

**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 November 4, 2020.

**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](http://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](mailto:Suzie.Teerlink@noaa.gov); Diana Kramer, NMFS Pacific Islands Region, (808) 725–5167, [Diana.Kramer@noaa.gov](mailto:Diana.Kramer@noaa.gov); Kara Shervanick, NMFS Southeast Region, (727) 824–5350, [Kara.Shervanick@noaa.gov](mailto:Kara.Shervanick@noaa.gov); or Caroline Good, NMFS Office of Protected Resources, (301) 427–8402, [Caroline.Good@noaa.gov](mailto: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<sub>t</sub>), represents the *total* amount of human-caused M/SI that NMFS considers negligible for a given stock. The second, lower threshold, Single NIT (NIT<sub>s</sub>) represents the level of M/SI from a *single commercial fishery* that NMFS considers negligible for a stock. NIT<sub>s</sub> 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<sub>t</sub>. If NIT<sub>t</sub> 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<sub>t</sub> is exceeded, then the Tier 2 analysis compares each individual fishery’s M/SI for a particular stock to NIT<sub>s</sub>. If NIT<sub>s</sub> 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 NIT<sub>t</sub> 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.

**Donna S. Wieting,**

*Director, Office of Protected Resources,  
National Marine Fisheries Service.*

[FR Doc. 2020–21901 Filed 10–2–20; 8:45 am]

**BILLING CODE 3510–22–P**

#### DEPARTMENT OF COMMERCE

#### National Oceanic and Atmospheric Administration

[RTID 0648–XA479]

#### Magnuson-Stevens Fishery Conservation and Management Act Provisions; Atlantic Bluefish Fishery; Withdrawal of Notice of Intent To Prepare Environmental Impact Statement for Amendment 7

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

**ACTION:** Notice of withdrawal.

**SUMMARY:** The Mid-Atlantic Fishery Management Council initiated development of Amendment 7 to the

## National Marine Fisheries Service 101(a)(5)(E) Assessment

### PURPOSE

Section 101(a)(5)(E) of the Marine Mammal Protection Act (MMPA) states that the National Marine Fisheries Service (NMFS), shall for a period of up to three years allow the incidental taking of marine mammal species listed under the Endangered Species Act (ESA) 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.

This document includes NMFS assessment of whether a fishery can be authorized under section 101(a)(5)(E) and presents a finding detailing how the fishery evaluated meets the requirements of this section. To determine if a M/SI incidental to a commercial fishery will have a negligible impact on the affected species or stock, this analysis employs the process and standards laid out in NMFS Procedure 02-204-02 "Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)."

### INSTRUCTIONS

Complete a Negligible Impact Determination (NID) analysis and 101(a)(5)(E) assessment for each commercial fishery evaluated. Follow the steps in the NID Procedural Directive ([NMFS Procedure 02-204-02](#) "Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)") to fill out a NID analysis species/stock worksheet for each ESA-listed stock/species, included on the most recent final MMPA [List of Fisheries](#) (LOF) interacting with that fishery. Use the most recent marine mammal Stock Assessment Reports (SAR), the LOF, and any other relevant information to complete the NID assessment. For each stock/species, include a short summary of the NID analysis (in the "species/stock NID justification"), and indicate whether a NID can be made for that stock. If additional space is needed, use the NID justification narrative section to complete your summary.

For the NID analysis, numeric precision with a scale of two decimal places is recommended. If a Tier 1 analysis is not conducted because a species/stock is transboundary or other reasons, select the N/A box and provide a brief explanation. If a Tier 2 analysis is not conducted, please select the N/A box and provide a brief explanation. If a Tier 2 is conducted under a special circumstance, please select that box and provide an explanation.

In the NID justification narrative, provide a brief summary (if needed) and justification for any deviations from the Procedural Directive, as well as a description of any special circumstances including:

1. An explanation if a species/stock does not conform to the PBR framework and an alternate NID approach is taken.
2. If sources other than the most recent SAR are used for annual average M/SI values.
3. A rationale, if the most recent 5-year average is not used for annual average M/SI values.
4. A detailed explanation if unattributed fishery M/SI is accounted for in the NID assessment.
5. If a minimum abundance estimate ( $N_{\min}$ ) is unavailable for conducting a standard negligible impact analysis, provide an explanation.
6. Details of any special circumstances if the individual fishery M/SI is unavailable or underestimated.

Complete a 101(a)(5)(E) assessment for each commercial fishery evaluated and indicate whether the fishery meets the requirements for an authorization.

Incorporate documents by reference as appropriate, including web links, if possible. If applicable, reference and attach any supporting documents that were developed for the assessment, and include a list of any such documents. In the "Final NID Determination" and "MMPA Section 101(a)(5)(E) Authorization" sections, choose the appropriate language option given the outcome of the NID or 101(a)(5)(E) assessment. For additional information please refer to the [NID Procedure](#) or the latest [Guidelines for Preparing Stock Assessment Reports](#) (GAMMS).

## Negligible Impact Determination Analysis: Fishery Information

Commercial Fishery Evaluated: HI deep-set longline/Western Pacific pelagic longline (HI deep-set component)

Fishery Region: Pacific Islands

This fishery is included in the final 2020 List of Fisheries (LOF) as a Category I  Category II  fishery.

Fishery Management Type: Federal  State  Fed/State  Other

ESA-listed marine mammal species/stocks with M/SI associated with this fishery:

- |  |    |
|--|----|
| 1) False killer whale, Main Hawaiian Islands Insular | 4) |
| 2) Humpback whale, Central North Pacific stock       | 5) |
| 3)   | 6) |

Is an ESA-listed marine mammal species/stock driving the LOF categorization? Yes  No

If yes, which species/stocks: False killer whale, Main Hawaiian Islands Insular stock

Is this a new NID  or an update to an existing (active) NID ?

If this is an update to an existing (active) NID, please detail a rationale for the modification:

If relevant, please provide additional background information for this fishery.

This fishery is a federally managed limited access program that targets tuna. The fishery operates both within the U.S. EEZ and on the high seas. The vessel operator must notify NMFS prior to departure whether the vessel is undertaking a deep-set or shallow-set trip. The fishery is subject to the False Killer Whale Take Reduction Team and associated regulations under the False Killer Whale Take Reduction Plan.

Since the high seas "Western Pacific Pelagic (HI Deep-set component)" on the 2020 List of Fisheries is an extension of the Hawaii Deep-set (tuna target) fishery operating in U.S. waters, and not a separate fishery, the two components of the Hawaii Deep-Set Longline are considered a single fishery for the purposes of this document.

## Negligible Impact Determination Analysis: ESA-Listed Marine Mammal Species/Stock Information

Species/stock 1 of 2 : False killer whale, Main Hawaiian Islands Insular stock

Does species/stock conform to the Potential Biological Removal (PBR) framework? Yes  No

If no, is an alternate approach used? Yes  No  (If yes, include explanation in the Justification)

Based on the  draft  final 2019 Stock Assessment Report, and/or  other sources:

The average annual M/SI, including SI of animals disentangled or released from fishing gear, (over 3 years, between 2013-2015 ) is:

Total Human Caused M/SI 0.0 All Comm. Fishery M/SI 0.0 Individual Comm. Fishery M/SI 0.0

Is there unattributed fishery M/SI for the species/stock? Yes  No

Was unattributed fishery M/SI accounted for in this NID? Yes  No  (Provide details in the Justification)

Is this a transboundary species/stock? Yes  No  If yes, check N/A for Tier 1; only conduct Tier 2 analysis.

Is a species/stock  $N_{min}$  available for conducting a standard negligible impact analysis? Yes  No

If yes, species/stock metrics are:

$N_{min}$  149  $R_{max}$  0.04

$NIT_t$  0.30  $NIT_s$  0.039

If no, calculate threshold  $N_{min}$  for the species/stock based on the minimum population size needed to be below the NIT.

Threshold  $N_{min}$  (for  $NIT_t$ )

Threshold  $N_{min}$  (for  $NIT_s$ )

### Tiered Analyses

**Tier 1 Analysis:** Does annual average total human caused M/SI exceed  $NIT_t$ ?

Yes  No  N/A

If no, then all commercial fisheries are considered to have a negligible impact on this species/stock and a Tier 2 analysis is not necessary. If yes or N/A, proceed to Tier 2 analysis.

**Tier 2 Analysis:** Does annual average individual fishery M/SI exceed  $NIT_s$ ?

Yes  No  N/A  Special Circumstances

If no, then the individual commercial fishery is considered to have a negligible impact on this species/stock unless the individual fishery M/SI is unavailable or underestimated and likely to be non-zero.

**Tier 1 Analysis:** Does the minimum population size likely exceed the threshold  $N_{min}$  for  $NIT_t$ ?

Yes  No  N/A

If yes, then all commercial fisheries are considered to have a negligible impact on this species/stock and a Tier 2 analysis is not necessary. If no or N/A, proceed to Tier 2 analysis.

**Tier 2 Analysis:** Does the minimum population size likely exceed the threshold  $N_{min}$  for  $NIT_s$ ?

Yes  No  N/A  Special Circumstances

If yes, then the individual commercial fishery is considered to have a negligible impact on this species/stock unless the individual fishery M/SI is unavailable or underestimated and likely to be non-zero.

### Species/Stock NID Justification:

False killer whale, Main Hawaiian Islands (MHI) Insular stock: The total annual average human caused M/SI for this stock (0.0) does not exceed  $NIT_t$  (0.30) thus, the Tier 1 analysis is satisfied and all commercial fisheries are considered to have a negligible impact on this stock.

## Negligible Impact Determination Analysis: ESA-Listed Marine Mammal Species/Stock Information

Species/stock **2** of **2** : Humpback whale, Central North Pacific stock

Does species/stock conform to the Potential Biological Removal (PBR) framework? Yes  No

If no, is an alternate approach used? Yes  No  (If yes, include explanation in the Justification)

Based on the  draft  final 2019 Stock Assessment Report, and/or  other sources:

The average annual M/SI, including SI of animals disentangled or released from fishing gear, (over **5** years, between **2013-2017**) is:

Total Human Caused M/SI **25** All Comm. Fishery M/SI **9.5** Individual Comm. Fishery M/SI **0.9**

Is there unattributed fishery M/SI for the species/stock? Yes  No

Was unattributed fishery M/SI accounted for in this NID? Yes  No  (Provide details in the Justification)

Is this a transboundary species/stock? Yes  No  If yes, check N/A for Tier 1; only conduct Tier 2 analysis.

Is a species/stock  $N_{min}$  available for conducting a standard negligible impact analysis? Yes  No

If yes, species/stock metrics are:

$N_{min}$  **7,891**  $R_{max}$  **.07**

$NIT_t$  **27.62**  $NIT_s$  **3.59**

If no, calculate threshold  $N_{min}$  for the species/stock based on the minimum population size needed to be below the NIT.

Threshold  $N_{min}$  (for  $NIT_t$ )

Threshold  $N_{min}$  (for  $NIT_s$ )

### Tiered Analyses

**Tier 1 Analysis:** Does annual average total human caused M/SI exceed  $NIT_t$ ?

Yes  No  N/A

If no, then all commercial fisheries are considered to have a negligible impact on this species/stock and a Tier 2 analysis is not necessary. If yes or N/A, proceed to Tier 2 analysis.

**Tier 2 Analysis:** Does annual average individual fishery M/SI exceed  $NIT_s$ ?

Yes  No  N/A  Special Circumstances

If no, then the individual commercial fishery is considered to have a negligible impact on this species/stock unless the individual fishery M/SI is unavailable or underestimated and likely to be non-zero.

**Tier 1 Analysis:** Does the minimum population size likely exceed the threshold  $N_{min}$  for  $NIT_t$ ?

Yes  No  N/A

If yes, then all commercial fisheries are considered to have a negligible impact on this species/stock and a Tier 2 analysis is not necessary. If no or N/A, proceed to Tier 2 analysis.

**Tier 2 Analysis:** Does the minimum population size likely exceed the threshold  $N_{min}$  for  $NIT_s$ ?

Yes  No  N/A  Special Circumstances

If yes, then the individual commercial fishery is considered to have a negligible impact on this species/stock unless the individual fishery M/SI is unavailable or underestimated and likely to be non-zero.

Species/Stock NID Justification:

See Negligible Impact Justification Summary



## Negligible Impact Determination Analysis: Summary and Justification

### NID SUMMARY TABLE

Species/stocks interacting with the commercial fishery evaluated	Does this species/stock meet the NID criteria?
1) False killer whale, Main Hawaiian Islands Insular stock	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
2) Humpback whale, Central North Pacific stock	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
3)	Yes <input type="checkbox"/> No <input type="checkbox"/>
4)	Yes <input type="checkbox"/> No <input type="checkbox"/>
5)	Yes <input type="checkbox"/> No <input type="checkbox"/>
6)	Yes <input type="checkbox"/> No <input type="checkbox"/>

### NEGLECTIBLE IMPACT JUSTIFICATION SUMMARY

Regarding the years used for calculation of M/SI, False killer whale, Main Hawaiian Islands Insular stock:

Adjustments to bycatch estimation methods for False killer whales, Main Hawaiian Islands (MHI) Insular stock were implemented in 2013 to account of take reduction plan (TRP) measures. These measures include gear requirements, measures to improve captain and crew response to hooked and entangled false killer whales, and elimination of the seasonal contraction of the Longline Exclusion Zone (LLEZ) around the MHI. The TRP became effective December 31, 2012, with gear requirements effective February 27, 2013. In the most recent year for which abundances and M/SI averages are available, a 5-yr average for the most recent 5 years (2011-2015) is not provided for the MHI insular stock, as the fishery was largely excluded from the stock range through the expansion of the LLEZ, resulting in significant change in the conduct of the fishery with respect to this stock. Instead, the 3-year period following the TRP implementation (2013-2015) is presented. Therefore, the 3-year M/SI annual average, which is included in the final 2019 stock assessment report, is considered the best available science and used for this NID analysis.

Regarding Humpback whales, Central North Pacific stock:

As noted in the final 2019 SAR, The humpback whale ESA listing final rule (81 FR 62259, 8 September 2016) established 14 Distinct Population Segments (DPSs) with different listing statuses. Some of the listed DPSs partially coincide with the currently defined Central North Pacific stock. Because NMFS 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 and Bettridge et al. (2015), NMFS continues to use the existing MMPA stock structure and considers the stock to be endangered and depleted for MMPA management purposes (e.g., selection of a recovery factor, stock status).

However, again as noted in the final 2019 SAR, Humpback whale mortality and serious injury in Hawaii-based fisheries involves whales from the Hawaii DPS; this DPS is not listed as threatened or endangered under the ESA. Therefore, a Tier 2 analysis was not conducted for the Hawaii DPS.

## Negligible Impact Determination Analysis: Determination

### FINAL NID DETERMINATION

Based on criteria outlined in NMFS Procedure 02-204-02 "Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E)" and the best scientific information available as detailed herein and cited below, the mortality and serious injury of ESA-listed marine mammals incidental to the Hawaii deep-set longline/Western Pacific pelagic longline (HI deep-set component) fishery will have a negligible impact on ESA-listed marine mammal stocks or species the purposes of issuing a permit under MMPA section 101(a)(5)(E), for a period of up to three years.

### LIST OF ATTACHMENTS (if applicable)

### LITERATURE CITED

- Bettridge, S., Baker, C.S., Barlow, J., Clapham, P., Ford, M.J., Gouveia, D., Mattila, D.K., Pace, R.M., Rosel, P.E., Silber, G.K., & Wade, P.R. 2015. Status review of the humpback whale (*Megaptera novaeangliae*) under the Endangered Species Act. U.S. Dep. Commer., NOAA Tech. Memo. NOAA-TM-NMFS-SWFSC-540, 2635 p. Available online: <https://repository.library.noaa.gov/view/noaa/4883>
- Carretta, J. V., K. A. Forney, E. M. Oleson, D. W. Weller, A. R. Lang, J. Baker, M. M. Muto, B. Hanson, A. J. Orr, H. Huber, M. S. Lowry, J. Barlow, J. E. Moore, D. Lynch, L. Carswell, and R. L. Brownell Jr. 2020. U.S. Pacific Marine Mammal Stock Assessments: 2019, U.S. Department of Commerce, NOAA Technical Memorandum NMFS-SWFSC-629. Available online: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>.
- Muto, M. M., V. T. Helker, B. J. Delean, R. P. Angliss, P. L. Boveng, J. M. Breiwick, B. M. Brost, M. F. Cameron, P. J. Clapham, S. P. Dahle, M. E. Dahlheim, B. S. Fadely, M. C. Ferguson, L. W. Fritz, R. C. Hobbs, Y. V. Ivashchenko, A. S. Kennedy, J. M. London, S. A. Mizroch, R. R. Ream, E. L. Richmond, K. E. W. Shelden, K. L. Sweeney, R. G. Towell, P. R. Wade, J. M. Waite, and A. N. Zerbin. 2020. Alaska Marine Mammal Stock Assessments, 2019. U.S. Dep. Commer., NOAA Tech. Memo. NMFS-AFSC-404, 395 p. Available online: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>.
- James V. Carretta, Karin. A. Forney, Erin M. Oleson, David W. Weller, Aimee R. Lang, Jason Baker, Marcia M. Muto, Brad Hanson, Anthony J. Orr, Harriet Huber, Mark S. Lowry, Jay Barlow, Jeffrey E. Moore, Deanna Lynch, Lilian Carswell, and Robert L. Brownell Jr. NOAA-TM-NMFS-SWFSC-602  
<https://repository.library.noaa.gov/view/noaa/18080>

## 101(a)(5)(E) Assessment

### MMPA SECTION 101(a)(5)(E)

MMPA section 101(a)(5)(E) requires NMFS to authorize the incidental take of ESA-listed marine mammals in commercial fisheries if NMFS determines, after notice and opportunity for public comment, that:

1. Incidental mortality and serious injury (M/SI) from commercial fisheries will have a negligible impact on the affected species/stock;
2. A recovery plan has been developed or is being developed for such species/stock; and
3. Where required under MMPA section 118, a monitoring program has been established, vessels are registered, and a take reduction plan has been developed or is being developed for such species/stock.

### FISHERY EVALUATION UNDER MMPA SECTION 101(a)(5)(E) CRITERIA

Commercial Fishery: Hawaii deep-set longline/Western Pacific pelagic longline (HI deep-set component)

Was a NID made for this fishery? Yes  No

	Is a recovery plan developed or underway for this species/stock?	
1) False killer whale, Main Hawaiian Islands Insular stock	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>
2) Humpback whale, Central North Pacific stock	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>
3)	Yes <input type="checkbox"/>	No <input type="checkbox"/>
4)	Yes <input type="checkbox"/>	No <input type="checkbox"/>
5)	Yes <input type="checkbox"/>	No <input type="checkbox"/>
6)	Yes <input type="checkbox"/>	No <input type="checkbox"/>

Is a monitoring program established for this fishery as required under MMPA section 118? Yes  No

Has this fishery met the take reduction plan requirements as required under MMPA section 118? Yes  No

If yes, is a take reduction plan complete  underway  or included  on the priority list for development?

Have all requirements been met for NMFS to authorize the incidental take of ESA-listed marine mammals in this commercial fishery? Yes  No

If relevant, please provide additional information.

A recovery plan for the False Killer Whale, Main Hawaiian Islands Insular stock, is currently in development and expected to be completed in 2020. The Species Status Assessment and Recovery Plan were released for peer review in 2019 and a final plan is expected in 2020.

The fishery is subject to the False Killer Whale Take Reduction Team (75 FR 2853; January 19, 2010) and associated regulations under the False Killer Whale Take Reduction Plan.

## 101(a)(5)(E) Authorization

### MMPA SECTION 101(a)(5)(E) AUTHORIZATION

Based on above criteria outlined under MMPA Section 101(a)(5)(E), and the best scientific information available as detailed herein and cited hereafter, the Hawaii deep-set longline/Western Pacific pelagic longline (HI deep-set component) fishery meets the requirements for issuance of a permit under MMPA section 101(a)(5)(E), for a period of up to three years.

DATE:

### LIST OF ATTACHMENTS (if applicable)

### LITERATURE CITED

Carretta, J. V., K. A. Forney, E. M. Oleson, D. W. Weller, A. R. Lang, J. Baker, M. M. Muto, B. Hanson, A. J. Orr, H. Huber, M. S. Lowry, J. Barlow, J. E. Moore, D. Lynch, L. Carswell, and R. L. Brownell Jr. 2020. U.S. Pacific Marine Mammal Stock Assessments: 2019, U.S. Department of Commerce, NOAA Technical Memorandum NMFS-SWFSC-629.

Available online:

<https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>.

Muto, M. M., V. T. Helker, B. J. Delean, R. P. Angliss, P. L. Boveng, J. M. Breiwick, B. M. Brost, M. F. Cameron, P. J. Clapham, S. P. Dahle, M. E. Dahlheim, B. S. Fadely, M. C. Ferguson, L. W. Fritz, R. C. Hobbs, Y. V. Ivashchenko, A. S. Kennedy, J. M. London, S. A. Mizroch, R. R. Ream, E. L. Richmond, K. E. W. Shelden, K. L. Sweeney, R. G. Towell, P. R. Wade, J. M. Waite, and A. N. Zerbin. 2020. Alaska Marine Mammal Stock Assessments, 2019. U.S. Dep. Commer., NOAA Tech. Memo. NMFS-AFSC-404, 395 p. Available online: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>.

James V. Carretta, Karin. A. Forney, Erin M. Oleson, David W. Weller, Aimee R. Lang, Jason Baker, Marcia M. Muto, Brad Hanson, Anthony J. Orr, Harriet Huber, Mark S. Lowry, Jay Barlow, Jeffrey E. Moore, Deanna Lynch, Lilian Carswell, and Robert L. Brownell Jr. NOAA-TM-NMFS-SWFSC-602

<https://repository.library.noaa.gov/view/noaa/18080>

Notice of establishment of a False Killer Whale Take Reduction Team and meeting; request for comment. (75 FR 2853)

<https://www.federalregister.gov/documents/2010/01/19/2010-835/false-killer-whale-take-reduction-team-meeting>