

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration**

[I.D. 062006A]

**Taking of Threatened or Endangered Marine Mammals Incidental to Commercial Fishing Operations; Proposed Permit**

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

**ACTION:** Notice of proposal for issuance of permit; request for comments.

**SUMMARY:** NMFS proposes to issue a permit for a period of three years, to authorize the incidental, but not intentional, taking of three stocks of threatened or endangered marine mammals by the California/Oregon (CA/OR) drift gillnet large mesh ( $\geq 14$  inch mesh) (DGN) fishery. NMFS must issue this permit provided that we can make the determinations that: the incidental take will have a negligible impact on the affected marine mammal stocks; a recovery plan for all affected stocks of threatened or endangered marine mammals has been developed or is being developed; and as required by the MMPA, a take reduction plan and monitoring program have been implemented and vessels in the CA/OR DGN fishery are registered. NMFS solicits public comments on the negligible impact determination and on the proposal to issue a permit to this fishery for the taking of affected threatened or endangered stocks of marine mammals.

**DATES:** Comments must be received by August 28, 2006.

**ADDRESSES:** A draft of the negligible impact determination is available on the Internet at the following addresses: <http://swr.nmfs.noaa.gov/>. Written copies of the determination may be requested from, and comments on the determination and proposed permit should be sent to: Monica DeAngelis, Protected Resources Division, NMFS, Southwest Region, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213. Comments may also be sent by e-mail to: [MMPA.permit-SWR@noaa.gov](mailto:MMPA.permit-SWR@noaa.gov) or by fax to (301) 427-2582.

The recovery plan for humpback whales is available on the Internet at the following address: <http://www.nmfs.noaa.gov/pr/recovery/plans.htm#mammals>.

The draft recovery plans for fin and sperm whales are available on the

Internet at the following address: <http://www.nmfs.noaa.gov/pr/>. (See "Recent News and Hot Topics".)

Regulations implementing the Pacific Offshore Cetacean Take Reduction Plan (POCTRP) are available on the Internet at the following address: <http://www.nmfs.noaa.gov/pr/interactions/trt/teams.htm>.

**FOR FURTHER INFORMATION CONTACT:**

Monica DeAngelis, NMFS, Southwest Region Protected Resources Division (SWR PRD), (562) 980-3232 or Christina Fahy, NMFS, SWR PRD, (562) 980-4023.

**SUPPLEMENTARY INFORMATION:****Background**

Section 101(a)(5)(E) of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1371(a)(5)(E)) requires NMFS to authorize the incidental taking of individuals from marine mammal stocks listed as threatened or endangered under the Endangered Species Act (ESA), as amended (16 U.S.C. 1531 *et seq.*) in the course of 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.

On August 31, 1995 (60 FR 45399), NMFS issued permits for fisheries meeting the conditions under section 101(a)(5)(E) of the MMPA. At that time, NMFS did not issue a permit to the CA/OR DGN fishery for the CA/OR/WA-Mexico humpback whale stock or the CA/OR/WA sperm whale stock because NMFS was unable to determine that the estimated mortality and serious injury incidental to commercial fishing operations was negligible. In addition, in 1995, NMFS did not consider issuing a permit for the incidental mortality and serious injury of the CA/OR/WA fin whale stock because there had been no reported incidental takes at that time, and NMFS had no reason to anticipate any such takes. However, NMFS did determine that the mortality and serious injury incidental to commercial fishing operations was negligible for the eastern Steller sea lion stock and issued a permit for that stock. On December 30, 1998 (63 FR 71894), NMFS extended the permit until June 30, 1999. At that time, NMFS announced that it was reviewing

the criteria for issuance of permits and evaluating whether the criteria were adequate or if changes should be made. No comments were received. On May 27, 1999 (64 FR 28800), NMFS proposed the issuance of permits for those fisheries that have negligible impacts on marine mammal stocks listed as threatened or endangered under the ESA for a period of 3 years. In addition, that document provided further guidance about the process for determining negligible impact. A permit for the mortality and serious injury of the Steller sea lion incidental to the CA/OR DGN fishery was also proposed. NMFS did not finalize the proposed permits.

Since 1995, NMFS has gathered additional data on the status of listed marine mammals. Based on the more recent survey data and analyses, the Stock Assessment Reports (SARs) contain revised estimates of Potential Biological Removal (PBR) levels. PBR is defined in the MMPA as "the maximum number of animals, not including natural mortalities, that may be removed from a stock while allowing that stock to reach or maintain its optimum sustainable population" (16 U.S.C. 1362 (20)). Also, since 1995, NMFS has developed and implemented the POCTRP (62 FR 51805, October 30, 1997) for the CA/OR DGN fishery. The initial goal of a take reduction plan is to reduce marine mammal bycatch in the fishery to levels below PBR for all stocks. Since the implementation of the POCTRP, overall cetacean mortality in this fishery has been reduced considerably.

In 2000, NMFS conducted a negligible impact determination and issued an authorization under MMPA section 101(a)(5)(E) for the CA/OR DGN fishery to incidentally take from four stocks of threatened or endangered marine mammals; the humpback whale, sperm whale, fin whale, and Steller sea lion. This authorization was finalized on October 30, 2000 (65 FR 64670) and was effective for three years, expiring in October 2003.

NMFS is now considering the issuance of a permit under MMPA section 101(a)(5)(E) to vessels registered in the CA/OR DGN fishery to incidentally take from three stocks of threatened or endangered marine mammals: the CA/OR/WA stock of fin whales (*Balaenoptera physalus*), the Eastern North Pacific stock of humpback whales (*Megaptera novaeangliae*), and the CA/OR/WA stock of sperm whales (*Physeter macrocephalus*). The data for considering an authorization were reviewed coincident with and following implementation of a Fishery

Management Plan (FMP) for U.S. West Coast Fisheries for Highly Migratory Species (HMS), publication of the 2005 List of Fisheries (LOF) (71 FR 247, January 4, 2006), and the 2005 SAR (Carretta et al. 2006). The CA/OR DGN fishery is the only fishery on the 2005 list of Category I and II fisheries that operates in the ranges of the affected stocks and has been observed to interact with endangered or threatened marine mammals other than Steller sea lions. The basis for authorizing the take of Steller sea lions incidental to commercial fishing will be considered in a future document.

Under Federal regulations, the CA/OR DGN fishery is restricted to waters outside 200 nautical miles (nm) from February 1 through April 30, outside 75 nm from May 1 through August 14, and is allowed to fish inside 75 nm from August 15 through January 31. Other closures can be found at 50 CFR 660.713. In 2001, a seasonal (15 August to 15 November) area closure was implemented in the DGN fishery north of Point Conception to protect leatherback turtles that feed in the area and have been observed entangled in previous fishing seasons. In addition, fishing effort east of the 120° W. longitude off the coast of southern CA would be prohibited during a forecasted, or occurring, El Nino event from June 1 through August 31, in order to reduce the likelihood of an interaction with loggerhead turtles (68 FR 69962, December 16, 2003).

#### **Basis for Determining Negligible Impact**

Section 101(a)(5)(E) of the MMPA requires the authorization of the incidental taking of individuals from marine mammal stocks listed as threatened or endangered under the ESA in the course of commercial fishing operations if NMFS determines, among other things, that incidental mortality and serious injury will have a negligible impact on the affected species or stock. "Negligible impact," as defined in 50 CFR 216.103 and as it applies here 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."

In 1990 as required by the MMPA, the Marine Mammal Commission (MMC) submitted guidelines to NMFS to govern the incidental taking of marine mammals during the course of commercial fishing operations. In those guidelines, the MMC recommended NMFS determine negligible impact if the mortality and serious injury incidental to commercial fishing

operations would cause no more than a 10 percent increase in the time to recovery. The MMC's recommendation was a quantified approach to assessing negligible impact; however, it did not identify what limit on mortality and serious injury would delay a stock's recovery by not more than 10 percent.

NMFS investigated such a limit of annual mortality and serious injury while implementing the MMPA Amendments of 1994. NMFS included the MMC's recommendation when preparing guidelines for the initial marine mammals stock assessment reports and determined that 90 percent of net annual production of endangered stocks of marine mammals should be reserved for recovery, which would increase recovery time of endangered stocks by no more than 10 percent. Accordingly, a default recovery factor of 0.1 was used in the PBR equation for endangered stocks of marine mammals (Barlow *et al.*, 1995). Thus, when human-caused mortality and serious injury of these stocks was limited to no more than the stock's PBR, such mortality and serious injury would cause no more than a 10-percent delay in the recovery of the stock.

On August 31, 1995 (60 FR 45399), NMFS issued permits for fisheries meeting the conditions under section 101(a)(5)(E) of the MMPA. As a starting point for making determinations, NMFS announced it would consider a total annual serious injury and mortality of not more than 10 percent of a threatened or endangered marine mammal's PBR level to be negligible. NMFS also announced that such a criterion would not be the only factor in evaluating whether a particular level of take would be considered negligible and that such factors as population trend and reliability of abundance and mortality estimates should also be considered. Consistent with the provisions of section 101(a)(5)(E)(ii) of the MMPA, NMFS determined that permits were not required for Category III fisheries, which are not required to register under section 118 of the MMPA. The only requirement for Category III fisheries is that any serious injury or mortality be reported, provided that mortality and serious injury incidental to commercial fisheries would have a negligible impact on the affected threatened or endangered stocks of marine mammals.

On December 30, 1998 (63 FR 71894), NMFS extended the permits until June 30, 1999. At that time, NMFS announced that it was reviewing the criteria for issuance of permits and requested public comments on whether the criteria were adequate or whether

changes should be made. No comments were received.

On May 27, 1999 (64 FR 28800), NMFS proposed issuing authorization for those fisheries that had negligible impacts on marine mammal stocks listed as threatened and endangered under the ESA, for a period of 3 years. Based on new information, NMFS did not finalize the proposed permits. However, the notice included the adoption by NMFS of new criteria for making a negligible impact determination under section 101(a)(5)(E), based on internal review:

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; or

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

In applying these criteria, 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.

On October 30, 2000 (65 FR 64670), NMFS conducted a negligible impact determination and issued an authorization under MMPA section 101(a)(5)(E) for the CA/OR DGN fishery to incidentally take four stocks of threatened or endangered marine mammals: humpback whales, sperm whales, fin whales, and Steller sea lions. To make this determination, NMFS used the criterion for stable or increasing stocks of threatened or endangered marine mammals and issued the authorization. The negligible impact determination concluded that the estimated mortality and serious injury caused by the CA/OR DGN fishery would cause no more than a 10 percent increase in the time to recovery for each of the four stocks of marine mammals; thus, takes below this level were considered negligible.

#### Negligible Impact Determination

NMFS evaluated the best available information for species listed as threatened or endangered under the ESA that interact with the CA/OR DGN fishery (using observer data from 1998 (post-POCTRP implementation) through 2005), other fisheries (using primarily stranding and sighting data from 1998–2005), and other sources of human-caused serious injury and mortality, and has determined, on a stock-by-stock basis, whether the incidental mortality and serious injury from all commercial fisheries is having a negligible impact on such stocks. Based on this assessment (see criteria used and assessment below), NMFS concludes that the estimated mortality and serious injury caused by the CA/OR DGN fishery would have a negligible impact on each of the three stocks of marine mammals addressed by this permit. Those stocks for which negligible impact findings were made were then reviewed to confirm that: 1) a recovery plan has been developed or is being developed for each of these species, as listed, and 2) where required under section 118, a monitoring program has been established, vessels engaged in such fisheries are registered, and a take reduction plan has been or is being developed. NMFS has confirmed that all of these requirements are currently being met.

For the following stocks with documented evidence of fishery-related interactions, NMFS has determined that the mortality and serious injury incidental to the CA/OR DGN fishery, which includes the proposed EFP, will have a negligible impact and proposes to issue a permit for incidental takes of the following stocks of endangered marine mammals:

1. Fin whale, CA/OR/WA stock;
  2. Humpback whale, Eastern North Pacific stock; and
  3. Sperm whale, CA/OR/WA stock.
- A stock-by-stock summary of the negligible impact determination follows (see **ADDRESSES** for a draft of the determination).

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

The PBR for this stock is 15 whales per year (Carretta *et al.*, 2006). After the implementation of the POCTRP in late 1997, overall cetacean entanglement rates in the CA/OR DGN fishery dropped considerably. Because of the changes in the CA/OR DGN fishery after the implementation of the POCTRP, mean annual mortality and serious injury for this fishery is based on 1998–2005 data. Based on an 8-year average, the annual mean mortality and serious injury rate from the CA/OR DGN fishery is estimated to be 0.63 whales per year. During the past 16 years, only one fin whale has been observed taken by this fishery (1999, which is after implementation of the Plan and prior to the 2001 closure off central CA /southern OR), indicating a remote likelihood of a fin whale take in the CA/OR DGN fishery. The known average annual human-caused mortality or serious injury, including ship strikes (0.88 animals per year) and incidental to commercial fishing (0.63 animals per year) for 1998–2005 is 1.5 fin whales, which is 10 percent of the PBR for the CA/OR/WA fin whale stock. Because total human-caused mortality and serious injury is below 10 percent of PBR, NMFS determines that mortality and serious injury incidental to commercial fishing is having a negligible impact on the CA/OR/WA stock of fin whales.

#### *Humpback Whale, Eastern North Pacific Stock*

The PBR for this stock is 2.3 whales per year (Carretta *et al.*, 2006). Because of the changes in the CA/OR DGN fishery after the implementation of the POCTRP, mean annual mortality and serious injury for this fishery is based on 1998–2005 data. Mean annual mortality and serious injury rate over this period is zero humpback whales in this fishery. Commercial fisheries

known to incidentally take humpback whales include crab pot fisheries, unknown pot fisheries, and unknown net fisheries, based on entangled humpbacks reported off CA. The known average annual human-caused mortality or serious injury, including ship strikes (0.25 animals per year) and incidental to commercial fishing for 1998–2005 (1.5 animals per year) is 1.75 humpback whales or 76.1 percent of the PBR for the Eastern North Pacific humpback whale stock. Although several humpback whales were entangled in recent years in crab pot gear and in unknown pot/net fisheries in CA, 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, there have been no reported mortalities or serious injuries of humpback whales attributed to the CA/OR DGN fishery. In addition, after the implementation of the POCTRP, overall cetacean entanglement rates in the DGN fishery dropped considerably. Lastly, the population for this stock is considered to be at least stable and is likely to be increasing by 6–7 percent per year (Carretta *et al.*, 2006). Based on this, and because the estimated mortality and serious injury caused by all Category I and II commercial fisheries, including the CA/OR DGN fishery, would not cause more than a 10 percent increase in the time to recovery, a negligible determination can be made under Criterion 3 for purposes of issuing a permit under MMPA section 101(a)(5)(E).

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

The PBR level for this stock is 1.8 whales per year (Carretta *et al.*, 2006). Because of the changes in the CA/OR DGN fishery after the implementation of the Plan, mean annual takes are based only on observer data from 1998–2005. This results in a mean annual mortality and serious injury rate of 0.63 sperm whales per year from the CA/OR DGN fishery. In 1998, one sperm whale was observed killed in a net that was not in compliance with the Plan (also taken prior to the 2001 closure off central California/southern Oregon). The Pacific Offshore Cetacean Take Reduction Team (Team) and the Pacific Scientific Review Group both recommended no further strategies to reduce sperm whale entanglement be taken until the effectiveness of pingers is better understood. Based upon the recommendation of the Team to increase compliance with the POCTRP (use of pingers), vessel operators were encouraged at skipper education workshops to use the full complement of pingers when deploying their nets.

Furthermore, NMFS enforcement officials met with the United States Coast Guard to train boarding personnel on the requirements of the plan and requested their assistance for at-sea enforcement. The known average annual human-caused mortality or serious injury, including ship strikes (0.38 animals per year) and incidental to commercial fishing (0.75 animals per year) for 1998–2005 is 1.13 sperm whales, or 62.5 percent of the PBR for the CA/OR/WA sperm whale stock.

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, and 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. The average annual fisheries-related mortality and serious injury for this stock is below PBR. There has not been a take of sperm whales in the CA/OR DGN fishery since 1998 and the likelihood that a sperm whale would be taken by the CA/OR DGN fishery is very low, especially given compliance with the POCTRP. Based on the trend of this stock of marine mammals, the existing management measures on the fishery, and that the estimated mortality and serious injury caused by all Category I and II commercial fisheries, including the CA/OR DGN fishery, would not cause more than a 10 percent increase in the time to recovery, a negligible determination can be made under Criterion 3 for purposes of issuing a permit under MMPA section 101(a)(5)(E).

#### Proposed Actions and Information Solicited

##### *Negligible Impact*

As required by the MMPA and as summarized above, NMFS has made a preliminary determination that incidental mortality and serious injury incidental to commercial fishing will have a negligible impact on the CA/OR/WA stock of fin whales, the Eastern North Pacific stock of humpback whales, and the CA/OR/WA stock of sperm whales. A draft of the determination is available for public review (see **ADDRESSES**), and NMFS solicits public comments on this draft determination.

##### *Recovery Plans*

A recovery plan for humpback whales was completed and issued in 1991. This plan is available on the Internet (see **ADDRESSES**). NMFS had previously

solicited public comments on a draft recovery plan for fin whales and sei whales (*Balaenoptera borealis*) (63 FR 41802, August 5, 1998); however, the plan was not completed. Subsequently, the information related to fin whales was separated from that of sei whales, and more recent information has been included in a draft recovery plan for fin whales. The draft recovery plan for fin whales is available for public review and comment (71 FR 38385, July 6, 2006). Also, NMFS has prepared a draft recovery plan for sperm whales, and this draft plan is available for public review and comment (71 FR 38385, July 6, 2006). These draft plans are available on the Internet (see **ADDRESSES**). Accordingly, NMFS determines that recovery plans for the affected endangered species of marine mammals have been or are being developed.

##### *MMPA Section 118 Requirements*

As noted in Carretta *et al.* (2006, see Appendix 1. Descriptions of U.S. Commercial Fisheries) an observer program has been in place in the CA/OR DGN fishery since 1990. The fishery has been included in the LOF since the list was initiated under MMPA section 118. The proposed 2006 LOF (71 FR 20941, April 24, 2006) estimates 85 vessels in the fishery, 57 vessels were registered in 2005, and 49 vessels are currently registered as required by MMPA section 118(c). NMFS anticipates additional vessels will be registered prior to the start of the fishing season. NMFS promulgated final regulations to implement the POCTRP on October 3, 1997 (62 FR 51805). The plan was subsequently revised to modify specifications for deploying pingers, which allowed safer deployment (64 FR 3431, January 22, 1999). These regulations are available on the Internet (see **ADDRESSES**). Accordingly, NMFS determines that the requirements of MMPA section 118 have been satisfied for the CA/OR DGN fishery.

##### *Proposed Action*

The impacts of implementing the HMS FMP, including the taking of threatened and endangered species of marine mammals, were analyzed in an Environmental Impact Statement for the HMS FMP and in a biological opinion prepared in February 2004 on the proposed adoption of the HMS FMP. The proposed permit would have no additional impact to the human environment beyond those analyzed in February 2004; therefore, additional environmental analyses were not conducted. Based on requirements of section 101(a)(5)(E) of the MMPA, NMFS proposes to issue a permit to

allow the incidental, but not intentional, taking of three stocks of endangered or threatened marine mammals to the CA/OR DGN fishery, fin whale, CA/OR/WA stock; humpback whale, Eastern North Pacific stock; and sperm whale, CA/OR/WA stock. This permit may be suspended or revoked if the level of take is likely to result in an impact that is more than negligible. As required by the MMPA, NMFS has determined that a recovery plan has been developed or is being developed for each of these species and that a monitoring program has been established, vessels engaged in the subject fishery are registered, and a take reduction plan has been developed. NMFS solicits public comments on this proposed permit.

#### References

- Barlow, J., S. Swartz, T. Eagle and P. Wade. 1995. U.S. Marine Mammal Stock Assessments: Guidelines for Preparation, Background, and a Summary of the 1995 Assessments. U.S. Department of Commerce, NOAA-TM-NMFS-SWFSC-219. 162 p.
- Carretta, J.V., K.A. Forney, M.M. Muto, J. Barlow, J. Baker, B. Hanson, and M.S. Lowry. 2006. U.S. Pacific Marine Mammal Stock Assessments: 2005. U.S. Department of Commerce, NOAA-TM-NMFS-SWFSC-388.
- Pacific Fishery Management Council. 2003. Final Environmental Impact Statement for U.S. West Coast Fisheries for Highly Migratory Species.

Dated: July 25, 2006.

#### James H. Lecky,

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National Marine Fisheries Service.

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## DEPARTMENT OF COMMERCE

### Notice of Intent To Conduct Restoration Planning

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**SUMMARY:** The natural resource trustees (the Trustees) hereby notify the public of their intent to conduct restoration planning activities for injuries to natural resources caused by the Bouchard B-120 Oil Spill that occurred on or about April 27, 2003. On that date, the Bouchard B-120, owned and operated by the Bouchard Transportation Company, grounded on a shoal in Buzzards Bay, which is located off the coasts of Massachusetts and Rhode Island, and released between 22,000 and 98,000 gallons of No. 6 fuel oil into the environment. The Trustees include the: