

Order 12778, October 25, 1991, 56 FR 55195, 3 CFR, 1991 Comp., p. 309.

**PART 64—[AMENDED]**

1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

**List of Subjects in 44 CFR Part 64**

Flood insurance, Floodplains.  
Accordingly, 44 CFR part 64 is amended as follows:

1. The authority citation for part 64 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*, Reorganization Plan No. 3 of 1978, 3 CFR,

**§ 64.6 [Amended]**

2. The tables published under the authority of § 64.6 are amended as follows:

State/location	Community No.	Effective date of authorization/cancellation of sale of flood insurance in community	Current effective map date
<b>New Eligibles—Emergency Program</b>			
Missouri: Dalton, village of, Chariton County .....	290464	December 2, 1994 .....	December 13, 1974.
<b>New Eligibles—Regular Program</b>			
Florida: DeBary, city of, Volusia County <sup>1</sup> .....	120672	May 14, 1971, Emerg.; November 23, 1973, Reg ...	March 3, 1992.
North Carolina: Holly Springs, town of, Wake County.	370403	December 23, 1994, Reg .....	
<b>Reinstatements—Regular Program</b>			
Pennsylvania: Lower Chichester, township of, Delaware County.	421604	October 9, 1974, Emerg.; September 22, 1979, Reg.; September 3, 1992, Susp.; December 6, 1994, Rein.	September 30, 1993.
Minnesota: Dakota, city of, Winona County .....	270526	August 21, 1974, Emerg.; June 15, 1982, Reg.; June 15, 1982, Susp.; December 8, 1994, Rein.	June 15, 1992.
Alabama: Russell County, unincorporated areas .....	010287	February, 25 1976, Emerg.; September 16, 1981, Reg.; September 16, 1981, Susp.; December 28, 1994, Rein.	September 16, 1981.
<b>Regular Program Conversions—Region IV</b>			
Tennessee:			
Bartlett, city of, Shelby County .....	470175	December 2, 1994, suspension withdrawn .....	December 2, 1994.
Collierville, town of, Shelby County .....	470263	.....do .....	Do.
Germantown, city of, Shelby County .....	470353	.....do .....	Do.
<b>Region V</b>			
Illinois:			
Arlington Heights, village of, Cook and Lake Counties.	170056	.....do .....	Do.
Michigan:			
Marquette, city of, Marquette County .....	260716	.....do .....	Do.
<b>Region V</b>			
Illinois:			
Grundy County, unincorporated areas .....	170256	December 15, 1994, suspension withdrawn .....	December 15, 1994.
<b>Region VI</b>			
Oklahoma:			
Osage County, unincorporated areas .....	400146	.....do .....	Do.

<sup>1</sup> This is a newly incorporated community, eligible 12-5-94, that was participating in the Regular Program as an unincorporated area of Volusia County (125155). The City has adopted the County's Flood Insurance Rate Map (FIRM), Flood Insurance Study (FIS) and ordinances for flood insurance and floodplain management purposes. (FIRM Panels 465, 475, 580 and 585).

Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension, Rein.—Reinstatement. (Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

Issued: January 23, 1995.

**Frank H. Thomas,**

*Deputy Associate Director, Mitigation Directorate.*

[FR Doc. 95-2456 Filed 1-31-95; 8:45 am]

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 229**

[Docket No. 950111010-5010-01; I.D. 103194B]

**Prohibition on the Intentional Lethal Take of Marine Mammals in Commercial Fishing Operations**

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

**ACTION:** Final rule.

**SUMMARY:** The Marine Mammal Protection Act Amendments of 1994 established in section 118 a new management regime for the taking of marine mammals incidental to commercial fishing operations. Among other things, section 118 prohibits the intentional lethal taking of marine mammals in the course of commercial fishing operations. In partial implementation of section 118, NMFS amends the interim exemption currently in effect under section 114 to make the prohibition on intentional lethal takings fully applicable to all commercial fishing operations. All other provisions of the interim exemption remain in effect until superseded by further regulations.

**EFFECTIVE DATE:** March 3, 1995.

**ADDRESSES:** Chief, Marine Mammal Division, Office of Protected Resources, F/PR, National Marine Fisheries Service (NMFS), 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Dean Wilkinson, Office of Protected Resources, 301-713-2322.

**SUPPLEMENTARY INFORMATION:**

### Background

On December 8, 1994, at 59 FR 63324, NMFS proposed a rule to prohibit the intentional lethal taking of marine mammals in the course of commercial fishing operations. The proposed rule provided an exception if such taking is imminently necessary in self-defense or to save the life of another person. The notice of proposed rulemaking requested comments and contained a discussion of the background for the proposed rule. The background is not repeated here.

This rule implements section 118(a)(5) of the Marine Mammal Protection Act (MMPA). It prohibits the intentional lethal take of marine mammals in the course of commercial fishing operations. An exception is provided for an intentional lethal take imminently necessary in self-defense or to save the life of another person in immediate danger. If a marine mammal is killed in self-defense or to save the life of another person, a report must be made to the appropriate NMFS Regional Office within 48 hours after the conclusion of the fishing trip.

In the notice of proposed rulemaking, NMFS announced that it intended to make January 1, 1995, the effective date for the final rule. In order to allow time to notify fishers, however, the effective date is delayed until 30 days after the date of publication in the **Federal Register**.

### Comments and Responses

Comments were received from the U.S. Fish and Wildlife Service, Carmel River Steelhead Association, the Center for Marine Conservation, Earth Island Institute, the Humane Society of the United States, Maine Aquaculture Association, Salmon for All, and 23 private individuals. Fifteen commenters supported the proposed rule. Thirteen commenters opposed the proposed rule. Two commenters neither supported nor opposed the proposed rule. Specific comments are addressed below:

*Comment:* There is no compelling reason that this one provision of the section 118 amendment should be adopted at this time. This action is clearly in opposition to Congress' intent

that the entire section 118 amendment be adopted collectively.

*Response:* There is nothing in the statutory language or in either the House or Senate Reports (House Report 103-439 and Senate Report 103-220) that indicates that all of section 118 is to be implemented simultaneously.

There is evidence that since the passage of the 1994 amendments to the MMPA, the intentional lethal taking of marine mammals has occurred at levels greater than historic levels. For example, one marine mammal rehabilitation facility reports that 31 California sea lions were admitted after being shot between May 1 and November 1, 1994. The same facility admitted a total of 37 pinnipeds that had been shot in the 8-year period prior to 1992. An acceleration in the rate of intentional lethal takes over historic levels is contrary to the intent of Congress to prohibit the intentional lethal take of marine mammals in the course of commercial fishing.

In addition, there have been indications that allowing the intentional lethal take of certain species may result in the intentional lethal taking of other species whose intentional lethal take is prohibited. Although it is not certain that fishers were responsible, an event in March 1993 illustrates this problem. In a relatively short period of time, 58 dead pinnipeds washed onto beaches on the central Washington coast. Nine of the animals were Steller sea lions. Of 34 animals that were fresh enough for examination, 32 had been shot including eight of the nine Steller sea lions—three of which were pregnant. The intentional lethal taking of Steller sea lions is prohibited under the MMPA, and the species is listed as threatened under the Endangered Species Act. It is possible that the similarity of Steller sea lions to other pinniped species, whose intentional lethal take is allowed, was responsible for individuals assuming that it was legal to kill them.

Given the above, the availability of nonlethal means of deterring marine mammals from gear and catch, and the fact that section 118(a)(5) of the MMPA requires that NMFS implement the prohibition on intentional lethal takes of marine mammals in connection with commercial fishing by no later than September 30, 1995, implementation of the statutory provision at this time is warranted.

*Comment:* The deadline for response to the proposed rule should be extended to 40 days. Fifteen days provides little opportunity to disseminate information to those who may be interested in commenting on the rule.

*Response:* NMFS is implementing section 118(a)(5) of the MMPA. The statutory language is explicit, and NMFS has no discretion as to the substantive content of the rule. As indicated in the previous response, there is reason to believe that intentional lethal takings of marine mammals are occurring at levels above historic levels and that allowing the intentional lethal take of some species may result in the taking of threatened species. Given this, a 15-day comment period was deemed sufficient.

Comments were received through day 27 from the date of the publication of the notice of proposed rulemaking, and all comments received were considered.

*Comment:* Several commenters opposed to the rule noted that, particularly on the west coast, fishers had a significant amount of their catch taken by pinnipeds. They also noted that populations of harbor seals and California sea lions have increased substantially since the passage of the MMPA and that natural predators such as bears, wolves, and cougars are no longer present. Some commenters pointed out that west coast salmonid runs have been seriously depleted, and that a number of populations either have been listed under the Endangered Species Act or are being considered for listing. The commenters provided information that pinnipeds prey on such runs. Two commenters provided documentation of the number of steelhead and coho in the Monterey, CA area with scars and wounds that appeared to be caused by marine mammals.

*Response:* As pointed out above, the statutory language does not provide NMFS with the discretion to allow the intentional lethal take of marine mammals in the course of commercial fishing operations other than to protect human life. The rule does not affect the ability of persons involved in such fisheries to use nonlethal deterrence methods.

Other provisions of the 1994 amendments to the MMPA address these issues. Section 120(f) of the MMPA requires NMFS to prepare a report to determine whether California sea lions and Pacific harbor seals are having a significant negative impact on the recovery of salmonid stocks. Although NMFS has no discretion in this rulemaking, the information submitted on this issue will be provided to the individuals drafting this report.

Further, sections 120(a) through (d) of the MMPA provide a procedure whereby a state may apply to NMFS to authorize intentional lethal take of individually identifiable pinnipeds

which are having a significant negative impact on the decline or recovery of salmonid stocks that have been listed under the Endangered Species Act or are approaching threatened or endangered species status. If authority to intentionally lethally take individually identifiable pinnipeds is granted, section 120(c)(4) requires that the taking be performed by Federal or state agencies, or by qualified individuals under contract to such agencies. However, it does not provide NMFS with the discretion to authorize intentional lethal taking in the course of commercial fishing operations.

*Comment:* Marine mammals that have learned to raid nets for their food can be extremely aggressive. Protecting oneself from threatening marine mammal behavior should not place the fisherman or woman in violation of the law.

*Response:* The rule contains an exception to the prohibition on intentional lethal takes for circumstances when the killing of a marine mammal is imminently necessary in self-defense or to save the life of another person in immediate danger. If a marine mammal is taken under such circumstances, the individual involved is required to report the taking to the appropriate NMFS Regional Office within 48 hours of the conclusion of the fishing trip.

*Comment:* It should be noted in the preamble to the rule that the section 101(c) exception allowing intentional lethal take to protect human life also provides the Secretary of Commerce (and for species under the jurisdiction of the Department of the Interior, the Secretary of the Interior) the authority to seize and dispose of any carcass.

*Response:* As part of the implementation of the 1994 amendments to the MMPA, NMFS intends to propose specific regulations to cover the section 101(c) exception. Those regulations will incorporate the provision allowing, but not requiring, the Secretary to seize and dispose of any carcass. As the commenter noted, this provision also applies to commercial fishing operations, and the point is well taken. Because of the nature of fisheries, such animals may never come into the possession of a fisher or may be discarded before a fishing trip is completed. In instances when a carcass is retained, the Secretary has statutory authority to confiscate and dispose of it. Because such instances are likely to be uncommon, language will not be added to this regulation, but will appear in the more generic regulation implementing the section 101(c) exception for intentional lethal taking to protect human safety.

*Comment:* The draft stock assessment sets potential biological removal (PBR) for western north Atlantic harbor seals at 864 animals. The small number of animals currently taken by intentional means to protect aquaculture facilities will have a negligible impact on the stock.

*Response:* With the exception of the section 101(c) provision noted above, the MMPA states that the intentional lethal taking of marine mammals in the course of commercial fishing operations is prohibited. Therefore, the question of whether the lethal removal of a specified number of animals is beneath the PBR level is irrelevant. The concept of PBR was developed in order to assist in managing incidental, i.e., unintentional, taking of marine mammals in commercial fisheries.

*Comment:* The Gulf of Maine Pinniped-Fishery Interaction Task Force mandated under section 120(h) has not been set up yet. The Task Force might recommend intentional lethal take as an option. In addition, the guidelines for nonlethal deterrence are not yet in effect.

*Response:* NMFS has made initial contacts concerning members of the Task Force, and the Task Force should be formalized by the time that this rule becomes effective. Nevertheless, the Task Force report is not due until the end of April 1996. Even if the Task Force were to recommend that intentional lethal takes be allowed, a statutory change would be required before such a recommendation could be implemented. Similarly, the draft guidelines on nonlethal take should be available soon. Although the guidelines are not yet in place, the section 114 interim exemption and its authorization for nonlethal deterrence remain valid. Until deterrence guidelines are issued, participants in commercial fisheries may continue to use all nonlethal deterrence methods that are currently used.

*Comment:* The promulgation of this regulation will result in the loss of millions of dollars to the salmon aquaculture industry because of harbor seal predation on salmon in net pens. NMFS cannot justify the statement that the proposed rule "would not have a significant impact on a substantial numbers of small entities."

*Response:* Since 1989, owners of salmon net pens have been subject to the requirement contained in the 1988 amendments to the MMPA (Pub. L. 100-711) that all lethal takes—whether intentional or unintentional—be reported to NMFS within 10 days. During that period, only three intentional lethal takes have been

reported by participants in the salmon aquaculture industry—one harbor seal in 1991 and two gray seals in 1993. While NMFS recognizes that there may have been a degree of underreporting, there is no documentation of a level of interaction between harbor seals and net pens of the magnitude that would be necessary to support the argument that prohibition of intentional lethal takes would result in the loss of millions of dollars to this fishery.

*Comment:* Two comments were received concerning gear practices. The comments dealt with issues more properly in the area of fishery management than the proposed rule. One commenter stated that an exception to the prohibition should be extended to hook and line fishermen, and fishing with nets should be totally banned. The second stated that as a recreational fisherman, he had been unable to catch fish because trawlers and net gears had devastated populations of such fish as haddock, cod, and yellowtail flounder. The commenter stated that there should be a partial ban on commercial fishing during certain times of the year.

*Response:* The statutory language does not permit an exception for specific types of fisheries. The comments on specific gear types are not within the scope of this rulemaking and should more properly be addressed to the Fishery Management Councils responsible for regulating specific fisheries.

#### Classification

This final rule has been determined to be not significant for purposes of E.O. 12866. Because NMFS is unable to consider alternatives to the statutory mandate, the preparation of an environmental assessment under the National Environmental Policy Act is not required, and none has been prepared.

#### List of Subjects in 50 CFR Part 229

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

Dated: January 27, 1995.

**Gary Matlock,**

*Program Management Officer, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 229 is amended as follows:

**PART 229—INTERIM EXEMPTION FOR COMMERCIAL FISHERIES UNDER THE MARINE MAMMAL PROTECTION ACT OF 1972**

1. The authority citation for part 229 continues to read as follows:

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

2. Section 229.2 paragraph (k) is revised to read as follows:

**§ 229.2 Definitions.**

\* \* \* \* \*

(k) *Incidental take* means the intentional nonlethal or accidental taking of a marine mammal in the course of commercial fishing operations.

\* \* \* \* \*

3. Section 229.4 is amended by revising paragraphs (b)(2) introductory text, (b)(2)(i)(B), and by adding paragraph (b)(2)(iii) to read as follows:

**§ 229.4 Prohibitions.**

\* \* \* \* \*

(b) \* \* \*  
(2) Under this part 229, except as provided under paragraph (b)(2)(iii) of this section, it is unlawful to:

- (i)(A) \* \* \*
- (B) Intentionally lethally take any marine mammal.

\* \* \* \* \*

(iii) If a taking under paragraph (b)(2)(i)(A) of this section or paragraph (b)(2)(i)(B) of this section is imminently necessary in self-defense or to save the life of a person in immediate danger, it is not an unlawful activity, provided that the taking is reported to the appropriate Regional Office of the National Marine Fisheries Service within 48 hours after the end of the fishing trip during which the taking occurs.

\* \* \* \* \*

4. Section 229.6 is amended by revising the third sentence of paragraph (c)(2)(i), removing paragraph (c)(6), and redesignating paragraphs (c)(7) through (c)(10) as paragraphs (c)(6) through (c)(9), respectively, to read as follows:

**§ 229.6 Issuance of Exemption Certificates.**

\* \* \* \* \*

(c) \* \* \*  
(2) \* \* \*  
(i) \* \* \* Marine mammal report/log forms require information on: The fishery, fishing effort, gear type, and fish species involved; the marine mammal species (or description of the animal(s), if species is not known), number, date, and location of marine mammal incidental takes; type of interaction and any injury to the marine mammal; a

description of any intentional takes (i.e., efforts to deter animals by nonlethal means to protect gear or catch or efforts to protect human life involving either lethal or nonlethal means); and any loss of fish or gear caused by marine mammals. \* \* \*

\* \* \* \* \*

5. Section 229.7 is amended by revising the last sentence of paragraph (b), removing paragraph (e), and redesignating paragraph (f) as paragraph (e) to read as follows:

**§ 229.7 Requirements for Category III Fisheries.**

\* \* \* \* \*

(b) \* \* \* The report must include information on: The fishery, fishing effort, gear type, and fish species involved; the marine mammal species (or description of the animal(s), if species is not known), number, date, and location of all lethal incidental takes; a description of any intentional lethal take to protect human life; and any loss of fish or gear caused by marine mammals.

\* \* \* \* \*

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**50 CFR Part 663**

[Docket No. 950126029-5029-01; I.D. 011095A]

RIN 0648-AH80

**Pacific Coast Groundfish Fishery; Emergency Rule to Extend the Application Period To Renew Permits for 1995**

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

**ACTION:** Emergency rule; request for comments.

**SUMMARY:** NMFS issues this emergency rule to amend the implementing regulations for the Pacific Coast Groundfish Fishery Management Plan (FMP) to provide an additional 4 months during which limited entry permit owners may apply for permit renewals for 1995. This action is necessary to rectify an administrative requirement that is overly restrictive for the first year of permit renewals in the limited entry fishery. The intended effect of this rule is to allow continued participation in the Pacific Coast groundfish fishery by permit owners who failed to apply for a permit renewal by November 30, 1994.

**DATES:** Effective January 27, 1995 through May 2, 1995. Comments will be accepted through March 3, 1995.

**ADDRESSES:** Submit comments to William Stelle, Jr., Director, Northwest Region, National Marine Fisheries Service, 7600 Sand Point Way NE, BIN-C15700, Seattle, WA 98115-0070; or Hilda Diaz-Soltero, Director Southwest Region, National Marine Fisheries Service, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213. Documentation supporting this emergency action is available at the Northwest Regional Office, NMFS, at the address above.

**FOR FURTHER INFORMATION CONTACT:** William L. Robinson at (206) 526-6140; or Rodney McInnis at (310) 980-4030. For further information on application procedures, phone (206) 526-4353.

**SUPPLEMENTARY INFORMATION:** NMFS issues this emergency rule under the authority of section 305(c)(1) of the Magnuson Fishery Conservation and Management Act (Magnuson Act). An emergency rule that changes a fishery management plan is treated as an amendment to such plan for the period during which such regulation is in effect.

The Pacific Fishery Management Council (Council) prepared, and NMFS approved and implemented, an amendment (Amendment 6) to the FMP, that established a limited entry program for the Pacific Coast groundfish fishery off the coasts of Washington, Oregon, and California. Final regulations implementing the limited entry program were published on November 16, 1992 (57 FR 54001) and the program went into effect on January 1, 1994.

The final regulations, at 50 CFR 663.41(c), require permits to be renewed each year between October 1 and November 30, in order to remain in force the following year. In addition, 50 CFR 663.41(c)(3) specifies that a limited entry permit that is allowed to expire will not be renewed unless the Northwest Region, NMFS, Fisheries Management Division determines that failure to renew was proximately caused by the illness, injury, or death of the permit holder.

Amendment 6, section 4.10, provided the following rationale as to why the administrative procedures should be so rigid:

As initially worded, the draft license limitation program of Amendment 6 provided no means by which the number of permits with 'A' endorsements might be reduced through attrition. A vessel could leave the fishery without transferring the permit to another vessel, and a number of years later the permit could be resurrected