

or III fisheries. This emergency authority will be used only when no alternative is available to prevent an immediate and significant adverse impact. In the case of a marine mammal population for which a take reduction plan, developed under subpart B, is in effect, section 118(g)(1)(A) requires that the emergency regulations be to reduce incidental mortality and serious injury consistent with the plan, to the maximum extent practicable and that, NMFS, concurrently, approve and implement, on an expedited basis, any amendments to such plan that are recommended by the take reduction team to address such adverse impact.

In the case of a marine mammal population for which a take reduction plan is being prepared, section 118(g)(1)(B) requires NMFS to approve and implement the plan on an expedited basis, which would provide methods to address such adverse impact if still necessary.

In the case of a marine mammal population for which a take reduction plan does not exist, or is not being developed, or in the case of a Category III fishery that NMFS believes may be contributing to such adverse impact, section 118(g)(1)(C) requires NMFS to immediately review the SAR for such population and the classification of such commercial fishery to determine if a take reduction team should be established.

As required by section 118(g)(2) of the MMPA, NMFS must consult with the regional fishery management councils, state fishery agencies, and treaty Indian tribal governments, where appropriate, before taking any emergency action. Emergency actions must, to the maximum extent practicable, avoid interfering with existing regional, state, or tribal fishery management or conservation programs, and must be as brief in duration and nonintrusive as possible. Emergency actions could include, but would not necessarily be limited to: Quotas on the number of marine mammals that may be taken; restrictions on the time, manner and location where the fishery may operate; and prohibitions on the use of fishing techniques or gear which are found to cause excessive marine mammal injuries or mortalities. Emergency regulations would expire at the end of the applicable commercial fishing season or at the end of 180 days, whichever is earlier. However, they could be extended for an additional 90-day period, if needed to address a continuing threat. If NMFS finds that the incidental mortality and serious injury is not having an immediate and significant adverse impact over a period

of time longer than 1 year, NMFS would develop and implement a take reduction plan under proposed § 229.14 instead of prescribing emergency regulations.

#### **Takes of Listed Marine Mammals**

Section 101(a)(5)(E) was added to the MMPA in 1994 to authorize NMFS to issue permits to commercial fishing vessels of the United States allowing for up to 3 years, incidental takes of marine mammals listed as threatened species or endangered species under the ESA. A permit may be issued only if NMFS determines that the total incidental mortality and serious injury from commercial fisheries would have a negligible impact on the species or stock (proposed § 229.2), and that a recovery plan has been, or is in the process of being, developed for that stock under the ESA. Furthermore, any applicable requirements of section 118 (e.g., registration, monitoring, and take reduction plans) must also be met before NMFS could authorize the incidental taking of listed marine mammals by any Category I or II fishery. NMFS will publish a list identifying the Category I, II and III fisheries for which such determinations were made. However, only Category I and II vessels require permits under section 101(a)(5)(E); vessels fishing in either a Category I or II fishery must receive authorizations under both section 118 and section 101(a)(5)(E) in order to legally engage in the incidental taking of listed marine mammals.

Vessels in Category III fisheries that are not required to register under section 118 but which are included in the list published pursuant to section 101(a)(5)(E) will not be subject to the penalties of the MMPA for the incidental taking of marine mammals that are listed as endangered or threatened species under the ESA, as long as the vessel owner or operator of such vessel, in accordance with the requirements of proposed § 229.6, reports any incidental mortality or injury within 48 hours of the end of the fishing trip where the incidental taking occurred.

The MMPA states that after opportunity for public comment, NMFS must determine which fisheries that have interaction with ESA-listed marine mammals have a negligible impact on those stocks. NMFS must then publish a list of those fisheries for which such a determination has been made. Because the proposed LOF (Tables 1 and 2 in this rule) specifies which fisheries have interactions with species or stocks listed under the ESA, and because the associated Environmental Assessment provides the data on which a negligible

determination will be made, NMFS is now requesting public comment specifically regarding this issue; such comments will be considered and a final list of those fisheries for which takes have been determined to be negligible will be published in the **Federal Register**.

The section 101(a)(5)(E) authorization in the MMPA to incidentally take marine mammals listed under the ESA will include appropriate terms and conditions made necessary by the associated ESA section 7 consultation. These conditions and restrictions may include actions to reduce the incidental taking or may prohibit any taking of an endangered or threatened species.

NMFS may issue permits under section 101(a)(5)(E) of the MMPA to an identifiable group of vessels, rather than to individuals when possible. Whenever possible, NMFS will issue permits issued under section 101(a)(5)(E) of the MMPA simultaneously with authorizations under section 118 in order not to delay fishing activities. Thus, fishers will not have to apply for a permit under section 101(a)(5)(E). When the level of incidental taking is more than negligible, NMFS may modify, suspend, or revoke such permits. In cases where an individual fisher has a record of excessive incidental takes, NMFS may revoke the permit from that fisher and not from the entire group of vessels in the fishery. For fisheries that have incidental takes of more than one ESA-listed stock, a permit under section 101(a)(5)(E) may be issued to authorize the takes of one stock but not necessarily other stocks.

#### **Penalties**

Except as otherwise provided, violations of section 118, the implementing regulations, Authorization Certificates, or permits issued to fishers authorizing the incidental taking of listed marine mammals during commercial fishing operations would subject vessel owners and fishers to the penalties provided in the MMPA and in NOAA regulations governing administrative procedures for the assessment of penalties (15 CFR part 904).

In addition, as noted above, Certificates may be revoked, suspended, or denied for violations of the MMPA, the regulations, take reduction plans, permits issued to fishers to authorize the incidental taking of listed marine mammals during commercial fishing operations, or emergency regulations issued under this part 229. For fishers operating in Category I or II fisheries, failure to report all incidental injuries and mortalities within 48 hours of the