BILLING CODE: 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XE909

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

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

ACTION: Notice; request for comments.

SUMMARY: We, the National Marine Fisheries Service (NMFS), are proposing to issue a permit for a period of three years to authorize the incidental, but not intentional, take of two stocks of marine mammals listed as threatened or endangered under the Endangered Species Act (ESA), under the Marine Mammal Protection Act (MMPA), by the California (CA) thresher shark/swordfish drift gillnet fishery (≥14 inch mesh) and the Washington (WA)/Oregon (OR)/CA sablefish pot fishery. In accordance with the MMPA, NMFS issues this permit provided that it can make the determination that: the incidental take will have a negligible impact on the affected stocks; a recovery plan for all affected stocks of threatened or endangered marine mammals has been developed or is being developed; and as required by the MMPA, a take reduction plan and monitoring program have been implemented, and vessels in the CA thresher shark/swordfish drift gillnet fishery (≥14 inch mesh) and the WA/OR/CA sablefish pot fisheries are registered. We have made a preliminary determination that incidental taking from commercial fishing will have a negligible impact on the ESA-listed humpback whale (CA/OR/WA

stock) and sperm whale (CA/OR/WA stock). Recovery plans have been completed for humpback and sperm whales. We solicit public comments on the draft negligible impact determination (NID) and on the proposal to issue a permit to vessels that operate in these fisheries for the taking of affected endangered stocks of marine mammals.

DATES: Comments on this action and supporting documents must be received by [*insert date 30 days after date of publication in the FEDERAL REGISTER*].

ADDRESSES: You may submit comments on this document and the draft negligible impact determination, which are available on the Internet at the following address: *http://www.westcoast.fisheries.noaa.gov/protected_species/marine_mammals/fisheries_interactions.html*. Recovery plans for these two species are available on the Internet at the following address: *http://www.nmfs.noaa.gov/pr/recovery/plans.htm#mammals.*

You may submit comments on this document or the draft negligible impact determination, identified by NOAA-NMFS-2016-0129, by either of the following methods:

- *Electronic Submissions*: Submit all electronic public comments via the Federal eRulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-0129*, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.
- *Mail*: Send written comments to: Chris Yates, Assistant Regional Administrator, Protected Resources Division, West Coast Region, 501 W. Ocean Blvd, Suite 4200; Long Beach, CA 90802. Comments may also be

faxed to (562) 980-4027. Include the identifier "NOAA-NMFS-2016-0129" in the comments.

Instructions: 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 by NMFS. 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.*), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Christina Fahy, NMFS West Coast Region, (562) 980-4023 or *Christina.Fahy@noaa.gov*; or Shannon Bettridge, NMFS Office of Protected Resources, (301) 427–8402 or *Shannon.Bettridge@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(E) of the MMPA, 16 U.S.C. 1361 *et seq.*, states that 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 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 (M/SI) 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.

We propose to issue a permit under MMPA section 101(a)(5)(E) to vessels registered in the CA thresher shark/swordfish drift gillnet fishery (≥14 inch mesh) to incidentally take individuals from two stocks of endangered marine mammals: 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 WA/OR/CA sablefish pot fishery to incidentally take individuals from the CA/OR/WA stock of humpback whales. A history of MMPA section 101(a)(5)(E) permits related to these stocks was included in previous notices for other permits to take threatened or endangered marine mammals incidental to commercial fishing (*e.g.*, 72 FR 60814, October 26, 2007; 78 FR 54553, September 4, 2013) and is not repeated here. The data for considering these authorizations were reviewed coincident with the 2016 MMPA List of Fisheries (LOF; 81 FR 20550, April 8, 2016), the final 2015 U.S. Pacific Marine Mammal Stock Assessment Report (SAR) (Carretta *et al.* 2016), Carretta and Moore (2014), Moore and Barlow (2014), the Fishery Management Plan (FMP) for U.S. West Coast Fisheries for Highly Migratory Species (HMS), recovery plans for these species (available on the Internet at:

http://www.nmfs.noaa.gov/pr/recovery/plans.htm#mammals), the best available scientific information and available data, and other relevant sources.

Based on observer data and marine mammal injury reporting forms, vessels operating in the Category I CA thresher shark/swordfish drift gillnet fishery (≥14 inch mesh) and the Category II WA/OR/CA sablefish pot fishery are the two Federally-managed Category I and II fisheries that operate in the ranges of affected stocks, namely the CA/OR/WA stocks of humpback whale and sperm whale, and are currently considered for authorization. A brief description of these fisheries can be found below. The CA thresher shark/swordfish drift gillnet fishery (≥14 inch mesh), is the only Federally-managed Category I fishery operating off the coast of California. The WA/OR/CA sablefish pot fishery is the only Federally-managed Category II fishery operating off the coasts of California, Oregon, and Washington. All other Category II fisheries that may interact with the marine mammal stocks observed off the coasts of California, Oregon, and Washington are state-managed and are not considered for authorization under this permit; however, M/SI related to these fisheries and all other human sources was evaluated in the draft NID. 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 any mortality or injury of marine mammals incidental to their operations.

Basis for Determining Negligible Impact

Prior to issuing a permit to take ESA-listed marine mammals incidental to commercial fishing, NMFS must determine if the M/SI incidental to commercial fisheries will have a negligible impact on the affected species or stocks of marine mammals.

NMFS satisfies this requirement through completion of a NID. We clarify that for purposes of the draft negligible impact analysis, incidental M/SI from commercial fisheries includes M/SI from entanglement in fishing gear or ingestion of fishing gear. Indirect effects, such as the effects of removing prey from habitat, are not included in this analysis. A biological opinion prepared under ESA section 7 considers direct and indirect effects of Federal actions (available at *http://www.westcoast.fisheries.noaa.gov/*), and thus, contains a broader scope of analysis than is required by MMPA section 101(a)(5)(E).

Although the MMPA does not define "negligible impact," NMFS has issued regulations providing a qualitative definition of "negligible impact" (50 CFR 216.103), and through scientific analysis, peer review, and public notice developed a quantitative approach for determining negligible impact. As it applies here, the definition of "negligible impact" is "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to adversely affect the species or stock through effects on annual rates of recruitment or survival." The development of the approach is outlined in detail in the current draft NID made available through this notice and was described in previous notices for other permits to take threatened or endangered marine mammals incidental to commercial fishing (*e.g.*, 72 FR 60814, October 26, 2007; 78 FR 54553, September 4, 2013).

Criteria for Determining Negligible Impact

In 1999 NMFS adopted criteria for making NIDs for MMPA 101(a)(5)(E) permits (64 FR 28800, May 27, 1999). In applying the 1999 criteria to determine whether M/SI incidental to commercial fisheries will have a negligible impact on a listed marine

mammal stock, Criterion 1 is whether total human-related M/SI is less than 10 percent of the stock's potential biological removal level (PBR). If total human-related M/SI is less than 10 percent of PBR, the analysis would be concluded, and the impact would be determined to be negligible. If Criterion 1 is not satisfied, NMFS may use one of the other criteria as appropriate. The remaining criteria describe alternatives under certain conditions. Criterion 2 is satisfied if the total human-related M/SI is greater than PBR, but commercial fisheries-related M/SI is less than 10 percent of PBR. If Criterion 2 is satisfied, vessels operating in individual fisheries may be permitted if management measures are being taken to address non-fisheries-related mortality and serious injury. Criterion 3 is satisfied if total commercial fisheries-related M/SI is greater than 10 percent of PBR and less than PBR, and the population is stable or increasing. Fisheries may then be permitted subject to individual review and certainty of data. Criterion 4 stipulates that if the population abundance of a stock is declining, the threshold level of 10 percent of PBR will continue to be used. Criterion 5 states that if total commercial fisheries-related M/SI is greater than PBR, permits may not be issued for that species or stock.

We considered two time frames for this analysis: 5 years (2010-2014) and 14 years (2001-2014). The first time frame we considered for both stocks of whales is the most recent five-year period for which data are available and have been analyzed (here, January 1, 2010 through December 31, 2014) and is typically used for NID analyses. A five-year time frame in many cases provides enough data to adequately capture year-to-year variations in take levels, while reflecting current environmental and fishing conditions, as they may change over time. However, NMFS' Guidelines for Assessing

Marine Mammal Stocks (GAMMS) suggest that mortality estimates could be averaged over as many years as necessary to achieve a coefficient of variation of less than or equal to 0.3.

In addition, Carretta and Moore (2014) recommend pooling longer time series of data when bycatch is a rare event. For example, pooling 10 years of fishery data resulted in bycatch estimates within 25 percent of the true bycatch rate over 50 percent of the time (*i.e.*, estimates were within 25 percent of the true value more often than not). Key to this approach was that the fishery must have had sufficiently constant characteristics (*e.g.*, effort, gear, locations) to support the inference of consistent results across years such as with the CA thresher shark/swordfish drift gillnet fishery (≥14 inch mesh). Rare bycatch events typically involve smaller populations paired with low observer coverage in a fishery. If true bycatch mortality is low, but near PBR, then estimation bias needs to be reduced to allow reliable evaluation of the bycatch estimate against a low removal threshold.

Currently, the humpback whale and the sperm whale stocks are the only ESA-listed marine mammal species interacting with the CA thresher shark/swordfish drift gillnet fishery (≥14 inch mesh) that meet the conditions described in Carretta and Moore (2014): these stocks have relatively small minimum population estimates and have been recorded as having been incidentally killed or seriously injured in rare events (in the CA thresher shark/swordfish drift gillnet fishery (≥ 14 inch mesh). The CA/OR/WA stock of humpback whale has also been recorded as having been rarely incidentally killed or seriously injured in the WA/OR/CA sablefish pot fishery.

In 2001, a time/area closure of the drift gillnet fishery off central and northern California/southern Oregon to protect leatherback sea turtles was implemented through regulations, and resulted in a decrease in overall fishing effort and a shift in effort to southern California. Therefore, the post-2000 time period best represents the current spatial state of the fishery, so we used the 14-year period post-2000 to calculate mean annual mortality estimate for these two stocks of whales, based on recommendations contained in the GAMMS and Carretta and Moore (2014). This time frame also provides a comprehensive look at the WA/OR/CA sablefish pot fishery, given changes in oceanographic conditions, fishing practices, and reporting and stranding records.

A conservative, or precautionary, approach is taken in these analyses for evaluating the negligible impact of fisheries and other sources of injury or mortality, such as recreational fisheries and ship strikes, on these stocks. In certain cases, the maximum estimate of M/SI was used for the calculations. For example, if a ship strike occurred, but M/SI was not observed on scene or confirmed by necropsy of the stranded animal, and if further review of reports and other sources then confirmed M/SI, it was assumed for purposes of this analysis, that M/SI occurred. Additionally, M/SI from unknown or unidentified fisheries was conservatively considered to be from commercial fisheries. Furthermore, in using two time frames for the negligible impact analyses (2001-2014 and 2010-2014), we took a precautionary approach by ensuring that a NID could be made for both time frames considered.

Negligible Impact Determinations

Below is a summary of our application of the negligible impact criteria and determination regarding the effects of commercial fisheries off the U.S. west coast on the CA/OR/WA stocks of humpback whale and sperm whale.

Criterion 1 Analysis

Criterion 1 would be satisfied if the total human-related M/SI is less than 10 percent of PBR.

The 5-year (2010-2014) average annual human-related M/SI to the CA/OR/WA stock of humpback whales is 6.8 or 62.0 percent of the PBR (11.0). The 14-year (2001-2014) average annual human-related M/SI to the CA/OR/WA stock of humpback whales is 5.1 or 46.4 percent of the PBR. The total annual human-related M/SI for this stock of humpback whales is not less than 10 percent of PBR for both time frames considered.

The 5-year (2010-2014) average annual human-related M/SI of the CA/OR/WA stock of sperm whales is 0.6 or 22.2 percent of the PBR (2.7). The 14-year (2001-2014) average annual human-related M/SI to the CA/OR/WA stock of sperm whales from all human sources is 0.9 or 33.3 percent of the PBR. The total annual human-caused M/SI for this stock of sperm whales is not less than 10 percent of the PBR for both time frames considered.

Criterion 1 was not satisfied because the total annual human-related M/SI for these stocks is not less than 10 percent of PBR for the time periods considered. As a result, the other criteria must be examined.

Criterion 2 Analysis

Criterion 2 would be satisfied if total human-related M/SI is greater than PBR and the total fisheries-related mortality is less than 10 percent of PBR. This criterion was not

satisfied because total human-related M/SI (detailed above) is less than PBR, and total fisheries-related mortality (detailed below) is greater than 10 percent of PBR for each stock (both time frames analyzed). As a result, the other criteria were examined.

Criterion 3 Analysis

Unlike Criteria 1 and 2, which examine total human-related M/SI relative to PBR, Criterion 3 compares total fisheries-related M/SI to PBR. Criterion 3 would be satisfied if the total commercial fisheries-related M/SI (including state and Federal fisheries) is greater than 10 percent of and less than 100 percent of PBR for each stock for the respective time frame considered, and the populations of these stocks are considered to be stable or increasing. If the Criterion is met, vessels may be permitted subject to individual review and certainty of data.

Criterion 3 was satisfied for the CA/OR/WA humpback whale stock as the annual average fishery-related M/SI from all commercial fisheries is greater than 10 percent of and less than 100 percent of PBR, and the population is increasing (6-7 percent per year). The 5-year (2010-2014) average annual fishery-related M/SI from all commercial fisheries for the CA/OR/WA humpback whale stock is estimated at 5.6 or 51.0 percent of PBR and 4.1 or 37.3 percent of PBR for the 14-year period (2001-2014), which is between 10 percent and 100 percent of PBR. In addition, the stock has experienced a positive growth rate (6-7 percent per year). Accordingly, Criterion 3 is satisfied in determining that M/SI of the CA/OR/WA humpback whale stock incidental to commercial fishing would have a negligible impact on the stock.

In 2015, there was a significant increase in reports of entangled humpback whales off the U.S. west coast, primarily in the state-managed pot/trap fisheries. In addition,

there were two fatal ship strikes of humpback whales. We evaluated the 2015 preliminary raw entanglement and ship strike data to understand how future data may impact this type of analysis. Serious injury determinations for 2015 will be completed in early 2017. If not all entanglements or ship strikes are determined to be M/SI, it is possible to conclude there is a negligible impact under Criterion 3 for both the 15-year and five-year time frames. Based on past humpback whale injury determinations from 2007 through 2014, 84 percent were determined to be M/SI.

Criterion 3 was satisfied for the CA/OR/WA sperm whale stock as the total fishery-related M/SI is greater than 10 percent of and less than 100 percent of PBR, and the population is stable. The 5-year (2010-2014) annual average fishery-related M/SI from all commercial fisheries for the CA/OR/WA sperm whale stock is estimated at 0.4 or 14.8 percent of PBR and 0.6 or 22.2 percent of PBR for the 14-year average (2001-2014), which is between 10 percent and 100 percent of PBR. The population is considered to be stable.

In 2015, there were no reports of entangled or ship-struck sperm whales. Therefore, the addition of one more year of data would not change the conclusion reached in the draft NID.

Accordingly, Criterion 3 is satisfied in determining that M/SI of the CA/OR/WA sperm whale stock incidental to commercial fishing would have a negligible impact on the stock.

In conclusion, based on the criteria outlined in 1999 (64 FR 28800), the final 2015 U.S. Pacific SAR (Carretta *et al*,. 2016), Carretta and Moore (2014), Moore and Barlow (2014), and the best available scientific information, available data and other sources,

NMFS has determined that the M/SI incidental to the CA thresher shark/swordfish drift gillnet fishery (≥14 inch mesh) and the WA/OR/CA sablefish pot fishery will have a negligible impact on the CA/OR/WA stock of humpback whales and the CA thresher shark/swordfish drift gillnet fishery (≥14 inch mesh) will have a negligible impact on the CA/OR/WA stock of sperm whales. NMFS therefore proposes to issue the MMPA 101(a)(5)(E) permit. Specifically, NMFS proposes that vessels operating in these identified commercial fisheries within the range of the CA/OR/WA humpback and sperm whale stocks may be permitted subject to individual review of the fishery and the certainty of relevant data, and provided that the other provisions of section 101(a)(5)(E) are met.

Description of Fisheries

The following is an individual review of the two Federally-authorized fisheries classified as Category I and II in the 2016 LOF (81 FR 20550) which are known through observer records, fisher self-reports, and confirmed entanglement reports to kill or seriously injure ESA-listed marine mammals incidental to commercial fishing operations. Detailed descriptions of those fisheries can be found in the NMFS (2011) Biological Opinion on the operation of the Pacific groundfish fishery, which includes the WA/OR/CA sablefish pot fishery; the NMFS (2013) Biological Opinion for the CA thresher shark/swordfish drift gillnet fishery (≥ 14 inch mesh); the 2015 SAR (Carretta *et al.* 2016); and the draft NID.

California Thresher Shark/Swordfish Drift Gillnet Fishery (> 14 inch mesh)

Participants in the CA thresher shark/swordfish drift gillnet fishery (≥ 14 inch mesh) are required to have a valid permit issued annually by the California Department of

Fish and Wildlife. In accordance with MMPA section 118(c), only those vessels participating in the CA thresher shark/swordfish drift gillnet fishery (≥ 14 inch mesh) that have registered with the Marine Mammal Authorization Program are authorized to take marine mammals incidental to their fishing operations. Vessels holding this authorization must comply with the Pacific Offshore Cetacean Take Reduction Plan and implementing regulations. Any vessel that violates regulations will be subject to enforcement action. The estimated number of vessels in the fishery is based upon the number of vessels that indicated intent to participate in the fishery according to historical reference and may not be an accurate estimate of the number of vessels actively engaged in fishing in any given year. The CA thresher shark/swordfish drift gillnet fishery (≥ 14 inch mesh) is a limited entry program, managed with gear, seasons, and area closures. The number of vessels participating in the CA thresher shark/swordfish drift gillnet fishery (≥ 14 inch mesh) has decreased from 148 permits issued and 98 active vessels in 1998 to 72 permits issued and 18 active vessels in 2016. Information on the number of active permit holders was obtained from the "Status of the U.S. west coast fisheries for HMS through 2004; Stock Assessment and Fishery Evaluation" report, available from the Pacific Fishery Management Council Web site (*www.pcouncil.org*).

The fishery targets swordfish and thresher shark. It operates outside of state waters to about 150 nautical miles (nm) offshore ranging from the U.S./Mexico border in the south to the Oregon border in the north, depending on sea surface temperature conditions. Regulations restrict the fishery to waters outside 200 nm from February 1 through April 30, and outside 75 nm from May 1 through August 14, while allowing fishing inside 75 nm from August 15 through January 31. Vessels in this fishery targeting

swordfish tend to set on warm ocean water temperature breaks, which do not appear along the California coast until late summer. Because of these restrictions, vessels are not active during February, March, and April, and very little fishing effort occurs during the months of May, June, and July.

In 2001, a seasonal (15 August–15 November) area closure was implemented in the CA thresher shark/swordfish drift gillnet fishery (≥ 14 inch mesh) north of Point Conception, to protect leatherback turtles that feed in the area and were observed entangled in previous fishing seasons. Additional seasonal/area closures in southern California have been established in the CA thresher shark/swordfish drift gillnet fishery to protect loggerhead turtles during a forecast or occurring El Niño event during the months of June, July and/or August.

The NMFS West Coast Region has operated an at-sea observer program in the CA thresher shark/swordfish drift gillnet fishery (≥ 14 inch mesh) since July 1990 to the present. The objectives of the NMFS observer program are to record, among other things, information on non-target fish species and protected species interactions. NMFS typically targets 20 percent observer coverage of the annual sets by the CA thresher shark/swordfish drift gillnet fishery (≥ 14 inch mesh) fleet, with close to 100 percent of net retrievals monitored on observed trips for, among other things, species identification and enumeration.

WA/OR/CA Sablefish Pot Fishery

The WA/OR/CA sablefish pot fishery targets sablefish using trapezoid, conical, or rectangular steel frame traps, wrapped with ≥2 inch nylon webbing. The fishery generally sets gear at depths between 80 and 300 fathoms off the west coast of the U.S. The fishery

is managed under regulations implementing the Pacific Coast Groundfish FMP developed by the Pacific Fishery Management Council. There are four distinct segments of the Pacific coast groundfish fishery where sablefish may be harvested, by some or all of the participants, with pot gear: limited entry fixed gear sablefish primary fishery and daily trip limit fishery; the trawl individual fishing quota (IFQ) fishery when vessels are "gear switching" (allowed since 2011); and the open access sablefish daily trip limit fishery. Further information about each of these segments of the groundfish fishery that may harvest sablefish with pot gear is provided below.

The limited entry fixed gear sablefish primary fishery occurs between 36° N. latitude (lat.) and the U.S. – Canada border and requires at least one limited entry permit, with both a fixed gear endorsement and a sablefish endorsement, be registered to a vessel. The primary fishery is composed of a three-tier system of cumulative landing quotas within a restricted season, from April 1 to October 31. Permits were assigned to a tier based on landing history when the system originally began in 1998. There are 32 Limited Entry Permits issued for the sablefish trap fishery on the West Coast. Fishing outside of the primary season or after fulfillment of tier quota is allowed, subject to limited entry fixed gear weekly and two-month cumulative limits. The limited entry permits are currently associated with vessels spread throughout the Pacific Northwest from Northern California through Washington, and some vessels registered to limited entry permits also fish in waters off Alaska. Up to three sablefish-endorsed permits may be stacked for cumulative landings on one vessel and may include both trap and longline gear endorsements.

The limited entry fixed gear daily trip limit fishery occurs coast wide, year-round. Vessels registered to limited entry permits with pot/trap gear endorsements may harvest sablefish with pot/trap gear year round, according to the applicable weekly and two-month cumulative limits, applicable to their time/area. Accounting for stacking of permits, there were 41 vessels using traps only and five using a combination of traps and longline to harvest sablefish in 2014.

The vessels participating in the limited entry trawl Shore-based IFQ Program may choose to harvest their sablefish quota with non-trawl gear, including pot gear, under provisions of the Program that allow for an activity called "gear switching." Vessels fishing in the Shore-based IFQ Program under gear switching provisions are subject to most of the same requirements as those vessels fishing trawl gear to harvest their groundfish quota, including 100 percent observer coverage, fishing on their own individual quota, etc. However, regulations that apply specifically to non-trawl gears, like gear-specific area and depth restrictions, apply to vessels gear switching.

The open access fishery is comprised of vessels not registered to limited entry permits, is available to fishermen year round, and managed throughout the year with daily, weekly, and two-month trip limits. NOAA's Northwest Fisheries Science Center estimates 204 fishermen (number of state-issued permits, not reflective of number of active fishermen), participating in the open access sector in 2014 based on a query, conducted on June 17, 2014 of the NMFS groundfish website (*https,://www.webapps.nwfsc.noaa.gov/apex_ifq/f?p=112:23*).

Participants in the sablefish fishery are required to keep daily logs of fishing activities. Depending on the area of the coast, fishing for sablefish with non-trawl gear

(*e.g*. pot gear, *etc*.) is prohibited in certain depths by the Groundfish Non-Trawl Rockfish Conservation Area. Specific depth restrictions vary, and may be modified during the year, but generally prohibit setting sablefish pots between 30 fathoms and 100 fathoms (from Washington to central California) and between 60 fathoms and 150 fathoms (southern California). Federal regulations pertaining to depth-based closures for limited entry fixed gear can be found in Table 2 (North and South) of 50 Code of Federal Regulations (CFR) part 660, subpart E, and open access closures can be found in Table 3, 50 CFR part 660, subpart F. The state management agencies may close additional areas. For example, south of Point Arguello, near Santa Barbara, the minimum depth for setting traps targeting sablefish is 200 fathoms. Multiple traps are connected to a common ground line made of nylon or nylon blend and 5/16th or 3/8th inch wide. Limited entry permit holders commonly fish 20 to 50 traps per string, as opposed to open access fishermen who generally fish several smaller strings; up to eight strings with one to four traps per string, each with a float line and buoy stick.

Conclusions for Proposed Permit

Based on the individual review of the fisheries and the certainty of relevant data, and as described in the accompanying draft NID, NMFS concludes that the M/SI incidental to the CA thresher shark/swordfish drift gillnet fishery ($\geq$14 inch mesh) and the WA/OR/CA sablefish pot fishery will have a negligible impact on the CA/OR/WA stock of humpback whales and the CA thresher shark/swordfish drift gillnet fishery ($\geq$14 inch mesh) will have a negligible impact on the CA/OR/WA stock of sperm 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 drift gillnet fishery (≥14 inch mesh) (as part of the HMS fisheries) and the WA/OR/CA sablefish pot fishery (as part of the West Coast groundfish fisheries), including the taking of threatened and endangered species of marine mammals, were analyzed in: the Pacific Fishery Management Council Highly Migratory Species FMP 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 FMP (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, 2011) and the Biological Opinion for the CA thresher shark/swordfish drift gillnet fishery (≥14 inch mesh) (NMFS, 2013), pursuant to the ESA. Because this proposed 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 now reviews the remaining requirements to issue a permit to take the subject listed species incidental to the CA thresher shark/swordfish drift gillnet fishery (≥14 inch mesh) and WA/OR/CA sablefish pot fisheries.

Recovery Plans

Recovery Plans for humpback 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.

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 drift gillnet fishery (≥14 inch mesh) and WA/OR/CA sablefish pot fisheries provide the information needed by NMFS to register their vessels for the MMPA incidental take authorization through the Federal limited entry permit process. 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 drift gillnet fishery (≥14 inch mesh) has been observed by NMFS since 1990. Levels of observer coverage vary over years but are adequate to produce reliable estimates of M/SI of listed species (*e.g.,* from 2001–2014, coverage ranged from approximately 12.0 to 37 percent). As part of the West Coast groundfish fishery and Magnuson-Stevens Fishery Conservation and Management Act objectives, the WA/OR/CA limited entry sablefish pot fishery, as managed under the groundfish FMP, has been observed between 13 percent and 57 percent between 2002

and 2014. Accordingly, as required by MMPA section 118, a monitoring program is in place for both fisheries.

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 two stocks considered for this permit are designated as strategic stocks under the MMPA because they are listed as endangered under the ESA (MMPA section 3(19)(C)).

In 1996, NMFS convened a take reduction team (TRT) to develop a TRP to address the incidental taking of several strategic marine mammal stocks, including CA/OR/WA stocks of sperm whales and humpback whales, in the CA thresher shark/swordfish drift gillnet fishery ($\geq$ 14 inch mesh). The Pacific Offshore Cetacean TRP was implemented through regulations in October, 1997 (62 FR 51813) and has been in place ever since. Although a TRP is in place for the gillnet fishery, there is currently not one in place for the sablefish pot fishery.

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 a zero mortality rate goal, defined by NMFS as 10 percent of PBR. MMPA section 118(b)(2) states that fisheries maintaining such M/SI levels are not required to further reduce their M/SI rates. However, the obligations to develop and implement a TRP are subject to the availability of funding. MMPA section 118(f)(3) (16 U.S.C. 1387(f)(3)) contains specific priorities for developing TRPs. 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 uses the most recent SAR and LOF as the basis to determine its priorities for establishing TRTs and developing TRPs. Through this process for developing TRTs, in 2015, NMFS evaluated the CA/OR/WA stock of humpback whales and the WA/OR/CA sablefish pot fishery and identified it as a lower priority compared to other marine mammal stocks and fisheries for establishing TRTs, based on population trends of the stock and M/SI levels incidental to that commercial fishery. In addition, NMFS continues to collect data to categorize fixed gear fisheries and assess their risk to large whales off the U.S. west coast. Accordingly, given these factors and NMFS' priorities, implementation of a TRP for the WA/OR/CA sablefish pot trap fishery and other similar Category II fisheries will be currently deferred under section 118 as other stocks/fisheries are a higher priority for any available funding for establishing new TRPs.

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 drift gillnet fishery (≥14 inch mesh) and WA/OR/CA sablefish pot fishery. Accordingly, NMFS proposes to issue a permit to participants in these Category I and II fisheries for the taking of CA/OR/WA humpback whales and CA/OR/WA sperm 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 mortality or

serious injury must be reported to NMFS. NMFS solicits public comments on the proposed permit and the preliminary determinations supporting the permit.

Dated: January 4, 2017.

_____

Donna S. Wieting,

Director, Office of Protected Resources,

National Marine Fisheries Service.

[FR Doc. 2017-00265 Filed: 1/9/2017 8:45 am; Publication Date: 1/10/2017]