

# Bycatch: Fishing Practices Threaten Seabirds in the Gulf

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**Bycatch is the unintentional, and often unknowing,** taking of non-target fish and marine life due to contact with fishing gear and fishing boats. The federal government has taken steps to reduce seabird bycatch in America's fisheries, but regional fishery management councils have focused primarily on bycatch of fish, sea turtles, and marine mammals rather than birds. Failure to comply with existing bycatch statutes and regulations threatens seabird populations and is also a statutory offense punishable by law. The bycatch prevention methods currently employed by fisheries have led to a reduction in national seabird bycatch numbers over the last thirty years.<sup>1</sup> However, if the regional fishery management councils adopt more stringent methods of bycatch prevention, they will be in compliance with requisite legislation and better protect the nation's seabird populations.

## Types of Bycatch

Trawling (dragging large nets behind one or more boats to harvest fish), longlining (a long line of baited hooks attached to a boat), and use of underwater crab traps are popular fishing practices in the Gulf of Mexico that cause seabird bycatch. Birds often become ensnared in trawl nets while diving to eat fish caught in the trawl. Birds also suffer broken bones by unintentionally striking trawl warps, lines, and wires. Injured seabirds settle on the water when they are unable to fly. If a bird is unable to fly, it will eventually either starve or drown. Likewise, birds often become hooked or caught in longlines while diving to eat fish off the lines when they are being pulled in or when they are being soaked. The greatest danger for seabirds with longlines is when the lines have just been baited and are being put into the water. Birds try to eat the bait, are hooked, and then drowned as the lines sink. Seabirds dive to eat crustaceans and bait out of underwater crab traps. Once in the trap, the birds are unable to escape and ultimately drown.

## Bycatch Laws

The United States has enacted statutes and entered into international treaties to protect birds. For example, in 1996 Congress amended the Magnuson-Stevens Fishery Conservation and Management Act (MSA) National Standards for Fishery Management Plans to include National Standard 9, codified as 16 U.S.C. § 1851(a)(9), requiring fishery management councils to consider the bycatch effects of existing and planned conservation management measures. In 2007, Congress enacted the Bycatch Reduction Engineering Program as an amendment to the MSA. This required regional fishery management councils to establish local bycatch reduction programs "based upon the best scientific information available." These programs were meant to incentivize compliance with bycatch regulations by setting bycatch quotas, promoting use of gear proven to lower bycatch rates, and implementing measures that will reduce bycatch and seabird interactions within fisheries.

While the 2007 amendment to the MSA addressed bycatch in general, it also specifically addressed seabirds, requiring the National Oceanic and Atmospheric Administration (NOAA) of the U.S. Department of Commerce to improve information and technology to reduce seabird bycatch. The amendment authorized NOAA to undertake projects with members of the fishing industry to establish outreach programs, contact international fishing organizations, and initiate projects to mitigate seabird mortality. It also required NOAA to transmit an annual report to the Senate describing the improvements and reductions in seabird bycatch, as well as new proposals to address remaining bycatch issues.<sup>2</sup>

The MSA amendments require fishery management councils to include in their fishery management plans methods of calculating bycatch, fishing practices that will minimize bycatch, and incentives for fishers to employ fishing practices

that result in less bycatch. They also require the councils to implement measures that will minimize the bycatch mortality of marine mammals and seabirds. NOAA promulgated regulations for National Standard 9 in 50 C.F.R. § 600.350, defining bycatch and requiring fishery management councils to consider economic and environmental impacts when establishing bycatch standards.

Bycatch requirements have been the basis for lawsuits by conservation groups. In *Pacific Marine Conservation Council, Inc. v. Evans*, a coalition of conservation groups brought suit against NOAA under the Magnuson-Stevens Act.<sup>4</sup> The coalition alleged that an amendment the National Marine Fisheries Service (NMFS) adopted for the Pacific Coast Groundfish Fishery Management Plan violated MSA requirements for fishery management plans to establish a standardized reporting methodology to assess bycatch and include conservation measures to minimize bycatch. According to the plaintiffs, NOAA failed to adopt a method for assessing bycatch of any form and did not adopt two bycatch reduction methods shown to be valid. The federal district court held that NOAA's dismissal of the valid bycatch reduction methods and failure to add a bycatch assessment method to the amendment violated the MSA. The court returned the amendment to the agency for redrafting in order to comply with the MSA.

### Statutes that Prohibit Harming Birds

In addition to bycatch laws under the MSA, seabirds are protected broadly by statutes that prohibit the taking of certain bird species. Both the Endangered Species Act (ESA) and the Migratory Bird Treaty Act (MBTA) may serve as alternative causes of action in cases regarding seabird bycatch. Additionally, NOAA regulations at 50 C.F.R. § 600.350(e) require regional management councils to consider other applicable laws such as the ESA and the MBTA in order to fully comply with the National Standards.

The MBTA is a law which resulted from a series of treaties. In 1918, the United States entered a formal agreement with Great Britain, which acted on behalf of Canada, to ensure the protection and preservation of migratory bird species shared by the two countries. Other treaties comprising the MBTA are with Mexico, Japan, and the Soviet Union (on behalf of Russia). The law makes it unlawful to hunt, kill, take, trade, ship, or transport migratory birds, migratory bird nests, and migratory bird eggs.<sup>5</sup>



Every time a migratory seabird is caught in a Gulf of Mexico longline without a permit, it is a violation of the MBTA. For example, there are frequent reports of brown pelican bycatch in the Gulf of Mexico.<sup>6</sup> Both brown and white pelicans are migratory birds, and, unless a permit was issued beforehand, any bycatch that includes the pelican is a violation of the MBTA.

In *Turtle Island Restoration Network v. U.S. Department of Commerce*, conservation groups brought action against NOAA Fisheries and the U.S. Fish and Wildlife Service (FWS) alleging illegal take of birds under the MBTA.<sup>7</sup> The conservation groups alleged that FWS violated the MBTA by issuing “special permits” to the local longline fishery for the bycatch of migratory birds without demonstrating a “compelling justification” required for such a permit to issue under 50 C.F.R. § 21.27(a). FWS argued that the special permits were necessary because closure of the fishery would result in increased catch by foreign longline fleets who did not follow bycatch mitigation practices. The court noted that the MBTA made it unlawful to kill or take a migratory bird by any matter or method, even if it was unintentional. The court found that bycatch did not fit the exceptions under the MBTA for permitted takes, and nullified the permit.

In 1973, Congress enacted the Endangered Species Act to conserve endangered species and protect the ecosystems that they depend on. Under 16 U.S.C. § 1532, the ESA defines species as “endangered” (a species in danger of extinction) or “threatened” (a species that is likely to become endangered). FWS is responsible for the protection of terrestrial and freshwater organisms under the ESA, while NOAA Fisheries oversees the protection of marine life. The ESA works by prohibiting the hunting, taking, sale, transportation, or possession of endangered species.

Conservation groups in Hawai'i used the ESA in conjunction with the MSA to challenge a rule that they feared would increase seabird bycatch in a fishery. In *Conservation Council for Hawai'i v. National Marine Fisheries Service*, conservation groups alleged that a recently enacted quota-shifting rule would increase bycatch of non-target and endangered species, including seabirds.<sup>8</sup> The new rule allowed NMFS to shift set percentages of the national longline fishery bigeye tuna catch limit in the form of fishing quotas to vessels based in the United States or other territories. The court noted that the quota-shifting rule required an annual review process wherein NMFS and the local fishery management council could take corrective actions in order to meet the conservation needs of non-target stock and protected species such as migratory seabirds. The conservation groups failed to show how this yearly assessment of the quota-shifting rule violated either the MSA or the ESA, and so the court upheld the new rule.

### Proposed Solutions to Seabird Bycatch in the Gulf

There are a plethora of methods and protocols that can be implemented to reduce seabird bycatch in Gulf fisheries and ensure compliance with federal law. The first step in reducing bycatch is mandatory reporting and data collection for all instances of seabird entanglements in Gulf fisheries. NOAA's Southeast Pelagic Observer Program is currently the only organization that consistently monitors seabird bycatch in the Gulf. This group focuses solely on the nation's pelagic longline fleet, and it does not collect data on the other seven fisheries.<sup>9</sup> An increase in data collection and bycatch monitoring would allow the management councils to better assess the amount of bycatch that is actually taking place and implement more effective bycatch reduction methods.

A second method of reducing bycatch in the Gulf is to adopt more bird-friendly fishing practices. Bycatch of birds can be reduced in longline fisheries by using "bird scaring lines" (a line that is covered with streamers and connected to a buoy that is towed behind the boat) and "weighted lines" (lines that rapidly sink so as to limit the amount of time on the surface). Deploying streamers on boats (similar to those in longline fisheries), using sirens when pulling in nets to scare away birds, decreasing the amount of time nets are above water, and maintaining clean nets are all methods to reduce seabird bycatch when trawling.

For traps, it is a best practice to ensure all old bait is removed and that the trap is left open so that diving birds have a way to escape.<sup>10</sup>

A third method of bycatch reduction for the Gulf is to establish mandatory bycatch limits for each fishery. This method is more complex than others because it requires extensive individualized research for each fishery, as well as a formal rulemaking process under the MSA to amend the existing fishery management plans. Groups such as Oceana, Inc., argue that a bycatch cap based on scientific data should be set for every fishery, and that the fishery should close for the season once its bycatch limit is reached.<sup>11</sup> While bycatch limits would force fisheries to stay below a set number of bycatch instances a year, there are conflicting studies as to whether bycatch limits are feasible for fisheries with thousands of vessels, such as the shrimp fishery in the Gulf of Mexico.<sup>12</sup> 🐡

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### Endnotes

1. Lee R. Benaka, et al., *U.S. National Bycatch Report First Edition Update 3*, NOAA, p. 29 (NMFS-F/SPO-190 2019).
2. 16 U.S.C. § 1865.
3. 16 U.S.C. § 1853.
4. *Pacific Marine Conservation Council v. Evans*, 200 F. Supp. 2d 1194 (N.D. Cal. 2009).
5. 16 U.S.C. § 703(a).
6. Lee R. Benaka, et al., *U.S. National Bycatch Report First Edition Update 3*, NOAA, p. 30 (NMFS-F/SPO-190 2019).
7. *Turtle Island Restoration Network v. U.S. Dept. of Commerce*, 878 F.3d 725 (9th Cir. 2017).
8. *Conservation Council for Hawai'i v. National Marine Fisheries Service*, 154 F. Supp. 3d 1006 (D. Haw. 2015).
9. NOAA Fisheries, *Southeast Pelagic Observer Program*.
10. American Bird Conservancy, *Seabird Bycatch Solutions for Fishery Sustainability*, at 35-42 (2016).
11. Amanda Keledjian, et al., *Wasted Catch: Unsolved Problems in U.S. Fisheries*, Oceana, Inc., p. 39 (March 2014).
12. Sandra L. Diamond, *Bycatch quotas in the Gulf of Mexico shrimp trawl fishery: Can they work*, *Reviews in Fish Biology and Fisheries*, p. 227 (2004).