

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the MMPA Amendments of 1994 amended section 114, the interim exemption, to extend it until September 1, 1995, or until superseded by regulations prescribed under section 118, whichever is earlier.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