



MARINE MAMMAL COMMISSION

13 February 2017

Mr. Chris Yates
National Marine Fisheries Service
West Coast Region
501 W. Ocean Blvd., Suite 4200
Long Beach, CA 90802

Dear Mr. Yates:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed and offers the following comments on the National Marine Fisheries Service's (NMFS) 10 January 2017 *Federal Register* notice (82 Fed. Reg. 2954) proposing a draft negligible impact determination (NID) for the California (CA) thresher shark/swordfish drift gillnet fishery (<14 inch mesh) and the Washington (WA)/Oregon (OR)/CA sablefish pot fishery.

Background

NMFS is proposing to issue permits pursuant to section 101(a)(5)(E) of the Marine Mammal Protection Act (MMPA) to allow the unintentional mortality or serious injury (M/SI) of two marine mammal species listed under the Endangered Species Act (ESA), the humpback whale (CA/OR/WA stock) and sperm whale (CA/OR/WA stock). As required under the MMPA, NMFS notes that recovery plans have been completed for these two species, and take reduction plans and monitoring programs have been implemented for managing takes of both species incidental to the CA thresher shark/swordfish drift gillnet fishery (<14 inch mesh) and the WA/OR/CA sablefish pot fishery. Both species, however, are also taken by other regional fisheries (e.g., sperm whales by the open access fixed gear hook and line fishery and humpback whales by the Dungeness crab pot fishery) at comparable or greater levels.

In 1999, NMFS adopted criteria for making NIDs when considering the effects of commercial fishing on endangered and threatened marine mammal populations. For the two fisheries included in the proposed incidental take authorization, the notice states that NMFS has reached a preliminary conclusion that the issuance of permits is warranted for both of the marine mammal species based on Criterion 3¹.

Humpback Whales

The proposed NID for this species is based on there being a single CA/OR/WA stock of humpback whales. This is the stock that is recognized in the most recent final stock assessment report (June 2014). However, as recognized in the 2016 draft stock assessment report, NMFS

¹ See http://www.fisheries.noaa.gov/pr/species/documents/draft_nid_2017.pdf (pp. vi-vii) for an explanation of the five criteria for NID.

recently revised its listing of humpback whales under ESA based on the recognition of several distinct population segments (DPSs), which do not correspond with current stock delineations under the MMPA. As noted in the 2016 draft stock assessment report, NMFS is evaluating the stock structure of humpback whales under the MMPA, but has yet to propose any changes.

Based on the information contained in the revised listing of humpback whales under the ESA (81 Fed. Reg. 62260), both the Endangered Central America DPS and the Threatened Mexico DPS occur off of the U.S. West Coast and, presumably are subject to entanglement in the CA thresher shark/swordfish drift gillnet fishery, the WA/OR/CA sablefish pot fishery and other fisheries known to take humpback whales off the West Coast. We are particularly concerned about the potential for humpback whales from the Central America DPS to be killed or seriously injured in these fisheries. As noted in the listing rule, this DPS has an estimated 411 individuals and trend information is lacking. If the Central America DPS were considered a stock under the MMPA, the PBR level would be less than one whale. As such, it would not meet any of the negligible impact criteria established by NMFS under section 101(a)(5)(E) of the MMPA. Even if PBR were significantly greater than one, the requirements under Criterion 3 would not be satisfied, inasmuch as data are lacking to conclude that the population is stable or increasing.

While we recognize that a DPS under the ESA is not necessarily equivalent to a stock under the MMPA, the two classifications have some similarities. A stock is defined under section 3(11) of the MMPA as “a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature.” To warrant designation as a DPS under the ESA, that population segment must also exhibit discreteness and “interbreed when mature.” Thus, until NMFS has completed its assessment as to how the newly recognized DPSs under the ESA comport with stock delineations under the MMPA, the Commission recommends that NMFS take a precautionary approach and treat those DPSs identified under the ESA listing process as putative stocks under the MMPA. The Commission further recommends that, in its analyses under section 101(a)(5)(E) for humpback whales, NMFS consider both the Central America and Mexico DPSs as stocks under the MMPA, unless and until it has completed its assessment of stock structure for whales along the West Coast and concluded that some other structure should be used. The Commission also notes that in other cases of overlapping stocks (e.g., bottlenose dolphins off the coast of North Carolina) for which takes cannot be ascribed to any particular stock, the entire take within the overlap area is applied to each stock within the range separately. As such, the current estimate of takes from the Central America DPS, and perhaps the Mexico DPS, would exceed PBR and not meet the NID criteria.

Finally, we note that in 2015 there was a significant increase in humpback whale mortality and serious injury (M/SI) off the U.S. west coast. For example, Carretta et al.² indicate that there were 35 humpback whale M/SI in 2015 alone, including at least 26 attributable to fishery interactions. To ensure that recent trends towards increasing fishery-related M/SI involving humpback whales in the region are recognized, the Commission recommends that NMFS use the average annual M/SI of humpbacks over the most recent five-year period for which data are available, including data for 2015, in its evaluation.

² Carretta, JV, MM Muto, J Greenman, K Wilkinson, D Lawson, J Viezbicke, and J Jannot. 2017. Sources of Human-Related Mortality for the U.S. Pacific West Coast Marine Mammal Stock Assessments, 2011-2015. PSRG-217-07. National Marine Fisheries Service, Southwest Fisheries Science Center

Negligible Impact Determinations

Although we believe that additional analyses are necessary to justify making a NID that includes humpback whales, the Commission recommends that NMFS issue the proposed NID for sperm whales for the two fisheries, subject to the following comments and recommendations—

- 1) NMFS issued a proposed rule (81 Fed. Reg. 70660) in October 2016 that would implement hard caps in the CA/OR large mesh drift gillnet fishery. This rulemaking would alter the management of marine mammal bycatch in this fishery and potentially impact the NIDs made in this notice. The Commission recommends that NMFS consider any potential impacts of these regulatory changes prior to issuing the final permits.
- 2) As the Commission has recommended in the past, the NID criteria need to be updated given new scientific information and overall policy changes. The Commission understands that NMFS is planning to update these criteria, and would welcome an opportunity to assist NMFS in this effort.

Thank you for the opportunity to comment on the proposed NIDs and incidental take permits. Please contact me if you have any questions regarding our recommendations.

Sincerely,

A handwritten signature in blue ink that reads "Rebecca J. Lent". The signature is written in a cursive style with a large initial "R".

Rebecca J. Lent, Ph.D.
Executive Director