

United States that can perform the approved repairs, and whether funds are available.

(e) Qualified M&R work includes any required inspection and any M&R work determined in the course of an inspection that is necessary to comply with the laws of the United States.

(f) Qualified M&R work does not include routine M&R or emergency M&R that is necessary to enable a vessel to return to a port in the United States.

Dated: July 15, 2004.

By Order of the Maritime Administrator.

**Joel C. Richard,**

*Secretary, Maritime Administration.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 229

[Docket No. 030630163-4205-03, I.D. 052303F]

**RIN 0648-AR15**

#### Authorization for Commercial Fisheries under the Marine Mammal Protection Act of 1972; Zero Mortality Rate Goal

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

**ACTION:** Final rule.

**SUMMARY:** The Marine Mammal Protection Act (MMPA) was enacted in 1972 with the ideal of eliminating mortality and serious injury of marine mammals incidental to commercial fishing operations. In 1994, Congress amended the MMPA and established a requirement for fisheries to reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero rate. This requirement is commonly referred to as the Zero Mortality Rate Goal (ZMRG). To implement the ZMRG, NMFS must establish a threshold level for mortality and serious injury to meet this requirement. This final rule establishes an insignificance threshold as 10 percent of the Potential Biological Removal level (PBR) of a stock of marine mammals.

**DATES:** Effective August 19, 2004.

**ADDRESSES:** A copy of the Environmental Assessment prepared for this action may be obtained by writing P. Michael Payne, Chief, Marine

Mammal Conservation Division, Office of Protected Resources, NMFS (PR2), 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Tom Eagle, Office of Protected Resources, NMFS, Silver Spring, MD (301) 713-2322, ext. 105, or email [Tom.Eagle@noaa.gov](mailto:Tom.Eagle@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### *Electronic Access*

Information related to this final rule, including the associated environmental assessment (EA), public comments on related actions, guidelines for differentiating serious and non-serious injury, and the guidelines for preparing marine mammal stock assessment reports, is available on the Internet at <http://www.nmfs.noaa.gov/pr/> (see "Recent News and Hot Topics").

#### Background

On July 9, 2003 (68 FR 40888), NMFS published an advance notice of proposed rulemaking (ANPR) describing options for defining provisions of the ZMRG, including the requirement under the MMPA for commercial fisheries to reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate. On April 29, 2004, NMFS issued a proposed rule (69 FR 23477) defining an insignificance threshold as the upper limit of annual incidental mortality and serious injury of marine mammal stocks by commercial fisheries considered to be insignificant levels approaching a zero mortality and serious injury rate. An insignificance threshold is estimated as 10 percent of the PBR for a stock of marine mammals. If certain parameters (e.g., maximum net productivity rate or the recovery factor in the calculation of the stock's PBR) can be estimated or otherwise modified from default values, the Assistant Administrator for Fisheries (Assistant Administrator) may use a modification of the number calculated from the simple formula for the insignificance threshold. The Assistant Administrator may also use a modification of the simple formula when information is insufficient to estimate the level of mortality and serious injury having an insignificant effect on the affected population stock and provide a rationale for using the modification. The preamble to the proposed rule described the ZMRG under MMPA section 118(b), in simple form, to include the following:

(1) A target for reducing incidental mortality and serious injury and a

deadline by which the target is to be achieved;

(2) A statement to exclude fisheries achieving and maintaining such levels of incidental mortality from the requirement to further reduce incidental mortality and serious injury;

(3) A requirement for submitting a report to Congress describing fisheries' progress toward the target and noting fisheries for which additional information is required to assess levels of incidental mortality and serious injury; and

(4) A mechanism (the TRP process) to reduce levels of incidental mortality and serious injury for fisheries not meeting the target. The economics of the fishery, availability of existing technology, and existing fishery management plans must be taken into account in the long-term goal of a TRP to reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate.

The preamble to the proposed rule also addressed key issues related to the implementation of the ZMRG. The key issues were summarized under headings posing the following questions:

(1) What is an insignificant level of incidental mortality and serious injury;

(2) Why is the deadline important;

(3) How will incidental mortality and serious injury levels approach a zero rate; and

(4) Would a fishery be closed if it missed the target mortality and serious injury level by the deadline?

Details of the options NMFS considered for implementing the ZMRG and a detailed description of the implementation of the ZMRG are included in the ANPR and proposed rule. The ANPR summarized the legislative history of the ZMRG within the MMPA. These descriptions are not repeated in the preamble to this final rule.

#### Comments and Responses

NMFS received letters with comments from 12 organizations or agencies, five of which were from the conservation community, five were from the fishing industry, and two were from governmental agencies. Several of the letters appended comments on the ANPR. Comments on the ANPR were summarized, and responses to these summary comments were included, in the preamble to the proposed rule; these comments and responses are not repeated here.

*Comment 1:* We support the proposed threshold of 10 percent of the PBR level as the most effective means to meet the ZMRG.

**Response:** NMFS has used the proposed threshold of 10 percent of PBR in this final rule.

**Comment 2:** In addition to limiting incidental mortality and serious injury to levels no higher than 10 percent of a stock's PBR, the definition of ZMRG should limit takes to levels no higher than current levels.

**Response:** As NMFS explained in the proposed rule in response to comment 68, setting allowable mortality levels no higher than current levels assumes the reported or estimated number of takes represents all incidental mortality and serious injury. Observer data are available only for a few selected fisheries; therefore, current levels of incidental mortality and serious injury cannot be verified independently and may exceed current estimates. In addition, the MMPA states once a fishery has achieved target levels of incidental mortality and serious injury, the fishery does not have to further reduce such mortality and serious injury. If target levels were a sliding scale, a fishery could have achieved its target in one year, and in a later year, when the target had been reduced, the fishery would again be above target mortality and serious injury levels. Such an approach does not lend itself to feasible implementation. Although NMFS does not propose a sliding scale to ratchet down stock-specific insignificant thresholds over time, insignificance thresholds could change as a result of new abundance or productivity estimates. (See 69 FR 23477, 23489, April 29, 2004.)

**Comment 3:** NMFS should periodically revisit the definition of ZMRG for each population to ensure takes continue at insignificant levels approaching a zero mortality and serious injury rate.

**Response:** NMFS will continue to periodically review and revise the stock assessment reports as required by the MMPA. Among other things, stock assessment reports must include an analysis whether the rate of incidental mortality and serious injury is insignificant and approaching a zero mortality and serious injury rate.

**Comment 4:** A restrictive definition of the ZMRG insignificance threshold is biologically unnecessary.

**Response:** The biological necessity of the ZMRG is not an issue for this rulemaking. The ZMRG is a requirement of the MMPA; therefore, NMFS must implement it. The stock-specific insignificance threshold quantifies the target contained in MMPA section 118.

**Comment 5:** The PBR is itself a conservative methodology for computing acceptable levels of removal.

**Response:** The PBR calculations are appropriately conservative as a basis for management decisions considering the levels of uncertainty typically found in the data supporting marine mammal-fishery interactions. PBR is not, however, an acceptable long-term goal for reducing mortality and serious injury of marine mammals incidental to commercial fishing operations because MMPA section 118 states such a long-term goal should be insignificant levels approaching a zero mortality and serious injury rate.

**Comment 6:** The proposed ZMRG threshold is unnecessary for marine mammal stocks to achieve OSP and should be redrafted by the agency as a stimulant for technology, rather than a conservative, rigidly defined point-specific objective.

**Response:** The insignificance threshold represents a target level of mortality and serious injury of marine mammals incidental to commercial fishing to implement the ZMRG as required under the MMPA. Accordingly, it serves as a stimulus for the development of new technologies and fishing practices through the TRP process.

**Comment 7:** NMFS should avoid a formulaic approach to establishing ZMRG and should reserve discretion to avoid imposing requirements to develop take reduction plans when available scientific information do not support this process.

**Response:** In accordance with MMPA section 118(b)(1), the ZMRG includes a target level of mortality and serious injury incidental to commercial fishing. Because abundances and trends of marine mammal stocks vary widely, a formula is the most simple and robust approach to defining the target. The process to achieve target levels of incidental mortality and serious injury (i.e., TRPs under MMPA section 118(f)) must take into consideration the best scientific information available from the stock assessment reports, any substantial new information, as well as other considerations. Therefore, NMFS will apply these standards in developing and implementing TRPs to reduce incidental mortality and serious injury.

**Comment 8:** The proposed definition of ZMRG as a fixed numerical point is inconsistent with the legislative history of this provision of law.

**Response:** The commenter does not explain how the proposed definition is inconsistent with the legislative history. However, the proposed definition of the insignificance threshold to implement the ZMRG is a formula rather than a fixed numerical point. Consequently,

the threshold can be updated as new information becomes available (e.g., new abundance estimates, information allowing a stock-specific estimate, rather than a generally applied default, for the maximum net productivity rate, or precise, unbiased mortality estimates allowing the recovery factor to be changed from a default value); thus, it is consistent with principles of adaptive management as well as the MMPA provisions and legislative history related to the ZMRG.

**Comment 9:** Any human-caused marine mammal mortality is undesirable, and the ideal objective of any fisheries management plan should be to work to eliminate such loss. We are concerned NMFS seems to take a contradictory stance in allowing the ZMRG to become an upwardly moving target if and when marine mammal populations increase.

**Response:** NMFS agrees eliminating incidental mortality and serious injury is an ideal goal of the MMPA. However, as NMFS explained in the proposed rule in response to comment 43, NMFS realizes the number of deaths of marine mammals incidental to commercial fishing could increase as numbers of marine mammals increase. As long as the mortality and serious injury rate (as a function of population size) decreases, an increase in the number of marine mammal deaths per year would still be consistent with the MMPA's goal of "approaching a zero mortality and serious injury rate." A rate based upon mortality and serious injury as a function of PBR (which, in turn, is based largely upon the abundance of the stock) addresses the impact of the mortality and serious injury on the affected stock of marine mammals and, therefore, is biologically relevant. NMFS is using a rate based upon population size or annual production (which is a function of population size) within the ZMRG. (See 69 FR 23477, 23466, April 29, 2004.)

**Comment 10:** If a fishery has achieved ZMRG target levels of incidental mortality and serious injury, further reduction in mortality rates should not be precluded. Thus, achieving zero mortality and serious injury rates would remain the ideal objective.

**Response:** NMFS agrees the elimination of mortality and serious injury of marine mammals remains the ideal goal. As long as fishery-caused mortality and serious injury remain below the insignificance thresholds for stocks of marine mammals, then the affected fisheries will not be required to further reduce mortality and serious injury (see MMPA section 118(b)(2)). However, NMFS will continue to work

with the fishing industry through incentive and improvement of available technologies and methods even after mortality and serious injury in a particular fishery is reduced to the insignificance thresholds for stocks of marine mammals.

*Comment 11:* NMFS correctly interpreted the MMPA's mandate of technology and economic factors should not be considered in setting ZMRG under MMPA section 118(b)(1) or in establishing the 6-month requirement for TRPs to reduce mortality and serious injury in strategic stocks to PBR levels. We realize technology and economic factors may be taken into account when determining the appropriate measures to implement a TRP to reduce mortality and serious injury to insignificant levels approaching a zero rate.

*Response:* NMFS agrees with this comment. The second sentence is based on the requirement to reduce, within 5 years of its implementation, mortality and serious injury of marine mammals incidental to 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 and regional fishery management plans.

*Comment 12:* In contrast to the ANPR, the proposed rule seems to have appropriately moved the analysis of the "feasible economics" of the fishery to the TRT process rather than the initial determination of whether ZMRG has been reached by the fishery. While we believe this is an improvement upon the approach outlined in the ANPR, we remain concerned the current proposal fails to include "approaching zero" within its definition of ZMRG.

*Response:* As noted in the proposed rule in responses to comments received on the ANPR, the ZMRG does not contain a 2-part target for reducing incidental mortality and serious injury (i.e., insignificant levels and approaching a zero rate). Rather, "approaching a zero mortality and serious injury rate" modifies the term "insignificant levels". See the response to comment 42 in the proposed rule (69 FR 23477, 23485, April 29, 2004).

*Comment 13:* We agree accounting for available technology and economic feasibility should occur during the TRP process rather than in determining whether a given level of incidental mortality and serious injury is, indeed, insignificant to the affected marine mammal population. If given a clear goal, experience has demonstrated take reduction teams can work cooperatively to devise the necessary technologies and

secure the funds to implement those technologies.

*Response:* NMFS agrees.

*Comment 14:* A review of the legislative history of the ZMRG concept shows any NMFS rule using ZMRG as a regulatory standard designed to return marine mammal populations to their pristine levels is contrary to Congressional intent. Congress did not intend to significantly curtail or shut down fisheries as long as fisheries are using the best available technology. Although Congress sought to encourage the development of new technology to reduce incidental interactions with marine mammals, Congress has also stated in no uncertain terms ZMRG is satisfied by the use of the best available technology technologically and economically feasible to employ.

*Response:* The insignificance thresholds for stocks of marine mammals are the target level of mortality and serious injury. Any subsequent regulatory action would come as the result of a TRP (see MMPA section 118(b)(4)), for which the long-term goal must take into account economics of the affected fisheries and available technologies (see MMPA section 118(f)(2)). In 1981, Congress adopted a "best available technology" standard for the purse seine fishery for yellow-fin tuna in the eastern tropical Pacific Ocean (ETP), but Congress did not modify the ZMRG for other commercial fisheries. The House Committee report recognized other fisheries had not developed new techniques and equipment for reducing incidental mortality (H.R. Rep. No 97-228 at 17-18 (1981)). Furthermore, Congress has used total dolphin mortality limits historically in the ETP and in 1997 established an annual cap of 5,000 dolphin deaths and stock-specific mortality limits of 0.1 percent of the minimum abundance estimate of the stock. This stock-specific mortality limit is the mathematical equivalent of 10 percent of PBRs for the affected stocks of dolphins in the ETP. A more complete discussion of the legislative history of the ZMRG may be found in the ANPR (68 FR 40888, July 9, 2003) under the heading "History of the ZMRG".

*Comment 15:* Consistent with the original intent and policy of Congress in 1972, the ZMRG threshold should not be used to shut down or significantly curtail the activities of commercial fishing.

*Response:* By defining an insignificance threshold in this final rule, NMFS has established a target level of mortality and serious injury of marine mammals incidental to

commercial fishing operations. MMPA section 118(b)(4) requires, where incidental mortality and serious injury exceed this level, NMFS to take appropriate action under MMPA section 118(f), which describes the development and implementation of TRPs. In the long-term goal of TRPs to reduce incidental mortality and serious injury to levels consistent with the ZMRG, NMFS must take into account fishery economics and existing technology. Thus, the ZMRG threshold is not defined in such a manner to shut-down or significantly curtail the activities of commercial fishing simply because a fishery exceeds the threshold.

The insignificance thresholds for stocks of marine mammals are the lower limit to which fisheries can be regulated to reduce incidental mortality and serious injury of marine mammals (see MMPA section 118(b)(2)). An examination of the criteria used to classify fisheries and the current list of fisheries shows most fisheries (those in Category III) have already met the requirements of the ZMRG and are not required to further reduce incidental mortality and serious injury.

*Comment 16:* We propose ZMRG should be satisfied for species that are not endangered, threatened, or depleted if the fishery is employing the best available technology that is economically and technologically feasible, provided incidental mortality and serious injury in the fishery does not exceed the PBR. This proposed definition is fully consistent with the MMPA.

*Response:* MMPA section 118(b)(1) requires commercial fisheries to reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate. MMPA section 118(f)(2) provides the short-term goal of TRPs to reduce incidental mortality and serious injury of marine mammals to levels less than PBR and a separate, long-term goal to reduce incidental mortality and serious injury to insignificant levels approaching a zero mortality and serious injury rate, taking into account listed factors. Therefore, the approach proposed in this comment is inconsistent with the MMPA.

*Comment 17:* With the International Dolphin Conservation Program Act (IDCPA), Congress not only established an overall dolphin mortality limit, it also set stock-specific dolphin mortality limits. These limits were put into place, and became binding, irrespective of the current state of technological development.

*Response:* NMFS agrees.

**Comment 18:** In passing the IDCPA, Congress distanced itself from a definition of ZMRG solely equated with technological advances, and NMFS should not restrict the proposed definition of ZMRG for US commercial fisheries on the basis of “feasible technology”.

**Response:** As previously provided in responses to other comments, NMFS does not use feasible technology in the determination of whether incidental mortality and serious injury exceed the insignificance threshold, but the availability of existing technology remains a consideration in the long-term goal of TRPs as provided in MMPA section 118(f)(2).

**Comment 19:** Congress would not wish to see the ZMRG used as a target from which there will be no improvement, rather the ZMRG should serve as an initial mechanism by which mortality and serious injury levels can be improved. ZMRG should be used within the TRPs to encourage the development of risk-averse fishing techniques, and it should not allow for any increase in levels of mortality and serious injury in a given fishery. Therefore, the proposed “upward sliding scale” for ZMRG is at odds with Congressional intent.

**Response:** As noted in the response to comment 10, a stock’s insignificance threshold identifies the limit to which fisheries would be subject to TRPs and resulting regulation for reducing mortality and serious injury of marine mammals. Additional reductions could occur through incentive and outreach. Incidental mortality and serious injury at or below levels identified by stocks’ insignificance thresholds would be insignificant to the affected stock of marine mammals and would be a rate (mortality and serious injury as a function of population size) so small as to be “approaching a zero mortality and serious injury rate”. Thus, this final rule is consistent with the MMPA and with Congressional intent.

**Comment 20:** Although NMFS included an option within the ANPR to take economic feasibility and the availability of technology into account in determining whether mortality and serious injury were below the insignificance threshold, the proposed rule did not include this option. NMFS should make this point explicit in the final rule.

**Response:** NMFS explicitly describes how these factors are used in the responses to comments and under the heading “The Final Rule”.

**Comment 21:** We have concerns with NMFS’ proposed definition because it leaves considerable discretion in the

hands of the Assistant Administrator. If this provision is limited to making changes in the default PBR variables and is based upon better scientific data, such flexibility may be lawful. If this provision is used to mis-categorize a fishery’s attainment of ZMRG based on political or other non-scientific data, it would be unlawful.

**Response:** The insignificance threshold is to be determined based on an estimate of the PBR level for a stock of marine mammals; however, the threshold can be modified when such a modification is biologically sound and consistent with the MMPA to do so. The definition of insignificance threshold provides the Assistant Administrator with discretion if certain parameters in determining the PBR level can be estimated or otherwise modified from default values based on available scientific information. In most cases, this discretion would likely result in a decrease of the insignificance threshold in cases such as a small or declining stock of marine mammals. For example, scientists have developed a population model for Hawaiian monk seals more sophisticated and based upon more data than the simple PBR approach. Therefore, the use of the more sophisticated model to assess the significance of human-caused mortality would be more appropriate than the use of the PBR model. Hawaiian monk seals are a small, declining population, and known human-caused mortality and serious injury is insufficient to cause the decline. Therefore, one of the basic assumptions of the PBR approach (i.e., the population would grow if human-caused mortality and serious injury was below the calculated PBR) is violated. Consequently, a PBR-based approach for estimating an insignificant level of fishery-caused mortality and serious injury would be inappropriate and misleading.

In addition, the insignificance threshold provides the Assistant Administrator discretion when information is insufficient to estimate the level of mortality and serious injury having an insignificant effect on the affected stock. The approach of comparing mortality and serious injury estimates to PBR, which is based on abundance estimates, assumes NMFS has adequate reliable information to estimate mortality and serious injury as well as abundance. The approach is consistent with MMPA section 118(b)(3), in which Congress recognized determinations under the ZMRG cannot be made without adequate reliable information. This subsection provides a requirement for submitting a report to Congress describing fisheries’ progress

toward the target of reducing incidental mortality and serious injury and requires NMFS to “note any commercial fishery for which additional information is required to accurately assess the level of incidental mortality and serious injury of marine mammals in the fishery.”

**Comment 22:** We are pleased NMFS is aware of the logistic model’s limits and its application to small and declining populations and support making an adjustment to the simple calculation for declining or small populations.

**Response:** Comment noted. See response to previous comment.

**Comment 23:** The proposal to allow NMFS to modify the ZMRG formula is legally unsupportable and further violates Congressional intent.

**Response:** See response to comment 21. The insignificance threshold provides the Assistant Administrator with discretion to deviate from a rote application of a simple formula under circumstances in which it would be biologically sound and consistent with the MMPA to do so.

**Comment 24:** Stating observer coverage is available for only a few fisheries, NMFS concedes “current levels of incidental mortality and serious injury cannot be verified independently and may exceed current estimates.” NMFS may not rely on its failure to collect data necessary to manage fisheries and protect the environment as an excuse from its duties to collect the data. When the type and amount of bycatch is unknown, a recent study recommended at least 20-percent observer coverage is needed when the bycatch is a commonly caught species and 50 percent is necessary for species caught rarely to accurately and precisely determine the total bycatch.

**Response:** NMFS can design and implement monitoring programs only to the extent resources allow. Congress anticipated funds would be insufficient to collect all pertinent data immediately and established priorities for observer programs in MMPA section 118(d)(4). Congress also established priorities for developing and implementing TRPs (see MMPA section 118(f)(3)). Since 1994, NMFS has used these priorities to design and implement observer programs to support TRP development and implementation (for strategic stocks, including stocks listed under the ESA) and to collect additional information where mortality and serious injury of marine mammals are uncertain but are suspected to be highest. Thus, NMFS has implemented MMPA section 118 to the fullest extent resources would allow.

**Comment 25:** Due to a lack of resources, there are a number of

fisheries about which we know little. Adequate information upon which to base a TRP and to evaluate its success is a vital part of the regime to govern interactions between marine mammals and commercial fishing operations. We hope we can help NMFS seek adequate funding for its work in this area.

*Response:* Comment noted.

*Comment 26:* The information available on the current level of incidental mortality and serious injury in Alaska fisheries is minimal and, thus, must be increased to provide more accurate estimates of incidental mortality. Specifically, this will require increased observer coverage for those fisheries having the greatest potential to cause incidental mortality and serious injury of marine mammals, and we strongly encourage NMFS to increase coverage as soon as possible.

*Response:* NMFS' appropriations for implementing MMPA sections 117 and 118 are fully used in existing programs based on statutory priorities. Existing observer programs are tied directly to existing take reduction plans. NMFS will continue to allocate resources based on statutory priorities. However, NMFS will not be able to implement large, new observer programs within the constraints of existing resources.

*Comment 27:* Two factors should be thoroughly evaluated prior to the establishment of a take reduction team and development of a TRP: (1) Outdated estimates of incidental mortality and serious injury and (2) substantial uncertainty in the estimate of population abundance for marine mammals, particularly when a stock's insignificance threshold is in the single digits.

*Response:* In accordance with the MMPA, each TRP shall include a review of the information in the final stock assessment report and any substantial new information. Reasonably accurate, reliable information on marine mammal abundance and stock structure and on mortality and serious injury incidental to commercial fisheries must be available to make the TRP process most effective and efficient. Such information also provides a basis for developing effective measures for the reduction of incidental mortality and serious injury.

*Comment 28:* NMFS must consider the reliability of the available information. For example, NMFS is not required to implement a TRP based on highly unreliable estimates of marine mammal population sizes and fishery interaction rates. It would be arbitrary and capricious for NMFS to subject the Hawaii longline fishery to such a plan due to the lack of reliable information

and the prevailing contrary scientific opinions.

*Response:* See response to comment 27. Under MMPA section 117, each stock assessment report must be based on the "best scientific information available." Therefore, NMFS must base development and implementation of TRPs on the best scientific information available in the stock assessment reports as well as substantial new information. In addition, NMFS has at this point proposed elevation of the Hawaii longline fishery in the 2004 List of Fisheries (LOF) from a Category III to a Category I fishery (69 FR 19365, April 13, 2004), and it has not published a final 2004 LOF to complete the proposed change. Upon completing the LOF, if the Hawaii longline fishery classification is elevated, NMFS must decide what priority to give development and implementation of a TRP for this fishery based on MMPA section 118(f)(3).

*Comment 29:* NMFS must reconsider and re-calibrate its mortality policy. NMFS' stock assessment report for the Hawaiian stock of false killer whales references unpublished 1998 guidelines apparently directing NMFS to classify in every instance of ingesting a hook, of hooking in the mouth or other body part, or of entanglement and release trailing gear for small cetaceans, as likely to result in mortality.

*Response:* NMFS convened a workshop of experts in marine mammal biology and fishing technologies in April 1997. The results of this workshop included guidelines for differentiating serious and non-serious injury of marine mammals incidental to commercial fishing operations, which were published as a NOAA Technical Memorandum. The publication process included scientific peer review. These guidelines represent a compilation of the best scientific information available at the time and have not been updated since 1997. Additional data, particularly on large whales, has been collected since the workshop was convened. When these additional data have been compiled and analyzed, NMFS will update the guidelines. The report of the workshop is available on the Internet (see Electronic Access).

*Comment 30:* NMFS' population estimates are subject to a very high level of uncertainty. For example, numerous flaws in extrapolating from the limited population data known about the Hawaiian stock of false killer whales has been acknowledged for some time. The 2002 survey was conducted in Hawaiian waters between August and November, and anecdotal information indicates false killer whales exhibit seasonal

behavior with peak abundance in Hawaiian waters believed to occur between June and August coincident with the peak in yellowfin tuna abundance. Accordingly, species and stock-specific information reliably indicates it is probable a fall survey would underestimate actual abundance of false killer whales.

*Response:* There is no scientific documentation of seasonality in false killer whale abundance near Hawaii. Sighting data from observers on longline fishing vessels based in Hawaii showed no apparent seasonal fluctuations; however, those data included all areas covered by the fishery and are not specific to the Hawaiian Islands. Boat-based surveys near the main Hawaiian Islands during all months except July and August resulted in 14 false killer whales sightings distributed throughout the year. Accordingly, there is no scientific information supporting the assertion of the 2002 survey underestimating the abundance or density of false killer whales in the Hawaiian EEZ. In the past, NMFS acknowledged limitations of abundance estimates for certain cetaceans in the Hawaiian EEZ because these estimates were based upon aerial surveys within 25 nautical miles of the main Hawaiian Islands. The 2002 surveys included line transects throughout the EEZ and are not subject to the same limitations.

*Comment 31:* In reality the Hawaiian population of false killer whales is not confined to the Hawaiian Exclusive Economic Zone (EEZ) as is predetermined by NMFS' regulatory definition of the stock; however, the extent of its distribution beyond the Hawaiian EEZ is unknown, as is the relative abundance of the population within the nearshore and open ocean areas of the EEZ.

*Response:* Genetic analysis of samples from false killer whales in the North Pacific Ocean indicates false killer whales found off Hawaii are reproductively isolated from those in the ETP, but geographic boundaries of the various populations cannot yet be identified. In the latest final stock assessment report, NMFS recognizes a stock containing false killer whales in the EEZ surrounding Hawaii and other US territories in the Pacific Ocean. This report was based on the best scientific information available at the time the report was prepared and on the requirement in MMPA section 117 to prepare stock assessment reports for each stock of marine mammals occurring in waters under the jurisdiction of the United States. As new scientific information is obtained, NMFS will review such information and

incorporate it into future revisions of the stock assessment reports as required by MMPA section 117. NMFS agrees the distribution of false killer whales beyond the Hawaiian EEZ and the relative abundances of false killer whales in nearshore and open ocean areas have not been the subject of specifically-designed research.

However, numerous reports and studies, designed for other purposes, contribute information related to false killer whale distribution and abundances, and all relevant sources of information are incorporated into NMFS' scientific analyses and conclusions related to false killer whales and other marine mammals in assessing their status and in developing and implementing conservation programs. Also see response to comment 33.

*Comment 32:* In the case of false killer whales, NMFS has defined the animals taken in the Hawaii EEZ as a strategic stock, based on genetic evidence suggesting false killer whales between the central North Pacific (Hawaii) are separate, reproductively isolated populations. However, the degree of separation of these false killer whales is not known, and the geographic boundaries for the populations cannot yet be identified. False killer whales have been taken by the longline fishery in an area ranging from the north of the Hawaii EEZ to the equator. Are all of these false killer whales from the same population or from separate isolated populations? If from the same population, then the designation of a strategic stock in the Hawaii EEZ would be questionable.

*Response:* See response to comment 31. In addition, even if the actual boundaries of the Hawaiian stock of false killer whales extended beyond the EEZ, the strategic status of the stock would not be changed. NMFS' guidelines for preparing marine mammal stock assessment reports contain specific instructions for calculating PBR of transboundary stocks. (The guidelines are available in electronic form; see Electronic Access.) In cases such as false killer whales in the Hawaiian EEZ, where the stock could extend into international waters, the PBR would be based on the abundance of animals within the EEZ. This guideline was established to prevent underestimating the effects of mortality and serious injury incidental to US fisheries in international waters where unknown levels of additional human-caused mortality and serious injury (e.g., incidental to foreign fisheries in the same waters) may also be affecting the stock.

*Comment 33:* The abundance estimate of the Hawaii stock of false killer whales resulting from the 2002 survey must be viewed with suspicion and its utility questioned in relation to implementing the ZMRG.

*Response:* The protocols for designing, conducting, and analyzing the 2002 survey have been used frequently in the past and have been subjected to scientific review. In addition, the report of this survey, including the resulting abundance estimates, has been peer-reviewed. The levels of uncertainty in the estimates from the 2002 survey are similar to those for many other stocks of offshore cetaceans, and the resulting abundance estimates conform to guidelines for preparing marine mammal stock assessment reports. Therefore, the survey results may be used reliably for applications related to the abundance, distribution, and density of false killer whales and other cetaceans within the Hawaiian EEZ.

*Comment 34:* The MMPA's goal is to maintain marine mammal populations at their OSP levels.

*Response:* NMFS agrees maintaining marine mammal populations within their OSP levels is one of the goals of the MMPA. The MMPA also requires reduction of mortality and serious injury of marine mammals incidental to commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate, which is commonly referred to as the ZMRG.

*Comment 35:* The proposed rule admits as long as human induced mortality does not exceed PBR levels, then a marine mammal stock will achieve OSP, which is the goal of the MMPA.

*Response:* NMFS agrees this is one goal of the MMPA. However, NMFS also recognizes reducing fishery-related mortality and serious injury of marine mammals to PBR is a short-term goal of TRPs under the MMPA, and the long-term goal requires reducing such mortality and serious injury to insignificant levels approaching a zero mortality and serious injury rate.

*Comment 36:* The proposed rule never explains why NMFS abandons any pretext of ecosystem-based management when it comes to marine mammals.

*Response:* NMFS' approach to ecosystem-based management must be consistent with the MMPA and other applicable law. One of the provisions of the MMPA requires commercial fisheries to reduce their incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate. Thus, NMFS is

issuing this final rule to implement the provisions of the MMPA related to the ZMRG.

*Comment 37:* We agree there are no provisions within the MMPA to develop and implement TRPs for non-strategic stocks interacting with Category II fisheries and urge NMFS to examine and devise mechanisms to reduce the bycatch from those fisheries for which the MMPA does not currently require TRPs. Toward this end, NMFS should take immediate steps to partner with the conservation community and the fishing industry to conduct workshops to explore the feasibility of transferring existing technologies deemed successful in reducing marine mammal bycatch in other fisheries and to investigate new technologies to reduce bycatch.

*Response:* NMFS has been partnering with many parties in investigating new technologies to reduce bycatch within the TRP context. Currently, funds for implementing MMPA section 118 are fully subscribed in existing activities to address statutory priorities (e.g., TRPs for all strategic stocks of marine mammals interacting with Category I or II fisheries). NMFS will consider effective and efficient mechanisms to reduce mortality and serious injury of non-strategic marine mammals incidental to commercial fishing, such as the workshop suggested in this comment, to the extent resources and priorities allow.

*Comment 38:* The proposed insignificance threshold will result in yet another layer of arbitrary regulation upon commercial fisheries in Hawaii, subjecting such fisheries to additional regulatory burdens, legal costs, and economic uncertainties.

*Response:* The definition of "insignificance threshold" will allow NMFS to implement one of the requirements of the MMPA. Rather than increase the regulatory burden on commercial fisheries in Hawaii or elsewhere, this rule establishes a lower limit to the extent to which commercial fisheries are required to reduce incidental mortality and serious injury of marine mammals. The insignificance threshold is consistent with the criterion for classification as a Category III fishery. Prior to this rule, the limit to reducing mortality and serious injury was not defined.

*Comment 39:* In the case of endangered whales, such as the Atlantic northern right whale, with only a few hundred individuals left in the population, there can be no question about requiring fisheries to literally zero-out interactions. However, false killer whales are not endangered, they are a circum-global species found in all

the world's oceans at tropical and sub-tropical latitudes. According to the evidence to date, there may be genetic isolation between eastern stocks and those in Hawaii, but the isolation of the false killer whales in the EEZ around Hawaii from those in the immediate adjacent waters is still an open question. NMFS needs to address how vulnerable the Hawaii fishery will be to closure or other constraints if it cannot achieve the ZMRG.

**Response:** NMFS addressed the extent to which fisheries would be subject to closure or other constraints under the ZMRG in the proposed rule (see 69 FR 23477, 23480, April 29, 2004, under the heading "Would a Fishery Be Closed if It Missed the Target Mortality and Serious Injury Level by the Deadline?"). The MMPA requires NMFS to take action to reduce mortality and serious injury to levels consistent with the ZMRG through a TRP, which must take into account the economics of the affected fishery, the availability of existing technology, and existing state and regional fishery management plans.

**Comment 40:** We interpret this rulemaking as limited to defining ZMRG as used in MMPA sections 101(a)(2) and 118 of the MMPA. We do not see this rulemaking as having any bearing on the implementation of the International Dolphin Conservation Program (MMPA sections 301–307).

**Response:** The comment is an accurate interpretation of the application of this final rule. As provided in response to comment 14, there are separate requirements applicable to the International Dolphin Conservation Program.

**Comment 41:** A single definition for "insignificant levels approaching a zero mortality and serious injury rate" is sufficient, and 10 percent of PBR is the most appropriate definition. However, large or increasing populations, even when incidental mortality and serious injury has been reduced to the insignificance threshold, may still have a large number of deaths. For example, the PBR of California sea lions is 6,591 animals, and 10 percent of its PBR is 659 sea lions. Although this level of mortality is insignificant and can be tolerated at the populations level, NMFS and the fishing industry should do everything possible to further reduce the mortality and serious injury of individual marine mammals to the lowest level practicable.

**Response:** Although 659 sea lions may seem a relatively large number (compared to single digits), annual mortality at this level would have an insignificant effect on the sea lion population. Furthermore, 659, as a

function of the sea lion population size, is so small it approaches a zero rate. Therefore, the insignificance threshold for California sea lions is consistent with the MMPA's goal of reducing mortality and serious injury of marine mammals incidental to commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate. However, as provided in response to comment 10, NMFS will continue to work with the fishing industry through incentive and improvement of available technologies and methods even after incidental mortality and serious injury in any particular fishery is reduced to the insignificance thresholds for stocks of marine mammals.

#### The Final Rule

The regulatory text in this final rule is identical to the proposed rule and establishes the default target level of mortality and serious injury satisfying target levels under the ZMRG as 10 percent of any stock's PBR. These targets result in upper limits ranging from two animals per 10,000 animals in the population stock for endangered whales to six animals per 1,000 in the population for robust pinniped stocks. Incidental mortality and serious injury limited to these thresholds would have an insignificant effect on stocks of marine mammals and would be so small as to be approaching a zero mortality and serious injury rate. These initial target levels of incidental mortality and serious injury are generally estimated as 10 percent of any stock's PBR. However, the Assistant Administrator has discretion to modify this simple formula if certain parameters (e.g., maximum net production rate or the recovery factor in the calculation of the stock's PBR level) can be estimated or otherwise modified from default values or when information is insufficient to estimate the level of mortality and serious injury having an insignificant effect on the affected population stock.

The insignificance threshold, which is the stock-specific target level of incidental mortality and serious injury under the ZMRG, includes only a consideration of the maximum number of individuals in a stock of marine mammals killed or seriously injured incidental to commercial fishing and still be considered insignificant levels approaching a zero mortality and serious injury rate. In this regard, it expresses a biological estimate and does not include consideration of the economics of affected fisheries, the availability of existing technology, or existing state or regional fishery management plans. These factors are

taken into account in the long-term goal of the TRP process to develop and implement measures to reduce incidental mortality and serious injury to insignificant levels approaching a zero mortality and serious injury rate (see MMPA section 118(f)(2)).

#### Classification

NMFS prepared an EA to analyze the impacts on the human environment of alternatives for establishing an insignificance threshold to implement the ZMRG. The draft EA was available for public review and comment along with the proposed rule, and no comments were received on the draft EA. Based upon the analyses in the EA, NMFS has determined the establishment of an insignificance threshold as 10 percent of a marine mammal stock's PBR would not have a significant impact on the human environment.

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866.

At the proposed rule stage, the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration this action, if adopted, would not have a significant economic impact on a substantial number of small entities. No comments were received regarding this certification or the economic impact of the rule, which was described in a preliminary regulatory impact review incorporated into the draft EA. As a result, no regulatory flexibility analysis is required, and none has been prepared.

This final rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act of 1980. This final rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 13132.

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

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

Dated: July 14, 2004.

**Rebecca Lent,**

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

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

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

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

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

- 2. In § 229.2, the definition for “Insignificance threshold” is added in alphabetical order to read as follows:

**§ 229.2 Definitions.**

\* \* \* \* \*

**Insignificance threshold** means the upper limit of annual incidental mortality and serious injury of marine mammal stocks by commercial fisheries that can be considered insignificant levels approaching a zero mortality and serious injury rate. An insignificance threshold is estimated as 10 percent of the Potential Biological Removal level for a stock of marine mammals. If certain parameters (e.g., maximum net productivity rate or the recovery factor in the calculation of the stock's potential biological removal level) can be estimated or otherwise modified from default values, the Assistant Administrator may use a modification of the number calculated from the simple formula for the insignificance threshold. The Assistant Administrator may also use a modification of the simple formula when information is insufficient to estimate the level of mortality and serious injury that would have an insignificant effect on the affected population stock and provide a rationale for using the modification.

\* \* \* \* \*

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 660**

[Docket No. 040429134-4135-01; I.D. 071304A]

**Fisheries Off West Coast States and in the Western Pacific; West Coast Salmon Fisheries; Inseason Actions #5 - Adjustments of the Commercial Fishery from the U.S.-Canada Border to Cape Falcon, Oregon**

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

**ACTION:** Modification of fishing season; request for comments.

**SUMMARY:** NMFS announces that the commercial fishery in the area from the U.S.-Canada Border to Cape Falcon, OR was modified to open July 8 and close at midnight on July 12, 2004, then to reopen on July 16 through midnight on July 19, 2004, with the provision that no vessel may possess, land, or deliver more than 100 chinook for each open period. This action was necessary to conform to the 2004 management goals. The intended effect of this action was to allow the fishery to operate within the seasons and quotas specified in the 2004 annual management measures.

**DATES:** Adjustment of the area from the U.S.-Canada Border to Cape Falcon, OR effective 0001 hours local time (l.t.), July 8, 2004, until 2359 hours l.t., July 19, 2004; after which the fishery will remain closed until opened through an additional inseason action for the west coast salmon fisheries, which will be published in the **Federal Register**, or until the effective date of the next scheduled open period announced in the 2004 annual management measures. Comments will be accepted through August 4, 2004.

**ADDRESSES:** Comments on these actions must be mailed to D. Robert Lohn, Regional Administrator, Northwest Region, NMFS, NOAA, 7600 Sand Point Way N.E., Bldg. 1, Seattle, WA 98115-0070; or faxed to 206-526-6376; or Rod McInnis, Acting Regional Administrator, Southwest Region, NMFS, NOAA, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802-4132; or faxed to 562-980-4018. Comments can also be submitted via e-mail at the [2004salmonIA5.nwr@noaa.gov](mailto:2004salmonIA5.nwr@noaa.gov) address, or through the internet at the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments, and include [docket number and/or RIN number] in the subject line of the message. Information relevant to this document is available for public review during business hours at the Office of the Regional Administrator, Northwest Region, NMFS.

**FOR FURTHER INFORMATION CONTACT:** Christopher Wright, 206-526-6140.

**SUPPLEMENTARY INFORMATION:** The Regional Administrator (RA) modified the season for the commercial fishery in the area from the U.S.-Canada Border to Cape Falcon, OR to open July 8 and close at midnight on July 12, 2004, then reopen on July 16 through July 19, with the provision that no vessel may possess, land, or deliver more than 100 chinook for each open period. On July 2 the Regional Administrator had determined available catch and effort

data indicated that the effort predicted preseas on was low and that restricting the fishery to slow the catch of chinook would allow additional time for fishers to access more of the coho quota. The fishery was scheduled to be reevaluated by an inseason conference call on July 14, and any further adjustments announced.

All other restrictions remain in effect as announced for 2004 ocean salmon fisheries. This action was necessary to conform to the 2004 management goals. Modification of fishing seasons is authorized by regulations at 50 CFR 660.409(b)(1)(i) and (ii).

In the 2004 annual management measures for ocean salmon fisheries (69 FR 25026, May 5, 2004), NMFS announced the commercial fishery for all salmon in the area from the U.S.-Canada Border to Cape Falcon, OR would open July 8 through the earlier of September 15, or a 14,700-chinook preseas on guideline, or a 67,500-coho quota. The 67,500-coho quota included a subarea quota of 8,000 coho for the area between the U.S.-Canada border and the Queets River, WA. The fishery was scheduled to be open Thursday through Monday prior to August 11, and Wednesday through Sunday thereafter, with the restriction that no vessel may possess, land, or deliver more than 125 chinook for each 5-day open period.

On July 2, 2004, the RA consulted with representatives of the Pacific Fishery Management Council, Washington Department of Fish and Wildlife, and Oregon Department of Fish and Wildlife by conference call. Information related to catch to date, the chinook catch rate, and effort data indicated that the effort predicted preseas on was low and that restricting the fishery to slow the catch of chinook would allow additional time for fishers to access more of the coho quota. As a result, on July 2 the states recommended, and the RA concurred, that the area from the U.S.-Canada Border to Cape Falcon, OR open July 8 and close at midnight l.t. on July 12, 2004 (5 days open), then reopen on July 16 through midnight l.t. on July 19, 2004 (4 days open), with the provision that no vessel may possess, land, or deliver more than 100 chinook for each open period. All other restrictions that apply to this fishery remain in effect as announced in the 2004 annual management measures.

The RA determined that the best available information indicated that the catch and effort data, and projections, supported the above inseason action recommended by the states. The states manage the fisheries in state waters adjacent to the areas of the U.S.