

Finding

Section 4(b)(3)(B)(iii) of the Act states that the Service may make warranted but precluded findings if it can demonstrate that an immediate proposed rule is precluded by other pending proposals and that expeditious progress is being made on other listing actions. Since September 30, 1993, the Service has proposed the listing of 118 species and has finalized the listing for 182 species. The Service believes this demonstrates expeditious progress. Furthermore, on September 21, 1983 (48 FR 43098), the Service published a system for prioritizing species for listing. This system considers 3 factors in assigning species' numerical listing priorities on a scale of 1 to 12. The three factors magnitude of threat, immediacy of threat, and taxonomic distinctiveness.

After reviewing and considering the scientific merits and significance of all comments, recommendations, and study proposals received from State and Federal agencies and from private individuals relative to the Service's 90-day Administrative Finding, the Service has concluded that the magnitude of the threat to the swift fox is moderate throughout its present range. The States of Kansas, Colorado, and Wyoming have presented evidence that swift foxes have reoccupied former prairie habitats and have also moved into agricultural lands. However, scientific evidence also indicates that identifiable threats to the swift fox exist over the entire 10-State range, and the Service has concluded that the immediacy of these threats is "imminent." The Service, in its determination of the current degree of threat to the species, also considered a long-range conservation strategy document drafted by an interagency State team which provides a framework of goals, objectives, and strategies. Implementation of this plan, including the formation of a swift fox working team should help reduce some of these threats to its survival. Having considered this draft conservation strategy document and the significance of the evidence provided by the aforementioned States, the Service believes that the magnitude of threats is "moderate" but the immediacy of these threats remains "imminent." Therefore, a listing priority of 8 is assigned for the species. The Service will reevaluate this warranted but precluded finding 1 year from the date of the finding. If sufficient new data or information becomes available in the future regarding the magnitude of threats, abundance, and health of these swift fox populations, the Service will reassess the status of the species. The warranted but

precluded finding elevates the swift fox's candidate species status from category 2 to category 1.

The Service's 12-month finding contains more detailed information regarding the above decisions. A copy may be obtained from the South Dakota Field office (see ADDRESSES section).

References Cited

A complete list of references cited in the rule is available upon request from the South Dakota Field office (see ADDRESSES section).

Author

The primary author of this document is David A. Allardyce (see ADDRESSES section).

Authority

The authority for this action is the Endangered Species Act (16 U.S.C. 1531 *et seq.*)

Dated: June 12, 1995.

Mollie H. Beattie,

Director, Fish and Wildlife Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 216 and 229

[Docket No. 950605147-5147-01; I.D. 052395C]

RIN 0648-AH33

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

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule to implement the new management regime for the taking of marine mammals incidental to commercial fishing operations established by certain provisions of the Marine Mammal Protection Act of 1972 (MMPA) as added to that Act by certain amendments in 1994. The regulations would implement requirements to authorize vessels engaged in commercial fishing to incidentally, but not intentionally, take species and stocks of marine mammals upon the receipt of specified information and that

require commercial fishers to report to NMFS the incidental mortality and injury of marine mammals in the course of commercial fishing and comply with certain other requirements. The intended effect of this rule is to provide for a limited exemption of commercial fisheries from the MMPA's moratorium on the taking of marine mammals incidental to commercial fishing activities. NMFS issues a proposed list of fisheries (LOF), categorized according to frequency of incidental serious injury and mortality of marine mammals. Comments are invited on the proposed rule and the proposed LOF.

DATES: Comments on this proposed rule must be received by July 31, 1995. Comments on the proposed LOF must be received by September 14, 1995.

ADDRESSES: Send comments 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 Environmental Assessment (EA) may be obtained by writing to this address, by telephoning one of the contacts listed below, or by accessing the NMFS "Home Page" on the World Wide Web at <http://kingfish.ssp.nmfs.gov:80/home-page.html> which will be available by June 19, 1995. Comments regarding the burden-hour estimate or any other aspects of the collection of information requirements contained in this rule should be sent to the above individual and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB); Attention: NOAA Desk Officer, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: Dr. Thomas Eagle or 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; Dr. Steve Zimmerman, Alaska Region, 907-586-7235.

SUPPLEMENTARY INFORMATION:

Legislative and Regulatory History

Prior to passage of the 1988 amendments to the MMPA (Public Law 92-522), commercial fishers could receive an exemption from the MMPA's general moratorium on the taking of marine mammals by applying for a general permit and certificates of inclusion. The 1988 amendments to the MMPA (Public Law 100-711), added a section 114 to the MMPA that exempts, on an interim basis, commercial fishers who comply with certain registration

and reporting requirements from the general prohibition on taking marine mammals (Interim Exemption for Commercial Fisheries). The purpose of this exemption was to allow NMFS to collect data to be used in setting up a comprehensive management regime governing fisheries interactions with marine mammals. The 1988 amendments did not allow for the taking of California sea otters or the intentional lethal taking of Steller sea lions, cetaceans, or marine mammals from a population stock designated as depleted.

Section 11 of the MMPA Amendments of 1994 (Public Law 103-278) added a new section 118 to the MMPA establishing a new management regime for the taking of marine mammals incidental to commercial fishing operations. In order to provide time for development and implementation, section 15 of the MMPA Amendments of 1994 amended section 114, the interim exemption, to extend it until September 1, 1995, or until superseded by regulations prescribed under section 118, whichever is earlier.

Since it was first passed in 1972, one of the underlying goals of the MMPA has been that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate (section 101(a)(2) of the MMPA). Section 11 of the 1994 amendments to the MMPA reaffirmed this Zero Mortality Rate Goal (ZMRG) (new section 118(b)(1)) and requires NMFS to begin review of each fishery's progress toward the ZMRG within 3 years of enactment (April 30, 1997), and report the results of this review to Congress within 4 years of enactment (April 30, 1998) (new section 118(b)(3)). The amendments specify that all fisheries must attain this goal within 7 years of enactment (April 30, 2001) (new section 118(b)(2)).

Section 10 of the 1994 Amendments adds a new section 117 to the MMPA that requires NMFS to complete stock assessments for every population or stock of marine mammals that occur in the waters under U.S. jurisdiction and to designate strategic stocks based on the level of human-caused mortality likely to reduce or keep the stock below its optimum sustainable population level. Strategic stocks are also those that are listed as endangered or threatened species under the Endangered Species Act (ESA), depleted under the MMPA, or that are declining and likely to be listed as a threatened species under the

ESA. Stock assessments must include an analysis of whether the incidental mortality and serious injury of marine mammals from commercial fishing operations is insignificant and is approaching a zero mortality and serious injury rate (e.g., ZMRG). Draft stock assessment reports (SARs) were published in August, 1994 (59 FR 40527). Final SARs are in preparation.

Section 118 of the MMPA requires NMFS to authorize commercial fishers to incidentally, but not intentionally, take marine mammals during the course of commercial fishing operations upon the receipt of specified information and provided certain conditions are met. The regulations being proposed by this notice would implement section 118.

Section 118(a)(5) of the MMPA prohibits the intentional lethal take of any marine mammal in the course of commercial fishing operations except as provided by section 101(c) which authorizes takings, including intentional lethal takings if imminently necessary in self-defense or to save the life of a person in immediate danger and as long as such taking is reported to NMFS within 48 hours (see 60 FR 6036). The 1994 amendments to the MMPA amended section 101(a)(4) of the MMPA to authorize fishers to deter marine mammals from damaging fishing gear, catch or other private property or from endangering personal safety provided such measures do not result in the serious injury or mortality of a marine mammal. Section 101(a)(4) directs NMFS to develop and publish guidelines for use in safely deterring marine mammals and to prohibit the use of deterrence measures determined to have a significant adverse effect on marine mammals. On May 5, 1995, NMFS published proposed guidelines and prohibited measures (60 FR 22345).

Section 4 of the MMPA Amendments of 1994 amended section 101(a)(5) of the MMPA to authorize NMFS to issue permits for the take of marine mammals listed as a threatened species or endangered species under the ESA incidental to commercial fishing operations.

The 1994 Amendments retained the concept of categorizing commercial fisheries into three groups based on the frequency of incidental mortality and serious injury of marine mammals from section 114—the Interim Exemption for Commercial Fisheries. On September 1, 1994, NMFS published a notice of proposed changes to the LOF (59 FR 45263). As required by section 118, that notice classified commercial fisheries by frequency of incidental serious injury and mortality of marine mammals. This classification differed from the

classifications under the Interim Exemption in that non-injurious takes, incidental or intentional, such as harassment, were not included in the revised classification criteria. Only incidental serious injuries and mortalities were considered. Also, since intentional lethal takes are prohibited by section 118(a)(5), those fisheries previously classified based only on intentional takes were proposed for reclassification.

Additional information on the regulatory and legislative history of the MMPA prior to the 1994 Amendments appears in the Environmental Assessment prepared for this rule.

Comments and Responses to the Notice of Proposed Changes to the List of Fisheries

Ten comments were received in response to the September 1, 1994, notice of proposed changes to the LOF (59 FR 45263). Comments and information were received from State agencies, commercial fishing organizations, Indian tribes, conservation groups, and other interested parties. Comments on the proposed reclassification of fisheries, classification criteria, treaty Indian fisheries, and related topics are summarized below along with NMFS' responses. These comments were considered in developing this proposed rule.

Comments on the Proposed Changes to the Criteria

Two commenters agreed with the proposed reclassifications, because of the assumption that the prohibition on intentional serious injuries and mortalities would result in a reduced taking of marine mammals. However, three commenters believed that it was inappropriate to reclassify any fisheries based on this assumption until the prohibition was implemented by regulations. One commenter suggested that any attempt to factor unknown levels of illegal activities when classifying fisheries was inappropriate and would be unfair to law-abiding fishers. On March 3, 1995, the prohibition in section 118(a)(5) on intentionally seriously injuring or killing a marine mammal during commercial fishing operations became effective by regulation (60 FR 6036). Previously, under regulations implementing section 114, lethal deterrence measures could be used to protect fishing gear or catch during commercial fishing operations. NMFS has informed owners of vessels currently registered in a Category I or II fishery (respectively, frequent or

occasional incidental mortality and serious injury of marine mammals) of this prohibition by mail. Furthermore, NMFS conducted a public outreach campaign to inform other affected parties (e.g., vessel owners participating in a Category III fishery (a remote likelihood of incidental mortality and serious injury of marine mammals)) through tradepapers, newsletters, and other media. For these reasons, the proposed classification of fisheries in this proposed rule (see List of Fisheries) is based on the assumption that the prohibition on intentional serious injury and mortality will result in a reduced taking of marine mammals. The proposed LOF is also based on the new proposed definitions of "frequent," "occasional," and "remote" incidental mortality and serious injury of marine mammals (proposed § 229.2).

Comments on the Definition of a Fishery

For purposes of section 114, NMFS defined fisheries by gear type, geographical area, and target species, in accordance with existing state or Federal management designations. However, for some fisheries this information is unavailable or only partially available. In the notice of proposed changes to the LOF, NMFS suggested that fisheries could be partitioned as necessary to reflect concentrations of marine mammals in certain areas within a fishery, or at certain times of the year in order to address management actions on fishery hot spots, or seasons. Gear type (e.g., mesh size) could also be used to help define a fishery to allow flexibility. Three commenters supported these approaches.

The proposed LOF in this notice would define fisheries based on state or Federal management designations where these designations exist and where practicable. When this information was not available, fisheries are defined based on the 1994 LOF. The 1994 LOF based fishery definitions on the location of the fishery, the gear type used, and sometimes the fish species that are targeted by the fishery. A fishery may be proposed to be grouped with other fisheries if the general location and gear type are similar and if the rates of incidental marine mammal mortality and serious injury are known or suspected to be similar. For instance, the U.S. mid-Atlantic coastal gillnet fishery in the 1994 LOF is composed of many small fisheries that target different fish species seasonally but use the same general type of gear, fish in the same general location, and have a marine mammal take that is suspected to be similar. When additional information on

either marine mammal incidental mortality and serious injury or on the fishery are available, fisheries in the proposed LOF may be grouped together or split apart in order to better manage the incidental mortality and serious injury of marine mammals in those fisheries.

New fisheries or fisheries that were new to the proposed LOF were defined based on general location, gear type, and, when applicable, target species.

Comments on Take Estimates

The classification criteria developed to implement the Interim Exemption (expiring section 114) were based on an interaction rate of marine mammals with a randomly selected vessel in a fishery during a 20-day period. In the September 1, 1994 notice of proposed changes to the LOF, NMFS solicited comments and/or suggestions on classification criteria based on the relative impact of a fishery on marine mammal stocks (e.g., percentage of a stock's potential biological removal level (PBR)) or other alternative criteria. Four commenters supported classifying fisheries based on the impact of the annual incidental take of marine mammals from a marine mammal stock relative to the stock's PBR. Two of these commenters suggested that a fishery should be considered to have a frequent taking of marine mammals if the incidental take is 30 percent of a stock's PBR per year, instead of 50 percent of a stock's PBR as was suggested in the notice. They believed that this would be a more conservative approach. One of these commenters suggested that a Category III fishery should be considered to have a remote likelihood of taking if the incidental take from a marine mammal stock is less than or equal to 10 percent of a stock's PBR, instead of the one percent of a stock's PBR as was suggested in the notice. Two commenters supported an approach that categorizes fisheries based on either the number of takes per 20 days or impact of an annual take relative to the stock's PBR.

Commercial fisheries were classified in this proposed LOF based on new definitions of "frequent," "occasional", and "remote" incidental mortality and serious injury of marine mammals (proposed § 229.2). These new definitions would take into account the relative impact of incidental serious injury and mortality by commercial fisheries on marine mammal stocks. The development and justification for these proposed new definitions are discussed in the "Comments and Responses to Draft Regulations to Implement Section

118 from Working Sessions and Written Comments" section of this preamble.

Comments on Treaty Indian Fisheries

In the notice of proposed changes to the LOF, NMFS considered whether the Pacific Northwest treaty Indian tribal fisheries should be excluded from the LOF. Seven commenters objected to the omission of Pacific Northwest Indian tribal fisheries from the LOF. Commenters believed that the requirement to register Treaty Indian Fisheries and categorize them in the LOF provided NMFS with a mechanism to evaluate the impact of these fisheries on marine mammals. Some of the commenters believed that while traditional hunting and fishing rights are covered by native treaty agreement, commercial enterprises are not covered and should be regulated under the MMPA. One commenter believed that the exclusion of the Pacific Northwest treaty Indian tribal fisheries from the LOF was appropriate and also objected to the solicitation of public opinion on this topic.

In a September, 1994 letter to the Northwest Indian Fish Commission, NMFS stated that it had reviewed the relationship of Northwest Indian treaties to the MMPA, and did not find clear evidence that Congress intended to abrogate Indian treaty rights with respect to marine mammals. The letter concluded that proposed tribal harvests of seals and sea lions did not violate the MMPA, noting that neither species was subject to the ESA, and that the healthy status of the stocks would not be affected. The letter urged the tribes to continue to consult with NMFS, and to observe adequate conservation measures.

With respect to the LOF and in keeping with its September, 1994 letter, NMFS has determined that Category I and II treaty Indian tribal fisheries are conducted pursuant to the tribes' treaty rights. For the reasons discussed above, NMFS proposes to not require treaty tribes to register, report or comply with take reduction plans under section 118 of the MMPA. In addition, NMFS has removed treaty fisheries from the LOF proposed in this notice.

Comments on Applicability to Zero Mortality Rate Goal

In the **Federal Register** notice of proposed changes to the LOF, NMFS solicited comments on the development of criteria that could be used in the assessment of a fishery's progress in achieving the ZMRG, and whether the criteria used to classify fisheries may be used to make that assessment. In the June 1994 workshop to develop

standards for SARs, workshop participants suggested that a marine mammal stock that experienced a removal level equal to or less than 10 percent of its PBR could be considered to have an insignificant level of incidental mortality and serious injury approaching zero mortality and serious injury rate because the biological impacts would be negligible (see PBR Workshop Report). Several comments were received on the proposed definition set forth in the workshop report. One commenter agreed that a fishery would have achieved the ZMRG if it took 10 percent or less of a stock's PBR. However, three commenters did not agree because for stocks with a large population size, 10 percent removal could still be a very large number of marine mammals. Even if a fishery achieved this 10 percent goal, these commenters believed the fishery should still try to reduce marine mammal bycatch when possible, regardless of whether the reduction would be necessary to mitigate a biological impact on the stock.

NMFS believes that the ZMRG would be met for a marine mammal stock when the incidental mortality and serious injury from commercial fishing operations are at levels significantly below such stock's PBR so that the incidental mortality and serious injury has a negligible effect on the status of the affected stock. In other words, when the total incidental mortality and serious injury from fisheries has no biological impact, the ZMRG will have been met. NMFS believes that fishers should make every reasonable effort to reduce incidental take below this level. Nevertheless, for the purposes of the MMPA, NMFS is proposing to consider a fishery as having achieved the ZMRG if, collectively with other fisheries, it is responsible for the annual removal of 10 percent or less of any marine mammal stock's PBR level (proposed § 229.2).

Comments and Responses to Draft Regulations To Implement Section 118 From Working Sessions and Written Comments

Informal working sessions to discuss the draft proposed regulations to implement section 118 of the MMPA were held in Silver Spring, MD, on November 30, 1994, and Seattle, WA, on December 2, 1994. Attendees at both sessions included Congressional staff (Silver Spring session only), representatives of conservation groups, members of the fishing community, representatives of state governments, a representative of the Alaska subsistence community (Seattle session only) and NMFS staff. Written comments were

also received on the draft proposed regulations to implement section 118. Comments on fishery classification criteria, options for classifying fisheries, and related topics are summarized below along with NMFS' responses. These comments were considered in developing this proposed rule.

Comments on Logbook Data

Some commenters believed that logbook data should be used to classify fisheries. Although logbook information is not and probably will not be reliable enough to determine reliable mortality estimates, the information can be used to determine the minimum mortality of marine mammals in a particular fishery. In addition, qualitative information provided in reports by fishers, such as areas of operation, number of fishers, and relative number of incidental takes, is useful in determining which fisheries need more intensive monitoring programs. When no other information is available for a particular fishery, NMFS will continue to use logbook information collected during the Interim Exemption program to supplement information from the monitoring program (e.g., observer program), and to better understand interactions in those commercial fisheries that are not being observed. Under the proposed rule, fishers will no longer be required to submit logbooks; thus, reports of incidental takes made by fishers will be used to classify fisheries when other information is lacking.

Comments on Criteria When Stock Status or Fishery Take Information Are Lacking

Some commenters believed that fishery classification criteria should not be based on annual takes relative to PBR because in the draft SARs many PBRs were zero (no potential removal level estimated) due to a lack of information on the marine mammal stock in question (e.g., stock size) and this would subject certain fisheries to be classified arbitrarily. Some commenters believed that guidelines must be developed to allow categorization of new fisheries, or fisheries about which little is known. Most commenters supported defaulting new fisheries into Category II.

1. In contrast to the number of zero PBRs in the draft SARs, there are relatively few zero PBRs in the final SARs. Furthermore, fisheries that have annual takes of marine mammals from such stocks generally take more than one species of marine mammal; thus, the fishery can be classified based on a stock with a known PBR.

2. New fisheries for which no information is available on its level of

interaction with marine mammals, and where the frequency of interaction can not be determined by analogy (e.g., gear used), would be deemed to be a Category II fishery until the next annual LOF is published which may recategorize them based on new information. NMFS believes that this would provide for the necessary safeguards to ensure that potentially high levels of incidental mortality and serious injury of marine mammals in new fisheries is appropriately monitored.

Comments on Options for Fishery Classification Criteria

Under section 118 of the MMPA, commercial fisheries must be classified in one of the following three categories:

Category I: Frequent incidental mortality and serious injury of marine mammals;

Category II: Occasional incidental mortality and serious injury of marine mammals;

Category III: A remote likelihood of or no known incidental mortality or serious injury of marine mammals.

Because the 1994 amendments to the MMPA did not define "frequent", "occasional" or "remote likelihood", definitions for these terms must be developed in order to classify fisheries. Several options for criteria to classify fisheries were considered and discussed during the working sessions, and are summarized below.

Option 1: Status Quo. This option would retain the definitions of "frequent", "occasional", and "remote likelihood" contained in the regulations to implementing section 114 (54 CFR 219.3). Under this option, "frequent" means that it is highly likely that more than one marine mammal will be incidentally taken by a randomly selected vessel in the fishery during a 20-day period. "Occasional" means that there is some likelihood that one marine mammal will be incidentally taken by a randomly selected vessel in the fishery during a 20-day period. "Remote likelihood" means that it is highly unlikely that any marine mammal will be incidentally taken by a randomly selected vessel in the fishery during a 20-day period.

Comments on Option 1. Some commenters stated that the criteria for classifying fisheries under section 118 of the MMPA should be identical to the criteria under section 114. They argued that changing the criteria was not the intent of Congress and might place additional regulatory burden on commercial fishers by increasing the number of fisheries placed in Categories I and II. Furthermore, they were

concerned about what process would be followed for classifying fisheries under a new set of criteria when little or no data exists from which to estimate fishing mortality or PBR. The majority of the commenters however, supported modification of fishery classification criteria to better reflect the effect of commercial fisheries on individual marine mammal stocks. This approach would allow NMFS to place management emphasis on stocks of particular concern. Attendees at the Seattle session constructed a new set of criteria, which is discussed below under Option 2.

Assumptions of Option 1. This approach assumes that NMFS has fairly reliable estimates of rates of serious injuries and mortalities for vessels per 20 days of fishing in each fishery. For fisheries in which NMFS has placed observers, these rates may vary in accuracy, depending on the level of observer coverage applied. For other fisheries, only information submitted in fishers' logbooks are available. Take rates obtained from fishers' logbooks have been found to vary from those reported by observers for the same fishery, with the general tendency to have observed take rates higher than fisher-reported take rates.

Strengths of Option 1. This criteria scheme is useful in identifying fisheries that have relatively high rates of incidental serious injuries and mortalities across a number of marine mammal stocks, regardless of the status of the stocks involved. These fisheries would be classified as Category I or II fisheries.

Weaknesses of Option 1. This approach is problematic in that it does not account for the size of the fishery as a whole (i.e., the number of vessels participating in the fishery), as it relates to impacts on stocks. For instance, two fisheries may have the same serious injury and mortality rate per 20 days of fishing, yet one fishery may have 20 vessels participating and the other may have 3,000 vessels participating. These two fisheries would have significantly different impacts on a particular stock or stocks of marine mammals.

Also, reporting requirements under section 118 require that fishers report only incidents of serious injury and mortality, and not information on fishing effort. This significantly reduces the information available to calculate takes rates per 20 days of fishing. This information would only be accurate for fisheries in which there are observers.

Option 1 could unnecessarily focus management and resources on fisheries (e.g., monitoring programs, take reduction plans, etc.) that do not have

a significant impact on marine mammal stocks. It may subject more vessel owners to registration, fees, and observer coverage. Finally, NMFS is concerned that option 1 may be inconsistent with the new section 118 because it does not consider the status of or impact to the marine mammal stocks.

Option 2: Base Criteria on Proportions of the Stock Size and PBR. Under this option, proportions of the best estimated stock size and the PBR for a particular marine mammal stock would be used to classify fisheries in the following manner:

Category I: Annual mortality and serious injury exceeds 0.005 of the best population estimate for cetaceans or 0.01 of the best population estimate for pinnipeds.

Category II: Annual mortality and serious injury is greater than 0.005 of the best population estimate but is greater than 0.01 of the PBR for cetaceans or is less than 0.01 of the best population estimate but greater than 0.1 of the PBR for pinnipeds.

Category III: Annual mortality and serious injury is less than 0.1 of PBR.

Comments on Option 2. There was no support for this option.

Option 3: Proportions of PBR. Under Option 3, a proportion of the PBR for a particular marine mammal would be used to classify fisheries in the following manner:

Category I: Annual mortality and serious injury of a stock in a given fishery is less than or equal to 50 percent of PBR.

Category II: Annual mortality and serious injury is greater than 1 percent and less than 50 percent of PBR.

Category III: Annual mortality and serious injury is less than 1 percent of PBR.

Comments on Option 3. Although there was general support for this type of approach, working session participants were concerned that Option 3 did not account for the collective impacts of all fisheries that interact with a marine mammal stock. Working session attendees also recognized that Option 3 did not account for marine mammal stocks that are subjected to a low level of incidental mortality and injury across a number of fisheries.

Option 4: Proportions of PBR—Two-tiered Approach. This approach is a two-tiered scheme 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. This approach is based on the annual number of serious injuries and mortalities due to

commercial fishing relative to a stock's PBR.

Tier 1: If the annual mortality and serious injury across all fisheries that interact with a stock is less than or equal to 10 percent of the PBR 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 some percentage of PBR.

Category II: Annual mortality and serious injury is between some percentage and some percentage of PBR.

Category III: Annual mortality and serious injury is less than or equal to some percentage of PBR.

This approach is modeled after the recommendations from the NMFS PBR Workshop held in June 1994 and the working sessions on the draft proposed regulations. The most critical classification threshold is the one between Category II and Category III fisheries because Category III fisheries only have a "remote likelihood" of incidental serious injury or mortality of a marine mammal and would not be subject to the more stringent requirements of Category I or II fisheries. The PBR Workshop participants agreed that serious injury and mortality incidental to commercial fishing operations would be insignificant to a stock if such removals were only a small portion (i.e., 10 percent of the PBR) of the stock. Using this rationale, all fisheries which impact a stock would be considered in the determination of whether impacts to that stock are significant (Tier 1). If the total removals from a stock across all fisheries were greater than 10 percent of the PBR for that stock, the fishery would then be categorized according to the criteria in Tier 2.

The term "some percentage" under Tier 2 is used, because NMFS considered a number of different percentage options under Option 4 (see EA). The threshold between Category I and II fisheries was set at 50 percent of PBR in this proposed rule. NMFS believes that this is a conservative approach, and in its analysis there were few additional fisheries added to Category I as a result of lowering the dividing line from exceeding PBR to 50 percent of PBR (see EA).

Comments on Option 4. Attendees at the Seattle working session supported the concept of basing fishery classification on takes relative to PBR, and the two-tier system that is presented

here as Option 4 resulted from that session. At the Silver Spring working session, there was also some support for this approach, but others believed that the criteria should remain as they were under section 114.

Assumptions of Option 4. This two-tiered approach assumes that NMFS has fairly accurate information on both the abundance of a stock (in order to calculate PBR) and the current level of incidental serious injury and mortality due to commercial fishing per year. For some cases, both the estimated fishing mortality and the PBRs of marine mammal stocks incidentally taken in that fishery are known with some degree of confidence. In these cases, fishing mortalities and serious injuries were calculated using data collected by observers. If observer data were not available, fishers' logbooks were used to estimate removal levels. However, it is assumed that logbooks provide only a minimum indication of total removal levels. In cases where the PBR for a stock is unknown, any known or inferred level of removal from that stock by a fishery usually warranted placement of that fishery in Category II so that better information could be collected.

For some fisheries, NMFS must use its best estimate of fishing mortality and serious injury based on inferences from similar fishing techniques, gear used, target species, seasons and areas fished, and species and distribution of marine mammals in the area. This method of inferring levels of removals was also used under regulations to implement section 114. In most of the Category III fisheries for which NMFS has no updated information to support a change in classification, the Category III designation was maintained.

Strengths of Option 4. This approach categorizes fisheries based on their impacts on stocks, thereby prompting take reduction teams to be formed first for those stocks of greatest concern. Option 4 would alleviate the burden of the management program for those fisheries that do not significantly interact with marine mammal stocks (Category III), because Category III vessel owners would not be required to register, pay fees, or take aboard an observer. Option 4 would focus management resources on those commercial fisheries that have impacts to marine mammals that are more than negligible. Furthermore, this approach would allow for the classification of fisheries that have only rare occurrences of serious injuries and mortalities as Category II, if the stock subject to removal has a very low PBR level and

could be greatly impacted by even a low level of taking.

Weaknesses of Option 4. This approach does not specifically address fisheries that have a high frequency of marine mammal serious injuries and mortalities across several stocks. These could be classified as either Category I, II, or III depending on the stocks with which they interact. This may affect the prioritization of take reduction team formation, although, eventually, take reduction teams must be formed for marine mammal stocks that have significant incidental interactions with Category I or II fisheries.

Criteria for Categorizing Fisheries

NMFS believes that the 1994 amendments to the MMPA emphasized management of the interaction between commercial fisheries and marine mammals on a stock-specific basis. For this reason, NMFS proposes to use Option 4 (discussed above) and the proposed definitions of frequent, occasional, and remote (proposed § 229.2) were used to classify commercial fisheries. This requires the previous proposed changes to the LOF to be revised and to be repropounded by this notice.

Zero Mortality Rate Goal

NMFS proposes to consider a fishery as having reached the ZMRG when collectively with other fisheries, it is responsible for the annual removal of (1) 10 percent or less of any marine mammal stock's PBR, or (2) more than 10 percent of any marine mammal stock's PBR, yet the fishery by itself is responsible for the annual removal of one percent or less of that stock's PBR (proposed § 229.2).

It is not possible to determine whether a level of mortality to a declining stock of marine mammals is insignificant simply by applying a mechanistic definition such as the one set forth above. Therefore, fisheries that kill or seriously injure declining, depleted, threatened, or endangered stocks of marine mammals would have to be examined separately to determine whether the incidental take is insignificant.

Another option for defining the ZMRG draws from the 1981 amendments to the MMPA that addressed reducing mortality of small cetaceans in the yellow-fin tuna fishery in the Eastern Tropical Pacific Ocean (ETP). In 1981, Congress expressed it was not its intent to shut down the tuna fishery via the MMPA and that the ZMRG could be achieved in that fishery by requiring the use of the best marine mammal safety techniques and

equipment that are economically and technologically practicable (H.R. Rep. 228, 97th Cong., 1st Sess. 13 (Sept. 16, 1981)). If a similar rationale were adopted for other fisheries, the following might be an option for defining the ZMRG: "Zero Mortality Rate Goal means the reduction of the annual number of incidental mortalities and serious injuries in each fishery to insignificant levels approaching a zero mortality and serious injury rate; at a minimum, this requires that the rate of incidental mortality and serious injury is at the lowest level that is technologically and economically practicable."

A problem with such an adopting such an approach when implementing section 118 of the MMPA, however, is that, while Congress adopted a "technologically and economically practicable" approach for the ETP yellowfin tuna fishery in 1981, it effectively abandoned that approach in 1984 when it established an annual statutory quota of 20,500 for that fishery. Congress reduced the quota again in 1992 when through the International Dolphin Conservation Act; there, it added a new section 306 to the MMPA in which the quota was reduced to 1000 for 1992, and 800 from January 1, 1993 to March 1, 1994. It also required that, for each year after 1992, dolphin mortality must decrease by a "statistically significant amount." Under these new requirements, the ETP yellowfin tuna fishery was forced to stop fishing in February of 1994 because it was approaching a take of 114 dolphins, which was statistically significantly less than the 115 it took in 1993. These statutory limits on dolphin mortality clearly indicate that, even for the ETP yellowfin tuna fishery, the 1981 approach using "technologically and economically practicable" methods a questionable method of achieving the ZMRG.

Some commenters proposed a definition where "zero equals zero" and believed that fisheries should be required to reduce their incidental mortality and serious injury of marine mammals to zero. There are two main problems with this approach: (1) It does not consider a "rate" of take as required by the ZMRG, and (2) this option could result in severe curtailment or complete cessation of fishing operations, even for fisheries that had only a remote likelihood of marine mammal incidental take.

In the proposed rule, the definition of ZMRG is proposed to be based on 10 percent of PBR. Comments on the preferred definition and the options presented are specifically encouraged.

Commercial Fishing Authorization

As required by the provisions of section 118(c) of the MMPA, under the proposed rule, in order for persons to lawfully take a marine mammal while engaged in a Category I or II fishery, the owner of a vessel or an authorized representative thereof would have to register with NMFS for and obtain an Authorization Certificate and decal, display the decal on the vessel, possess physical evidence of the authorization on the vessel, and report all incidental mortality and injury of marine mammals to NMFS. Vessels engaged in a Category I or II fishery would be required to carry aboard an observer if requested by NMFS. In the case of a nonvessel fishery, the owner of the fishing gear, or an authorized representative thereof, would have to register with NMFS for and obtain an Authorization Certificate and decal and attach the decal to the Authorization Certificate and the Certificate or a copy thereof would have to be in the possession of the person in charge of the fishing operations.

Owners of vessels engaged only in Category III fisheries would not be required to register with NMFS for or obtain an Authorization Certificate or decal to incidentally take marine mammals as a result of their fishing operations; however, they would be required to report all marine mammals incidentally killed or injured. Owners of vessels in Category I or II fisheries would be required to comply with any general regulations, conditions of Authorization Certificates issued to the vessel owner, and emergency or take reduction plan regulations published under the authority of section 118; owners of vessels in Category III fisheries would be required to comply with emergency or take reduction plan regulations and reporting requirements.

As specified in section 118(c)(2)(B) of the MMPA, the authorization for commercial fisheries applies only to U.S. commercial fishing vessels including licensed commercial passenger fishing vessels (e.g., charter and party boats) or to those foreign vessels with valid fishing permits issued under section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*) (Magnuson Act). As specified in section 118(a)(3), authorizations under section 118 are not applicable to vessels fishing in the yellowfin tuna purse seine fishery in the eastern tropical Pacific. Although registration of vessels in Category I and II fisheries under the MMPA is necessary to lawfully incidentally take a marine mammal, not registering under the MMPA would not prevent a fisher

from fishing. Fishing is governed by a variety of mechanisms such as Federal or state laws and their respective implementing regulations (including regulations implementing regional fishery management plans).

The authorization for commercial fisheries does not apply to Northwest Treaty Tribal fishers exercising treaty rights.

Section 118 of the MMPA does not include authority to incidentally take southern (California) sea otters (*Enhydra lutris nereis*). This subspecies historically ranged along the west coast of the United States, but currently is found only along the central California coast and San Nicolas Island, CA. Section 118 of the MMPA does not supersede or otherwise affect the provisions of Public Law 99-625, governing the translocation of southern sea otters to San Nicolas Island for research and recovery purposes. Within special zones established for this experimental population, certain restrictions on incidental taking under the MMPA do not apply. (See 50 CFR 17.84(d) for a description of these special zones and activities that can be lawfully conducted within these zones.) Issuance of Authorization Certificates for Category I and II Fisheries

Registration Process

As required by section 118(c) of the MMPA, under the proposed regulations, a vessel owner (or authorized representative) would have to register to obtain an Authorization Certificate and decal for each vessel that will engage in a Category I or II fishery. The initial registration would cover 1996. After that, registrations to renew certificates would be required each calendar year. Those owners of vessels holding valid Exemption Certificates under section 114 would be deemed to have registered under section 118 through December 31, 1995.

Registration forms, outlining the required information, would be available from NMFS (proposed § 229.4(c)). However, if the granting and administration of authorizations is integrated and coordinated with an existing fishery license, registration, or related program operated by an entity other than NMFS, registration forms will be available from those program offices. A notice will be published in the **Federal Register** indicating where to register and other means will also be used to notify fishers of the change (e.g., MMPA Bulletin, mailings to previously registered fishers, etc).

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 registrant would be requested to send the first page of the registration form to one of the NMFS offices listed in proposed section § 229.4; the second page should be retained by the registrant and would serve as an indication of registration until an Authorization Certificate is issued.

For annual renewals, registration forms, containing the information on file with NMFS, would be sent to existing Authorization Certificate holders prior to the beginning of the year. Vessel owners would be required to make any necessary corrections or updates and sign and return the form to NMFS. A signed registration renewal form would have to be submitted to NMFS prior to any incidental taking of a marine mammal by that vessel owner in a Category I or II fishery.

The term "vessel owners" (proposed § 229.2), in addition to owners of commercial fishing vessels, would be defined to include owners of fixed or other fishing gear that is used in a "nonvessel fishery." A "nonvessel fishery" would mean a commercial fishing operation that uses fixed or other fishing gear without a vessel, such as gear used in set gillnet, trap, beach seine, weir, ranch and pen fisheries. Owners of such gear would be subject to the same requirements and restrictions as owners of fishing vessels or fish processing vessels operating in a commercial fishery.

A registration fee may be required to accompany each registration or request for renewal if NMFS is issuing the Authorization Certificates.

Under the legislation, NMFS is authorized to establish a fee to cover the administrative cost of granting Authorization Certificates and renewals, however, the amount that would be required has not been determined at this time. "Vessel owners" in "nonvessel fisheries" may be required to submit one fee to register all gear owned. The fees collected in connection with the authorization system would be available to NMFS to cover the administrative costs and will be determined annually and published in the LOF.

Issuing Procedures

After submission of a completed registration form and the required fee, an Authorization Certificate and a vessel decal or other physical evidence would be issued to the vessel owner for each vessel intending to engage in a Category I or II fishery. The initial Certificate and decal would be valid for calendar year 1996. After that, Certificate renewals and decals would be issued each year after receipt of an updated registration,

required fee, and statement (yes/no) regarding whether any marine mammals were incidentally killed or injured during the previous calendar year covering all registered Category I or II fisheries.

Decals or other physical evidence would be required to be displayed as proof of current registration. In those instances where NMFS is successful in incorporating the registration process with existing licensing systems, fishers will be notified of the accepted "physical evidence" requirements.

A replacement decal would be issued, if requested, to replace a lost or damaged decal. In nonvessel fisheries, the decal would have to be affixed to the Certificate. Annual decals would be issued along with the Certificates in subsequent years.

The Authorization Certificate or a copy thereof would have to be on board the vessel while it is operating in a Category I or II fishery, or, in the case of a nonvessel fishery, a copy of the Certificate would have to be in the possession of the person in charge of the fishing operations. A copy of the Certificate would have to be made available upon request to any state or Federal government official authorized to enforce the provisions of the MMPA or to any designated agent of NMFS.

Suspension or Revocation of Authorization Certificates

Under the proposed regulations, NMFS could suspend or revoke a Certificate or deny a Certificate renewal for any vessel if the Certificate holder (1) fails to report as required under proposed § 229.6, or (2) fails to take aboard an observer in a Category I or II fishery as required under proposed § 229.7, if requested. In addition, NMFS could revoke or suspend a Certificate for any vessel that fails to comply with other terms and conditions of the Authorization Certificate or the regulations governing the incidental taking of marine mammals during commercial operations under this section. NMFS could suspend or revoke a Certificate or could deny a Certificate renewal for any vessel which fails to comply with a take reduction plan or emergency regulations under this section. The suspension, revocation or denial could occur without notice or opportunity for hearing in the case of failure to submit required reports. Other actions would be subject to NOAA's civil procedures contained in subpart D of 15 CFR part 904. Previous failure to comply with the requirements of section 114 of the MMPA would not bar authorization under this section for an

owner who complies with the requirements of this section.

Requirements for Category III Fisheries

Under section 118(c) of the MMPA and these proposed regulations, owners of vessels engaged only in Category III fisheries are not required to register with NMFS or to obtain an Authorization Certificate to legally incidentally take marine mammals during commercial fishing operations. However, they would be required to report all incidental mortality and injury and make all reasonable efforts to release animals unharmed. Where necessary to address immediate and adverse impacts to marine mammal stocks, NMFS could place observers aboard Category III vessels if there is reason to believe that such vessels may be causing the incidental mortality and serious injury to such a stock.

Reporting Requirements

As required by section 118(e) of the MMPA and the proposed regulations, vessel owners or operators engaged in Category I, II, or III fisheries would have to report all incidental mortality and injury of marine mammals during the course of commercial fishing operations to NMFS Headquarters or appropriate NMFS Regional Office. NMFS proposes to define an "injury" (proposed § 229.2) as a wound or other physical harm. Any animal that requires assistance to escape from entanglement in fishing gear would also be considered injured and would have to be reported.

Reports would have to be submitted by mail or other means such as FAX within 48 hours after the end of each fishing trip during which the incidental mortality or injury occurred. The "end of a fishing trip" (proposed § 229.2) would mean the time of a vessels' return to port after a fishing trip. NMFS would provide a standard postage-paid form and instructions for recording information for this purpose. If a fisher participates in more than one fishery during a single fishing trip, a separate report would be required to be submitted for each such fishery. Report forms would require information on: The fishery, 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 and whether an injury or mortality occurred. Failure to report incidental mortality or injury of marine mammals during the course of commercial fishing operations would result in suspension or revocation of the Authorization Certificate and denial of Authorization Certificate renewal

requests until the vessel owner complies with reporting requirements of proposed § 229.6 of this part.

Monitoring Program

As required by section 118(d) of the MMPA, NMFS would establish a program to monitor incidental mortality and serious injury of marine mammals during the course of commercial fishing operations. A "serious injury" (proposed § 229.2) would be defined as any injury of a marine mammal during a commercial fishing operation that will likely result in mortality of that marine mammal. The purposes of the monitoring program as specified in section 118(d)(1) of the MMPA are to: (1) Obtain statistically reliable estimates of incidental mortality and serious injury of marine mammals; (2) determine the reliability of reports of incidental mortality and injury of marine mammals obtained from fishers' reports; and (3) identify changes in fishing methods or technology that may increase or decrease incidental mortality or serious injury of marine mammals. The monitoring program would use information from observer programs, fishers' reports, and marine mammal stranding reports.

Observer Program

Section 118(d)(2) authorizes NMFS to place observers aboard vessels, as necessary, to monitor incidental mortality and serious injury of marine mammals during commercial fishing operations for vessels engaged in Category I or II fisheries. Under the proposed regulations, the owner of a vessel engaged in a Category I or II fishery would be required to take aboard an observer if requested by NMFS or a contractor of NMFS, to do so. The extent of observer coverage would be based on the ability to obtain statistically reliable estimates of incidental mortality and serious injury in each individual fishery and could include up to 100 percent observer coverage of a fishery. The specific design of the observer program, including how long an observer would be placed on a particular vessel, would vary among fisheries.

As required by section 118(d)(4), the highest priority for allocating observers among fisheries would be for those commercial fisheries that have incidental mortality or serious injury of marine mammals from stocks listed as endangered or threatened species under the ESA. To the extent practicable, the next highest priority for allocation would be for those commercial fisheries that have incidental mortality and serious injury of marine mammals from strategic stocks. A "strategic stock" is a

marine mammal stock (1) for which the level of human-caused mortality is greater than the potential biological removal, or (2) which is declining and is likely to be listed under the ESA, or (3) which is listed under the ESA, or (4) which is designated as depleted under the MMPA (proposed § 229.2). The "potential biological removal level" (proposed § 229.2) would mean 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 optimal sustainable population. To the extent practicable, the third highest priority for allocation would be for commercial fisheries that have incidental mortality or serious injury of marine mammals from stocks for which the level of incidental mortality and serious injury relative to the stock size is uncertain.

As required by section 118(d)(3), when determining the distribution of observers among fisheries and vessels within a fishery, NMFS would be guided by the following standards: (1) The requirement to obtain statistically reliable information; (2) the requirement that the assignment of observers be fair and equitable among fisheries and among vessels within a fishery; (3) the requirement that no individual person or vessel, or group of persons or vessels, be subject to excessive or overly burdensome observer coverage; and (4) to the extent practicable, the need to minimize costs and avoid duplication.

Under section 118(d)(6) of the MMPA, NMFS is not required to place an observer on a Category I or II vessel if (1) 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 on board the harvesting vessel, (2) 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, or (3) an observer is not available.

The first exception addresses the situation in which Category I or II vessel catcher/harvester boats do not bring the catch on board, but deliver the fish directly to a floating processor on which an observer is placed. For example, observers on foreign vessels in over-the-side joint ventures may satisfy the observer requirements, and observers would not be needed on the catcher/harvester boats.

With respect to whether a vessel is adequate for taking an observer aboard, NMFS would make the necessary determinations on a case-by-case basis.

Examples of situations in which observers would not be required or if a vessel is too small to carry (or house) an observer safely, if an observer would displace a crew member, or if fishing gear or the vessel could not be operated safely because of the presence of an observer.

The exception for unavailability of observers would include situations where NMFS may have inadequate funds to cover a full observer program or may not be able to employ or contract for sufficient qualified personnel to fully staff an observer program. To minimize these situations, NMFS would use observers, to the maximum extent possible, placed under other authorities, such as the Magnuson Act, to collect marine mammal interaction information, in addition to their other duties, to fulfill the observer requirements under the MMPA.

Vessel owners, operators, and crew members would be required to cooperate with observers and to provide information, such as vessel location, needed to meet the observers' responsibilities. If feasible and if required by the observer, marine mammals killed during the fishing operation which are readily accessible to crew members would have to be brought on board the vessel for biological processing and could be retained by NMFS. NMFS recognizes that for many smaller vessels, this will not be feasible and, therefore, would not be required. As authorized by section 118(d)(2), observers could, among other tasks (1) record incidental mortality and serious injury, or bycatch of other nontarget species; (2) record numbers of marine mammals sighted; and (3) perform other scientific investigations, including photographing incidental takes.

Although the primary purpose of the observer program is to collect data on incidental take of marine mammals, observers would not be limited to this activity. Regional fishery management councils, states or other Federal agencies could request NMFS to collect other scientific or biological information needed in their resource conservation and management programs, such as fishery resource and sea bird data. NMFS would require the observer to collect the requested additional information unless NMFS found in writing, and after opportunity for public comment, that the collection of the requested information would interfere with the collection of information related to marine mammals.

Pursuant to section 118(d)(7) of the MMPA, NMFS could place an observer aboard a vessel engaged in a Category III

fishery with the consent with the vessel owner or pursuant to section 118(g)(1)(C), if NMFS believed that the incidental mortality or serious injury of marine mammals from such fishery may be contributing to the immediate and significant adverse impact of a species or stock listed under the ESA and has prescribed emergency regulations under proposed § 229.9(a)(3). If an observer was placed on a vessel engaged in a Category III fishery, the vessel owner, operator, and crew members would have to comply with the requirements under § 229.9(e).

NMFS, in coordination with Federal and state scientists and personnel experienced in fishery observer programs, is designing its observer program to obtain statistically reliable information on the species and number of marine mammals incidentally killed or seriously injured in as many Category I and II fisheries as possible. The level of observer coverage and whether an alternative program would be used would be determined for each Category I and II fishery. These determinations would be based on the size and nature of each fishery and on the resources available for these programs. NMFS will try to make the best use of available resources by using existing research programs, programs operated by the states or other authorities, or alternative programs where statistically reliable information can be obtained at lower cost.

Alternative Observer Program

As authorized by section 118(d)(5) of the MMPA, if observers could not be placed on Category I or II vessels at the necessary level, NMFS could establish an alternative observer program to provide statistically reliable information on the species and number of marine mammals incidentally killed or seriously injured in the course of commercial fishing operations. The alternative observer program could include, but would not be limited to, direct observation of fishing activities from vessels, airplanes, or points on shore. Provided sufficient resources were available, an alternative program could also be established in any fishery for which reliable information was not otherwise obtainable.

Stranding Information

The NMFS may use marine mammal stranding data to monitor incidental mortality and serious injury of marine mammals from commercial fishing operations to supplement the information obtained from the observer program and fishers' reports. **Intentional Taking of Marine Mammals**

Section 118(a)(5) of the MMPA prohibits the intentional lethal take of any marine mammal in the course of commercial fishing operations in Category I, II, or III fisheries except as proved by section 101(c), which authorizes takings, including intentional lethal takings, if imminently necessary in self-defense or to save the life of a person in immediate danger and such taking is reported to NMFS within 48 hours. On February 1, 1995, NMFS published a final rule implementing this section of the MMPA (60 FR 6036). That rule, which became effective on March 3, 1995, requires that a report be made to the appropriate NMFS Regional Office within 48 hours if a marine mammal is killed by a fisher or a member of the general public in self-defense or in order to save the life of another person. If a report is not submitted, the person responsible for the take, whether a fisher or a member of the general public, will be subject to the penalties which have been authorized by the MMPA for illegal takes. This proposed rule incorporates the provisions of that final rule and would supersede it.

When necessary to deter a marine mammal from damaging gear, catch, or private property, or from endangering personal safety, fishers in Category I, II, or III fisheries may do so provided they follow the guidelines for safely deterring marine mammals found at proposed 50 CFR § 216.29(c) and do not use any measures prohibited under proposed 50 CFR 216.29(d). These sections were proposed on May 5, 1995 (60 FR 22345) and are subject to change based on the comments received.

Definitions of Incidental Taking and Incidental Mortality

The proposed definition of incidental, but not intentional, take is the nonintentional or accidental taking of a marine mammal that results from, but is not the purpose of, carrying out an otherwise lawful action. The proposed definition of incidental mortality is 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. The phrase "incidental, but not intentional" is intended to mean accidental taking. The words 'not intentional' should not be read to mean that persons who 'know' that there is some possibility of taking marine mammals incidental to commercial fishing operations or other specified activities are precluded from doing so.

Prohibition on Discarding Fishing Gear

Proposed section 229.3(f) would prohibit the discarding of fishing gear at sea. The ingestion of, or entanglement in, discarded fishing gear by marine mammals often causes them serious injury or mortality. It is not necessary for the conduct of fishing operations to discard fishing gear at sea. Gear can be stowed and safely discarded in port. Accordingly, it is proposed to prohibit the discard of fishing gear at sea, because such discards are not necessary to fishing operations and prohibiting such discards would decrease the number of serious injuries and mortalities to marine mammals caused by fishing operations consistent with the ZMRG.

Publication of List of Fisheries

Section 118(c) of the MMPA requires NMFS to publish a LOF, along with the marine mammals and number of vessels or persons involved in each such fishery, for those fisheries that have:

Category I: A frequent incidental mortality and serious injury of marine mammals;

Category II: An occasional incidental mortality and serious injury of marine mammals; or

Category III: A remote likelihood, or no known incidental mortality or serious injury of marine mammals.

A notice proposing revisions to the last LOF would be published in the **Federal Register** on or about July 1 of each year for the purpose of receiving public comment. A final LOF would be published on or about October 1 of each year which would become effective January 1 of the next calendar year. The proposed and final LOF would be developed according to the definitions for Category I, II, and III fisheries under § 229.2. Each LOF would list the marine mammals that interact with the fisheries, the approximate number of vessels or persons actively involved in each fishery, and would set forth the registration fee. A revised LOF may be published at any time after notice and opportunity for public comment.

Proposed List of Fisheries

The proposed regulations would establish the following fishery classification criteria:

Tier 1: If the annual mortality and serious injury across all fisheries that interact with a stock is less than or equal to 10 percent of the PBR 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 PBR.

Category II: Annual mortality and serious injury is greater than 1 percent and less than 50 percent of PBR.

Category III: Annual mortality and serious injury is less than or equal to 1 percent of PBR.

These criteria and information on commercial fisheries were used to develop the proposed LOF contained in this notice based on the following prioritization scheme:

1. Observer data extrapolated to estimate a total annual kill for that fishery was used where available, after which the proposed classification criteria were applied for Category I, II and III fisheries in order to classify the fisheries. The source of the observer data is provided in the description of how the fishery was classified.

2. Logbook data were used if observer data was unavailable. Only those animals recorded as "injured in gear" and "killed in gear" were included. Those animals harassed, injured, or killed by deterrence were not included in the data used to categorize the fisheries. Logbook data were summarized from the F/PR database. An estimated total annual kill is not calculated; fisheries are categorized based on the reported injuries and mortalities. When logbook data were questionable, the NMFS evaluated the reliability of the data.

3. When neither observer data nor logbook data were available, fisher's reports of marine mammal takes were used to classify the fisheries.

4. Evidence of fishery interactions can sometimes be gleaned by examination of stranded marine mammals. When the cause of death of a particular stranded marine mammal could be attributed to a specific fishery, this information was used to classify some fisheries.

5. If no information was available on which to base the classification of a particular fishery, the fishery was classified based on analogy with other fisheries occurring in similar locations or having similar gear types or methods for which observer or logbook information exists. When classifying fisheries, analogies were not made to fisheries which were classified based on fisher's reports or stranding data.

6. If available information is deemed by NMFS to be highly questionable, the fishery may be categorized based on the best information available, which includes but is not limited to historical patterns of marine mammal takes and expected magnitude of takes resulting from changes in fishery effort.

Justification for Categorization of Commercial Fisheries

The following are justifications for the proposed categorization of commercial fisheries into Category I, II, or III based on the proposed classification scheme. Justifications are presented for only those fisheries proposed to be placed in Category I or II and those fisheries in Category III for which observer, logbook, stranding or other information exist. Unless otherwise specified, fisheries classified into Category I or II have passed the Tier I criteria; thus, most justifications for placing fisheries detail only the information used to classify the fishery under the Tier 2 criteria. Tables 1 and 2 presents the proposed LOF.

Commercial Fisheries in the Pacific Ocean

Category I

California angel shark/halibut and other species large mesh (greater than 3.5 in) set gill net fishery. For the purpose of the 1994 LOF, this fishery was included with the California drift gillnet fishery under the general fishery definition "California set and drift gillnet fisheries that use a stretched mesh size of greater than 3.5 inches". This fishery was renamed in order to remain consistent with the name under which observer data is collected and because the name is more descriptive of the fishery.

This fishery is proposed to be placed in Category I, because observer data averaged across the years 1991 to 1993 indicate that the annual take of the central Californian stock of harbor porpoise (31 animals) is 91 percent of the PBR for this stock (34 animals).

California, Oregon thresher shark/swordfish/blue shark (blue shark in Oregon only) drift gill net fishery. This fishery was included with the California angel shark/halibut set gillnet fishery in the 1994 LOF and was called the "California set and drift gillnet fisheries that use a stretched mesh size of greater than 3.5 inches". This fishery was renamed to be more specific and to include the northward expansion of the fishery into Oregon and a possible future expansion into Washington. Observer data collected in the fishery both in California and in Oregon indicates that the incidental take of marine mammals occurs throughout the fishery. In addition, observer data collected in the late 1980's during an experimental shark fishery in Oregon and Washington using comparable gear also showed incidental takes of marine mammals for the fishery at that time (Stick and Hreha, 1989).

This fishery is proposed to be placed in Category I, because observer data provided by the NMFS Southwest Fisheries Science Center averaged across the years 1991 to 1993 indicate that the annual take of the Pacific sperm whale stock (15 animals) is greater than the PBR for this stock (1 animal).

Category II

Alaska Prince William Sound salmon drift gillnet. Categorization of this fishery is based on observer data. The Prince William Sound drift gillnet (Eshamy, Coghill and Unawik districts) and Copper River and Bering River salmon drift gillnet are combined in this fishery. Because total known harbor porpoise mortality and serious injury levels across all fisheries exceed 10 percent of the stock's PBR, and the known harbor porpoise mortality and serious injury level for this fishery is 20 animals per year (8.1 percent of PBR), this fishery is proposed to be placed in Category II.

Alaska Peninsula/Aleutians salmon drift gillnet fishery. Categorization of this fishery is based on observer data. The South Unimak (including False Pass and Unimak Pass) drift gillnet and the Alaska Peninsula (other than South Unimak) drift gillnet fisheries are combined in this fishery. Although total known Dall's porpoise mortality and serious injury levels across all fisheries do not exceed 10 percent of the stock's PBR with currently available information, low levels of observer coverage across all fisheries have been inadequate to determine mortality and serious injury levels across all fisheries for this stock, and available data suggest that levels of mortality and serious injury may exceed 10 percent of this stock's PBR if observer information were available. This, combined with the fact that known Dall's porpoise mortality and serious injury level of 28/year (1.8 percent of PBR) suggests that this fishery should be placed in Category II.

Southeast Alaska salmon drift gillnet fishery. Categorization of this fishery is based on observer and strandings data. Because total known humpback whale and harbor porpoise mortality and serious injury levels across all fisheries exceed 10 percent of each stock's PBR, and the known harbor porpoise mortality and serious injury level for this fishery is 3 animals per year (1.3 percent of PBR) and humpback mortality and serious injury level for this fishery is 0.13 animals per year (4.6 percent of PBR), this fishery is proposed to be placed in Category II.

Alaska Cook Inlet salmon drift gillnet. Categorization of this fishery is based on logbook data. Although total known

marine mammal mortality and serious injury levels across all fisheries do not exceed 10 percent of each stock's PBR with currently available information for those species known to be taken in this fishery, low levels of observer coverage across all fisheries have been inadequate to determine mortality and serious injury levels across all fisheries for these stocks, and available data suggest that levels of mortality and serious injury may exceed 10 percent of each stock's PBR if observer information were available. Similarly, low levels of marine mammals have been documented for this fishery, and available data suggest that levels of marine mammal mortality and serious injury in this fishery are expected to be similar to levels of other drift gillnet fisheries which interact with similar marine mammals species if observer data were available. Therefore, this fishery is proposed to be placed in Category II.

Alaska Yakutat salmon set gillnet fishery. Categorization of this fishery is based on logbook data. Although total known harbor porpoise mortality and serious injury levels across all fisheries do not exceed 10 percent of this stock's PBR with currently available information, low levels of observer coverage across all fisheries have been inadequate to determine mortality and serious injury levels across all fisheries for this stock, and available data suggest that levels of mortality and serious injury may exceed 10 percent of this stock's PBR if observer information were available. This, combined with the fact that known harbor seal mortality and serious injury level of 30/year (1.5 percent of PBR) suggests that this fishery should be placed in Category II.

Alaska Cook Inlet salmon set gillnet. Categorization of this fishery is based on logbook data. Although total known marine mammal mortality and serious injury levels across all fisheries do not exceed 10 percent of each stock's PBR with currently available information for those species known to be taken in this fishery, low levels of observer coverage across all fisheries has not been at a level high enough to accurately determine mortality and serious injury levels across all fisheries for these stocks, and available data suggest that levels of mortality and serious injury may exceed 10 percent of each stock's PBR if observer information were available, especially for harbor porpoise. Similarly, low levels of marine mammals have been documented for this fishery, and available data suggest that levels of marine mammal mortality and serious injury in this fishery would be expected to be similar to levels of

other set gillnet fisheries which interact with similar marine mammals species if observer data were available. Therefore, this fishery is proposed to be placed in Category II.

Alaska Kodiak salmon set gillnet.

Categorization of this fishery is based on logbook data. Because total known harbor porpoise mortality and serious injury levels across all fisheries exceed 10 percent of this stock's PBR, and the known harbor porpoise mortality and serious injury level for this fishery is 4 animals per year (1.6 percent of PBR), this fishery is proposed to be placed in Category II.

Alaska Peninsula/Aleutians salmon set gillnet (includes Atka and Amlia Islands). Categorization of this fishery is based on logbook data. Although total known marine mammal mortality and serious injury levels across all fisheries do not exceed 10 percent of each stock's PBR with currently available information for those species known to be taken in this fishery, low levels of observer coverage across all fisheries have been inadequate to determine mortality and serious injury levels across all fisheries for these stocks, and available data suggest that levels of mortality and serious injury may exceed 10 percent of each stock's PBR if observer information were available, especially for harbor porpoise.

Similarly, though low levels of marine mammal mortalities and serious injuries have been documented for this fishery, available data suggest that levels of mortality and serious injury in this fishery would be expected to be similar to levels of other set gillnet fisheries which interact with similar marine mammals species if observer data were available. Therefore, this fishery is proposed to be placed in Category II.

Alaska Bristol Bay salmon drift gillnet. Categorization of this fishery is based on logbook data. Although total known marine mammal mortality and serious injury levels across all fisheries do not exceed 10 percent of each stock's PBR with currently available information for those species known to be taken in this fishery, low levels of observer coverage across all fisheries have been inadequate to determine mortality and serious injury levels across all fisheries for these stocks, and available data suggest that levels of mortality and serious injury may exceed 10 percent of each stock's PBR if observer information were available, especially for harbor porpoise, harbor seals and Steller sea lions. Similarly, though low levels of marine mammal mortalities and serious injuries have been documented for this fishery, available data suggest that levels of

mortality and serious injury in this fishery would be expected to be similar to levels of other set gillnet fisheries which interact with similar marine mammals species if observer data were available. Therefore, this fishery is proposed to be placed in Category II.

Alaska Bristol Bay salmon set gillnet. Categorization of this fishery is based on information from logbooks. This fishery is proposed to be placed in Category II based on an occasional take of marine mammals (0.5 Bristol Bay stock of beluga whales per year). Because the take relative to PBR is 2 percent, which is greater than 1 percent and less than 50 percent, this fishery is proposed to be placed in Category II.

Alaska Metlakatla/Annette Island salmon drift gillnet. This fishery is separated from the Southeast drift gillnet fishery only for purposes of registration. It is a tribal fishery and is thus exempt from the registration fee. For categorization purposes, it is considered the same as the Southeast drift gillnet fishery and is thus proposed to be placed in Category II.

Washington Puget Sound Region salmon drift gillnet fishery (includes inland waters south of U.S.-Canada border and eastward of the Bonilla-Tatoosh line—Treaty Indian fishing is excluded). The name of this fishery has been modified from the name in the 1994 LOF in order to exclude set gillnet gear and commercial steelhead fishing since these fisheries are conducted only by treaty Indian fishers. Also, the name change clarifies that the regulations governing incidental take of marine mammals in fisheries do not apply to tribal members exercising treaty Indian fishing rights.

Categorization of this fishery is based on information from observer programs and logbooks. This fishery experiences an occasional take of marine mammals (50 harbor seals from the Washington inland waters stock were reported in logbooks each year). Because the take relative to PBR is 6 percent, which is greater than 1 percent and less than 50 percent, this fishery is proposed to be placed in Category II. The observer programs conducted in 1993 and 1994 documented a few incidental takes of harbor seals, harbor porpoise and Dall's porpoise; however, the extrapolated estimates of take for the non-Indian fishery are not yet available.

California anchovy, mackerel, tuna purse seine. Categorization of this fishery is based on information from logbooks. This fishery experiences an occasional take of marine mammals (0.33 bottlenose dolphins per year). Because the take relative to PBR is 2 percent, which is greater than 1 percent

and less than 50 percent, this fishery is proposed to be placed in Category II.

Alaska Southeast salmon purse seine. This fishery was included under the general title "Alaska salmon/herring beach and purse seine" in the 1994 LOF. Categorization of this fishery is based on Category III reports. Because total known humpback whale mortality and serious injury levels across all fisheries exceed 10 percent of this stock's PBR, and the known humpback whale mortality and serious injury level for this fishery is 0.4 animals per year (14.3 percent of PBR), this fishery is proposed to be placed in Category II.

Alaska Bering Sea and Aleutian Islands groundfish trawl. Categorization of this fishery is based on observer data. Because total known killer whale mortality and serious injury levels across all fisheries exceed 10 percent of this stock's PBR, and the known killer whale mortality and serious injury level for this fishery is 1 animal (0.8 animals) per year (8 percent of PBR), this fishery is proposed to be placed in Category II.

Alaska pair trawl—new fishery. Because this is a new fishery to the region, no information is available to make a determination on expected levels of marine mammal mortalities and serious injuries in this fishery. Analogy cannot be drawn with the Atlantic tuna swordfish pair trawl, as target species and marine mammal species it might interact with are too dissimilar. However, because this is a new fishery for which no information is available, this fishery is proposed to be placed in Category II.

Oregon swordfish/blue shark surface longline fishery—new fishery. Categorization of this fishery is based on analogy with observed pelagic longline fisheries in the Atlantic Ocean. Based on observer data, the Atlantic Ocean pelagic longline fishery for swordfish and tuna have at least an occasional incidental serious injury and mortality of marine mammals. Accordingly, this fishery is proposed to be placed in Category II.

Alaska southern Bering Sea, Aleutian Islands, and Western Gulf of Alaska sablefish longline/set line (federally regulated waters). The name of this fishery has been modified from the 1994 LOF name to specify that this fishery occurs in Federal waters. Categorization of this fishery is based on observer data. Because total known killer whale mortality and serious injury levels across all fisheries exceed 10 percent of this stock's PBR, and the known killer whale mortality and serious injury level for this fishery is 0.25 animals per year (2.5 percent of PBR), this fishery is proposed to remain in Category II.

Category III

Alaska Kuskokwim, Yukon, Norton Sound, Kotzebue salmon set/drift gillnet. The name of this fishery has been changed from the 1994 LOF designation "Alaska Kuskokwim/Yukon/Norton Sound/Kotzebue salmon gillnets" to specify that both set and drift gillnets are used in this fishery. Although this fishery is expected to have occasional interactions with marine mammals, interactions usually result in directed takes for subsistence purposes. Therefore, this fishery is proposed to remain in Category III.

Alaska state waters sablefish longline/set line. This fishery is classified based on logbook data from the Alaska Prince William Sound longline/set line fishery. The fishery description has been expanded from the 1994 LOF to include all sablefish longline/set line fisheries in Alaska state waters. There were no records of incidental takes in logbook reports from this fishery. This fishery is proposed to be reclassified into Category III from Category II based on the prohibition of intentional lethal takes.

Alaska Prince William Sound set gill net. Categorization of this fishery is based on observer data. Because marine mammal mortality and serious injury levels approaching 1 percent of any stocks' PBR are not expected, this fishery is proposed to be reclassified from Category II to Category III.

Washington Willapa Bay salmon drift gillnet. This fishery is classified based on observer data extrapolated to estimate the total annual kill. There were no incidental serious injuries or mortalities in the Willapa Bay fishery in 1991 or 1992; thus, the fishery is proposed to remain in Category III.

Washington Grays Harbor (includes rivers, estuaries, etc.) drift gillnet. This fishery is classified based on observer data extrapolated to estimate the total annual kill. There is a low level of incidental mortality and serious injury of harbor seals in this fishery (under 1 percent of PBR). This fishery is proposed to be placed in Category III.

Washington, Oregon lower Columbia River (includes tributaries) drift gillnet. Categorization of this fishery is based on data from observer programs and current and anticipated future low fishing effort in the winter fishing season. During 3 years of observations in this fishery with observer coverage averaging from 3.0 percent to 9.5 percent each year, all but one of the observed harbor seal mortalities were documented in the winter season. The extrapolated annual mortality of harbor seals in this fishery from 1991 to 1993 was 233 seals in 1991 (all during the

winter season), 192 seals in 1992 (180 in the winter season and 12 in the fall), and 11 seals in 1993 (all during the winter season). Although the estimated annual takes of harbor seals in 1991 and 1992 could justify placing this fishery in Category II, reduced fishing seasons in recent years and reduced fishing effort (due to restrictions on the fishery to minimize impacts on ESA listed Snake River chinook salmon) are unlikely to result in the levels of harbor seal mortality observed in 1991 and 1992. The winter season of 1993, when an estimated total of only 11 harbor seals were taken, was restricted due to ESA considerations and resulted in chinook landings of 446 fish in 1993 in contrast with landings of 2,692 fish in 1991 and 1,537 landings in 1992. The winter season was closed in 1994. Therefore, this fishery is proposed to be placed in Category III.

Alaska miscellaneous finfish set gillnet. This fishery description has been changed from the definition "Alaska gillnet (except salmon, herring, and sunken gill nets for groundfish)" used under the 1994 LOF to correlate with the State of Alaska name for this fishery. This fishery is categorized based on logbook data. This fishery is proposed to be moved from Category II to Category III based on an infrequent take of marine mammals (under two unidentified pinnipeds and unidentified species are taken per year).

Alaska salmon purse seine. This fishery used to be called the "Alaska salmon/herring beach and purse seine" fishery and the "Alaska South Unimak (False Pass and Unimak Pass) salmon purse seine" fishery under the 1994 LOF. This proposed fishery description includes all salmon purse seine fisheries in Alaska except for the Alaska Southeast salmon purse seine fishery. Because mortality and serious injuries of marine mammals are not expected for this fishery, it is proposed to be placed in Category III.

California/Oregon/Washington salmon troll. The name of this fishery has been changed from that used in the 1994 LOF, because it is managed as one fishery and the intentional lethal take prohibition will reduce the level of take to very low levels. The previous division of the fishery into the "Washington, Oregon north of 45°46' (Cape Falcon) salmon troll" and the "California, Oregon south of 45°46' (Cape Falcon) salmon troll" was based on differences in intentional lethal take rates between the northern and southern portions of the fishery. In this fishery, lethal deterrence, which is now prohibited, was the predominant source of mortality to marine mammals. As

lethal deterrence is illegal and expected to no longer be a source of mortality for marine mammals, it is proposed to reclassify this fishery from Category II to Category III.

Alaska salmon troll. Categorization of this fishery is based on logbook data from 1990. Known Steller sea lion mortalities and serious injuries for this fishery do not exceed 1 percent of the stock's PBR and current information does not indicate that this level is likely to exceed 1 percent. Thus, this fishery is proposed to be placed in Category III.

California herring purse seine. This fishery is categorized based on logbook data. This fishery is proposed to be placed in Category III due to an infrequent take of marine mammals (all marine mammal takes are at a level less than 1 percent of PBR).

California sardine purse seine. This fishery is categorized based on logbook data. This fishery is proposed to be placed in Category III due to an infrequent take of marine mammals (no marine mammal takes have been recorded in logbooks).

California squid purse seine. This fishery is categorized based on logbook data. This fishery is proposed to be placed in Category III due to an infrequent take of marine mammals (California sea lion takes are at a level less than 1 percent of PBR).

Alaska Metlakatla fish trap. No marine mammal mortalities or serious injuries have been recorded for this fishery. Therefore, this fishery is proposed to be placed in Category III. *California squid dip net.* This fishery is categorized based on logbook data. This fishery is proposed to be placed in Category III due to an infrequent take of marine mammals (no marine mammal takes have been recorded in logbooks).

Washington, Oregon salmon net pens. This fishery is categorized based on logbook data. This fishery is proposed to be placed in Category III due to an infrequent take of marine mammals (California sea lion takes are at a level less than 1 percent of the PBR).

Oregon salmon ranch. This fishery is categorized based on logbook data. This fishery is proposed to be placed in Category III due to an infrequent take of marine mammals (no marine mammal takes have been recorded in logbooks).

Miscellaneous finfish/groundfish longline/set line. This fishery is renamed from the 1994 LOF designation "Alaska groundfish long line/set line (except sablefish in the Bering Sea-Aleutian Islands/Gulf of Alaska)" to correspond with the fishery name as specified in the State of Alaska records and to include both miscellaneous finfish and groundfish (rockfish). This

fishery is classified based on observer data. This fishery is proposed to remain in Category III due to an infrequent take of marine mammals (all incidental takes are at a level less than 1 percent of the PBR).

Hawaii swordfish, tuna, billfish, mahi mahi, wahoo, oceanic sharks longline/set line. Categorization of this fishery is based on observer data. Because there have been no records of incidental serious injury and mortality of marine mammals, this fishery is proposed to remain in Category III.

Alaska Gulf of Alaska groundfish trawl. This fishery is classified based on extrapolations from observer data. This fishery is proposed to remain in Category III due to an infrequent take of marine mammals (all incidental takes are at a level less than 1 percent of the PBR).

Alaska roe herring and food/bait herring gillnet. The name of this fishery has been modified from "Alaska herring gill net" in the 1994 LOF to include two different fisheries on herring. Alaska roe herring and food/bait herring purse seine. This fishery is renamed from the 1994 LOF designation of "Alaska salmon/herring beach or purse seine" to separate out the two target species and gear types.

Alaska roe herring and food/bait herring beach seine. This fishery is renamed from the 1994 LOF designation of "Alaska salmon/herring beach or purse seine" to separate out the two target species and gear types.

Washington, Oregon, California albacore, groundfish, bottom fish, California halibut nonsalmonid troll fisheries. This fishery is renamed from the 1994 LOF designation of "Alaska North Pacific halibut, Alaska bottom fish, Washington, Oregon, California albacore, groundfish, bottom fish, California halibut nonsalmonid troll fisheries" to separate the Alaska fisheries from the fisheries of other states.

Alaska halibut longline/set line (state and Federal waters). This fishery is renamed from the 1994 LOF designation of "Alaska, Washington, Oregon North Pacific halibut longline/set line" to separate the Alaska fisheries from the fisheries of other states. Washington, Oregon North Pacific halibut longline/set line. This fishery is renamed from the 1994 LOF designation of "Alaska, Washington, Oregon North Pacific halibut longline/set line" to separate the Alaska fisheries from the fisheries of other states. Alaska miscellaneous finfish purse seine. This fishery is renamed from the 1994 LOF designation of "Alaska other finfish beach or purse

seine" to separate the beach and purse seine fisheries.

Alaska miscellaneous finfish beach seine. This fishery is renamed from the 1994 LOF designation of "Alaska other finfish beach or purse seine" to separate the beach and purse seine fisheries.

Washington, Oregon, California shrimp trawl. This fishery is renamed from the 1994 LOF designation of "Alaska, Washington, Oregon shrimp trawl" to separate the Alaska fisheries from the fisheries of other states.

Alaska shrimp otter trawl and beam trawl (statewide; includes Cook Inlet). This fishery is renamed from the 1994 LOF designation of "Alaska, Washington, Oregon shrimp trawl" to separate the Alaska fisheries from the fisheries of other states.

Alaska miscellaneous finfish otter and beam trawl—new fishery. This is proposed to be a new fishery to the LOF.

Alaska crustacean/octopus/squid pot. This fishery is renamed from the 1994 LOF designation of "Alaska shellfish pot" to more accurately describe this fishery. This fishery includes the crab pot fisheries, the shrimp pot fisheries, and the octopus/squid pot fisheries.

Oregon developmental fishery bottom longline/set line—new fishery. This fishery is classified based on analogy to other bottom longline/setline fisheries such as the Alaska sablefish longline fishery. This fishery is considered separate from the Oregon developmental longline fishery for shark/swordfish, which is classified into Category II based on analogy with surface longline fisheries for similar species in the Atlantic Ocean. Oregon developmental fishery round haul (purse seine and lampara) beach seine and throw net. This fishery is proposed to be classified in Category III based on analogy with similar fisheries in the Pacific Ocean. This fishery may target any or all of the following: Pacific sardine or saury, whitebait, eulachon, night smelt, longfin smelt, surf smelt, sandfish, pomfret, and slender sole.

Oregon developmental fishery trawl—new fishery. This fishery is proposed to be classified in Category III based on analogy with similar fisheries in the Pacific Ocean. This fishery may target any or all of the following: Pacific sardine or saury, whitebait, eulachon, night smelt, longfin smelt, surf smelt, sandfish, pomfret, and slender sole.

Oregon developmental fishery pots, ring nets, and traps—new fishery. This fishery is proposed to be classified in Category III based on analogy with similar fisheries in the Pacific Ocean. This fishery may target any or all of the following: Pacific sardine or saury, whitebait, eulachon, night smelt, longfin

smelt, surf smelt, sandfish, pomfret, and slender sole.

Oregon developmental fishery handline and jig—new fishery. This fishery is proposed to be classified in Category III based on analogy with similar fisheries in the Pacific Ocean. This fishery may target any or all of the following: Pacific sardine or saury, whitebait, eulachon, night smelt, longfin smelt, surf smelt, sandfish, pomfret, and slender sole.

Oregon developmental fishery dive, hand, mechanical collection—new fishery. This fishery is proposed to be classified in Category III based on analogy with similar fisheries in the Pacific Ocean. This fishery may target any or all of the following: Pacific sardine or saury, whitebait, eulachon, night smelt, longfin smelt, surf smelt, sandfish, pomfret, and slender sole.

New Pacific Fisheries

The following fisheries are new Pacific fisheries proposed to be placed in Category III, because they are expected to have a remote likelihood of incidental serious injury or mortality of marine mammals:

California bait pen
California finfish and shellfish live trap/
hook-and-line
Alaska spawn-on-kelp empoundment
California salmon enhancement rearing
pen
Oregon shrimp trawl
Alaska octopus/squid purse seine
Alaska octopus/squid handline
Alaska octopus/squid longline
Alaska octopus/squid other gear

Fisheries Removed From the LOF

The following fisheries have been removed from the proposed LOF:

Northern Washington coastal (area 4 and 4A) salmon set gillnet. This fishery has been removed from the proposed LOF, because it is a fishery conducted by a Northwest Treaty Tribe. The provisions of 50 CFR part 229, including the LOF, do not apply to Northwest treaty Indian tribal members exercising treaty fishing rights.

Washington coastal river set gillnet. This fishery has been removed from the proposed LOF, because it is a fishery conducted by a Northwest Treaty Tribe. The provisions of part 229, including the LOF, do not apply to Northwest treaty Indian tribal members exercising treaty fishing rights.

Washington tribal ranch. This fishery has been removed from the proposed LOF, because it is a fishery conducted by a Northwest Treaty Tribe. The provisions of part 229, including the LOF, do not apply to Northwest treaty Indian tribal members exercising treaty fishing rights.

Washington Puget Sound region and inland waters south of the U.S.-Canada border, including the Strait of Juan de Fuca, Hood Canal and estuaries and lower river areas (subject to tidal action) set and drift gillnet. The name of this fishery has been modified from the name in the 1994 LOF in order to exclude set gillnet gear and commercial steelhead fishing since these fisheries are conducted only by treaty Indian fishers. The provisions of part 229, including the LOF, do not apply to Northwest treaty Indian tribal members exercising treaty fishing rights.

California Klamath River gill net. This fishery is proposed for removal from the LOF, because no commercial fishing has been conducted in recent years.

Washington, Oregon Upper Columbia River Basin (above Bonneville Dam) salmon and other finfish gillnet. This fishery is proposed to be removed from the LOF, because no marine mammals are expected to be encountered.

Other fisheries. There are many fisheries in Category III that were not mentioned above. Because no additional information is available that warrants reclassification for these fisheries, they are proposed to remain in Category III. Commercial Fisheries in the Atlantic Ocean and the Gulf of Mexico

Category I

Atlantic Ocean, Caribbean, Gulf of Mexico swordfish, tuna, shark pair trawl. This fishery was classified based on observer data. This fishery is proposed to be placed in Category I, because the annual estimated take of common dolphins (an average of 1992 and 1993 data was used) is equal to the PBR for this stock (PBR = 33). In addition, the annual estimated take of the offshore stock of bottlenose dolphin (79 animals) is 95 percent of PBR (83).

Atlantic Ocean, Caribbean, Gulf of Mexico swordfish, tuna, shark drift gill net. This fishery was classified based on observer data. This fishery was placed in Category I, because the annual estimated takes of common dolphins (424 animals), pilot whales (61 animals), spotted dolphins (23 animals), right whales (1 animal) and sperm whales (1 animal) exceed the PBRs for these stocks.

New England multispecies sink gill net. This fishery is directed primarily towards species covered by the Multispecies Fishery Management Plan and spiny dogfish. It was classified based on observer data. This fishery is proposed to remain in Category I, because the annual estimated take of harbor porpoise (an average of 1,300 animals for 1992 and 1993; average of

1,875 animals for 1990–93) exceeds the PBR for this stock (403 animals).

Gulf of Maine small pelagics. This fishery has been directed towards small pelagics including mackerel and herring, primarily for bait. Although there has been little or no effort in this fishery in recent years, this fishery is proposed to be retained in Category I, because there is no information currently available to place this fishery in a different category.

Atlantic Ocean, Caribbean, Gulf of Mexico tuna, shark, swordfish longline. This fishery was classified based on observer data. In 1994, this fishery was classified in Category II based on the classification system in section 114. Based on the proposed fishery classification criteria, this fishery is proposed to be placed in Category I, because the annual estimated take of pilot whales (26 animals) is at least 93 percent of the PBR (between 4 and 28 animals), an amount greater than the lower threshold for classification as a Category I fishery, this fishery is proposed to be placed in Category I.

Category II

U.S. Mid-Atlantic coastal gillnet. This fishery was categorized based on stranding information curated by the NMFS Northeast and Southeast Regions. The NMFS Northeast Fisheries Science Center has been focusing observer effort on this fishery from 1993 to the present but has not recorded any interactions. Classification of this fishery is based on the necropsy results of the harbor porpoise stranded in the mid-Atlantic in 1993–94. Of the 68 animals examined, 41 (59 percent) were in good enough condition to be evaluated as to whether or not they had been involved in a human interaction. Twenty-one of the 41 (51 percent) exhibited no signs of human interaction, and 19 (46 percent) were evaluated as having been involved in human interaction, based in each case on the presence of net marks. Therefore, approximately half of the stranded harbor porpoise in that area showed signs of having been involved in human interaction believed to be some kind of net gear. The average annual take of harbor porpoise in this fishery is then calculated at a minimum of ten animals, which is 2.5 percent of PBR. Because the annual take is between 1 percent and 50 percent of the PBR, this fishery is proposed to be placed in Category II.

U.S. South Atlantic shark gillnet fishery. Categorization of this fishery is based on a Category III report from a limited observer program. In 1992, one bottlenose dolphin was captured in this fishery. No takes were observed in 1993. This fishery is proposed to be placed in

Category II, because the annual take of the Western North Atlantic coastal bottlenose dolphin averaged over 1992 and 1993 is between 1 percent and 50 percent of the PBR (25 animals).

Atlantic mid-water trawl fishery. This fishery is directed towards species included in the Atlantic Mackerel, Squid and Butterfish Fishery Management Plan and other species. This fishery is proposed to be renamed and would include the 1994 LOF descriptions "Mid-Atlantic squid trawl" and "Mid-Atlantic mackerel trawl". The fishery is renamed, because the gear type and probability for interactions is similar for these mid-water trawl fisheries.

Categorization of this fishery is based on logbook data. Observer data exist for this fishery but are not currently available. In 1994, this fishery was classified in Category III based on the section 114 classification system. Based on the proposed fishery classification criteria, this fishery is proposed to be placed in Category II, because the annual take of pilot whales is between 1 percent and 50 percent of the PBR.

North Carolina roe mullet stop net. Categorization of this fishery is based on stranding information and visual observations. This is a new fishery proposed to be added to the LOF; stop nets for other target species and in other locations are included under Category III. This fishery is proposed to be placed in Category II, because the take of bottlenose dolphins (3 animals per year since 1990) is between 1 percent and 50 percent of the PBR for this stock (25 animals).

North Carolina haul seine fishery—new fishery. This fishery has the potential to take harbor porpoise and U.S. western North Atlantic coastal bottlenose dolphins. Because it is a new fishery to the LOF, and because of the high probability of takes of the above two stocks, this fishery is proposed to be classified in Category II.

Gulf of Maine, U.S. mid-Atlantic menhaden purse seine. This fishery is categorized based on Category III reports. This fishery is proposed to be placed in Category II due to mortality and serious injury of western North Atlantic coastal bottlenose dolphins (1.75 animals per year) that is 6 percent of the PBR for that stock. Because western North Atlantic coastal bottlenose dolphins do not occur in the Gulf of Maine, it may be appropriate to separate this fishery into northern and southern components.

Category III

North Atlantic bottom trawl. This fishery targets species included in, but

not limited to, all species described in the Multispecies, Summer Flounder, and Scup and Sea Bass Fishery Management Plans. This fishery is renamed from the 1994 LOF designation "Gulf of Maine, Mid-Atlantic groundfish trawl" to include a specific list of species targeted. This fishery was classified based on observer data.

Six takes of marine mammals incidental to this fishery have been observed from 1989 to 1992. Three of the takes were marine mammals known or suspected to have been dead prior to being caught in the bottom trawl gear. Two takes of striped dolphin were observed in December 1991 along the continental shelf edge off Rhode Island in 50 fathoms of water. Extrapolation of these takes to the entire groundfish bottom trawl fishery generate an estimated mortality level of 45 animals which is 62 percent of this species' PBR. However, several complicating factors exist:

- The observed coverage in the Category III groundfish bottom trawl fishery is small (under 1 percent) and was designed to monitor fishery management related issues. Therefore, the coefficient of variation of the mortality estimate is very high and is derived from nonrandom observer effort.

- The known distribution of the striped dolphin is along the shelf edge from Georges Bank to Cape Hatteras and extends further south.

- Since the species only exists in a small portion of the area fished by North Atlantic Bottom Trawl gear, extrapolation of the observed mortality to the entire fishery produces a substantial overestimate of the total mortality.

- Fishing effort in this fishery will be reduced by 50 percent in 5 years under Amendment nos. 5 and 7 to the Fishery Management Plan for the Northeast Multispecies Fishery, which may be implemented as early as next year, may reduce effort by 80 percent in the first year of implementation.

The mortality estimates derived from two takes of striped dolphin over 4 years of less than 10 percent observer effort are statistically weak and, due to the marginal overlap of the fishery with this species distribution, likely to be an overestimate. The fishery is facing severe cutbacks in effort under ongoing and proposed Magnuson Act actions, further reducing the likelihood of interactions. Therefore, the fishery is proposed to remain in Category III.

U.S. Mid-Atlantic, U.S. South Atlantic, Gulf of Mexico shrimp trawl. Categorization of this fishery is based on observer data. There has been one

observed serious injury or mortality in this fishery from 1979 to 1993. Because this is a low level of mortality, this fishery is proposed to be placed in Category III.

Finfish aquaculture. The name of this fishery is proposed to be changed from the 1994 LOF designation "Gulf of Maine Atlantic salmon" to broaden the definition to include other regions and species. Classification of this fishery is based on logbook data and the proposed reclassification due to the prohibition of intentional lethal takes. Incidental takes of harbor seals are less than 1 percent of the PBR. Thus, this fishery is proposed to be placed in Category III.

Shellfish aquaculture. This is a new fishery that is proposed to be added to the LOF. This fishery is classified by analogy to other aquaculture fisheries that have a remote likelihood of serious injury and mortality of marine mammals.

Gulf of Mexico inshore gillnet (black drum, sheepshead). This is a new fishery proposed to be added to the LOF. This fishery is classified by analogy to other inshore gillnet fisheries, specifically the inshore fisheries that occur in the U.S. mid-Atlantic.

U.S. mid-Atlantic hand seine. This is a new fishery proposed to be added to the LOF. This fishery is placed in Category III by analogy with other hand seine fisheries.

Offshore monkfish bottom gillnet. This is a new fishery that is proposed to be added to the LOF. This fishery involves a small number (under 50) of vessels operating along the shelf edge off Rhode Island. Because this fishery uses gear that is set very deep and a remote likelihood of serious injury and mortality of marine mammals is expected, it is proposed to be placed in Category III.

Georgia, South Carolina, Maryland whelk trawl. This fishery is renamed from the 1994 LOF designation "Georgia, South Carolina whelk trawl" to include the extended range of the fishery.

U.S. mid-Atlantic offshore surfclam and quahog dredge. This fishery is renamed from the 1994 LOF designation "Mid-Atlantic offshore clam" to include the dredge fishery for quahogs.

U.S. mid-Atlantic/Gulf of Mexico oyster. This fishery is renamed from the 1994 LOF designation "Mid-Atlantic oyster" to include the Gulf of Mexico oyster fishery.

U.S. mid-Atlantic mixed species stop/seine/weir (except the North Carolina roe mullet stop net). This fishery includes all fixed or staked net fisheries from Nantucket Sound to the

Chesapeake Bay. One bottlenose dolphin was found entangled in a pound net lead during the five years of data collection under the Exemption Program. This occurred in a Chesapeake Bay fishery for which bycatch survey information has been available throughout the 5-year Exemption Program. Bycatch surveys are also carried out in other regions where this gear is used. Therefore, we believe that the remote possibility of marine mammal mortality and serious injury occurring in these fisheries is verifiable, and the fishery remain in Category III.

Gulf of Mexico menhaden purse seine. This fishery is proposed to be defined as separate from the U.S. South Atlantic menhaden purse seine fishery. This fishery is proposed to be placed in Category III based on an expectation of low levels of interaction with marine mammals.

U.S. South Atlantic menhaden purse seine. This fishery is proposed to be defined as separate from the Gulf of Mexico menhaden purse seine fishery. This fishery is proposed to be placed in Category III based on an expectation of low levels of interaction with marine mammals.

Proposed List of Fisheries

The following two tables list the commercial fisheries of the United States in their proposed categories. The estimated number of vessels is expressed in terms of the number of active participants in the fishery, when possible, and, as the estimated number of vessels or persons when information on the number of active participants is not available, these values have been updated from the 1994 LOF when possible. The information on which marine mammal species/stocks are involved in interactions with the fishery is based on observer data, logbook data, stranding reports, fisher's reports, and the 1994 LOF. If there is no information indicating which stocks of marine mammals might be involved in fishery interactions, analogy is used to provide a list of stocks with which interactions may occur, if appropriate. An asterisk (*) indicates that the stock is a strategic stock; a plus (+) indicates that the stock is listed as threatened or endangered under the ESA.

Pursuant to section 101(a)(5)(E), NMFS must determine which fisheries have a negligible impact on species or stocks of marine mammals that are listed under the ESA. NMFS is therefore specifically seeking public comments that address those fisheries in the proposed LOF (Tables 1 and 2) that interact with species or stocks of marine mammals listed under the ESA and the information on the magnitude of the

takes of such species or stocks found in the EA that accompanies this proposed rule.

TABLE 1.—PROPOSED LIST OF FISHERIES
[Commercial Fisheries in the Pacific Ocean]

Fishery description	Estimated No. of ves- sels/per- sons	Marine mammal spec- ies/stocks involved
Category I:		
CA angel shark/halibut and other species large mesh (>3.5in) set gillnet fishery	520	99, 109, 110, 138, 139, 142.
CA/OR/WA thresher shark/swordfish/blue shark (blue shark OR only) drift gillnet fishery	150	2*+, 92*+, 103, 104, 105, 107, 109, 110, 111, 113*, 117*, 142.
Category II:		
AK Prince William Sound salmon drift gillnet	509	1*+, 5, 19.
AK Peninsula/Aleutians salmon drift gillnet fishery	107	3*, 5, 6, 7, 19, 20, 154.
Southeast Alaska salmon drift gillnet fishery	443	2*+, 4, 18, 19, 20.
AK Cook Inlet drift gillnet	554	1*+, 5, 19, 20.
AK Yakutat salmon set gillnet	152	4, 7.
AK Cook Inlet salmon set gillnet	633	1*+, 5, 19, 20.
AK Peninsula/Aleutian Island salmon set gillnet	120	1*+, 19.
AK Kodiak salmon set gillnet	162	5, 19.
AK Bristol Bay drift gillnet	1,741	1*+, 3*, 6, 7, 8, 14, 18, 25.
AK Bristol Bay set gillnet	888	6, 14.
AK Metlakatla/Annette Island salmon drift gillnet	60	4, 19.
WA Puget Sound Region salmon drift gillnet fishery (includes all inland waters south of US-Canada border and eastward of the Bonilla-Tatoosh line—Treaty Indian fishing is excluded).	1,044	2*+, 103, 102, 138, 141.
CA anchovy, mackerel, tuna purse seine	150	107, 138, 139.
AK Southeast salmon purse seine	443	27*+, 19.
AK Bering Sea and Aleutian Islands groundfish trawl	490	1*+, 2*+, 3*, 17, 18, 19, 6, 7, 8, 9, 10, 20, 142, 155.
AK pair trawl	2	5, 6, 18, 20.
AK southern Bering Sea, Aleutian Islands, and Western Gulf of Alaska sablefish longline/set line (fed- erally regulated waters).	226	16, 142.
OR swordfish/blue shark surface longline fishery	30	unknown.
Category III:		
AK Prince William Sound set gillnet	29	1*+, 19.
AK Kuskokwim, Yukon, Norton Sound, Kotzebue salmon gillnet	1,651	7, 12, 13, 14, 19.
AK roe herring and food/bait herring gillnet	162	19, 4, 5, 6.
WA, OR herring, smelt, shad, sturgeon, bottom fish, mullet, perch, rockfish gillnet	913	138, 140, 141.
WA Willapa Bay drift gillnet	82	2*+, 138, 141, 142.
WA Grays Harbor salmon drift gillnet (excluding treaty Tribal fishing)	24	2*+, 138, 141.
WA, OR lower Columbia River (includes tributaries) drift gillnet	40	2*+, 138, 140, 141.
CA set and drift gillnet fisheries that use a stretched mesh size of 3.5 in or less	341	2*+, 25, 99, 100, 103, 109, 110, 138, 139.
AK miscellaneous finfish set gillnet	9	1*+, 2*+, 19, 4, 5, 6.
Hawaii gillnet	115	145*+.
AK salmon purse seine (except Southeast Alaska, which is in Category II)	1,053	1*+, 2*+, 3, 19, 155.
AK salmon beach seine	34	1*+, 2*+, 4, 5, 6, 19.
AK roe herring and food/bait herring purse seine	866	1*+, 2*+, 4, 5, 6, 19.
AK roe herring and food/bait herring beach seine	14	1*+, 2*+, 4, 5, 6, 19.
AK octopus/squid purse seine	3	1*+, 2*+, 4, 5, 6, 19.
CA herring purse seine	100	106, 138, 139.
CA sardine purse seine	120	138.
CA squid purse seine	145	105, 113, 138.
CA squid dip net	115	113, 138.
WA, OR salmon net pens	21	2*+, 138, 140, 141.
OR salmon ranch	1	138, 141.
AK salmon troll	1,450	1*+, 2*+, 3*, 5, 6, 33*+.
CA/OR/WA salmon troll	4,300	2*+, 138, 139, 141.
AK north Pacific halibut, AK bottom fish, WA, OR, CA albacore, groundfish, bottom fish, CA halibut non-salmonid troll fisheries.	1,354	4, 5, 6, 139, 140, 141.
HI trolling, rod and reel	1,795	127, 131, 132.
Guam tuna troll	50	None documented.
Commonwealth of the Northern Mariana Islands tuna troll	50	None documented.
American Samoa tuna troll	<50	None documented.
AK miscellaneous finfish purse seine	6	1*+, 2*+, 4, 5, 6, 19.

TABLE 1.—PROPOSED LIST OF FISHERIES—Continued
[Commercial Fisheries in the Pacific Ocean]

Fishery description	Estimated No. of vessels/persons	Marine mammal species/stocks involved
AK miscellaneous finfish beach seine	4	1*+, 2*+, 4, 5, 6, 19.
WA salmon purse seine	440	103, 140, 141.
WA salmon reef net	53	140, 141.
WA, OR herring, smelt, squid purse seine or lampara	130	138, 140, 141.
WA (all species) beach seine or drag seine	235	None documented.
HI purse seine	18	None documented.
HI opelu/akule net	16	None documented.
HI throw net, cast net	47	None documented.
HI net unclassified	106	None documented.
AK state waters sablefish long line/set line	240	5, 6, 16, 142.
Miscellaneous finfish/groundfish longline/set line	838	5, 6, 142.
HI swordfish, tuna, billfish, mahi mahi, wahoo, oceanic sharks longline/set line	140	127, 131.
WA, OR North Pacific halibut longline/set line	5,364	16, 21*+.
AK halibut longline/set line (state and Federal waters)	213	1*+, 2*+, 5, 6, 26, 27, 142.
WA, OR, CA groundfish, bottomfish longline/set line	367	2*+, 18, 138, 139, 141.
AK octopus/squid longline	1	None documented.
CA shark/bonito longline/set line	10	138.
WA, OR, CA shrimp trawl	300	None documented.
AK shrimp otter trawl and beam trawl (statewide and Cook Inlet)	48	None documented.
AK Gulf of Alaska groundfish trawl	490	1*+, 2*+, 3*, 5, 7, 8, 9, 10, 16, 17, 20, 142.
AK state-managed waters of Cook Inlet, Kachemak Bay, Prince William Sound, Southeast AK groundfish trawl.	8	20.
AK miscellaneous finfish otter or beam trawl	324	None documented.
AK food/bait herring trawl	2	None documented.
WA, OR, CA groundfish trawl	585	1*+, 3*, 18, 103, 138, 139, 141.
AK crustacean pot	1,951	None documented.
AK Bering Sea, Gulf of Alaska finfish pot	226	5, 6, 155.
WA, OR, CA sablefish pot	176	139, 140, 141.
WA, OR, CA crab pot	1,478	25, 28, 139, 140, 141.
WA, OR shrimp pot & trap	254	None documented.
CA lobster, prawn, shrimp, rock crab, fish pot	608	None documented.
OR, CA hagfish pot or trap	25	None documented.
HI lobster trap	15	145*+.
HI crab trap	22	None documented.
HI fish trap	19	None documented.
HI shrimp trap	5	None documented.
AK North Pacific halibut handline and mechanical jig	84	None documented.
AK other finfish handline and mechanical jig	474	None documented.
AK octopus/squid handline	2	None documented.
WA groundfish, bottomfish jig	679	2*+, 138, 140, 141.
HI aku boat, pole and line	54	None documented.
HI inshore handline	650	132.
HI deep sea bottomfish	434	132, 145*+.
HI tuna	144	131, 132, 145*+.
Guam bottomfish	<50	None documented.
Commonwealth of the Northern Mariana Islands bottomfish	<50	None documented.
American Samoa bottomfish	<50	None documented.
WA, OR smelt, herring dip net	119	None documented.
CA swordfish harpoon	228	None documented.
AK Southeast Alaska herring food/bait pound net	7	None documented.
WA herring brush	1	None documented.
WA/OR/CA bait pens	13	25, 141.
Coastwide scallop dredge	106	None documented.
AK abalone	177	None documented.
AK dungeness crab	1	None documented.
AK herring spawn-on-kelp	306	2*+.
AK urchin and other fish/shellfish	127	None documented.
AK clam hand shovel	125	None documented.
AK clam mechanical/hydraulic fishery	3	None documented.
WA herring spawn-on-kelp	4	None documented.
WA/OR sea urchin, other clam, octopus, oyster, sea cucumber, scallop, ghost shrimp hand, dive, or mechanical collection.	637	None documented.
CA abalone	111	None documented.

TABLE 1.—PROPOSED LIST OF FISHERIES—Continued
[Commercial Fisheries in the Pacific Ocean]

Fishery description	Estimated No. of ves-sels/per-sons	Marine mammal spe-cies/stocks involved
CA sea urchin	583	None documented.
HI squidting, spear	267	None documented.
HI lobster diving	6	None documented.
HI coral diving	2	None documented.
HI handpick	135	None documented.
WA shellfish aquaculture	684	None documented.
WA, CA kelp	4	None documented.
HI fish pond	10	None documented.
AK, WA OR, CA commercial passenger fishing vessel	1,243	4, 5, 6, 138, 139, 140, 141.
AK octopus/squid "other"	19	None documented.
HI "other"	114	None documented.
AK Metlakatla purse seine	3	4, 19.
CA finfish and shellfish live trap/hook-and-line	93	None documented.
CA salmon enhancement rearing pen	>1	None documented.

TABLE 2.—PROPOSED LIST OF FISHERIES
[Commercial Fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean]

Fishery description	Estimated No. of ves-sels/per-sons	Marine mammal spe-cies/stocks involved
Category I:		
Atlantic Ocean, Caribbean, Gulf of Mexico swordfish, tuna, shark pair trawl	7	49, 50*, 51*, 54*, 59*.
Atlantic Ocean, Caribbean, Gulf of Mexico swordfish, tuna, shark drift gillnet	75	33*+, 37, 38*, 49, 50*, 51*, 52, 54*, 57, 58, 59*.
New England multispecies sink gillnet	341	32*, 33*+, 36, 50*, 51*, 52, 61, 62.
Gulf of Maine small pelagics surface gillnet	133	33*+, 36, 52, 61*, 62, 63.
Atlantic Ocean, Caribbean, Gulf of Mexico tuna, shark, swordfish longline	830	33*+, 36, 50, 51, 54*.
Category II:		
U.S. mid-Atlantic coastal gillnet fishery	>655	33*+, 36, 60*, 61*.
U.S. South Atlantic shark gillnet fishery	10	60*.
Gulf of Maine, Mid-Atlantic menhaden purse seine	10	36, 60*.
Atlantic mid-water trawl	620	49, 50*, 51*, 52, 54*.
North Carolina haul seine	unknown ..	60*, 61*.
North Carolina roe mullet stop net	13	60*.
Category III:		
North Atlantic bottom trawl	1,052	50*, 51*, 52, 57, 60*.
Mid-Atlantic, U.S. South Atlantic, Gulf of Mexico shrimp trawl	>18,000	71, 72, 73, 74, 75, 76.
Finfish aquaculture	48	62, 63.
Shellfish aquaculture	unknown ..	None documented.
Rhode Island, southern Massachusetts (to Monomoy Island), and New York Bight (Raritan and Lower New York Bays) inshore gillnet	32	33*+, 36, 60*, 61*.
Long Island Sound inshore gillnet	20	33*+, 36, 60*, 61*.
Delaware Bay inshore gillnet	60	33*+, 36, 60*, 61*.
North Carolina inshore gillnet	94	33*+, 36, 60*, 61*.
Gulf of Mexico inshore gillnet (black drum, sheepshead)	unknown ..	None documented.
Offshore monkfish bottom gillnet	<50	None documented.
Gulf of Maine northern shrimp trawl	320	None documented.
Gulf of Maine mackerel trawl	30	None documented.
Gulf of Maine, Mid-Atlantic sea scallop trawl	215	None documented.
Gulf of Maine, Southern North Atlantic, Gulf of Mexico coastal herring trawl	5	55, 56.
Mid-Atlantic mixed species trawl	>1,000	None documented.
Gulf of Mexico butterflyfish trawl	2	55, 56.
Georgia, South Carolina, Maryland whelk trawl	25	None documented.
Calico scallops trawl	200	None documented.
Bluefish, croaker, flounder trawl	550	None documented.
Crab trawl	400	None documented.
Gulf of Maine Atlantic herring purse seine	30	61*, 62, 63.
Gulf of Mexico menhaden purse seine	51	73, 74, 75, 76.
U.S. South Atlantic menhaden purse seine	51	60*.
Florida west coast sardine purse seine	16	73.

TABLE 2.—PROPOSED LIST OF FISHERIES—Continued
[Commercial Fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean]

Fishery description	Estimated No. of vessels/persons	Marine mammal species/stocks involved
U.S. mid-Atlantic hand seine	> 250	None documented.
Gulf of Maine tub trawl groundfish bottom longline/hook-and-line	46	62, 63.
U.S. South Atlantic, Gulf of Mexico snapper-grouper and other reef fish bottom longline/hook-and-line	1,944	None documented.
U.S. South Atlantic, Gulf of Mexico shark bottom longline/hook-and-line	124	None documented.
Gulf of Maine, U.S. mid-Atlantic tuna, shark swordfish hook-and-line/harpoon	26,223	None documented.
U.S. South Atlantic, Gulf of Mexico & U.S. mid-Atlantic pelagic hook-and-line/harpoon	1,446	None documented.
Gulf of Maine, U.S. South Atlantic coastal shad, sturgeon gillnet	1,285	36, 61*.
U.S. South Atlantic, Gulf of Mexico coastal gillnet	4,000	73, 74, 75.
Florida east coast, Gulf of Mexico pelagics king and Spanish mackerel gillnet	271	71, 72, 73, 74, 75.
Florida mullet gillnet	unknown	None documented.
Gulf of Maine, U.S. mid-Atlantic mixed species trap/pot	100	33*+, 36, 61*, 62, 63.
U.S. mid-Atlantic black sea bass trap/pot	30	None documented.
U.S. mid-Atlantic eel trap/pot	>700	None documented.
Gulf of Maine, U.S. mid-Atlantic inshore lobster trap/pot	10,613	32*, 33*+, 36, 52, 62.
Gulf of Maine, U.S. mid-Atlantic offshore lobster trap/pot	2,902	None documented.
Atlantic Ocean, Gulf of Mexico blue crab trap/pot	20,500	73, 74, 75, 153+.
U.S. South Atlantic, Gulf of Mexico, Caribbean spiny lobster trap/pot	736	73, 74, 75, 153+.
Gulf of Maine herring and Atlantic mackerel stop seine/weir	50	32*, 33*+, 36, 61*, 62, 63.
U.S. mid-Atlantic mixed species stop/seine/weir (except the North Carolina roe mullet stop net)	500	None documented.
U.S. mid-Atlantic crab stop seine/weir	2,600	None documented.
Gulf of Maine, U.S. mid-Atlantic sea scallop dredge	233	33*+.
U.S. mid-Atlantic offshore surfclam and quahog dredge	100	None documented.
Gulf of Maine mussel	> 50	None documented.
U.S. mid-Atlantic/Gulf of Mexico oyster	7,000	None documented.
U.S. South Atlantic, Caribbean haul seine	150	None documented.
Caribbean beach seine	15	153+.
Gulf of Maine urchin dive, hand/mechanical collection	> 50	None documented.
Atlantic Ocean, Gulf of Mexico, Caribbean shellfish dive, hand/mechanical collection	20,000	None documented.

SPECIES AND STOCK CODES FOR MARINE MAMMALS OCCURRING IN U.S. WATERS

[Some, but not all stocks listed are taken in the course of commercial fishing operations]

Code	Common name	Stock designation
1	Steller sea lion	Western U.S.*
2	Steller sea lion	Eastern U.S.*
3	Northern fur seal.	North Pacific*
4	Harbor seal	Southeast Alaska.
5	Harbor seal	Gulf of Alaska.
6	Harbor seal	Bering Sea.
7	Spotted seal	Alaska.
8	Bearded seal	Alaska.
9	Ringed seal	Alaska.
10	Ribbon seal	Alaska.
11	Beluga	Beaufort Sea.
12	Beluga	Eastern Chukchi Sea.
13	Beluga	Norton Sound.
14	Beluga	Bristol Bay.
15	Beluga	Cook Inlet.
16	Killer whale	Alaska and Washington Inland Waters—Resident.

SPECIES AND STOCK CODES FOR MARINE MAMMALS OCCURRING IN U.S. WATERS—Continued

[Some, but not all stocks listed are taken in the course of commercial fishing operations]

Code	Common name	Stock designation
17	Killer whale	Alaska and Washington Inland Waters—Transient.
18	Pacific white-sided dolphin.	North Pacific.
19	Harbor porpoise.	Alaska.
20	Dall's porpoise	Alaska.
21	Sperm whale	Alaska*.
22	Baird's beaked whale.	Alaska.
23	Cuvier's beaked whale.	Alaska.
24	Stejneger's beaked whale.	Alaska.
25	Gray whale	Eastern North Pacific.
26	Humpback whale.	Western North Pacific*.
27	Humpback whale.	Central North Pacific*.
28	Fin whale	N. Pacific*.
28	Minke whale	Alaska.

SPECIES AND STOCK CODES FOR MARINE MAMMALS OCCURRING IN U.S. WATERS—Continued

[Some, but not all stocks listed are taken in the course of commercial fishing operations]

Code	Common name	Stock designation
29	Northern right whale.	North Pacific*.
31	Bowhead whale.	Western Arctic Stock*.
32	North Atlantic right whale.	Western North Atlantic*.
33	Humpback whale.	Western North Atlantic*.
34	Fin whale	Western North Atlantic*.
35	Sei whale	Western North Atlantic*.
36	Minke whale	Canadian east coast.
37	Blue whale	Western North Atlantic*.
38	Sperm whale	Western North Atlantic*.
39	Dwarf sperm whale.	Western North Atlantic*.
40	Pygmy sperm whale.	Western North Atlantic*.
41	Killer whale	Western North Atlantic.
42	Pygmy killer whale.	Northern Gulf of Mexico.

SPECIES AND STOCK CODES FOR MARINE MAMMALS OCCURRING IN U.S. WATERS—Continued

[Some, but not all stocks listed are taken in the course of commercial fishing operations]

Code	Common name	Stock designation
43	Northern bottlenose whale.	Western North Atlantic.
44	Cuvier's beaked whale.	Western North Atlantic*.
45	True's beaked whale.	Western North Atlantic*.
46	Gervais' beaked whale.	Western North Atlantic*.
47	Blainville's beaked whale.	Western North Atlantic*.
48	Sowerby's beaked whale.	Western North Atlantic*.
49	Risso's dolphin	Western North Atlantic.
50	Pilot whale, long-finned.	Western North Atlantic*.
51	Pilot whale, short-finned.	Western North Atlantic*.
52	Atlantic white-sided dolphin.	Western North Atlantic.
53	White-beaked dolphin.	Western North Atlantic.
54	Common dolphin.	Western North Atlantic*.
55	Atlantic spotted dolphin.	Western North Atlantic*.
56	Pantropical spotted dolphin.	Western North Atlantic*.
57	Striped dolphin	Western North Atlantic.
58	Spinner dolphin	Western North Atlantic.
59	Bottlenose dolphin.	Mid-Atlantic offshore*.
60	Bottlenose dolphin.	Western North Atlantic Coastal*.
61	Harbor porpoise.	Gulf of Maine/Bay of Fundy*.
62	Harbor seal	Western North Atlantic.
63	Gray seal	Northwest North Atlantic.
64	Harp seal	Northwestern North Atlantic.
65	Hooded seal northwestern.	North Atlantic.
66	Sperm whale	Northern Gulf of Mexico*.
67	Bryde's whale	Northern Gulf of Mexico.
68	Cuvier's beaked whale.	Northern Gulf of Mexico.
69	Blainville's beaked whale.	Northern Gulf of Mexico.

SPECIES AND STOCK CODES FOR MARINE MAMMALS OCCURRING IN U.S. WATERS—Continued

[Some, but not all stocks listed are taken in the course of commercial fishing operations]

Code	Common name	Stock designation
70	Gervais' beaked whale.	Northern Gulf of Mexico.
71	Bottlenose dolphin.	Gulf of Mexico Outer Continental Shelf.
72	Bottlenose dolphin.	Gulf of Mexico Continental Shelf Edge and Slope.
73	Bottlenose dolphin.	Western Gulf of Mexico Coastal.
74	Bottlenose dolphin.	Northern Gulf of Mexico Coastal.
75	Bottlenose dolphin.	Eastern Gulf of Mexico Coastal.
76	Bottlenose dolphin.	Gulf of Mexico Bay & Sound*.
77	Atlantic spotted dolphin.	Northern Gulf of Mexico.
78	Pantropical spotted dolphin.	Northern Gulf of Mexico.
79	Striped dolphin	Northern Gulf of Mexico.
80	Spinner dolphin	Northern Gulf of Mexico.
81	Rough-toothed dolphin.	Northern Gulf of Mexico.
82	Clymene dolphin.	Northern Gulf of Mexico.
83	Fraser's dolphin.	Northern Gulf of Mexico.
84	Killer whale	Northern Gulf of Mexico.
85	False Killer whale.	Northern Gulf of Mexico.
86	Pygmy killer whale.	Atlantic EEZ.
87	Dwarf sperm whale.	Northern Gulf of Mexico*.
88	Pygmy sperm whale.	Northern Gulf of Mexico*.
89	Melon-headed whale.	Northern Gulf of Mexico.
90	Risso's dolphin	Northern Gulf of Mexico.
91	Pilot whale, short-finned.	Northern Gulf of Mexico*.
92	Sperm whale	California to Washington*.
93	Humpback whale.	California/Mexico*.
94	Blue whale	California/Mexico*.
95	Fin whale	California to Washington*.
96	Brydes whale	Eastern Tropical Pacific.
97	Sei whale	Eastern North Pacific*.

SPECIES AND STOCK CODES FOR MARINE MAMMALS OCCURRING IN U.S. WATERS—Continued

[Some, but not all stocks listed are taken in the course of commercial fishing operations]

Code	Common name	Stock designation
98	Minke whale	California/Oregon/Washington.
99	Harbor porpoise.	Central California*.
100	Harbor porpoise.	Northern California.
101	Harbor porpoise.	Oregon/Washington coast.
102	Harbor porpoise.	Inland Washington.
103	Dall's porpoise	California/Oregon/Washington.
104	Pacific white sided dolphin.	California/Oregon/Washington.
105	Risso's dolphin	California/Oregon/Washington.
106	Bottlenose dolphin.	California coastal.
107	Bottlenose dolphin.	California/Oregon/Washington Off-shore.
108	Striped dolphin	California.
109	Common dolphin, short-beaked.	California/Oregon/Washington.
110	Common dolphin, long-beaked.	California.
111	Northern right whale dolphin.	California/Oregon/Washington.
112	Killer whale	California/Oregon/Washington.
113	Pilot whale—short-finned.	California/Oregon/Washington*.
114	Baird's beaked whale.	California to Washington*.
115	Mesoplodont beaked whales.	California to Washington*.
116	Cuvier's beaked whale.	California/Oregon/Washington*.
117	Pygmy sperm whale.	California/Oregon/Washington*.
118	Dwarf sperm whale.	California/Oregon/Washington.
119	Brydes whale	Hawaii.
120	Blue whale	Hawaii*.
121	Fin whale	Hawaii*.
122	Pygmy killer whale.	Hawaii.
123	Pilot whale—short-finned.	Hawaii.
124	Risso's dolphin	Hawaii.
125	Killer whale	Hawaii.

SPECIES AND STOCK CODES FOR MARINE MAMMALS OCCURRING IN U.S. WATERS—Continued

[Some, but not all stocks listed are taken in the course of commercial fishing operations]

Code	Common name	Stock designation
126	Melon-headed whale.	Hawaii.
127	False killer whale.	Hawaii.
128	Pantropical spotted dolphin.	Hawaii.
129	Striped dolphin	Hawaii.
130	Spinner dolphin	Hawaii.
131	Rough-Toothed dolphin.	Hawaii.
132	Bottlenose dolphin.	Hawaii.
133	Pygmy sperm whale.	Hawaii.
134	Dwarf sperm whale.	Hawaii.
135	Sperm whale ..	Hawaii*.
136	Cuvier's beaked whale.	Hawaii.
137	Blainville's beaked whale.	Hawaii.
138	California sea lion.	U.S.
139	Harbor seal	California.
140	Harbor seal	Washington In-land waters.
141	Harbor seal	Oregon/Washington coast.
142	Northern elephant seal.	California breeding.
143	Guadalupe fur seal.	Mexico to California*.
144	Northern fur seal.	San Miguel Island.
145	Hawaiian monk seal.	Hawaii*.
146	Beaked whale, all stocks.	Pacific.
147	Harbor seal, all stocks.	Pacific.
148	Beaked whale, all stocks.	Atlantic.
149	Spotted dolphin, all stocks.	Atlantic.
150	Pilot whale, all stocks.	Atlantic.
151	Bottlenose dolphin, all stocks.	Gulf of Mexico.
152	Southern (Calif.) sea otter.	California*.
153	Florida manatee.	Florida*.
154	Walrus	Pacific.
155	Northern (Alaska) sea otter.	Pacific.

Take Reduction Plans

New section 118(f) of the MMPA requires NMFS to develop and

implement take reduction plans designed to assist in the recovery or prevent the depletion of each strategic stock that interacts with a Category I or II fishery. NMFS may also develop and implement a take reduction plan for any other marine mammal stock that interacts with a Category I fishery that NMFS determines, after notice and opportunity for public comment, has a high level of mortality and serious injury across a number of such marine mammal stocks. Under these proposed regulations, a Category I fishery would be considered to have a high level of mortality and serious injury across a number of marine mammal stocks, if its annual incidental mortality and serious injury exceeds or equals 50 percent of two or more marine mammal stocks' PBRs.

As required by section 118(f)(2), the immediate goal of a take reduction plan is to reduce, within 6 months of its implementation, the incidental mortality or serious injury of marine mammals from commercial fishing operations to levels less than the PBR established for a stock under the SAR developed pursuant to section 117, and the long-term goal is to reduce, within 5 years of its implementation, the incidental mortality or serious injury of marine mammals from commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate, taking into account the economics of the fishery, the availability of existing technology, and existing state or regional fishery management plans. Failure of a plan to meet these goals may result in a revision of the plan and implementation of regulations necessary to achieve these goals. Priority for development and implementation of these plans will be accorded to stocks whose level of incidental mortality and serious injury exceeds the PBR, those that have a small population size, and those that are declining rapidly.

Each take reduction plan is required by section 118(f)(4) of the MMPA to include a review of information in the final SAR and any substantial new information. In addition, each plan is required to include recommended regulatory or voluntary measures for the reduction of incidental mortality and serious injury and recommended dates for achieving the specific objectives of the plan. Regulations implementing take reduction plans may: (1) Establish fishery-specific limits on incidental mortality and serious injury of marine mammals in commercial fisheries or restrict commercial fisheries by time or area; (2) require the use of alternative fishing gear or techniques and new

technologies, encourage the development of such gear or technology, or convene skipper's panels; and (3) provide for monitoring of the effectiveness of measures taken to reduce the level of incidental mortality and serious injury of marine mammals. Plans would not necessarily include each of these types of measures, rather they would be flexible and designed to address specific problems.

Section 118(f)(6) requires NMFS to establish a take reduction team to develop a draft take reduction plan within 30 days after the publication of a final SAR for a strategic stock. These teams will consist of a balance of representatives of the fishing industry and non-resource user interests. Section 118(f)(6) of the MMPA requires that members represent a diversity of interests including those of Federal agencies, appropriate states and regional fishery management councils, interstate fishery commissions, academic and scientific organizations, environmental groups, all commercial and recreational fisheries groups and gear types which take the species or stock, Alaska Native organizations or Indian tribal organizations, and others as NMFS deems appropriate. By including all interested parties on take reduction teams, a fair and reasonable plan designed to reduce incidental takes of marine mammals during commercial fishing operations should be developed. Take reduction team meetings will be open to the public.

Within 6 months after establishment of the take reduction teams for strategic stocks that interact with Category I or II fisheries and where mortality exceeds PBR, the team must submit a draft take reduction plan for such stock to NMFS. NMFS must take the draft plan into consideration and must publish in the **Federal Register**, for public review and comment, the plan proposed by the team, any changes proposed by NMFS, the rationale for such changes, and proposed regulations to implement such a plan. NMFS must issue a final take reduction plan and implementing regulations within 60 days after the close of the comment period.

Emergency Regulations

New section 118(g) of the MMPA provides NMFS with authority to issue emergency regulations to reduce incidental mortality and serious injury of marine mammals if the incidental mortality and 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. Emergency regulations can apply to Category I, II,

or III fisheries. This emergency authority will be used only when no alternative is available to prevent an immediate and significant adverse impact. In the case of a marine mammal population for which a take reduction plan, developed under subpart B, is in effect, section 118(g)(1)(A) requires that the emergency regulations be to reduce incidental mortality and serious injury consistent with the plan, to the maximum extent practicable and that, NMFS, concurrently, 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.

In the case of a marine mammal population for which a take reduction plan is being prepared, section 118(g)(1)(B) requires NMFS to approve and implement the plan on an expedited basis, which would provide methods to address such adverse impact if still necessary.

In the case of a marine mammal population for which a take reduction plan does not exist, or is not being developed, or in the case of a Category III fishery that NMFS believes may be contributing to such adverse impact, section 118(g)(1)(C) requires NMFS to immediately review the SAR for such population and the classification of such commercial fishery to determine if a take reduction team should be established.

As required by section 118(g)(2) of the MMPA, NMFS must consult with the regional fishery management councils, state fishery agencies, and treaty Indian tribal governments, where appropriate, before taking any emergency action. Emergency actions must, to the maximum extent practicable, avoid interfering with existing regional, state, or tribal fishery management or conservation programs, and must be as brief in duration and nonintrusive as possible. Emergency actions could include, but would not necessarily be limited to: Quotas on the number of marine mammals that may be taken; restrictions on the time, manner and location where the fishery may operate; and prohibitions on the use of fishing techniques or gear which are found to cause excessive marine mammal injuries or mortalities. Emergency regulations would expire at the end of the applicable commercial fishing season or at the end of 180 days, whichever is earlier. However, they could be extended for an additional 90-day period, if needed to address a continuing threat. If NMFS finds that the incidental mortality and serious injury is not having an immediate and significant adverse impact over a period

of time longer than 1 year, NMFS would develop and implement a take reduction plan under proposed § 229.14 instead of prescribing emergency regulations.

Takes of Listed Marine Mammals

Section 101(a)(5)(E) was added to the MMPA in 1994 to authorize NMFS to issue permits to commercial fishing vessels of the United States allowing for up to 3 years, incidental takes of marine mammals listed as threatened species or endangered species under the ESA. A permit may be issued only if NMFS determines that the total incidental mortality and serious injury from commercial fisheries would have a negligible impact on the species or stock (proposed § 229.2), and that a recovery plan has been, or is in the process of being, developed for that stock under the ESA. Furthermore, any applicable requirements of section 118 (e.g., registration, monitoring, and take reduction plans) must also be met before NMFS could authorize the incidental taking of listed marine mammals by any Category I or II fishery. NMFS will publish a list identifying the Category I, II and III fisheries for which such determinations were made. However, only Category I and II vessels require permits under section 101(a)(5)(E); vessels fishing in either a Category I or II fishery must receive authorizations under both section 118 and section 101(a)(5)(E) in order to legally engage in the incidental taking of listed marine mammals.

Vessels in Category III fisheries that are not required to register under section 118 but which are included in the list published pursuant to section 101(a)(5)(E) will not be subject to the penalties of the MMPA for the incidental taking of marine mammals that are listed as endangered or threatened species under the ESA, as long as the vessel owner or operator of such vessel, in accordance with the requirements of proposed § 229.6, reports any incidental mortality or injury within 48 hours of the end of the fishing trip where the incidental taking occurred.

The MMPA states that after opportunity for public comment, NMFS must determine which fisheries that have interaction with ESA-listed marine mammals have a negligible impact on those stocks. NMFS must then publish a list of those fisheries for which such a determination has been made. Because the proposed LOF (Tables 1 and 2 in this rule) specifies which fisheries have interactions with species or stocks listed under the ESA, and because the associated Environmental Assessment provides the data on which a negligible

determination will be made, NMFS is now requesting public comment specifically regarding this issue; such comments will be considered and a final list of those fisheries for which takes have been determined to be negligible will be published in the **Federal Register**.

The section 101(a)(5)(E) authorization in the MMPA to incidentally take marine mammals listed under the ESA will include appropriate terms and conditions made necessary by the associated ESA section 7 consultation. These conditions and restrictions may include actions to reduce the incidental taking or may prohibit any taking of an endangered or threatened species.

NMFS may issue permits under section 101(a)(5)(E) of the MMPA to an identifiable group of vessels, rather than to individuals when possible. Whenever possible, NMFS will issue permits issued under section 101(a)(5)(E) of the MMPA simultaneously with authorizations under section 118 in order not to delay fishing activities. Thus, fishers will not have to apply for a permit under section 101(a)(5)(E). When the level of incidental taking is more than negligible, NMFS may modify, suspend, or revoke such permits. In cases where an individual fisher has a record of excessive incidental takes, NMFS may revoke the permit from that fisher and not from the entire group of vessels in the fishery. For fisheries that have incidental takes of more than one ESA-listed stock, a permit under section 101(a)(5)(E) may be issued to authorize the takes of one stock but not necessarily other stocks.

Penalties

Except as otherwise provided, violations of section 118, the implementing regulations, Authorization Certificates, or permits issued to fishers authorizing the incidental taking of listed marine mammals during commercial fishing operations would subject vessel owners and fishers to the penalties provided in the MMPA and in NOAA regulations governing administrative procedures for the assessment of penalties (15 CFR part 904).

In addition, as noted above, Certificates may be revoked, suspended, or denied for violations of the MMPA, the regulations, take reduction plans, permits issued to fishers to authorize the incidental taking of listed marine mammals during commercial fishing operations, or emergency regulations issued under this part 229. For fishers operating in Category I or II fisheries, failure to report all incidental injuries and mortalities within 48 hours of the

end of the fishing trip during which such taking occurred, will result in suspension or revocation of an Authorization Certificate until such requirements have been fulfilled. For fisheries operating in Category III fisheries, failure to report all incidental injuries and mortalities within 48 hours of the end of the fishing trip during which such taking occurred, will subject such persons to the full penalties of the Act.

An owner of a vessel engaged in a Category I or II fishery who fails to obtain from the NMFS an authorization for such vessel under this section, or fails to maintain a current and valid authorization for such vessel will be deemed to have violated this part and will be subject to the penalties of sections 105, 106, and 107 of the MMPA. An 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 or is in possession of the operator of the vessel, will be deemed to have violated this part and will be subject to a fine of not more than \$100 for each offense.

Owners or operators of vessels or nonvessel fisheries that fail to comply with a take reduction plan or implementing regulations issued under subpart C of this part will be subject to the penalties in sections 105 and 107 of the Act, and may be subject to the penalties of section 106 of the Act.

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 this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities since it would establish a process for issuance of authorizations for the incidental taking of marine mammals while conducting commercial fishing in waters of the U.S. exclusive economic zone. Without these authorizations, the taking of marine mammals would be prohibited and fishers could be subject to fines when takings occur in the course of commercial fishing operations. The payment of a fee set to recover the costs of certificate issuance would be 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 proposed rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

This proposed rule contains collection-of-information requirements subject to the provisions of the Paperwork Reduction Act. Although these collections have been approved previously by OMB under OMB control numbers 0648-0224 and 0648-0225, because of new collection requirements for commercial fishing in § 229.6 and slightly modified registration requirements under § 229.4, these collection requirements are being resubmitted to OMB for review and approval.

The average reporting burden for these collections is estimated to be approximately 0.25 hours for each of approximately 13,000 fishers to register each year and 0.17 hours for each report of marine mammal injury or mortality. Because fishers would be required to submit a report for each occurrence of marine mammal injury or mortality, there may be multiple reports required per fisher.

Send comments regarding these burden estimates or any other aspect of these collection of information requirements, including suggestions for reducing the burden, to the Chief, Marine Mammals Division, Office of Protected Resources, and to the Office of Information and Regulatory Affairs, OMB (see ADDRESSES).

National Environmental Policy Act

The Assistant Administrator for Fisheries, NOAA (AA) has determined, based upon an EA prepared 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: June 13, 1995.

Gary Matlock,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For reasons set out in the preamble, 50 CFR parts 216 and 229 are proposed to be 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.*, unless otherwise noted.

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 exceptions to the Act's moratorium on the taking of marine mammals incidental to certain commercial fishing operations.

(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 this part 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 purpose of the regulations in this part is to 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 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 analogy or, if an analogy is not possible, the Assistant Administrator may, after public notice and opportunity for public comment regarding a fishery's incidental mortality and serious injury on a stock of marine mammals, place that fishery in Category II. Eligible commercial fisheries not specifically identified in the list of fisheries are deemed to be Category II fisheries until the next annual 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) 10 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 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 analogy or, if an analogy is not possible, the Assistant Administrator may, after public notice and opportunity for public

comment regarding a fishery's incidental mortality and serious injury on a stock of marine mammals, place that fishery in Category III.

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.

Fishery has the same meaning it does 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.

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 requires assistance to escape from entanglement in fishing gear will be considered injured regardless of the absence of any wound or other evidence of an injury.

Interaction means coming in contact with. An interaction may be characterized by a marine mammal entangled, hooked, or otherwise trapped in fishing gear, regardless of whether injury or mortality occur, 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.

NMFS means the National Marine Fisheries Service.

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.

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 review 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 it does in section 3 of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1802).

Zero mortality rate goal is the reduction of the annual number of incidental mortalities and serious injuries in each fishery to insignificant levels approaching a zero mortality and serious injury rate. A fishery will have reached this goal when it is responsible for, collectively with other fisheries, the annual removal of:

- (1) 10 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, but that fishery by itself is responsible for the annual removal of 1 percent or less of that stock's potential biological removal level and does not seriously injure or kill species listed as endangered or threatened under the Endangered Species Act or depleted under the MMPA. In addition, those fisheries that kill or seriously injure declining, depleted, threatened, or endangered

stocks of marine mammals would have to be examined separately to determine that the incidental take is insignificant.

§ 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. 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 willfully discard any fishing gear at sea, in whole or in part.

(g) It is prohibited to violate any regulation in this part.

§ 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 non vessel fishing gear must annually register for and receive an Authorization Certificate. The granting and administration of authorizations under this part 229 may 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) *Required information.* Owners of vessels or, for nonvessel fisheries, gear, must submit the following information when registering for an Authorization Certificate:

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

(2) Name, address, and phone number of operator, if different from owner and if known, 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, state commercial vessel license number, and/or Tribal Permit number (as applicable);

(4) A list of all Category I and II fisheries in which the fisher will actively engage in 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 (a) of this section, requests for registration forms and completed registration forms should be sent to one of the following NMFS Regional Offices:

(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.

(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 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 the guidelines for use in safely deterring marine mammals proposed at 60 FR 22345, May 5, 1995, § 216.29(c) of this chapter and are prohibited from using any deterrence measure proposed at FR 22345, May 5, 1995, § 216.29(d) of this chapter.

(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 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 engaged in a

Category III fishery must comply with the guidelines for use in safely deterring marine mammals proposed at § 216.29(c) of this chapter and are prohibited from using any deterrence measure proposed at § 216.29(d) of this part.

(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 serious 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 include all of the information in paragraphs (a)(1) through (a)(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, or bycatch of other target 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 specimens, upon request by NMFS personnel;

(vii) Sampling, retaining and storing mammal specimens, upon request by NMFS personnel, designated contractors, or the onboard observer 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 that are readily accessible to crew members must be brought aboard 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 aboard observer, be retained in cold storage aboard the vessel, if feasible, until removed at the request of NMFS personnel, designated contractors, or the aboard observer, 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 onboard observer, 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 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** notice of 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 for 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 notice 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) Will take effect immediately upon publication 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 subsection (d); and

(2) May be terminated by notice 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 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, 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 part 229 may result in suspension or revocation of an Authorization Certificate, and failure to comply with a take reduction plan is also subject to penalties of 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 to comply with requirements to carry an observer, 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 full penalties 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:

(i) Fails to report all incidental mortality and serious injury of marine mammals as required under § 229.6;

(ii) 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. 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 which 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 a notice 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 for which determinations under the procedures of paragraph (b) of this section.

(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 under § 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 temporarily 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 notice 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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50 CFR Part 227

[Docket No. 950427119-5149-03; I.D.060195E]

RIN 0648-AH98

Sea Turtle Conservation: Restrictions Applicable to Shrimp Trawling Activities; Additional Turtle Excluder Device Requirements Within Certain Statistical Zones; Hearings

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

ACTION: Proposed rule; notice of hearings.

SUMMARY: NMFS is proposing to impose, for a 30-day period beginning with the reopening of the waters off Texas, additional restrictions on shrimp trawlers fishing in Gulf of Mexico offshore waters out to 10 nautical miles (nm)(18.5 km) from the COLREGS line, along a portion of the Texas coast, between the Texas-Louisiana border and the line along 27° N. lat. This area includes nearshore waters in shrimp fishery statistical Zones 18, 19, and 20 and the westernmost portion of Zone 17 east to Sabine Pass, TX. The restrictions would include prohibitions on the use by shrimp trawlers of soft turtle excluder devices (TEDs), bottom-opening TEDs, flaps completely covering the escape opening of TEDs, and try nets with a headrope length greater than 12 ft (3.6 m) or a footrope length greater than 15 ft (4.5 m), unless the try nets are equipped with approved TEDs other than soft or bottom-opening TEDs. These restrictions would prevent the reoccurrence of high levels of mortality and strandings of threatened and endangered sea turtles documented in Texas after the waters off Texas are reopened to shrimping.

DATES: Comments on this proposed rule must be submitted by July 3, 1995.

The hearings are scheduled as follows:

1. June 19, 1995, at 7 p.m., Galveston, TX
2. June 20, 1995, at 5 p.m., Rockport, TX

ADDRESSES: Comments on this proposed rule and requests for a copy of the environmental assessment (EA) or supplemental Biological Opinion prepared for this proposed rule should

be addressed to the Chief, Endangered Species Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

The hearings will be held at the following locations:

1. Texas-Galveston County Court House, (Jury room, 1st floor), 722 Moody Street, Galveston, TX 77550
2. Texas-Aransas County Court House (Commissioners Courtroom), 301 North Live Oak Street, Rockport, TX 78382.

FOR FURTHER INFORMATION CONTACT:

Charles A. Oravetz, 813-570-5312, FAX: 813-570-5300 or Russell J. Bellmer, 301-713-1401.

SUPPLEMENTARY INFORMATION:

Background

All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the Endangered Species Act of 1973 (ESA). The Kemp's ridley (*Lepidochelys kempi*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) are listed as endangered. Loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico, which are listed as endangered.

The incidental take and mortality of sea turtles as a result of shrimp trawling activities have been documented in the Gulf of Mexico and along the Atlantic seaboard. Under the ESA and its implementing regulations, taking sea turtles is prohibited, with exceptions set forth at 50 CFR 227.72. The incidental taking of turtles during shrimp trawling in the Gulf and Atlantic Areas is excepted from the taking prohibition, if the sea turtle conservation measures specified in the sea turtle conservation regulations (50 CFR part 227, subpart D) are employed. The regulations require most shrimp trawlers operating in the Gulf of Mexico and Southeast U.S. Atlantic to have a NMFS-approved TED installed in each net rigged for fishing, year round.

Recent Events

On April 30, 1995 (60 FR 21741, May 3, 1995), the sea turtle conservation measures were revised, for a 30-day period expiring on May 30, 1995, for shrimp trawlers fishing in nearshore waters along two sections of the Texas and Louisiana coast (statistical Zones 18 and 20, and a portion of Zone 17) in order to ensure that ongoing shrimp fishing would not likely jeopardize the continued existence of listed species of sea turtles and that the incidental take level identified in the incidental take

statement (ITS) accompanying the Biological Opinion issued November 14, 1994 (BO) on shrimp fishing would not be exceeded, which would require reinitiation of consultation pursuant to 50 CFR 402.16. The revisions were imposed as temporary additional restrictions pursuant to 50 CFR 227.72(e)(6). This provision states that such restrictions may be imposed upon the determination of the Assistant Administrator for Fisheries, NOAA (AA), that continued takings of sea turtles by shrimp fishing are unauthorized, because they would violate the restrictions, terms and conditions of the ITS issued with the BO or would likely jeopardize the continued existence of a listed species. The BO specifically requires that such restrictions be imposed immediately when sea turtle takings, indicated or documented, reach 75 percent of the established incidental take levels. The restrictions imposed were necessitated by the continued high rates of sea turtle strandings occurring along areas of the Texas coast, and were consistent with the BO and the NMFS Shrimp Fishery Emergency Response Plan (ERP).

The BO required the development of a plan to respond to elevated stranding levels. The ERP provides a general statement of policy with respect to NMFS' enforcement practice and use of future rulemaking in response to elevated sea turtle strandings associated with shrimping effort and ensures compliance with sea turtle conservation regulations. The ERP was signed by the AA on March 14, 1995, and was immediately distributed widely among industry and environmental groups. A notice of availability of the ERP was published in the **Federal Register** on April 21, 1995 (60 FR 19885), and comments are being accepted. In addition, NMFS distributes weekly reports of stranding events and notices of enforcement efforts and restrictions being implemented. NMFS is currently in the process of revising the ERP based on comments received.

A complete discussion of sea turtle strandings in Texas was contained in the temporary restrictions published on May 3, 1995 (60 FR 21741), and only a summary of strandings is provided here. For the 3 consecutive weeks from April 9 through April 29, strandings in Zone 18 were 12, 16, 6 turtles per week, respectively. The temporary restrictions went into effect on April 30, and strandings for the 2 consecutive weeks beginning April 30 through May 13 were 8, and 8 turtles per week, respectively. Forty of the 50 total turtles stranded during this 5-week period were Kemp's ridleys. Texas offshore waters