



BILLING CODE: 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XA254]

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

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

ACTION: Notice; request for comments.

SUMMARY: The National Marine Fisheries Service (NMFS) is proposing to issue permits to authorize the incidental, but not intentional, take of specific Endangered Species Act (ESA)-listed marine mammal species or stocks under the Marine Mammal Protection Act (MMPA), in certain U.S. commercial fisheries.

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 the proposed permits and the preliminary determinations supporting the permits, identified by NOAA-NMFS-2020-0096, through the Federal e-Rulemaking Portal:

1. Go to <https://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0096>.
2. Click the “**Comment Now!**” icon, and complete the required fields.
3. Enter or attach your comments.

Instructions: NMFS may not consider comments if they are sent by any other method, to any other address or individual, or received after the end of the comment period. Due to delays in processing mail related to COVID-19 and health and safety concerns, no mail, courier, or hand deliveries will be accepted. 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.

The preliminary determinations supporting the permits are available on the Internet at <https://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0096>. Other supporting information is available on the Internet including: recovery plans for the ESA-listed marine mammal species, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>; 2020 MMPA List of Fisheries, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables>; the most recent Marine Mammal Stock Assessment Reports by region, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>, and stock, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-species-stock>; and Take Reduction Teams and Plans,

<https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams>.

FOR FURTHER INFORMATION CONTACT: Suzie Teerlink, NMFS Alaska Region, (907) 586-7240, *Suzie.Teerlink@noaa.gov*; Diana Kramer, NMFS Pacific Islands Region, (808) 725-5167, *Diana.Kramer@noaa.gov*; Kara Shervanick, NMFS Southeast Region, (727) 824-5350, *Kara.Shervanick@noaa.gov*; or Caroline Good, NMFS Office of Protected Resources, (301) 427-8402, *Caroline.Good@noaa.gov*.

SUPPLEMENTARY INFORMATION:

The MMPA requires NMFS to authorize the incidental take of ESA-listed marine mammals in commercial fisheries provided it can make the following determinations: 1) the incidental mortality and serious injury (M/SI) from commercial fisheries will have a negligible impact on the affected species or stocks; 2) a recovery plan for all affected species or stocks of threatened or endangered marine mammals has been developed or is being developed; and 3) where required under MMPA section 118, a take reduction plan has been developed or is being developed, a monitoring program is implemented, and vessels participating in the fishery are registered. We have made a preliminary determination that certain commercial fisheries meet these three requirements and propose to issue permits to these fisheries to authorize the incidental take of ESA-listed marine mammal species or stocks under the MMPA for a period of three years. We solicit public comments on the proposed issuance of these permits and the underlying preliminary determinations. We are also providing a preliminary list of commercial fisheries that, based on their level of M/SI of ESA-listed marine mammal species, do not

require authorization under MMPA 101(a)(5)(E) so long as any incidental mortality or injury is reported.

Background

The MMPA List of Fisheries (LOF) classifies each commercial fishery as a Category I, II, or III fishery based on the level of mortality and injury of marine mammals occurring incidental to each fishery as defined in 50 CFR 229.2. Category I and II fisheries must register with NMFS and are subsequently authorized to incidentally take marine mammals during commercial fishing operations. However, that authorization is limited to those marine mammals that are not listed as threatened or endangered under the ESA. Section 101(a)(5)(E) of the MMPA, 16 U.S.C. 1371, states that NMFS, as delegated by the Secretary of Commerce, for a period of up to three years shall allow the incidental, but not intentional, taking of marine mammal stocks designated as depleted because of their listing as an endangered species or threatened species 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 M/SI from commercial fisheries 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.

The LOF includes a list of marine mammal species or stocks incidentally killed or injured in each commercial fishery. We evaluated ESA-listed stocks or species documented on the 2020 MMPA LOF as killed or seriously injured following NMFS’ Procedural Directive 02-238 “Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals.” Based on this evaluation, we propose to issue permits under MMPA section 101(a)(5)(E) to vessels registered in five Category I or Category II commercial fisheries, as classified on the final 2020 MMPA LOF, to incidentally kill or seriously injure individuals from specific ESA-listed marine mammal stocks, as listed in Table 1 below.

Table 1 – List of Commercial Fisheries Authorized to Take (M/SI) Specific Threatened and Endangered Marine Mammals Incidental to Fishing Operations

Commercial Fishery	LOF Category	ESA-Listed Marine Mammal Stock
Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline	I	Sperm whale, Northern Gulf of Mexico
HI deep-set longline/Western Pacific pelagic longline (HI deep-set component)	I	False killer whale, Main HI Islands Insular Humpback whale, Central North Pacific
AK Bering Sea, Aleutian Islands flatfish trawl	II	Bearded seal, Alaska Humpback whale, Western North Pacific Ringed seal, Alaska Steller sea lion, Western U.S.
AK Bering Sea, Aleutian Islands pollock trawl	II	Bearded seal, Alaska Humpback whale, Central North Pacific Steller sea lion, Western U.S.
AK Gulf of Alaska, sablefish longline	II	Sperm whale, North Pacific

Category III fisheries are those commercial fisheries that have a remote likelihood of or no known incidental mortality or serious injury of marine mammals (MMPA

section 118(c)(1)(A)(iii)). All commercial fisheries classified as Category III on the most current LOF do not require MMPA 101(a)(5)(E) authorization, so long as any mortality or injury of marine mammals incidental to their operations is reported pursuant to MMPA section 118(e). Furthermore, per NMFS' Procedural Directive 02-204-02 (procedural directive), "Criteria for Determining Negligible Impact under MMPA section 101(a)(5)(E)" (NMFS 2020), NMFS considers such Category III fisheries to have a negligible impact on that marine mammal stock or species.

Thus, we incorporate by reference all Category III fisheries included in the 2020 MMPA LOF (85 FR 21079, April 16, 2020) as not subject to the ESA prohibition against incidentally taking marine mammals from endangered or threatened stocks, and not subject to any penalties, provided any mortalities or injures are reported as required under MMPA section 118(e).

In addition, for the purposes of MMPA section 101(a)(5)(E), commercial fisheries classified as Category I or II on the LOF solely because of incidental M/SI of non-ESA-listed marine mammals meet the definition of a Category III commercial fishery with respect to ESA-listed stocks or species because the fishery has a remote likelihood of or no known incidental M/SI of ESA-listed marine mammals. We have determined that the following two Category II commercial fisheries meet this criteria:

- AK Bering Sea, Aleutian Islands Pacific cod longline; and
- HI shallow-set longline/Western Pacific pelagic longline (HI shallow-set component).

These fisheries do not require 101(a)(5)(E) authorization and are not subject to the ESA prohibition against incidentally taking marine mammals from endangered or threatened

stocks, and not subject to any penalties, provided any marine mammal mortalities or injuries are reported as required under MMPA section 118(e).

In addition to the commercial fisheries referenced above, NMFS is evaluating other commercial fisheries for purposes of making a negligible impact determination (NID) and anticipates addressing such fisheries in future *Federal Register* notices. More information about the commercial fisheries listed above is available in the 2020 MMPA LOF (85 FR 21079; April 16, 2020) and on the Internet at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables>.

Tribal fisheries conducted pursuant to a treaty with the United States are not included on the LOF, and are not subject to the requirements of section 101(a)(5)(E). In the final rule implementing section 118 of the MMPA (60 FR 45086, August 30, 1995), NMFS concluded that treaty tribal fisheries are conducted under the authority of the Indian treaties; the MMPA's requirements in section 118 do not apply to treaty Indian tribal fisheries. In the 2010 final LOF (74 FR 58859, November 16, 2009), NMFS re-evaluated its 1995 conclusion to exempt tribal fisheries from the LOF (60 FR 45086, August 30, 1995) to determine whether it should be changed due to *Anderson v. Evans*. NMFS considered, among other things, the public comments received on the proposed 2010 LOF and the 1994 amendments to the MMPA and accompanying legislative history, and determined that *Anderson v. Evans* did not alter NMFS' original analysis in the final rule implementing section 118 of the MMPA (60 FR 45086, August 30, 1995). Thus, tribal fisheries are not included on the LOF nor in MMPA 101(a)(5)(E) authorizations. Additional information on NMFS' decision to continue to exclude tribal

fisheries from the LOF is provided in the 2010 LOF final rule (74 FR 58859, November 16, 2009). NMFS continues to work on a government-to-government basis with the affected treaty tribal governments to gather data on injuries and mortalities of marine mammals incidental to tribal fisheries.

For each commercial fishery listed in Table 1 above, we reviewed the best available scientific information to determine if the fishery met the three requirements of MMPA 101(a)(5)(E) for issuing a permit. This information is included in the 2020 MMPA LOF (85 FR 21079; April 16, 2020), the Marine Mammal Stock Assessment Reports, recovery plans for these species (available at:

<https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>), and other relevant information, as detailed further in the documents describing the preliminary determinations supporting the permits (available at: <https://www.regulations.gov/#/docketDetail;D=NOAA-NMFS-2020-0096>).

NMFS is in the process of reviewing humpback whale stock structure under the MMPA in light of the 14 Distinct Population Segments (DPSs) established under the ESA (81 FR 62259, September 8, 2016), based on the recently finalized “Procedural Directive 02-204-03: Reviewing and Designating Stocks and Issuing Stock Assessment Reports under the Marine Mammal Protection Act” (NMFS 2019). The DPSs that occur in waters under the jurisdiction of the United States do not align with the existing MMPA stocks. Some of the listed DPSs partially coincide with the currently defined stocks. Because we cannot manage one portion of an MMPA stock as ESA-listed and another portion of a stock as not ESA-listed, until such time as the MMPA stock delineations are

reviewed in light of the DPS designations, NMFS continues to use the existing MMPA stock structure for MMPA management purposes (*e.g.*, selection of a recovery factor, stock status) and treats such stocks as ESA-listed if a component of that stock is listed under the Act and overlaps with the analyzed commercial fishery.

NMFS considers humpback whale stock designation a high priority for revision. Once NMFS has completed our review, we will revise humpback whale stock designations in future SARs.

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 marine mammal species or stocks. NMFS satisfies this requirement by making a NID. Although the MMPA does not define “negligible impact,” NMFS has issued regulations providing a qualitative definition of “negligible impact,” defined in 50 CFR 216.103 as “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.”

Criteria for Determining Negligible Impact

Through scientific analysis, peer review, and public notice, NMFS developed a quantitative approach for determining negligible impact. We finalized the NMFS Procedural Directive 02-204-02 (directive), “Criteria for Determining Negligible Impact under MMPA section 101(a)(5)(E),” effective on June 17, 2020 (NMFS 2020). The procedural directive is available online at: <https://www.fisheries.noaa.gov/national/laws->

and-policies/protected-resources-policy-directives. This procedural directive describes a process for determining whether incidental M/SI from commercial fisheries will have a negligible impact on ESA-listed marine mammal species/stocks (the first requirement necessary for issuing an MMPA section 101(a)(5)(E) permit as noted above).

The procedural directive first describes the derivation of two Negligible Impact Thresholds (NIT), which represent levels of removal from a marine mammal species or stock. The first, Total Negligible Impact Threshold (NIT_t), represents the *total* amount of human-caused M/SI that NMFS considers negligible for a given stock. The second, lower threshold, Single NIT (NIT_s) represents the level of M/SI from a *single commercial fishery* that NMFS considers negligible for a stock. NIT_s was developed in recognition that some stocks may experience non-negligible levels of total human-caused M/SI but one or more individual fisheries may contribute a very small portion of that M/SI, and the effect of an individual fishery may be considered negligible.

The directive describes a detailed process for using these NIT values to conduct a NID analysis for each fishery classified as a Category I or II fishery on the MMPA LOF. The NID process uses a two-tiered analysis. The Tier 1 analysis first compares the total human-caused M/SI for a particular stock to NIT_t. If NIT_t is not exceeded, then all commercial fisheries that kill or seriously injure the stock are determined to have a negligible impact on the particular stock. If NIT_t is exceeded, then the Tier 2 analysis compares each individual fishery's M/SI for a particular stock to NIT_s. If NIT_s is not exceeded, then the commercial fishery is determined to have a negligible impact on that particular stock. For transboundary, migratory stocks, because of the uncertainty regarding the M/SI that occurs outside of U.S. waters, we assume that total M/SI exceeds

NITt and proceed directly to the Tier 2 NITs analysis. If a commercial fishery has a negligible impact across all ESA-listed stocks, then the first of three findings necessary for issuing an MMPA 101(a)(5)(E) permit to the commercial fishery has been met (*i.e.*, a negligible impact determination). If a commercial fishery has a non-negligible impact on any ESA-listed stock, then NMFS cannot issue an MMPA 101(a)(5)(E) permit for the fishery to incidentally take ESA-listed marine mammals.

These criteria rely on the best available scientific information, including estimates of a stock's minimum population size and human-caused M/SI levels, as published in the most recent SARs and other supporting documents, as appropriate. Using these inputs, the quantitative negligible impact thresholds allow for straightforward calculations that lead to clear negligible or non-negligible impact determinations for each commercial fishery analyzed. In rare cases, robust data may be unavailable for a straightforward calculation, and the directive provides instructions for completing alternative calculations or assessments where appropriate.

Negligible Impact Determinations

We evaluated the impact of each commercial fishery (listed in Table 1 above) following the procedural directive, and, based on the best available scientific information, made NIDs. These NID analyses are presented in accompanying MMPA 101(a)(5)(E) determination documents that provide summaries of the information used to evaluate each ESA-listed stock documented on the 2020 MMPA LOF as killed or injured incidental to the fishery. The draft MMPA 101(a)(5)(E) determination documents are available at: <https://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0096>. Based on the criteria outlined in the procedural directive, the most recent SARs, and the

best available scientific information, NMFS has determined that the M/SI incidental to the five Category I and II commercial fisheries listed in Table 1 will have a negligible impact on the associated ESA-listed marine mammal stocks. Accordingly, this MMPA 101(a)(5)(E) requirement is satisfied for these commercial fisheries.

Recovery Plans

Recovery Plans for the ESA-listed species or stocks listed in Table 1 have either been completed (see <https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>) or are being developed. Accordingly, the requirement to have recovery plans in place or being developed is satisfied.

Take Reduction Plans

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

The short- and long-term goals of a TRP are to reduce M/SI of marine mammals incidental to commercial fishing to levels below the Potential Biological Removal (PBR) level for stocks and to an insignificant threshold, defined by NMFS as 10 percent of PBR, respectively. 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 when funding is insufficient. 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 Take Reduction Teams (TRT) and developing TRPs. Information about NMFS' marine mammal TRTs and TRPs may be found at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams>.

All of the evaluated fisheries listed in Table 1, for the affected marine mammal species or stocks, either have a TRP in place or based on NMFS' priorities, implementation of a TRP is currently deferred under section 118 as other stocks/fisheries are a higher priority for any available funding for establishing new TRPs. Accordingly, the requirement under MMPA section 118 to have TRPs in place or in development is satisfied (see preliminary determinations supporting the permits available on the Internet at <https://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0096>).

Monitoring Program

Under MMPA section 118(d), NMFS is to establish a program for monitoring incidental M/SI of marine mammals from commercial fishing operations. Each of the fisheries listed in Table 1 considered for authorization under MMPA section 101(a)(5)(E) is monitored by NMFS fishery observer programs. Accordingly, the requirement under MMPA section 118 to have a monitoring program in place 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. NMFS has integrated the MMPA registration process, implemented through

the Marine Mammal Authorization Program (MMAP), with existing state and Federal fishery license, registration, or permit systems for Category I and II fisheries on the LOF. Therefore, the requirement for vessel registration is satisfied.

Conclusions for Proposed Permits

Based on the above evaluation for each commercial fishery listed in Table 1 as it relates to the three requirements of MMPA 101(a)(5)(E), we propose to issue MMPA 101(a)(5)(E) permits to the commercial fisheries in Table 1 to authorize the incidental take of ESA-listed species or stocks during commercial fishing operations. If, during the 3-year authorization, there is a significant change in the information or conditions used to support any of these determinations, NMFS will re-evaluate whether to amend or modify that specific authorization, after notice and opportunity for public comment. If the authorization for an individual fishery in Table 1 becomes amended, modified, or invalidated for any reason during the 3-year period, the authorizations for the other commercial fisheries in Table 1 will continue unchanged and effective until the end of the 3-year period. As noted above, under MMPA section 101(a)(5)(E)(ii), no permit is required for vessels in Category III fisheries, or for the Category II commercial fisheries listed above that meet the definition of a Category III commercial fishery with respect to ESA-listed species or stocks, so long as any incidental marine mammal mortality or injury is reported to NMFS pursuant to MMPA section 118(e). NMFS solicits public comments on the proposed permits and the preliminary determinations supporting the permits.

Endangered Species Act Section 7 and National Environmental Policy Act Requirements

ESA section 7(a)(2) requires federal agencies to ensure that actions they authorize, fund, or carry out do not jeopardize the existence of any species listed under the ESA, or destroy or adversely modify designated critical habitat of any ESA-listed species. The effects of these commercial fisheries on ESA-listed marine mammals for which permits are proposed here, were analyzed in the appropriate Fishery Management Plan ESA section 7 Biological Opinions, and incidental take was exempted for those ESA-listed marine mammals for each of these fisheries.

The National Environmental Policy Act (NEPA) requires Federal agencies to evaluate the impacts of alternatives for their actions on the human environment. Because these proposed permits would not modify any fishery operation and the effects of the fishery operations have been evaluated in accordance with NEPA, no additional NEPA analysis beyond that conducted for the associated Fishery Management Plans is required for these permits. Issuing the proposed permits would have no additional impact on the human environment or effects on threatened or endangered species beyond those analyzed in these documents.

References

National Marine Fisheries Service (NMFS). 2020. National Marine Fisheries Service

Procedure 02-204-02: Criteria for Determining Negligible Impact under MMPA

Section 101(a)(5)(E). 20 p. Available online:

<https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives>.

National Marine Fisheries Service (NMFS). 2019. National Marine Fisheries Service

Procedure 02-204-03: Reviewing and designating stocks and issuing Stock

Assessment Reports under the Marine Mammal Protection Act. 9 p. Available online: <https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives>

National Marine Fisheries Service (NMFS). 2016. National Marine Fisheries Service Procedure 02-204-01: Guidelines for preparing stock assessment reports pursuant to the 1994 amendments to the Marine Mammal Protection Act. 23 p. Available online: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/guidelines-assessing-marine-mammal-stocks>.

National Marine Fisheries Service (NMFS). 2014. National Marine Fisheries Service Procedure 02-238-01: Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals. 42 p. Available online: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-policies-guidance-and-regulations>

Dated: September 29, 2020.

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