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 selfdefense 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.