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