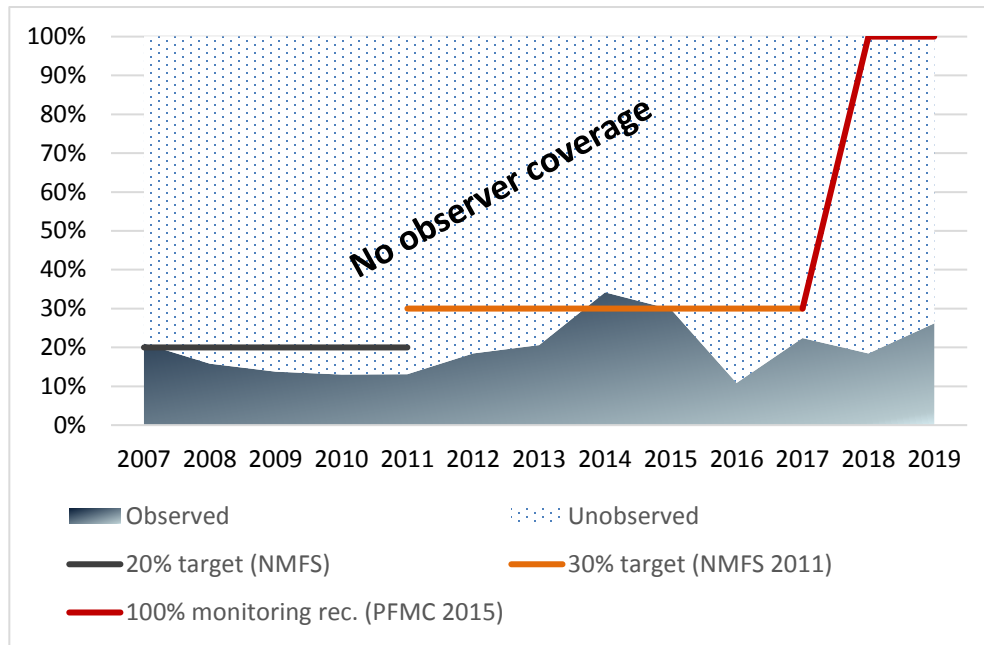


Figure 1. Percent observer coverage in the California large mesh drift gillnet fishery compared to target level observer coverage, 2007 to 2019. The 30% target level was recommended by NMFS in 2011 (see footnote 2) and then again by the PFMC in September 2015 when the Council recommended that NMFS maintain a minimum 30% observer target and 100% monitoring by 2018.

*Marine Mammal and Sea Turtle Performance Metrics for Use in Annual Determination**

Species	Recommended metric: Highest 2004-2013 serious injury/ mortality estimate	Notes
Minke whale	1.1	
Short-beaked common dolphin	57.7	
Long-beaked common dolphin	5.6	
Risso's dolphin	2.9	
California sea lion	57.2	<i>Pinnipeds not considered as part of the regression tree method in September 2018 PFMC motion, if not this, continue to use estimation method.</i>
Northern elephant seal	4.2	
Northern right whale dolphin	8.1	
Gray whale	2.1	
Pacific white-sided dolphin	9.2	
Sperm whale	2	<i>hard cap species</i>
Humpback whale	0.2	<i>hard cap species</i>
Fin whale	0.3	<i>Hard cap species</i>
Short-finned pilot whale	1.3	<i>hard cap species</i>
Bottlenose dolphin	4.2	<i>hard cap species</i>
Leatherback sea turtle	1.9	<i>hard cap species</i>
Loggerhead sea turtle	1.2	<i>hard cap species</i>
Olive Ridley sea turtle	0	<i>hard cap species</i>
Green sea turtle	0.3	<i>hard cap species</i>

Table 1. Recommended marine mammal and sea turtle performance metrics based on regression tree methodology and highest Serious Injury/Mortality estimates, 2003-2013 as in Carretta et al. 2018.¹⁰ To date no regression tree analyses is available for finfish species with performance metrics: Billfish (non-swordfish, prohibited sharks (megamouth, basking, white), hammerhead sharks and manta ray. If a single year's estimated SI/M exceeds these values, the performance metric is considered exceeded, triggering immediate development, consideration, and adoption of management measures to prevent it from being exceeded in the future.

¹⁰ Carretta, J.V., J.E. Moore, and K.A. Forney. 2018. Estimates of marine mammals, sea turtles, and seabird bycatch from the California large-mesh drift gillnet fishery: 1990-2016. NOAA PSRG-2018-07 12 February 2018.

June 12th 2017

Transcript of Marci Yaremko, California Department of Fish and Wildlife (CDFW)
June 2017 Pacific Fishery Management Council Meeting

Regarding the National Marine Fisheries Service (NMFS) report on the withdrawal of a proposed rule implementing hard caps for the California drift gillnet swordfish fishery.

Transcribed from Pacific Fishery Management Council audio file: 6-12-17pm1Copy.mp3, at 1:30. Audio file available at ftp://ftp.pcouncil.org/pub/R1706_June_2017_Recordings/

Thank you Mr. Vice Chair, and thank you for the time to address the Council on this important issue to California. It's our view that NMFS, and the Council, and the fishery lost an opportunity here. Thanks to all on the Council [Pacific Fishery Management Council], and all in the audience for your time on this issue and I appreciate the chance to express disappointment with the decision on behalf of the state.

This Council expressed its intent to change management of this fishery using tools available to us under Magnuson to create a new framework to move this fishery forward. Many are asking what comes next after this decision is made and we heard a lot in testimony. The answer that I thought I might give before doesn't appear to be viable. I wanted to see the fishery itself, have an opportunity to achieve the standards we imposed, perhaps to receive MSC [Marie Stewardship Council] or some other green label certification for performing within our standards and the chance to develop new markets as a result. And I wanted the Council to have a solid basis to look at next steps and other new and innovative approaches to redevelop the West Coast swordfish fishery with this gear. We had that pathway forward and now I just feel like the road fell out from under us and we're stuck in a sinkhole.

There were a number of reasons for the Council's recommendations on hard caps and as Michelle [Michele Culver, WDFW] artfully explained just a second ago, NMFS appears to have chosen to consider only one of them. What the additional protections would have afforded was benefit to the ESA [Endangered Species Act] listed marine mammals and turtles. The policy and social reasons for the rule apparently were not considered or were considered and dismissed. And yet, those reasons are strongly embedded in our MSA [Magnuson Stevens Fishery Conservation and Management Act] framework in our National Standards.

It is the Council's job to consider these elements when balancing competing interests to help us make difficult decisions and we did. The rule would have established a Bright Line Standard, one that when crossed would shut the fishery down just in the same way we manage our other fisheries domestically with applications of ACLs [annual catch limits] and accountability measures. Everyone - the public, the government, NGOs, and the fishermen themselves - are acutely aware of what the limits are and what happens when you exceed them. Yes, there is a TRT [take reduction team] process that gets in swing when PBR [potential biological removal] and ITS [incidental take statement] limits are exceeded and groups of scientists and representatives get together to talk but there's no immediate action that results. It's just a series of meetings, plans and negotiations that precede the development of new federal

rules designed to mitigate the consequences; actions, which often take years to fully develop and implement.

Equally important as the Bright Line Standard, some of you have mentioned this already, was the Council's goal in changing behavior with this rule. It was a way to ensure this fleet would take accountability for its actions and force operators to think before making a set to ensure that the risk of entanglements are low. NMFS has implemented hard caps in other fisheries under its jurisdiction, notably including the Hawaii longline fisheries for swordfish. It is pretty clear that those fisheries have maintained if not improved economic viability as landings from that fishery seem to be on a steep upward trajectory into California ports in recent years.

The administrative record will also show that the Council on its consideration of hard caps deliberately considered the potential economic impacts of the rule and if anyone looked at the record, the Council initially proposed hard caps that were only for one year in duration, rather than two. Our recommendation was refined following industries' unequivocal statement to us that a measure that invoked a one and done management response made the costs associated with gearing up to fish for a season too prohibitive. The Council considered that input and made adjustments such that the recommendation included cap levels that all had numbers greater than one animal and hence, we recommended the two year rolling cap alternative.

Meanwhile on the other side of the Sustainable Fisheries Division house- in the groundfish world, apparently a different standard is applied when viewing Council recommendations and prospective economic harm to individuals. As I think we all recall in the IFQ [individual fishing quota] program, if an individual exceeds their allowable individual quota level, they are immediately shut down and not allowed to re-enter the fishery until they can cover their overage, which can take years depending on the amount of overage and the cost. And during that time, they are not allowed to participate in any other federal groundfish fishery. The Council and NMFS stood firmly behind those rules and it has been clear that exceeding those limits has consequences. Nor have we deviated from that approach.

In the six years since the IFQ program's been in effect, three vessels have had lightning strikes and have had to leave the fishery. Despite requests for the Council to reconsider its position on the consequences of exceeding a quota limit and trying to find a way for those vessels to re-enter the fishery, the Council and NMFS stood firm. I hadn't forgotten the testimony we heard from Jeff Lackey when his vessel accidentally made a disaster tow with overfished rockfish, and the resulting consequences of that fish leaving the fishery, and last I checked they are still trying to pay down their debts on the overage. The negative economic consequences to these vessels is likely greater than what it would be seen on the entire drift net fishery where a hard cap effectively to close the DGN [drift gillnet] fishery.

So I have trouble understanding how NMFS can use two different sets of standards when it comes to economic harm. I also take issue with the statement that the participants in the DGN fishery do not have other viable alternatives. California fishermen rarely rely on one fishery for their sole source of income, but instead participate in multiple fisheries as part of their fishery portfolio in business plans. I haven't had the chance to review the 106 page final Environmental Assessment that was released after the

Council meeting started but I will do so. I will be paying close attention to the discussion of alternative fisheries available to the DGN fishermen upon a closure resulting from a hard cap attainment.

I don't recall CDFW being consulted on that analysis on that state managed fisheries opportunity, particularly fisheries that fall under the authority of the state's general gillnet permit. This permit is not specific to any fishery target, but it is required for the use of gillnet gear so all of the current DGN permittees have this state issued permit. These fisheries for California halibut, white seabass and angel shark are worth millions of dollars annually. The state requires DGN permittees to concurrently hold this permit so I am perplexed why NMFS doesn't consider this a viable alternative fishery to participate in should the DGN fishery close due to the attainment of a hard cap.

Moreover, I recall our DGN advisors from the Advisory Subpanel actually recommended a mitigation measure to the Council should hardcaps be attained. They suggested to us that in the event a cap was attained, the alternative of being able to fish using buoy gear might be an approach to mitigate the effects of the closure. While the council didn't take that up in its development of its FPA and its recommendations to NMFS, as far as I am aware, that recommendation is still a viable one that NMFS could have maybe considered putting back before the Council, before withdrawing the proposed action.

NMFS reported to us today on plans to implement the Council's recommendation for a 100% monitoring of the DGN fishery, which was the second part of the council's September 2015 motion. There is vagueness and uncertainty in the proposed rulemaking, which would include the rule to remove the unobservable exception that is currently applicable to DGN vessels. My discomfort is growing that this recommendation will be effective by regulation by next year. It's feeling more and more like NMFS is saying like it's only going to implement the HMS recommendations from the Council that it likes, such as the limited entry drift net permit.

The DGN fishery is a California fishery. We understood that the Council process was [the] venue for the state to provide management guidance on fishery activities originating out of and returning to California ports. CDFW has participated and contributed to discussions and developed management strategies and plans in the spirit of co-managing these fishery resources off our coast. The HMS FMP [Highly Migratory Species Fishery Management Plan] has been around for well over a decade now, yet we've only made a few amendments to the plan. Mostly administrative in nature and as required by NMFS for reasons such as compliance with the latest national standard and the omnibus amendment to include unmanaged forage fish protections and we'll take up the housekeeping amendment agenda item next.

Meanwhile the Council, its members, the stakeholders, NMFS staff and the public continue to invest millions in the Council process to support management under the HMS FMP. What I have to ask is what the point of all of that is and what is there to show for it other than a growing list of disapprovals and subliminal messages of, "no we can't"?

I thought the goal was to actively manage HMS under authority of the MSA but instead the letter from NMFS to the Council just encourages us to continue to participate in the TRT process if we wish to develop measure to reduce probability of marine mammal entanglement in the DGN fishery.

So after several years of investment in the HMS planning and Council process it just seems there's not much interest in doing much to regulate the fishery under MSA so I will just wrap this up with a few questions.

What is the value of the plan if we can't do anything under its authority? And how does NMFS justify applying different standards to West Coast fisheries under its jurisdiction regarding expected economic impacts of regulations?

And maybe just to end on a little brighter note: I would like to offer a comment on the management team report regarding the performance objectives and thank the management team for that analysis. The table shows the fishery largely attained our standards with just one exception and I'd like to thank the management team for reminding the Council what the goal is with our annual review of the standards, which is to evaluate if bycatch or protected species interaction levels are consistently at a level higher than one of the performance objectives the Council could consider whether additional management measures are necessary to minimize bycatch or reduce protected species interactions in the fishery. I guess I'd like to just note that in my view this simple and low workload analysis worked and apples to apples is good enough for me right now and in light of our goal of doing a general year by year review of performance against a clear standard I do support the discussion and adding this to our agenda for next year.

Thank you.

End transcript