



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XE813]

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: NMFS is issuing a permit 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 the Category II California (CA) thresher shark/swordfish drift gillnet (≥ 14 inch (in) mesh) fishery and the corresponding high seas component of the fishery defined on the MMPA List of Fisheries (LOF) as the Pacific highly migratory species drift gillnet fishery (hereinafter, collectively referred to as the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery.

DATES: This permit is effective beginning [insert date of publication in the **FEDERAL REGISTER**] through December 31, 2027.

ADDRESSES: The materials supporting the permit are available on the Internet at <https://www.regulations.gov/docket/NOAA-NMFS-2025-0007>. 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>; 2024 MMPA LOF, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables>; the most recent Marine Mammal Stock Assessment Reports (SAR) 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 (TRT) and Plans, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams>.

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SUPPLEMENTARY INFORMATION:

The MMPA requires NMFS to authorize the incidental take of ESA-listed marine mammals in Category I and II commercial fisheries provided: (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 pursuant to the ESA; and (3) where required under MMPA section 118, a take reduction plan (TRP) has been developed or is being developed, a monitoring program is established, and vessels participating in the fishery are registered. We have determined that the Category II CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery meets these three requirements and are issuing a permit to the fishery to authorize the incidental take of ESA-listed marine mammal species or stocks (Central America/Southern Mexico-CA/Oregon (OR)/Washington (WA) and Mainland Mexico-CA/OR/WA stocks of humpback whale; CA/OR/WA stock of sperm whale) under the MMPA through December 31, 2027.

Background

The MMPA 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. Section 118(c)(2) of the MMPA requires fishing vessels that operate in Category I and II fisheries to register with NMFS and are subsequently authorized to incidentally take marine mammals during commercial fishing operations. Section 118(a)(2) of the MMPA, 16 U.S.C. 1387(a)(2), also requires an additional authorization for these fisheries at section 101(a)(5) of the MMPA, 16 U.S.C. 1371(a)(5), for incidental taking of ESA-listed marine mammals. Section 101(a)(5)(E) of the MMPA, 16 U.S.C. 1371(a)(5), states that NMFS, as delegated by the Secretary of Commerce, for a period of up to 3 consecutive years shall allow the incidental, but not intentional, taking of marine mammal species or 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, 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 pursuant to 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 TRP 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 marine mammal species or stocks listed under the ESA included on the final 2024 MMPA LOF (89 FR 12257, February 16, 2024) 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 are issuing a permit under MMPA section 101(a)(5)(E) to vessels registered in the Category II CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery, as classified on the final 2024 MMPA LOF, to incidentally kill or seriously injure individuals from the Central America/Southern Mexico-CA/OR/WA and Mainland Mexico-CA/OR/WA stocks of humpback whale and CA/OR/WA stock of sperm whale (90 FR 12148, March 14, 2025).

NMFS regularly evaluates commercial fisheries for purposes of making a negligible impact determination (NID) and issuing section 101(a)(5)(E) authorizations with the annual LOF as new information becomes available. More information about the fisheries is available in the 2024 MMPA LOF (89 FR 12257, February 16, 2024) and on the Internet at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables>.

We reviewed the best available scientific information to determine if the fishery met the three requirements of MMPA section 101(a)(5)(E) for issuing a permit. This information is included in the 2024 MMPA LOF (89 FR 12257, February 16, 2024), the SARs for these species (available at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/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 document describing the determinations supporting the permit (available at: <https://www.regulations.gov/docket/NOAA-NMFS-2025-0007>).

Basis for Determining Negligible Impact

Prior to issuing a MMPA 101(a)(5)(E) 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’ regulations provide 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

NMFS uses a quantitative approach for determining negligible impact detailed in NMFS Procedural Directive 02-204-02 (directive), “Criteria for Determining Negligible Impact under MMPA section 101(a)(5)(E).” The procedural directive is available online at: <https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives>. The directive describes NMFS’ 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 a MMPA section 101(a)(5)(E) permit as noted above).

The 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 NIT (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 even though 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 by stock 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 commercial 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 where the M/SI that occurs outside of U.S. waters is uncertain, we generally assume that total M/SI exceeds NIT_t and proceed directly to the Tier 2 NIT_s analysis. If a commercial fishery has a negligible impact across all ESA-listed stocks, then the first of three findings necessary for issuing a MMPA 101(a)(5)(E) permit to the commercial fishery has been met (*i.e.*, a NID). If a commercial fishery has a non-negligible impact on any ESA-listed stock, then the requirements of MMPA 101(a)(5)(E) are not met, and NMFS cannot issue a permit for the fishery to incidentally take ESA-listed marine mammals.

These NID 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. In using this information, 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 Determination

NMFS evaluated the impact of the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery, following the directive and based on the best available scientific information, and made a NID. The NID analysis is presented in the accompanying MMPA 101(a)(5)(E) evaluation document provides

summaries of the information used to evaluate each ESA-listed stock documented on the 2024 MMPA LOF as killed or injured incidental to the fishery (available at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables>). The MMPA 101(a)(5)(E) evaluation document is available at: <https://www.regulations.gov/docket/NOAA-NMFS-2025-0007>.

The Central America/Southern Mexico-CA/OR/WA and Mainland Mexico-CA/OR/WA stocks of humpback whale are transboundary. The CA/OR/WA stock of sperm whales is also transboundary based on the description of the stock's geographic range in the 2023 SAR (Carretta *et al.* 2024). A recent study by Wild *et al.* (2024) found that after foraging in the Gulf of Alaska, tagged male sperm whales travelled south, along the west coast of North America, down to Mexican waters. Because the M/SI that occurs outside of U.S. waters for these transboundary stocks is uncertain, we proceeded directly to the Tier 2 NIT_s analysis.

Based on the criteria outlined in the directive, the most recent SARs, and the best available scientific information, NMFS has determined that the M/SI of Central America/Southern Mexico-CA/OR/WA and Mainland Mexico-CA/OR/WA stocks of humpback whale and CA/OR/WA stock of sperm whale incidental to the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery will have a negligible impact on these stocks. Accordingly, this MMPA 101(a)(5)(E) requirement is satisfied for CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery (see MMPA 101(a)(5)(E) determination document, available at: <https://www.regulations.gov/docket/NOAA-NMFS-2025-0007>). Summaries of the NID analyses are provided below.

The Category II CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery has documented incidental M/SI of the Central America/Southern Mexico-CA/OR/WA and Mainland Mexico-CA/OR/WA

stocks of humpback whale and the CA/OR/WA stock of sperm whale. The 2022 SAR (data from 2016-2020) includes mean annual total commercial fishery-related M/SI for the Central America/Southern Mexico-CA/OR/WA stock of humpback whale (8.1) and Mainland Mexico-CA/OR/WA stock of humpback whale (11.4) (Carretta *et al.* 2023). The 2023 SAR (data from 2017-2021) includes a mean annual total commercial fishery-related M/SI for the CA/OR/WA stock of sperm whales of 0.52 (Carretta *et al.* 2024). These comprise M/SI from all commercial fisheries, including the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery, as well as fishery-related M/SI for the stock not assigned to a specific commercial fishery.

A more recent publication, Carretta (2024), includes bycatch data from 1990 through 2023 for the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery. NMFS used M/SI from 2019-2023 from Carretta (2024) for the NID analyses discussed below.

Estimated M/SI of the Central America/Southern Mexico-CA/OR/WA stock of humpback whales in the fishery is 0.17 (Carretta 2024) and is less than NIT_s (0.68). Estimated M/SI of the Mainland Mexico-CA/OR/WA stock of humpback whales in the fishery is 0.231 (Carretta 2024) and is less than NIT_s (1.70). Estimated M/SI of sperm whales fishery is zero (Carretta 2024) and is less than NIT_s (0.523). Since M/SI for all three stocks are less than their respective NIT_s thresholds, NMFS determined that the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery has a negligible impact on the Central America/Southern Mexico-CA/OR/WA and Mainland Mexico-CA/OR/WA stocks of humpback whale and the CA/OR/WA stock of sperm whale (see accompanying MMPA 101(a)(5)(E) evaluation document).

The most recent SARs for the Central America/Southern Mexico-CA/OR/WA and Mainland Mexico-CA/OR/WA stocks of humpback whale and CA/OR/WA stock of sperm whale include fishery-related M/SI not assigned to a specific commercial fishery. This unattributed fishery-related M/SI could be from any number of commercial, recreational, or tribal fisheries. However, because this fishery is observed (~20 percent observer coverage) we are confident that any unobserved humpback or sperm whale M/SI in the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery is accounted for in the model-based M/SI estimates for these stocks (Carretta 2024). Given this, any unattributed fishery-related M/SI that may be incidental to this specific commercial fishery is already accounted for, and we did not include unattributed mortality in the calculations for NID Tier 2 analyses (described above). NMFS is actively monitoring this fishery through a fishery observer program. If additional fishery-related M/SI is documented through the observer program and/or required reporting indicates additional M/SI of the Central America/Southern Mexico-CA/OR/WA and Mainland Mexico-CA/OR/WA stocks of humpback whale or CA/OR/WA stock of sperm whale is occurring, then NMFS will re-evaluate the NIDs and the permit.

Recovery Plans

A recovery plan for sperm whales has been developed (see <https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>).

A recovery plan for the globally ESA-listed humpback whale species was developed in 1991. In 2016, NMFS revised the listing status of the humpback whale under the ESA. The globally listed endangered species was divided into 14 distinct population segments (DPSs), the species-level listing was removed, and NMFS listed four DPSs as endangered and one DPS as threatened (81 FR 62260, September 8, 2016).

In June 2022, NMFS published a recovery outline for the Central America, Mexico, and Western North Pacific DPSs of humpback whales

(<https://www.fisheries.noaa.gov/resource/document/recovery-outline-central-america-mexico-and-western-north-pacific-distinct>). The recovery outline serves as an interim guidance document and, with the existing species-wide recovery plan, directs recovery efforts, including recovery planning, for the Central America and Mexico DPSs of humpback whales. These DPSs correspond with the Central America/Southern Mexico-CA/OR/WA and Mainland Mexico-CA/OR/WA stocks of humpback whales, respectively. Once finalized, the new recovery plan will replace the species-wide recovery plan.

Accordingly, the requirement that a recovery plan has been developed pursuant to the ESA is satisfied.

Take Reduction Plan

MMPA section 118 requires the development and implementation of a TRP for each strategic stock that interacts with a Category I or II fishery. The stocks considered for this permit are designated as strategic stocks under the MMPA because the stocks or a component of the stocks are listed as threatened species or endangered species under the ESA (MMPA section 3(19)(C)). A TRP for the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery and the affected marine mammal species or stocks (Central America/Southern Mexico-CA/OR/WA and Mainland Mexico-CA/OR/WA stocks of humpback whale and CA/OR/WA stock of sperm whale) has been developed (*see Pacific Offshore Cetacean Take Reduction Plan <https://www.fisheries.noaa.gov/national/marine-mammal-protection/pacific-offshore-cetacean-take-reduction-plan>*).

Accordingly, the requirement under MMPA section 118 to have a TRP in place or in development is satisfied (see determinations supporting the permit available on the Internet at <https://www.regulations.gov/docket/NOAA-NMFS-2025-0007>).

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. The CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery is monitored by a NMFS fishery observer program. 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, 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 Permit

Based on the above evaluation for the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery as it relates to the three requirements of MMPA section 101(a)(5)(E), we are issuing an MMPA 101(a)(5)(E) permit to the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery to authorize the incidental take of three particular ESA-listed species or stocks during commercial fishing operations. The permit covers the period from publication of this notice until December 31, 2027, when the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery will be phased out as mandated by the Driftnet Modernization and Bycatch

Reduction Act of 2022. If, during the authorization period, 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 the authorization, after notice and opportunity for public comment.

ESA Section 7 and National Environmental Policy Act (NEPA) Requirements

ESA section 7(a)(2) requires Federal agencies to ensure that actions they authorize, fund, or carry out do not jeopardize the continued existence of any species listed under the ESA, or destroy or adversely modify designated critical habitat of any ESA-listed species. The effects of CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery on ESA-listed marine mammals, were analyzed in the appropriate ESA section 7 Biological Opinion on the commercial fishery (see <https://repository.library.noaa.gov/view/noaa/51058>), and issued incidental take for those ESA-listed marine mammals for the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery in accordance with the Biological Opinions' incidental take statement. Under section 7 of the ESA, Biological Opinions quantify the effects of the proposed action on ESA-listed species and their critical habitat and, where appropriate, exempt take of ESA-listed species that is reasonably certain to occur, as specified in the incidental take statement.

Under MMPA section 101(a)(5)(E), NMFS analyzes previously documented M/SI incidental to commercial fisheries through the NID process, and when the necessary findings can be made, issues an MMPA section 101(a)(5)(E) permit that allows for an unspecified amount of incidental taking of specific ESA-listed marine mammal stocks while engaging in commercial fishing operations. Thus, the applicable standards and resulting analyses under the MMPA and ESA differ, and as such, do not always align.

NEPA requires Federal agencies to evaluate the impacts of alternatives for their actions on the human environment. Because the permit 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 Plan is required for the permit. Issuing the permit would have no additional impact on the human environment or effects on threatened or endangered species beyond those analyzed in these documents.

Comments and Responses

On March 14, 2024, NMFS published a notice and request for comments in the **Federal Register** for the proposed issuance of a permit under MMPA section 101(a)(5)(E) (90 FR 12148). The public comment period closed on April 14, 2025. NMFS received three comment letters opposing the proposed issuance of a permit to the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery and its underlying preliminary determinations. Only responses to significant comments pertaining to the proposed permit and preliminary determinations under MMPA section 101(a)(5)(E) for the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery are addressed below.

Comment 1: Center for Biological Diversity (CBD) comments that the Driftnet Modernization and Bycatch Reduction Act of 2022 required the phase-out of the CA drift gillnet fishery within 5 years. They state that NMFS must not authorize the fishery to incidentally take ESA-listed species or stocks after December 29, 2027.

Response: NMFS agrees. The Driftnet Modernization and Bycatch Reduction Act was enacted on December 29, 2022, and it phases out the use of large mesh drift gillnet gear by December 2027. The permit issued to the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery authorizing the

incidental take of specific ESA-listed marine mammal species or stocks under the MMPA will expire on December 31, 2027.

Comment 2: CBD states that the 2023 “Biological Opinion on Continued Operation of the Large Mesh Drift Gillnet Fishery” anticipated incidental take of endangered fin whales, and NMFS failed to analyze if this take of fin whales is negligible under MMPA section 101(a)(5)(E). They assert that issuing an incidental take statement for fin whales in the Biological Opinion, and not authorizing the take under the MMPA, violates the ESA and MMPA.

Response: Following NMFS’ Procedural Directive 02-238 “Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals,” NMFS evaluated ESA-listed stocks or species included on the final 2024 MMPA LOF (89 FR 12257, February 16, 2024) as killed or seriously injured in the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery. Based on this evaluation, we proposed to issue a permit under MMPA section 101(a)(5)(E) to vessels registered in the Category II CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery, as classified on the final 2024 MMPA LOF, to incidentally kill or seriously injure individuals from the Central America/Southern Mexico-CA/OR/WA and Mainland Mexico-CA/OR/WA stocks of humpback whale and CA/OR/WA stock of sperm whale (90 FR 12148, March 14, 2025).

Fin whales are not included on the list of marine mammal species/stocks killed or injured in the Category II CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery in the most recent final LOF (2024). In addition, there has not been an observed fin whale M/SI in the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery since 1999.

Although NMFS predicted that there would be incidental take of one fin whale in the fishery in the 2023 “Biological Opinion on Continued Operation of the Large Mesh Drift Gillnet Fishery” over a 5-year period (NMFS 2023), given there have been no documented fin whale M/SI in the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery since 1999 and the specific requirements of MMPA 101(a)(5)(E), additional take authorization under MMPA section 101(a)(5)(E) is not required for the remaining years the fishery is in operation (until December 31, 2027). In addition, using M/SI from 2019-2023, estimated M/SI of fin whales (CA/OR/WA stock) in the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery is zero (Carretta 2024). Therefore, the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery has a negligible impact on the CA/OR/WA stock of fin whale.

Comment 3: CBD states that NMFS’ proposed MMPA 101(a)(5)(E) authorization did not use the best available science regarding the number of large whale entanglements on the West Coast. They note that the Federal Register notice uses M/SI data from Carretta 2023; however, a more recent publication provides data through 2024 (Carretta 2024). CBD further states that the analysis does not reference the 2024 West Coast large whale entanglement summary. CBD also comments that the NID for the Central America DPS of humpback whales does not consider background levels of M/SI occurring from other commercial fisheries.

Response: In this final permit, NMFS updated the NID analyses for the Central America/Southern Mexico-CA/OR/WA and Mainland Mexico-CA/OR/WA stocks of humpback whale and CA/OR/WA stock of sperm whale using M/SI data from 2019-2023 in the Carretta (2024) publication (see accompanying MMPA 101(a)(5)(E) evaluation document). The M/SI estimates in the CA thresher shark/swordfish drift gillnet (≥ 14 in

mesh)/Pacific highly migratory species drift gillnet fishery from 2019-2023 (Carretta 2024) were identical to the M/SI estimated reported from 2018-2022 (Carretta 2023). As such, the NIDs remain the same as analyzed in the proposed permit for the fishery (90 FR 12148, March 14, 2025).

In addition, the West Coast Large Whale Entanglement Summary (NMFS 2025) referenced by CBD published in April 2025 after the proposed MMPA 101(a)(5)(E) permit for the CA thresher shark/swordfish drift gillnet (≥ 14 in mesh)/Pacific highly migratory species drift gillnet fishery published in the **Federal Register** (90 FR 12148, March 14, 2025). In 2024, there were no confirmed entanglements of humpback whales in CA drift gillnet gear nor any documented sperm whale entanglements (NMFS 2025). While there was one report of a humpback whale entangled in an unknown gillnet, we do not have evidence to link this entanglement to the CA drift gillnet fishery (NMFS 2025).

Comment 4: CBD comments that NMFS is not developing nor has developed a recovery plan for ESA-listed humpback whale DPSs. They assert that because NMFS identified 14 humpback whale DPSs in 2016, the 1991 recovery plan is out of date and does not meet the requirements of MMPA section 101(a)(5)(E). They continue that NMFS cannot rely on the recovery outline published in June 2022, and that the revised recovery plan for humpback whales has been postponed indefinitely.

Response: As noted, a recovery plan for the humpback whale species (global listing) was developed in 1991. In June 2022, NMFS published a recovery outline for the Central America, Mexico, and Western North Pacific DPSs of humpback whales (<https://www.fisheries.noaa.gov/resource/document/recovery-outline-central-america-mexico-and-western-north-pacific-distinct>). This recovery outline serves as an interim guidance document and, along with the existing species-wide recovery plan, directs recovery efforts, including recovery planning, for the Central America (Central America/Southern Mexico-CA/OR/WA stock) and Mexico (Mainland Mexico-

CA/OR/WA stock) DPSs of humpback whales. NMFS is actively developing a new recovery plan specific to the ESA-listed DPSs; it has not been postponed indefinitely as CBD purports. Once finalized, this new recovery plan will replace the species-wide recovery plan that was published in 1991.

References

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