

LOF (60 FR 37043). In both notices, comments were requested that addressed: (1) Those fisheries in the proposed LOF that interact with species or stocks listed under the ESA, and (2) information on the magnitude of the takes of such species or stocks found in the environmental assessment (EA) that accompanied the rule. These comments and NMFS' responses to the comments are included in the preamble of the final rule to implement section 118 published in the **Federal Register** on August 30, 1995.

Several commenters expressed concern that the information upon which negligible impact findings under section 101(a)(5)(E) were to be made was not provided in sufficient detail for informed comments to be made. Comments also indicated that it was unclear how NMFS proposed to make the determination that the incidental mortality and serious injury from commercial fisheries would have a negligible impact on such species or stocks. It was recommended that NMFS publish a notice that clearly describes the stocks and fisheries for which it proposes to make a finding of negligible impact and explain the basis for the proposed determinations. The time frame for issuance of the section 101(a)(5)(E) permits did not allow for a more complete analysis of endangered and threatened stocks on a fishery-by-fishery basis. Therefore, NMFS issues this interim permit and an explanation of the process by which negligible impact determinations have been made, and invites public comments on the issuance of section 101(a)(5)(E) permits. NMFS will issue individual permits, and any necessary revisions to the LOF, prior to January 1, 1996.

#### Process for Determining Negligible Impact

In order to determine whether serious injuries and mortalities incidental to commercial fishing activities are having a negligible impact on threatened or endangered stocks of marine mammals, NMFS evaluated the total number of all incidental serious injuries and mortalities due to commercial fishing for each such stock. Pertinent information is included in final stock assessment reports made available on August 25, 1995 (60 FR 44308) and in the EA prepared for the proposed rule implementing section 118 of the MMPA.

"Negligible impact", as defined in 50 CFR 228.3, is "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Because of the qualitative nature of this definition and limitations on available information, NMFS determined that the application of strict quantitative criteria for making negligible impact findings was not appropriate. However, as a starting point, NMFS considered a total annual serious injury and mortality of not more than 10 percent of a stock's Potential Biological Removal (PBR) level to be insignificant, based on recommendations of a NMFS workshop held in June, 1994, to propose guidelines for preparing stock assessment reports.

Such a criterion could not, however, be the only factor in evaluating whether a particular level of take could be considered negligible. The information in the stock assessment reports and the EA has varying degrees of uncertainty, and factors other than PBR level (e.g., population trend) were also considered. Because the negligible impact determinations required some judgment based upon the available information, each finding indicates NMFS' best assessment of whether or not the estimated mortality and serious injury of endangered and threatened marine mammals incidental to commercial fishing operations will adversely affect the species or stock through effects on annual rates of recruitment or survival.

Participants in fisheries designated as Category III under the MMPA are not required to obtain an authorization certificate under section 118. They are, however, required to report all incidental mortalities and injuries of marine mammals in accordance with the regulations implementing section 118. Participants in Category III fisheries that interact with threatened or endangered stocks for which the criteria under section 101(a)(5)(E)(i), discussed above, have been met are not subject to penalties under the MMPA, so long as they also report all incidental mortalities and injuries of marine mammals in accordance with section 118 of the MMPA.

Vessels that are registered for those fisheries for which NMFS has issued permits for the incidental, but not intentional, takes of threatened or endangered marine mammals are not subject to penalties under the MMPA. NMFS has consulted on the action of allowing takes of threatened or endangered stocks under section 7 of the ESA, and has determined that the level of takings specified for each stock in the permits issued to commercial fishers is not likely to jeopardize the continued existence of such stocks.

#### Summary of Findings

NMFS has evaluated the best available information for stocks listed as threatened or endangered under the ESA and has determined on a stock-by-stock basis, whether the incidental mortality and serious injury from all commercial fisheries has a negligible impact on such stocks.

Those stocks for which negligible impact findings were made were then reviewed to confirm that: (1) A recovery plan has been developed or is being developed, and (2) where required under section 118, a monitoring program has been established, vessels engaged in such fisheries are registered, and a take reduction plan has been or is being developed. For stocks that have met all of these criteria, NMFS identified the fisheries that may be permitted incidental takes from such marine mammal stocks (Table 1).

For the following stocks, NMFS has determined that the mortality and serious injury incidental to commercial fishing operations will have a negligible impact. An interim permit is issued for incidental takes from these stocks for the Category I and II fisheries indicated in Table 1. Vessels engaged in Category III fisheries included in this list shall not be subject to penalties for the incidental taking of marine mammals listed under the ESA, provided that such takes are reported in accordance with section 118 of the MMPA.

- Humpback whale, Central North Pacific stock
  - Steller sea lion, Eastern stock
  - Steller sea lion, Western U.S. stock
- For the following stocks, NMFS is unable to determine that the mortality and serious injury incidental to commercial fishing operations will have a negligible impact. No takes of these endangered or threatened marine mammal stocks incidental to commercial fishing are allowed.
- Fin whale, Western North Atlantic stock
  - Humpback whale, Western North Atlantic stock
  - Humpback whale, California/Oregon/Washington-Mexico stock
  - Northern right whale, Western North Atlantic stock
  - Sperm whale, Western North Atlantic stock
  - Sperm whale, California/Oregon/Washington stock
  - Hawaiian monk seal

There is no documented evidence of fishery-related interactions for the following marine mammal stocks, which are listed as endangered or threatened under the ESA:

- Blue whale, Western North Atlantic stock