

## SUPPLEMENTARY INFORMATION:

**Background**

On November 10, 1994 (59 FR 56116), January 9, 1995 (60 FR 2325), and April 24, 1995 (60 FR 20035), we published final rules with an error in each one. The errors are in three items of amendatory language that need to be changed to ensure consistency in one case and to reestablish text that was inadvertently deleted in the other two cases.

**Correction of publications**

Accordingly:

A. The publication on November 10, 1994, of the final regulation that was the subject of FR Doc. 94-27703 is corrected as follows:

**§ 442.30 [Corrected]**

Page 56235, column 3: In the amendatory language to item 10, the word "and" is inserted before "(a)(4)" in line 2 and the words "introductory paragraph" are inserted before "(a)(7)" in line 3.

B. The publication on January 9, 1995, of the final regulation that was the subject of FR Doc. 95-485 is corrected as follows:

**PART 486****Subparts C and D [Corrected]**

Page 2329, column 2: The amendatory language of item 2 is revised to read as follows:

2. In newly designated subparts C and D, in the following sections, the section heading is amended to change the dash to a colon, capitalize the first word after the colon, and replace the word "Conditions" (in the two places it appears) with the word "Condition": §§ 486.100, 486.102, 486.104, 486.106, 486.108, 486.110, 486.153, 486.155, 486.157, and 486.161.

C. The publication on April 24, 1995, of the final regulation that was the subject of FR Doc. 9553 is corrected as follows:

**§ 493.2001 [Corrected]**

Page 20051, column 3: In the amendatory language to item 56, the word "introductory" is inserted before the word "paragraph" in line 1.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; Program No. 93.774, Medicare—Supplementary Medical Insurance Program; and Program No. 93.778, Medical Assistance Program)

Dated: August 22, 1995.

**Neil J. Stillman,**

*Deputy Assistant Secretary for Information Resources Management.*

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**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Parts 216 and 229**

[Docket No. 950605147-5209-02; I.D. 052395C]

RIN 0648-AH33

**Taking of Marine Mammals Incidental to Commercial Fishing Operations; Authorization for Commercial Fisheries**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to implement the new management regime for the unintentional taking of marine mammals incidental to commercial fishing operations established by section 118 of the Marine Mammal Protection Act of 1972 (MMPA) as amended by the MMPA Amendments of 1994. Section 118 provides for limited exemptions from the MMPA's general prohibition on the take of marine mammals, for the unintentional incidental take of marine mammals by commercial fishers in the course of commercial fishing, and requires NMFS to authorize such incidental takes by a commercial fisher upon the receipt of certain information and provided certain other conditions are met. This rule requires commercial fishers to annually register for an Authorization Certificate by filing specified information, provides for the issuance by NMFS of such certificates, requires commercial fishers to report to NMFS the incidental mortality and injury of any marine mammals in the course of commercial fishing, and requires commercial fishers to comply with certain other requirements. In order to allow commercial fishers time to comply with the new section 118 registrations and reporting requirements which become effective on September 1, 1995, NMFS by this notice also announces transition policies from the old section 114 regime which expires on September 1, 1995.

**EFFECTIVE DATES:** September 1, 1995 except § 229.6, which becomes effective January 1, 1996.

**ADDRESSES:** Copies of NOAA Administrative Order 216-100, the MMPA, as amended in 1994, and the Environmental Assessment (EA) prepared for the proposed rule in aggregate or summary form may be obtained by writing to Chief, Marine Mammal Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. A copy of the EA may also be obtained by accessing the NMFS "Home Page" on the World Wide Web at <http://kingfish.ssp.nmfs.gov:80/home-page.html>.

**FOR FURTHER INFORMATION CONTACT:** Robyn Angliss, Office of Protected Resources, 301-713-2322; Douglas Beach, Northeast Region, 508-281-9254; Charles Oravetz, Southeast Region, 813-570-5301; James Lecky, Southwest Region, 310-980-4015; Brent Norberg, Northwest Region, 206-526-6140; Steve Zimmerman, Alaska Region, 907-586-7235.

**SUPPLEMENTARY INFORMATION:**

Section 118 of the MMPA, as added by the MMPA Amendments of 1994, establishes a new regime to govern interactions between marine mammals and commercial fisheries. Proposed regulations implementing section 118 and a proposed list of fisheries (LOF) for 1996 were published on June 16, 1995 (60 FR 31666). An EA was prepared concurrently and was made available when the proposed regulations were published. The public comment period for the proposed regulations ended on July 31, 1995; the public comment period for the proposed LOF ends September 14, 1995. This final rule addresses only the public comments on the proposed rule. Comments addressing the proposed LOF will be published in the **Federal Register** with the final LOF.

**History of the Proposed Rule Implementing Section 118**

Section 118 of the MMPA, as amended in 1994, replaces section 114 which exempted, on an interim basis, commercial fishers who comply with certain requirements from the general prohibition on the taking of marine mammals. The process used to develop the proposed and final rule included many opportunities for public involvement.

A **Federal Register** notice (59 FR 45263) announcing proposed changes to the LOF and different options for new fishery classification criteria was published on September 1, 1994.

Comments were received and were taken into consideration when preparing draft proposed regulations. Informal working sessions to discuss the draft proposed regulations were held in Silver Spring, MD, on November 30, 1994, and in Seattle, WA, on December 1, 1994. These working sessions provided interested parties the opportunity to participate in discussions of how to revise the draft regulations.

The "MMPA Bulletin", a new publication of the Office of Protected Resources, is designed to increase public awareness of and participation in the regulatory process. The first edition, published in September, 1994, included a description of the 1994 Amendments to the MMPA, and subsequent editions have focused on NMFS' efforts to implement the amendments. The "MMPA Bulletin" has been sent to approximately 1,600 interested parties, including fishers, members of the environmental community, marine mammal scientists, state and Federal agencies dealing with protected species issues, Native American groups, public display facilities, and Congressional staff.

The proposed rule was published on June 16, 1995, in combination with the proposed LOF (60 FR 31666). NMFS issued a press release announcing the availability of the proposed rule and summarizing the major issues contained in the proposed rule. Information included in this press release was published in several newspapers. A summary of the proposed rule was also included on the front page of the June/July issue of the "MMPA Bulletin", along with major changes proposed in the LOF. NMFS circulated a "Regulatory Alert" to its "MMPA Bulletin" mailing list summarizing the proposed rule and listing dates for public hearings. Regional public hearings were held in Danvers, MA; Oceanville, NJ; Silver Spring, MD; Ocean City, MD; Long Beach, CA; Ronkonkoma, NY; Anchorage, AK; Beaufort, NC; and Seattle, WA. Each hearing was attended by between 2 and 20 people, and between 0 and 10 people provided public comments.

On July 19, 1995, a correction was published (60 FR 37043) in the **Federal Register**. The correction identified errors and omissions in the proposed LOF and clarified the status of certain stocks of marine mammals identified in the proposed LOF.

#### **Transition from Section 114 Regime to the Section 118 Regime**

While the MMPA requires that section 114 expire on September 1, 1995, or

when final section 118 implementing regulations become effective, whichever is earlier, no transition procedures are specified. In order to allow fishers time to comply with the new section 118 registration and reporting requirements which become effective on September 1, 1995, NMFS announces the following transition policies:

**Registration:** Those owners of vessels holding valid Exemption Certificates issued under section 114 will be deemed to have registered under section 118 through December 31, 1995. Fishers participating in Category I or II fisheries as identified in the current LOF who are not currently registered must register with the nearest NMFS regional office before participating in such Category I or II fisheries. Registration procedures for obtaining Authorization Certificates in 1996 will be published concurrently with the final LOF for 1996.

**Reporting:** NMFS is in the process of developing the reporting form that fishers will use after January 1, 1996. A draft of this reporting form will be published in the **Federal Register** and will be available for public comment. Commercial fishers are requested to report all injuries and mortalities to the nearest NMFS regional office until these forms are available.

**Incidental taking of species listed as endangered or threatened under the Endangered Species Act:** Under section 101(a)(5)(E) of the MMPA, NMFS is required to issue permits for the incidental taking of threatened or endangered species listed under the Endangered Species Act (ESA), if it can be determined that (1) mortality and serious injury incidental to commercial fisheries would have a negligible impact on the affected species or stock, (2) a recovery plan for that species or stock has been developed or is being developed, and (3) where required under section 118, a monitoring program has been established, vessels are registered, and a take reduction plan has been developed or is being developed. NMFS expects to publish an interim final LOF that have met these conditions by September 1, 1995. Comments on the list will be accepted for 45 days from the date of publication of the list, after which time a final list will be published. Inclusion of a fishery on the list constitutes authorization for that fishery to incidentally take marine mammals from the specified threatened or endangered species or stocks. Fisheries may be authorized to have incidental takes of some species or stocks listed as threatened or endangered, but not others. Participants in fisheries that are not included on the list will not receive permits and will

remain subject to the ESA prohibition against taking marine mammals from endangered or threatened stocks.

#### **Responses to Comments**

During July 1995, NMFS held 10 public hearings at various locations throughout the country to receive comments on the proposed rule and LOF. A total of 86 individuals attended these hearings, 28 of whom submitted oral comments on the proposed rule, LOF or both. NMFS also received 54 written comments during the comment period for the proposed rule. Many comments also addressed aspects of the LOF. Since the comment period for the LOF remains open until September 14, 1995, all comments related to the LOF will be addressed during publication of the final LOF in October 1995. Comments were received from fishers, fishing industry groups, environmental groups, animal rights groups, state departments of fisheries, other executive branch departments, and members of the general public.

Approximately 15 letters were general in nature, expressing support for the MMPA and opposition to any measures that might weaken the MMPA. Most comments from fishers, industry groups, and environmental groups expressed general support for NMFS's two-tiered approach to classifying fisheries based on Potential Biological Removal (PBR) levels; however, many raised specific concerns about the dividing lines established to separate Category I, II and III fisheries. Many of the comments are lengthy and raise many points of concern. Key issues and concerns are summarized and responded to as follows:

#### *Comments on the Goals and Purpose of the Section 118 Regulations*

Several comments addressed the Zero Mortality Rate Goal (ZMRG) definition in the proposed rule. The final rule does not contain a definition for this goal. NMFS is still considering what would be an appropriate definition for the goal. Specific comments on the goal will be addressed when a final definition is published in the **Federal Register**. Other comments about the goals and purpose of this action are summarized and responded to as follows.

*Comment 1:* The goal of restoring all populations to optimum levels is short-sighted and ignores the competition between species for habitat and prey. There are always natural and complementary increases and decreases of competing marine mammal stocks. Therefore, NMFS should use an ecosystem approach to marine mammal

management rather than a species by species approach.

*Response:* The MMPA (section 2(2)) states that marine mammal species and stocks "should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population (OSP)." NMFS recognizes that complex relationships may exist between different marine mammals and their prey populations. However, many marine mammal species are depleted and, in some cases, threatened or endangered. The return of these stocks to OSP will allow them to continue as a functioning part of the ecosystem. The implementing regulations promulgated under the MMPA must endeavor to allow those species and stocks to return to OSP.

*Comment 2:* NMFS should use incidental take as a barometer of marine mammal population health. If you have lots of takes you have a strong population.

*Response:* A high incidence of serious injury and mortality incidental to commercial fishing operations could be due to several different factors. The type of gear used in a fishery, the geographic location of a fishery, the season during which a fishery operates, the distribution and behavior of marine mammals in a particular area, and other factors affect the frequency of marine mammal serious injury and mortality incidental to commercial fishing operations. In addition, there are fisheries which operate in areas with relatively high levels of marine mammals, yet which do not have high levels of incidental removals. Thus, having a high level of incidental take does not necessarily mean that a population is strong.

*Comment 3:* We need to reassess our values that place marine mammals above human concerns.

*Response:* A primary purpose of section 118 of the MMPA is to provide an exemption for commercial fisheries so they may accidentally seriously injure or kill marine mammals incidental to their commercial fishing operations so long as the level of serious injury and mortality does not severely impact marine mammal populations. Without this exemption, fishers could not legally take marine mammals incidental to their fishing operations. This rulemaking is not the appropriate mechanism for reassessing societal valuation of marine mammals. That

issue should be addressed, if appropriate, by Congress.

#### *Comments on Definitions of Fisheries in the List of Fisheries*

*Comment 4:* NMFS should define fisheries based on the effect on marine mammal stocks, not artificial criteria such as state boundaries.

*Response:* NMFS will, whenever possible, define fisheries the way they are defined in federal, regional, or state fishery management programs. This will (1) help which NMFS fulfill its statutory obligations by coordinating registration under the MMPA with existing fishery management programs, (2) provide a "common name" for a fishery that can be used by NMFS, fishers, and state and regional fishery managers, and (3) allow NMFS to more easily collect information on fishery statistics, such as the number of participants, target species, length of fishing season, etc.

#### *Comments on Fishery Classification Criteria*

Many public comments were received requesting clarification on how fishery classification criteria were applied. A brief discussion of the two-tier approach is provided, followed by specific comments.

The regulations implementing section 118 include a new fishery classification scheme. The fishery classification criteria consist of a two-tiered, stock-specific approach that first addresses the total impacts of all fisheries on each marine mammal stock and then addresses the impacts of individual fisheries on each stock. Tier 1 considers the additive fishery mortality and serious injury for a particular stock, while Tier 2 considers fishery-specific mortality for a particular stock. This approach is based on the rate, in numbers of animals per year, of serious injuries and mortalities due to commercial fishing relative to a stock's PBR level. A more extensive explanation of NMFS' two-tiered approach is found in the EA for the proposed rule.

*Tier 1:* If the total annual mortality and serious injury across all fisheries that interact with a stock is less than or equal to 10 percent of the PBR level of such a stock, then all fisheries interacting with this stock (and no other stocks that do not fit this criteria) would be placed in Category III. Otherwise, these fisheries are subject to the next tier to determine their classification.

*Tier 2—Category I:* Annual mortality and serious injury of a stock in a given fishery is greater than or equal to 50 percent of the stock's PBR level.

*Tier 2—Category II:* Annual mortality and serious injury is greater than 1 percent and less than 50 percent of the stock's PBR level.

*Tier 2—Category III:* Annual mortality and serious injury is less than or equal to 1 percent of the PBR level.

The threshold between Tier 1 and Tier 2 was set at 10 percent of the PBR level based on the recommendation of individuals at a PBR Workshop held in La Jolla, California in June 1994. The Workshop Report indicated that if the total annual incidental serious injury and mortality level for a particular stock did not exceed 10 percent of the PBR level, the amount of time necessary for that population to achieve OSP would only increase by 10 percent. Thus, 10 percent of the PBR level for a particular stock was equated to "biological insignificance."

The threshold between Category II and III was set at 1 percent of PBR. This threshold resulted from working group discussions that supported the Tier 1 threshold to be 10 percent or less. Because there are situations where as many as 10 fisheries may be responsible for serious injuries and mortalities from the same marine mammal stock, 1 percent was used as the threshold between Category II and III fisheries.

The threshold between Category I and Category II fisheries was set at 50 percent of the PBR level. Although the working session recommended 30 percent as the threshold, during the preparation of the proposed rule NMFS determined that 30 percent was more conservative than required. The proposed threshold was then increased to 50 percent.

*Example:* Suppose Fishery A, B, and C have annual mortality and serious injury levels of 1 percent, 8 percent, and 12 percent of the PBR level for a particular stock, respectively, and these fisheries do not interact with any other stocks of marine mammals. Because the additive percent take relative to the PBR level for all three fisheries is 21 percent, all three fisheries would meet the Tier 1 criteria and be subject to classification under Tier 2. Under the Tier 2 criteria, Fishery A would be placed in Category III, and Fisheries B and C would be placed in Category II.

*Comment 5:* The dividing line between Category I and II fisheries should be changed to 30 percent of the PBR level. The more conservative 30 percent dividing line is warranted because there are only a few fisheries where both PBR level and estimated fishing mortality are known with some degree of confidence and because reductions in NMFS appropriations are likely to severely hamper research and

implementation, further confounding NMFS's ability to gather accurate estimates of PBR levels and total fishing mortality. In all other cases NMFS must use logbooks and anecdotal information which represent only a minimum indication of total removal levels. The more conservative 30 percent dividing line will guarantee that marginal fisheries are included in Category I where observation of such fisheries are a greater priority.

*Response:* The 2-tier approach to classifying fisheries first considers combined fisheries impacts on a marine mammal stock and then considers the contribution of each individual fishery impacting a stock. If the combined impact of all fisheries on a particular stock are below 10 percent of the PBR level then that stock is placed in Tier 1. All fisheries impacting Tier 1 stocks receive a Category III classification regardless of whether their individual impacts are above 1 percent of the PBR level. If the combined impact of all fisheries on a particular stock is above 10 percent of the PBR level then that stock is placed in Tier 2. Only those fisheries impacting Tier 2 stocks are required to meet the 1 percent of the PBR level threshold in order to receive a Category III classification. Under this 2-tier approach, the biological significance level of 10 percent of PBR is the first standard used to classify fisheries. Consequently, fisheries are not required to meet the Tier 2 Category III threshold of 1 percent of the PBR level unless the combined fishery-related impacts on the marine mammal stock are above the biological significance level of 10 percent of the PBR level.

*Comment 6:* The 50 percent of the PBR level dividing line between Category I and II fisheries is appropriate because there are already enough conservative assumptions built into the Category I classification.

*Response:* NMFS agrees. The threshold between Category I and II fisheries has been retained at 50 percent.

*Comment 7:* Five percent of the PBR level is a more reasonable and practical dividing line between Categories II and III fisheries. In the EA for the proposed rule there is little discussion about the need for so strict a standard and no justification for dismissing an alternative threshold of 5 percent of PBR. A June 1994 NMFS workshop on the PBR level has already concluded that fishery takes from a marine mammal stock should be considered insignificant if they are less than 10 percent of the PBR level.

*Response:* The dividing line chosen for the proposed rule was based, in part,

on information from the Seattle Working Session where it was discussed that the cumulative fishery incidental serious injuries and mortalities should be under 10 percent and individual fishery takes should be under 1 percent. Also see general description of the two-tiered scheme at the beginning of this section of the preamble.

*Comment 8:* In many Category II fisheries with high levels of fishing effort, the low levels of marine mammal take shown in the EA suggest random accidents. In some instances, fisheries make hundreds of thousands of sets and still take less than one marine mammal per year. An extreme level of disruption may be required for some of these fisheries to reach take levels below 1 percent of the PBR level. In some cases, it may even be impossible to reach the 1 percent of the PBR level where fisheries interact with marine mammal stocks with low PBR levels.

*Response:* The fishery classification criteria in the final rule consider the incidental serious injury and mortality of marine mammals in commercial fisheries on a stock-specific basis to allow for management of marine mammal takes using a "weakest stock" approach. The population level and status of each marine mammal stock that interacts with fisheries is specific to that stock. Thus, the level of take each marine mammal population can withstand, while still allowing the population to attain OSP, is also stock-specific. For instance, because the minimum population size of North Atlantic right whales is 295 animals, the number of animals that can be removed from this population by commercial fishing while allowing the population to attain OSP is 0. In addition, because the minimum population size of harbor seals (Oregon/Washington coast stock) is 28,322, the number of animals that can be removed from this population by commercial fishing while allowing the population to attain OSP, is 1,699. Thus, a small take of right whales ( $\leq 1$  per year) would have a significant negative effect on the population, whereas a similar take of the Oregon/Washington coastal stock of harbor seals would not. The chosen approach allows NMFS to focus management actions where fishery interactions have a significant negative effect on the population.

*Comment 9:* If the 1 percent dividing line between Category II and Category III fisheries is used, ridiculously low levels of takes (less than one per year) will shift some otherwise non-interacting fisheries from Category III to Category II. Therefore, fisheries with takes below some absolute threshold, such as one animal per year, should be considered

Category III fisheries and to have met the ZMRG as long as their take does not exceed the 10 percent of the PBR insignificant take level established in the rule. Classifying fisheries that have average takes below one animal per year as Category II draw government attention and resources away from real concerns with Category I and legitimately classified Category II fisheries.

*Response:* See response to Comment 8 regarding the significance a low level of take may have on a marine mammal population. NMFS recognizes that there are some marine mammal populations that are so small in size (e.g., right whales) that serious injury and mortality of one animal every two years would still have a significant impact on the population.

The definitions of Category II and III fisheries in the final rule include qualitative criteria that allow the Assistant Administrator for Fisheries, NOAA (Assistant Administrator) to place a fishery into Category II or III after public notice and opportunity for public comment. In the absence of reliable information, this qualitative criteria will allow the Assistant Administrator to take into consideration cases where the PBR level for a particular stock is very low and/or where the level of incidental interaction with commercial fisheries is low and not likely to delay the population's attainment of OSP.

*Comment 10:* The classification system should be modified so that fisheries with a high frequency of marine mammal mortality and serious injury across several stocks are included in Category I, even if the mortality rate for each individual stock is below 50 percent of the PBR level.

*Response:* In order to address fisheries with a high frequency of marine mammal mortality and serious injury across several stocks, the fishery classification criteria would need to be a combination of those under the old section 114 and the new criteria. This option was considered in the EA. The EA examined hypothetical fishery classification criteria which would be based on per-vessel takes of all marine mammals per 20 days and on annual take of a specific stock relative to the PBR level.

To use this approach, NMFS would need fairly good estimates of fishing effort, marine mammal population sizes, and annual and per-20 day levels of incidental serious injuries and mortalities. Because the MMPA Amendments have eliminated logbooks from the requirements for Category I and II fisheries, fishing effort in unobserved

fisheries will no longer be quantified on a daily basis and a per-vessel per 20-day take rate for all marine mammals would be difficult to calculate.

While some fisheries have takes of many different species or stocks of marine mammals, NMFS believes that limited agency resources should be directed towards those fisheries that have "biologically significant" takes of particular stocks of marine mammals. Accordingly, this approach was rejected.

*Comment 11:* The fishery classification criteria should be made more flexible by including examinations of both the number of serious injuries and mortalities relative to the PBR level and the rate of serious injuries and mortalities per vessel, per day.

*Response:* This approach is addressed in the EA. The primary difficulty with adopting any fishery classification criteria which depends on a per-vessel/per-day rate is NMFS' inability to collect effort data from commercial fisheries.

Under section 114 of the MMPA, logbooks were completed by commercial fishers in Category I and II fisheries. These logbooks provided NMFS with a rough estimate of the level of effort for each fishery. NMFS was also able to use landings data in a number of state/federal fisheries to calculate effort under section 114. Under section 118, fishers must only report injury and mortality of marine mammals, but not effort. While observers in Category I and II fisheries may record effort data, in many fisheries, the sample size is so small that the information is inadequate to allow NMFS to compute a per vessel, per day take rate for the fishery as a whole.

*Comment 12:* The proposed classification system could allow a fishery to be moved from Category I to Category II by subdividing it into two or more fisheries.

*Response:* Although a subdivision could potentially move a fishery from Category I to II, because of the stringent criteria for Category III fisheries, it is unlikely that dividing a fishery could place part of that fishery in Category III. Moreover, the practical differences between Category I and II fisheries are small; fishers in both categories must register, carry observers if requested by NMFS, and comply with take reduction plans.

NMFS could decide to subdivide a fishery if available information indicates that some part of the fishery has a higher frequency of marine mammal incidental serious injury and mortality. This would have a beneficial impact in that it would focus management actions

on that part of the fishery that has the greatest impact on a marine mammal stock.

*Comment 13:* NMFS should clarify how it will classify fisheries where the PBR level for a marine mammal stock incidentally taken in a fishery is zero or not available.

*Response:* In general, fisheries were classified based on the marine mammal stock with the highest number of mortalities and serious injuries relative to the PBR level. If takes of a marine mammal stock occurred for a stock with a zero PBR level, that stock was placed in Category I (> 50 percent of the PBR level). If takes of a marine mammal stock occurred for a stock where the PBR level was not available, the stock with the highest number of takes relative to a known PBR level was used to classify the fishery.

*Comment 14:* The Category III fishery definition should be amended to allow observer monitoring of Category III fisheries in order to see whether further reductions in marine mammal kills can be made by these fisheries.

*Response:* Section 118 of the MMPA does not allow NMFS to allow observer monitoring of Category III fisheries unless the Assistant Administrator believes the incidental mortality and serious injury of marine mammals occurring in the fishery will have a immediate and significant adverse impact on a species listed under the ESA, emergency regulations have been published, and a determination has been made regarding whether the fishery should be included in a Take Reduction Plan. By their classification in Category III, NMFS believes that, generally, further reductions in marine mammal mortality are not necessary.

*Comment 15:* The Category III fishery definition should be restricted to fisheries in which the collective take with all other fisheries is less than 10 percent of a stock's PBR level "and" that fishery by itself is responsible for the removal of 1 percent or less of that stock's PBR level.

*Response:* NMFS has determined that the definition of Category III fishery should include "or" rather than "and". This will allow fisheries with marine mammal incidental serious injury and mortality of under 1 percent of the PBR level to be placed in Category III.

*Comment 16:* NMFS should not automatically place a fishery into Category II when a stock status or fishery serious injury or mortality information is lacking. This places an additional registration burden on these fisheries. NMFS still has the authority to mandate observer coverage for Category III fisheries if there is a suspected

problem. In addition, NMFS may reclassify fisheries into a different Category if there is a suspected problem.

*Response:* NMFS may only place observers on vessels participating in a Category III fisheries in certain emergency circumstances (see response to Comment 14). Because of this limitation and in order for NMFS to be allowed the opportunity to obtain information needed to most accurately categorize a commercial fishery, new commercial fisheries without reliable marine mammal take statistics will be placed in Category II until enough information is collected to warrant reclassification.

*Comment 17:* It is reasonable to place any fishery not specified in the LOF in the Category II classification until the next LOF is published as this will allow NMFS to obtain registration data and place observers in these fisheries if more information is needed.

*Response:* NMFS agrees. Section 229.2 has been modified to provide guidelines for the classification of fisheries in cases where data do not exist or are not reliable.

*Comment 18:* The definition for both Category II and III fisheries contain qualitative and vague criteria. Using the term "by analogy" without further guidance is ambiguous and contrary to the process NMFS outlines in the preamble. Therefore, the definition of Category II and III fisheries should be changed to read as follows: "In making the determination of the frequency of incidental mortality and serious injury of marine mammals by a commercial fishery, the Assistant Administrator may determine whether the taking is 'occasional' by using observer data extrapolated to estimate a total annual kill log book or other reports by fishers, examination of stranded animals, or by analogy with other fisheries occurring in similar locations or times or having similar gear types or methods for which observer or logbook information exists including consideration of the distribution of marine mammals in the areas."

*Response:* NMFS agrees. The definition is changed to delete the term "analogy" and specify the types of qualitative criteria that may be used to classify fisheries.

*Comment 19:* In fisheries with low rates of observer coverage, the extrapolation of data highlights the need for exceptionally competent observers. A single misstep or improper species identification can adversely impact a fishery. As a case in point, a single observed pilot whale take was used to re-categorize the pelagic long-line fishery. Some believe the observer mis-

identified the animal which could have been a false orca.

*Response:* NMFS observers are well-trained in species identification and, although may mistakes occur, they are rare. Questions such as the pilot whale/false killer whale example may be verified by examining the location of the take; false killer whales occur in the Northern Gulf of Mexico but are rare in the North Atlantic, where the majority of the effort in the longline fishery occurs. In addition, observers undergo extensive debriefing when they return to port to ensure that the observer has correctly identified all species with which the fishing vessel interacted.

*Comment 20:* NMFS should include a new definition, that of "high level of mortality and serious injury across a number of stocks," which would relate to the seriousness of a fishery's interaction with all stocks. The following definition is proposed: "High level of mortality and serious injury across a number of stocks means a Category I fishery which has an annual incidental mortality and serious injury rate that exceeds or equals 30 percent of two or more marine mammal stocks' PBR level."

*Response:* The phrase "high level of mortality and serious injury across a number of stocks" appears in section 118(f)(1) of the MMPA and was used in the preamble of the proposed rule when discussing statutory guidelines for Take Reduction Teams. Because this term will not be used in regulatory text until subpart C of part 229 is developed, it is not necessary to define this term at this time.

*Comment 21:* If observer coverage is focused on those few fisheries that currently have high rates of marine mammal interactions, how will it ever be determined that there is a potential problem in another fishery? Because interactions between marine mammals and fisheries tend to fluctuate from year to year, the potential is there for a fishery not having much marine mammal interaction today but have many interactions in the future.

*Response:* In addition to traditional observer programs and fisher's reports, NMFS may also use stranding data, alternate observer programs that utilize platforms such as aircraft and non-fishing vessels, and other sources of information to determine the level of serious injury and mortality in fisheries, to prioritize observer placement, and to collect information on incidental interactions between commercial fisheries and marine mammals. The observer program will be modified to include both Category I and II fisheries

where reliable observer data are not currently available.

*Comment 22:* Using PBR levels to classify fisheries has several management advantages, but it is only as accurate as the data being used in the PBR level calculations. To establish PBR levels for marine mammals, NMFS assumes its population estimates are accurate. How current are the data NMFS is using to determine population estimates? How is NMFS planning to update population estimates for different stocks, particularly strategic stocks? How often will NMFS update its population estimates for strategic stocks?

*Response:* NMFS recognizes that the regime established under section 118 must be one that minimizes risk to marine mammals. Establishing and maintaining extensive banks of information regarding marine mammal populations and mortality is necessary to minimize restrictions on fishing opportunity. The MMPA directs NMFS to update information on a regular basis, and NMFS has implemented an assessment program that will be as extensive as Congressional appropriations allow.

The assessment program provides information on an annual basis; therefore, some estimates are no more than a year old, whereas other estimates are more than 5 years old. Abundance and mortality estimates are supported based upon the perceived need for information based upon known or suspected status of the population and level of mortality, as well as the age and quality of existing information. Because funding levels cannot be predicted in advance, NMFS cannot give a specific interval for updating information on marine mammals populations status.

*Comment 23:* Commercial passenger fishing vessels should be included in the definition of commercial fishing operations. Many of these vessels routinely sell their catch in addition to receiving a fee for hire.

*Response:* NMFS agrees. Commercial passenger fishing vessels are already included in the definition of "commercial fishing operations" in § 229.2.

*Comment 24:* It appears that marine mammals taken by foreign vessels fishing in proximity to U.S. stocks will be considered as "uncontrollable mortality" and will come "off the top" before NMFS sets PBR levels. American fishermen will again be forced to bear the burden of stock restoration while our foreign counterparts fish unrestricted. These regulations may give our foreign competitors a real incentive to announce large numbers of marine

mammal takes because they would then benefit by minimizing or eliminating U.S. competition in the global marketplace.

*Response:* The calculation of a PBR level for trans-boundary marine mammal stocks was considered on a case-by-case basis. General guidelines for migratory and non-migratory stocks were developed, but were not applied in those instances where the guidelines were inconsistent with what is known about the biology of the marine mammal stock of concern. For migratory stocks, PBR level calculations are generally based upon the portion of a stock found (or proportion of a year that a migratory stock spends) in waters under U.S. jurisdiction, and mortalities from foreign fisheries were generally included in the estimate of total mortality but not in the estimate of fishing mortality. For non-migratory stocks, the PBR level was calculated based on the abundance estimate of the stock residing in waters under U.S. jurisdiction. Restricting PBR calculations in such a manner was necessary because NMFS can only regulate incidental mortality and serious injury only within waters under U.S. jurisdiction. Because mortality and serious injury incidental to foreign fishing operations outside the U.S. EEZ do not affect the status of the stock (strategic vs. non-strategic) or the estimate of fishing mortality, the PBR approach will not effect the ability of U.S. fishers to compete with foreign fishers.

#### *Comments on the Prohibition on Intentional Lethal Take*

*Comment 25:* Some fisheries are facing increasing loss of gear and catch because they are no longer able to shoot at marine mammals to deter them. The law should be changed so that fishermen can again protect their catch and gear.

*Response:* The MMPA, as amended in 1994, prohibits intentional lethal taking for protection of gear and catch; however, non-lethal means of deterring predation by marine mammals are permissible, provided they are consistent with guidelines issued by NMFS pursuant to section 101(a)(4).

*Comment 26:* Where exclusion of previously documented levels of intentional lethal taking results in placing a fishery in a lower category than under the interim exemption program, NMFS should monitor the fishery sufficiently to detect and respond to any illegal intentional taking until such time as is justification for concluding that little, if any, illegal taking is occurring.

*Response:* NMFS will monitor fisheries to the extent possible given appropriations limits and consistent with the priorities for observer coverage mandated by section 118(d)(3) and (4) of the MMPA.

*Comment 27:* NMFS should clarify whether it believes that the prohibition on intentional lethal taking will result in a reduction of an elimination of intentional lethal taking. If only a reduction in taking is expected, NMFS should indicate whether and how such taking will be considered when classifying fisheries.

*Response:* Section 118 requires NMFS to classify fisheries based solely on incidental serious injury and mortality. Since Congress specifically provided for incidental serious injury and mortality in section 118 but at the same time prohibited intentional lethal taking, NMFS concludes that Congress did not intend for intentional lethal taking to be considered a form of incidental serious injury or mortality. Thus, for purposes of classifying fisheries based on incidental serious injury or mortality, NMFS will not consider intentional lethal taking when classifying fisheries under section 118.

#### *Comments on the Requirements for Category I and II Fisheries*

*Comment 28:* In § 229.4(b)(4) of the proposed rule, it is unclear whether the "fisher" is the owner or the operator or both. This should be clarified in the final rule.

*Response:* "Fisher" is defined in § 229.2 as the vessel owner or operator; thus, fisher may mean both owner and operator. In general, "fisher" is a gender-neutral term that applies to any person who fishes.

*Comment 29:* Section 229.4(b)(5) of the proposed rule requires the owner of a vessel to give the time, duration and location of any Category I and II fishery he/she will be participating in during the year. Unfortunately, few if any fisheries lend themselves to this type of detail, except in very general terms. The timing of many openings and closures are totally dependent on how quickly quotas are taken or how quickly prohibited species caps are reached. Through no fault of the owner, the information provided when registering for an Authorization Certificate may be highly inaccurate. Given NMFS's ability to revoke or suspend Certificates, this puts owners at great risk. NMFS should reconsider the need for this provision or more precisely specify the level of detail needed to comply.

*Response:* This information requirement is specified in the MMPA. The term "approximate" that precedes

"time, duration, and location of such fishery operations" in the regulatory text provides flexibility for fishers that may not know the precise detail of his/her fishing operations in the coming year. The LOF which will be published each year by NMFS provides a general descriptive title (e.g., "Prince William Sound set gill net" or "U.S. coastal mid-Atlantic gill net") for each fishery which may assist fishers in meeting the information requirements of registration. When registering for an Authorization Certificate, fishers should review the LOF and use the descriptive titles of the Category I or II fisheries in which they plan to participate. The fisher should provide NMFS with the best estimate of information on the time and duration of the fishing effort if precise details are unknown.

*Comment 30:* It is unclear whether the Authorization Certificates and decal requirements (§ 229.4(f)) are directed toward owners, vessels or both. The relationship between vessel and owner with respect to the Certificates should be clarified.

*Response:* The Authorization Certificate and decal requirements apply to the owners or operators of the vessels engaged in the fishery. In nonvessel fisheries, they apply to the owners or operators of the gear. For purposes of § 229, the term "fisher" is used as a gender-neutral term which means the vessel owner or operator or, in nonvessel fisheries, the owner or operator of the gear.

*Comment 31:* The language in the proposed § 229.4 should be modified to indicate the statutory directive that NMFS "shall" integrate and coordinate registration under section 118 of the MMPA with existing state and Federal fishery management systems. For some fisheries (e.g., those in Alaska), all aspects of incidental take management should be coordinated with existing programs. Assurance should be provided that effective coordination will occur.

*Response:* NMFS agrees. The language in § 229.4 has been modified to reflect the statutory language.

While NMFS is under statutory obligation to coordinate registration systems with existing fishery management programs when possible, no similar obligation exists for reporting of takes, observer programs, or enforcement.

NMFS Regional Offices are in the process of coordinating registration under the MMPA with existing state and Federal fishery management programs. NMFS recognizes that each region and each state will likely proceed with the coordination process at a different rate.

When coordination in any one area is achieved, a notice to this effect will be published in the **Federal Register** accompanied by instructions regarding how and with whom fishers will be required to register.

*Comment 32:* NMFS should clarify that registration covers only those fisheries in Category I and II identified in the registration form or added to the authorization later. NMFS should also explain how and where vessels should register if they intend to participate in several fisheries.

*Response:* One registration per vessel would be required and would cover all Category I and II fisheries in which the vessel participates during the calendar year. The registration will cover only those fisheries in Category I and II identified in the registration form (§ 229.4(b)(4)) or later added to the authorization (§ 229.4(f)(4)). Regardless of where they live and unless otherwise instructed, fishers should register with the NMFS region where the fishery occurs.

*Comment 33:* NMFS should clarify that a renewal form must be submitted prior to engaging in a Category I or II fishery.

*Response:* Pursuant to § 229.4(e), Authorization Certificates will be renewed annually, after receipt of an updated registration form, required fee, and statement (yes/no) regarding whether any marine mammals were injured or killed during the previous calendar year.

*Comment 34:* NMFS should clarify that vessels participating in Category III fisheries would be required to report incidental injuries and mortalities even though they are not required to register. The timing requirements of section 118(e) are applicable to vessels participating in Category III fisheries; thus, reports must be submitted to NMFS with 48 hours of the end of the fishing trip during which the take occurred.

*Response:* Pursuant to § 229.6(a), all commercial fishers must report marine mammal incidental mortalities and injuries regardless of which fishery they participate in.

*Comment 35:* NMFS should eliminate any ambiguity that marine mammal takes other than mortalities and injuries need to be reported.

*Response:* If an interaction between a marine mammal and commercial fishing operations does not result in a mortality or an injury as defined in § 229.2, the fisher need not report the interaction.

*Comments on the Definitions of Fishing Trip and Fishing Vessel*

*Comment 36:* In the proposed rule, fishing trip is defined as "any time spent away from port actively engaged in commercial fishing operations. The end of a fishing trip will be the time of a fishing vessel's return to port." This definition may not cover nonvessel commercial fishing operations such as set gillnet, trap, beach seine, weir, ranch and pen fisheries. Section 229.6 of the proposed rule stipulates that "nonvessel fisheries, [must report] within 48 hours of an occurrence of an incidental mortality or serious injury." Based on this requirement, the following text should be added to the definition of fishing trip: "The end of a fishing trip will be the time of a fishing vessel's return to port or the return of a fisher from tending gear in a nonvessel fishery."

*Response:* Section 229.2 has been modified to clarify the definition of fishing trip as applied to nonvessel fisheries.

*Comment 37:* NMFS should include two important elements in the definition of fishing vessel that were included in the draft document. These elements are: (1) All vessels that have valid fishing permits issued in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (Magnuson Act), and (2) all vessels aiding or assisting one or more vessels at sea in the performance of any activity related to fishing.

First, it is important, where possible, for the definitions in the MMPA to be consistent with the Magnuson Act. Second, the MMPA states that NMFS is not required to place an observer on a Category I or II vessel if statistically reliable information can be obtained from observers on processing vessels to which Category I or II harvesting vessels deliver a catch that has not been taken onboard the harvesting vessel. While it is clear that the harvesting vessel has taken a marine mammal and therefore must be registered and have an Authorization Certificate, it is not clear whether the act of a processing vessel "taking on board" a marine mammal as part of the catch of the harvesting vessel constitutes a "take" under this section. It stands to reason that if NMFS intends to place observers on processing vessels, those vessels should be registered and included in the definition of a "fishing vessel".

*Response:* The proposed rule would define "fishing vessel" as "any vessel, boat, or other craft that is used for, equipped to be used for, or of a type normally used for fishing." This

definition is broad enough to include vessels that have valid fishing permits issued under section 204(b) of the Magnuson Act. The definition of "fishing vessel" is carried forward from the proposed rule unchanged.

*Comments on Reporting Requirements and the Definition of Injury*

*Comment 38:* The requirement that all entanglements must be reported as injuries is excessive and unnecessarily burdensome. What standards will NMFS use to determine whether a reported entanglement will be considered a serious injury and be counted as a lethal take?

*Response:* The regulatory text has been modified such that entanglements in fishing gear are not by themselves considered injuries. The regulatory text instead states that marine mammals released trailing gear will be considered injured.

Section 118 of the MMPA as amended in 1994 includes both the term "injury" and the term "serious injury". These terms are used in different portions of section 118. According to the MMPA, fishers must report the occurrence of an injury to a marine mammal incidental to commercial fishing operation, whereas fisheries must be classified based on the number of occurrences of incidental mortalities and serious injuries.

"Injury" is defined in great detail because the fisher must be provided with objective criteria in order to determine whether an incidental interaction with a marine mammal constitutes an injury and, hence, whether a report of interaction needs to be submitted to NMFS. The fisher will be asked to describe the injury on the reporting form using the different descriptions of injury included in the definition.

"Serious injury" is defined more generally to recognize that not all incidental injuries to marine mammals incurred during the course of commercial fishing are likely to result in a mortality. Injuries reported by fishers will be analyzed, taking into consideration the type of fishing gear and the marine mammal species affected, to determine which are indeed serious injuries. For instance, hooking a baleen whale in its mouth may not produce a serious injury, yet hooking a harbor porpoise in this manner may produce a serious injury. The number of incidental serious injuries of marine mammals in a fishery would then be combined with the number of incidental mortalities to determine total removal levels for each fishery.

*Comment 39:* Expand the preamble to indicate how NMFS will determine whether an injury is serious.

*Response:* NMFS is currently developing guidelines for determining whether a reported injury constitutes a serious injury. NMFS expects that this will be done on a fishery-by-fishery, case-by-case basis.

*Comment 40:* There is a discrepancy between the definition of serious injury in the proposed rule and in the proposed deterrence regulations that needs to be addressed. The deterrence regulations imply that serious injuries include anything that breaks the skin or is directed at the head or eyes of a marine mammal.

*Response:* The proposed deterrence guidelines published in the **Federal Register** on May 5, 1995 (60 FR 22345) detailed methods of deterrence that NMFS believes can be used safely, without risk of causing serious injury or death to a marine mammal. In the proposed guidelines, methods such as prodding an animal with blunt poles, herding them with plywood, or canvas, or using some light explosives, should not break the skin of an animal or be directed toward an animal's head or eyes. The intent there was to avoid, to the extent possible, deterrence activities that could result in the serious injury or death of a marine mammal.

The proposed deterrence guidelines do not imply that anything that breaks the skin or is directed at the head of a marine mammal, constitutes a "serious injury." To the contrary, the approach taken in the guidelines is consistent with the proposed delineation between the definition of "injury" and "serious injury" in this rulemaking. The guidelines conservatively seek to restrict activities that could lead to a serious injury or death, and breaking an animal's skin or poking at its head or eyes are thought to pose risk of "injury" that could very well result in serious injury or death.

*Comment 41:* What standards will NMFS use to review anecdotal reports?

*Response:* Under the final rule, in the absence of other information, anecdotal reports may be used to classify commercial fisheries. These reports will be reviewed by the NMFS Regional Offices to determine reliability. Reports will be considered a source of reliable information if (1) two or more individuals witnessed the interaction, (2) a NMFS employee or contractor witnessed the interaction, or (3) a single, reliable person is willing to have his/her name affiliated with the report. Unverified rumors will not be used to categorize a fishery.

*Comment 42:* It is appropriate for NMFS to require the reporting of all injuries and entanglements because fishers cannot always differentiate whether an animal is injured or seriously injured, especially an animal that is trailing gear.

*Response:* NMFS agrees.

*Comment 43:* The system of incentives established by defining any entanglement as injury could result in more marine mammal mortalities, not less, since reports of marine mammal entanglement will be used to classify fisheries. As a consequence, fishers will know that any animal they release alive will "count against" them as surely as one that is killed. They will also know that the same marine mammal they release alive in good condition today may come back to "count against" them again tomorrow. Under those conditions, there is little incentive for a fisherman to bear any risk of personal injury to release a marine mammal alive.

*Response:* The definition of "injury" has been revised in this final rule so that entanglements with gear are not considered an injury, except when other signs of injury are present. However, NMFS may request that fishers voluntarily provide information on entanglement to aid in NMFS management of marine mammal interactions with commercial fisheries. This information will not be used in the calculation of annual serious injury and mortality rates.

*Comment 44:* The definition of injury should be amended to include any animal that is released with fishing gear entangling, trailing or perforating any part of the body.

*Response:* NMFS agrees. The definition of "injury" was revised to reflect this concern.

*Comment 45:* The provision under § 229.7(b)(1) in the proposed rule reads: "Record incidental mortality and injury, or bycatch of other target species." However, the provision as stated in section 118(d)(2)(A) of the MMPA uses the term "nontarget species". NMFS should change the provision in the final rule from "target" to "nontarget" to mirror the language of the MMPA.

*Response:* NMFS agrees. Section 229.7(b)(1) has been modified to reflect the statutory language.

*Comment 46:* The logbook requirement should not be dropped from the new regulations because logbooks provide NMFS with important management data to track kills of marine mammals by fishing vessels.

*Response:* The MMPA, as amended in 1994, no longer requires fishers to submit logbooks as previously

mandated for participants in Category I or II fisheries under the Interim Exemption Program. However, all fishers are required to report any mortality or injury that occurs incidental to commercial fishing operations. Although these reports do not provide information on day-to-day fishing effort, they will provide information on marine mammal removal levels incidental to each fishery.

*Comment 47:* The new postcard method of reporting takes and injuries of marine mammals is preferable to the old method of requiring fishers to maintain a marine mammal log. Most fishers already complete fishing logbooks for NMFS or state fisheries agencies. These agencies should be able to share the effort data currently requested in the marine mammal logs.

*Response:* NMFS agrees. NMFS Science Centers are currently using information on fishery effort obtained from fishing logbooks, and will expand this capability as more logbooks become available.

*Comment 48:* NMFS should provide an identification key to help fishers identify marine mammal species and report interactions more accurately.

*Response:* NMFS is currently preparing region-specific guides to aid in the identification of marine mammals and will make them available to fishers.

*Comment 49:* Self reporting on postcards will fail. Fishers recognize that NMFS only uses data to their detriment. Therefore, few if any, takes will be voluntarily reported.

*Response:* All fishers are required by the MMPA to report, within 48 hours of returning to port, any injury or mortality of a marine mammal that occurred incidental to commercial fishing operations. If a fisher in a Category I or II fishery fails to report an incidental injury or mortality, the Assistant Administrator is required to suspend or revoke the fisher's authorization to take marine mammals. If a fisher does not have a valid authorization and a marine mammal take occurs, the fisher may be subject to civil or criminal penalties.

*Comment 50:* The proposed rule states that NMFS may determine that a stock is strategic if it is declining and likely to be listed under the ESA. NMFS should expand this discussion to provide guidance as to when listing under the ESA would be considered likely.

*Response:* Whether a listing of a marine mammal stock under the ESA is likely depends on the circumstances specific to each situation and must therefore be analyzed on a case-by-case basis. It is therefore not possible to be more specific at this time.

#### *Comments on Authorization Certificates*

*Comment 51:* The Authorization Certificate section of part 229 should be amended so that Authorization Certificates may specify the terms and conditions of such authorized incidental taking, including any document that modifies the certificate. Examples may be the terms and conditions necessary to implement take reduction plans or emergency regulations (e.g., time/area closures, permits, or fishery specific limits on incidental mortality). This is important as fishers should be aware of any such restrictions.

*Response:* There is no authority under the MMPA, as amended in 1994, to specify terms and conditions in the Authorization Certificate. Restrictions such as time/area closures and fishery specific limits on incidental mortality will be established through the take reduction plans and their implementing regulations. Fishers will be made aware of any such restrictions through announcements in the *Federal Register*, letters, press releases, and other forms of notification.

#### *Comments on Observer Coverage Requirements*

*Comment 52:* Section 229.7(c)(2) of the proposed rule gives authority to the "designated contractor" to tell a vessel owner that they require an observer and § 229.7(c)(3) allows the "designated contractor" to waive the observer requirement. These regulations appear to give extraordinary authority to a "designated contractor", yet do not identify the types of entities who might be contractors or specify how NMFS will designate contractors. Does NMFS intend to designate states or the Coast Guard as contractors, or will private consultants be used? Where does NMFS derive the authority to give contractors the power anticipated by this regulation? At a minimum, NMFS should specify in the rule the guidelines under which contractors will operate, as well as which entity within NMFS will hire them.

*Response:* Section 112(c) of the MMPA authorizes NMFS to "Enter into such contracts \* \* \* or other transactions as may be necessary to carry out the purposes of this title \* \* \* and on such terms as it deems appropriate with any Federal or state agency, public or private institution or other person."

The extent of contractor involvement in observer programs varies considerably among regions and observed fisheries. Some observer programs are operated completely "in-house" by Federal or state agencies. In other programs, responsibilities are

shared between contractors and the managing agency. Finally, in some observer programs, a private contractor may handle virtually all aspects of the program, including monitoring program design, hiring and training of observers, analysis of data and production of reports. In programs operated primarily by contractors, the contractor must have the ability to place observers as necessary to allow for the collection of unbiased and accurate data. In all cases where contractors have been authorized to assign or waive observer coverage for specific vessels, the contractors are bound by the same laws and regulations as the agency, and prohibited from discriminating among vessels. NMFS is currently preparing national guidelines for the hiring of contractors and the placement of observers by contractors.

*Comment 53:* NMFS must obtain more male observers for vessels with little or no accommodations for females aboard. This is primarily a problem for small vessels which may not be able to provide private sleeping and toilet facilities for female observers.

*Response:* NMFS is aware of the unique living conditions and lack of privacy aboard many fishing vessels at sea. However, Federal law prohibits discrimination based on gender, age, national origin, religion or race. NMFS does not discriminate on the basis of sex in either the hiring or the placement of observers. Vessel owners, operators, and crews are expected to reasonably accommodate the needs of female observers. Special circumstances such as the small size of a vessel may mean a different level of accommodation than on a large vessel.

*Comment 54:* Moving observers from one vessel to another at sea is very dangerous without special boarding equipment that many small vessels may not have. Vessels and their crews also face risks if they must come along side at sea for the purpose of transferring observers. Transfers at sea should not be left to the discretion of the observers, many of whom may be inexperienced at sea. Rather, the practice should be discouraged or prohibited. If NMFS allows the practice to continue, the government should provide liability coverage for both the vessels and observers.

*Response:* Observer and vessel safety is a primary concern of all NMFS observer programs, and safety at-sea is one of the most important elements in all observer training programs. However, because conditions and practices within U.S. fisheries vary greatly from region to region, guidelines for observer safety and conduct must be tailored to specific fisheries. It is

currently the responsibility of program managers to establish safety guidelines for observers, including guidelines for such practices such as at-sea transfers which are discouraged except under limited conditions. NMFS is preparing national guidelines to address a variety of safety concerns such as at-sea transfers.

*Comment 55:* The requirement that vessel owners or operators must notify the observer program 5 days prior to sailing impacts the fisher's need to be flexible with regard to weather patterns and other fishing conditions. Also, fishers have found that despite giving 5-days notice, observers are not always available at sailing time.

*Response:* NMFS recognizes the uncertain scheduling inherent in many fisheries. However, advance notification is essential in order for program managers to be able to randomly place observers on vessels.

*Comment 56:* Many vessel owners and operators are concerned with potential liability for carrying observers. NMFS should resolve the liability issue and use a "willful misconduct" standard against which vessels owners or masters will be measured in the case of injury to an observer.

*Response:* Section 114(e)(7) provided that an observer on a vessel that was ill, disabled, injured, or killed from their service as an observer on that vessel could not bring a civil action under any law of the United States for that illness, disability, injury, or death against the vessel or vessel owner, unless the claim arose from the vessel owner's "willful misconduct." That expiring statutory provision was implemented in NMFS' section 114 regulations at 50 CFR 229.6(c)(3)(vi).

New section 118, which is being implemented by this rulemaking, replaces section 114. Section 118 does not contain a limitation of liability provision similar to the one in section 114(e)(7). Thus, there is no longer a statutory limit in the MMPA on claims that can be made by observers against vessel owners. Therefore, NMFS has no legal authority to include a limitation of liability provision in this rule. Vessel owners concerned about liability for claims made by observers should consider obtaining liability insurance. The lack of any such coverage is not a basis under the MMPA for refusing to carry an observer if requested by NMFS.

#### *Comments on the Prioritization of Observer Coverage*

*Comment 57:* The prioritization scheme for allocation of observer programs among commercial fisheries should be included in the regulations.

At the minimum, NMFS should specify in the regulations that it will assign observers in accordance with the statutory priorities.

*Response:* Because the prioritization scheme is clearly outlined in section 118(d)(4)(A) - (C) and is not open to NMFS discretion, it is not necessary to repeat the scheme in the regulations.

#### *Comments on the Formation of Take Reduction Teams*

*Comment 58:* NMFS should clarify the time line for the formation of take reduction teams.

*Response:* Take reduction teams must be established and a notice must be published in the **Federal Register** indicating the team's establishment, the names of the team's appointed members, the full geographic range of the stock, and a list of all commercial fisheries that cause incidental mortality and serious injury of marine mammals from the stock within 30 days of the publication of the final Stock Assessment Reports. After establishment of a take reduction team, the time line depends on whether the human-caused mortality and serious injury from a strategic stock is equal to or greater than the PBR level or is less than the PBR level.

Teams addressing takes of marine mammals in a strategic stock where the level of take is greater than or equal to the PBR level must submit draft take reduction plans to NMFS within 6 months of the establishment of the team. Within 60 days of receiving the draft take reduction plan, NMFS must publish in the **Federal Register** the plan proposed by the team, any changes proposed by NMFS, and proposed regulations to implement the plan. These proposed regulations will have a public comment period of up to 90 days. NMFS must issue final regulations not later than 60 days after the end of the public comment period. If the take reduction team does not submit a draft plan to NMFS within 6 months, NMFS must publish a proposed take reduction plan and implementing regulations within 8 months of the establishment of the take reduction team.

Teams addressing takes of marine mammals in a strategic stock where the level of take is greater than or equal to the PBR level must submit draft take reduction plans to NMFS within 11 months of the establishment of the team. Within 60 days of receiving the draft take reduction plan, NMFS must publish in the **Federal Register** the plan proposed by the team, any changes proposed by NMFS, and proposed regulations to implement the plan. These proposed regulations will have a

public comment period of up to 90 days. NMFS must issue final regulations not later than 60 days after the end of the public comment period. If the take reduction team does not submit a draft plan to NMFS within 11 months, NMFS must publish a proposed take reduction plan and implementing regulations within 13 months of the establishment of the take reduction team.

*Comments on Technical Changes to the Publication of the List of Fisheries*

*Comment 59:* Modify the preamble and regulatory text so it is clear that each instance where a fisher engaged in a Category I or II fishery without having registered would constitute a violation of the Act regardless of whether marine mammals were incidentally taken. Add the phrase "or to engage lawfully in any such fishery" to § 229.4(a) after "in a Category I or II fishery \* \* \*."

*Response:* The MMPA authorizes commercial fishers to incidentally take marine mammals subject to compliance with these regulations, but does not authorize commercial fishers to fish. This interpretation is supported in section 118(c)(3)(A) by such phrases as "[a]n owner of a vessel engaged in any fishery in Category I or II shall, in order to engage in the lawful incidental taking of marine mammals in a commercial fishery \* \* \* register with NMFS, display a decal, report takes of marine mammals, and comply with take reduction plans. This language is in marked contrast to the language it replaced in section 114(b)(3)(A), which said "each owner of a vessel engaged in any fishery [in Category I or II] shall, in order to engage lawfully in that fishery \* \* \* register, display a decal, and report. This interpretation is supported by the limited legislative history of section 118. Thus, a violation of the MMPA requirement to comply with section 118 of the MMPA would not subject fishers to charges of illegal fishing under the MMPA. Rather, the fishers would be subject to violating the MMPA if they illegally incidentally took a marine mammal, and for failing to register, report, carry observers, and comply with take reduction plans. Section 229.4(b) was modified to clarify that all participants in Category I and II fisheries must register and receive Authorization Certificates.

*Comment 60:* Incidental mortality and serious injury data should be summarized and included in the proposed and final LOF.

*Response:* This requirement is not included in the MMPA, as amended in 1994. Although the most recent data are used when revising the LOF on an annual basis, inclusion of this data in

the LOF would be cumbersome and unnecessary. This information is generally provided in the preamble accompanying the proposed and final LOF. Current information on take rates is provided in the EA.

*Comments on Penalties*

*Comment 61:* The penalty process described in the preamble to the proposed rule would violate the due process rights of Certificate holders. In addition, the preamble and proposed rule are inconsistent on the remedies NMFS may seek if a Certificate holder fails to submit a required report. The preamble states that NMFS would be able to suspend or revoke a Certificate or deny a Certificate renewal without notice or an opportunity for a hearing if the Certificate holder fails to file a report or fails to take an observer on board as requested. However, § 229.10(g)(1) of the proposed rule provides that the Assistant Administrator shall suspend, revoke or deny renewal of a Certificate in accordance with 15 CFR part 904 in connection with either of those violations.

15 CFR part 904 contains notice and hearing requirements associated with civil penalty and permit sanction actions for MMPA violations, hence, the inconsistency between the preamble and proposed rule. In addition, the NOAA Alaska Regional Counsel prepared a legal analysis on the topic of due process and "reward fisheries". This legal analysis supports these due process requirements for fisheries regulations. NMFS should therefore assure that all permit sanction and penalty actions are conducted in accordance with the notice and hearing requirements of 15 CFR 904.30.

*Response:* The inconsistency between the preamble to the proposed rule and § 229.10(g)(1) had been resolved in this final rule so that compliance with 15 CFR 90 is required.

*Comments on the Exclusion of Treaty Tribe Fisheries*

*Comment 62:* Several commenters objected to the exclusion of Treaty Indian Fisheries from the LOF and the registration requirements contained in these regulations. The commenters felt that the by-catch of marine mammals during treaty fishing activities should not be considered part of the treaty right to hunt and fish and that tribal fisheries and the incidental takes of marine mammals during tribal fishing should be regulated and monitored to conserve marine mammal species.

*Response:* NMFS is issuing these regulations to authorize the otherwise

prohibited taking of marine mammals during commercial fishing operations. However, the rights to fish and hunt are already secured separately for the Northwest Indian tribes pursuant to their treaties with the United States. NMFS reviewed the relationship of the Northwest Indian treaties to the MMPA and did not find clear evidence that Congress intended to abrogate treaty Indian rights. Section 14 of the Amendments to the MMPA (Pub. L. No. 103-238) states "Nothing in this Act, including any amendments to the Marine Mammal Protection Act of 1972 made by this Act—alters or is intended to alter any treaty between the United States and one or more Indian tribes." This provision clarifies that existing treaty Indian fishing rights are not affected by the amendments to the MMPA. Therefore, tribal fisheries are conducted under the authority of the Indian treaties rather than the MMPA, and the MMPA's mandatory registration systems do not apply to treaty Indian fishers operating in their usual and accustomed fishing areas. Since inclusion of the treaty Indian fisheries in the LOF would also establish an obligation to obtain an MMPA registration under section 118, NMFS has deleted reference to tribal fisheries in the LOF. The registration requirement for Category I or II fisheries will not apply to treaty Indian tribes.

In recent years, tribal governments have developed regulations for the management of tribal fishing under the treaties. NMFS and other fisheries regulatory agencies have participated with the tribes during this regulatory development. Several northwest tribes have implemented and others are in the process of developing regulations for the management of tribal activities with respect to marine mammals. The tribes have cooperated, and indicate that they will continue to cooperate with NMFS in gathering and submitting data on interactions of their fisheries with marine mammals so that the health of affected stocks can be monitored.

*Comment 63:* Several commenters indicated that tribal fisheries kill depleted species and therefore should be regulated by the government. They cite species listed in previous NMFS LOF as the source of this information.

*Response:* The NMFS LOF, prepared under the Interim Exemption Program, included all species known to be in the area where a fishery is operating, not just species killed in the fishery. The LOF were intended to provide an indication of a potential for involvement but were not intended to imply mortality or confirmation of incidental takes. The LOF for 1996 will indicate

which species are known to interact with fishing gear in the various fisheries based on data collected during the interim program.

There is no indication that tribal fisheries are killing depleted species. In the event that this occurs, the treaty rights principle of "conservation necessity" can be considered, and the Department of Commerce will consult with the Department of Interior regarding the exercise of regulatory authority in order to protect marine mammals.

#### *Comments on Emergency Regulations*

*Comment 64:* The proposed rule allows NMFS to implement emergency actions immediately for up to 180 days. How will NMFS notify fisheries participants, especially those who may be at sea at the time of the emergency action?

*Response:* When emergency regulations are implemented, NMFS regional offices generally publicize them to the greatest extent practicable through such means as press releases to the media and affected industry organizations, faxes, computer bulletin boards and radio announcements, in addition to publication in the **Federal Register**. NMFS believes that these means of notification are sufficient to reach participants who may be at sea at the time of the emergency action.

*Comment 65:* The closure authority in the proposed rule is too great. How can any fisher survive a closure of up to 9 months?

*Response:* NMFS recognizes that the closure authority provided by section 118(g) is considerable. However, section 118(g)(2) requires NMFS to consult with the Marine Mammal Commission, all appropriate regional fishery management councils, state fishery managers, and the appropriate take reduction team (if established) before it may take any action under section 118(g)(2). Moreover, any emergency regulation issued under 118(g) must "take into account the economics of the fishery concerned and the availability of existing technology to prevent or minimize incidental taking of marine mammals." Any emergency regulations issued must, to the maximum extent practicable, avoid interfering with existing state or regional fishery management plans. These consultation requirements will ensure that participants in a fishery will be impacted only when that fishery has severe adverse effects on a marine mammal species.

#### *Comments on the Section 118 Rulemaking Process*

*Comment 66:* The Regulatory Flexibility Act finding in the preamble to the proposed rule states that there will be no significant economic impact as a result of these regulations on a substantial number of small entities. This analysis only looks at the fees charged for Authorization Certificates and does not consider any impacts fishers may face in meeting the ZMRG. There are likely to be significant economic impacts in many fisheries if they are forced to shut down or undergo drastic restrictions to meet the ZMRG.

*Response:* The analysis was limited to the direct costs of the industry compliance with the proposed rule for several reasons. First, the section 118 regulations implement a program relieving fishers from the MMPA's prohibition on the taking of marine mammals. Without the section 118 regulations, fishers would face civil and criminal penalties for every incidental take of marine mammals.

Second, fisheries which have significant removals of strategic stocks of marine mammals will be addressed by take reduction teams. These teams, consisting of members of the fishing industry, environmental community, NMFS, and others as outlined in section 118(f)(6)(C), will work together to develop a plan for reducing bycatch in a manner that is acceptable to all parties. The teams are likely to recommend changes in fishing techniques, time-area closures, or deterrence methods; full closure of a fishery or drastic restrictions in fishing effort would likely be a last resort. Any regulations adopted as a result of take reduction plans would be subject to both E.O. 12866 review and the requirements of the Regulatory Flexibility Act.

*Comment 67:* The period for public comment and public hearings corresponded with the busiest fishing periods for fishers when they are away from home and regular mail service.

*Response:* Because the interim exemption program is scheduled to expire September 1, 1995, NMFS was forced to accelerate the rulemaking schedule in order to have a new management regime in place to govern interactions between commercial fisheries and marine mammals before that date. NMFS regrets that some fishers were not able to attend one of the public hearings, and hopes they took the opportunity to submit written comments on the proposed rule.

*Comment 68:* Why are there no public hearings south of North Carolina in the

Atlantic nor any in the Gulf of Mexico? Fisheries from those regions are covered under the regulations and should have an opportunity to comment on the proposed regulations.

*Response:* Hearing locations and dates were scheduled by NMFS managers at regional offices and science centers throughout the country. Because there is no appreciable effort by Category I or II fisheries in the Gulf of Mexico, hearings were concentrated in other regions where fishers will be more directly impacted by the rule. In any event, fishers from all regions of the United States were encouraged to submit written comments during the 45 day comment period for the proposed rule.

*Comment 69:* NMFS' notice of public hearings was inadequate. Many fishers received 2 days notice of the closest hearing, which was still some 300 to 500 miles away.

*Response:* See responses to comments 67 and 68.

*Comment 70:* Longliners are most active when the moon is full and fishing is best. Therefore, public hearings involving longliners should only be scheduled during the dark half of the moon.

*Response:* See response to comment 67.

#### *Comments on Takes of Threatened and Endangered Marine Mammals*

*Comment 71:* Section 229.20(a)(3)(i) should require that all vessels interacting with threatened or endangered marine mammals be subject to observer coverage regardless of fishery category.

*Response:* There is no authority in the MMPA, as amended, to require full coverage regardless of fishery category. However, the highest priority for allocation of observers are those fisheries that have incidental mortality or serious injury of marine mammals listed as threatened or endangered under the ESA.

*Comment 72:* It is unclear from the proposed rule how NMFS proposes to make the determination whether "the incidental mortality and serious injury from commercial fisheries will have a negligible impact on such species or stock (§ 229.20(a)(1)). Is NMFS considering a quantifiable biological level of incidental mortality and serious injury relative to the PBR level?

*Response:* NMFS is considering both quantitative and qualitative factors in its approach. There will be a quantitative threshold based on serious injuries and mortalities relative to the PBR level. If serious injuries and mortalities of a particular marine mammal stock are over that threshold, a qualitative

assessment of the level of take relative to that threshold will then be conducted. Factors that NMFS will consider in a qualitative manner may include, but will not be limited to, confidence in the marine mammal population estimate and the resulting PBR level, confidence in the status of the marine mammal population, confidence in the level of marine mammal take in a fishery, and the cumulative impact of all fishery takes on a stock.

*Comment 73:* NMFS should not allow incidental takes of threatened or endangered marine mammal species because it will be too easy to claim that deliberate or careless taking of these species was merely "incidental".

*Response:* The MMPA, as amended, provides NMFS with the authority to issue permits to fishers for taking in specific fisheries of species listed under the ESA as long as (1) takes have a negligible impact on the marine mammal stock, (2) a recovery plan has been developed or is being developed, and (3) where required under section 118, a monitoring program is established, vessels engaged in such fisheries are registered, and a take reduction plan has been developed or is being developed. Each fishery that has takes of ESA-listed species or stocks will be carefully scrutinized by NMFS to determine whether the takes can be considered negligible.

*Comment 74:* NMFS should clarify that, in addition to being able to modify, suspend, or revoke the incidental take authority for endangered and threatened species when the level of taking is more than negligible, NMFS may also invoke section 101(a)(5)(E)(ii), which allows NMFS to use the emergency authority of section 118 to protect the species or stock.

*Response:* Pursuant to §§ 229.20(e) and 229.9, NMFS may use emergency regulations in addition to being able to modify, suspend, or revoke the incidental take authority for endangered and threatened species when the level of take is later found to be more than negligible.

*Comment 75:* The information upon which negligible impact findings under section 101(a)(5)(E) will be made is not provided in sufficient detail for informed comments to be made. Therefore, NMFS should publish a notice that clearly describes the stocks and fisheries for which it proposes to make a finding of negligible impact and explain the basis for the proposed determinations.

*Response:* NMFS agrees that information included in the proposed rule and EA was insufficient to promote

informed comments. However, NMFS was unable to provide a complete analysis of stocks listed as endangered or threatened under the ESA on a fishery-by-fishery basis in a time frame that would not delay publication of the proposed rule. Therefore, NMFS will publish a separate interim final notice that includes a list of fisheries that have met the criteria listed under section 101(a)(5)(E)(i) of the MMPA and that will explain, in greater detail, the process by which negligible impact determinations have been made. The public will have an opportunity to comment on the list of fisheries that will be authorized to take endangered and threatened species, as well as the process used for determining that serious injuries and mortalities due to commercial fishing are indeed negligible. NMFS expects to publish this interim final rule in the *Federal Register* by September 1, 1995.

#### *Comments Recommending Technical Changes to the Regulatory Text*

*Comment 76:* NMFS should clarify in § 229.1(c) that the taking of species listed as depleted under the MMPA, as well as those listed as threatened or endangered under the ESA, are governed by section 101(a)(5)(E)(i) of the MMPA.

*Response:* NMFS does not agree. Section 101(a)(5)(E)(i) of the MMPA applies only to a species designated as depleted because of its listing as threatened or endangered under the ESA. Thus, species listed as depleted through the procedures in section 115 of the MMPA, but not also listed as threatened or endangered under of section 4 of the ESA are not subject to the requirements of section 101(a)(5)(E)(i) of the MMPA and are only subject to the requirements of section 118.

*Comment 77:* NMFS should add mention of the short-term goal to § 229.1(g) to reflect the statutory goals to reduce mortality and serious injury to below PBR.

*Response:* NMFS agrees. The regulatory text was modified to this effect.

*Comment 78:* NMFS should further clarify the definition of "interaction" by specifying that the marine mammal must come into contact with gear or catch.

*Response:* NMFS agrees. The regulatory text was modified to this effect.

*Comment 79:* The definition of take reduction teams in § 229.2 should be modified to include the word "recommend" instead of "review" to better reflect the purpose of the teams.

*Response:* NMFS agrees. The regulatory text was modified to this effect.

*Comment 80:* Expand § 229.3(b) regarding the prohibition on interfering with observers to include attempted interference. This could be completed by rephrasing the second sentence to "This prohibition includes, but is not limited to, any action that interferes with or attempts to interfere with an observer's ability to carry out his or her responsibilities \* \* \*"

*Response:* NMFS agrees. The regulatory text was modified to this effect.

*Comment 81:* In § 229.4(b), NMFS should include a statement to the effect that the specified information must be submitted in a particular format.

*Response:* NMFS agrees. The regulatory text was modified to this effect.

*Comment 82:* In § 229.4(b)(3), NMFS should ask registrants to supply their radio call signs.

*Response:* NMFS has no authority to require fishers to supply this information when submitting a registration form.

*Comment 83:* Modify the language in § 229.4(b)(4) to indicate that fishers should list all fisheries they "may engage in" or "intend to engage in" during the calendar year, as the fisher may not necessarily know all fisheries that they will be engaged in during the upcoming year.

*Response:* NMFS agrees. The regulatory text was modified to this effect.

*Comment 84:* In § 229.4(e), NMFS should specify that renewal of an Authorization Certificate will be contingent upon compliance with other provisions of the incidental take regime, e.g., the reporting requirements, the requirement to carry an observer when requested, etc. Such requirements should also be included in this provision.

*Response:* NMFS agrees. The regulatory text was modified to this effect.

*Comment 85:* Modify § 229.4(j) to clarify that a fisher may only deter a marine mammal if that marine mammal interacts with the fisher's gear or catch, not just any gear or catch.

*Response:* NMFS agrees. Only the owner and/or operator of a commercial fishing vessel or gear in nonvessel fisheries or the designee of the owner/operator may deter a marine mammal if that marine mammal interacts with the owner/operator's gear or catch.

*Comment 86:* Modify § 229.6(a)(4) to require that fishers provide a description of the marine mammal on

the reporting form if the species is uncertain.

*Response:* This provision is already included in § 229.6(a)(4).

*Comment 87:* Modify § 229.6(b) to replace the word "include" with the word "provide".

*Response:* NMFS agrees. The regulatory text was modified to this effect.

*Comment 88:* Modify § 229.7(b)(1) to replace the word "or" with the word "and".

*Response:* NMFS agrees. The regulatory text was modified to this effect.

*Comment 89:* Modify § 229.7(c)(4)(vi) and (vii) to allow observers to collect biological samples from all protected species and not just marine mammals.

*Response:* NMFS agrees. The regulatory text was modified to this effect.

*Comment 90:* Modify § 229.7(c)(4)(viii) to remove the word "commercial" before "fishing operations" so that experimental or other types of fishing will not be excluded.

*Response:* Section 118 of the MMPA, by its terms, applies only to "commercial fishing operations".

*Comment 91:* Modify § 229.7(c)(5) to replace the word "aboard" with "onboard".

*Response:* In this context, NMFS interprets the terms "aboard" and "onboard" to have the same meaning.

*Comment 92:* Modify § 229.7(d)(2) to indicate that the vessel owner and/or operator must comply with the requirements of § 229.7(c).

*Response:* NMFS agrees. The regulatory text was modified to this effect.

*Comment 93:* Modify § 229.8(b)(1) to replace the word "for" with the word "of".

*Response:* NMFS agrees. The regulatory text was modified to this effect.

*Comment 94:* Modify § 229.10(a) to clarify that "any person who violates any regulation under this Part or any provision of section 118 of the MMPA shall be subject to the penalties set forth in the Act."

*Response:* NMFS agrees. The regulatory text was modified to this effect.

*Comment 95:* Modify § 229.10(c) to state that up to \$100 could be fined for each offense.

*Response:* The language in § 229.10(c) is clear as it stands.

*Comment 96:* Modify § 229.10(e) to indicate that, in addition to fishers being subject to suspension, revocation, or denial of their Authorization

Certificate until the requirements have been satisfied, they are also subject to other penalties, such as fines, for the failure to report.

*Response:* NMFS agrees. The regulatory text has been modified to this effect.

#### Other Changes from the Proposed Rule

The following is a list of other changes from the proposed rule that were not previously mentioned in the preamble or response to comments section, or were not made for editorial consistency:

Section 229.1(a) - Replaced "exceptions from the Act's moratorium on the taking of marine mammals incidental to certain commercial fishing operation" with "for exceptions for the taking of marine mammals incidental to certain commercial fishing operation from the Act's general moratorium on the taking of marine mammals" to more precisely state the purpose of section 118 of the MMPA.

Section 229.1(c) - Deleted "this part" and replaced with "Subpart B" to make it clear that this section refers to Subpart B of the section 118 implementing regulations.

Section 229.2 - Deleted "annual" from the last sentence in the definition of a Category II fishery. This will allow NMFS to reclassify a fishery categorized by default into Category II at times other than at the annual review and publication of the list of fisheries.

Section 229.3(f) - Deleted "(f) It is prohibited to willfully discard any fishing gear at sea, in whole or in part." Coast Guard regulations already prohibit the discarding of fishing gear at sea.

Section 229.3(g) - Renumbered this provision as 229.3(f). Add "or any provision of section 118 of the Act" to the end of the existing provision.

Section 229.4(a) - Deleted "may" and replace with "shall" so the sentences reads as follows: "The granting and administration of authorizations under this part 229 shall be integrated and coordinated with existing fishery license, registration, or permit systems and related programs, wherever possible."

Section 229.4(d) - Added "the NMFS Regional Office in the region where the fishery occurs. The addresses of the NMFS Regional Offices are given below:" to specify that fishers should request registration forms and submit completed registration forms to the region in which their fishery occurs.

Section 229.9(c)(1) - Deleted "will take effect immediately upon publication in \*\*\*" and added "Shall be published in \*\*\*" to allow agency

discretion as to when an emergency rule will take effect.

Section 229.10(e) - Added "will subject such persons to the penalties of sections 105 and 107, and may subject them to section 106, of the Act" to make this section read: "requirements to carry an observer, will subject such persons to the penalties of sections 105 and 107, and may subject them to section 106, of the Act and will result in suspension, \* \* \*." This change is necessary to parallel § 229.10(f), so that it is clear that fisheries in all categories will be subject to the penalties of sections 105 and 107, and possibly section 106, of the Act for failure to report, carry observers, display an annual decal, and comply with take reduction plans.

Section 229.10(f) - Replaced "to the full penalties" with "to the penalties of sections 105 and 107, and may subject them to section 106, \* \* \*."

Section 229.20(c) - Added "can be made" to make this sentence complete.

Section 229.20(f) - Delete "temporarily" and add "pursuant to the provisions of 15 CFR Part 904" so the first sentence of this part reads as follows: "The Assistant Administrator may, pursuant to the provisions of 15 CFR Part 904, suspend or revoke a permit granted under this section if the Assistant Administrator determines that the conditions or limitations set forth in such permit are not being complied with."

#### Classification

This action has been determined to be not significant for purposes of E.O. 12866.

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Small Business Administration that, as proposed, this rule would not have a significant economic impact on a substantial number of small entities. The rule establishes a process for issuance of authorizations for the incidental taking of marine mammals while conducting commercial fishing in the U.S. territorial seas, the EEZ and the high seas. Without these authorizations, the taking of marine mammals is prohibited and fishers could be subject to civil and criminal penalties when takings occur in the course of commercial fishing operations. The payment of a fee set to recover the costs of certificate issuance is required to obtain an Authorization Certificate. While the amount of such fee has not yet been determined, it would cost no more than approximately \$30. Approximately 20,000 fishers are currently required to register under the old interim exemption regime and pay

a similar fee. This number is not expected to increase under the new regime.

This final rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

This final rule contains collection-of-information requirements subject to the provisions of the Paperwork Reduction Act. These collections have been approved by OMB under OMB control numbers 0648-0224 and 0648-0225.

The average reporting burden for these collections is estimated to be approximately 0.25 hours for each of approximately 20,000 fishers to register each year and 0.17 hours for each report of marine mammal injury or mortality. Because fishers are required by section 118(e) of the MMPA to submit a report for marine mammal injuries or mortalities at the end of each fishing trip, there may be multiple reports required per fisher.

The Assistant Administrator finds that it is unnecessary to delay for 30 days the effective date of most of the provisions of this final rule, because under 5 U.S.C. 553(d), this rule relieves a restriction, constitutes statements of agency policy, or good cause exists to waive the 30 day delay because a delay would be contrary to the public interest.

Without this rule, all takes of marine mammals incidental to commercial fishing operations would subject fishers to civil or criminal penalties as of Sept. 1, 1995. This rule provides for the authorization of such takes, relieving a restriction that would otherwise be imposed on commercial fishers. The provisions of sections 229.1 (Purpose and Scope) and 229.2 (Definitions) are statements of agency policy and/or related to relieving a restriction. Delay in their effective date is unnecessary in that it would serve no useful purpose. Section 229.3 (Prohibitions) in large part repeats statutory prohibitions or restates existing prohibitions under earlier regulations. Delay in its effective date is unnecessary in that it would serve no useful purpose; moreover, good cause exists for waiving the 30-day delay, because delay would be contrary to the public interest. Sections 229.4 (Requirements for Category I and II fisheries) and 229.5 (Requirements for Category III fisheries) relieve a restriction since they authorize fishers in Category I, II, and III fisheries to lawfully incidentally take marine mammals during commercial fishing operations. Section 229.6 (Reporting) does not become effective until January 1, 1996. Section 229.7 (Monitoring of incidental mortalities and serious

injuries) in large part restates provisions in earlier regulations or repeats statutory requirements. Further, it is directly related to relieving a restriction because the statutory language makes relief dependent on the section's requirements. Section 229.8 (Publication of list of fisheries) is procedural and under 5 U.S.C. 553(d) is not subject to a delay in effective date. Further, in large part it only governs internal agency procedures.

Good cause exists for waiving the 30-day delayed effective date for sections 229.9 (Emergency regulations) and 229.10 (Penalties), since a delay would be contrary to the public interest because the agency would be unable to respond to emergency situations involving alarming numbers of takes of marine mammals and would be unable to assess penalties against persons who violate the provisions of the MMPA. Sections 229.11 (Confidential fisheries data) and 229.12 (Consultation with the Secretary of the Interior) repeat statutory text and state agency policy; a delay in their effective date is unnecessary because it would serve no useful purpose. Section 229.20 (Issuance of permits) authorizing the take of endangered or threatened marine mammals is procedural and, to the effect it is substantive, is related to relieving a restriction by providing a mechanism for authorizing takes of endangered or threatened marine mammals incidental to commercial fishing operations, which would otherwise be prohibited.

#### *National Environmental Policy Act*

The Assistant Administrator for Fisheries, NOAA has determined, based upon an EA prepared in conjunction with the proposed rule under the National Environmental Policy Act, that implementation of these regulations would not have a significant impact on the human environment. As a result of this determination, an environmental impact statement is not required. A copy of the EA is available upon request (see ADDRESSES).

#### **List of Subjects**

##### *50 CFR Part 216*

Administrative practice and procedure, Imports, Indians, Marine Mammals, Penalties, Reporting and recordkeeping requirements, Transportation

##### *50 CFR Part 229*

Administrative practice and procedure, Confidential business information, Fisheries, Marine mammals, Reporting and recordkeeping requirements.

Dated: August 24, 1994.

**Nancy Foster,**

*Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.*

For reasons set out in the preamble, 50 CFR parts 216 and 229 are amended as follows:

#### **PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS**

1. The authority citation for part 216 continues to read as follows:

**Authority:** 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

2. Section 216.24 is amended by removing the phrase, under the Note to § 216.24: "for the period from June 17, 1994, through September 1, 1995".

3. Part 229 is revised to read as follows:

#### **PART 229—AUTHORIZATION FOR COMMERCIAL FISHERIES UNDER THE MARINE MAMMAL PROTECTION ACT OF 1972**

##### **Subpart A—General Provisions**

Sec.

- 229.1 Purpose and scope.
- 229.2 Definitions.
- 229.3 Prohibitions.
- 229.4 Requirements for Category I and II fisheries.
- 229.5 Requirements for Category III fisheries.
- 229.6 Reporting requirements.
- 229.7 Monitoring of incidental mortalities and serious injuries.
- 229.8 Publication of List of Fisheries.
- 229.9 Emergency regulations.
- 229.10 Penalties.
- 229.11 Confidential fisheries data.
- 229.12 Consultation with the Secretary of the Interior.

##### **Subpart B—Takes of Endangered and Threatened Marine Mammals**

- 229.20 Issuance of permits.

##### **Subpart C—Take Reduction Plan Regulations and Emergency Regulations [Reserved]**

**Authority:** 16 U.S.C. 1361 *et seq.*

##### **Subpart A—General Provisions**

###### **§ 229.1 Purpose and scope.**

(a) The regulations in this part implement sections 101(a)(5)(E) and 118 of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1371(a)(5)(E) and 1387) that provide for exceptions for the taking of marine mammals incidental to certain commercial fishing operations from the Act's general moratorium on the taking of marine mammals.

(b) Section 118 of the Act, rather than sections 103 and 104, governs the

incidental taking of marine mammals in the course of commercial fishing operations by persons using vessels of the United States, other than vessels fishing for yellowfin tuna in the eastern tropical Pacific Ocean purse seine fishery, and vessels that have valid fishing permits issued in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)).

(c) The regulations of Subpart B also govern the incidental taking by commercial fishers of marine mammals from species or stocks designated under the Act as depleted on the basis of their listing as threatened species or endangered species under the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

(d) The regulations of this part do not apply to the incidental taking of California sea otters or to Northwest treaty Indian tribal members exercising treaty fishing rights.

(e) Authorizations under subpart A of this part are exemptions only from the taking prohibitions under the Act and not those under the Endangered Species Act of 1973. To be exempt from the taking prohibitions under the Endangered Species Act, specific authorization under subpart B of this part is required.

(f) Authorizations under this part do not apply to the intentional lethal taking of marine mammals in the course of commercial fishing operations.

(g) The purposes of the regulations in this part are to: (1) Reduce the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations below the potential biological removal level for a particular stock, and

(2) Reduce the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate by the statutory deadline of April 30, 2001.

#### § 229.2 Definitions.

In addition to the definitions contained in the Act and § 216.3 of this chapter, and unless the context otherwise requires, in this part 229:

*Act* or *MMPA* means the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*).

*Authorization Certificate* means a document issued by the Assistant Administrator, or designee, under the authority of section 118 of the Act that authorizes the incidental, but not intentional, taking of marine mammals in Category I or II fisheries.

*Category I fishery* means a commercial fishery determined by the Assistant Administrator to have frequent incidental mortality and serious injury of marine mammals. A commercial fishery that frequently causes mortality or serious injury of marine mammals is one that is by itself responsible for the annual removal of 50 percent or more of any stock's potential biological removal level.

*Category II fishery* means a commercial fishery determined by the Assistant Administrator to have occasional incidental mortality and serious injury of marine mammals. A commercial fishery that occasionally causes mortality or serious injury of marine mammals is one that, collectively with other fisheries, is responsible for the annual removal of more than 10 percent of any marine mammal stock's potential biological removal level and that is by itself responsible for the annual removal of between 1 and 50 percent, exclusive, of any stock's potential biological removal level. In the absence of reliable information indicating the frequency of incidental mortality and serious injury of marine mammals by a commercial fishery, the Assistant Administrator will determine whether the taking is "occasional" by evaluating other factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, and the species and distribution of marine mammals in the area, or at the discretion of the Assistant Administrator. Eligible commercial fisheries not specifically identified in the list of fisheries are deemed to be Category II fisheries until the next list of fisheries is published.

*Category III fishery* means a commercial fishery determined by the Assistant Administrator to have a remote likelihood of, or no known incidental mortality and serious injury of marine mammals. A commercial fishery that has a remote likelihood of causing incidental mortality and serious injury of marine mammals is one that collectively with other fisheries is responsible for the annual removal of:

(1) Ten percent or less of any marine mammal stock's potential biological removal level, or

(2) More than 10 percent of any marine mammal stock's potential biological removal level, yet that fishery by itself is responsible for the annual removal of 1 percent or less of that stock's potential biological removal level. In the absence of reliable information indicating the frequency of incidental mortality and serious injury

of marine mammals by a commercial fishery, the Assistant Administrator will determine whether the taking is "remote" by evaluating other factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, and the species and distribution of marine mammals in the area or at the discretion of the Administrator.

*Commercial fishing operation* means the catching, taking, or harvesting of fish from the marine environment (or other areas where marine mammals occur) that results in the sale or barter of all or part of the fish harvested. The term includes licensed commercial passenger fishing vessel (as defined in § 216.3 of this chapter) activities and aquaculture activities.

*Depleted species* means any species or population that has been designated as depleted under the Act and is listed in § 216.15 of this chapter or part 18, subpart E of this title, or any endangered or threatened species of marine mammal.

*Fisher* means the vessel owner or operator or owner or operator of gear in a nonvessel fishery.

*Fishery* has the same meaning as in section 3 of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1802).

*Fishing trip* means any time spent away from port actively engaged in commercial fishing operations. The end of a fishing trip will be the time of a fishing vessel's return to port or the return of a fisher from tending gear in a nonvessel fishery.

*Fishing vessel* or *vessel* means any vessel, boat, ship, or other craft that is used for, equipped to be used for, or of a type normally used for, fishing.

*Incidental, but not intentional, take* means the non-intentional or accidental taking of a marine mammal that results from, but is not the purpose of, carrying out an otherwise lawful action.

*Incidental mortality* means the non-intentional or accidental death of a marine mammal that results from, but is not the purpose of, carrying out an otherwise lawful action.

*Injury* means a wound or other physical harm. Signs of injury to a marine mammal include, but are not limited to, visible blood flow, loss of or damage to an appendage or jaw, inability to use one or more appendages, asymmetry in the shape of the body or body position, noticeable swelling or hemorrhage, laceration, puncture or rupture of eyeball, listless appearance or inability to defend itself, inability to swim or dive upon release from fishing

gear, or signs of equilibrium imbalance. Any animal that ingests fishing gear, or any animal that is released with fishing gear entangling, trailing or perforating any part of the body will be considered injured regardless of the absence of any wound or other evidence of an injury.

*Interaction* means coming in contact with fishing gear or catch. An interaction may be characterized by a marine mammal entangled, hooked, or otherwise trapped in fishing gear, regardless of whether injury or mortality occurs, or situations where marine mammals are preying on catch. Catch means fish or shellfish that has been hooked, entangled, snagged, trapped or otherwise captured by commercial fishing gear.

*List of Fisheries* means the most recent final list of commercial fisheries published in the **Federal Register** by the Assistant Administrator, categorized according to the likelihood of incidental mortality and serious injury of marine mammals during commercial fishing operations.

*Minimum population estimate* means an estimate of the number of animals in a stock that:

(1) Is based on the best available scientific information on abundance, incorporating the precision and variability associated with such information; and

(2) Provides reasonable assurance that the stock size is equal to or greater than the estimate.

*Negligible impact* has the same meaning as in § 228.3 of this chapter.

*Net productivity rate* means the annual per capita rate of increase in a stock resulting from additions due to reproduction, less losses due to mortality.

*Nonvessel fishery* means a commercial fishing operation that uses fixed or other gear without a vessel, such as gear used in set gillnet, trap, beach seine, weir, ranch, and pen fisheries.

*NMFS* means the National Marine Fisheries Service.

*Observer* means an individual authorized by NMFS, or a designated contractor, to record information on marine mammal interactions, fishing operations, marine mammal life history information, and other scientific data, and collect biological specimens during commercial fishing activities.

*Potential biological removal level* means the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population. The

potential biological removal level is the product of the following factors:

(1) The minimum population estimate of the stock;

(2) One-half the maximum theoretical or estimated net productivity rate of the stock at a small population size; and

(3) A recovery factor of between 0.1 and 1.0.

*Regional Fishery Management Council* means a regional fishery management council established under section 302 of the Magnuson Fishery Conservation and Management Act.

*Serious injury* means any injury that will likely result in mortality.

*Strategic stock* means a marine mammal stock:

(1) For which the level of direct human-caused mortality exceeds the potential biological removal level;

(2) Which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the Endangered Species Act of 1973 within the foreseeable future;

(3) Which is listed as a threatened species or endangered species under the Endangered Species Act of 1973; or

(4) Which is designated as depleted under the Marine Mammal Protection Act of 1972, as amended.

*Take Reduction Plan* means a plan developed to reduce the incidental mortality and serious injury of marine mammals during commercial fishing operations in accordance with section 118 of the Marine Mammal Protection Act of 1972, as amended.

*Take Reduction Team* means a team established to recommend methods of reducing the incidental mortality and serious injury of marine mammals due to commercial fishing operations, in accordance with section 118 of the Marine Mammal Protection Act of 1972, as amended.

*Vessel owner or operator* means the owner or operator of:

(1) A fishing vessel that engages in a commercial fishing operation; or

(2) Fixed or other commercial fishing gear that is used in a nonvessel fishery.

*Vessel of the United States* has the same meaning as in section 3 of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1802).

#### § 229.3 Prohibitions.

(a) It is prohibited to take any marine mammal incidental to commercial fishing operations except as otherwise provided in part 216 of this chapter or in this part 229.

(b) It is prohibited to assault, harm, harass (including sexually harass), oppose, impede, intimidate, impair, or in any way influence or interfere with

an observer, or attempt the same. This prohibition includes, but is not limited to, any action that interferes with an observer's responsibilities, or that creates an intimidating, hostile, or offensive environment.

(c) It is prohibited to provide false information when registering for an Authorization Certificate, applying for renewal of the Authorization Certificate, reporting the taking of any marine mammal, or providing information to any observer.

(d) It is prohibited to tamper with or destroy observer equipment in any way.

(e) It is prohibited to intentionally lethally take any marine mammal in the course of commercial fishing operations unless imminently necessary in self-defense or to save the life of a person in immediate danger, and such taking is reported in accordance with the requirements of § 229.6.

(f) It is prohibited to violate any regulation in this part or any provision of section 118 of the Act.

#### § 229.4 Requirements for Category I and II fisheries.

(a) *General.* For a vessel owner or crew members to lawfully incidentally take marine mammals in the course of commercial fishing operations in a Category I or II fishery, the owner or authorized representative of a fishing vessel or nonvessel fishing gear must annually register for and receive an Authorization Certificate. The granting and administration of authorizations under this part shall be integrated and coordinated with existing fishery license, registration, or permit systems and related programs, wherever possible. These programs may include, but are not limited to, state or interjurisdictional fisheries programs. If the administration of authorizations is integrated into an existing program, NMFS will publish a notice in the **Federal Register** of where to register, and efforts will be made to contact affected fishers via other appropriate means of notification.

(b) *Registration.* Owners of vessels or, for nonvessel fisheries, gear, must register for and receive an Authorization Certificate. To register, owners must submit the following information, using a format specified by NMFS:

(1) Name, address, and phone number of owner;

(2) Name, address, and phone number of operator, if different from owner, unless the name of the operator is not known or has not been established at the time the registration is submitted;

(3) Vessel name, length and home port; U.S. Coast Guard documentation number, or state registration number,

and state commercial vessel license number;

(4) A list of all Category I and II fisheries in which the fisher may actively engage during the calendar year;

(5) The approximate time, duration, and location of each such fishery operation, and the general type and nature of use of the fishing gear and techniques used; and

(6) A certification, signed and dated by the vessel owner or authorized representative, as follows: "I hereby certify that I am the owner of the vessel, that I have reviewed all information contained on this document, and that it is true and complete to the best of my knowledge."

(c) *Fee.* A check or money order made payable to NMFS in the amount specified in the notice of the final List of Fisheries must accompany each registration submitted to NMFS. The amount of this fee will be based on recovering the administrative costs incurred in granting an authorization. The Assistant Administrator may waive the fee requirement for good cause upon the recommendation of the Regional Director.

(d) *Address.* Unless the granting and administration of authorizations under part 229 is integrated and coordinated with existing fishery licenses, registrations, or related programs pursuant to paragraph (a) of this section, requests for registration forms and completed registration forms should be sent to the NMFS Regional Offices are given:

(1) Alaska Region, NMFS, P.O. Box 21668, 709 West 9th Street, Juneau, AK 99802; telephone: 907-586-7235;

(2) Northwest Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115-0070; telephone: 206-526-4353;

(3) Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213; telephone: 310-980-4001;

(4) Northeast Region, NMFS, 1 Blackburn Drive, Gloucester, MA 01930; telephone: 508-281-9254; or

(5) Southeast Region, NMFS, 9721 Executive Center Drive North, St. Petersburg, FL 33702; telephone: 813-570-5301.

(e) *Issuance.* After receipt of a completed initial registration form and the required fee, NMFS will issue an Authorization Certificate and annual decal to the vessel owner. The Authorization Certificate will be renewed annually, and an annual decal issued, after receipt of an updated registration form, required fee, and statement (yes/no) regarding whether any marine mammals were incidentally

killed or injured during the previous calendar year. The Authorization Certificate will be renewed only if the fisher has complied with the provisions of §§ 229.4, 229.6, and 229.7.

(f) *Authorization Certificate and decal requirements.* (1) The annual decal must be attached to the vessel on the port side of the cabin or, in the absence of a cabin, on the forward port side of the hull, and must be free of obstruction and in good condition. The decal must be attached to the Authorization Certificate for nonvessel fisheries.

(2) The Authorization Certificate, or a copy, must be on board the vessel while it is operating in a Category I or II fishery, or, in the case of nonvessel fisheries, the Authorization Certificate with decal attached, or copy must be in the possession of the person in charge of the fishing operation. The Authorization Certificate, or copy, must be made available upon request to any state or Federal enforcement agent authorized to enforce the Act, any designated agent of NMFS, or any contractor providing observer services to NMFS.

(3) Authorization Certificates and annual decals are not transferable. In the event of the sale or change in ownership of the vessel, the Authorization Certificate is void and the new owner must register for an Authorization Certificate and decal.

(4) An Authorization Certificate holder must notify the issuing office in writing:

(i) If the vessel or nonvessel fishing gear will engage in any Category I or II fishery not listed on the initial registration form at least 30 days prior to engaging in that fishery; and,

(ii) If there are any changes in the mailing address or vessel ownership within 30 days of such change.

(g) *Reporting.* Any Authorization Certificate holders must comply with the reporting requirements specified under § 229.6.

(h) *Disposition of marine mammals.* Any marine mammal incidentally taken must be immediately returned to the sea with a minimum of further injury, unless directed otherwise by NMFS personnel, a designated contractor or an official onboard observer, or authorized otherwise by a scientific research permit that is in the possession of the operator.

(i) *Monitoring.* Authorization Certificate holders must comply with the observer or other monitoring requirements specified under § 229.7.

(j) *Deterrence.* When necessary to deter a marine mammal from damaging fishing gear, catch, or other private property, or from endangering personal safety, vessel owners and crew members

engaged in a Category I or II fishery must comply with all deterrence provisions set forth in the Act and all guidelines and prohibitions published thereunder.

(k) *Self defense.* When imminently necessary in self-defense or to save the life of a person in immediate danger, a marine mammal may be lethally taken if such taking is reported to NMFS in accordance with the requirements of § 229.6.

(l) *Take reduction plans and emergency regulations.* Authorization Certificate holders must comply with any applicable take reduction plans and emergency regulations.

(m) *Expiration.* Authorization Certificates and annual decals expire at the end of each calendar year.

#### § 229.5 Requirements for Category III fisheries.

(a) *General.* Vessel owners and crew members of such vessels engaged only in Category III fisheries may incidentally take marine mammals without registering for or receiving an Authorization Certificate.

(b) *Reporting.* Vessel owners engaged in a Category III fishery must comply with the reporting requirements specified in § 229.6.

(c) *Disposition of marine mammals.* Any marine mammal incidentally taken must be immediately returned to the sea with a minimum of further injury unless directed otherwise by NMFS personnel, a designated contractor, or an official onboard observer, or authorized otherwise by a scientific research permit in the possession of the operator.

(d) *Monitoring.* Vessel owners engaged in a Category III fishery must comply with the observer requirements specified under § 229.7(f).

(e) *Deterrence.* When necessary to deter a marine mammal from damaging fishing gear, catch, or other private property, or from endangering personal safety, vessel owners and crew members engaged in a Category I or II fishery must comply with all deterrence provisions set forth in the Act and all guidelines and prohibitions published thereunder.

(f) *Self-defense.* When imminently necessary in self-defense or to save the life of a person in immediate danger, a marine mammal may be lethally taken if such taking is reported to NMFS in accordance with the requirements of § 229.6.

(g) *Emergency regulations.* Vessel owners engaged in a Category III fishery must comply with any applicable emergency regulations.

**§ 229.6 Reporting requirements.**

(a) Vessel owners or operators engaged in any Category I, II, or III fishery must report all incidental mortality and injury of marine mammals in the course of commercial fishing operations to the Assistant Administrator, or appropriate Regional Office, by mail or other means, such as fax or overnight mail specified by the Assistant Administrator. Reports must be sent within 48 hours after the end of each fishing trip during which the incidental mortality or injury occurred, or, for nonvessel fisheries, within 48 hours of an occurrence of an incidental mortality or injury. Reports must be submitted on a standard postage-paid form as provided by the Assistant Administrator. The vessel owner or operator must provide the following information on this form:

(1) The vessel name, and Federal, state, or tribal registration numbers of the registered vessel;

(2) The name and address of the vessel owner or operator;

(3) The name and description of the fishery, including gear type and target species; and

(4) The species and number of each marine mammal incidentally killed or injured, and the date, time, and approximate geographic location of such occurrence. A description of the animal(s) killed or injured must be provided if the species is unknown.

(b) Participants in nonvessel fisheries must provide all of the information in paragraphs (a)(1) through (4) of this section with the exception of the vessel name and registration number.

**§ 229.7 Monitoring of incidental mortalities and serious injuries.**

(a) *Purpose.* The Assistant Administrator will establish a program to monitor incidental mortality and serious injury of marine mammals during the course of commercial fishing operations in order to:

(1) Obtain statistically reliable estimates of incidental mortality and serious injury;

(2) Determine the reliability of reports of incidental mortality and injury under § 229.6; and

(3) Identify changes in fishing methods or technology that may increase or decrease incidental mortality and serious injury.

(b) *Observer program.* Pursuant to paragraph (a) of this section, the Assistant Administrator may place observers aboard Category I and II vessels as necessary. Observers may, among other tasks:

(1) Record incidental mortality and injury, and bycatch of other nontarget species;

(2) Record numbers of marine mammals sighted; and

(3) Perform other scientific investigations, which may include, but are not limited to, sampling and photographing incidental mortalities and serious injuries.

(c) *Observer requirements for Authorization Certificate holders.* (1) If requested by NMFS or a designated contractor providing observer services to NMFS, an Authorization Certificate holder engaged in a Category I or II fishery must take aboard an observer to accompany the vessel on fishing trips.

(2) After being notified by NMFS, or by a designated contractor providing observer services to NMFS, that the vessel is required to carry an observer, the Authorization Certificate holder must comply with the notification by providing information requested within the specified time on scheduled or anticipated fishing trips.

(3) NMFS, or a designated contractor providing observer services to NMFS, may waive the observer requirement based on a finding that the facilities for housing the observer or for carrying out observer functions are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized.

(4) The Authorization Certificate holder and crew must cooperate with the observer in the performance of the observer's duties including:

(i) Providing adequate accommodations;

(ii) Allowing for the embarking and debarking of the observer as specified by NMFS personnel or designated contractors. The operator of a vessel must ensure that transfers of observers at sea are accomplished in a safe manner, via small boat or raft, during daylight hours if feasible, as weather and sea conditions allow, and with the agreement of the observer involved;

(iii) Allowing the observer access to all areas of the vessel necessary to conduct observer duties;

(iv) Allowing the observer access to communications equipment and navigation equipment, when available on the vessel, as necessary to perform observer duties;

(v) Providing true vessel locations by latitude and longitude, accurate to the minute, or by loran coordinates, upon request by the observer;

(vi) Sampling marine mammal or other protected species specimens, upon request by NMFS personnel;

(vii) Sampling, retaining and storing mammal or other protected species

specimens, upon request by NMFS personnel, designated contractors, or the observer aboard, if adequate facilities are available and, if feasible;

(viii) Notifying the observer in a timely fashion of when all commercial fishing operations are to begin and end;

(ix) Not impairing or in any way interfering with the research or observations being carried out; and

(x) Complying with other guidelines or regulations that NMFS may develop to ensure the effective deployment and use of observers.

(5) Marine mammals incidentally killed during fishing operations and which are readily accessible to crew members, must be brought onboard the vessel as biological specimens and retained for the purposes of scientific research if feasible and requested by NMFS personnel, designated contractors, or the aboard observer. Marine mammals so collected and retained as biological specimens must, upon request by NMFS personnel, designated contractors, or the observer aboard, be retained in cold storage on board the vessel, if feasible, until removed at the request of NMFS personnel, designated contractors, or the observer aboard, retrieved by authorized personnel of NMFS, or released by the observer for return to the ocean. Such biological specimens may be transported on board the vessel during the fishing trip and back to port under this authorization.

(6) Any marine mammal incidentally taken may be retained only if authorized by NMFS personnel, designated contractors or an official observer aboard, or by a scientific research permit that is in the possession of the operator.

(d) *Observer requirements for Category III fisheries.* (1) The Assistant Administrator may place observers on Category III vessels if the Assistant Administrator:

(i) Believes that the incidental mortality and serious injury of marine mammals from such fishery may be contributing to the immediate and significant adverse impact on a species or stock listed as a threatened species or endangered species under the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*); and

(ii) Has complied with § 229.9(a)(3)(i) and (ii); or

(iii) Has the consent of the vessel owner.

(2) If an observer is placed on a Category III vessel, the vessel owner and/or operator must comply with the requirements of § 229.7(c).

(e) *Alternative observer program.* The Assistant Administrator may establish

an alternative observer program to provide statistically reliable information on the species and number of marine mammals incidentally taken in the course of commercial fishing operations. The alternative observer program may include direct observation of fishing activities from vessels, airplanes, or points on shore.

#### § 229.8 Publication of List of Fisheries.

(a) The Assistant Administrator will publish in the **Federal Register** a proposed revised List of Fisheries on or about July 1 of each year for the purpose of receiving public comment. Each year, on or about October 1, the Assistant Administrator will publish a final revised List of Fisheries, which will become effective January 1 of the next calendar year.

(b) The proposed and final revised List of Fisheries will:

(1) Categorize each commercial fishery based on the definitions of Category I, II, and III fisheries set forth in § 229.2; and

(2) List the marine mammals that interact with commercial fishing operations and the estimated number of vessels or persons involved in each commercial fishery.

(c) The Assistant Administrator may publish a revised List of Fisheries at other times, after notification and opportunity for public comment. The revised final List of Fisheries will become effective no sooner than 30 days after publication in the **Federal Register**.

#### § 229.9 Emergency regulations.

(a) If the Assistant Administrator finds that the incidental mortality or serious injury of marine mammals from commercial fisheries is having, or is likely to have, an immediate and significant adverse impact on a stock or species, the Assistant Administrator will:

(1) In the case of a stock or species for which a take reduction plan is in effect—

(i) Prescribe emergency regulations that, consistent with such plan to the maximum extent practicable, reduce incidental mortality and serious injury in that fishery; and

(ii) Approve and implement on an expedited basis, any amendments to such plan that are recommended by the Take Reduction Team to address such adverse impact;

(2) In the case of a stock or species for which a take reduction plan is being developed—

(i) Prescribe emergency regulations to reduce such incidental mortality and serious injury in that fishery; and

(ii) Approve and implement, on an expedited basis, such plan, which will provide methods to address such adverse impact if still necessary;

(3) In the case of a stock or species for which a take reduction plan does not exist and is not being developed, or in the case of a Category III fishery that the Assistant Administrator believes may be contributing to such adverse impact,

(i) Prescribe emergency regulations to reduce such incidental mortality and serious injury in that fishery, to the extent necessary to mitigate such adverse impact;

(ii) Immediately review the stock assessment for such stock or species and the classification of such commercial fishery under this section to determine if a take reduction team should be established; and

(iii) Where necessary to address such adverse impact on a species or stock listed as a threatened species or endangered species under the Endangered Species Act (16 U.S.C. 1531 *et seq.*), place observers on vessels in a Category III fishery if the Assistant Administrator has reason to believe such vessels may be causing the incidental mortality and serious injury to marine mammals from such stock.

(b) Prior to taking any action under § 229.9(a)(1) through (3), the Assistant Administrator will consult with the Marine Mammal Commission, all appropriate Regional Fishery Management Councils, state fishery managers, and the appropriate take reduction team, if established.

(c) Any emergency regulations issued under this section:

(1) Shall be published in the **Federal Register** and will remain in effect for no more than 180 days or until the end of the applicable commercial fishing season, whichever is earlier, except as provided in paragraph (d) of this section; and

(2) May be terminated by notification in the **Federal Register** at an earlier date if the Assistant Administrator determines that the reasons for the emergency regulations no longer exist.

(d) If the Assistant Administrator finds that incidental mortality and serious injury of marine mammals in a commercial fishery is continuing to have an immediate and significant adverse impact on a stock or species, the Assistant Administrator may extend the emergency regulations for an additional period of not more than 90 days or until reasons for the emergency regulations no longer exist, whichever is earlier.

#### § 229.10 Penalties.

(a) Except as provided for in paragraphs (b) and (c) of this section,

any person who violates any regulation under this part or any provision of section 118 of the MMPA shall be subject to all penalties set forth in the Act.

(b) The owner or master of a vessel that fails to comply with a take reduction plan shall be subject to the penalties of sections 105 and 107 of the Act, and may be subject to the penalties of section 106 of the Act.

(c) The owner of a vessel engaged in a Category I or II fishery who fails to ensure that a decal, or other physical evidence of such authorization issued by NMFS, is displayed on the vessel or is in possession of the operator of the vessel shall be subject to a penalty of not more than \$100.

(d) Failure to comply with take reduction plans or emergency regulations issued under this part may result in suspension or revocation of an Authorization Certificate, and failure to comply with a take reduction plan is also subject to the penalties of sections 105 and 107 of the Act, and may be subject to the penalties of section 106 of the Act.

(e) For fishers operating in Category I or II fisheries, failure to report all incidental injuries and mortalities within 48 hours of the end of each fishing trip, or failure to comply with requirements to carry an observer, will subject such persons to the penalties of sections 105 and 107 and may subject them to the penalties of section 106 of the Act, which will result in suspension, revocation, or denial of an Authorization Certificate until such requirements have been fulfilled.

(f) For fishers operating in Category III fisheries, failure to report all incidental injuries and mortalities within 48 hours of the end of each fishing trip will subject such persons to the penalties of sections 105 and 107, and may subject them to section 106, of the Act.

(g) *Suspension, revocation or denial of Authorization Certificates.* (1) Until the Authorization Certificate holder complies with the regulations under this part, the Assistant Administrator shall suspend or revoke an Authorization Certificate or deny an annual renewal of an Authorization Certificate in accordance with the provisions in 15 CFR part 904 if the Authorization Certificate holder fails to report all incidental mortality and serious injury of marine mammals as required under § 229.6; or fails to take aboard an observer if requested by NMFS or its designated contractors.

(2) The Assistant Administrator may suspend or revoke an Authorization Certificate or deny an annual renewal of an Authorization Certificate in

accordance with the provisions in 15 CFR part 904 if the Authorization Certificate holder fails to comply with any applicable take reduction plan, take reduction regulations, or emergency regulations developed under this subpart or subparts B and C of this part or if the Authorization Certificate holder fails to comply with other requirements of these regulations:

(3) A suspended Authorization Certificate may be reinstated at any time at the discretion of the Assistant Administrator provided the Assistant Administrator has determined that the reasons for the suspension no longer apply or corrective actions have been taken.

#### § 229.11 Confidential fisheries data.

(a) Proprietary information collected under this part is confidential and includes information, the unauthorized disclosure of which could be prejudicial or harmful, such as information or data that are identifiable with an individual fisher. Proprietary information obtained under part 229 will not be disclosed, in accordance with NOAA Administrative Order 216-100, except:

(1) To Federal employees whose duties require access to such information;

(2) To state employees under an agreement with NMFS that prevents public disclosure of the identity or business of any person;

(3) When required by court order; or

(4) In the case of scientific information involving fisheries, to employees of Regional Fishery Management Councils who are responsible for fishery management plan development and monitoring.

(5) To other individuals or organizations authorized by the Assistant Administrator to analyze this information, so long as the confidentiality of individual fishers is not revealed.

(b) Information will be made available to the public in aggregate, summary, or other such form that does not disclose the identity or business of any person in accordance with NOAA Administrative Order 216-100 (see ADDRESSES). Aggregate or summary form means data structured so that the identity of the submitter cannot be determined either from the present release of the data or in combination with other releases.

#### § 229.12 Consultation with the Secretary of the Interior.

The Assistant Administrator will consult with the Secretary of the Interior prior to taking actions or making determinations under this part that affect or relate to species or population

stocks of marine mammals for which the Secretary of the Interior is responsible under the Act.

### Subpart B—Takes of Endangered and Threatened Marine Mammals

#### § 229.20 Issuance of permits.

(a) *Determinations.* During a period of up to 3 consecutive years, NMFS will allow the incidental, but not the intentional, taking by persons using vessels of the United States or foreign vessels that have valid fishing permits issued by the Assistant Administrator in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)), while engaging in commercial fishing operations, of marine mammals from a species or stock designated as depleted because of its listing as an endangered species or threatened species under the Endangered Species Act of 1973 if the Assistant Administrator determines that:

(1) The incidental mortality and serious injury from commercial fisheries will have a negligible impact on such species or stock;

(2) A recovery plan has been developed or is being developed for such species or stock pursuant to the Endangered Species Act of 1973; and

(3) Where required under regulations in subpart A of this part:

(i) A monitoring program has been established under § 229.7; (ii) Vessels engaged in such fisheries are registered in accordance with § 229.4; and

(iii) A take reduction plan has been developed or is being developed for such species or stock in accordance with regulations at subpart C of this part.

(b) *Procedures for making determinations.* In making any of the determinations listed in paragraph (a) of this section, the Assistant Administrator will publish an announcement in the **Federal Register** of fisheries having takes of marine mammals listed under the Endangered Species Act, including a summary of available information regarding the fisheries interactions with listed species. Any interested party may, within 45 days of such publication, submit to the Assistant Administrator written data or views with respect to the listed fisheries. As soon as practicable after the end of the 45 days following publication, NMFS will publish in the **Federal Register** a list of the fisheries for which the determinations listed in paragraph (a) of this section have been made. This publication will set forth a summary of the information used to make the determinations.

(c) *Issuance of authorization.* The Assistant Administrator will issue appropriate permits for vessels in fisheries that are required to register under § 229.4 and for which determinations under the procedures of paragraph (b) of this section can be made.

(d) *Category III fisheries.* Vessel owners engaged only in Category III fisheries for which determinations are made under the procedures of paragraph (b) of this section will not be subject to the penalties of this Act for the incidental taking of marine mammals to which this subpart applies, as long as the vessel owner or operator of such vessel reports any incidental mortality or injury of such marine mammals in accordance with the requirements of § 229.6.

(e) *Emergency authority.* During the course of the commercial fishing season, if the Assistant Administrator determines that the level of incidental mortality or serious injury from commercial fisheries for which such a determination was made under this section has resulted or is likely to result in an impact that is more than negligible on the endangered or threatened species or stock, the Assistant Administrator will use the emergency authority of § 229.9 to protect such species or stock, and may modify any permit granted under this paragraph as necessary.

(f) *Suspension, revocation, modification and amendment.* The Assistant Administrator may, pursuant to the provisions of 15 CFR part 904, suspend or revoke a permit granted under this section if the Assistant Administrator determines that the conditions or limitations set forth in such permit are not being complied with. The Assistant Administrator may amend or modify, after notification and opportunity for public comment, the list of fisheries published in accordance with § 229.21(b) whenever the Assistant Administrator determines there has been a significant change in the information or conditions used to determine such a list.

(g) *Southern sea otters.* This subpart does not apply to the taking of Southern (California) sea otters.

### Subpart C—Take Reduction Plan Regulations and Emergency Regulations [Reserved]

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