



MARINE MAMMAL COMMISSION

9 March 2020

Mr. Lyle Enriques
National Marine Fisheries Service
West Coast Region
501 W. Ocean Blvd., Suite 4200
Long Beach, CA 90802

Re: RIN 0648–BJ58

Dear Mr. Enriques:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service’s (NMFS) final rule (85 Fed. Reg. 7246). Under the authority of Section 303(b) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the rule establishes strict limits (hard caps) on the incidental catch (take or bycatch) of certain marine mammals in the California/Oregon Large-Mesh Drift Gillnet Fishery (DGN fishery), and implements an immediate closure if those limits are met or exceeded. The Commission herein offers comments and recommendations regarding these regulations.

The rule establishes hard caps on the incidental catch in the DGN fishery of five cetacean species – sperm whales, humpback whales, fin whales, short-finned pilot whales, and common bottlenose dolphins. Sperm and fin whales, and two populations of humpback whales that are subject to incidental catch in the fishery, are listed under the Endangered Species Act. The DGN fishery will be closed if the observed rolling two-year mortality and serious injury (M&SI) level for any of these five species or stocks meets or exceeds its specified hard cap.

The rule was first proposed by NMFS in 2016 (81 Fed. Reg. 70660), based on recommendations made by the Pacific Fishery Management Council (PFMC). Following the public comment period and additional analyses, on June 12, 2017, NMFS withdrew the proposed rule, citing “significant adverse short-term economic effects”. One month later, NMFS was sued to compel publication of the proposed regulations. The litigants argued that NMFS had not followed the law in withdrawing the proposed regulations based on determinations made subsequent to issuing the proposed rule. In October 2018, the U.S. District Court for the Central District of California found that NMFS had exceeded its authority under the MSA and the Administrative Procedure Act, and on January 8, 2020 ordered NMFS to publish the final rule by February 7, 2020, which NMFS has now done. The order also required NMFS to consult with the PFMC regarding revisions to the proposed rule. However, NMFS argued that the order did not provide enough time for that process, and therefore the federal notice of the final rule includes a request for public comments “to gather information that can be used to develop” such potential revisions to the rule.

On December 28, 2016, the Commission sent recommendations to NMFS in response to the proposed hard-cap regulations (letter attached).¹ Because the final rule is identical to the proposed rule, the Commission's recommendations have not changed, and the Commission refers NMFS to that letter for the Commission's recommendations and their rationale. Briefly, the Commission made recommendations regarding the following:

1. NMFS did not explain why management of the impacts of the DGN fishery on fin, humpback, and sperm whales under the ESA and MMPA require enhancement under the MSA to provide the necessary level of protection.
2. NMFS did not explain why a closure of the fishery would best be implemented through MSA regulations rather than through re-initiation of Section 7 consultation and/or amendment of the applicable MMPA permit.
3. NMFS did not provide justification for its conclusions that 1) section 7 consultation and the TRT process have provided inadequate protection to listed species, and 2) a more stringent response to potentially excessive bycatch is required or is the best option for protecting certain fin, humpback, and sperm whale stocks.
4. NMFS did not adequately consider the proposed fishery closures in light of the modest improvement in bycatch reduction likely to be achieved under the proposed rule as compared to those options available under section 7 consultation and the TRT process.
5. NMFS did not design the hard caps based on the best available science, or make them sufficiently precautionary and adaptive.
6. NMFS did not provide justification for implementing DGN fishery closures to protect stocks experiencing sustainable take levels in that fishery.

Considering these and other issues identified in the Commission's 2016 letter, and the Commission's conclusion that the proposed hard caps would be unlikely to have a significant effect on short-term bycatch rates and would likely have a negligible effect on long-term bycatch rates, the Commission recommended that NMFS not implement the proposed hard caps in the DGN fishery, a recommendation that NMFS initially adopted. At this juncture, the Commission recommends that NMFS review the recommendations made in the Commission's 2016 letter as it considers revisions to the final hard-cap rule.

¹ <http://www.mmc.gov/wp-content/uploads/16-12-28Enriques-DGN-Fishery-Hard-Caps-.pdf>


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Thank you for the opportunity to comment on the final hard-cap rule. Please contact me if you have any questions about our recommendations and rationale.

Sincerely,



Peter O. Thomas, Ph.D.,
Executive Director

cc: Donna S. Wieting, Director, Office of Protected Resources, NOAA Fisheries
Christopher E. Yates, Assistant Regional Administrator, West Coast Region, NOAA Fisheries

Attachment: 28 December 2016, Commission letter with comments and recommendations on NMFS' 2016 proposed CA/OR DGN hard-cap rule.