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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 160728670-6904-01]

RIN 0648-BG23

Fisheries off West Coast States; Highly Migratory Fisheries; California Drift Gillnet Fishery; Protected Species Hard Caps for the California/Oregon Large-Mesh Drift Gillnet Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS is proposing regulations under the authority of Section 303 (b) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) to implement an immediate closure of the California thresher shark/swordfish drift gillnet (DGN) (mesh size \geq 14 inches) fishery if a hard cap (i.e., limit) on mortality/injury is met or exceeded for certain protected species during a rolling 2-year period. The length of the closure would be dependent on when—during the 2-year period—the hard cap is reached.

DATES: Comments on the proposed rule and supporting documents must be submitted in writing by **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments on this document, the draft Environmental Assessment (EA), draft Regulatory Impact Review (RIR) and Initial Regulatory Flexibility Analysis (IRFA), identified by NOAA-NMFS-2016-0123, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-0123>, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Lyle Enriquez, NMFS West Coast Region, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802. Include the identifier “NOAA-NMFS-2016-0123” in the comments.

Instructions: Comments must be submitted by one of the above methods to ensure they are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

Copies of the draft EA, draft RIR, IRFA, and other supporting documents are available via the Federal eRulemaking Portal: <http://www.regulations.gov>, docket NOAA-NMFS-2016-0123 or by contacting the Regional Administrator, Barry Thom, NMFS West Coast Region, 1201 NE Lloyd Blvd, Portland, OR 97232-2182, or RegionalAdministrator.WCRHMS@noaa.gov.

FOR FURTHER INFORMATION CONTACT: Lyle Enriquez, NMFS, West Coast Region,

562-980-4025, or *Lyle.Enriquez@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Background

The DGN fishery for swordfish and thresher shark (14" minimum mesh size) is federally managed under the Federal Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP) and via regulations of the states of California and Oregon to conserve target and non-target stocks, including protected species that are incidentally captured. The HMS FMP was prepared by the Pacific Fishery Management Council (Council) and is implemented under the authority of the MSA by regulations at 50 CFR part 660.

The DGN fishery has been subject to a number of seasonal closures. Since 1982, it has been closed inside the entire U.S. West Coast exclusive economic zone (EEZ) from February 1 to April 30 of each year. In 1986, a closure was established within 75 miles of the California mainland from June 1 through Aug 14 of each year to conserve common thresher sharks; this closure was extended to include May in 1990 and later years. In 2001, NMFS implemented two Pacific sea turtle conservation areas on the U.S. West Coast with seasonal DGN restrictions to protect endangered leatherback and loggerhead sea turtles. The larger of the two closures spans the EEZ north of Point Conception, CA (34°27' N. latitude) to mid-Oregon (45° N. latitude) and west to 129° W. longitude. DGN fishing is prohibited annually within this conservation area from August 15 to November 15 to protect leatherback sea turtles. A smaller closure was implemented to protect Pacific loggerhead turtles from DGN gear from June 1 – August 31 of each year during a forecasted or occurring El Niño event, and is located south of Point Conception, CA, and east of 120° W. longitude (72 FR 31756). The number of active vessels in

the DGN fishery has remained under 50 vessels since 2003, and there has been an average of 20 active vessels per year from 2010 through 2015.

Since 1990, NMFS has targeted 20 percent observer coverage of the DGN fishery each year, per recommendations from the Southwest Fisheries Science Center (NMFS 1989). NMFS' fleet-wide observer coverage target has been 30 percent since 2013. Since some DGN vessels are unobservable due to safety or accommodations requirements, the observable vessels are observed at a rate higher than 30 percent to attain the fleet-wide 30 percent coverage. Four to six DGN vessels have been unobservable during each fishing season from 2011 to present.

Council Background

In March 2012, the Council tasked NMFS with determining the steps needed to implement protected species hard caps in the DGN fishery. Originally concerned with sea turtle interactions, the Council expanded its scope to include marine mammals at its June 2014 meeting. At that meeting, the Council directed its Highly Migratory Species Management Team (HMSMT) to begin developing a range of alternatives to establish hard caps on high-priority protected species (i.e. sea turtles and marine mammals) incidentally caught in the DGN fishery. In September 2014, the Council selected a Range of Alternatives and Preliminary Preferred Alternative (PPA); however, the HMSMT identified implementation issues with the Council's PPA, and an additional PPA, identified as the California Department of Fish and Wildlife (CDFW) PPA, was selected in March 2015. In June, the Council added a 2-year hard cap sub-option to the Council hard cap PPA and the CDFW hard cap PPA, and an additional alternative that modified the CDFW PPA was added in September 2015. This alternative contained 2-year rolling hard caps based on observed mortality/injury; the Council selected this alternative as its Final Preferred Alternative (FPA).

Proposed Regulations for Hard Cap Limits

The implementation of hard caps is intended to manage the fishery under the MSA to protect certain non-target species. Its purpose is not to manage marine mammal or endangered species populations, but rather to enhance the provisions of ESA and the MMPA under MSA Section 303(b)(12) and National Standard 9. This proposed rule would implement the Council's FPA, which would establish 2-year rolling hard caps on 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 in the DGN fishery. The definition of injury is taken from the NMFS West Coast Region Observer Program field manual. Observers record protected species released as Alive, Injured, or Dead. Observer program staff reviews observer data forms and notes to make a final determination of the condition of entangled protected species. To determine whether a hard cap has been reached, NMFS would count observed mortalities and injuries to these species during the 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. The Council recommended hard cap values for when the DGN observer coverage level is less than 75 percent; the Council will revisit hard cap values when observer coverage becomes greater than 75 percent.

Table 1. Proposed Protected Species Hard Caps for Drift Gillnet Fishery.

Species	Rolling 2-Year Hard 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-fin Pilot Whale (CA/OR/WA stock)	4
Bottlenose Dolphin (CA/OR/WA stock)	4

Fishery Closure Procedures

NMFS will report observed protected species mortalities and injuries to help participants in the DGN fishery plan for the possibility of a hard cap being reached. If, as determined by NMFS, the DGN fleet meets or exceeds a hard cap during a rolling 2-year period, the fishery will be closed. NMFS will publish a notice in the **Federal Register** announcing the specified beginning and end dates of the closure. Upon the effective date identified in the **Federal Register** Notice, a DGN vessel may not be used to target, retain on board, transship, or land any additional fish using DGN gear in the U.S. West Coast EEZ during the period specified in the announcement. Any fish already on board a DGN fishing vessel on the effective date may be retained on board, transshipped, and/or landed, to the extent authorized by applicable laws and regulations, if they are landed within 4 days after the effective date. NMFS will notify vessel owners/operators of the closure by Vessel Monitoring System communication to the fleet stating when large-mesh drift gillnet fishing is closed. Notification will also be made by postal mail and a posting on the NMFS regional website.

Classification

Pursuant to section 304 (b)(1)(A) of the MSA, the NMFS West Coast Regional Administrator has determined that this proposed rule is consistent with the HMS FMP, other provisions of the MSA, and other applicable law, subject to further consideration after public comment.

There are no new collection-of-information requirements associated with this action that are subject to the Paperwork Reduction Act (PRA), and existing collection-of-information

requirements still apply under the following Control Numbers: 0648-0593. Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection-of-information subject to the requirements of the PRA, unless that collection-of-information displays a currently valid Office of Management and Budget control number.

NMFS prepared a draft EA for the proposed regulations that discusses the impact on the environment as a result of this rule. The proposed action will have minor beneficial environmental impacts on target, not-target, and protected species and negative economic impacts to the DGN fleet. All of the proposed alternatives would result in a negative economic impact; however, the Council's FPA would result in a limited economic impact when compared to the other alternatives (a more detailed explanation can be found in the IRFA). A copy of the draft EA is available from NMFS (see **ADDRESSES**).

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

On December 29, 2015, the National Marine Fisheries Service (NMFS) issued a final rule establishing a small business size standard of \$11 million in annual gross receipts for all businesses primarily engaged in the commercial fishing industry (NAICS 11411) for Regulatory Flexibility Act (RFA) compliance purposes only (80 FR 81194, December 29, 2015). The \$11 million standard became effective on July 1, 2016, and is to be used in place of the U.S. Small Business Administration's (SBA) current standards of \$20.5 million, \$5.5 million, and \$7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing (NAICS 114119) sectors of the U.S. commercial fishing industry in all NMFS rules subject to the RFA after July 1, 2016. *Id.* at 81194.

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the SUMMARY section of the preamble. A summary of the analysis follows. A copy of this analysis is available from NMFS (see **ADDRESSES**).

There are currently 73 individual permit holders with valid California Department of Fish and Wildlife drift gillnet permits; however, many permits remain inactive. On average, 20 vessels participated in the fishery each year from 2010 through 2015. In 2015, 18 vessels participated in the fishery with total landings equaling 96 metric tons (mt) (round weight), about 5.3 mt on average per vessel. Total landings included 18 mt of common thresher shark, 6 mt of shortfin mako shark, 66 mt of swordfish, and 5 mt of tunas. All participants in the fishery are considered small businesses since average annual per vessel revenues persist well below the \$11 million threshold.

The Council considered six alternatives for protected species hard caps for the DGN fishery before selecting Alternative 6 as their FPA. Compared to the baseline, the proposed regulatory action (i.e., based on Alternative 6) would result in a \$4,596 annual loss per vessel based on a DGN fleet size of 20 vessels. These potential adverse economic effects of the proposed regulations appear to be limited. DGN effort is variable over the course of a fishing season, as vessels may choose to fish for salmon, albacore, and other marketable species based on abundance and environmental conditions, which may mitigate some of the anticipated economic losses. If vessel operators are successful in reducing the frequency of hard cap species catch in the future, the DGN fishery would close less often. However, given the many existing

regulatory measures to reduce protected species interactions in the DGN fishery to minimal levels, the degree to which further take reductions can be realized through fishermen's deliberate effort to avoid reaching caps cannot be determined.

Action Alternatives 1 through 4 were estimated to produce fewer costs to the fleet than the FPA; however, these alternatives presented significant implementation challenges. The evaluation of the fishery against hard caps in each of these Alternatives was based on an estimated mortality and serious injury (M&SI) calculation derived from observer coverage levels. The current NMFS process under the MMPA for making M&SI determinations is an extensive and multi-step process that takes months to complete and occurs at the end of each calendar year. It was deemed that this process, therefore, would not be responsive enough to inseason interactions with protected species. NMFS would have to create an expedited M&SI assessment process to make a more timely determination, which would have further delayed this action. Additionally, observer coverage rates for the DGN fishery vary between and within fishing seasons. This makes it difficult to determine the coverage rate at the time an interaction occurs and then extrapolate observed M&SI for comparison to the hard caps. Similarly, using a generalized observer coverage rate is problematic because DGN vessels often participate in multiple fisheries based on environmental factors and the presence of different species. This adds to the variation in observer coverage levels over the course of a fishing season. Lastly, because fishing effort has been low compared to historical levels, a small change in observed fishing effort can have a potentially big effect on the observer coverage rate if unobserved effort does not change commensurately.

In response to the identified implementation issues with Alternatives 1 through 4, the CDFW proposed Alternative 5 with two sub-Alternatives. Based on Alternative 5 sub-option 1,

the DGN fishery would be expected to meet or exceed a hard cap seven out of thirteen fishing seasons, using historical observations (there is, however, less fishing effort in recent years, so the fishery would be expected to close fewer than seven times under this Alternative). Using Alternative 5 sub-option 2, the fishery would be expected to close in 14.6 percent of simulated seasons, with the possibility of closing for more than one full fishing season. While Alternative 5 would produce greater beneficial effects to target, non-target, and protected species than the other alternatives, the results of the economic analysis indicate that it would have the greatest economic impact and not be conducive to supporting an economically viable swordfish fishery. The Council's FPA, Alternative 6, is the least costly alternative of those that did not present significant implementation issues.

NMFS considers all entities subject to this action to be small entities as defined NMFS' size standards. The small entities that would be affected by the proposed action are all U.S. commercial DGN vessels that may be used in the California/Oregon large-mesh DGN fishery. Because each affected vessel is a small business, the proposed rule has an equal effect on all of these small entities. Therefore, the proposed action will impact all these small entities in the same manner. This rulemaking is not anticipated to have a significant economic impact on a substantial number of small entities, or place small entities at a disadvantage to large entities.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Reporting, and recordkeeping requirements.

Dated: October 6, 2016.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 660 is proposed to be amended as follows:

PART 660--FISHERIES OFF WEST COAST STATES

1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*, 16 U.S.C. 773 *et seq.*, and 16 U.S.C. 7001 *et seq.*

2. In § 660.702, add the definition for “Injury” in alphabetical order to read as follows:

§ 660.702 Definitions.

* * * * *

Injury, when referring to marine mammals and sea turtles, means the animal has been released with obvious physical injury or with attached fishing gear.

* * * * *

3. In § 660.705, add paragraphs (tt) and (uu) to read as follows:

§ 660.705 Prohibitions.

* * * * *

(tt) Fish with a large-mesh drift gillnet (mesh size \geq 14 inches) in the U.S. West Coast Exclusive Economic Zone during the time the fishery is closed pursuant to § 660.713(h)(2)(ii).

(uu) Retain on board, transship, or land any fish caught with a large-mesh drift gillnet (mesh size \geq 14 inches) later than 4 days after the effective date of a drift gillnet fishery closure and before the drift gillnet fishery re-opens pursuant to § 660.713(h)(2)(ii).

4. In § 660.713, add paragraph (h) to read as follows:

§ 660.713 Drift gillnet fishery.

* * * * *

(h) Limits on protected species mortalities and injuries.

(1) Maximum 2-year hard caps are established on the number of sea turtle and marine mammal mortalities and injuries that occur as a result of observed interactions with large-mesh drift gillnets (mesh size \geq 14 inches) deployed by vessels registered for use under HMS permits. Mortalities and injuries during the current fishing season (May 1 through January 31) and the previous fishing season are counted towards the hard caps. The mortality and injury hard caps are as follows:

Species	Rolling 2-Year Hard 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-fin Pilot Whale (CA/OR/WA stock)	4
Bottlenose Dolphin (CA/OR/WA stock)	4

(2) Upon determination by the Regional Administrator that, based on data from NMFS observers or a NMFS Electronic Monitoring program, the fishery has reached any of the protected species hard caps during a given 2-year period:

(i) As soon as practicable, the Regional Administrator will file for publication at the Office of the Federal Register a notification that the fishery has reached a protected species hard cap. The notification will include an advisement that the large-mesh drift gillnet (mesh size \geq 14 inches) fishery shall be closed, and that drift gillnet fishing in the U.S. West Coast Exclusive Economic Zone by vessels registered for use under HMS permits will be prohibited beginning at a specified date and ending at a specified date. Drift gillnet fishing will then be allowed beginning May 1 of the year when observed mortality and injury of each species during the previous May 1 through January 31 fishing season is below its hard cap value. Coincidental with the filing of the notification, the Regional Administrator will also provide actual notice that the large-mesh drift gillnet (mesh size \geq 14 inches) fishery shall be closed, and that drift gillnet fishing in the U.S. West Coast Exclusive Economic Zone by vessels registered for use under HMS permits will be prohibited beginning at a specified date, to all holders of HMS permits with a drift gillnet endorsement via VMS communication, postal mail, and a posting on the NMFS regional website.

(ii) Beginning on the fishery closure date published in the **Federal Register** and indicated by the Regional Administrator in the notification provided to vessel operators and permit holders under paragraph (h)(2)(i) of this section, and until the specified ending date, the large-mesh drift gillnet (mesh size \geq 14 inches) fishery shall be closed. During the closure period commercial fishing vessels registered for use under HMS permits may not be used to target, retain on board, transship, or land fish captured with a large-mesh drift gillnet (mesh size \geq 14

inches), with the exception that any fish already on board a fishing vessel on the effective date of the notice may be retained on board, transshipped, and/or landed, to the extent authorized by applicable laws and regulations, provided such fish are landed within 4 days after the effective date published in the fishing closure notice.

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