

which are having a significant negative impact on the decline or recovery of salmonid stocks that have been listed under the Endangered Species Act or are approaching threatened or endangered species status. If authority to intentionally lethally take individually identifiable pinnipeds is granted, section 120(c)(4) requires that the taking be performed by Federal or state agencies, or by qualified individuals under contract to such agencies. However, it does not provide NMFS with the discretion to authorize intentional lethal taking in the course of commercial fishing operations.

*Comment:* Marine mammals that have learned to raid nets for their food can be extremely aggressive. Protecting oneself from threatening marine mammal behavior should not place the fisherman or woman in violation of the law.

*Response:* The rule contains an exception to the prohibition on intentional lethal takes for circumstances when the killing of a marine mammal is imminently necessary in self-defense or to save the life of another person in immediate danger. If a marine mammal is taken under such circumstances, the individual involved is required to report the taking to the appropriate NMFS Regional Office within 48 hours of the conclusion of the fishing trip.

*Comment:* It should be noted in the preamble to the rule that the section 101(c) exception allowing intentional lethal take to protect human life also provides the Secretary of Commerce (and for species under the jurisdiction of the Department of the Interior, the Secretary of the Interior) the authority to seize and dispose of any carcass.

*Response:* As part of the implementation of the 1994 amendments to the MMPA, NMFS intends to propose specific regulations to cover the section 101(c) exception. Those regulations will incorporate the provision allowing, but not requiring, the Secretary to seize and dispose of any carcass. As the commenter noted, this provision also applies to commercial fishing operations, and the point is well taken. Because of the nature of fisheries, such animals may never come into the possession of a fisher or may be discarded before a fishing trip is completed. In instances when a carcass is retained, the Secretary has statutory authority to confiscate and dispose of it. Because such instances are likely to be uncommon, language will not be added to this regulation, but will appear in the more generic regulation implementing the section 101(c) exception for intentional lethal taking to protect human safety.

*Comment:* The draft stock assessment sets potential biological removal (PBR) for western north Atlantic harbor seals at 864 animals. The small number of animals currently taken by intentional means to protect aquaculture facilities will have a negligible impact on the stock.

*Response:* With the exception of the section 101(c) provision noted above, the MMPA states that the intentional lethal taking of marine mammals in the course of commercial fishing operations is prohibited. Therefore, the question of whether the lethal removal of a specified number of animals is beneath the PBR level is irrelevant. The concept of PBR was developed in order to assist in managing incidental, i.e., unintentional, taking of marine mammals in commercial fisheries.

*Comment:* The Gulf of Maine Pinniped-Fishery Interaction Task Force mandated under section 120(h) has not been set up yet. The Task Force might recommend intentional lethal take as an option. In addition, the guidelines for nonlethal deterrence are not yet in effect.

*Response:* NMFS has made initial contacts concerning members of the Task Force, and the Task Force should be formalized by the time that this rule becomes effective. Nevertheless, the Task Force report is not due until the end of April 1996. Even if the Task Force were to recommend that intentional lethal takes be allowed, a statutory change would be required before such a recommendation could be implemented. Similarly, the draft guidelines on nonlethal take should be available soon. Although the guidelines are not yet in place, the section 114 interim exemption and its authorization for nonlethal deterrence remain valid. Until deterrence guidelines are issued, participants in commercial fisheries may continue to use all nonlethal deterrence methods that are currently used.

*Comment:* The promulgation of this regulation will result in the loss of millions of dollars to the salmon aquaculture industry because of harbor seal predation on salmon in net pens. NMFS cannot justify the statement that the proposed rule "would not have a significant impact on a substantial numbers of small entities."

*Response:* Since 1989, owners of salmon net pens have been subject to the requirement contained in the 1988 amendments to the MMPA (Pub. L. 100-711) that all lethal takes—whether intentional or unintentional—be reported to NMFS within 10 days. During that period, only three intentional lethal takes have been

reported by participants in the salmon aquaculture industry—one harbor seal in 1991 and two gray seals in 1993. While NMFS recognizes that there may have been a degree of underreporting, there is no documentation of a level of interaction between harbor seals and net pens of the magnitude that would be necessary to support the argument that prohibition of intentional lethal takes would result in the loss of millions of dollars to this fishery.

*Comment:* Two comments were received concerning gear practices. The comments dealt with issues more properly in the area of fishery management than the proposed rule. One commenter stated that an exception to the prohibition should be extended to hook and line fishermen, and fishing with nets should be totally banned. The second stated that as a recreational fisherman, he had been unable to catch fish because trawlers and net gears had devastated populations of such fish as haddock, cod, and yellowtail flounder. The commenter stated that there should be a partial ban on commercial fishing during certain times of the year.

*Response:* The statutory language does not permit an exception for specific types of fisheries. The comments on specific gear types are not within the scope of this rulemaking and should more properly be addressed to the Fishery Management Councils responsible for regulating specific fisheries.

#### Classification

This final rule has been determined to be not significant for purposes of E.O. 12866. Because NMFS is unable to consider alternatives to the statutory mandate, the preparation of an environmental assessment under the National Environmental Policy Act is not required, and none has been prepared.

#### List of Subjects in 50 CFR Part 229

Administrative practice and procedure, Confidential business information, Fisheries, Marine mammals, Reporting and recordkeeping requirements.

Dated: January 27, 1995.

**Gary Matlock,**

*Program Management Officer, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 229 is amended as follows: