

EFFECTIVE DATE: March 3, 1995.

ADDRESSES: Chief, Marine Mammal Division, Office of Protected Resources, F/PR, National Marine Fisheries Service (NMFS), 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Dean Wilkinson, Office of Protected Resources, 301-713-2322.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1994, at 59 FR 63324, NMFS proposed a rule to prohibit the intentional lethal taking of marine mammals in the course of commercial fishing operations. The proposed rule provided an exception if such taking is imminently necessary in self-defense or to save the life of another person. The notice of proposed rulemaking requested comments and contained a discussion of the background for the proposed rule. The background is not repeated here.

This rule implements section 118(a)(5) of the Marine Mammal Protection Act (MMPA). It prohibits the intentional lethal take of marine mammals in the course of commercial fishing operations. An exception is provided for an intentional lethal take imminently necessary in self-defense or to save the life of another person in immediate danger. If a marine mammal is killed in self-defense or to save the life of another person, a report must be made to the appropriate NMFS Regional Office within 48 hours after the conclusion of the fishing trip.

In the notice of proposed rulemaking, NMFS announced that it intended to make January 1, 1995, the effective date for the final rule. In order to allow time to notify fishers, however, the effective date is delayed until 30 days after the date of publication in the **Federal Register**.

Comments and Responses

Comments were received from the U.S. Fish and Wildlife Service, Carmel River Steelhead Association, the Center for Marine Conservation, Earth Island Institute, the Humane Society of the United States, Maine Aquaculture Association, Salmon for All, and 23 private individuals. Fifteen commenters supported the proposed rule. Thirteen commenters opposed the proposed rule. Two commenters neither supported nor opposed the proposed rule. Specific comments are addressed below:

Comment: There is no compelling reason that this one provision of the section 118 amendment should be adopted at this time. This action is clearly in opposition to Congress' intent

that the entire section 118 amendment be adopted collectively.

Response: There is nothing in the statutory language or in either the House or Senate Reports (House Report 103-439 and Senate Report 103-220) that indicates that all of section 118 is to be implemented simultaneously.

There is evidence that since the passage of the 1994 amendments to the MMPA, the intentional lethal taking of marine mammals has occurred at levels greater than historic levels. For example, one marine mammal rehabilitation facility reports that 31 California sea lions were admitted after being shot between May 1 and November 1, 1994. The same facility admitted a total of 37 pinnipeds that had been shot in the 8-year period prior to 1992. An acceleration in the rate of intentional lethal takes over historic levels is contrary to the intent of Congress to prohibit the intentional lethal take of marine mammals in the course of commercial fishing.

In addition, there have been indications that allowing the intentional lethal take of certain species may result in the intentional lethal taking of other species whose intentional lethal take is prohibited. Although it is not certain that fishers were responsible, an event in March 1993 illustrates this problem. In a relatively short period of time, 58 dead pinnipeds washed onto beaches on the central Washington coast. Nine of the animals were Steller sea lions. Of 34 animals that were fresh enough for examination, 32 had been shot including eight of the nine Steller sea lions—three of which were pregnant. The intentional lethal taking of Steller sea lions is prohibited under the MMPA, and the species is listed as threatened under the Endangered Species Act. It is possible that the similarity of Steller sea lions to other pinniped species, whose intentional lethal take is allowed, was responsible for individuals assuming that it was legal to kill them.

Given the above, the availability of nonlethal means of deterring marine mammals from gear and catch, and the fact that section 118(a)(5) of the MMPA requires that NMFS implement the prohibition on intentional lethal takes of marine mammals in connection with commercial fishing by no later than September 30, 1995, implementation of the statutory provision at this time is warranted.

Comment: The deadline for response to the proposed rule should be extended to 40 days. Fifteen days provides little opportunity to disseminate information to those who may be interested in commenting on the rule.

Response: NMFS is implementing section 118(a)(5) of the MMPA. The statutory language is explicit, and NMFS has no discretion as to the substantive content of the rule. As indicated in the previous response, there is reason to believe that intentional lethal takings of marine mammals are occurring at levels above historic levels and that allowing the intentional lethal take of some species may result in the taking of threatened species. Given this, a 15-day comment period was deemed sufficient.

Comments were received through day 27 from the date of the publication of the notice of proposed rulemaking, and all comments received were considered.

Comment: Several commenters opposed to the rule noted that, particularly on the west coast, fishers had a significant amount of their catch taken by pinnipeds. They also noted that populations of harbor seals and California sea lions have increased substantially since the passage of the MMPA and that natural predators such as bears, wolves, and cougars are no longer present. Some commenters pointed out that west coast salmonid runs have been seriously depleted, and that a number of populations either have been listed under the Endangered Species Act or are being considered for listing. The commenters provided information that pinnipeds prey on such runs. Two commenters provided documentation of the number of steelhead and coho in the Monterey, CA area with scars and wounds that appeared to be caused by marine mammals.

Response: As pointed out above, the statutory language does not provide NMFS with the discretion to allow the intentional lethal take of marine mammals in the course of commercial fishing operations other than to protect human life. The rule does not affect the ability of persons involved in such fisheries to use nonlethal deterrence methods.

Other provisions of the 1994 amendments to the MMPA address this issue. Section 120(f) of the MMPA requires NMFS to prepare a report to determine whether California sea lions and Pacific harbor seals are having a significant negative impact on the recovery of salmonid stocks. Although NMFS has no discretion in this rulemaking, the information submitted on this issue will be provided to the individuals drafting this report.

Further, sections 120(a) through (d) of the MMPA provide a procedure whereby a state may apply to NMFS to authorize intentional lethal take of individually identifiable pinnipeds