

requesting company Tradewinds Intl because, as Tradewinds itself acknowledges, the successor-in-interest has yet to occur. Specifically, Tradewinds states that “{n}o structural, management, employee, supplier, customer, or other changes are **anticipated** as a result of the transfer” (emphasis added). Despite Tradewinds’ assurances that operations will eventually be essentially the same, the Department cannot base a ruling on speculation, as it provides the Department with no record evidence to analyze. For a more detailed discussion, including relevant factors of a proprietary nature, see the Decision Memorandum.

As a result, we continue to find that Tradewinds Intl is not the successor-in-interest to Fortune Glory at this time and, therefore, should not be given the same antidumping duty treatment as Fortune Glory.

This notice is issued and published in accordance with sections 751(b)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 C.F.R. 351.216.

Dated: October 19, 2007.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[I.D. 062006A]

RIN 0648-XD10

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

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

**ACTION:** Notice.

**SUMMARY:** In accordance with the Marine Mammal Protection Act, NMFS hereby issues a permit for a period of 3 years to authorize the incidental, but not intentional, taking of three stocks of endangered marine mammals by the California/Oregon (CA/OR) drift gillnet fishery. The three stocks are: fin whale, California/Oregon/Washington (CA/OR/WA) stock; humpback whale, Eastern North Pacific (ENP) stock; and sperm whale, CA/OR/WA stock. This authorization is based in part on a determination that this incidental take

will have a negligible impact on the affected marine mammal stocks.

**DATES:** This permit is effective for a 3-year period beginning October 26, 2007.

**ADDRESSES:** Copies of the reference materials may be obtained from Protected Resources Division, NMFS, Southwest Region, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213. Attention: Christina Fahy.

**FOR FURTHER INFORMATION CONTACT:** Monica DeAngelis, NMFS, Southwest Region, Protected Resources Division, (562) 980-3232 or Christina Fahy, (562) 980-4023.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361, *et seq.*), NMFS is issuing a permit to authorize the taking of three stocks of endangered marine mammals (fin whale, California/Oregon/Washington (CA/OR/WA) stock; humpback whale, Eastern North Pacific (ENP) stock; and sperm whale, CA/OR/WA stock) incidental to the CA/OR drift gillnet fishery. This fishery is the only Category I or II fishery with a recent history of taking these three stocks of marine mammals, and in recent history this fishery has taken no other stocks of threatened or endangered marine mammals. Therefore, only this fishery and these three stocks of marine mammals are affected by this permit.

MMPA section 101(a)(5)(E) requires NMFS to allow the taking of marine mammals from species or stocks listed as threatened or endangered under the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*) incidental to commercial fishing operations if NMFS determines that: (1) incidental mortality and serious injury will have a negligible impact on the affected species or stock; (2) a recovery plan has been developed or is being developed for such species or stock under the ESA; and (3) where required under section 118 of the MMPA, a monitoring program has been established, vessels engaged in such fisheries are registered in accordance with section 118 of the MMPA, and a take reduction plan has been developed or is being developed for such species or stock.

MMPA section 101(a)(5)(E)(ii) requires NMFS to publish a list of the fisheries for which the necessary determinations have been made for the taking of threatened or endangered marine mammals incidental to the fisheries’ operations. This list of fisheries currently contains the three fisheries that are the subject of this notice and identified in Table 1. The MMPA also requires NMFS, upon such determinations, to issue a permit to those fisheries in which vessels are

required to be registered (Category I and II fisheries).

The 2007 List of Fisheries indicates that two Category III fisheries (CA lobster, prawn, shrimp, rock crab, fish pot and CA/OR/WA crab pot) have a history of taking humpback whales. NMFS is currently in the process of characterizing the trap and pot fisheries off the west coast of the United States and assessing the impact, based on the available information, to determine if reclassifying these fisheries is warranted. As provided by the MMPA, the taking of this stock of humpback whales would be authorized, if it were to occur and the owner or master of the vessel reported the take, as required by MMPA section 118(e). MMPA section 101(a)(5)(E)(ii) states that (1) permits are not required for Category III fisheries because participants are not required to register their vessels and (2) that after an appropriate negligible impact determination is completed, taking threatened or endangered marine mammals would not be a violation, so long as any injury or mortality is reported in accordance with MMPA section 118.

#### History of Applying Negligible Impact in Fisheries

Among the requirements of MMPA section 101(a)(5)(E) to issue a permit to take ESA-listed marine mammals incidental to commercial fishing, NMFS must determine whether the incidental taking from commercial fisheries would have a negligible impact on the affected stock or stocks of threatened or endangered marine mammals. Negligible impact determinations are required only in MMPA section 101(a)(5), and they are used in the procedures to authorize the take of small numbers of any stock of marine mammals incidental to activities other than commercial fishing (termed the “Small Take Program”) and to permit the take of threatened or endangered marine mammals incidental to commercial fishing operations. That is, within the MMPA’s provisions for the Small Take Program, NMFS must determine if the taking (by harassment, injury, and mortality) incidental to specified activities will have a negligible impact on the affected stocks of marine mammals (MMPA sections 101(a)(5)(A)(I) and 101(A)(5)(D)(i)(I)). For permitting the take of threatened or endangered marine mammals incidental to fishing operations, NMFS must determine if mortality and serious injury incidental to commercial fisheries will have a negligible impact on the affected species or stocks of

marine mammals (MMPA section 101(a)(5)(E)(i)(I)).

NMFS has implemented these programs through regulations and has relied upon qualitative and quantitative approaches to determine the levels of taking that would result in a negligible impact to affected stocks of marine mammals. The quantitative approach is more appropriate for serious injury and mortality than for non-lethal takes because mortality and serious injury are considered removals from the population and can be evaluated by well-documented models of population dynamics.

The MMPA does not define "negligible impact." There is, however, a reference to negligible impact in the House of Representatives committee report for the MMPA Amendments of 1981. That report states, "'negligible' is intended to mean an impact which is able to be disregarded. In this regard, the committee notes that Webster's Dictionary defines the term 'negligible' to mean 'so small or unimportant or of so little consequence as to warrant little or no attention.'" (House of Representatives, Report 97-228, September 16, 1981). NMFS defined negligible impact in regulations for the Small Take Program (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." This qualitative definition indicates that detectable population-level effects are important features in negligible impact determinations.

This qualitative definition of negligible impact was the standard NMFS used to implement the Small Take Program from its inception in 1981 through 1994, when additional amendments to the MMPA required a more quantitative approach for assessing what level of removals from a population stock of marine mammals could be considered a negligible impact. It remains the only formal definition of negligible impact for implementing the MMPA, and its use was expanded in 1995 (see 50 CFR 229.2) to include determinations related to incidental taking from commercial fishing.

The MMPA Amendments of 1994 were enacted primarily to establish a regime to govern the taking of marine mammals incidental to commercial fishing operations, including MMPA section 101(a)(5)(E). These amendments were based in large part on a legislative proposal NMFS submitted to Congress in 1992. This legislative proposal was, in turn, based in large part on

recommended guidelines, required by MMPA section 114, from the Marine Mammal Commission (Commission) in early 1990 (Recommended Guidelines to Govern the Incidental Taking of Marine Mammals in the Course of Commercial Fishing Operations after October 1993, transmitted to NMFS on July 12, 1990). In these guidelines, the Commission recommended, among five other characteristics of a mechanism to govern the take of threatened and endangered marine mammals incidental to fishing, "the authorized level of take would have a negligible effect on population size and recovery time..." The Commission provided initial quantitative guidance on negligible effect on population size and recovery time as the following: "an effect that (a) will not cause or contribute to a further decline in distribution or size lasting more than twelve months; and/or (b) will not cause greater than a 10-percent increase in the best available estimate of the time it will take the affected species or population to recover to its maximum net productivity level."

The first of the Commission's quantitative approaches is more appropriate for an activity that would have a relatively short duration relative to the life expectancy of the affected stocks of marine mammals and, in the case of commercial fishing, for the remote likelihood of serious injury or mortality by a Category III fishery. Where incidental mortality or serious injury may occur on a more regular basis, as expected for interactions with Category I or II commercial fisheries, the delay-in-recovery standard would be more appropriate.

NMFS has consistently used the Commission's delay-in-recovery guideline in distinguishing negligible from non-negligible impact. To apply this criterion, however, NMFS had to estimate what annual levels of removal would cause no more than a 10 percent delay in time to recovery. Such an effort was initiated at a NMFS-convened workshop (June 1994) to develop guidelines for preparing marine mammal stock assessment reports. Among the many items considered at that workshop, participants agreed that recovery factors (RF) used in the calculation of Potential Biological Removal (PBR) for each stock of marine mammals should compensate for uncertainty and possible unknown estimation errors. In discussing the RF for stocks of endangered species of marine mammals, participants noted that a RF of 0.1 would preserve 90 percent of net annual production for recovery of the stock, limiting the proportion of net annual production of

the stock available for authorization of mortality or serious injury incidental to human-caused mortality. Participants also stated that reserving such a high proportion of net annual production of endangered species was appropriate to "allow stocks to recover at near maximum rates, and to minimize the probability that naturally occurring stochastic mortality would result in extinction of the stock." (Barlow *et al.*, 1995). Workshop participants also noted, "authorized levels of human-related mortality should increase recovery time of endangered stocks by no more than 10 percent (consistent with the goal stated in NMFS legislative proposal)." (Barlow *et al.*, 1995). Consequently, participants at the workshop recommended, and NMFS accepted after public review and comment, that mortality and serious injury remaining at or below PBR for an endangered stock (with 0.1 as the RF in the PBR calculation) would have an insignificant or negligible impact on the affected stock.

In applying the negligible impact criterion to determinations made initially under the MMPA Amendments of 1994, NMFS understood that total human-caused mortality and serious injury limited to a level no greater than a PBR calculated with RF of 0.1 would be negligible; however, MMPA section 101(a)(5)(E) required a determination related to the impact of mortality and serious injury incidental to commercial fishing rather than incidental to all human activities. Accordingly, NMFS proposed to use, and subsequently used, 10 percent of any stock's PBR as the upper limit of mortality and serious injury incidental to commercial fishing in making the first negligible impact determinations (60 FR 31666, June 16, 1995 (proposed) and 65 FR 45399, August 31, 1995 (interim)). A rationale supporting this approach was that a negligible (or insignificant) level of fishery-related mortality and serious injury should be only a small portion of the maximum level of mortality and serious injury a stock could sustain. NMFS noted that the threshold value was a starting point; that is, the criterion should not be used rigidly but should produce the first estimate, which, in turn, could be modified on a case-by-case basis according to existing information. Although 10 percent of PBR was used in 1995 in issuing permits to fisheries under MMPA section 101(a)(5)(E), NMFS later became concerned that 10 percent of PBR may result in a much smaller number than the 10 percent-delay criterion would require (Wade and Angliss, 1997).

Later, Wade (1998) summarized the robustness trials conducted in support of the PBR approach for marine mammal conservation, including an aspect that was missing from simulations conducted for the NMFS-convened workshop in 1994: exploring the maximum level of annual removals from a population that would result in no more than a 10-percent delay in the time a population would need for recovery to its Maximum Net Productivity Level (MNPL). Wade (1998) found that an upper limit of annual removals equal to the value of a PBR calculation with a RF of 0.15 would allow 95 percent of simulations to equilibrate at or above MNPL, which was an initial step in quantifying the maximum number of annual removals resulting in a negligible impact. However, in some applications the negligible impact standard must also address a performance criterion for marine mammal stocks that are not necessarily depleted. Wade (1998), therefore, reported that an upper limit of annual mortality limited to a value equal to a PBR calculation with a RF of 0.1 would allow 95 percent of simulations to equilibrate within 95 percent of the carrying capacity of the affected stock of marine mammals.

Wade's (1998) performance testing included removals to the threshold level for a period of 100 years and evaluated the robustness of each case over a range of bias or uncertainty in productivity rates, abundance estimation, and mortality estimation. Thus, the limits are appropriate for use on long-term average removals and do not indicate that a short-term level of removal exceeding the threshold would delay time to recovery by more than 10 percent.

In 1998, NMFS published a notice (63 FR 71894, December 30, 1998) advising the public that NMFS was extending the 3-year permit issued to fisheries in 1995 to authorize the taking of threatened or endangered marine mammals. This notice also informed the public that NMFS considered the 6-month extension of the permit an opportunity to review existing criteria for the issuance of permits and to address issues that have arisen since the permits were first issued. NMFS solicited public comments to develop alternatives to 10 percent of PBR as a criterion for determining negligible impact; however, none were received.

Having received no comments upon which to develop alternatives for determining negligible impact, NMFS published a notice proposing to issue permits under MMPA section 101(a)(5)(E) in 1999 (64 FR 28800, May

27, 1999). The notice contained a statement that NMFS, through internal deliberation, had adopted the following criteria for making negligible impact determinations for such permits:

(1) The threshold for initial determination will remain at 0.1 PBR. If total human-related serious injuries and mortalities are less than 0.1 PBR, all fisheries may be permitted.

(2) If total human-related serious injuries and mortalities are greater than PBR, and fisheries-related mortality is less than 0.1 PBR, individual fisheries may be permitted if management measures are being taken to address non-fisheries-related serious injuries and mortalities. When fisheries-related serious injury and mortality is less than 10 percent of the total, the appropriate management action is to address components that account for the major portion of the total.

(3) If total fisheries-related serious injuries and mortalities are greater than 0.1 PBR and less than PBR and the population is stable or increasing, fisheries may be permitted subject to individual review and certainty of data. Although the PBR level has been set up as a conservative standard that will allow recovery of a stock, there are reasons for individually reviewing fisheries if serious injuries and mortalities are above the threshold level. First, increases in permitted serious injuries and mortalities should be carefully considered. Second, as serious injuries and mortalities approach the PBR level, uncertainties in elements such as population size, reproductive rates, and fisheries-related mortalities become more important.

(4) If the population abundance of a stock is declining, the threshold level of 0.1 PBR will continue to be used. If a population is declining despite limitations on human-related serious injuries and mortalities below the PBR level, a more conservative criterion is warranted.

(5) If total fisheries-related serious injuries and mortalities are greater than PBR, permits may not be issued.

Criterion 1 is the starting point for analyses. If this criterion is satisfied, the analysis would be concluded. The remaining criteria describe alternatives under certain conditions, such as fishery mortality below the negligible threshold but other human-caused mortality above the threshold, or fishery and other human-caused mortality between the negligible threshold and PBR for a stock that is increasing or stable. If criterion 1 is not satisfied, NMFS may use one of the other criteria, as appropriate.

In 2000, NMFS issued a permit to the CA/OR drift gillnet fishery to authorize the taking of threatened and endangered marine mammals incidental to its operation (65 FR 64670, October 30, 2000). For that permit, as for the current permit, NMFS used the criteria adopted in 1999 to distinguish between negligible and non-negligible impact on affected stocks of marine mammals.

#### Current Permit

Observer data, stranding records, and marine mammal reporting forms indicate the CA/OR drift gillnet fishery is the only Category I or II commercial fishery that takes the CA/OR/WA stocks of fin and sperm whales, and the ENP stock of humpback whales. However, based on stranding records, pot fisheries that operate in California (currently listed as Category III fisheries), may also take humpback whales.

On July 28, 2006 (71 FR 42809), NMFS proposed the issuance of a permit under MMPA section 101(a)(5)(E), for a period of 3 years, to authorize the incidental, but not intentional, taking of three stocks of threatened or endangered marine mammals (CA/OR/WA stocks of fin and sperm whales and the ENP stock of humpback whales) by the CA/OR drift gillnet fishery. That notice summarized documentation that: (1) a recovery plan has been developed or is being developed for the affected stocks, and (2) where required under section 118 of the MMPA, a monitoring program has been established, vessels engaged in such fisheries are registered, and a take reduction plan has been, or is being, developed.

The proposed permit indicated that recovery plans had been developed (humpback whales) or were being developed (fin and sperm whales). These recovery plans are available on the internet at the following address: <http://www.nmfs.noaa.gov/pr/recovery/plans.htm>. Accordingly, NMFS determined that recovery plans for the affected stocks are completed or being developed.

Vessels active in the fishery are registered under the MMPA each year, and an observer program has been in place in the CA/OR drift gillnet fishery since 1990 (see Description of the Fishery; Carretta *et al.*, 2006, Appendix 1. Descriptions of U.S. Commercial Fisheries). Since the Pacific Offshore Cetacean Take Reduction Plan (POCTRP) was implemented in 1997 (62 FR 51805, October 3, 1997), observer coverage has been sufficient for reliable estimates of marine mammals mortality and serious injury. No other Category I or II fisheries, which are the only

commercial fisheries required to register, carry observers, or be subject to take reduction plans, have a history of taking these stocks of endangered whales. Accordingly, NMFS determined that, as required by MMPA section 118, vessels were registered under the MMPA, a monitoring program was in place, and a take reduction plan was in place for these stocks. Thus, all conditions for issuing a permit under MMPA section 101(a)(5)(E) are fulfilled.

In 2005, NMFS received an application for an Exempted Fishing Permit (EFP) for drift gillnet fishing from the Federation of Independent Seafood Harvesters to reopen the area closed in 2001 (described below) to drift gillnet fishing. The Pacific Fishery Management Council (PFMC) reviewed the EFP and facilitated the development of the permit conditions. These included: drift gillnet EFP fishing effort in the closure area would be limited to no more than 300 sets, and 100 percent observer coverage would be required, and up to 30 vessels would be eligible to participate. The permit included limits on the number of protected species that could be incidentally entangled in the drift gillnet EFP fishery. The PFMC recommended that NMFS issue the 2006 permit, and NMFS formally began review of the EFP, which included consultation under the ESA, to consider the impacts on ESA-listed species. The proposed 2006 EFP recommended by the PFMC for issuance was not issued. However, the PFMC recommended at their April 2007 meeting that NMFS issue this EFP in 2007 with the same terms and conditions as originally recommended for the 2006 application. On June 5, 2007, in a letter from NMFS to the PFMC, NMFS determined that it would not issue the permit for the proposed 2007 drift gillnet EFP, due to the potential for leatherback sea turtle mortalities that would result if the EFP were approved. If NMFS considers the issuance of a DGN EFP during the three years of this 101(a)(5)(E) permit, taking of listed marine mammal stocks considered under this permit would be covered under the existing analysis. The data analyzed in the negligible impact determination for this permit included years prior to 2001 when the currently closed area (requested to be opened under the EFP in 2006 and 2007) was open to fishing. Therefore, any taking of these stocks of marine mammals incidental to fishing under a similarly issued EFP (if it is granted) would be authorized by this permit. All drift gillnet fishing under an EFP would be subject to applicable requirements

under the HMS FMP and would have to comply with the POCTRP. In addition, any proposed EFP application would be subjected to thorough review and analysis of impacts, in order to satisfy all mandated requirements under the ESA and the National Environmental Policy Act (NEPA).

#### Description of the Fishery

The CA/OR drift gillnet fishery operates primarily outside of state waters to about 150 nm offshore ranging from the U.S. Mexico border in the south to northward of the Columbia River, depending on sea surface temperature conditions. The 2007 List of Fisheries (72 FR 14466, March 28, 2007) estimated that there were 85 vessels in the fishery. This estimate of the number of vessels in the fishery is a historical reference based upon the number of vessels that indicated intent to participate in the fishery and may not be an accurate estimate of the number of vessels actively engaged in fishing in any given year. The drift gillnet fishery is a limited entry program, managed with gear, seasons, and area closures. In 2005, there were 90 fishing permits issued, and 42 vessels actively fished under their permit (Pacific Fishery Management Council 2006). More detailed information on the operation of this fishery is included in Appendix 2 of the final negligible impact determination associated with this permit.

Under California State regulations, the fishery is restricted to waters outside 200 nm from February 1 through April 30, and outside 75 nm from May 1 through August 14; the fishery is allowed to fish inside 75 nm from August 15 through January 31. In the portion of the U.S. EEZ off the Oregon coast, the fishery is closed throughout the year east of a line approximating 1000 fathoms. Because of these restrictions, vessels are not active during February, March, and April, and very little fishing effort occurs during the months of May, June, and July because CA/OR drift gillnet vessels targeting swordfish tend to set on warm ocean water temperature breaks, which do not appear along the California coast until late summer.

The fishery has been conducted under state and/or Federal regulations since MMPA section 118 was enacted. When the List of Fisheries under MMPA section 118 was first began, the CA/OR drift gillnet fishery was state-regulated. As a result, when NMFS promulgated regulations implementing the POCTRP (62 FR 51805, October 3, 1997), there were no other Federal actions associated with the fishery. For initial

implementation of the take reduction plan, NMFS completed a consultation under ESA section 7 in September, 1997 (no jeopardy determination) and completed an Environmental Assessment under NEPA in August 1997. The regulatory requirements in the POCTRP included the use of extenders so that the upper part of the gillnet was 36 ft (10.9 m) below the surface and the use of acoustic warning devices (pingers) on nets.

As part of reasonable and prudent alternatives contained in a 2000 ESA consultation on the drift gillnet fishery, in 2001, a seasonal (15 August–15 November) area closure was implemented in the drift gillnet fishery north of Point Conception, to protect leatherback turtles that feed in the area and were observed entangled in previous fishing seasons. Additional seasonal/area closures in southern California have been established in the drift gillnet fishery to protect loggerhead turtles during declared or predicted El Niño years.

On February 4, 2004, NMFS partially approved the HMS FMP prepared by the PFMC. This FMP includes commercial fisheries using various gear types to target highly migratory species; however, only the drift gillnet fishery has a history of taking threatened or endangered marine mammals. Implementing regulations for the approved portions of the FMP were published on April 7, 2004 (69 FR 18444). The preamble to these regulations noted that an Environmental Impact Statement (EIS) had been prepared and filed with the Environmental Protection Agency and that a formal consultation under the ESA had been completed. These documents analyzed the effects of the fishery on the human environment and on threatened or endangered species.

The HMS FMP includes a permit requirement for vessels or vessel owners. Participants in the CA/OR drift gillnet fishery are also required to have a valid permit issued annually by the California Department of Fish and Game or Oregon Department of Fish and Wildlife, as applicable, depending upon where fishing occurs and landings are made. In accordance with MMPA section 118(c), only those vessels in the CA/OR drift gillnet fishery that have registered for a Marine Mammal Authorization Program (MMAP) are authorized to take marine mammals incidental to their fishing operations. Vessels holding this permit must comply with the POCTRP and implementing regulations.

### Current Negligible Impact Determination

NMFS has evaluated the best available information for the three stocks listed as threatened or endangered under the ESA addressed by this permit and has determined (using data from 1998 through 2005 and computing a yearly average), on a stock-by-stock basis, whether the mortality and serious injury incidental to the CA/OR drift gillnet fishery is having a negligible impact on such stocks (NMFS 2006). Based on this assessment, using the 1999 criteria (see History of Applying Negligible Impact in Fisheries) for the three stocks of marine mammals addressed by this permit, NMFS concludes that the estimated mortality and serious injury incidental to commercial fishing will have a negligible impact on these stocks of fin, humpback, and sperm whales. A stock-by-stock summary of the negligible impact determination follows.

#### *Fin Whale, CA/OR/WA Stock*

The annual average serious injury and mortality to the CA/OR/WA stock of fin whales from all human-caused sources, including commercial fisheries (0.63 animals) plus ship strikes (0.88 animals), is 1.51 animals, which is 10 percent of this stock's PBR. Although criterion 1 states the threshold is less than rather than equal to 10 percent of PBR, there are circumstances that prompt NMFS to determine that this minor deviation from the guidelines is reasonable. The abundance of this stock is increasing, the PBR calculation uses a recovery factor of 0.1, and the serious injury and mortality is far below a level that would cause more than a 10 percent delay in recovery. During the past 16 years, only one fin whale has been observed taken by the CA/OR drift gillnet fishery (1999; which is after the implementation of the POCTRP and prior to the 2001 closure off California and Oregon), indicating that the likelihood that a fin whale would be taken in the CA/OR drift gillnet fishery is very low. NMFS estimates that total human-caused mortality and serious injury of fin whales will be less than 10 percent of the PBR of this stock.

Therefore, mortality and serious injury of fin whales incidental to commercial fishing will have a negligible impact on the CA/OR/WA stock of fin whales under criterion 1.

#### *Humpback Whale, ENP Stock*

The annual average serious injury and mortality to the ENP stock of humpback whales from all human-caused sources, including commercial fisheries (1.5 animals) plus ship strikes (0.25 animals), is 1.75 animals, which is 76.1 percent of this stock's PBR (above the 0.1 PBR threshold, but below PBR). Although several humpback whales were entangled in recent years in crab pot gear and in unknown pot/net fisheries in California, the total fisheries-related serious injury and mortality is less than this stock's PBR. Since the beginning of the NMFS observer program in 1990, no mortalities or serious injuries of humpback whales have been attributed to the CA/OR drift gillnet fishery. No other Category I or II commercial fisheries have a history of causing mortality and serious injury of this stock. In addition, after the implementation of the POCTRP, overall cetacean entanglement rates in the drift gillnet fishery dropped considerably. Finally, the population for this stock is considered to be increasing by 6–7 percent per year (Carretta *et al.*, 2006). Because fishery-caused mortality and serious injury, in combination with other sources of human-caused mortality and serious injury, are below the PBR of an increasing stock, NMFS determines that mortality and serious injury incidental to commercial fisheries will have a negligible impact on the ENP stock of humpback whales using criterion 3.

#### *Sperm Whale, CA/OR/WA Stock*

The annual average serious injury and mortality to the CA/OR/WA stock of sperm whales from commercial fisheries (0.75 animals) plus ship strikes (0.38 animals), is 1.13 animals, which is 62.5 percent of this stock's PBR (above the 0.1 PBR threshold, but below PBR). The minimum population estimate for this stock is considered to be variable, with no obvious trend (Carretta *et al.*, 2006). However, the overall population of

sperm whales has increased worldwide since it was listed under the ESA in 1973. Although it is difficult to determine a trend for the CA/OR/WA stock of sperm whales, this stock does not appear to be declining; therefore, it is either stable or increasing. The average annual fisheries-related mortality and serious injury for this stock is below PBR. Since the implementation of the POCTRP, only one sperm whale was incidentally taken (1998; taken prior to the 2001 closure off central California/southern Oregon) in the CA/OR drift gillnet fishery, but the net did not have a full complement of pingers; therefore, it is difficult to evaluate whether pingers have an effect on sperm whale entanglement. However, pingers have shown to have a positive effect on other odontocetes (i.e., lower entanglement rates) (Barlow and Cameron 2003). Further, there has not been a take of sperm whales since 1998 and the likelihood that a sperm whale would be taken by the CA/OR drift gillnet fishery is very low. Because the stock is stable or increasing and total human-caused mortality and serious injury is below PBR, NMFS determines that the mortality and serious injury incidental to commercial fisheries will have a negligible impact on the CA/OR/WA stock of sperm whales using criterion 3.

A permit is hereby issued to the CA/OR drift gillnet fishery authorizing the non-lethal taking of individuals from the CA/OR/WA stock of fin whales, the ENP stock of humpback whales, and the CA/OR/WA stock of sperm whales for a 3-year period. If NMFS determines at a later date that incidental mortality and serious injury from commercial fishing is having more than a negligible impact on these stocks, NMFS may use its emergency authority under MMPA section 118 to protect the affected stock or stocks and may modify the permit issued herein. In accordance with the MMPA, participants in Category III fisheries included in Table I are also authorized to take marine mammals from these three stocks of marine mammals so long as such taking is reported in accordance with MMPA section 118(d).

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

Fishery	Category	Marine Mammal Stock
CA/OR Drift Gillnet Fishery	I	Fin whale, CA/OR/WA stock Humpback whale, ENP stock Sperm whale, CA/OR/WA stock
CA lobster, prawn, shrimp, rock crab, fish pot	III	Fin whale, CA/OR/WA stock Humpback whale, ENP stock Sperm whale, CA/OR/WA stock
WA/OR/CA crab pot	III	Fin whale, CA/OR/WA stock Humpback whale, ENP stock Sperm whale, CA/OR/WA stock

### Comments and Responses

NMFS received six comment letters concerning the proposal for issuance of the 101(a)(5)(E) permit under the MMPA. All of these letters were in opposition to the issuance this permit. Two commenters expressed opposition to the issuance of a permit but did not explain the basis for their opposition. Therefore, these comments are not included the following summary of comments and responses.

*Comment 1:* Commenters stated that any fishing pursuant to the EFP would require a separate MMPA permit from NMFS.

*Response:* NMFS disagrees. The current 101(a)(5)(E) permit authorizes the taking of marine mammals incidental to the operation of the CA/OR drift gillnet fishery as it currently operates and would include fishing under an EFP, if proposed similarly to the application in 2006 and 2007 (i.e., fishing in the currently closed leatherback conservation area). The negligible impact determination included operation prior to 2001, when the affected area was open (see Current Negligible Impact); therefore, NMFS determined that commercial fishing, including that under an EFP, had it been approved, will have a negligible impact. The monitoring program would remain in place, vessels would be registered, and the take reduction plan would remain in effect. However, just as the current operation of the fishery required analysis under the ESA and NEPA, expanding effort through approval of a proposed EFP would require additional analyses pursuant to these statutes.

*Comment 2:* Commenters stated that NMFS improperly issued the October 2000 permit.

*Response:* NMFS disagrees. In the October 2000 permit (65 FR 64670), NMFS made all requisite determinations and followed the procedures for public comment required by MMPA section 101(a)(5)(E); therefore, the issuance of the 2000 permit was appropriate.

*Comment 3:* Commenters stated that the CA/OR drift gillnet fishery has continued to entangle ESA-listed marine mammals in the absence of a permit and, thus, has operated illegally for the past three years.

*Response:* NMFS disagrees. The MMPA permit addresses only the take of ESA-listed marine mammals incidental to the fishery rather than the operation of the fishery. One entanglement of a humpback whale occurred after the previous permit expired in 2003. The entangling net was out of compliance with regulations implementing the POCTRP. Thus, the participant in this fishery was not operating lawfully and take was not authorized. The event was reported for investigation. This 101(a)(5)(E) permit was initiated to ensure any future taking of threatened or endangered marine mammals is authorized in accordance with the ESA and MMPA.

*Comment 4:* Commenters expressed that NMFS cannot lawfully make a negligible impact determination for sperm whales because take is not below 10 percent of the PBR level. PBR for this stock is 1.8 whales per year, and the estimated take is 1.13 whales per year. Total mortality for sperm whales exceeds 10 percent of the PBR. The determinations for this permit are based upon the 1999 criteria, which are consistent with the objective to delay recovery by no more than 10 percent.

*Response:* NMFS disagrees. The MMPA contains no reference to 10 percent of PBR nor does it define negligible impact. The determinations for this stock was based upon criterion 3 as adopted in 1999 (see Current Negligible Impact Determination), which is consistent with the objective to delay recovery by no more than 10 percent.

*Comment 5:* Commenters questioned whether a permit could be issued under section 101(a)(5)(E) of the MMPA because there is insufficient evidence to support NMFS' determination that the CA/OR/WA sperm whale stock is stable

or increasing because the population does not show obvious trends and since the level of mortality sustained by the stock is stated to be "unknown" or "uncertain." NMFS cannot make a finding that the stock is stable or increasing. At best, the agency states that "this stock does not appear to be declining.≥"

*Response:* NMFS disagrees. As the comment notes, NMFS has established that the population is not decreasing; therefore, it is either stable or increasing. Although there remains some uncertainty related to the abundance of the population, the apparent trend for sperm whales in the Pacific Ocean is an increase, and this apparent increase is occurring even with current levels of mortality and serious injury.

*Comment 6:* Commenters remarked that NMFS cannot lawfully make a negligible impact determination for humpback whales because take is not below 10 percent PBR. The estimated take is 1.75 whales per year, but this is a gross underestimate. The PBR estimate is 2.3 whales per year. NMFS has substantial information on file that significant unobserved and/or unreported take is occurring. Commenters stated that NMFS needs to make the finding that the humpback whale stock "is stable or increasing," not "likely stable or increasing.≥"

*Response:* NMFS disagrees that we cannot lawfully make a negligible impact determination, as noted in the response to comment 4. Although there are uncertainties in the mortality estimates, the performance of the delay in recovery criterion (Wade, 1998) is robust from bias and variance in mortality, as well as abundance estimates. According to the 2006 SARs and the best scientific information available, the Eastern North Pacific humpback whale stock is increasing in abundance, and NMFS has modified text in the Negligible Impact Determination to be clear that the population is "stable or increasing.≥"

*Comment 7:* Commenters remarked that NMFS cannot lawfully make a negligible impact determination for fin whales because take is “at” 10 percent PBR. These commenters noted that 1.5 fin whales injured and killed per year is not “below” 10 percent PBR, but rather it is 10 percent of the stock’s PBR of 15. Commenters stated that NMFS needs to make the finding that the fin whale stock “is stable or increasing,” not “likely stable or increasing.”

*Response:* NMFS disagrees. As noted in the response to comment 4, a lawful determination of negligible impact does not require reference to 10 percent of PBR. Total human-caused mortality and serious injury of this stock of fin whales is 10 percent of the stock’s PBR, which is the threshold for negligible impact determinations. Due to the “stable or increasing” trend and the recovery factor of 0.1 in the PBR calculation for fin whales, this minor deviation from the specific wording of criterion 1 would not affect the over-arching goal to delay recovery by no more than 10 percent (see Current Negligible Impact Determination). Therefore, NMFS considered total human-caused mortality and serious injury at, rather than below, 10 percent of the stock’s PBR to be a negligible impact. According to the 2006 SARs and the best scientific information available, the CA/OR/WA fin whale stock is increasing in abundance and NMFS has worded the Negligible Impact Determination to be clear that the population is “stable or increasing.”

*Comment 8:* Commenters state that NMFS’ calculations of total human-caused mortality and serious injury of fin, humpback, and sperm whales, is a gross underestimate, as most ship strikes go unreported and other fisheries that are known to entangle large whales remain unobserved.

*Response:* NMFS agrees that the total human-caused mortality and serious injury of fin, humpback, and sperm whales may be underestimates, but the agency used the best available data for our analysis in making the negligible impact determination. Although mortality may be underestimated, Wade (1998) showed that NMFS’ basis for negligible impact determinations is robust to certain levels of underestimated mortality; therefore, NMFS determined that mortality and serious injury incidental to commercial fishing operations will have a negligible impact on these whale stocks.

*Comment 9:* Commenters stated that the deadline for Zero Mortality Rate Goal (ZMRG) has passed, and any take above ZMRG would be unlawful.

*Response:* NMFS disagrees and believes that this comment misinterprets the MMPA. The ZMRG, as described in Section 118 of the MMPA, has four parts. First, there is a threshold level of mortality and serious injury (insignificant levels approaching a zero mortality and serious injury rate) and a deadline by which commercial fisheries should reach the threshold. Second, there is a statement that fisheries that have achieved the threshold level of mortality and serious injury are not required to further reduce incidental mortality and serious injury. Third, there is a requirement for a review of fisheries progress toward the threshold. Fourth, there is a mechanism for reducing incidental mortality and serious injury (i.e., take reduction plans). Although the threshold and deadline are stated without condition, there is no statement in the MMPA that excess removals (mortality and serious injury exceeding threshold values after the deadline) cannot be authorized. The fourth part of the ZMRG states that these excess removals must be addressed through the take reduction plan process. NMFS has implemented a POCTRP as developed by a Pacific Offshore Cetacean Take Reduction Team (POCTRT) convened pursuant to MMPA section 118(f) and continues to keep that team intact until the threshold level of removals under the ZMRG has been achieved. NMFS convened a meeting of the POCTRT in April 2007 to evaluate the existing removal levels, to consider the economics of the fishery, the availability of existing technology, and existing fishery management plans, and to recommend, as appropriate, additional measures to further reduce incidental removals.

*Comment 10:* Commenters stated that it is unacceptable that the recovery plan for the humpback whale is 15 years old and the sperm and fin whales plan are in draft form.

*Response:* NMFS disagrees. Section 101(a)(5)(E) of the MMPA requires that “a recovery plan has been developed or is being developed.” Although, the humpback whale recovery plan was completed in 1991, NMFS maintains that this recovery plan is still effective, due in part to the documented increase in humpback whale populations in the Atlantic and Pacific Oceans (Carretta *et al.*, 2006, Waring *et al.*, 2006, and Angliss and Outlaw, 2006). NMFS announced the availability of draft recovery plans for fin and sperm whales on July 6, 2006 (71 FR 38385). Following a 60-day public comment period, NMFS is finalizing the sperm and fin whale recovery plans.

*Comment 11:* Commenters remarked that the proposed permit is inconsistent with the Guidelines for Assessing Marine Mammal Stocks (GAMMS) report and legislative intent (90 percent production reserved for recovery) and the proposed permit would waive the requirement that mortality not delay recovery by more than 10 percent. These commenters also stated that the proposal essentially renders the margin of safety created by the recovery factor meaningless and thereby reduces protection for listed species. In addition, commenters stated that the criteria are inconsistent with MMPA, that NMFS abandoned its previous “more conservative approach” (10 percent PBR in 1999) by adopting criteria based on internal review, and that the proposed permit further diminishes conservation for the most imperiled marine mammals.

*Response:* NMFS disagrees that the approach used here is inconsistent with NMFS’ guidelines for preparing stock assessment reports or with legislative intent. The approach for determining negligible impact is consistent with the guidelines prepared by the Commission and submitted to NMFS in 1990 to be used in its development of a regime to govern the mortality and serious injury of marine mammals incidental to commercial fishing operations. In the guidelines, the Commission stated that a negligible impact should cause no more than a 10 percent delay in a severely depleted stock’s recovery. Although this approach is less restrictive than a strict application of 10 percent of PBR as a threshold, the criteria adopted in 1999, which were applied in 2000 and used in this determination, are appropriate for a negligible impact determination because they fulfill NMFS’ original objective to allow human-caused mortality and serious injury to cause no more than a 10 percent delay in the recovery of the affected stocks of marine mammals (see History of Applying Negligible Impact in Fisheries).

*Comment 12:* Commenters stated that the permit violates section 2(c) and 7(a)(1) of the ESA because the agency is required to use its authorities to further the purpose of listed species conservation. In addition, commenters noted that the ESA requires agencies to suspend activities that result in taking, and issuing a permit to continue to take without requiring additional measures to reduce bycatch violates the statutory directive to conserve listed species.

*Response:* NMFS disagrees. Issuance of this 101(a)(5)(E) permit is not a violation of either section 2(c) or 7(a)(1) of the ESA because this action would

authorize a level of take that would have a negligible impact on these three stocks of whales. Such an approach is consistent with the MMPA and is more restrictive than the "jeopardy" standard required in Section 7 of the ESA. The approach is also consistent with ESA section 2(c) because such a limit on mortality and serious injury promotes rapid recovery of the affected stocks; thus, NMFS is using its authority to promote the conservation and recovery of these species.

*Comment 13:* Commenters stated that the Steller sea lions should be included in the analysis.

*Response:* NMFS disagrees. Over the past 16 years, only two Steller sea lions have been observed taken by the drift gillnet fishery, one off southern California in 1992, and one off the CA/OR border in 1994. No Steller sea lions have been observed taken or reported entangled in drift gillnet gear since 1994. NMFS expects the entanglement of Steller sea lions in this fishery to be a rare event and not likely to occur within the next three years. Because taking Steller sea lions is not expected, this species was not included in the analysis, and no take of Steller sea lions is permitted.

*Comment 14:* Commenters stated that if NMFS intends to rely on the EIS prepared for the HMS FMP for compliance with NEPA, the agency must make the document available for review. Comments were provided previously on the significant legal flaws with that EIS.

*Response:* NMFS agrees that the EIS should be open to public comment. In accordance with the provisions of NEPA, NMFS solicited public comments on the Draft EIS (August 2003) for the HMS FMP and also solicited comments on the Final EIS in December 2003.

*Comment 15:* Commenters noted that numerous participants in the CA/OR drift gillnet fishery regularly operate in violation of applicable law and regulations. Rather than do anything about this gross non-compliance, NMFS simply assumes that compliance will be better this year. Given the flagrant disregard of MMPA provisions by the vessels in the fishery, commenters stated that NMFS must deny the permit to the fishery, or, at a minimum, suspend all other authorizations and permits for vessels in the fishery that have either not registered with NMFS as required under section 118(c) of the MMPA, or that have fished in violation of the POCTRP regulations. These commenters also noted that there are inconsistencies in the number of permit holders and expected number of

participants in the fishery. NMFS indirectly admits that over 40 percent of the vessels in the fishery are violating registration requirements.

*Response:* NMFS disagrees that participants in this fishery regularly operate in violation of the law. The only specific violation described in the comment is a low proportion of the estimated number of participants are registered under the MMPA. This difference between estimated number of participants and the number of registered vessels does not reflect a violation of the law. As noted earlier in this notice (see Description of the Fishery), the estimated number of participants is based on a historical record of the number of individuals who have expressed intent to fish. Such an intent does not necessarily mean that there was active fishing by that vessel. Rather, the vessel owner or captain may have fished in the past or expressed intent to fish in the past; however, this vessel was not actively fishing in the affected year. Consequently, the number of registered vessels is lower than the estimated number of participants.

*Comment 16:* One commenter stated that fishing under the proposed EFP will undoubtedly kill endangered marine mammals, and, therefore, authorization under both the ESA and MMPA is required. The proposed permit makes no mention of the EFP, while in several places it mentions the leatherback closure as a likely factor in reducing marine mammal take to levels that NMFS feels it can make a negligible impact determination. This commenter noted that NMFS cannot rely on these 2004 documents for ESA and NEPA compliance (in reference to the HMS FMP EIS and biological opinion (BO)), and that NMFS would have to carry out a new consultation on the FMP as a whole and issue and circulate a new draft EIS for public comment. In addition, the commenter stated that NMFS cannot claim that the new ESA consultation it is currently carrying out for the EFP would also be sufficient for the MMPA permit.

*Response:* NMFS disagrees that expanding fishing effort, as proposed in the 2006 and 2007 EFP application, would undoubtedly result in deaths of endangered marine mammals. Takes through this fishing activity that result in mortality are rare events, and there is very limited additional effort requested under the EFP. If NMFS and/or the PFMC considers a DGN EFP in the future, as similarly proposed in 2006 and 2007, a section 7 consultation and all other applicable analyses would need to be completed before issuance.

*Comment 17:* One commenter expressed that NMFS states that it will rely on the February 2004 BO for the HMS FMP. This commenter noted that no take of ESA-listed marine mammals was authorized in this BO. Nevertheless, take of humpback whales has occurred since the BO. The commenter stated that therefore, the reinitiation requirements have been triggered.

*Response:* NMFS disagrees. The 2004 BO for the HMS FMP included an Incidental Take Statement which estimated the anticipated incidental take of listed species in the HMS fisheries. The estimated entanglement of fin, humpback, and sperm whales was 4 animals in 3 years, per species. The estimated mortality of fin and sperm whales was 2 animals in 3 years, per species. There were no anticipated mortalities of humpback whales. The entangled humpback whale in 2004 was released alive and uninjured. However, the net used was not in full compliance with the POCTRP (NMFS Observer Program 2006), and therefore not in compliance with the incidental take statement, which anticipates take during lawful activity. Because the take did not occur incidental to a lawful activity, the incidental take statement is not applicable, and no violation occurred. As mentioned earlier, this incident has been forwarded to the NMFS Southwest Regional Office of Law Enforcement for investigation. This permit was initiated to ensure that taking marine mammals incidental to the fishery was consistent with the MMPA as well as the ESA.

*Comment 18:* One commenter expressed concern that observer coverage for the rest of the fishery would be limited and that there is no assurance that sufficient observer coverage can be maintained, due to 100 percent observer coverage required for EFP.

*Response:* Observer coverage for the current drift gillnet fishery averages at least 20 percent per year. NMFS expects to maintain this level of coverage even if an EFP is issued.

*Comment 19:* One commenter stated that the permit is only being issued to support the EFP. The commenter noted that NMFS should properly conduct the negligible impact analysis and should not rush its analysis for the sake of approving the EFP.

*Response:* The permit is being issued to fulfill NMFS' obligations under MMPA section 101(a)(5)(E). The analysis of the CA/OR drift gillnet observer data from 1998–2005 resulted in a negligible impact determination for the CA/OR/WA stocks of fin and sperm whales and ENP stock of humpback whales. The negligible impact analysis



was a deliberate process that took more than a year to complete and ensures that the DGN is operating consistent with the requirements of the ESA and the MMPA.

*Comment 20:* Commenters stated that criterion 1 is not appropriate criteria to use for fin whales; therefore, it is improper to make a negligible impact determination under criterion 1 and that NMFS must move to perform analysis under criterion 2.

*Response:* NMFS disagrees. In applying the 1999 criteria, NMFS uses criterion 1 as the starting point for the analyses. If this criterion is satisfied, the analysis would be concluded. If criterion 1 is not satisfied, NMFS may use one of the other criteria, as appropriate. Total human-caused mortality of this stock of fin whales does not exceed the threshold, and, as noted earlier (see History of Applying Negligible Impact in Fisheries and Current Negligible Impact Determination), there are other factors (e.g., recovery factor in the PBR calculation and the trend in abundance of the stock) supporting the use of criterion 1.

*Comment 21:* Commenters stated that criterion 1 is not appropriate to use for humpback whales; therefore it is improper to find under criterion 1. Commenters questioned whether a finding under criterion 3 was appropriate because of "certainty of data." Criterion 3 should be applied in a conservative manner, and NMFS should not overlook significant sources of uncertainty (human-cause injury and mortality). NMFS' declaration that mortality and serious injury caused by Category I and II fisheries will not delay recovery time by more than 10 percent is irrelevant, as criterion 3 looks to "total fisheries-related serious injuries and mortalities."

*Response:* NMFS applied criterion 3, not criterion 1, to assess the total fisheries-related serious injury and mortality to the humpback whale and adjusted the Negligible Impact Determination accordingly. Criterion 3 is appropriate when the affected population is stable or increasing and human-caused mortality is above 10 percent of PBR but less than PBR. These conditions were satisfied in this case; therefore, criterion 3 was appropriate.

*Comment 22:* Commenters remarked that with regard to the fin whale, under criterion 2, non-fisheries related mortality must have already been addressed with specific "management measures," before a permit can be issued.

*Response:* As noted earlier (see History of Applying Negligible Impact

in Fisheries), criterion 1 is the starting point for negligible impact analyses, and the others are used only if this criterion is not satisfied. In this case, criterion 1 was satisfied (human-caused mortality did not exceed 10 percent of PBR); therefore, NMFS did not use criterion 2, which is premised on total human-caused mortality exceeding 10 percent of PBR.

*Comment 23:* Commenters stated that management measures do not exist or are not intended to address the mortality of these three species. Pingers are not effective in preventing mysticete entanglements and have not been proven effective and/or the effectiveness of pingers is not well understood for sperm whales.

*Response:* NMFS disagrees that management measures are not in place to address the mortality of these three species. The POCTRP contains many regulatory and non-regulatory measures designed to reduced mortality and serious injury of marine mammals. Since implementation of the POCTRP, mortality and serious injury of marine mammals incidental to the gillnet fishery are lower than in years prior to the POCTRP.

*Comment 24:* One commenter noted that there was no plan to reduce ship strikes on the west coast.

*Response:* NMFS Southwest Regional Office is working with the U.S. Coast Guard to develop a system to report sightings and location of marine mammals, large cetaceans in particular, and notify mariners of the presence and location of such marine mammals.

*Comment 25:* One commenter stated that ship-related deaths of large cetaceans go largely undetected in the absence of thorough necropsies of dead stranded animals. Dead or stranded humpback whales are not routinely necropsied throughout the range of this stock.

*Response:* NMFS acknowledges that there are uncertainties in assigning cause of death in many stranded marine mammals, generally due to decomposition of tissues and that necropsies are an important tool in helping to determine cause of death. Members of the marine mammal stranding network perform necropsies on marine mammals throughout the west coast region, when possible.

*Comment 26:* One commenter stated that just because enforcement was lax enough that a take occurred in an illegal net, this does not obviate risk to species.

*Response:* NMFS considered all mortality and serious injury, including the incident noted in this comment (the humpback whale was incidentally taken, but released alive and uninjured

in 2004), in the current negligible impact determinations for the fin, sperm, and humpback whales. NMFS forwarded the incident in question to the Southwest Region's Office of Law Enforcement.

*Comment 27:* Commenters expressed that issuance of the proposed permit would violate two requirements of the National Marine Sanctuaries Act: to avoid injury to Sanctuary resources and to consult with the National Ocean Service about potential effects on Sanctuary resources. The fishery overlaps the boundaries of three national marine sanctuaries. The fin, humpback, and sperm whales are all resources protected by these sanctuary designations. Fishing under the proposed permit would clearly "destroy, cause the loss, or injure" these resources.

*Response:* The fishery overlaps four sanctuaries. NMFS consults with staff in the affected sanctuaries to ensure fishery operations are consistent with all relevant statutory and regulatory provisions.

Dated: October 23, 2007.

**Helen M. Golde,**

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

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648-XD61**

#### Marine Mammals; File No. 10080

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

**ACTION:** Notice; receipt of application.

**SUMMARY:** Notice is hereby given that Dr. Kathryn A. Ono, Department of Biological Sciences, University of New England, Biddeford, ME, has applied in due form for a permit to conduct research on marine mammals.

**DATES:** Written, telefaxed, or e-mail comments must be received on or before November 26, 2007.

**ADDRESSES:** The application and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713-2289; fax (301)427-2521; and