

3. Weather parameters (*e.g.*, percent cover, visibility);
4. Water conditions (*e.g.*, sea state, tide state);
5. Species, numbers, and, if possible, sex and age class of marine mammals;
6. Description of any observable marine mammal behavior patterns, including bearing and direction of travel and distance from pile driving activity;
7. Distance from pile driving activities to marine mammals and distance from the marine mammals to the observation point;
8. Locations of all marine mammal observations; and
9. Other human activity in the area.

(f) Reporting Measures:

(i) In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by the IHA, such as an injury (Level A harassment), serious injury or mortality (*e.g.*, ship-strike, gear interaction, and/or entanglement), ADOT&PF would immediately cease the specified activities and immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Alaska Regional Stranding Coordinators. The report would include the following information:

1. Time, date, and location (latitude/longitude) of the incident;
2. Name and type of vessel involved;
3. Vessel's speed during and leading up to the incident;
4. Description of the incident;
5. Status of all sound source use in the 24 hours preceding the incident;
6. Water depth;
7. Environmental conditions (*e.g.*, wind speed and direction, Beaufort sea state, cloud cover, and visibility);
8. Description of all marine mammal observations in the 24 hours preceding the incident;
9. Species identification or description of the animal(s) involved;
10. Fate of the animal(s); and
11. Photographs or video footage of the animal(s) (if equipment is available);

(ii) Activities would not resume until NMFS is able to review the circumstances of the prohibited take. NMFS would work with ADOT&PF to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. ADOT&PF would not be able to resume their activities until notified by NMFS via letter, email, or telephone;

(iii) In the event that ADOT&PF discovers an injured or dead marine mammal, and the lead MMO determines that the cause of the injury or death is unknown and the death is relatively

recent (*i.e.*, in less than a moderate state of decomposition as described in the next paragraph), ADOT&PF would immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinators. The report would include the same information identified in the paragraph above. Activities would be able to continue while NMFS reviews the circumstances of the incident. NMFS would work with ADOT&PF to determine whether modifications in the activities are appropriate;

(iv) In the event that ADOT&PF discovers an injured or dead marine mammal, and the lead MMO determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.*, previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), ADOT&PF would report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinators, within 24 hours of the discovery. ADOT&PF would provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network.

6. This Authorization may be modified, suspended or withdrawn if the holder fails to abide by the conditions prescribed herein, or if NMFS determines the authorized taking is having more than a negligible impact on the species or stock of affected marine mammals.

#### Request for Public Comments

NMFS requests comment on our analysis, the draft authorization, and any other aspect of the Notice of Proposed IHA for ADOT&PF's reconstruction of the existing Gustavus Ferry Terminal located in Gustavus, Alaska. Please include with your comments any supporting data or literature citations to help inform our final decision on ADOT&PF's request for an MMPA authorization.

Dated: June 20, 2016.

**Donna S. Wieting,**

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

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

RIN 0648-XD283

#### 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 (MMPA), we, NMFS, hereby issue a permit for a period of three years to authorize the incidental, but not intentional, taking of individuals from three marine mammal stocks listed under the Endangered Species Act (ESA) by the Bering Sea and Aleutian Islands (BSAI) pollock trawl and BSAI flatfish trawl fisheries: The Western North Pacific (WNP) stock of humpback whales (*Megaptera novaeangliae*); Central North Pacific (CNP) stock of humpback whales; and Western U.S. stock of Steller sea lions (*Eumetopias jubatus*).

**DATES:** This permit is effective for a three-year period beginning June 23, 2016.

**ADDRESSES:** Reference materials for this permit, including the negligible impact determination (NID), are available on the Internet at <http://www.regulations.gov>, identified by Docket Number NOAA-NMFS-2014-0057. Recovery plans for humpback whales and Steller sea lions are available on the Internet at <http://www.nmfs.noaa.gov/pr/recovery/plans.htm#mammals>. Copies of the reference materials are also available upon request from the NMFS Office of Protected Resources, 1315 East-West Highway, 13th Floor, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Jon Kurland, NMFS Alaska Region, 907-586-7638, [Jon.Kurland@noaa.gov](mailto:Jon.Kurland@noaa.gov); or Shannon Bettridge, NMFS Office of Protected Resources, 301-427-8402, [Shannon.Bettridge@noaa.gov](mailto:Shannon.Bettridge@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

Pursuant to section 101(a)(5)(E) of the MMPA, 16 U.S.C. 1361 *et seq.*, NMFS shall for a period of up to three consecutive years, allow the incidental, but not the intentional, taking of marine mammal species listed under the ESA,

16 U.S.C. 1531 *et seq.*, by persons using vessels of the United States and those vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1824(b), while engaging in commercial fishing operations, if we make certain determinations. We must determine, after notice and opportunity for public comment, that: (1) Incidental mortality and serious injury will have a negligible impact on the affected species or stocks; (2) a recovery plan has been developed or is being developed for the species or stocks under the ESA; and (3) where required under section 118 of the MMPA, a monitoring program has been established for the fisheries, vessels engaged in the fisheries are registered, and a take reduction plan (TRP) has been developed or is being developed for the species or stocks.

We are issuing a permit under MMPA section 101(a)(5)(E) to vessels registered in the BSAI pollock trawl and BSAI flatfish trawl fisheries to incidentally take individuals from the WNP and CNP stocks of humpback whales and the Western U.S. stock of Steller sea lions. Humpback whales and the western Distinct Population Segment of Steller sea lions are listed as endangered under the ESA. We have determined that incidental taking from these fisheries will have a negligible impact on these stocks, as documented in our NID (see **ADDRESSES**). We have also determined that recovery plans have been completed for humpback whales and Steller sea lions, and in accordance with MMPA section 118, a monitoring program is established for the fisheries and vessels are registered. Finally, we have determined that these fisheries and stocks meet the MMPA trigger for development of a TRP, but they are lower priorities compared to other marine mammal stocks and fisheries based on the levels of incidental mortality and serious injury (M/SI) and population levels and trends. Accordingly, development of TRPs for these three stocks in these two fisheries will be deferred under section 118, since other stocks/fisheries are higher priorities for any available funding for establishing new Take Reduction Teams. The basis for these determinations is further described below.

We recognize that a proposed change to the ESA listing for humpback whales (80 FR 22303 April 21, 2015), if finalized, might affect the need for an MMPA 101(a)(5)(E) permit for these fisheries to incidentally take humpback whales. However, we are including

humpback whales in this permit because the species is currently listed as endangered.

Our proposed permit and draft NID addressed two other marine mammals (the Alaska stocks of bearded and ringed seals) and one other fishery (the BSAI Pacific cod longline fishery) (80 FR 78711, December 17, 2015). On July 25, 2014, the U.S. District Court for the District of Alaska issued a memorandum decision in a lawsuit challenging the listing of bearded seals under the ESA (*Alaska Oil and Gas Association v. Pritzker*, Case No.4:13-cv-00018-RPB). The decision vacated our listing of the Beringia DPS of bearded seals as a threatened species. On March 11, 2016, the U.S. District Court for the District of Alaska issued a memorandum decision in a lawsuit challenging the listing of ringed seals under the ESA (*Alaska Oil and Gas Association v. Pritzker*, Case No.4:14-cv-00029-RRB). The decision vacated our listing of the Arctic subspecies of ringed seals as a threatened species. We are currently appealing these decisions. In the interim, our NID continues to evaluate the impacts of fisheries on the Alaska stocks of bearded and ringed seals under MMPA 101(a)(5)(E), but because the ESA listings for these two species are not currently in effect, we are not including them in this permit and they are not further discussed in this Notice. The BSAI Pacific cod longline fishery has incidental take of the Alaska stock of ringed seals but no other ESA-listed species. We evaluate the impacts of this fishery on the Alaska stock of ringed seals in our NID, but we are not including the fishery in this permit.

A description of the two permitted fisheries can be found in the NID and the **Federal Register** notice for the proposed permit (80 FR 78711, December 17, 2015). These federally-managed fisheries take place inside both state waters (from the coastline out to three nautical miles) and federal waters (three to two hundred nautical miles from shore). The federally-managed fisheries inside Alaska state waters are often referred to as state “parallel” fisheries and are included in this authorization. All other Category II fisheries that interact with ESA-listed marine mammal stocks observed off the coasts of Alaska are state-managed fisheries (as opposed to state parallel fisheries), and are not included in this permit. Participants in Category III fisheries are not required to obtain incidental take permits under MMPA section 101(a)(5)(E) but are required to report injuries or mortality of marine mammals incidental to their operations.

### Basis for Determining Negligible Impact

As described above, prior to issuing the permit, we must determine if M/SI incidental to commercial fisheries will have a negligible impact on the affected marine mammal species or stocks. We satisfied this requirement through completion of a NID (see **ADDRESSES**).

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

In 1999, we proposed criteria to determine whether M/SI incidental to commercial fisheries will have a negligible impact on a listed marine mammal stock for MMPA section 101(a)(5)(E) permits (64 FR 28800, May 27, 1999). In applying the 1999 criteria, Criterion 1 is whether total known, assumed, or extrapolated human-caused M/SI is less than 10 percent of the potential biological removal level (PBR) for the stock. If total known, assumed, or extrapolated human-caused M/SI is less than 10 percent of PBR, the analysis would be concluded, and the impact would be determined to be negligible. If Criterion 1 is not satisfied, we may use one of the other criteria as appropriate. Criterion 2 is satisfied if the total known, assumed, or extrapolated human-caused M/SI is greater than PBR, but fisheries-related M/SI is less than 10 percent of PBR. If Criterion 2 is satisfied, vessels operating in individual fisheries may be permitted if management measures are being taken to address non-fisheries-related mortality and serious injury. Criterion 3 is satisfied if total fisheries-related M/SI is greater than 10 percent of PBR and less than PBR, and the population is stable or increasing. Fisheries may then be permitted subject to individual review and certainty of data. Criterion 4 stipulates that if the population abundance of a stock is declining, the threshold level of 10 percent of PBR will continue to be used. Criterion 5 states

that if total fisheries-related M/SI are greater than PBR, permits may not be issued for that species or stock.

### Negligible Impact Determinations

The NID provides a complete analysis of the criteria for determining whether commercial fisheries off Alaska are having a negligible impact on the WNP or CNP stocks of humpback whales or the Western U.S. stock of Steller sea lions. A summary of the analysis and subsequent determination follows. The analysis is based on the 2014 marine mammal stock assessment reports (SARs), which estimate mean or minimum annual mortality for 2008–2012 from observed commercial fisheries and entanglement data from the NMFS Marine Mammal Health and Stranding Network. This is the most recent five-year period for which data were available and had been analyzed when the proposed permit and draft NID were being developed. In cases where available observer data are only available outside that time frame, as is the case for state-managed fisheries, the most recent observer data are used.

#### *Humpback Whale, WNP Stock*

Total fisheries-related M/SI per year (0.9, 30 percent of PBR) is greater than 10 percent of the stock's PBR but less than PBR (3.0). We expect only minor fluctuations in fisheries-related M/SI. The stock is considered to be increasing: The most recent abundance estimate represents a 6.7 percent annual rate of increase over the previous (1991–1993) estimate, though this rate is biased high to an unknown degree. Therefore, using Criterion 3 we determine that M/SI incidental to commercial fishing will have a negligible impact on the stock.

#### *Humpback Whale, CNP Stock*

CNP humpback whales represent a case not considered by the existing criteria, but data support a negligible impact determination. Total annual human-caused M/SI (15.89, 19.19 percent of PBR) is well below the Criterion 2 M/SI threshold (*i.e.*, below PBR) and is expected to remain so for the foreseeable future. Total annual fisheries-related M/SI (3.95, 4.77 percent of PBR) is well below the Criterion 3 M/SI threshold (*i.e.*, below PBR) with only minor fluctuations in fisheries-related M/SI expected, and the population is increasing (4.9–10 percent per year, depending on the study and specific area). Therefore, we determine that M/SI incidental to commercial fishing will have a negligible impact on the stock.

#### *Steller Sea Lion, Western U.S. Stock*

Total fisheries related M/SI per year (32.7, 11.2 percent of PBR) is greater than 10 percent of the stock's PBR, but less than PBR (292). We expect only minor fluctuations in fisheries-related M/SI. The level of total human-caused M/SI is estimated to be below PBR and is expected to remain below PBR for the foreseeable future. Survey data collected since 2000 indicate that Steller sea lion decline continues in the central and western Aleutian Islands but regional populations east of Samalga Pass have increased or are stable. Overall, the stock is increasing at an annual rate of 1.67 percent (non-pups) and 1.45 percent (pups). Therefore, using Criterion 3 we determine that M/SI incidental to commercial fishing will have a negligible impact on this stock.

### Conclusions for the Permit

In conclusion, based on the negligible impact criteria outlined in 1999 (64 FR 28800), the 2014 Alaska SARs, and the best scientific information and data available for the time period analyzed in this permit, we have determined that for a period of up to three years, M/SI incidental to the BSAI pollock trawl and BSAI flatfish trawl fisheries will have a negligible impact on the WNP and CNP stocks of humpback whales and the Western U.S. stock of Steller sea lions.

The impacts on the human environment of continuing and modifying the Bering Sea trawl fisheries, including the taking of threatened and endangered species of marine mammals, were analyzed in the 2004 Alaska Groundfish Fisheries Programmatic Supplemental Environmental Impact Statement (PSEIS). The 2015 Alaska Groundfish Fisheries PSEIS Supplemental Information Report reviewed new information since 2004 and concluded that a new PSEIS was not necessary because (1) management changes to the fisheries since 2004 do not constitute a substantial change in the action, and all changes are consistent with the preferred alternative evaluated in the PSEIS, (2) the current status of the resources can be considered within the range of variability analyzed in the 2004 PSEIS, and (3) although new information exists regarding the impacts of the groundfish fisheries on resources, no information indicates that a new analysis would conclude that there is now a significant impact where the 2004 PSEIS concludes that the impact was insignificant.

Because this permit would not modify any fishery operation and the effects of the fishery operations have been

evaluated fully in accordance with NEPA, no additional NEPA analysis is required for this permit. Issuing the permit would have no additional impact to the human environment or effects on threatened or endangered species beyond those analyzed in these documents.

### Recovery Plans

Section 4(f) of the ESA requires that we develop recovery plans for ESA-listed species, unless such a plan will not promote the conservation of the species. Recovery Plans for humpback whales and Steller sea lions have been completed (see **ADDRESSES**).

### Vessel Registration

MMPA section 118(c) requires that vessels participating in Category I and II fisheries register to obtain an authorization to take marine mammals incidental to fishing activities. Further, section 118(c)(5)(A) provides that registration of vessels in fisheries should, after appropriate consultations, be integrated and coordinated to the maximum extent feasible with existing fisher licenses, registrations, and related programs. MMPA registration for participants in the BSAI trawl fisheries has been integrated with the Federal groundfish limited entry permit process of the Federal Vessel Monitoring System.

### Monitoring Program

BSAI trawl fisheries authorized under this permit are monitored by NMFS-certified observers in the North Pacific Groundfish Observer Program. Observer coverage rates range from 50–100 percent. Accordingly, as required by MMPA section 118, a monitoring program is in place for the BSAI pollock trawl and flatfish trawl fisheries.

### Take Reduction Plans

MMPA section 118 requires the development and implementation of a TRP in cases where a strategic stock interacts with a Category I or II fishery. The stocks covered under this permit are designated as strategic stocks under the MMPA because they are listed as endangered under the ESA (MMPA section 3(19)(C)). The two fisheries covered by this permit are Category II fisheries. Therefore, the three listed stocks and two fisheries meet the MMPA's triggers for convening a take reduction team (TRT) and developing a TRP.

The obligations to develop and implement a TRP are further subject to the availability of funding. MMPA section 118(f)(3) contains specific priorities for developing TRPs. At this

time, we have 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 sections 118(f)(6)(A) and (f)(7), we used the most recent SARs and List of Fisheries (LOF) as the basis to determine our priorities for establishing TRTs and developing TRPs. Through this process, we evaluated the WNP and CNP stocks of humpback whale and the Western U.S. stock of Steller sea lions as lower priorities for establishing TRTs compared to other marine mammal stocks and fisheries, based on M/SI levels incidental to those fisheries and population levels and trends. Accordingly, given these factors and our priorities, developing TRPs for these three stocks in these two fisheries will be deferred under section 118, since other stocks/fisheries are a higher

priority for any available funding for establishing new TRTs.

#### Current Permit

As described above, all of the requirements to issue a permit to Federally-managed BSAI pollock trawl and BSAI flatfish trawl fisheries have been satisfied. Accordingly, we hereby issue a permit to participants in these two fisheries to incidentally take individuals from the WNP and CNP stocks of humpback whales and the Western U.S. stock of Steller sea lions. As noted under MMPA section 101(a)(5)(E)(ii), no permit is required for vessels in Category III fisheries. For incidental taking of marine mammals to be authorized in Category III fisheries, M/SI must be reported to NMFS. If we determine at a later date that incidental M/SI from commercial fishing is having more than a negligible impact on these

stocks, we may use our emergency authority under MMPA section 118 to protect the stocks and may modify the permit issued herein.

MMPA section 101(a)(5)(E) requires NMFS to publish in the **Federal Register** a list of fisheries that have been authorized to take threatened or endangered marine mammals. A list of such fisheries was most recently published, as required, on April 23, 2015 (80 FR 22713). With issuance of the current permit, we are not adding any fisheries to this list, but are revising the list of marine mammal species and stocks authorized in the BSAI pollock and flatfish trawl fisheries, and removing the Alaska Bering Sea sablefish pot fishery and the Alaska BSAI Pacific cod longline fishery (Table 1).

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

Fishery	Category	Marine mammal stock
HI deep-set (tuna target) longline .....	I .....	Humpback whale, CNP stock. Sperm whale, Hawaii stock. False killer whale, MHI IFKW stock.
CA thresher shark/swordfish drift gillnet fishery (≤14 in mesh) .....	I .....	Fin whale, CA/OR/WA stock. Humpback whale, CA/OR/WA stock. Sperm whale, CA/OR/WA stock.
HI shallow-set (swordfish target) longline/set line .....	II .....	Humpback whale, CNP stock.
AK Bering Sea/Aleutian Islands flatfish trawl .....	II .....	Humpback whale, WNP stock. Humpback whale, CNP stock.
AK Bering Sea/Aleutian Island pollock trawl .....	II .....	Steller sea lion, Western U.S. stock. Humpback whale, WNP stock. Humpback whale, CNP stock.
WA/OR/CA sablefish pot fishery .....	II .....	Steller sea lion, Western U.S. stock. Humpback whale, CA/OR/WA stock.

#### Comments and Responses

NMFS received three comment letters on the proposed permit and draft NID. The Marine Mammal Commission (Commission) supported issuing the permit while two other commenters, Center for Biological Diversity (Center) and an individual, opposed issuing the permit. Only comments pertaining to the draft NID and proposed permit are responded to in this notice.

##### General Comments

*Comment 1:* The Center urged NMFS to consult under ESA section 7 on issuing the permit.

*Response:* This MMPA section 101(a)(5)(E) permit is not a stand-alone action and does not require separate ESA section 7 consultation. NMFS has consulted under ESA section 7 on the BSAI groundfish fishery management plans. The resulting biological opinions analyze the impact of the fishery-related mortalities on ESA-listed marine

mammals including the five species analyzed in the NID. This MMPA section 101(a)(5)(E) permit authorizes take of ESA-listed marine mammals under the MMPA while the biological opinions authorize take of ESA-listed marine mammals under the ESA.

*Comment 2:* The Center recommends that NMFS include state-managed fisheries under this permit. The Center feels that by not including state fisheries in the permit, NMFS is undermining conservation of marine mammals because it implies that state-managed fisheries are not subject to the same take prohibitions as federal fisheries. The Center notes that NMFS has the authority and duty to manage state-managed fisheries under MMPA section 118.

*Response:* MMPA section 101(a)(5)(E) is one of the links between the MMPA and the ESA. For federally-managed fisheries, NMFS has a federal nexus to consult under ESA section 7 on the

activity that may affect ESA-listed species (e.g., commercial fishing by issuing a fishery management plan or an amendment to such a plan). As noted in response to Comment 1, this MMPA permit is linked to federal management of the BSAI groundfish fisheries. The NID considered state fisheries in the analysis, including those with mortality data preceding the time frame for the analysis if those data were the best available, so that impacts of takes from the federally-managed fisheries could be understood in the context of all known fishery-related takes. However, NMFS is not authorizing incidental take of ESA-listed species in state fisheries.

Take of ESA-listed marine mammals in state-managed fisheries is subject to the same prohibitions as federally-managed fisheries. But, without the federal nexus, ESA section 7 does not apply to state fisheries. States are responsible for applying for an incidental take permit under ESA

section 10(a)(1)(B) to obtain authorization for takes of ESA-listed species that occur incidental to an otherwise authorized activity (e.g., state-managed fisheries). Unless a state obtains such a permit, any take of ESA-listed species would be unauthorized. NMFS cannot require that a state apply for such a permit; it is the state's responsibility to do so as part of managing state fisheries.

MMPA section 118 provides the framework for addressing marine mammal interactions in commercial fisheries nationwide and includes various metrics and guidance for managing the take reduction program as a whole. First, the program authorizes incidental take of non-ESA-listed marine mammals in commercial fisheries classified as Category I or II (no authorization is required for Category III fisheries). Then, the program directs efforts to reduce M/SI incidental to commercial fisheries and provides for priority-setting when funding is limited. TRPs can and do address marine mammal M/SI in state-managed fisheries. NMFS can authorize incidental take of endangered marine mammals in state fisheries, but is not doing so through this action.

*Comment 3:* The Center believes that additional mitigation measures to reduce entanglement should be included in the permit given the MMPA's requirement to develop a TRP. Therefore, the Center feels that NMFS cannot authorize these fisheries until such a plan has been developed. Further, the Center requests that NMFS convene a take reduction team to develop a TRP.

*Response:* As noted in the **Federal Register** notice for the proposed permit (80 FR 78711, December 17, 2015), take reduction requirements are triggered when a strategic stock is killed or seriously injured in Category I or II fisheries. All the stocks addressed by this permit are designated as strategic because they are listed under the ESA (MMPA section 2(19)(C)) and not because fishery-related M/SI exceeds PBR. MMPA section 118 is explicitly designed to reduce fishery-related M/SI below PBR, so while required by the MMPA, TRPs may not be necessary for addressing threats affecting recovery of the species. In recognition of this, a 2008 review of the take reduction program by the Government Accountability Office recommended that Congress consider amending the statutory requirements for establishing a take reduction team to stipulate that not only must a marine mammal stock be strategic and interacting with a Category I or II fishery, but that the fishery with

which the marine mammal stock interacts causes at least occasional incidental mortality or serious injury of that particular marine mammal stock (i.e., convening teams and developing plans for stocks where fishery-related M/SI is low is contrary to the purpose of this section). Regardless, the obligation to develop and implement TRPs is subject to the availability of funding. MMPA section 118(f)(3) contains specific priorities for developing TRPs. As stated above under Conclusions for the Permit, all stocks authorized to be incidentally taken under this permit are currently lower priorities for developing TRPs compared to other marine mammal stocks and commercial fisheries.

*Comment 4:* The Center recommends that NMFS include the North Pacific stock of sperm whales in the NID analysis and, if warranted, include this stock under this permit. The commenter notes that the draft NID contains conflicting information, in that at page 19 it reports "M/SI of sperm whales only occurred in the Gulf of Alaska (GOA) sablefish longline fishery (a Category III fishery) in 2007" but Table 5 reflects one observed fishery mortality or serious injury. Further, the draft stock assessment report for sperm whales indicates four serious injuries of sperm whales incidental to the Gulf of Alaska sablefish longline fishery (two each observed in 2012 and 2013). However, NMFS did not provide extrapolated estimates of sperm whale serious injury and mortality stating they were unavailable. Additionally, the Center notes, according to NMFS, because the population size and the PBR for sperm whales are unknown, any fishery interacting with the sperm whale is precluded from qualifying as Category I or II.

*Response:* The commenter refers to the M/SI of a sperm whale from 2007, which precedes the time frame analyzed for this permit (2008–2012). Table 5 refers to M/SI of Steller sea lions and not to sperm whales. We reviewed the 2014 and 2015 SARs for North Pacific sperm whales per the comment, and recognize that NMFS mistakenly omitted the 2012 serious injuries incidental to the GOA sablefish longline fishery in the 2014 SAR, which includes 2008–2012 data. The 2015 draft SAR includes the 2012 observed serious injuries and notes that the extrapolated estimate is not available. NMFS is currently analyzing these data and intends to include the resulting bycatch estimates in the 2016 draft SAR. When this information has been incorporated into the 2016 draft SAR, NMFS will then evaluate it for the next annual LOF,

likely the 2017 LOF. If the GOA sablefish longline fishery is elevated to Category I or II in a future LOF, NMFS will evaluate the need for incidental take permit under MMPA section 101(a)(5)(E). This process is iterative and we will evaluate the best available data at the time we undertake our analysis to issue these permits.

The commenter notes that stocks without minimum abundance estimates are precluded from being considered in the LOF tier analysis, thereby precluding any fisheries that kill or seriously injure those stocks from being classified as Category I or II fisheries. This is incorrect. NMFS may classify fisheries by analogy to other similar fisheries based on various factors (50 CFR 229.2). The commenter references other Category I and II fisheries that take sperm whales, including two pelagic longline fisheries and a drift gillnet fishery. These gear types are not analogous to the GOA sablefish longline fishery, which is a demersal longline fishery, in that the gear used and the fishing practices are substantially different from one another. Both fishing gear and fishing practices are typically related to the risk of entanglement. That said, NMFS will conduct a full evaluation of this stock and this fishery pursuant to the LOF.

#### *Humpback Whales*

*Comment 5:* The notice and draft NID state that the population of Western North Pacific humpback whales is estimated to be increasing at an annual rate of 6.7 percent, but the Commission believes the rate of increase is likely an overestimate because the 2004–06 study included an area not surveyed in the 1991–1993 study. Therefore, the Commission suggested NMFS consider estimating the rate of increase based only on data from sites surveyed in both 1991–93 and 2004–06 to evaluate whether that analysis indicates a clearly stable or increasing trend, which would support the draft NID.

*Response:* This analysis is part of a larger ongoing analysis of the SPLASH (Structure of Populations, Levels of Abundance and Status of Humpback Whales in the North Pacific) effort. When the results are available, we will evaluate whether any of the findings in the NID would change and take appropriate action at that time.

*Comment 6:* The Commission is concerned that the WNP population of humpback whales may consist of two distinct population segments (DPS) under the recent proposed ESA listing rule (80 FR 22304, April 21, 2015) whose feeding range overlaps that of the CNP population of humpbacks. If that is

the case, population trends for the two putative western North Pacific DPSs may not be the same and the BSAI groundfish fisheries could have a negligible impact on one stock, but more than a negligible impact on the other. Thus, the Commission encourages NMFS to collect and analyze additional information on the discreteness of the two putative Western North Pacific DPSs identified by the humpback whale Biological Review Team.

*Response:* For the NID, we analyzed the stocks as currently defined in the SARs. The ESA listing rule has not been finalized. NMFS uses the best available data at the time of the analysis and generally does not collect new data for the purposes of issuing an MMPA section 101(a)(5)(E) permit.

*Comment 7:* The Commission recommended that NMFS consult with researchers to gather data and develop new abundance estimates for the Western North Pacific stock of humpback whales before issuing a subsequent permit.

*Response:* NMFS agrees that additional, new data would be useful and will continue to collaborate with those researchers collecting data on the Western North Pacific stock of humpback whales.

*Comment 8:* The Commission encouraged NMFS to instruct fishery observers to collect tissue samples or photographs of all humpback whales take incidental to fisheries to appropriately identify the stock.

*Response:* Fishery observers are already instructed to take photographs and collect tissue samples when possible. In some cases, as examples, the interaction occurs too quickly or too far from the vessel and photographs/tissue samples may not be possible. Regardless, it has been our practice to assign a take to both stocks so that we can evaluate the impact of that mortality on each stock separately.

*Comment 9:* The Center recommends that for humpback whales NMFS include the most recent observer data from 2013 and the resulting M/SI estimate in the NID. Specifically, the Center suggests that NMFS consider extrapolating observer data from all fisheries, including the Southeast Alaska drift gillnet fishery, to calculate mean or minimum annual mortality estimates as well as including stranding data from the marine mammal unusual mortality event that began in May 2015 in the western GOA. The Center feels that given the 2013 observer data and the 2015 stranding data, a significant number of animals may have been removed from the population and the

extent of M/SI incidental to commercial fishing is unacceptably high.

*Response:* These permits are iterative and cyclical; they are effective for 3 years per the MMPA. This means that NMFS is regularly considering the most recent information available in the NID analysis to support issuing these permits every three years. This particular permit is based on the 2014 final SAR, which includes 2008–2012 data. We will consider 2013 and 2015 data in future iterations of this permit. New data become available all the time; if we are constantly updating and revising the analysis it will hinder our ability to take action and issue permit decisions.

#### *Steller Sea Lions*

*Comment 10:* The Commission recommends that NMFS consider amending its criteria for making NIDs under section 101(a)(5)(E) of the MMPA to ensure that for declining marine mammal populations listed as endangered or threatened under the ESA, the estimated M/SI by commercial fisheries does not result in a statistically significantly increase in the rate of decline across a large portion of their geographic range. With regard to the western U.S. stock of Steller sea lions, before making a NID for the fisheries subject to this action, NMFS should evaluate M/SI in the three BSAI groundfish fisheries relative to the species' abundance in areas west of Samalga Pass where sea lion numbers have been declining.

*Response:* NMFS appreciates the suggestion for amending the NID criteria and we will consider as we revise those criteria. As we note in the response to *Comment 2*, NMFS uses the best available information at the time of the NID analysis, including the currently identified range and trends as provided in the most recent SAR. Therefore, we are not conducting a new analysis at this time. With respect to observing the fishery, it is currently monitored both east and west of Samalga Pass and those data are incorporated into the stock assessment.

#### *Bearded and Ringed Seals*

*Comment 11:* The Commission notes that if, indeed, only 2 bearded seals are killed or seriously injured each year by commercial fisheries out of nearly 6,800 removals from the population, it is difficult to see how fisheries-related mortality can be considered significant even if overall PBR is exceeded. Given the removals of bearded and ringed seals by subsistence hunting, the Commission recommends that NMFS consider amending its criteria for

making NIDs under section 101(a)(5)(E) of the MMPA to cover situations where (1) the level of mortality and serious injury exceeds or likely exceeds PBR primarily due to subsistence hunting, (2) subsistence hunting is determined to be sustainable, and (3) fishery-related take is a very small fraction of overall removals (e.g., <1.0 percent).

*Response:* NMFS appreciates the suggestion for amending the NID criteria and we will consider it as we revise those criteria.

*Comment 12:* The Commission raised concerns about the availability of reliable and up-to-date estimates of population size and subsistence harvest and feels that NMFS is not providing adequate funding to generate these estimates. Given the importance of subsistence hunting to Alaska Native communities and the possible effects of climate change on the abundance and health of ice seals, the Commission believes that NMFS must (1) in cooperation with its co-management partners, identify the essential components of ongoing programs to monitor the abundance and trends of ice seal populations and the number of seals taken by Native hunters, and (2) ensure that funding is adequate to implement those programs. The Commission therefore recommends that NMFS consult with the Alaska Native Ice Seal Committee to identify the steps necessary to carry out adequate ice seal population surveys and harvest monitoring programs, and seek the funding necessary to implement them. The Commission recognizes NMFS's constraints on funding for marine mammal research and management, but believes it is imperative that these needs receive higher priority.

*Response:* NMFS recently conducted a protected species science program review of the Alaska Fisheries Science Center (AFSC). The review generated several recommendations related to ice seals. Recommendation 1.5 directs NMFS to develop an explicit strategy for assessing all stocks, considering costs, likely available funds, and scientific and management priorities. In its response, in 2015–2016, the NMFS AFSC committed to developing a proposed strategy for assessing all marine mammal stocks and including that strategy and a system for prioritizing those assessments in the 5-year plan for the AFSC. Regardless, abundance surveys for ice seals are ongoing, with another scheduled for 2016, which are intended to result in an abundance estimate. Additionally, Recommendation 1.6 directs NMFS to pursue support for bycatch and harvest monitoring in particularly risky

fisheries or regions. The AFSC response notes that monitoring harvest levels is currently unfunded, and while resources are limited the AFSC will work with the NMFS Alaska Regional Office to develop a joint list of priorities for understanding harvest levels so both entities can solicit additional resources and coordinate to achieve this objective.

Dated: June 20, 2016.

**Donna S. Wieting,**

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

[FR Doc. 2016-14866 Filed 6-22-16; 8:45 am]

**BILLING CODE 3510-22-P**

## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

#### Legal Processes

**ACTION:** Notice and request for comment.

**SUMMARY:** The United States Patent and Trademark Office (USPTO), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on this continuing information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments must be submitted on or before August 22, 2016.

**ADDRESSES:** You may submit comments by any of the following methods:

- **Email:** [InformationCollection@uspto.gov](mailto:InformationCollection@uspto.gov). Include "0651-0046 inquiry" in the subject line of the message.
- **Federal Rulemaking Portal:** <http://www.regulations.gov>.
- **Mail:** Marcie Lovett, Records Management Division Director, Office of the Chief Information Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450.

#### FOR FURTHER INFORMATION CONTACT:

Requests for additional information should be directed to Kyu Lee, Office of General Law, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450; by telephone at 571-272-6421; or by email at [Kyu.Lee@uspto.gov](mailto:Kyu.Lee@uspto.gov) with "0651-0046 inquiry" in the subject line. Additional

information about this collection is also available at <http://www.reginfo.gov> under "Information Collection Review."

#### SUPPLEMENTARY INFORMATION:

##### I. Abstract

The purpose of this collection is to cover information requirements related to civil actions and claims involving current and former employees of the United States Patent and Trademark Office (USPTO). The rules for these legal processes may be found under 37 CFR part 104, which outlines procedures for service of process, demands for employee testimony and production of documents in legal proceedings, reports of unauthorized testimony, employee indemnification, and filing claims against the USPTO under the Federal Tort Claims Act (28 U.S.C. 2672) and the corresponding Department of Justice regulations (28 CFR part 14). The public may also petition the USPTO Office of General Counsel under 37 CFR 104.3 to waive or suspend these rules in extraordinary cases.

The procedures under 37 CFR part 104 ensure that service of process intended for current and former employees of the USPTO is handled properly. The USPTO will only accept service of process for an employee acting in an official capacity. This collection is necessary so that respondents or their representatives can serve a summons or complaint on the USPTO, demand employee testimony and documents related to a legal proceeding, or file a claim under the Federal Tort Claims Act. Respondents may also petition the USPTO to waive or suspend these rules for legal processes. This collection is also necessary so that current and former USPTO employees may properly forward service and demands to the Office of General Counsel, report unauthorized testimony, and request indemnification. The USPTO covers current employees as respondents under this information collection even though their responses do not require approval under the Paperwork Reduction Act. In those instances where both current and former employees may respond to the USPTO, the agency estimates that the number of respondents will be small.

There are no forms provided by the USPTO for this collection. For filing claims under the Federal Tort Claims Act, the public may use Standard Form 95 "Claim for Damage, Injury, or Death," which is provided by the Department of Justice and approved by the Office of Management and Budget (OMB) under OMB Control Number 1105-0008.

##### II. Method of Collection

By mail or hand delivery to the USPTO.

##### III. Data

**OMB Number:** 0651-0046.

**Form Number(s):** None.

**Type of Review:** Revision of a currently approved collection.

**Affected Public:** Individuals or households; businesses or other for-profits; not-for-profit institutions; and the Federal Government.

**Estimated Number of Respondents:** 299 responses per year. The USPTO estimates that approximately 10% of these responses will be from small entities.

**Estimated Time per Response:** The USPTO estimates that it will take the public from 5 minutes (0.08 hours) to 6 hours to prepare a single item in this collection, including gathering the necessary information, preparing the appropriate documents, and submitting the information required for this collection.

**Estimated Total Annual Hour Burden:** 87.08 hours.

**Estimated Total Annual Cost Burden (Hourly):** \$35,539.05. The USPTO expects that the information in this collection will be prepared by attorneys and former employees at an hourly rate of \$410, except for the requests for employee indemnification, which generally come from professional and supervisory staff at an hourly rate of \$79.78. Since the majority of the former employees affected by this collection are attorneys, the estimated attorney hourly rate will be used for former employees as well. Using these hourly rates, the USPTO estimates that the total respondent cost burden for this collection will be approximately \$35,539.05 per year.

TABLE 1—RESPONDENT HOURLY COST BURDEN

IC No./Item	Estimated response time (hours)	Estimated annual responses	Estimated annual burden hours	Rate (\$/hr)	Total cost (\$/yr)
	(a)	(b)	(a) × (b) = (c)	(d)	(c) × (d) = (e)
1. Petition to Waive Rules .....	0.50	5	2.50	\$410.00	\$1,025.00