

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration**

RIN 0648–XC645

**Taking of Threatened or Endangered Marine Mammals Incidental to Commercial Fishing Operations; Issuance of Permit**

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

**ACTION:** Notice.

**SUMMARY:** In accordance with the Marine Mammal Protection Act (MMPA), NMFS hereby issues a permit for a period of three years to authorize the incidental, but not intentional, taking of individuals of three stocks of marine mammals listed as threatened or endangered under the Endangered Species Act (ESA) by the California (CA) thresher shark/swordfish drift gillnet (DGN) fishery ( $\geq 14$  inch mesh) and the incidental, but not intentional, taking of individuals from one stock by the Washington/Oregon/California (WA/OR/CA) sablefish pot fishery.

**DATES:** This permit is effective for a three-year period beginning September 4, 2013.

**ADDRESSES:** Reference material, including the negligible impact determination, for this permit is available on the Internet at the following address: <http://swr.nmfs.noaa.gov/>. Recovery plans for these species are available on the Internet at the following address: <http://www.nmfs.noaa.gov/pr/recovery/plans.htm#mammals>. Information on the Pacific Offshore Cetacean Take Reduction Plan is available the Internet at the following address: <http://www.nmfs.noaa.gov/pr/interactions/trt/poctrp.htm>.

Copies of the reference materials may also be obtained from the Protected Resources Division, 501 W Ocean Blvd., Suite 4200, Long Beach, CA 90802.

**FOR FURTHER INFORMATION CONTACT:** Monica DeAngelis, NMFS Southwest Region, (562) 980–3232, or Shannon Bettridge, NMFS Office of Protected Resources, (301) 427–8402.

**SUPPLEMENTARY INFORMATION:****Background**

Section 101(a)(5)(E) of the Marine Mammal Protection Act (MMPA), 16 U.S.C. 1361 *et seq.*, states that NOAA's National Marine Fisheries Service (NMFS), as delegated by the Secretary of Commerce, shall for a period of up to three years allow the incidental taking

of marine mammal species listed under the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, by persons using vessels of the United States and those vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1824(b), while engaging in commercial fishing operations, if NMFS makes certain determinations. NMFS must determine, after notice and opportunity for public comment, that: (1) Incidental mortality and serious injury will have a negligible impact on the affected species or stock; (2) a recovery plan has been developed or is being developed for such species or stock under the ESA; and (3) where required under section 118 of the MMPA, a monitoring program has been established, vessels engaged in such fisheries are registered in accordance with section 118 of the MMPA, and a take reduction plan has been developed or is being developed for such species or stock.

On May 8, 2013 (78 FR 26751), NMFS proposed to issue a permit under MMPA section 101(a)(5)(E) to vessels registered in the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) to incidentally take individuals from three stocks of threatened or endangered marine mammals: the CA/OR/WA stock of fin whales (*Balaenoptera physalus*), the CA/OR/WA stock of humpback whales (*Megaptera novaeangliae*), and the CA/OR/WA stock of sperm whales (*Physeter macrocephalus*); and to vessels registered in the and the WA/OR/CA sablefish pot fishery to incidentally take individuals from the CA/OR/WA stock of humpback whales. The data for considering these authorizations were reviewed coincident with the preparation of the 2012 MMPA List of Fisheries (LOF or List) (76 FR 73912; November 29, 2011), the 2011 marine mammal stock assessment reports (SARs) (Carretta *et al.* 2012; Allen and Angliss 2011), the Fishery Management Plan (FMP) for U.S. West Coast Fisheries for Highly Migratory Species (HMS), Pacific Coast Groundfish FMP, recovery plans for these species (available on the Internet at the following address: <http://www.nmfs.noaa.gov/pr/recovery/plans.htm#mammals>), the Emergency Rule (RIN 0648–BD57), and other relevant sources.

Based on observer data and marine mammal reporting forms, the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) and the WA/OR/CA sablefish pot fishery are the Category I or II fisheries that operate in the ranges of affected stocks, namely the CA/OR/

WA stocks of fin, sperm whales, and humpback whales. A detailed description of these fisheries can be found in the negligible impact determination (see **ADDRESSES**). All other Category II fisheries that interact with the marine mammal stocks observed off the coasts of Washington, Oregon, and California are State-managed and are not considered for authorization under this permit. Participants in Category III fisheries are not required to obtain incidental take permits under MMPA section 101(a)(5)(E) but are required to report injuries or mortality of marine mammals incidental to their operations.

In accordance with the MMPA, NMFS has made a determination that incidental taking from commercial fishing will have a negligible impact on the fin whale, CA/OR/WA stock; humpback whale, CA/OR/WA stock; and sperm whale, CA/OR/WA stock. This authorization is based on a determination that this incidental take will have a negligible impact on the affected marine mammal stocks, recovery plans have been developed for each species, a monitoring program is established, vessels in the fisheries are registered, and that the necessary take reduction plan (TRP) is in place for the humpback and sperm whale stocks. A TRP is not required for the CA/OR/WA stock of fin whales because mortality and serious injury of this stock incidental to the CA thresher shark/swordfish DGN fishery and the WA/OR/CA sablefish pot fishery is at insignificant levels approaching a zero mortality and serious injury rate. NMFS also issued emergency regulations to reduce risk of sperm whale takes by the West Coast swordfish drift gillnet fishery (RIN 0648–BD57) below the stock's Potential Biological Removal (PBR) level of 1.5 animals; NMFS developed the measures in the emergency rule based on recommendations from the Pacific Offshore Cetacean Take Reduction Team. Revisions to the draft negligible impact determination were based on issuance of the emergency rule and on public comment received on the draft negligible impact determination (78 FR 26751, May 8, 2013).

**Basis for Determining Negligible Impact**

Prior to issuing a permit to take ESA-listed marine mammals incidental to commercial fishing, NMFS must determine if mortality and serious injury incidental to commercial fisheries will have a negligible impact on the affected species or stocks of marine mammals. NMFS satisfied this requirement through completion of a

negligible impact determination (see **ADDRESSES**). NMFS calculated the total human-related serious injury and mortality to make a negligible impact determination for this authorization and included all human sources, such as commercial fisheries and ship strikes. See the negligible impact determination for more detailed information.

The average annual serious injury and mortality, from all sources, is below PBR for the CA/OR/WA fin and humpback whale stocks, but is above PBR for the CA/OR/WA sperm whale stock. At this time, no other fishery, with the exception of the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh), has documented takes of sperm whales. As a result, NMFS convened the Pacific Offshore Cetacean Take Reduction Team (Team) on July 31 and August 7, 2013 and charged the Team with developing recommendations to reduce sperm whale serious injury and mortality in the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh). NMFS considered the Team's recommendations and developed an emergency rule (RIN 0648-BD57) to modify the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) to reduce the risk of mortality and serious injury of sperm whales incidental to the fishery. In doing so, NMFS determined that the negligible impact determination conditions of the MMPA section 101(a)(5)(E) could be met, thereby allowing NMFS to provide incidental take authorization under the ESA and MMPA for the 2013–2014 fishing season.

The emergency rule, effective through January 31, 2014, includes several provisions to reduce risk to sperm whales and monitor the fishery. Specifically, the emergency rule provides for immediate termination of the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) if one sperm whale is observed killed or seriously injured in DGN gear off California and establishes a 100-percent observer coverage zone that is closed to DGN fishing during the August 15, 2013 to January 31, 2014 fishing season unless the fishing vessel is carrying a NMFS-trained observer. The zone covers nearly all areas in the U.S. exclusive economic zone (EEZ) deeper than the 1,100 fathoms (fm) (2,012 meters (m)) depth contour. Owners/operators of vessels intending to fish with DGN gear are required to install, activate, carry and operate a vessel monitoring system prior to embarking on a DGN fishing trip.

NMFS intends to reconvene the Team to consider long-term measures for reducing sperm whale mortality and serious injury in the CA thresher shark/

swordfish DGN fishery ( $\geq 14$  inch mesh) in subsequent fishing seasons. It is expected that any future changes to the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) that may occur as a result of modifying the Pacific Offshore Cetacean Take Reduction Plan would not change the negligible impact analysis. However, if a mortality or serious injury of a sperm whale (CA/OR/WA stock) occurs in any fishery, that would be included in the total fishery-related serious injury or mortality considered in a future negligible impact determination. The underlying data indicate that there is a very low likelihood that another fishery may take a sperm whale, but in the unlikely event that a mortality or serious injury occurs during the three-year time frame for this authorization, the negligible impact determination would be re-evaluated pursuant to section 101(a)(5)(E)(iii), (iv), and (v) of the MMPA (16 U.S.C. 1371(a)(5)(E)(iii), (iv), and (v)). Thus, based on this information, the emergency rule (RIN 0648-BD57), and the applicability of Criterion 3, NMFS determines that the mortality and serious injury incidental to commercial fisheries will have a negligible impact on the CA/OR/WA stock of sperm whales.

In conclusion, based on the negligible impact criteria outlined in 1999 (64 FR 28800), the 2011 Pacific SARs (Carretta *et al.* 2012), the best scientific information and data available, and the measures required in the emergency rule (RIN 0648-BD57) to modify the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh), NMFS has determined that for a period of up to three years, mortality and serious injury incidental to the CA thresher shark/swordfish DGN fishery will have a negligible impact on the CA/OR/WA stocks of sperm whales, humpback whales, and fin whales, and mortality and serious injury incidental to the WA/OR/CA sablefish pot fishery will have a negligible impact on the CA/OR/WA stock of humpback whales.

The available serious injury and mortality data for the CA/OR/WA stock of fin whales meet the factors for negligible impact determination under Criterion 2 of the 1999 criteria, including because the annual average fisheries-related mortality is less than 0.1 PBR. The available data for the CA/OR/WA stock of humpback whales meet the factors for negligible impact determination under Criterion 3 of the 1999 criteria, including because the expected fisheries-related mortality is greater than 0.1 PBR and less than PBR and the population is increasing. Total fishery-related serious injury and mortality for the CA/OR/WA stock of

sperm whales is greater than 0.1 PBR and is anticipated to be less than PBR following implementation of the emergency rule to modify the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) fishery (RIN 0648-BD57), and the population is stable; thus, the conditions of Criterion 3 of the 1999 negligible impact criteria are met for this stock and would be re-evaluated pursuant to section 101(a)(5)(E)(iii), (iv), and (v) of the MMPA. Therefore, the identified commercial fisheries within the range of the CA/OR/WA stocks of fin, humpback, and sperm whales may be permitted subject to their individual review and the certainty of relevant data, and provided that the other provisions of MMPA section 101(a)(5)(E) are met.

#### Determinations for the Permit

Based on the final negligible impact determination, NMFS concludes that the incidental mortality and serious injury from the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) will have a negligible impact on the CA/OR/WA stock of humpback whales, fin whales, and sperm whales and the WA/OR/CA sablefish pot fishery will have a negligible impact on the CA/OR/WA stock of humpback whales.

The National Environmental Policy Act (NEPA) requires Federal agencies to evaluate the impacts of alternatives for their actions on the human environment. The impacts on the human environment of continuing and modifying the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) (as part of the FMP for U.S. West Coast Fisheries for Highly Migratory Species) and the WA/OR/CA sablefish pot fishery (as part of the Pacific Coast groundfish FMP), including the taking of threatened and endangered species of marine mammals, were analyzed in: the Pacific Fishery Management Council Highly Migratory Species Fishery Management Plan final environmental impact statement (August 2003); the Pacific Fishery Management Council Proposed Harvest Specifications and Management Measures for the 2013–2014 Pacific Coast Groundfish Fishery and Amendment 21–2 to the Pacific Coast Fishery Management Plan (September 2012); Risk assessment of U.S. West Coast groundfish fisheries to threatened and endangered marine species (NWFSC 2012); and in the Final Biological Opinion prepared for the West Coast groundfish fisheries (NMFS 2012a) and the Final Biological Opinion (May 7, 2013) as amended (August 21, 2013), for the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) (NMFS 2012b), pursuant to the ESA.

Because this permit would not modify any fishery operation and the effects of the fishery operations have been evaluated fully in accordance with NEPA, no additional NEPA analysis is required for this permit. Issuing the proposed permit would have no additional impact to the human environment or effects on threatened or endangered species beyond those analyzed in these documents. NMFS reviews the remaining requirements to issue a permit to take the subject listed species incidental to the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) and WA/OR/CA sablefish pot fisheries in the sections below.

#### Recovery Plans

Recovery Plans for humpback whales, fin whales, and sperm whales have been completed (see <http://www.nmfs.noaa.gov/pr/recovery/plans.htm#mammals>). Accordingly, the requirement to have recovery plans in place or being developed is satisfied for all three stocks.

#### Vessel Registration

MMPA section 118(c) requires that vessels participating in Category I and II fisheries register to obtain an authorization to take marine mammals incidental to fishing activities. Further, section 118(c)(5)(A) provides that registration of vessels in fisheries should, after appropriate consultations, be integrated and coordinated to the maximum extent feasible with existing fisher licenses, registrations, and related programs. Participants in the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) and WA/OR/CA sablefish pot fisheries already provide the information needed by NMFS to register their vessels for the incidental take authorization under the MMPA either through the Federal groundfish limited entry permit process or the Federal vessel monitoring system. Therefore, vessel registration for an MMPA authorization is integrated through those programs in accordance with MMPA section 118.

#### Monitoring Program

The CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) has been observed by NMFS-certified observers since the early 1990s. Levels of observer coverage vary over time but are adequate to produce reliable estimates of mortality and serious injury of listed species (e.g., from 2000–2010, coverage ranged from 12.0 to 22.9 percent). As part of the Pacific Coast Groundfish FMP and MSA objectives, the WA/OR/CA sablefish pot fishery is observed at about 1–6% per year. Accordingly, as

required by MMPA section 118, a monitoring program is in place for both fisheries.

Additionally, the emergency rule (RIN 0648–BD57) establishes a 100-percent observer coverage zone that is closed to DGN fishing during the August 15, 2013 to January 31, 2014 fishing season unless the fishing vessel is carrying a NMFS-trained observer. The zone covers nearly all areas in the U.S. EEZ deeper than the 1,100 fm (2,012 meters m) depth contour. NMFS will reconvene the Take Reduction Team to review this requirement, among other issues, and will take appropriate action for subsequent fishing seasons.

#### Take Reduction Plans

Subject to available funding, MMPA section 118 requires the development and implementation of a Take Reduction Plan (TRP) in cases where a strategic stock interacts with a Category I or II fishery. The stocks considered for this permit are designated as strategic stocks under the MMPA because they are listed as threatened or endangered under the ESA (MMPA section 3(19)(C)).

In 1996, the Pacific Offshore Cetacean Take Reduction Team was convened to develop a TRP to address the incidental taking of several strategic stocks in the CA thresher shark/swordfish drift gillnet fishery. A TRP was implemented, through regulations, in October, 1997 (62 FR 51813) and has been in place ever since. The 2011 U.S. Pacific Marine Mammal Stock Assessment Reports (Carretta *et al.* 2012) and the MMPA List of Fisheries (<http://www.nmfs.noaa.gov/pr/interactions/lof/>) indicate no fin whales have interacted with either the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) or the WA/OR/CA sablefish pot fishery in the last five years, the time period used to determine PBR levels for all marine mammal stocks. As such, a take reduction plan is not required for the CA/OR/WA stock of fin whales because mortality and serious injury of this stock incidental to commercial fishing operations is at insignificant levels approaching a zero mortality and serious injury rate. The short- and long-term goals of a TRP are to reduce mortality and serious injury of marine mammals incidental to commercial fishing to levels below PBR and to insignificant levels approaching a zero mortality and serious injury rate (i.e., 10% of PBR), respectively. MMPA section 118(b)(2) states that fisheries maintaining such mortality and serious injury levels are not required to further reduce their mortality and serious injury rates.

The CA/OR/WA humpback whale stock, also a strategic stock, interacts with the WA/OR/CA sablefish pot/trap fishery and other Category II fisheries. However, the obligations to develop and implement a TRP are subject to the availability of funding. NMFS has insufficient funding available to simultaneously develop and implement TRPs for all strategic stocks that interact with Category I or Category II fisheries. As provided in MMPA section 118(f)(6)(A) and (f)(7), NMFS used the most recent SARs and LOF as the basis to determine its priorities for establishing Take Reduction Teams (TRTs) and developing TRPs. Through this process, NMFS evaluated the available data on abundance and fishery-related mortality for the CA/OR/WA stock of humpback whales, and identified them as a lower priority compared to other marine mammal stocks and fisheries for establishing TRTs, based on increasing abundance as well as mortality and serious injury levels below the stock's PBR. The CA/OR/WA stock of humpback whales has been designated as strategic because it is ESA-listed (MMPA section 3(19)(C)) and not because direct human-caused mortality exceeds PBR (MMPA section 3(19)(A)). In addition, NMFS is currently collecting data to characterize fixed gear fisheries and assess their risk to large whales off the U.S. west coast. Given these factors and NMFS' priorities, developing a TRP for the WA/OR/CA sablefish pot trap fishery and other similar Category II fisheries will be deferred under section 118 as other stocks/fisheries are a higher priority for any available funding for developing new TRPs.

#### Current Permit

As noted in the summary above, all of the requirements to issue a permit to the following Federally-authorized fisheries have been satisfied: the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) and WA/OR/CA sablefish pot fishery. Accordingly, NMFS hereby issues a permit to participants in the Category I CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) for the taking of CA/OR/WA humpback whales, CA/OR/WA fin whales, and CA/OR/WA sperm whales, and participants in the Category II WA/OR/CA sablefish pot fishery for the taking of CA/OR/WA stock of humpback whales, incidental to the fisheries' operations. As noted under MMPA section 101(a)(5)(E)(ii), no permit is required for vessels in Category III fisheries. For incidental taking of marine mammals to be authorized in Category III fisheries, any injuries or mortality must be reported to

NMFS. If NMFS determines at a later date that incidental mortality and serious injury from commercial fishing is having more than a negligible impact on the CA/OR/WA stocks of fin, humpback, or sperm whales, NMFS may use its emergency authority under MMPA section 118 to protect the stock

and may modify the permit issued herein. MMPA section 101(a)(5)(E) requires NMFS to publish in the **Federal Register** a list of fisheries that have been authorized to take threatened or endangered marine mammals. A list of such fisheries was most recently published, as required, on February 27, 2012 (77 FR 11493), which authorized

the taking of threatened or endangered marine mammals incidental to one Category II fishery along the west coast of the United States. With issuance of the current permit, NMFS adds the CA thresher shark/swordfish DGN fishery (≥14 inch mesh) fishery and WA/OR/CA sablefish pot fishery to this list (Table 1).

TABLE 1—LIST OF FISHERIES AUTHORIZED TO TAKE SPECIFIC THREATENED AND ENDANGERED MARINE MAMMALS INCIDENTAL TO COMMERCIAL FISHING OPERATIONS

Fishery	Category	Marine mammal stock
HI deep-set (tuna target) longline/set line	I	Humpback whale, CNP stock.
CA thresher shark/swordfish drift gillnet fishery (≥14 in mesh)	I	Fin whale, CA/OR/WA stock. Humpback whale, CA/OR/WA stock. Sperm whale, CA/OR/WA stock.
HI shallow-set (swordfish target) longline/set line	II	Humpback whale, CNP stock.
AK Bering Sea/Aleutian Islands flatfish trawl	II	Steller sea lion, Western stock.
AK Bering Sea/Aleutian Island pollock trawl	II	Fin whale, NEP stock. Steller sea lion, Western stock.
AK Bering Sea sablefish pot	II	Humpback whale, WNP stock. Humpback whale, CNP stock.
AK Bering Sea/Aleutian Islands Pacific cod longline fisheries	II	Steller sea lion, Western stock.
WA/OR/CA sablefish pot fishery	II	Humpback whale, CA/OR/WA stock.
AK miscellaneous finfish set gillnet	III	Steller sea lion, Western stock.
AK Gulf of Alaska sablefish longline	III	Sperm whale, NP stock. Steller sea lion, Eastern stock.
AK halibut longline/set line (State and Federal waters)	III	Steller sea lion, Western stock.
AK Bering Sea/Aleutian Islands Atka mackerel trawl	III	Steller sea lion, Western stock.
AK Bering Sea/Aleutian Islands Pacific cod trawl	III	Steller sea lion, Western stock.
AK Gulf of Alaska Pacific cod trawl	III	Steller sea lion, Western stock.
AK Gulf of Alaska pollock trawl	III	Fin whale, NEP stock. Steller sea lion, Western stock.
CA set gill net	III	None documented.
CA/OR/WA salmon troll	III	None documented.
WA/OR/CA groundfish, bottomfish longline/set line	III	None documented.
WA/OR North Pacific halibut longline/set line	III	None documented.
CA halibut bottom trawl	III	None documented.
WA/OR/CA shrimp trawl	III	None documented.

**Comments and Responses**

On May 8, 2013 (78 FR 26751), NMFS proposed to issue a permit under MMPA section 101(a)(5)(E) to vessels registered in the CA thresher shark/swordfish DGN fishery (≥14 inch mesh) and the WA/OR/CA sablefish pot fishery to incidentally take individual animals from the CA/OR/WA stocks of fin, humpback, and sperm whales. NMFS solicited comments on the proposal to issue a permit and the negligible impact determination and received letters containing comments from four organizations, the Marine Mammal Commission (Commission) and a joint letter from the Center for Biological Diversity, Turtle Island Restoration Network, and Oceana. Each letter contained multiple comments. NMFS also received one petition letter signed by 13,425 people, and one individual sent the exact same petition letter separately.

*Comment 1:* The Commission briefly summarized NMFS’ findings for the

proposed permit and recommended that NMFS comply with the MMPA section 101(a)(5)(E) by issuing the permit to the CA thresher shark/swordfish drift gillnet fishery (≥14 in mesh) for the CA/OR/WA fin and humpback whale stocks and the WA/OR/CA sablefish pot fishery for the CA/OR/WA humpback whale stock. The Commission also recommended that NMFS comply with MMPA section 101(a)(5)(E) by issuing the permit to the WA/OR/CA sablefish pot fishery for the CA/OR/WA fin and sperm whale stocks.

*Response:* NMFS agrees and is issuing the permit as required by the MMPA. NMFS clarifies that the permit will be issued for the WA/OR/CA sablefish pot fishery for the CA/OR/WA humpback whale stock, but not for the CA/OR/WA fin and sperm whale stocks as these two stocks do not interact with this fishery.

*Comment 2:* The Commission recommended that NMFS, before authorizing the take of sperm whales in the CA thresher shark/swordfish drift

gillnet fishery (≥14 in mesh), account for negative bias in the serious injury and mortality estimates and demonstrate that the available survey data and the degree of uncertainty in the data on population size and trends, reproductive rate and serious injury and mortality estimates provide statistical evidence that the stock is stable and not declining. Further, the Commission recommended that “total fisheries-related serious injuries and mortalities” should include extrapolated values from the observed number of serious injury or mortality with the corresponding observer coverage rate, not just the observed number of serious injuries and mortalities. The Center for Biological Diversity, Turtle Island Restoration Network, and Oceana provided a similar comment and also indicated that takes of sperm whales exceeded the PBR of 1.5 animals.

*Response:* With respect to bias and uncertainty and the PBR equation, NMFS notes that PBR is based upon

conservative estimates of abundance and  $R_{max}$  and includes a recovery factor (0.1 for sperm whales). The PBR approach was thoroughly tested in simulation trials and found to be robust to over-estimates of  $R_{max}$ , underestimates of mortality, and low precision of abundance and mortality estimates. Further, NMFS has established that the CA/OR/WA sperm whale stock is not decreasing; therefore, it is either stable or increasing (Carretta *et al.* 2012).

NMFS agrees that further analysis of the CA/OR/WA sperm whale stock was warranted. As recommended by the Commission, the negligible impact determination analysis now includes the estimated mortality and serious injury as an extrapolated value based on the takes observed by a NMFS-certified fishery observer and the observer coverage for that year.

*Comment 3:* The Commission noted that while NMFS is developing a Take Reduction Plan for the sablefish pot fishery, the details of that process have yet to be published and no Take Reduction Team has been formed.

*Response:* As noted earlier in this notice, MMPA section 118(f)(3) (16 U.S.C. 1387(f)(3)) contains specific priorities for developing TRPs if insufficient funding is available to develop and implement TRPs for all applicable stocks and fisheries. NMFS has insufficient funding available to simultaneously develop and implement TRPs for all strategic stocks that interact with Category I or Category II fisheries. As such, NMFS prioritizes which stocks and fisheries to address under a TRP. MMPA section 118(f) provides that if there is insufficient funding available to develop and implement a take reduction plan for stocks that interact with Category I and II fisheries, the Secretary shall give highest priority to the development of TRPs for species or stocks whose level of incidental mortality and serious injury exceeds PBR, that have small population size, and those that declining most rapidly. Further, NMFS notes that the CA/OR/WA stock of humpback whales has been designated as strategic because it is ESA-listed (MMPA section 3(19)(C)) and not because direct human-caused mortality exceeds PBR (MMPA section 3(19)(A)). At this time, developing a TRP for the WA/OR/CA sablefish pot trap fishery and other similar Category II fisheries will be deferred under section 118 as other stocks/fisheries are a higher priority for developing new TRPs.

In the meantime, NMFS has identified conservation recommendations for humpback whales in the biological

opinion, dated December 7, 2012, on the Continuing Operation of the Pacific Coast Groundfish Fishery, that provides general guidance for unique, visual marking of sablefish pot/trap gear as identifiable to a specific fishery, as well as guidance to report, track, and retrieve pot/trap gear that becomes lost and minimize the loss of pot/trap gear. Consistent with the terms and conditions of that biological opinion, the Pacific Fishery Management Council recently established the Pacific Coast Groundfish and Endangered Species Work Group, to serve as a multi-party advisory body to the Council for the purpose of supporting ESA compliance for species including humpback whales. One of the work group's duties will be to propose, for Council consideration, conservation and management measures to minimize bycatch of the aforementioned species. NMFS anticipates that this group will draw from the conservation recommendations developed in the biological opinion when considering measures.

Appointments to the workgroup will be made at the September 2013 Council meeting, and a first meeting will follow this coming fall/winter. Lastly, over the last four years, NMFS has been collecting data and conducting a risk assessment of the impact of fixed gear fisheries, including the sablefish pot fishery, on large whales off the United States. This assessment will help NMFS to determine whether additional data collection would be necessary to convene a TRT.

*Comment 4:* The Commission questioned whether the observer coverage in the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) is sufficient to meet the MMPA's mandate under section 118(d)(1)(A) that such programs be adequate to "obtain statistically reliable estimates of incidental mortality and serious injury" or describe plans for attaining the recommended 30 percent coverage level. Similarly, Center for Biological Diversity, Turtle Island Restoration Network, and Oceana opposed the issuance of the permit because the existing monitoring programs for the fisheries considered in the proposed authorization do not meet the MMPA's requirement to provide statistically reliable estimates of serious injury and mortality.

*Response:* The CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) has been observed by NMFS-certified observers since the early 1990s. Observer coverage levels in the fishery vary over time but are adequate to produce reliable estimates of mortality and serious injury of listed species (e.g.,

from 2000–2010, coverage ranged from 12.0 to 22.9 percent). Additionally, the recent emergency rule (RIN 0648–BD57) requires increased observer coverage in the fishery. Specifically, the rule establishes a 100-percent observer coverage zone that is closed to DGN fishing during the August 15, 2013 to January 31, 2014 fishing season unless the fishing vessel is carrying a NMFS-trained observer. The zone covers nearly all areas in the U.S. EEZ deeper than the 1,100 fm (2,012 m) depth contour. Therefore, 100% observer coverage is required in areas deeper than the 1,100 fm (2,012 m) depth contour, and NMFS hopes to attain at least 30% observer coverage in other areas where fishing will occur. NMFS expects to reconvene the Take Reduction Team to review this monitoring requirement, among other issues, and would take appropriate action for subsequent fishing seasons.

*Comment 5:* The Commission noted that the sablefish pot fishery has been subject to much lower observer coverage and recommended that NMFS describe alternative approaches, such as gear marking, to obtain reliable estimates of serious injury and mortality rates in the sablefish pot fishery.

*Response:* The observer coverage for the WA/OR/CA sablefish pot fishery is at 1–6% per year, and NMFS expects to maintain this level of coverage. Observer programs have not observed entangled humpback whales because the interactions are occurring when the fishing vessel is not present (the pot gear is left unattended). The probability of observing a take in this fishery is therefore extremely rare. Large whales can swim considerable distances after becoming entangled in such gear, so takes can go unobserved in these fisheries even if observers are on board. NMFS has records of entangled whales, including humpback whales, from opportunistic sightings reported to stranding networks, not from observer programs.

NMFS acknowledges the Commission's recommendation to describe alternative approaches to obtain reliable estimates of serious injury and mortality rates in the sablefish pot fishery; and, as discussed in Comment 3, NMFS has identified conservation recommendations for humpback whales in the biological opinion, dated December 7, 2012, on the Continuing Operation of the Pacific Coast Groundfish Fishery, that provide general guidance for unique, visual marking of sablefish pot/trap gear as identifiable to a specific fishery, as well as guidance to report, track, and retrieve pot/trap gear that becomes lost, and

guidance to minimize the loss of pot/trap gear.

*Comment 6:* The Commission noted that the criteria for establishing a negligible impact determination under section 101(a)(5)(E) of the MMPA are not well defined. The Commission recommended that NMFS, in consultation with the Commission, review the negligible impact determination criteria and their application, and take the necessary steps to establish improved criteria that are clear, logical, internally consistent, and cover all probable scenarios. In addition, the Commission stated that NMFS should examine its other authorities that play a part in making determinations under section 118 of the MMPA to identify possible modifications to fishing gear and practices that would reduce the likelihood of serious injury or mortality to the lowest degree practicable and further efforts to satisfy the zero mortality rate goal of the MMPA.

*Response:* NMFS agrees that the criteria for establishing a negligible impact determination under section 101(a)(5)(E) of the MMPA should be reviewed and appreciates the Commission's willingness to work with NMFS and to review and, if necessary, modify the criteria. NMFS will also continue to work with TRTs to develop take reduction measures that achieve the MMPA's long-term goal for TRPs.

*Comment 7:* The Center for Biological Diversity, Turtle Island Restoration Network, and Oceana opposed the issuance of the permit because the proposed authorization included no measures to (1) reduce entanglements and loss of fishing gear; (2) collect better data to quantify loss of gear from fisheries; and (3) encourage the removal of derelict fishing gear and proper disposal.

*Response:* Authorization under section 101(a)(5)(E) of the MMPA requires a determination that (a) the incidental mortality and serious injury incidental to commercial fisheries will have a negligible impact on the stock or species; (b) a recovery plan has been or is being developed; and (c) where required, a monitoring program is established, vessels are registered accordingly, and a Take Reduction Plan has been or is being developed. These authorizations themselves do not include measures that will reduce entanglements, collect better data, or encourage the removal of derelict fishing gear. However, NMFS implements other programs to address marine mammal entanglement in fishing gear, such as the Pacific Offshore Cetacean Take Reduction Plan and ESA

section 7 consultations on FMPs (see Response to Comment 3).

*Comment 8:* The Center for Biological Diversity, Turtle Island Restoration Network, and Oceana stated that NMFS neglected to include in its tally of sperm whale serious injury events the observed collision in 2007 between a sperm whale and a limited entry fixed gear vessel, fishing with longline gear and participating in the sablefish fishery. Commenters indicated that the serious injury should be attributed to this fishery, which includes sablefish and longlines.

*Response:* NMFS disagrees. The tally for total human-caused serious injury and mortality did include the mortality of this sperm whale, but the event was not considered a fisheries-related serious injury or mortality as the cause of death was a ship strike and not related to interactions with fishing gear. This interaction was applied to non-fisheries mortality and included in the total human-caused mortality figure.

*Comment 9:* The Center for Biological Diversity, Turtle Island Restoration Network, and Oceana stated that NMFS must consider additional measures to mitigate the take of endangered marine mammals in process of its determination and alternatives should include examination of whether a closed area may protect endangered marine mammals based on the density data NMFS has collected.

*Response:* NMFS agrees and has modified the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) in a separate emergency rule (RIN 0648-BD57) to reduce risk to sperm whales.

*Comment 10:* The Center for Biological Diversity, Turtle Island Restoration Network, and Oceana stated that NMFS did not consider all Category I and II fisheries that seriously injure and kill the fin, humpback, and sperm whales in California, Oregon, and Washington and that it is improper to issue a permit for some commercial fisheries while stating that NMFS will not consider others operating in violation of the MMPA by taking the same stocks.

*Response:* NMFS considered all fishery-related serious injury and mortality to the CA/OR/WA stocks of fin, humpback, and sperm whales in making its negligible impact determination. All recorded takes from all fisheries that interact with the CA/OR/WA stocks of fin, humpback, and sperm whales are accounted for in the analysis. In this notice, NMFS is authorizing incidental take by commercial fishers in the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$

in mesh) and the WA/OR/CA sablefish pot fishery to take specific marine mammal stocks (see Table 1). The remaining Category II fisheries that interact with the marine mammal stocks observed off the coasts of Washington, Oregon, and California are state-managed and not considered under this permit for authorization of incidental take by fishers in those state-managed fisheries. Serious injuries and mortalities attributed to the state-managed fisheries were, however, included in the tallies of take in the negligible impact determination analysis.

*Comment 11:* The Center for Biological Diversity, Turtle Island Restoration Network, and Oceana stated that the proposed authorization must be self-effectuating with respect to the expiration date of the permit. Commenters further explained that based on NMFS' history of issuing authorizations, the proposed authorization may in practice allow take of endangered whales for six to seven years and that the MMPA section 101(a)(5)(E) authorization allow incidental take "during any period of up to 3 consecutive years." Therefore, issuing the permit without language that requires the fishery to shut down or otherwise avoid incidental take of marine mammals at the expiration of the permit is outside of NMFS' statutory authority.

*Response:* NMFS acknowledges that there have been delays between the expiration of one 101(a)(5)(E) authorization and the issuance of another. Authorization to incidentally take endangered marine mammals under MMPA 101(a)(5)(E) is for a period of up to three consecutive years.

*Comment 12:* The Center for Biological Diversity, Turtle Island Restoration Network, and Oceana stated that the permit could not be issued because no take reduction plan has or is being developed for the fin whale because the 1997 Pacific Offshore Take Reduction Plan did not anticipate the incidental bycatch of fin whales in the California drift gillnet fishery.

*Response:* The MMPA List of Fisheries (<http://www.nmfs.noaa.gov/pr/interactions/lof/>) indicates that fin whales do not interact with the CA thresher shark/swordfish DGN fishery or the WA/OR/CA sablefish pot fishery; and, as indicated in the 2011 U.S. Pacific Marine Mammal Stock Assessments (Carretta *et al.* 2012), no fin whales have interacted with either of these fisheries in the last five years, the time period used to determine PBR. Take Reduction Plans are not required for the CA/OR/WA stock of fin whales

because mortality and serious injury of this stock incidental to commercial fishing operations is at insignificant levels approaching a zero mortality and serious injury rate.

*Comment 13:* The Center for Biological Diversity, Turtle Island Restoration Network, and Oceana state that the proposed authorization will violate section 7 of the ESA without completion of formal consultation regarding NMFS' issuance of a MMPA section 101(a)(5)(E) permit authorizing take of endangered fin, humpback, and sperm whales.

*Response:* NMFS has complied with the ESA for the issuance of the MMPA permit through the issuance of a biological opinion on December 7, 2012 for the WA/OR/CA sablefish pot fishery, a biological opinion on May 2, 2013 for the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh), and updated memo on August 21, 2013 to account for the emergency rule (RIN 0648-BD57).

*Comment 14:* The Commission and the Center for Biological Diversity, Turtle Island Restoration Network, and Oceana stated that NMFS needs to make the finding that the sperm whale stock is either stable or increasing and that NMFS cannot assume for the purposes of the negligible impact determination that the stock is stable or increasing, especially given that the most recent estimate from 2008 survey is the lowest to date.

*Response:* As described in response to Comment 2, NMFS has established that the CA/OR/WA sperm whale stock is not decreasing; therefore, it is either stable or increasing. Although there remains some uncertainty related to the abundance of the population, the apparent trend for sperm whales in the

Pacific Ocean is an increase, and this increase is occurring even with current levels of mortality and serious injury.

*Comment 15:* The Center for Biological Diversity, Turtle Island Restoration Network, and Oceana requested that NMFS prescribe emergency regulations that reduce the incidental mortality and serious injury in the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) as requested in a letter sent to NMFS on September 12, 2012; reconvene the Take Reduction Team for the purposes of modifying the existing Take Reduction Plan so as to reduce mortality and serious injury of all marine mammals in the fishery to insignificant levels approaching a zero mortality and serious injury rate (i.e., 10% of PBR); and issue a section 101(a)(5)(E) permit only if such modifications to the Take Reduction Plan are deemed likely to reduce take of endangered marine mammals to levels below 10% of PBR.

*Response:* Modifications to the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) were made in an emergency rule to reduce risk of sperm whale takes by the West Coast swordfish drift gillnet fishery (RIN 0648-BD57) in accordance with the MSA, the ESA, and the MMPA for the 2013/2014 fishing season. These measures emerged from Pacific Offshore Cetacean Take Reduction Team meetings, which NMFS convened on July 31 and August 7, 2013. The Team was charged with developing recommendations to reduce sperm whale mortality and serious injury in the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh). NMFS considered the Team's recommendations and developed an emergency rule to modify the fishery and reduce risk to sperm whales during

the 2013–14 fishing season. The emergency rule provides for immediate termination of the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) if one sperm whale is observed killed or seriously injured in the fishery and establishes a 100-percent observer coverage zone that is closed to DGN fishing during the August 15, 2013 to January 31, 2014 fishing season unless the fishing vessel is carrying a NMFS-trained observer. The zone covers nearly all areas in the U.S. EEZ deeper than the 1,100 fm (2,012 m) depth contour. Owners and operators of vessels intending to fish in the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) will be required to install, activate, carry, and operate a vessel monitoring system. NMFS intends to convene the Take Reduction Team to consider long-term measures for reducing sperm whale mortality and serious injury in the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) in subsequent fishing seasons.

*Comment 16:* NMFS received one petition letter signed by 13,425 people and one individual opposing the three-year authorization urging the closure of the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) fishery and the denial of the permit, based upon underfunded monitoring of the fishery and marine mammal bycatch associated with the fishery (specifically sperm whales).

*Response:* See responses above under Comments 2, 4, 7, 9, and 16.

Dated: August 28, 2013.

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