

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**