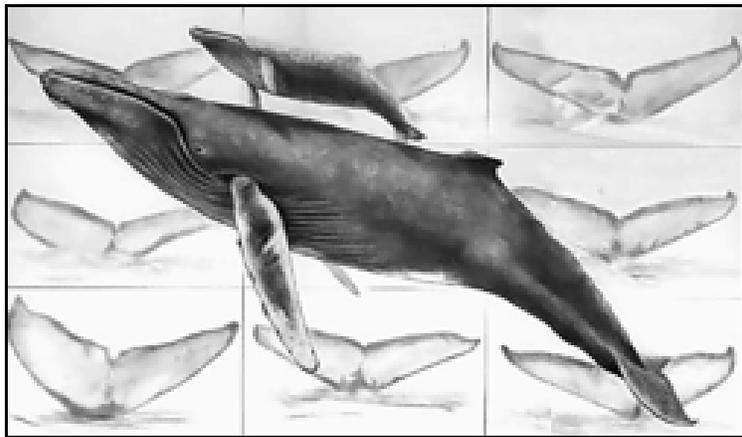


Report to Congress:

Review of Commercial Fisheries' Progress Toward Reducing  
Mortality and Serious Injury of Marine Mammals  
Incidental to Commercial Fishing Operations



Prepared by:  
National Marine Fisheries Service  
Office of Protected Resources  
Silver Spring, Maryland

August 2004





**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
**NATIONAL MARINE FISHERIES SERVICE**  
1315 East-West Highway  
Silver Spring, MD 20910

THE DIRECTOR

SEP - 7 2004

The Honorable John McCain  
Chairman  
Committee on Commerce, Science, and Technology  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed is the National Marine Fisheries Service's (NMFS) Report to Congress on commercial fisheries' progress in reducing incidental mortality and serious injury of marine mammals in accordance with the Zero Mortality Rate Goal (ZMRG) of the Marine Mammal Protection Act (MMPA). NMFS prepared this report on behalf of the Department of Commerce.

This report, which is required by MMPA section 118(b)(3), summarizes fisheries progress in reducing incidental mortality and serious injury of marine mammals to levels consistent with the ZMRG. The ZMRG requires such mortality and serious injury to be reduced to insignificant levels approaching a zero mortality and serious injury rate. The report (1) describes the current status of fisheries' incidental mortality by evaluating the List of Fisheries for 2004, (2) describes reduction of mortality as a result of take reduction plans prepared under the MMPA, and (3) discusses information available on fishery-related mortality of marine mammals, noting those fisheries for which additional information is necessary to accurately assess the level of incidental mortality of marine mammals (related to the ZMRG) in the fishery.

Please contact Deb Larson, Director, Office of Legislative Affairs, at (202) 482-4951 if you have any questions.

Sincerely yours,

A handwritten signature in black ink, appearing to read "W. T. Hogarth".

William T. Hogarth, Ph.D.

Enclosure

THE ASSISTANT ADMINISTRATOR  
FOR FISHERIES





**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
**NATIONAL MARINE FISHERIES SERVICE**  
1315 East-West Highway  
Silver Spring, MD 20910

THE DIRECTOR

SEP - 7 2004

The Honorable Ernest F. Hollings  
Ranking Minority Member  
Committee on Commerce, Science and Technology  
United States Senate  
Washington, D.C. 20510

Dear Senator Hollings:

Enclosed is the National Marine Fisheries Service's (NMFS) Report to Congress on commercial fisheries' progress in reducing incidental mortality and serious injury of marine mammals in accordance with the Zero Mortality Rate Goal (ZMRG) of the Marine Mammal Protection Act (MMPA). NMFS prepared this report on behalf of the Department of Commerce.

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William T. Hogarth, Ph.D.

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National Oceanic and Atmospheric Administration  
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1315 East-West Highway  
Silver Spring, Maryland 20910  
THE DIRECTOR

SEP - 7 2004

The Honorable Richard Pombo  
Chairman  
Committee on Resources  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed is the National Marine Fisheries Service's (NMFS) Report to Congress on commercial fisheries' progress in reducing incidental mortality and serious injury of marine mammals in accordance with the Zero Mortality Rate Goal (ZMRG) of the Marine Mammal Protection Act (MMPA). NMFS prepared this report on behalf of the Department of Commerce.

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Sincerely yours,

William T. Hogarth, Ph.D.

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**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE  
1315 East-West Highway  
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THE DIRECTOR

SEP - 7 2004

The Honorable Nick J. Rahall, II  
Ranking Minority Member  
Committee on Resources  
House of Representatives  
Washington, D.C. 20515

Dear Representative Rahall:

Enclosed is the National Marine Fisheries Service's (NMFS) Report to Congress on commercial fisheries' progress in reducing incidental mortality and serious injury of marine mammals in accordance with the Zero Mortality Rate Goal (ZMRG) of the Marine Mammal Protection Act (MMPA). NMFS prepared this report on behalf of the Department of Commerce.

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UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
1315 East-West Highway  
Silver Spring, Maryland 20910  
THE DIRECTOR

SEP - 7 2004

The Honorable Don Young  
Chairman  
Committee on Transportation and Infrastructure  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed is the National Marine Fisheries Service's (NMFS) Report to Congress on commercial fisheries' progress in reducing incidental mortality and serious injury of marine mammals in accordance with the Zero Mortality Rate Goal (ZMRG) of the Marine Mammal Protection Act (MMPA). NMFS prepared this report on behalf of the Department of Commerce.

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William T. Hogarth, Ph.D.

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UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
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1315 East-West Highway  
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THE DIRECTOR

SEP - 7 2004

The Honorable James L. Oberstar  
Ranking Minority Member  
Committee on Transportation and Infrastructure  
House of Representatives  
Washington, D.C. 20515

Dear Representative Oberstar:

Enclosed is the National Marine Fisheries Service's (NMFS) Report to Congress on commercial fisheries' progress in reducing incidental mortality and serious injury of marine mammals in accordance with the Zero Mortality Rate Goal (ZMRG) of the Marine Mammal Protection Act (MMPA). NMFS prepared this report on behalf of the Department of Commerce.

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William T. Hogarth, Ph.D.

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## Executive Summary

Section 118(b) of the Marine Mammal Protection Act (MMPA) is entitled the Zero Mortality Rate Goal (ZMRG) and contains four elements. First, commercial fisheries shall reduce incidental mortality and serious injury (hereafter in this report, the term "mortality" includes mortality and serious injury unless otherwise noted) to insignificant levels approaching a zero mortality rate. Second, fisheries that maintain insignificant mortality levels approaching a zero rate shall not be required to further reduce incidental mortality. Third, the National Marine Fisheries Service (NMFS) must review the progress of all commercial fisheries in reducing incidental mortality to target levels (insignificant levels approaching a zero rate) and must submit a report to Congress on this review. In addition, NMFS shall note in the report any commercial fishery for which additional information is required to accurately assess the level of incidental mortality in the fishery. Finally, for those fisheries in which the rate of incidental mortality is not consistent with target levels, NMFS must take appropriate action under MMPA section 118(f), which contains provisions related to Take Reduction Plans (TRPs).

This report was prepared to summarize the results of the review required by the third element in the MMPA's description of the ZMRG. In this report, NMFS (1) describes the current status of fisheries' incidental mortality by evaluating the List of Fisheries (LOF) for 2004, (2) describes reduction of mortality as a result of TRPs prepared under MMPA section 118(f), and (3) discusses information available on fishery-related mortality of marine mammals, noting those fisheries for which additional information is necessary to accurately assess the level of incidental mortality of marine mammals (related to the ZMRG) in the fishery.

Each year, as provided in MMPA section 118(c), NMFS classifies commercial fisheries according to their levels of incidental mortality of marine mammals. Category III fisheries on the LOF have achieved incidental mortality and serious injury rates consistent with the ZMRG and do not have to further reduce incidental mortality and serious injury. The 2004 LOF shows that 80 percent of fisheries are classified in Category III.

NMFS has convened six teams to develop draft TRPs under MMPA section 118(f) to reduce incidental mortality and serious injury. Plans of two teams were combined to produce a single Gulf of Maine/Bay of Fundy harbor porpoise TRP, and another team, the Atlantic Offshore Cetacean team, was disbanded due to changes in management and operation of the fisheries involved. The Atlantic Offshore team was originally convened to address cetacean mortality in three fisheries in the Atlantic Ocean: a pelagic pair-trawl fishery (inactive at the time the team was convened), a pelagic drift gillnet fishery, and a pelagic longline fishery. Two of these fisheries no longer operate, and the third (the longline fishery) has been substantially modified for fishery management purposes. Therefore, NMFS dissolved this team before completing the TRP.

Of the implemented plans, the harbor porpoise plan has been very successful. Mortality and serious injury of harbor porpoise incidental to affected fisheries has been reduced from more than five times the stock's Potential Biological Removal level (PBR) to less than half of its PBR.

(The MMPA defines PBR as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.) The Pacific Offshore Cetacean TRP has been successful, and the affected fishery (a state-regulated drift gillnet fishery) has been reclassified from a Category I to a Category II fishery, indicating incidental mortality has been reduced from "frequent" to "occasional". The Atlantic Large Whale TRP has been difficult to assess because the target levels of mortality and serious injury and the encounter rate (per set entanglement rate) are exceedingly low, and accurate, precise information is difficult to obtain. The TRP to reduce Atlantic coastal bottlenose dolphin has been drafted, and an implementing proposed rule is expected to be published in fall 2004. NMFS plans two additional teams in 2005 and 2006 to address pelagic longline and trawl fisheries in the Atlantic Ocean, respectively.

MMPA section 118(b)(3) requires NMFS to note any fishery for which additional information is needed to accurately assess the level of incidental mortality of marine mammals in the fishery. Because the term "accurate" is not defined in the MMPA, NMFS distinguishes between an accurate assessment required for this report and the information standard (best available scientific information) used under the MMPA for preparing the annual LOF, which provides a summary of the current status of fisheries under the ZMRG. For purposes of this report, NMFS uses the dictionary definition of accurate as "free from error" in noting the need for additional information. The report describes sampling error associated with assessing the level of incidental mortality and its impact on marine mammal stocks. Factors related to sampling error are precision, bias, and age of supporting data.

Using mortality and serious injury of harbor porpoise incidental to the New England multispecies sink gillnet fishery as an example, the report shows additional information in one of the most well-studied fisheries will be needed for an accurate assessment of incidental mortality and serious injury. The report concludes that sufficient information for accurate assessment of incidental mortality is available in less than 6 percent of the 216 fisheries in the 2004 LOF, and additional information is needed in most other fisheries to accurately assess when mortality incidental to commercial fisheries has been reduced to levels consistent with the ZMRG. The target levels of mortality under the ZMRG are based upon the PBR of marine mammal stocks; therefore, the accurate assessment of incidental mortality under the ZMRG depends upon precise, unbiased, current abundance estimates. Such estimates are available for less than half of the identified stocks of marine mammals.

As a result of the review required by MMPA section 118(b)(3), NMFS concludes the following:

- (1) Most fisheries have achieved levels of incidental mortality consistent with the ZMRG. As the 2004 LOF shows, 175 of 216 fisheries (>80 percent) are in Category III. The criteria for classifying fisheries as Category III are consistent with target levels of incidental mortality under the ZMRG, and Category III fisheries are not subject to TRPs to further reduce incidental mortality.
- (2) Substantial progress has been made in reducing incidental mortality through TRPs. For

example, incidental mortality of Gulf of Maine/Bay of Fundy harbor porpoise incidental to fisheries in New England and the mid-Atlantic states has been reduced from more than five times the stock's PBR to less than half of the stock's PBR. Under the Pacific Offshore Cetacean TRP, the CA/OR drift gillnet fishery has reduced incidental mortality to levels that classify it as a Category II fishery from earlier classification as a Category I fishery.

(3) Additional information will be needed for most fisheries and stocks of marine mammals to accurately assess whether mortality incidental to commercial fishing is at insignificant levels approaching a zero mortality and serious injury rate. The factors related to accurate assessments and limitations on information are discussed in the report. Thus, additional information would be required in almost every fishery to make accurate determinations in most fisheries having incidental mortality and serious injury of marine mammals.

## Table of Contents

1: Introduction.....	1
2: History of the ZMRG.....	2
The MMPA of 1972 (Public Law No. 92-522).....	2
MMPA Amendments of 1981 (Public Law No. 97-58) .....	3
MMPA Amendments of 1988 (Public Law No. 100-711) .....	3
International Dolphin Conservation Act of 1992 (Public Law No. 102-523) .....	4
MMPA Amendments of 1994 (Public Law No. 103-238) .....	4
The International Dolphin Conservation Program Act of 1997 (Public Law No. 105-42) .....	4
2004 Final Rule.....	5
3: List of Fisheries .....	6
4: Take Reduction Plans .....	8
Atlantic Harbor Porpoise .....	9
Pacific Offshore Cetaceans .....	11
Atlantic Offshore Cetaceans .....	11
Atlantic Large Whales .....	11
Atlantic Coastal Bottlenose Dolphins.....	12
5: Additional Information .....	13
Case Study .....	16
Conclusion .....	18
Appendix: List of Fisheries for 2004.....	19

## 1: Introduction

In 1994, Congress amended the Marine Mammal Protection Act (MMPA), adding, among other things, Sections 117 and 118 (16 U.S.C. 1386 and 1387). Section 117 requires the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service to prepare and periodically update stock assessment reports for all stocks of marine mammals in waters under the jurisdiction of the United States. Section 118 governs the taking of marine mammals incidental to commercial fishing operations.

One provision of MMPA Section 118 is entitled the Zero Mortality Rate Goal (ZMRG) and contains four elements (see MMPA section 118(b)). First, commercial fisheries shall reduce incidental mortality and serious injury (hereafter in this report, the term "mortality" includes mortality and serious injury unless otherwise noted) to insignificant levels approaching a zero mortality rate. Second, fisheries that maintain insignificant mortality levels approaching a zero rate shall not be required to further reduce incidental mortality. Third, NMFS must review the progress of all commercial fisheries in reducing incidental mortality to target levels (insignificant levels approaching a zero rate) and must submit a report to Congress on this review. In addition, NMFS shall note in the report any commercial fishery for which additional information is required to accurately assess the level of incidental mortality in the fishery. Finally, for those fisheries in which the rate of incidental mortality is not consistent with target levels, NMFS must take appropriate action under MMPA section 118(f), which contains the provisions related to Take Reduction Plans (TRPs).

MMPA section 118(f) establishes take reduction plans as the mechanism to reduce the taking of marine mammals incidental to commercial fishing. NMFS is directed to develop and implement a take reduction plan designed to assist in the recovery or prevent the depletion of each strategic stock which interacts with a Category I (frequent incidental mortality or serious injury of marine mammals) or II (occasional incidental mortality and serious injury of marine mammals) fishery and may develop and implement a plan for any other marine mammal stock that interacts with a Category I fishery having a high level of mortality and serious injury across a number of marine mammal stocks. A strategic stock of marine mammals is a marine mammal stock that is listed as threatened or endangered under the Endangered Species Act (16 U.S.C. 1531, *et seq.*), designated as depleted under the MMPA, is declining and is likely to be listed as a threatened species under the Endangered Species Act within the foreseeable future, or for which human-caused mortality exceeds the stock's Potential Biological Removal level (PBR).<sup>1</sup>

MMPA section 118(f)(2) includes two goals of a TRP. The immediate goal is to reduce, within 6 months of implementation, the incidental mortality and serious injury of marine mammals incidentally taken in the course of commercial fishing operations to levels less than the potential

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<sup>1</sup> PBR is defined as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population. PBR is calculated as the product of the minimum population estimate of the affected stock ( $N_{min}$ ); one-half the maximum theoretical or estimated net productivity rate of the stock at a small population size ( $R_{max}$ ); and a recovery factor (RF) between 0.1 and 1.0 (the definition is expressed in the following simple equation:  $PBR = N_{min} * 0.5R_{max} * RF$ , see MMPA section 3(20) (16 U.S.C. 1362(20))).

biological removal (PBR) level of all affected marine mammal population stocks. The long-term goal of a TRP is to reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate within five years of implementation, taking into account the economics of the fishery, the availability of existing technology, and existing State or regional fishery management plans. MMPA section 118(f)(3) establishes priorities for developing and implementing take reduction plans if funds are insufficient to develop and implement plans for all stocks that interact with Category I or II fisheries.

This report was prepared to summarize the results of the review required by the third element in the ZMRG. In this report, NMFS (1) describes the current status of commercial fisheries' (hereafter in this report, the term "fisheries" is used in the place of "commercial fisheries" unless otherwise noted) incidental mortality by evaluating the List of Fisheries (LOF) for 2004, (2) describes reduction of mortality as a result of TRPs prepared under MMPA section 118(f), and (3) discusses information available on fishery-related mortality of marine mammals, noting those fisheries for which additional information is necessary to accurately assess the level of incidental mortality of marine mammals (related to the ZMRG) in the fishery.

## **2: History of the ZMRG**

When the MMPA was enacted in 1972, the ZMRG was directed solely at the yellowfin tuna purse seine fishery in the Eastern Tropical Pacific Ocean (ETP), where participants in the fishery deliberately encircled dolphins to catch tuna. Hundreds of thousands of dolphins were being killed each year as a result of this fishing practice. Congress addressed the ZMRG several times from 1972 to 1997, and a brief history of Congressional action and guidance related to ZMRG is presented below.

### The MMPA of 1972 (Public Law No. 92-522, 86 Stat. 1027)

Congress developed the legislative guidance for protecting marine mammals and defining the ZMRG in response to unsustainable mortality levels. The House committee noted it was not their intent to shut down or significantly curtail the activities of the tuna fleet so long as the Secretary of Commerce "is satisfied that the tuna fishermen are using the best available technology to assure minimal hazards to marine mammal populations" (H.R. Rep No. 92-707, at 24 (1971)). The Senate clarified their intent regarding the ZMRG, stating regulations should be imposed "as soon as practicable to minimize marine mammal fatalities through the use of currently available technology..." (S. Rep. No. 92-863, at 6 (1972)). The Senate report stated, "while it should be the goal of Congress and the Executive eventually to eliminate totally the killing of porpoises, present technology is not adequate to the task." House and Senate Conferees agreed on a provision in MMPA section 101(a)(2), 16 U.S.C. 1371(a)(2), as follows: "In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." (H.R. Conf. Rep. No. 92-1488, at 5 (1972)). In the Joint Explanatory Statement the report provided, "the objective of

regulation would be to approach as closely as is feasible the goal of zero mortality and injury to marine mammals...It may never be possible to achieve this goal, human fallibility being what it is, but the objective remains clear.” (H. R. Conf. Rep. No. 92-1488 at 23)

In its original form, the ZMRG was directed at the ETP tuna fishery but was sufficiently broad that it could include other fisheries in waters under U.S. jurisdiction. The ZMRG guided NMFS to regulate the tuna fleet to minimize incidental mortality immediately to the extent that the current technology would allow; however, NMFS and the industry should continue to strive to eliminate incidental mortality of marine mammals in the fishery. The original ZMRG contained the following elements: immediate reduction of incidental mortality to the extent that current technology would allow, economic consideration of regulating fishing operations, and the long-term necessity to continue technological improvement for applying to future fishing operations.

#### MMPA Amendments of 1981 (Public Law No. 97-58, 95 Stat. 979)

In developing the amendments to the MMPA in 1981, the House committee noted successes of the MMPA, including, "In the area of reducing the incidental take of porpoises in tuna fishing operations, for example, the number of porpoises killed has dropped from an estimated 368,000 animals in 1972 to an estimated 15,303 porpoises in 1980." (H. R. Rep. No. 97-228 at 11 (1981)). The report explained that an amendment to MMPA section 101(a)(2) was being made to clarify that ZMRG "is satisfied in the case of the purse seine fishery for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable." (H. R. Rep. No. 97-228 at 17). The "best techniques" approach was reaffirmed in 1984 when Congress reauthorized the MMPA (H. R. Rep. No. 98-758 at 8 (1984)).

The House committee declined, however, to modify ZMRG for other commercial fisheries. The committee recognized that other fisheries (citing the foreign high seas salmon gillnet fishery as an example) had not developed new techniques and equipment for reducing incidental mortality. Therefore, the goal in MMPA section 101(a)(2) would remain unchanged for other commercial fisheries "to stimulate new technology for reducing the incidental taking of marine mammals." (H. R. Rep. No. 97-228 at 17-18 (1981)).

#### MMPA Amendments of 1988 (Public Law No. 100-711, 102 Stat. 4755)

In the Interim Exemption for Commercial Fisheries under MMPA section 114, 16 U.S.C. 1383a, Congress retained the ZMRG as an objective of a regime to govern interactions between marine mammals and commercial fishing operations other than the commercial yellowfin tuna fishery (H. R. Rep. No. 100-970 at 21 (1988), S. Rep. No. 100-592 at 16 (1988)). The 1988 Amendments also required the Marine Mammal Commission to recommend guidelines to govern the incidental taking of marine mammals in the course of fishing operations after the interim exemption expired. The Commission's guidelines (Recommended Guidelines to Govern the Incidental Taking of Marine Mammals in the Course of Commercial Fishing Operations After

October 1993, July 1990) maintained the ZMRG as an important component of the MMPA, but did not present additional insight into the meaning of insignificant levels approaching a zero mortality and serious injury rate. The Commission's guidelines provided a quantitative approach for evaluating whether or not marine mammal mortality was having a negligible effect on the affected population and included an impact whose effect lasted for less than 1 year or one causing less than a 10-percent increase in time it would take a depleted stock to reach its maximum net productivity level. The first of these two criteria may be appropriate for a one-time activity; however, commercial fishing is repeated annually, and some level of incidental mortality is likely to continue after one year. The second criterion, no more than a 10 percent delay in recovery of a depleted stock, addresses the annual level of incidental mortality and serious injury to assess the effects of continuing fishery interactions with marine mammals. However, this approach applies to the recovery of depleted stocks, and not all stocks are depleted. Consequently, this criterion would not necessarily be applicable to all stocks, and an additional criterion would have to apply to those cases.

#### International Dolphin Conservation Act of 1992 (Public Law No. 102-523, 106 Stat. 3425)

Congress passed the International Dolphin Conservation Act of 1992, which, among other things, prohibited U.S. vessels from setting nets on or encircling dolphins to catch tuna and limited dolphin mortality from U.S. vessels to specific numbers for specific periods. In doing so, Congress reversed its course for reducing dolphin mortality in the ETP and, thus, cast some question on legislative intent regarding the ability of the "best available technology" standard to meet the ZMRG.

#### MMPA Amendments of 1994 (Public Law No. 103-238, 108 Stat. 532)

The legislative history for the MMPA amendments of 1994, which enacted MMPA section 118, reiterates the statutory language for ZMRG and does not expand on what it means (See H. R. Rep. No. 103-439, at 37 (1994); S. Rep. No. 103-220 at 16 (1994)). These amendments included a specific date (7 years following enactment or April 30, 2001) by which commercial fisheries had to reduce incidental mortality and serious injury to insignificant levels approaching a zero mortality and serious injury rate.

#### The International Dolphin Conservation Program Act of 1997 (Public Law No. 105-42, 111 Stat.1122)

Congress amended the MMPA again in 1997 to establish a new dolphin conservation program for the tuna fishery. The House Committee on Resources noted, "while current law focuses on techniques of reducing dolphin bycatch, the alternative fishing practices exacerbate fishing pressure on other sensitive marine populations." (H. R. Rep. No. 105-74, Part I at 15 (1997))

This set of amendments to the MMPA did not specifically mention "insignificant levels approaching a zero mortality and serious injury rate." It did, however, authorize entering into a binding international agreement to establish a total dolphin mortality limit of 5,000 with an

objective of progressively reducing dolphin mortality to a level approaching zero by setting annual limits (see MMPA section 302(1) (16 U.S.C. 1412(1))). Furthermore, the 1997 amendments established stock-specific annual mortality limits (starting in 2001) of less than or equal to 0.1 percent of the minimum population estimate of the stock (MMPA section 302(3)). This stock-specific mortality limit is the mathematical equivalent of 10 percent of PBR for a cetacean stock of unknown or depleted status when using the default values for net productivity and the recovery factor.

The 1997 amendments required sets on dolphins to cease for the applicable fishing year if a mortality limit is exceeded. In addition, these amendments required the establishment of a per vessel annual mortality limit (MMPA section 302(4) and (7)); thus, high levels of mortality by a single vessel would not affect operations of other vessels. Furthermore, the goal of eliminating dolphin mortality, once it is below total or stock-specific mortality limits, must be accomplished through a system of incentives rather than regulation of fishing activity (MMPA section 302(8)). As a result of these changes, the MMPA now includes a regulatory framework for reducing mortality to levels below dolphin mortality limits (which may be interpreted to be "insignificant levels") and includes further reductions to meet the ultimate goal of eliminating dolphin mortality to be accomplished through incentives.

Although the 1997 amendments made no explicit reference to the ZMRG, at least one constituent group noted the relationship between stock-specific mortality limits and the long-term goal of reducing incidental mortality and serious injury to a zero rate. In their written statement during hearings on the 1997 amendments, the Center for Marine Conservation (now known as the Ocean Conservancy) stated, "While any human-caused dolphin mortality is undesirable and recognizing that our objective is to eliminate dolphin mortality, the great majority of independent and government marine mammal scientists consider mortality levels of less than 0.1 percent to have a "negligible impact" on the dolphin stocks and to meet the MMPA's zero mortality rate goal." (Transcript of the "Hearing Before the Subcommittee on Oceans and Fisheries of the Committee on Commerce, Science and Transportation, United States Senate, One Hundred Fifth Congress, First Session, May 14, 1997).

#### 2004 Final Rule

Although the ZMRG has been a part of the MMPA since its enactment in 1972, the legislative history of the ZMRG does not provide the fishing industry and other constituents with clear guidance on the meaning of "insignificant levels approaching a zero mortality and serious injury rate". Consequently, NMFS had to clarify through regulation the target levels for mortality reduction under the ZMRG. NMFS announced its intention to promulgate such a regulation in an advance notice of proposed rulemaking (ANPR) (68 FR 40888, July 9, 2003). In the ANPR, NMFS provided background into the legislative history of the ZMRG, explained that implementation of the ZMRG required a definition of insignificance thresholds as the target levels of reducing mortality and serious injury, described three options under consideration for the insignificance threshold, and solicited comments and additional recommendations from the public. Public comments NMFS received to the ANPR indicated that the public remained highly

polarized on Congressional intent for the ZMRG.

NMFS reviewed comments on the ANPR and prepared a proposed rule to implement the ZMRG by defining an insignificance threshold. On April 29, 2004, NMFS issued a proposed rule (69 FR 23477) to define an insignificance threshold (estimated as 10 percent of a marine mammal stock's PBR) as the upper limit of annual incidental mortality and serious injury of marine mammal stocks by commercial fisheries that can be considered insignificant levels approaching a zero mortality and serious injury rate. The proposed rule also allowed the Assistant Administrator for Fisheries to use discretion to adjust the insignificance threshold for stocks of marine mammals under certain circumstances.

The preamble to the proposed rule addressed several specific controversial issues, including whether a fishery with incidental mortality and serious injury above target levels would be shut down or severely restricted. Such fisheries would not necessarily be shut down or severely restricted because the ZMRG refers these fisheries to the TRP process. The long-term goal of a TRP, which is consistent with target levels under the ZMRG, is to reduce mortality and serious injury of marine mammals to insignificant levels approaching a zero rate, taking into account the economics of the fishery, the availability of existing technology, and existing state and Federal fishery management plans. These considerations would limit regulatory requirements to economically feasible measures to reduce incidental mortality.

NMFS completed a final rule defining insignificance thresholds to implement the ZMRG (69 FR 43338, July 20, 2004). As in the proposed rule, the final rule defines a stock's insignificance threshold, which is estimated as 10 percent of the stock's PBR. This definition is consistent with the regulatory criterion that separates Category II and Category III fisheries. Category III fisheries are those fisheries that have incidental mortality and serious injury of no more than 10 percent of any stock's PBR. In cases where total fishery mortality exceeds 10 percent of a stock's PBR and a single fishery has incidental mortality and serious injury no higher than 1 percent of a stock's PBR, then the fishery would also be placed in Category III.

### **3: List of Fisheries**

Under the MMPA, Category III fisheries are not subject to TRPs to further reduce incidental mortality and serious injury. The criteria for classifying a fishery as a Category III fishery are consistent with stock-specific levels of mortality and serious injury under the ZMRG. Additionally, under the ZMRG, any fishery that has achieved target levels of incidental mortality and serious injury does not have to further reduce incidental mortality and serious injury. Therefore, any fishery in Category III should be considered to have achieved the target levels of mortality and serious injury under the ZMRG. The List of Fisheries (LOF) provides a regularly updated status of fisheries under the ZMRG.

As provided in MMPA section 118(c)(1), in an annual LOF, NMFS classifies commercial fisheries according to the level of incidental mortality of marine mammals:

- Category I includes fisheries that have frequent mortality and serious injury of marine mammals. By regulation (50 CFR 229.2) NMFS has quantified such annual mortality as greater than or equal to 50 percent of PBR.
- Category II includes fisheries that have occasional mortality and serious injury of marine mammals, and NMFS has quantified such annual mortality under a 2-tiered system. In the first tier, a fishery would be in Category II if it, in combination with other fisheries, caused incidental mortality and serious injury of marine mammals at levels above 10 percent of any stock's PBR. Under the second tier, the contribution of the individual fishery is evaluated, and the fishery is included in Category II if its incidental mortality and serious injury exceeds one percent of any stock's PBR.
- Category III fisheries include those fisheries that have a remote likelihood of killing or seriously injuring marine mammals. NMFS uses a 2-tiered system for Category III fisheries as well. If total fishery mortality is less than or equal to ten percent of PBR then the affected fisheries would be in Category III. Under the second tier, where total fishery mortality exceeds 10 percent of a stock's PBR, individual fisheries with annual mortality less than or equal to one percent of PBR would be placed in Category III.

Because stock-specific insignificance thresholds are consistent with the upper limit of mortality and serious injury used in classifying fisheries as Category III fisheries, an examination of the current LOF provides the current status of fisheries relative to the ZMRG. Category I and II fisheries have mortality and serious injury above insignificance thresholds; therefore, these fisheries are subject to further reduction in incidental mortality and serious injury under the ZMRG.

Based on the discussion in the previous paragraph, the 2004 LOF (69 FR 48407, August 10, 2004; included in the appendix of this report) indicates that most fisheries (see Table 1), those in Category III, have levels of incidental mortality and serious injury consistent with the ZMRG. Of the 216 fisheries listed in the 2004 LOF, 175 (>80 percent) are classified in Category III.

Seven fisheries are in Category I in the 2004 LOF, and TRPs are implemented, drafted, or planned for five of them. Classification of the California set gillnet fishery for angel sharks, halibut, and other species is affected primarily by the take of harbor porpoise, and the State of California has recently taken management measures (moved the fishery to deep water) that were expected to eliminate mortality of harbor porpoise. In September 2002, the state permanently closed waters 60 fathoms or less from Point Reyes to Point Arguello to the use of gill and trammel nets. This closure should move the fishery outside areas occupied by harbor porpoise, and NMFS will re-evaluate the classification of this fishery when observer data are sufficient to show if the expected reduction in mortality has actually occurred. The Hawaii longline fishery was reclassified from Category III to Category I fishery in the 2004 LOF, and a TRP for the fishery has not been planned at this time.

Although the LOF depicts the current status of fisheries under the ZMRG, movement of fisheries from one category to another does not necessarily reflect increases or decreases in incidental mortality. In many cases, particularly where a TRP has not been developed and implemented, fishery reclassification results from additional information resulting in a modified estimate of annual mortality in the fishery or of the abundance of the affected stock or stocks of marine mammals. Thus, the reclassification may be based upon a better idea of the true level of incidental mortality in the fishery and the effect of that mortality upon marine mammals rather than an increase or decrease in actual mortality.

**Table 1**  
**2004 List of Fisheries**

Category I Fisheries	
Pacific	2
Atlantic, Gulf of Mexico, & Caribbean	5
<b>TOTAL</b>	<b>7</b>
Category II Fisheries	
Pacific	20
Atlantic, Gulf of Mexico, & Caribbean	14
<b>TOTAL</b>	<b>34</b>
Category III Fisheries	
Pacific	124
Atlantic, Gulf of Mexico, & Caribbean	51
<b>TOTAL</b>	<b>175</b>
<b>Total Number of Fisheries in All Categories</b>	<b>216</b>
Sources: 2004 LOF.	

Incidental mortality has been reduced in several fisheries as a result of TRP measures; however, the reduction of mortality in these fisheries may not have been sufficient to reclassify the fishery. Consequently, commercial fisheries' progress in reducing incidental mortality is not completely reflected in evaluations of the LOF. Because reducing incidental mortality is accomplished through the TRP process, an evaluation of existing and future TRPs provides an indication of progress fisheries have made or are expected to make in reducing incidental mortality.

#### 4: Take Reduction Plans

Under the ZMRG (see MMPA section 118(b)(4)), the mechanism to reduce mortality and serious injury of marine mammals incidental to commercial fishing is the TRP process. As described in

MMPA section 118(f), the TRP process includes convening a team of stakeholders. Members of teams have expertise in the conservation or biology of marine mammals or in the fishing practices resulting in the incidental mortality of affected marine mammals. Members of the teams must include representatives of Federal agencies, each coastal state with fisheries interacting with the affected stock or stocks of marine mammals, appropriate regional fishery management councils, interstate fisheries commissions, academic or scientific organizations, environmental groups, all affected commercial and recreational fisheries groups and gear types incidentally taking the species or stock, Alaska Native organizations, Indian tribal organizations, and others as NMFS deems appropriate.

Based on priorities under MMPA section 118(f)(3) for developing and implementing TRPs, NMFS has convened six teams to help develop TRPs for reducing incidental mortality and serious injury (see Table 2). An evaluation of progress to reduce incidental mortality and serious injury under each of these teams and plans follows.

Additional TRPs are to be initiated in 2005 and 2006. NMFS will convene a team in 2005 to prepare a draft TRP to reduce mortality of several population stocks of cetaceans taken incidental to the Category I pelagic longline fishery in the Atlantic Ocean. Another team will be convened in 2006 to develop a plan to reduce incidental mortality of marine mammals in Category I trawl fisheries in the Atlantic Ocean.

#### Atlantic Harbor Porpoise

Plans drafted by two teams (mid-Atlantic and Gulf of Maine harbor porpoise) were combined to develop a single comprehensive TRP for Gulf of Maine/Bay of Fundy stock of harbor porpoise. Principal measures to reduce mortality and serious injury of harbor porpoise under the plan included pingers (acoustic devices attached to fishing nets), gear modifications (restrictions of twine and mesh size), and time/area closures. Members of the team worked in conjunction with the New England Fishery Management Council to ensure that restrictions, especially closures, for fishery management purposes were designed with reduction of harbor porpoise mortality as an additional goal. The TRP also added to fishery management actions by identifying certain time-area closures specifically to reduce harbor porpoise incidental mortality.

**Table 2**  
**Take Reduction Plan Development and Implementation**

<b>TRT</b>	<b>Marine Mammals Addressed</b>	<b>Fisheries Included</b>	<b>Date Convened</b>	<b>TRP Implemented</b>
Mid-Atlantic Harbor Porpoise	Harbor porpoise	Mid-Atlantic coastal gillnet fishery	February 1997	January 1999 (merged with Gulf of Maine harbor porpoise)
Gulf of Maine Harbor Porpoise	Harbor porpoise	Northeast sink gillnet fishery	February 1996	January 1999 (merged with Mid-Atlantic harbor porpoise)
Pacific Offshore Cetacean	Beaked whales, pilot whales, pygmy sperm whales, sperm whales, humpback whales	Swordfish/shark drift gillnet fishery off California and Oregon	February 1996	October 1997
Atlantic Large Whale	North Atlantic right whales, humpback whales, fin whales	Southeastern US shark gillnet fishery, Northeast/Mid-Atlantic lobster trap/pot fishery, Mid-Atlantic coastal gillnet fishery, and Northeast sink gillnet fishery	August 1996	August 1997
Atlantic Offshore Cetacean	North Atlantic right whales, humpback whales, sperm whales, beaked whales, pilot whales, common dolphins, bottlenose dolphins, spotted dolphins	Atlantic pelagic driftnet, pair trawl, and pelagic longline fisheries	May 1996 (disbanded in 2001 due to changes in management and operation of the fisheries)	Not applicable (NA)
Bottlenose Dolphin	Western North Atlantic coastal bottlenose dolphin	Mid-Atlantic and Southeast gillnet, beach seine, stop net, haul seine, and trap/pot fisheries	November 2001	NMFS is drafting a proposed rule to implement the TRP
<i>Future TRT</i>	<i>Primarily Risso's dolphins and pilot whales</i>	<i>Atlantic pelagic longline fishery</i>	<i>2005</i>	<i>NA</i>
<i>Future TRT</i>	<i>Pilot Whales, Common Dolphins, and White-sided Dolphins</i>	<i>Atlantic trawl fisheries</i>	<i>2006</i>	<i>NA</i>

Take reduction measures under this TRP have been highly successful, reducing incidental mortality and serious injury of harbor porpoise from nearly 2,000 porpoise per year in the early 1990s to fewer than 300 harbor porpoise in recent years. At the same time that incidental mortality was being reduced, NMFS was improving its assessment techniques for harbor porpoise, and the abundance estimates increased from about 37,000 in 1991 to about 89,000 in 1999. With the reduction in incidental mortality combined with improved abundance estimates, mortality has been reduced from about 5 times the PBR in the early 1990s to less than half the PBR in the 2003 stock assessment reports.

### Pacific Offshore Cetaceans

The Pacific Offshore Cetacean TRP was designed primarily to address mortality of cetaceans incidental to the drift gillnet fishery for swordfish and thresher sharks. Sperm whales were a key species under the plan; however, mortality of other marine mammals (beaked whales, pilot whales, pygmy sperm whales, and humpback whales) has been reduced as well. These measures included pingers, lowering the top of the net to six fathoms below the surface, working with the state to decrease the number of "inactive" permittees, and conducting workshops to educate fishers about marine mammals, the MMPA, and the TRP. Marine mammals are often found near the surface of the water, and lowering the nets in the water column was expected to minimize vulnerability of marine mammals to entanglement. Although reducing the number of inactive permittees was not expected to reduce mortality, it was expected to avoid future increases in incidental mortality from a potential increase in effort. Incidental mortality has been reduced to levels that the fishery was reclassified from a Category I to a Category II fishery.

### Atlantic Offshore Cetaceans

The Atlantic Offshore Cetacean team developed a TRP and submitted the draft plan to NMFS. However, the team was disbanded before the TRP was implemented because two of the three affected fisheries, a pelagic drift gillnet fishery and a pelagic pair trawl fishery, no longer operate. The third, a pelagic longline fishery, was restricted under other legislation to reduce the bycatch of billfish and marine turtles. The pair trawl fishery was inactive at the time the team was convened and was included to ensure that conservation measures were in place if it was reactivated. However, the fishery was not reactivated. The use of pelagic gillnets was prohibited for swordfish in January 1999 and for tunas in May 1999.

Since 1999, observer coverage in the pelagic longline fishery has been expanded, and a large ship-board survey has produced new abundance estimates. NMFS is convening a team in 2005 to develop a TRP for the pelagic longline fishery (see Table 2).

### Atlantic Large Whales

The Atlantic large whale team was convened in 1996 and submitted its recommendations for measures to reduce incidental mortality of several species of large whales in the Western North Atlantic Ocean. The species of whales included were the northern right whale, humpback whale,

and fin whale. Minke whales, although not a strategic stock, have received incidental benefits in reduction of incidental mortality as a result of the plan's measures. The plan to reduce mortality of these whales applied to several gillnet and trap or pot fisheries along the east coast of the United States.

The plan was implemented in July 1997 by an interim final rule. It has been modified several times and now includes the following types of measures to reduce incidental mortality and serious injury: time/area closures, requirements for gear modifications, and requirements for line marking. NMFS has maintained an ongoing grants program to allow fishers to participate in research efforts to develop and test new gear or fishing practices to further reduce mortality and serious injury. Efforts to minimize incidental mortality have been supplemented by an active disentanglement program. The plan also includes working with the states to terminate "inactive" permits.

Success under the large whale plan is difficult to assess for several reasons. First, the insignificance thresholds for large whales are very low – in the case of Western North Atlantic right whales, it is zero kills per year. Second, the encounter rate (per set entanglement rate) is also exceedingly low; therefore, it requires a very large investment in time and resources to obtain an incremental reduction in mortality and serious injury. In addition, sampling fisheries to estimate fishery-specific mortality rates is difficult for a number of reasons as noted in the section of this report on additional information.

Finally, the types of fishing technologies that would result in a detectable reduction of incidental mortality of large whales in an economically feasible manner have not been fully developed. Consequently, this take reduction plan has been modified several times since its initial implementation in 1997. In coordination with the take reduction team, NMFS is preparing a proposed rule and supporting analyses for further modifications to the plan.

#### Atlantic Coastal Bottlenose Dolphins

The bottlenose dolphin team began meeting in November 2001 and submitted its initial draft TRP in May 2002. NMFS determined the team's draft plan was not expected to reach the MMPA's short-term goal for TRPs to reduce incidental mortality below PBR. In addition, as requested by the team, NMFS was conducting additional studies on bottlenose dolphins in 2002, which resulted in new abundance estimates. Consequently, NMFS convened the bottlenose dolphin team again to reconsider its recommendations. The team reviewed its initial draft TRP in light of the new information and submitted a new draft to NMFS in May 2003. NMFS is currently preparing a proposed rule to implement the team's draft plan and analyzing potential impacts on the human environment as required by the National Environmental Policy Act. A proposed rule is anticipated in fall 2004.

The measures recommended by the team for reducing incidental mortality of bottlenose dolphins included both regulatory (e.g., required gear modifications) and non-regulatory (e.g., research). Recommended regulatory measures include effort reduction (e.g., restricted or prohibited night

fishing), fishing practices (e.g., remaining near deployed fishing gear), gear modifications (e.g., use of multi-fiber nets for certain fisheries), and marking gear. Non-regulatory recommendations include education, outreach, and research into improved fishing technologies.

## **5: Additional Information**

In its direction to prepare this report to Congress, MMPA section 118(b)(3) requires the report to note any commercial fishery for which additional information is needed to accurately assess the level of incidental mortality of marine mammals in the fishery. The meaning of the term "accurate" is not described in the MMPA or its legislative history, and it is not used in relation to any other determinations NMFS must make under the MMPA. Therefore, NMFS has not defined the term "accurate" in implementing the MMPA. The information standard for stock assessment reports under MMPA section 117 is the "best scientific information available." Under MMPA section 118(c)(1)(C), NMFS must annually reexamine the LOF "based on information gathered under this chapter and other relevant sources and after notice and opportunity for public comment." Therefore, the information standard for the annual revision to the list of fisheries should include the best scientific information available in the stock assessment reports and other relevant sources as well as consideration of public comment. In its regulations defining categories of fisheries for purposes of the LOF, NMFS uses reliable information when available to compare levels of incidental mortality and serious injury from commercial fisheries to a stock's potential biological removal level. (See 50 CFR 229.2.) NMFS generally considers this information reliable when there is direct information from observer programs to estimate levels of incidental mortality and serious injury and similarly direct information from abundance surveys to estimate a stock's abundance and thus reliably determine the potential biological removal level for that stock. In the absence of such reliable direct information, NMFS may use indirect, relevant information, such as comparison with incidental mortality rates in fisheries with the same general gear types for which observer-based estimates are available.

There is no statutory definition of "accurate", and it is not used in other determinations; therefore, NMFS must define the term for purposes of this report. Standard use of the term "accurate" is described in the dictionary definition of the term. Merriam-Webster Online (<http://www.m-w.com>) defines the term "accurate" as "...1: free from error especially as the result of care <an *accurate* diagnosis>, 2: conforming exactly to truth or to a standard; exact <providing *accurate* color>..." and provides the term "correct" as a synonym. MMPA section 118(b)(3) uses "accurate" in the sense of the first definition above because it requires NMFS to note fisheries for which additional information is needed for an accurate assessment of incidental mortality and serious injury of marine mammals. The assessment of incidental mortality is compared to insignificance thresholds, which are estimated from PBR of affected stocks of marine mammals. Consequently, the accuracy of the assessment depends on the estimates of marine mammal abundance, which are key elements in the PBR estimates, as well as on the estimates of incidental mortality and serious injury.

In biological sampling, a typical source of information for making assessments under the

MMPA, error may be partitioned into three general areas: precision, bias, and age of supporting data. Precision in statistical analyses to produce abundance and mortality estimates is often expressed as a Coefficient of Variation<sup>2</sup> (CV). As the CV of an estimate increases, the precision of the estimate decreases. In biological sampling, precision is often affected by sample size – as the sample size increases, so does precision. Conversely, as sample size decreases (*e.g.*, number of observed incidental mortalities or serious injuries used to estimate total mortality and serious injury in a fishery), the precision of the estimate decreases.

Bias is a deviation of an estimated mean from the true mean in a population and results from several factors in marine mammal population estimation. Many marine mammals are either attracted to or try to avoid ships at sea. Attraction would tend to cause an overestimate of the abundance (biased high) because animals would readily be seen, and avoidance would tend toward an under estimate. Individual marine mammals may be under water when the ship or airplane is in the area, and these animals would be missed – resulting in an underestimate. In addition, NMFS often must limit survey effort to a portion of the range of a stock, which also may result in an underestimate of the stock's abundance.

The effect of age on accuracy is relatively straight forward. If an estimate is very old (*e.g.*, more than five years), its potential to be free of error in representing the current abundance or annual mortality is questionable.

In a previous section of this report, NMFS uses the LOF to show the current status of fisheries relative to ZMRG. In preparing its annual LOF, NMFS has used the MMPA's standard for information, which is the best available scientific information from marine mammal stock assessment reports and other sources. Levels of precision and bias and the age of such information is subject to limitations on NMFS' resources. NMFS has used its available resources to obtain information based on statutory priorities in MMPA section 118(d)(4) for observer programs and in MMPA section 118(f)(3) for take reduction plans. More accurate assessments of mortality incidental to these fisheries and its impacts on marine mammals would require a more extensive observer program to collect fishery-independent data for all U.S. fisheries and a substantial increase in abundance surveys for all marine mammal stocks in waters under the jurisdiction of the United States. Such surveys would be conducted at least once every three years and would include all portions of the range of the affected stocks of marine mammals, and each survey would include sufficient related studies to compensate for potential bias (*e.g.*, animals available on the track line but not seen).

Observer programs are one of the few independent sampling methods to verify incidental mortality estimates from other sources (*e.g.*, fisher reports). In general, NMFS has a goal of achieving a CV of 30% for annual mortality estimates. (At this level of precision, a gradual trend may be detected in a 10-year period. Furthermore, the diminishing marginal return in improved precision with increased observer effort results in a poor cost-benefit ratio below a CV of about 30%.) Few fisheries (as noted below, less than 6 percent) have sufficient data for such precise,

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<sup>2</sup> Coefficient of Variation is the standard error of an estimate expressed as a fraction or percentage of the mean.

stock-specific mortality estimates. The following discussion describes the quality of information available for "accurately" assessing levels of incidental mortality by fishery and by stock of marine mammals.

In many cases, there has been no independent data collection (such as through an observer program) to document existing levels of incidental mortality. Thus, for most fisheries, an analysis of incidental mortality (such as for classifying fisheries for the LOF) requires the use of fisher-reported injuries or indirect methods, such as comparison with incidental mortality rates in fisheries with the same general gear types for which observer-based estimates are available. Of the 216 fisheries in the 2004 LOF, precise, unbiased information has been collected in fewer than 12 fisheries. For the remaining fisheries, the assessment of the accuracy of the mortality estimate for this report is based upon indirect measures, such as comparison to other fisheries, or upon sampling efforts at a pilot scale rather than sufficient to achieve a CV of 30 percent or less.

For fixed-gear fisheries having incidental mortality of large whales, mortality estimates are generally considered minimum estimates, and observer programs would not likely yield useful information to calculate accurate mortality estimates. When a large whale becomes entangled in fixed gear, the observable result may be missing gear. The observer could not tell if the loss of gear was due to a large whale entanglement or some other cause, such as a conflict with another fishing operation, oceanographic features (e.g., warm core rings), and storms. Consequently, the information available for large whale mortality incidental to commercial fishing is often opportunistic sightings of entangled whales or stranded whales having injuries consistent with entanglement.

Because most fisheries having incidental mortality take more than one stock of marine mammals, it is instructive to evaluate the effects of fishery mortality on a stock-specific basis. The accurate evaluation of fishery-based mortality under the ZMRG requires the calculation of an unbiased, precise abundance estimate upon which to base the associated PBR as well as an unbiased, precise mortality estimate. In a recent evaluation of the information available on 165 stocks of marine mammals identified in late 2003, abundance estimates for just over half of the stocks were characterized as not available or based upon imprecise and/or infrequent surveys. Also, mortality estimates were considered inaccurate (not available or based upon incomplete information) for about half of the stocks. Compounding the effects of imprecise or biased abundance and mortality estimates for many stocks of marine mammals, nearly two thirds of all stocks of marine mammals are identified on the basis of no dedicated stock-structure data (e.g., stock structure is inferred from oceanographic features rather than based upon biological data on the population or from geographic boundaries) or from data derived in sampling efforts designed for other purposes.

Limited or old information is available for many marine mammal stocks because NMFS has focused its marine mammal data collection to supply information needed to develop or evaluate the success of TRPs. As noted above, six TRTs have been convened. Of these, plans from two (mid-Atlantic and Gulf of Maine harbor porpoise TRTs) were combined to develop a single take reduction plan, and one team was disbanded. Consequently, the intensive data collection

required for accurate assessment of incidental mortality under the ZMRG has been limited to relatively few fisheries, as described in section 4 of this report.

### Case Study

The Gulf of Maine/Bay of Fundy stock of harbor porpoise serves as a good case study for the take-reduction process and NMFS's ability to evaluate the success of a take reduction plan. There is a long history of data collection in at least one of the fisheries interacting with this stock, and it was the subject of one of the first take reduction plans. In the early 1980s, high levels of mortality of harbor porpoise incidental to gillnet fishing in New England were reported, and representatives of the associated fisheries and the conservation community formed the Harbor Porpoise Working Group to try to identify methods to reduce incidental mortality. When the MMPA was amended in 1988 resulting in the establishment of a national data collection program for evaluating the impact of incidental mortality on marine mammal stocks, the harbor porpoise/gillnet interaction received sustained effort to characterize the scope of the interactions and impacts to the stock and to identify alternatives to reduce incidental mortality.

Prior to the establishment of the take reduction team and implementation of the take reduction plan, incidental mortality averaged nearly 1,200 porpoise per year in the fishery. Mortality in the New England sink gillnet fishery was in addition to another 360 porpoise per year taken in the mid-Atlantic gillnet fishery and an unknown number of porpoise taken incidental to fishing in Canada. From 1994-1998, average annual mortality was estimated as 1,163 (CV = 0.11).

When the take reduction plan was implemented, estimated mortality decreased, with average annual mortality from 1999 through 2001 reduced to 277 porpoise per year (CV = 0.25). However, the precision of the estimate (CV) is related, among other things, to the frequency of observed mortality. As the mortality rate is decreased toward the insignificance threshold (which is currently estimated to be about 75 harbor porpoise taken per year), the precision of mortality estimates will decrease accordingly (*i.e.*, the CV will increase). As the CV of the estimate increases, the ability to make an accurate evaluation of harbor porpoise mortality incidental to the fishery decreases substantially. Additional observer coverage would be required to ensure future evaluations of mortality reduction pursuant to the ZMRG have a high potential to be free of error.

In the harbor porpoise case study, the available information is sufficient to conclude accurately that mortality remains above the stock's insignificance threshold; however, the New England sink gillnet and mid-Atlantic coastal gillnet fisheries have made substantial progress in reducing mortality. Data from 1990 through 1998 provided reliable estimates for identifying baseline (pre-take reduction team) mortality levels, for identifying key features in fishing gear or practices that could be altered to reduce mortality, and for evaluating success of measures under the take reduction plan.

One simple way to look at the accuracy of a determination that a fishery has reduced incidental mortality to levels below the insignificance threshold is to assume a constant CV (0.30) and

examine the 95 percent confidence limits (the use of 95 percent confidence limits is common in the scientific literature) to see if the insignificance threshold is within the confidence interval.

Using the Gulf of Maine/Bay of Fundy harbor porpoise stock as an example, PBR = 747, and the insignificance threshold is 74.7. Assuming the mortality estimate has a 30 percent CV, the precision of estimates is shown in Table 4.

**Table 4. Confidence limits of mortality estimates for several levels of assumed mortality of harbor porpoise.**

assumed mortality	mortality point estimate	lower 95% confidence limit	upper 95% confidence limit
PBR * 0.5	374	210	665
PBR * 0.4	299	168	532
PBR * 0.3	224	126	398
PBR * 0.2	149	84	265
PBR * 0.175	131	74	233
PBR * 0.15	112	63	199
PBR * 0.1	75	42	133

The above simple example shows that at current mortality levels (just below 300 per year), the insignificance threshold is less than the lower 95 percent confidence limit. The 95 percent confidence threshold does not include the insignificance threshold until the point estimate for mortality is about 130 harbor porpoise. Therefore, it may be accurately concluded that current level of harbor porpoise mortality incidental to the sink gillnet fishery remains above the insignificance threshold. To ensure incidental mortality is below the insignificance threshold (with 95 percent confidence), the point estimate of incidental mortality would have to be reduced to about 40 harbor porpoise per year.

Such a long history of data collection for use in developing, implementing, and evaluating a take reduction plan is available for only one other fishery, the California/Oregon drift gillnet fishery for swordfish and other target species. In that fishery, the take reduction plan has been successful in reducing incidental mortality of key stocks of marine mammals; however, for the key marine mammal stock associated with this plan (California, Oregon, Washington stock of sperm whales), a single observed mortality in 1998 results in an average annual mortality estimate for the last five years of available, reviewed data of 1 sperm whale per year, with a CV of 89 percent. This level of mortality is closer to the PBR (1.8) than the insignificance threshold (0.18). Because a single observed mortality has such a substantial effect in evaluating progress

toward the small insignificance threshold of this stock, it would be decades before NMFS could conclude, with a high potential for being correct, annual mortality is below the insignificance threshold for this stock of sperm whales.

### Conclusion

As is apparent from the case study on harbor porpoise and the sink gillnet fishery, the current information allows an accurate determination that incidental mortality remains above the insignificance threshold. However, as incidental mortality is reduced to levels near or below the insignificance threshold, the accuracy of the determination diminishes due to higher uncertainty (lower precision) in the mortality estimate. This uncertainty is due primarily to constraints on the levels of observer coverage required to provide sufficient data to calculate accurate, precise estimates of incidental mortality.

The case study demonstrates clearly that even in one of the most data rich cases, additional information would be required to accurately assess the levels of incidental mortality and serious injury (relative to the stock's insignificance threshold). If information is too limited for an accurate assessment even in one of the best cases, the assessment in other fisheries will be even less accurate. Thus, additional information would be required in almost every fishery and for many stocks of marine mammals to make accurate determinations (precise, unbiased, recent estimates) as the term "accurate" is defined for purposes of this report.

**Appendix: List of Fisheries for 2004**

**§ 195.2 Definitions.**

\* \* \* \* \*

*Exposed underwater pipeline* means an underwater pipeline where the top of the pipe protrudes above the underwater natural bottom (as determined by recognized and generally accepted practices) in waters less than 15 feet (4.6 meters) deep, as measured from mean low water.

\* \* \* \* \*

*Hazard to navigation* means, for the purposes of this part, a pipeline where the top of the pipe is less than 12 inches (305 millimeters) below the underwater natural bottom (as determined by recognized and generally accepted practices) in waters less than 15 feet (4.6

meters) deep, as measured from the mean low water.

\* \* \* \* \*

■ 3. Amend § 195.246 by revising paragraph (b) to read as follows:

**§ 195.246 Installation of pipe in a ditch.**

\* \* \* \* \*

(b) Except for pipe in the Gulf of Mexico and its inlets in waters less than 15 feet deep, all offshore pipe in water at least 12 feet deep (3.7 meters) but not more than 200 feet deep (61 meters) deep as measured from the mean low water must be installed so that the top of the pipe is below the underwater natural bottom (as determined by recognized and generally accepted practices) unless the pipe is supported by stanchions held in place by anchors

or heavy concrete coating or protected by an equivalent means.

\* \* \* \* \*

■ 4. Amend § 195.248 by revising paragraphs (a) and (b) introductory text to read as follows:

**§ 195.248 Cover over buried pipeline.**

(a) Unless specifically exempted in this subpart, all pipe must be buried so that it is below the level of cultivation. Except as provided in paragraph (b) of this section, the pipe must be installed so that the cover between the top of the pipe and the ground level, road bed, river bottom, or underwater natural bottom (as determined by recognized and generally accepted practices), as applicable, complies with the following table:

Location	Cover inches (millimeters)	
	For normal excavation	For rock excavation <sup>1</sup>
Industrial, commercial, and residential areas .....	36 (914)	30 (762)
Crossing of inland bodies of water with a width of at least 100 feet (30 millimeters) from high water mark to high water mark .....	48 (1219)	18 (457)
Drainage ditches at public roads and railroads .....	36 (914)	36 (914)
Deepwater port safety zones .....	48 (1219)	24 (610)
Gulf of Mexico and its inlets in waters less than 15 feet (4.6 meters) deep as measured from mean low water .....	36 (914)	18 (457)
Other offshore areas under water less than 12 ft (3.7 meters) deep as measured from mean low water .....	36 (914)	18 (457)
Any other area .....	30 (762)	18 (457)

<sup>1</sup> Rock excavation is any excavation that requires blasting or removal by equivalent means.

(b) Except for the Gulf of Mexico and its inlets in waters less than 15 feet (4.6 meters) deep, less cover than the minimum required by paragraph (a) of this section and § 195.210 may be used if—

\* \* \* \* \*

■ 5. Section 195.413 is revised to read as follows:

**§ 195.413 Underwater inspection and reburial of pipelines in the Gulf of Mexico and its inlets.**

(a) Except for gathering lines of 4½ inches (114mm) nominal outside diameter or smaller, each operator shall prepare and follow a procedure to identify its pipelines in the Gulf of Mexico and its inlets in waters less than 15 feet (4.6 meters) deep as measured from mean low water that are at risk of being an exposed underwater pipeline or a hazard to navigation. The procedures must be in effect August 10, 2005.

(b) Each operator shall conduct appropriate periodic underwater inspections of its pipelines in the Gulf of Mexico and its inlets in waters less than 15 feet (4.6 meters) deep as measured from mean low water based on the identified risk.

(c) If an operator discovers that its pipeline is an exposed underwater pipeline or poses a hazard to navigation, the operator shall—

(1) Promptly, but not later than 24 hours after discovery, notify the National Response Center, telephone: 1-800-424-8802, of the location and, if available, the geographic coordinates of that pipeline.

(2) Promptly, but not later than 7 days after discovery, mark the location of the pipeline in accordance with 33 CFR Part 64 at the ends of the pipeline segment and at intervals of not over 500 yards (457 meters) long, except that a pipeline segment less than 200 yards (183 meters) long need only be marked at the center; and

(3) Within 6 months after discovery, or not later than November 1 of the following year if the 6 month period is later than November 1 of the year of discovery, bury the pipeline so that the top of the pipe is 36 inches (914 millimeters) below the underwater natural bottom (as determined by recognized and generally accepted practices) for normal excavation or 18 inches (457 millimeters) for rock excavation.

(i) An operator may employ engineered alternatives to burial that

meet or exceed the level of protection provided by burial.

(ii) If an operator cannot obtain required state or Federal permits in time to comply with this section, it must notify OPS; specify whether the required permit is State or Federal; and, justify the delay.

Issued in Washington, DC on July 29, 2004.

**Samuel G. Bonasso,**

*Deputy Administrator.*

[FR Doc. 04-17746 Filed 8-9-04; 8:45 am]

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 229**

[Docket No. 040407106-4219-03, I.D. 040104A]

RIN 0648-AS04

**List of Fisheries for 2004**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

**ACTION:** Final rule.

**SUMMARY:** The National Marine Fisheries Service (NMFS) is publishing its final List of Fisheries (LOF) for 2004, as required by the Marine Mammal Protection Act (MMPA). The final LOF for 2004 reflects new information on interactions between commercial fisheries and marine mammals. NMFS must categorize each commercial fishery on the LOF into one of three categories under the MMPA based upon the level of serious injury and mortality of marine mammals that occurs incidental to each fishery. The categorization of a fishery in the LOF determines whether participants in that fishery are subject to certain provisions of the MMPA, such as registration, observer coverage, and take reduction plan requirements.

**DATES:** This final rule is effective September 9, 2004. However, compliance with the requirement to register with NMFS and to obtain an authorization certificate is not required until January 1, 2005, for fisheries added or elevated to Category I in this final rule. For fisheries affected by the delay, see **SUPPLEMENTARY INFORMATION**.

#### **Compliance Date for Registration Under the MMPA**

Compliance with the requirement to register with NMFS and to obtain an authorization certificate is not required until January 1, 2005, for the Hawaii Swordfish, Tuna, Billfish, Mahi Mahi, Wahoo, Oceanic Sharks Longline/Set Line Fishery (Hawaii longline fishery), which is elevated to Category I for the 2004 LOF. The abovementioned fishery is considered to be a Category I fishery on September 9, 2004, and is required to comply with all requirements of Category I fisheries (*i.e.*, complying with applicable take reduction plan requirements and carrying observers, if requested), other than the registration requirement on that date.

**ADDRESSES:** Registration information, materials, and marine mammal reporting forms may be obtained from several regional offices. Registration information, materials, and marine mammal reporting forms may be obtained from the following regional offices:

NMFS, Northeast Region, One Blackburn Drive, Gloucester, MA 01930-2298, Attn: Marcia Hobbs;  
 NMFS, Southeast Region, 9721 Executive Center Drive North, St. Petersburg, FL 33702, Attn: Teletha Griffin;  
 NMFS, Southwest Region, Protected Species Management Division, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213, Attn: Don Peterson;

NMFS, Northwest Region, 7600 Sand Point Way NE, Seattle, WA 98115, Attn: Permits Office; or  
 NMFS, Alaska Region, Protected Resources, P.O. Box 22668, 709 West 9th Street, Juneau, AK 99802.

**FOR FURTHER INFORMATION CONTACT:** For additional information or general questions on the LOF, please contact the following NMFS staff:

Kristy Long, Office of Protected Resources, 301-713-1401;  
 David Gouveia, Northeast Region, 978-281-9328;  
 Juan Levesque, Southeast Region, 727-570-5312;  
 Cathy Campbell, Southwest Region, 562-980-4060;  
 Brent Norberg, Northwest Region, 206-526-6733;  
 Tamra Faris, Pacific Islands Region, 808-973-2937;  
 Bridget Mansfield, Alaska Region, 907-586-7642.

Individuals who use a telecommunications device for the hearing impaired may call the Federal Information Relay Service at 1-800-877-8339 between 8 a.m. and 4 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

#### **SUPPLEMENTARY INFORMATION:**

##### **What Is the List of Fisheries?**

Section 118 of the MMPA requires NMFS to place all U.S. commercial fisheries into one of three categories based on the level of incidental serious injury and mortality of marine mammals occurring in each fishery (16 U.S.C. 1387 (c)(1)). The categorization of a fishery in the LOF determines whether participants in that fishery may be required to comply with certain provisions of the MMPA, such as registration, observer coverage, and take reduction plan requirements. NMFS must reexamine the LOF annually, considering new information in the Stock Assessment Reports and other relevant sources and publish in the **Federal Register** any necessary changes to the LOF after notice and opportunity for public comment (16 U.S.C. 1387 (c)(1)(C)).

##### **How Does NMFS Determine in Which Category a Fishery Is Placed?**

The definitions for the fishery classification criteria can be found in the implementing regulations for section 118 of the MMPA (50 CFR 229.2). The criteria are also summarized here.

##### *Fishery Classification Criteria*

The fishery classification criteria consist of a two-tiered, stock-specific approach that first addresses the total

impact of all fisheries on each marine mammal stock, and then addresses the impact of individual fisheries on each stock. This approach is based on consideration of the rate, in numbers of animals per year, of incidental mortalities and serious injuries of marine mammals due to commercial fishing operations relative to the potential biological removal (PBR) level for each marine mammal stock. The MMPA (16 U.S.C. 1362 (20)) defines the PBR level as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population. This definition can also be found in the implementing regulations for section 118 at 50 CFR 229.2.

*Tier 1:* If the total annual mortality and serious injury of a marine mammal stock, across all fisheries, is less than or equal to 10 percent of the PBR level of the stock, all fisheries interacting with the stock would be placed in Category III. Otherwise, these fisheries are subject to the next tier (Tier 2) of analysis 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 the PBR level.

*Tier 2, Category II:* Annual mortality and serious injury of a stock in a given fishery is greater than 1 percent and less than 50 percent of the PBR level.

*Tier 2, Category III:* Annual mortality and serious injury of a stock in a given fishery is less than or equal to 1 percent of the PBR level.

While Tier 1 considers the cumulative fishery mortality and serious injury for a particular stock, Tier 2 considers fishery-specific mortality and serious injury for a particular stock. Additional details regarding how the categories were determined are provided in the preamble to the final rule implementing section 118 of the MMPA (60 FR 45086, August 30, 1995).

Since fisheries are categorized on a per-stock basis, a fishery may qualify as one Category for one marine mammal stock and another Category for a different marine mammal stock. A fishery is typically categorized on the LOF at its highest level of classification (*e.g.*, a fishery qualifying for Category III for one marine mammal stock and for Category II for another marine mammal stock will be listed under Category II).

##### **Other Criteria That May Be Considered**

In the absence of reliable information indicating the frequency of incidental mortality and serious injury of marine mammals by a commercial fishery,

NMFS will determine whether the incidental serious injury or mortality qualifies for Category II by evaluating other factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, and the species and distribution of marine mammals in the area, or at the discretion of the Assistant Administrator for Fisheries (50 CFR 229.2).

#### **How Do I Find Out if a Specific Fishery Is in Category I, II, or III?**

This final rule includes two tables that list all U.S. commercial fisheries by LOF Category. Table 1 lists all of the fisheries in the Pacific Ocean (including Alaska). Table 2 lists all of the fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean.

#### **Am I Required To Register Under the MMPA?**

Owners of vessels or gear engaging in a Category I or II fishery are required under the MMPA (16 U.S.C. 1387(c)(2)), as described in 50 CFR 229.4, to register with NMFS and obtain a marine mammal authorization from NMFS in order to lawfully incidentally take a marine mammal in a commercial fishery. Owners of vessels or gear engaged in a Category III fishery are not required to register with NMFS or obtain a marine mammal authorization.

#### **How Do I Register?**

Fishers must register with the Marine Mammal Authorization Program (MMAP) by contacting the relevant NMFS Regional Office (see **ADDRESSES**) unless they participate in a fishery that has an integrated registration program (described below). Upon receipt of a completed registration, NMFS will issue vessel or gear owners physical evidence of a current and valid registration that must be displayed or in the possession of the master of each vessel while fishing in accordance with section 118 of the MMPA (16 U.S.C. 1387(c)(3)(A)).

#### **What Is the Process for Registering in an Integrated Fishery?**

For some fisheries, NMFS has integrated the MMPA registration process with existing State and Federal fishery license, registration, or permit systems and related programs. Participants in these fisheries are automatically registered under the MMPA and are not required to submit registration or renewal materials or pay the \$25 registration fee. Following is a list of integrated fisheries and a summary of the integration process for

each Region. Fishers who operate in an integrated fishery and have not received registration materials should contact their NMFS Regional Office (see **ADDRESSES**).

#### **Which Fisheries Have Integrated Registration Programs?**

The following fisheries have integrated registration programs under the MMPA:

1. All Alaska Category II fisheries;
2. All Washington and Oregon Category II fisheries;
3. Northeast Regional fisheries for which a State or Federal permit is required.

Individuals fishing in fisheries for which no state or Federal permit is required must register with NMFS by contacting the Northeast Regional Office (see **ADDRESSES**); and

4. All North Carolina, South Carolina, Georgia, and Florida Category I and II fisheries for which a State permit is required.

#### **How Do I Renew My Registration Under the MMPA?**

Regional Offices, except for the Northeast Region, annually send renewal packets to previously registered participants in Category I or II fisheries. However, it is the responsibility of the fisher to ensure that registration or renewal forms are completed and submitted to NMFS at least 30 days in advance of fishing. Individuals who have not received a renewal packet by January 1 or are registering for the first time should request a registration form from the appropriate Regional Office (see **ADDRESSES**).

#### **Am I Required To Submit Reports When I Injure or Kill a Marine Mammal During the Course of Commercial Fishing Operations?**

In accordance with the MMPA (16 U.S.C. 1387(e)) and 50 CFR 229.6, any vessel owner or operator, or fisher (in the case of non-vessel fisheries), participating in a Category I, II, or III fishery must report to NMFS all incidental injuries and mortalities of marine mammals that occur during commercial fishing operations. "Injury" is defined in 50 CFR 229.2 as a wound or other physical harm. In addition, any animal that ingests fishing gear or any animal that is released with fishing gear entangling, trailing, or perforating any part of the body is considered injured, regardless of the presence of any wound or other evidence of injury, and must be reported. Instructions on how to submit reports can be found in 50 CFR 229.6.

#### **Am I Required To Take an Observer Aboard My Vessel?**

Fishers participating in a Category I or II fishery are required to accommodate an observer aboard vessel(s) upon request. Observer requirements can be found in 50 CFR 229.7.

#### **Am I Required To Comply With Any Take Reduction Plan Regulations?**

Fishers participating in a Category I or II fishery are required to comply with any applicable take reduction plans.

#### **Sources of Information Reviewed for the Proposed 2004 LOF**

NMFS reviewed the marine mammal incidental serious injury and mortality information presented in the Stock Assessment Reports (SARs) for all observed fisheries to determine whether changes in fishery classification were warranted. NMFS SARs are based on the best scientific information available, including information on the level of serious injury and mortality of marine mammals that occurs incidental to commercial fisheries and the PBR levels of marine mammal stocks. NMFS also reviewed other sources of new, relevant information, including marine mammal stranding data, observer program data, fisher self-reports, and other information that is not included in the SARs. Additionally, NMFS took into account information presented at a workshop from June 2–3, 2004, to review data used in the proposed categorization of the Hawaii longline fishery.

The information contained in the SARs is reviewed by regional scientific review groups (SRGs) representing Alaska, the Pacific (including Hawaii), and the U.S. Atlantic, Gulf of Mexico, and the Caribbean. The SRGs were created by the MMPA to review the science that goes into the SARs, and to advise NMFS on population status and trends, stock structure, uncertainties in the science, research needs, and other issues.

The LOF for 2004 was based, among other things, on information provided in the final SARs for 1996 (63 FR 60, January 2, 1998), the final SARs for 2001 (67 FR 10671, March 8, 2002), the final SARs for 2002 (68 FR 17920, April 14, 2003), and the draft SARs for 2003 (68 FR 51561, August 27, 2003).

#### **Comments and Responses**

NMFS received 10 comment letters on the proposed 2004 LOF (69 FR 19365, April 13, 2004) from environmental, commercial fishing, and Federal and State interests. Issues outside the scope of the LOF are not responded to in this final rule. Any comments received after

the public comment period closed on June 14, 2004, are not responded to in this final rule.

#### General Comments

*Comment 1:* One commenter disapproved of the fishery classification criteria used for the LOF, but did not offer an alternative suggestion for the criteria.

*Response:* The current fishery classification system is based on a two-tiered, stock-specific approach that first addresses the total impacts of all fisheries on each marine mammal stock and then addresses the impacts of individual fisheries on each stock (60 FR 31666, June 16, 1995). Tier 1 considers the additive fishery mortality and serious injury for a particular stock, while Tier 2 considers fishery-specific mortality for a particular stock. This approach is based on the rate, in numbers of animals per year, of serious injuries and mortalities due to commercial fishing relative to a stock's PBR level. Under the Tier 1 analysis, if the total annual mortality and serious injury across all fisheries that interact with a stock is less than or equal to 10 percent of the PBR level of such a stock, then all fisheries interacting with this stock would be placed in Category III. Otherwise, these fisheries are subject to the next tier to determine their classification. Under the Tier 2 analysis, those fisheries in which annual mortality and serious injury of a stock in a given fishery is greater than or equal to 50 percent of the stock's PBR level are placed in Category I, while those fisheries in which annual mortality and serious injury is greater than 1 percent and less than 50 percent of the stock's PBR level are placed in Category II. Individual fisheries in which annual mortality and serious injury is less than or equal to 1 percent of the PBR level would be placed in Category III. The threshold between Tier 1 and Tier 2 was set at 10 percent of the PBR level based on recommendations that arose from a PBR Workshop held in La Jolla, California in June 1994. The Workshop Report indicated if the total annual incidental serious injury and mortality level for a particular stock did not exceed 10 percent of the PBR level, the amount of time necessary for that population to achieve the optimum sustainable population level would only increase by 10 percent. Thus, 10 percent of the PBR level for a particular stock was equated to "biological insignificance." This approach ensures that fisheries are categorized based on their impacts on stocks and allows NMFS to focus resources on those

fisheries that have a significant impact on marine mammals.

This approach is based on the fact that the MMPA established both a short-term and a long-term goal with respect to take reduction plans for reducing marine mammal mortality and serious injury incidental to commercial fishing operations. MMPA section 118(f)(2) provides: "The immediate goal of a take reduction plan for a strategic stock shall be to reduce, within 6 months of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to levels less than the potential biological removal established for that stock under section 117. The long-term goal of the plan shall be to reduce, within 5 years of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate, taking into account the economics of the fishery, the availability of existing technology, and existing State or regional fishery management plans." NMFS established the tier-based fishery classification system with each goal in mind and to ensure that fisheries progressively move toward the long-term goal of the MMPA.

*Comment 2:* One commenter called into question NMFS' execution of the LOF, particularly that all fisheries should be listed as Category I.

*Response:* Section 118 of the MMPA (16 U.S.C. 1387(c)(1)) and the regulations implementing that section (50 CFR part 229) specify how NMFS executes the annual LOF. NMFS reexamines commercial fisheries each year to determine whether changes are needed. Proposed and final LOFs must categorize each commercial fishery based on the definitions of Category I, II, and III fisheries (50 CFR 229.2), list the marine mammals that have been incidentally injured or killed by commercial fishing operations, and estimate the number of vessels or persons involved in each commercial fishery. See Response to Comment 1.

*Comment 3:* One commenter stated that all high seas fisheries conducted by U.S. flagged vessels should be listed on the LOF. In particular, the commenter suggested adding the U.S. Patagonian toothfish longline fishery and the U.S. trawl fishery for krill as Category II fisheries until further information is available. The commenter noted several other fisheries, including the Cobb Seamount, Pacific pelagic squid jig, and South Pacific tuna purse seine, that should be analyzed for interactions with

marine mammals and appropriately classified on the LOF.

*Response:* NMFS must publish any proposed changes to the LOF in the **Federal Register** to allow for notice and opportunity for public comment. Therefore, NMFS cannot add these new fisheries to the 2004 final LOF because it is beyond the scope of what was included in the proposed 2004 LOF. NMFS will consider this comment and whether the LOF applies to high seas fisheries during development of future proposed LOFs.

#### Comments on Fisheries in the Pacific Ocean

*Comment 4:* One commenter stated that gillnet fisheries in Alaska may require more observer coverage than current fishery classifications allow.

*Response:* NMFS works annually through the National Observer Program to obtain resources necessary to monitor Alaska gillnet fisheries. Funds are limited; therefore NMFS rotates observer coverage among gillnet fisheries based on statutory priorities (16 U.S.C. 1387(d)) and specific time cycles. The Alaska gillnet fisheries on the LOF (nearshore salmon drift and set gillnet fisheries) are managed by the State of Alaska's Department of Fish and Game. These fisheries were originally placed into Category II as unobserved fisheries. The Category II designation was made for these fisheries, where little or no information on marine mammal takes for the specific fisheries was available, because gillnet fisheries worldwide have been demonstrated as having the capability of causing significant numbers of mortalities and serious injuries to marine mammals. The only Alaska gillnet fisheries currently in Category III are those fisheries that have been observed and subsequent analyses of observer data indicate these fisheries meet the threshold for a Category III designation. The remainder of the unobserved Alaska gillnet fisheries continue to remain in Category II until such time that they can be observed and data are obtained that indicate a change in fishery classification is warranted. Several Alaska gillnet fisheries that have been observed remain in Category II due to analyses of observer data that indicate a Category II threshold has been met for each of those fisheries.

*Comment 5:* NMFS received several comments supporting the delineation of Alaska fisheries. One commenter stated that NMFS should reclassify fisheries appropriately after analyses on the new fisheries are completed. Another commenter was concerned that subdividing Alaska fisheries creates the

appearance of fewer impacts on marine mammals, when a larger fishery as previously delineated may have met the threshold for classification as a Category I or II fishery.

*Response:* NMFS plans to complete the analyses on all Alaska fisheries and appropriately propose reclassification of those fisheries that meet the criteria for Category I and II fisheries in the 2005 proposed LOF. The analysis for fishery classification is designed to take into effect the cumulative impacts of multiple fisheries on marine mammal stocks. NMFS continues to work toward supporting increased observer coverage in all Category I and II fisheries across the country, including fisheries in Alaska, to improve the accuracy of marine mammal bycatch estimates.

The Alaska fisheries delineated in the 2004 proposed LOF as individual fisheries were separated to more accurately reflect the actual management and operational practices of those fisheries and to keep better track of marine mammal serious injuries and mortalities occurring in different sectors of the fishery. This is being implemented as a two-step process, the delineation of the fisheries in 2004 followed by analyses to reclassify the fisheries as appropriate in the 2005 proposed LOF. The analyses will be performed according to the existing protocol used to categorize fisheries. Documented mortalities and serious injuries used in previous analyses to categorize the fisheries will be assigned to one of the newly delineated fisheries. Any additional documented serious injuries or mortalities will likewise be assigned to the appropriate fishery. These changes will also be made in the SARs for each of the relevant marine mammal stocks. These changes will provide a more accurate understanding of the interactions between marine mammals and various Alaska fisheries. Prior to these changes, large groups of diverse fisheries were artificially lumped together based only on gear type over vast geographic areas of the Bering Sea and the Gulf of Alaska.

*Comment 6:* One commenter suggested that NMFS update relevant SARs with the new Alaska fishery delineations, determine which trawl and pot fisheries interact with the central and western North Pacific stocks of humpback whales, and recategorize the fisheries accordingly.

*Response:* Delineating the Alaska trawl and pot fisheries by area and target species will allow NMFS to better evaluate interactions between the central and western North Pacific humpback whale stocks and specific fisheries. NMFS will analyze relevant

data and propose fishery classifications accordingly. See Response to Comment 5.

*Comment 7:* One commenter suggested separating out the yellowfin sole fishery from the Bering Sea and Aleutian Islands (BSAI) flatfish trawl fishery because the fishery has its own total allowable catch (TAC) and prohibited species catch (PSC). The commenter also noted that some vessels that target yellowfin sole do not target other flatfish species. Additionally, the yellowfin sole fishery operates in the relatively shallow waters along the sand bottom shelf areas of the central and northern portions of the Bering Sea where interactions with marine mammals seems unlikely.

*Response:* The BSAI flatfish trawl fishery was designated as a single fishery in the proposed 2004 LOF based on information indicating an overlap in the prosecution of the flatfish trawl fisheries of the BSAI. As noted in the public comment, the yellowfin sole fishery has its own TAC and PSC quotas, as do other flatfish fisheries, and some separation exists in time and areas of prosecution of these fisheries. However, while the yellowfin sole fishery can be prosecuted at times with few interactions with marine mammals, significant overlap of the fishery occurs particularly with the rock sole, flathead sole, and Alaska plaice fisheries, with vessels catching these other species together with yellowfin sole in the same trip and haul. The overlap of these fisheries prevents listing the yellowfin sole fishery separately in the LOF.

*Comment 8:* One commenter stated that the reclassification of the CA/OR thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in. mesh) from Category I to Category II was premature and should be reversed. The commenter noted that the fishery still interacts with a wide range of stocks and the annual take of sperm whales is 47.8 percent of the stock's PBR level, just under the threshold for inclusion in Category I.

*Response:* The CA/OR thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in. mesh) was moved from Category I to Category II in the 2003 final LOF (68 FR 41725, July 15, 2003). This change in fishery classification was based on observer data from 1997–2001 that indicated the take of marine mammals incidental to this fishery was less than 50 percent of the PBR level for those stocks that interact with the fishery. One observed take of a sperm whale occurred in this fishery in 1998, but no takes have been observed in the most recent 5 years of data from 1999–2003. Therefore, NMFS does not believe a change in fishery classification is

warranted at this time. In an effort to reduce marine mammal serious injury and mortality, the owners and operators of CA/OR drift gillnet vessels operating in this fishery have been complying with the requirements of the Pacific Offshore Cetacean Take Reduction Plan, including carrying observers, using acoustic deterrents (pingers) on the nets, and complying with other gear modification requirements. Observers will continue to monitor this fishery, and if sperm whales are observed taken, NMFS will reevaluate this fishery.

*Comment 9:* Several commenters requested NMFS to extend the public comment period on the proposed 2004 LOF to accommodate a workshop on false killer whale population abundance and fishery interactions in the central Pacific Ocean (Workshop).

*Response:* NMFS agreed and the public comment period was extended from May 13, 2004, to June 14, 2004 (69 FR 26539, May 13, 2004), to accommodate the Workshop, which was held June 2–3, 2004 in Honolulu, Hawaii, and public comment resulting from the Workshop. The purpose of the Workshop was to discuss MMPA fishery classification requirements, specifically concerning the abundance and fishery interactions for false killer whales (*Pseudorca crassidens*) within the U.S. Exclusive Economic Zone (EEZ) around the Hawaiian Islands. The workshop also covered background information and procedures used to categorize the Hawaii longline fishery in the LOF. For a summary of the Workshop, please contact the Pacific Islands Regional Office (see **ADDRESSES**).

*Comment 10:* One commenter requested that NMFS reopen the comment period on the 2004 proposed LOF once the results of the Workshop on the Hawaii longline fishery and false killer whales were made available for public review.

*Response:* NMFS convened the Workshop to review available information and the process to reclassify the Hawaii longline fishery based on that information. NMFS staff, scientific experts, fishery representatives, and other interested members of the public participated in this Workshop. NMFS considered all information presented and discussed at the Workshop and public comment resulting from the Workshop in the decision to reclassify this fishery. See Response to Comment 9.

*Comment 11:* NMFS received several comments supporting the proposed elevation of the Hawaii longline fishery from Category III to Category I.

*Response:* NMFS has reclassified and elevated the fishery from Category III to Category I in the 2004 LOF.

*Comment 12:* One commenter recommended elevating the Hawaii longline fishery from Category III to Category II, instead of Category I, based on uncertainties surrounding the population abundance and mortality data. The commenter maintains that the NMFS 2002 survey on cetacean abundance in Hawaiian waters is flawed for two reasons. First, it was conducted between August and November when false killer whales are generally less abundant in Hawaiian waters. Second, the survey covered the entire EEZ while false killer whales are known to occur around islands rather than in the open ocean.

*Response:* At the June 2004 Workshop, relevant information was presented indicating that there was no evidence of seasonality in abundance of false killer whales in waters surrounding Hawaii (Baird, Workshop presentation; Kobayashi, Workshop presentation). In addition, limited data that are available from year-round surveys may actually suggest lower encounter rates during the late spring/early summer than during November-December. The commenter cited a reference (Stacey *et al.*, 1994) to indicate evidence of seasonality in false killer whale abundance. However, that study discussed seasonality in false killer whales in temperate waters around Japan and off the coast of the former Soviet Union, not in tropical waters surrounding the Hawaiian Islands. The marine ecosystems surrounding Japan and the Hawaiian Islands are very different and, therefore, NMFS does not believe that the information in this reference is relevant to false killer whales in Hawaiian waters.

Based on the data, NMFS concludes false killer whales are not more common around the Hawaiian Islands than in the open ocean. Relevant data indicate false killer whale occurrences on the open sea, and published literature indicates that "False killer whales are found most often offshore, although there are occasional records from inshore waters \* \* \*" (Stacey and Baird, 1991). Furthermore, nearshore sightings data from studies conducted around the main Hawaiian Islands since 1993 (Baird, Workshop presentation; Mobley 2003) have demonstrated that sightings are not frequent around the main Hawaiian Islands. Particularly, during the two most recent spring aerial surveys, conducted in 2000 and 2003, no false killer whales were seen around the Hawaiian Islands. The NMFS 2002 survey was conducted in the area where

the Hawaii longline fishery operates around the Hawaiian Islands and was compared to the mortality and serious injury of false killer whales in the same area for purposes of classifying the fishery.

*Comment 13:* One commenter disagreed with NMFS' abundance estimates of the Hawaiian stock of false killer whales for the following reasons. The commenter noted, first, that NMFS' data indicate that the Hawaiian stock of false killer whales exhibit seasonal abundance, possibly peaking coincident to yellowfin tuna peak abundance. Second, the commenter maintained there is information indicating false killer whale distribution varies not only by season, but possibly over years, which may be linked to El Nino effects on prey species. Third, the commenter criticized NMFS' extrapolation of one sighting during the 2002 shipboard survey to a group of 10 individuals. The commenter noted that it is well-accepted that false killer whales are a highly social species found in group sizes averaging from 20 to 50 individuals. Fourth, the commenter disapproved of NMFS' diving correction factor, stating that it does not reflect false killer whale behavior.

*Response:* NMFS disagrees with this comment. The abundance estimates are based on established scientific methods and were reviewed and accepted by the Pacific Scientific Review Group. The issues raised by the commenter are not indicative of deficiencies in the abundance estimates. First, neither the cited NMFS data (Walsh and Kobayashi, Draft Report, May 21, 2004), nor the data presented by independent scientists (Baird, Mobley) at the June workshop, provide any evidence for seasonality in the abundance of false killer whales around Hawaii. The NMFS draft report states "False killer whales (Figure A3c) were the most frequently sighted species, present in every EEZ except Jarvis, *with no apparent seasonality*" [emphasis added]. Second, NMFS agrees that interannual variability in false killer whale distribution may occur, and that additional years of data will improve the precision of the abundance estimate. However, the marine mammal stock assessment process under the MMPA was specifically designed to allow for levels of uncertainty in abundance similar to those observed for Hawaiian false killer whales. Third, the references cited by the commenter do not indicate substantially greater mean group sizes for false killer whales in tropical waters, such as those surrounding Hawaii. In the eastern tropical Pacific, Stacey and Baird (1991) report a mean group size of

18.1 false killer whales, contrasting with a mean group size of 55 in temperate waters off Japan (Stacey *et al.*, 1994). Extensive NMFS survey data for tropical Pacific waters yielded an average group size of 11.4 false killer whales (Wade and Gerrodette, 1993). Thus, published estimates for tropical waters are similar to the group size of 10 false killer whales observed during the 2002 survey. Finally, the dive correction factor used in the estimation of abundance (Barlow, 2003) reflects a combination of false killer whale diving behavior and the search behavior of the observer team aboard NMFS research vessels during marine mammal surveys. Observations of false killer whales from longline vessels are fundamentally different in nature, and the proportion of animals missed is expected to differ. See also Response to Comment 12.

*Comment 14:* Two commenters noted that false killer whale abundance around Hawaii may actually be overestimated, not underestimated, as stated in the proposed 2004 LOF. Several reasons were given: (1) The relative proportion of false killer whales to all delphinids is similar between the Hawaiian EEZ and the ETP; (2) false killer whales in Hawaiian waters do not appear to dive for particularly long periods; (3) two independent research projects found false killer whales to be uncommon around Hawaii; and (4) the abundance estimate may be biased because it is based on a correction factor developed for a suite of similar-sized delphinids, which often occur in groups smaller than false killer whale groups and are, therefore, more difficult to observe.

*Response:* NMFS agrees that it is possible that the abundance estimate for the Hawaiian stock of false killer whales may be overestimated. NMFS recognizes that the correction factor used for animals missed on the trackline during a survey could possibly be overestimated if false killer whales are more active and visible around Hawaii than false killer whales and similar-sized cetaceans in the ETP, which is where the correction factor was developed. These potential sources of minor upward bias in the false killer whale abundance estimates do not affect the classification of the Hawaii-based longline fishery, because there would be no change in the classification of the fishery or the designation of the Hawaiian stock of false killer whales as a strategic stock if potential sources of upward bias were identified and removed. The total annual mortality and serious injury of the Hawaiian stock of false killer whales would still exceed the PBR level. Therefore, the available

abundance estimates are considered reliable for purposes of the classification of the fishery as Category I.

*Comment 15:* One commenter noted that a revised aerial survey abundance estimate that includes data from 2000 and 2003 would be lower than that presented in Mobley (2000).

*Response:* If aerial survey data from 2000 and 2003 (Mobley) were revised and combined with the results of the offshore surveys (Barlow 2003), the abundance estimate would be equal to or less than the estimate presented in Barlow (2003). If an updated abundance estimate including the 2000 and 2003 aerial survey results were available, the Hawaiian stock of false killer whales would remain a strategic stock, and the Hawaii-based longline fishery would remain a category I fishery. See also the Response to Comment 14.

*Comment 16:* One commenter recommended that NMFS undertake a new population survey that accounts for the known seasonality of false killer whale abundance in the Hawaiian Islands EEZ before publishing the 2005 LOF.

*Response:* There is no known seasonality of false killer whales in the Hawaiian Islands EEZ. Neither NMFS observer data (Walsh and Kobayashi, Draft Report, May 21, 2004), nor data presented by independent scientists (Baird, Mobley) at the June 2004 workshop, provide any evidence for seasonality in the abundance of false killer whales around Hawaii.

*Comment 17:* One commenter noted that NMFS has defined the false killer whale stock in the Hawaiian EEZ as a strategic stock, based on genetic evidence suggesting false killer whales between the central North Pacific (Hawaii) are separate, reproductively isolated populations from false killer whales in the ETP. However, the commenter notes the degree of separation between these false killer whales is not known, and the geographic boundaries for the populations cannot yet be identified. False killer whales have been taken by the Hawaii longline fishery in an area ranging from north of the Hawaiian EEZ to the equator. Are all of these false killer whales from the same population or from separate isolated populations? If from the same population, then the designation of a strategic stock in the Hawaii EEZ would be questionable.

*Response:* The Hawaiian stock of false killer whales is considered a strategic stock under the MMPA because fishery-related mortality and serious injury exceeds the PBR level for this stock (see 16 U.S.C. 1362(19)).

Genetic analysis of samples from false killer whales in the North Pacific Ocean indicates population structure, but geographic boundaries of the various populations cannot yet be identified. However, the evidence for reproductive isolation and strong genetic differentiation of individuals sampled around Hawaii from individuals sampled in the ETP is solid. Furthermore, NMFS' current mortality and serious injury estimates are based only on takes within the U.S. EEZ and compared to PBR levels derived from abundance estimates for waters within the U.S. EEZ. In addition, even if the actual boundaries of the Hawaiian stock of false killer whales extended beyond the EEZ, the strategic status of the stock would not be changed. NMFS' guidelines for preparing marine mammal stock assessment reports contain specific instructions for calculating PBR of trans-boundary stocks. (The guidelines are available in electronic form at <http://nmml.afsc.noaa.gov/library/gammsrep/gammsrep.htm>.) In cases such as false killer whales in the Hawaiian EEZ, where the stock could extend into international waters, the PBR would be based on the abundance of animals within the EEZ. This guideline was established to prevent underestimating the effects of mortality and serious injury incidental to U.S. fisheries in international waters where unknown levels of additional human-caused mortality and serious injury (e.g., incidental to foreign fisheries in the same waters) may also be affecting the stock. NMFS does, however, plan to try to obtain additional genetic samples from a broader geographic range to help define stock boundaries.

*Comment 18:* One commenter stated that estimated mortality of false killer whales in the Hawaii longline fishery may be underestimated for several reasons, including: (1) some hooked and thus seriously injured whales may break free of the gear before reaching the boat, (2) some false killer whales from the Hawaiian stock may be taken outside the U.S. EEZ; (3) false killer whales observed taken in Palmyra's EEZ may be part of the Hawaiian stock; and (4) several observed interactions with unidentified cetaceans are likely to have been false killer whales. If the number of unidentified cetaceans seriously injured or killed in the Hawaii longline fishery was pro-rated in proportion to the known mortality and serious injury of the potential species involved, the estimated takes of false killer whales within the Hawaiian EEZ would increase.

*Response:* Mortality of false killer whales in the Hawaii longline fishery may be underestimated. NMFS intends to obtain additional data to clarify the stock structure and genetic differentiation of animals found in waters surrounding Palmyra Island versus those in the Hawaiian EEZ and in international waters of the tropical Pacific. See Response to Comment 17.

*Comment 19:* One commenter noted that NMFS incorrectly states, "Since 1998, only one false killer whale has been observed killed in the Hawaiian EEZ" (69 FR 19368, May 13, 2004). The commenter stated that serious injury and mortality estimates should not have been based on this interaction because it is over five years old.

*Response:* The proposed 2004 LOF does contain an error; since 1998, only one false killer whale has been observed seriously injured in the Hawaiian EEZ. The individual was released with a hook in the mouth and trailing line. Based on NMFS' serious injury guidelines, any cetacean released with trailing gear is considered seriously injured. By definition, a serious injury is one that will likely result in mortality (50 CFR 229.2). Furthermore, section 118 of the MMPA treats mortality and serious injury equally.

NMFS mortality estimates are based on information presented in the most recent SAR. Based on NMFS' guidelines for preparing SARs, serious injury and mortality rates are generally based on the most recent 5-year averages of data available when the SAR is drafted (e.g., 1997–2001 for the 2003 SARs).

*Comment 19a:* One commenter stated re-opening the area closed to swordfish fishing will likely increase takes of false killer whales by the Hawaii longline fishery.

*Response:* Comment noted.

*Comment 20:* Two commenters expressed concerns regarding NMFS protocols for assessing serious injuries of false killer whales and requested NMFS to revisit its serious injury guidelines or develop a more refined assessment method. In particular, one commenter requested NMFS to convene a workshop to specifically address serious injury guidelines for false killer whales, since the commenter does not believe an individual hooked in the mouth is likely to die.

*Response:* NMFS convened a workshop of experts in marine mammal biology, marine mammal medicine, and fishing technologies in April 1997. The results of this workshop included guidelines for differentiating serious and non-serious injuries of marine mammals incidental to commercial

fishing operations, which were published as a NOAA Technical Memorandum (NMFS-OPR-13 1998), and have been used to determine severity of injuries to false killer whales and other cetaceans in the Hawaii longline fishery. The publication process included scientific peer review. These guidelines represent a compilation of the best scientific information available at the time and have not been updated since 1997. Additional data, particularly on large whales, have been collected since the workshop was convened. When these additional data have been compiled and analyzed, NMFS will update the guidelines as needed.

*Comment 21:* One commenter urged NMFS to increase observer coverage to more accurately estimate serious injury and mortality of marine mammals incidental to the Hawaii longline fishery.

*Response:* There is 100-percent observer coverage in the shallow-set component and 20-percent observer coverage in the deep-set component of the Hawaii longline fishery beginning in 2004, as mandated by an Endangered Species Act section 7 biological opinion on sea turtle interactions with the fishery, and these observers are trained to collect information on interactions with all protected species. Given the relatively long history of the deep-set component and our understanding of fishing practices, catch, and interactions with protected species, 20 percent is a sufficient level of coverage in the deep-set component of the fishery.

*Comment 22:* One commenter stated that, under the National Environmental Policy Act (NEPA), NMFS should not rely on the Environmental Assessment (EA) prepared for regulations to implement section 118 of the MMPA (1995 EA) for the 2004 LOF.

*Response:* The 1995 EA concluded that implementation of these regulations would not have a significant impact on the human environment. This final rule would not make any significant change in the management of reclassified fisheries, and therefore, this final rule is not expected to change the analysis or conclusion of the 1995 EA. If NMFS takes a management action, for example, through the development of a TRP, NMFS will first prepare the appropriate environmental analysis as required under NEPA specific to that action.

*Comment 23:* One commenter stated that NMFS did not comply with the Regulatory Flexibility Act (RFA) in preparing the 2004 LOF.

*Response:* NMFS complied with the RFA. The Chief Counsel for Regulation of the Commerce Department certified

to the Chief Counsel for Advocacy of the Small Business Administration that the rule would not have a significant economic impact on a substantial number of small entities. (See 5 U.S.C. 605 and the Classification section of the proposed rule, 69 FR 19365, April 13, 2004.) As a result, no initial or final regulatory flexibility analysis was required. For convenience, the factual basis leading to the certification is repeated below.

Under existing regulations, all fishers participating in Category I or II fisheries must register under the MMPA, obtain an Authorization Certificate, and pay a fee of \$25. Additionally, fishers may be subject to a take reduction plan and requested to carry an observer. The Authorization Certificate authorizes the taking of marine mammals incidental to commercial fishing operations. NMFS has estimated that approximately 41,600 fishing vessels, most of which are small entities, operate in Category I or II fisheries, and therefore, are required to register. However, registration has been integrated with existing State or Federal registration programs for the majority of these fisheries so that the majority of fishers do not need to register separately under the MMPA. Currently, approximately 5,800 fishers register directly with NMFS under the MMPA authorization program.

This rule proposes to elevate the Hawaii Swordfish, Tuna, Billfish, Mahi Mahi, Wahoo, Oceanic Sharks Longline/Set Line Fishery to Category I in the LOF. Therefore participants in this fishery (140 participants) would be required to register under the MMPA.

Though this proposed rule would affect a number of small entities, the \$25 registration fee, with respect to anticipated revenues, is not considered a significant economic impact. If a vessel is requested to carry an observer, fishers will not incur any economic costs associated with carrying that observer. As a result of this certification, an initial regulatory flexibility analysis was not prepared. In the event that reclassification of a fishery to Category I or II results in a take reduction plan, economic analyses of the effects of that plan will be summarized in subsequent rulemaking actions.

#### **Comments on Fisheries in the Atlantic Ocean, Caribbean, and Gulf of Mexico**

*Comment 24:* Several commenters recommended elevating the Gulf of Mexico blue crab trap/pot fishery from Category III to Category II due to interactions with bottlenose dolphins. One commenter also recommended that NMFS institute an observer program in this fishery to obtain more reliable information.

*Response:* As stated in the 2004 proposed LOF (69 FR 19365, 19370, April 13, 2004), NMFS believes it is necessary to investigate stock structure of bottlenose dolphins in the Gulf of Mexico and intends to reevaluate this fishery as relevant information becomes

available. The vast majority of NMFS resources for bottlenose dolphin research is being expended in the Atlantic Ocean to satisfy the needs of the Atlantic Bottlenose Dolphin Take Reduction Team (TRT). As the needs of this existing TRT are met, NMFS plans to shift resources to the Gulf of Mexico to better define bottlenose dolphin stock structure and interactions with fisheries in this area. However, NMFS does not have adequate information at this time to change the classification of this fishery.

*Comment 25:* One commenter recommended NMFS reclassify the Gulf of Mexico menhaden purse seine fishery as a Category I fishery and direct more observer effort to determining the level of fishery interactions with bottlenose dolphins.

*Response:* NMFS believes it is necessary to investigate the stock structure of bottlenose dolphins in the Gulf of Mexico and monitor interactions between bottlenose dolphins and the Gulf of Mexico menhaden purse seine fishery and Gulf of Mexico gillnet fishery. NMFS intends to reevaluate this fishery as relevant information becomes available. However, NMFS does not have adequate information at this time to change the classification of this fishery. See Response to Comment 24. See also the 2003 LOF, for the response to a similar comment (68 FR 41725, 41730; July 15, 2003).

*Comment 26:* One commenter recommended NMFS reclassify the Gulf of Mexico gillnet fishery as a Category I fishery given that bottlenose dolphin population structure in the Gulf of Mexico is composed of numerous stocks with low PBR levels.

*Response:* See Response to Comment 25.

*Comment 27:* One commenter strongly urged NMFS to promptly respond to, and necropsy, strandings in the southeast U.S. to assess patterns and levels of marine mammal interactions with the Gulf of Mexico blue crab trap/pot fishery.

*Response:* The marine mammal stranding network has established protocols in place for responding to and investigating stranding events. The Level A data form that responders are required to use has a specific field to note any evidence of a fishery interaction. In the event that a fishery interaction is suspected, the network and the appropriate NMFS Regional Office and/or Science Center have protocols in place to investigate further and identify the fishery.

*Comment 28:* One commenter noted the expansion of open ocean aquaculture operations may warrant

further consideration related to the LOF. The commenter stated that a proposal to expand aquaculture operations to old oil platforms in the Gulf of Mexico may cause interactions with bottlenose dolphins if the operation uses high intensity acoustic harassment devices. The commenter noted that the finfish or shellfish aquaculture fisheries currently listed on the LOF would not include this new operation.

*Response:* NMFS is aware of the expansion of aquaculture and growing concerns with aquaculture operations particularly as they relate to harassment of marine mammals. On January 12–13, 1999, NMFS held a marine aquaculture workshop to evaluate the potential effects of aquaculture operations on marine mammals and sea turtles. NMFS is considering additional workshops to further evaluate these operations for cases involving serious injuries and mortalities of marine mammals. NMFS believes the fishery classification criteria sufficiently address fishery-related interactions with aquaculture operations. NMFS is not aware of any proposals for the use of oil platforms as aquaculture facilities. The current marine aquaculture fisheries listed on the LOF, “Finfish aquaculture” and “Shellfish aquaculture,” apply to all aquaculture operations conducted in the Atlantic Ocean, Gulf of Mexico, and Caribbean.

#### **Summary of Changes to the LOF for 2004**

The following summarizes changes to the LOF in 2004 in fishery classification, fisheries listed on the LOF, the number of participants in a particular fishery, and the species and/or stocks that are incidentally killed or seriously injured in a particular fishery. The LOF for 2004 is identical to the LOF for 2003 with the following exceptions.

##### *Fishery Classification*

The “Hawaii Swordfish, Tuna, Billfish, Mahi Mahi, Wahoo, Oceanic Sharks Longline/Set Line Fishery” is elevated from Category III to Category I.

##### *Addition of Fisheries to the LOF*

The following fisheries are added to the LOF as Category III fisheries:

“AK Bering Sea and Aleutian Islands Atka Mackerel Trawl Fishery,” “AK Bering Sea and Aleutian Islands Flatfish Trawl Fishery,” “AK Bering Sea and Aleutian Islands Pacific Cod Trawl Fishery,” “AK Bering Sea and Aleutian Islands Pollock Trawl Fishery,” “AK Gulf of Alaska Flatfish Trawl Fishery,” “AK Gulf of Alaska Pacific Cod Trawl Fishery,” “AK Gulf of Alaska Pollock Trawl Fishery,” “AK Gulf of Alaska Rockfish Trawl Fishery,” “AK Aleutian Islands Sablefish Pot Fishery,” “AK Bering Sea Sablefish Pot Fishery,” “AK Bering Sea and Aleutian Islands Pacific Cod Pot Fishery,” “AK Gulf of Alaska Pacific Cod Pot Fishery,” “AK Southeast Alaska Shrimp Pot Fishery,” “AK Southeast Alaska Crab Pot Fishery,” “AK Gulf of Alaska Crab Pot Fishery,” “AK Bering Sea and Aleutian Islands Crab Pot Fishery,” “AK Bering Sea and Aleutian Islands Greenland Turbot Longline Fishery,” “AK Bering Sea and Aleutian Islands Pacific Cod Longline Fishery,” “AK Bering Sea and Aleutian Islands Rockfish Longline,” “AK Bering Sea and Aleutian Islands Sablefish Longline Fishery,” “AK Gulf of Alaska Sablefish Longline Fishery,” “AK Gulf of Alaska Pacific Cod Longline Fishery,” “AK Gulf of Alaska Flatfish Longline Fishery,” and “AK Gulf of Alaska Rockfish Longline.”

##### *Removal of Fisheries From the LOF*

The following fisheries are removed from the 2004 LOF: The “AK Bering Sea and Gulf of Alaska Finfish Pot Fishery,” “AK Crustacean Pot Fishery,” “AK Bering Sea and Aleutian Islands Groundfish Longline/Set Line Fishery (federally regulated waters, including miscellaneous finfish and sablefish),” “AK Gulf of Alaska Groundfish Longline/Set Line Fishery (federally regulated waters, including miscellaneous finfish and sablefish),” “AK Bering Sea and Aleutian Islands Groundfish Trawl Fishery,” and “AK Gulf of Alaska Groundfish Trawl Fishery.”

##### **Number of Vessels/Persons**

The estimated number of participants in the “OR Swordfish Floating Longline Fishery” is updated to 1.

The estimated number of participants in the “WA Puget Sound Region Salmon Drift Gillnet Fishery” is updated to 210 based on 2003 permit data.

##### **List of Fisheries**

The following two tables list U.S. commercial fisheries according to their assigned categories under section 118 of the MMPA. The estimated number of vessels/participants is expressed in terms of the number of active participants in the fishery, when possible. If this information is not available, the estimated number of vessels or persons licensed for a particular fishery is provided. If no recent information is available on the number of participants in a fishery, the number from the most recent LOF is used.

The tables also list the marine mammal species or stocks incidentally killed or injured in each fishery based on observer data, logbook data, stranding reports, and fisher reports. This list includes all species or stocks known to experience serious injury or mortality in a given fishery, but also includes species or stocks for which there are anecdotal or historical, but not necessarily current, records of interaction. Additionally, species identified by logbook entries may not be verified. Not all species or stocks identified are the reason for a fishery’s placement in a given category. There are a few fisheries that are in Category II that have no recently documented interactions with marine mammals. Justifications for placement of these fisheries are by analogy to other gear types that are known to cause mortality or serious injury of marine mammals, as discussed in the final LOF for 1996 (60 FR 67063, December 28, 1995), and according to factors listed in the definition of “Category II fishery” in 50 CFR 229.2.

Table 1 lists commercial fisheries in the Pacific Ocean (including Alaska); Table 2 lists commercial fisheries in the Atlantic Ocean, Gulf of Mexico, and Caribbean.

TABLE 1.—LIST OF FISHERIES COMMERCIAL FISHERIES IN THE PACIFIC OCEAN

Fishery description	Estimated # of vessels/persons	Marine mammal species and stocks incidentally killed/injured
<b>Category I</b>		
Gillnet Fisheries: CA angel shark/halibut and other species set gillnet (>3.5 in. mesh) ..	58	Harbor porpoise, Central CA. Common dolphin, short-beaked, CA/OR/WA. Common dolphin, long-beaked CA. California sea lion, U.S. Harbor seal, CA. Northern elephant seal, CA breeding. Sea otter, CA.
Longline/Set Line Fisheries: HI swordfish, tuna, billfish, mahi mahi, wahoo, oceanic sharks longline/set line.	140	Humpback whale, Central North Pacific. False killer whales, HI. Risso's dolphin, HI. Bottlenose dolphin, HI. Spinner dolphin, HI. Short-finned pilot whale, HI. Sperm whale, HI.
<b>Category II</b>		
Gillnet Fisheries: AK Bristol Bay salmon drift gillnet .....	1,903	Steller sea lion, Western U.S. Northern fur seal, Eastern Pacific. Harbor seal, Bering Sea. Beluga whale, Bristol Bay. Gray whale, Eastern North Pacific. Spotted seal, AK. Pacific white-sided dolphin, North Pacific.
AK Bristol Bay salmon set gillnet .....	1,014	Harbor seal, Bering Sea. Beluga whale, Bristol Bay. Gray whale, Eastern North Pacific. Northern fur seal, Eastern Pacific. Spotted seal, AK.
AK Cook Inlet salmon drift gillnet .....	576	Steller sea lion, Western U.S. Harbor seal, GOA. Harbor porpoise, GOA. Dall's porpoise, AK. Beluga whale, Cook Inlet.
AK Kodiak salmon set gillnet .....	188	Harbor seal, GOA. Harbor porpoise, GOA. Sea otter, AK.
AK Metlakatla/Annette Island salmon drift gillnet .....	60	None documented.
AK Peninsula/Aleutian Islands salmon drift gillnet .....	164	Northern fur seal, Eastern Pacific. Harbor seal, GOA. Harbor porpoise, GOA. Dall's porpoise, AK.
AK Peninsula/Aleutian Islands salmon set gillnet .....	116	Steller sea lion, Western U.S. Harbor porpoise, Bering Sea.
AK Prince William Sound salmon drift gillnet .....	541	Steller sea lion, Western U.S. Northern fur seal, Eastern Pacific. Harbor seal, GOA. Pacific white-sided dolphin, North Pacific. Harbor porpoise, GOA. Dall's porpoise, AK. Sea Otter, AK.
AK Southeast salmon drift gillnet .....	481	Steller sea lion, Eastern U.S. Harbor seal, Southeast AK. Pacific white-sided dolphin, North Pacific. Harbor porpoise, Southeast AK. Dall's porpoise, AK.
AK Yakutat salmon set gillnet .....	170	Humpback whale, Central North Pacific. Harbor seal, Southeast AK. Gray whale, Eastern North Pacific.
CA/OR thresher shark/swordfish drift gillnet (≥14 in. mesh) .....	113	Steller sea lion, Eastern U.S. Sperm whale, CA/OR/WA. Dall's porpoise, CA/OR/WA. Fin whale, CA/OR/WA. Gray whale, Eastern North Pacific. Northern Pacific white-sided dolphin, CA/OR/WA

TABLE 1.—LIST OF FISHERIES COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery description	Estimated # of vessels/persons	Marine mammal species and stocks incidentally killed/injured
		Southern Pacific white-sided dolphin, CA/OR/WA. Risso's dolphin, CA/OR/WA. Bottlenose dolphin, CA/OR/WA offshore. Short-beaked common dolphin, CA/OR/WA. Long-beaked common dolphin, CA/OR/WA. Northern right-whale dolphin, CA/OR/WA. Short-finned pilot whale, CA/OR/WA. Baird's beaked whale, CA/OR/WA. Mesoplodont beaked whale, CA/OR/WA. Cuvier's beaked whale, CA/OR/WA. Pygmy sperm whale, CA/OR/WA. California sea lion, U.S. Northern elephant seal, CA breeding. Humpback whale, CA/OR/WA-Mexico. Minke whale, CA/OR/WA. Striped dolphin, CA/OR/WA. Killer whale, CA/OR/WA Pacific coast. Northern fur seal, San Miguel Island. None documented.
CA yellowtail, barracuda, white seabass, and tuna drift gillnet fishery (mesh size > 3.5 inches and < 14 inches).	24	
WA Puget Sound Region salmon drift gillnet (includes all inland waters south of US-Canada border and eastward of the Bonilla-Tatoosh line-Treaty Indian fishing is excluded).	210	Harbor porpoise, inland WA. Dall's porpoise, CA/OR/WA. Harbor seal, WA inland.
Purse Seine Fisheries:		
AK Southeast salmon purse seine .....	416	Humpback whale, Central North Pacific.
CA anchovy, mackerel, tuna purse seine .....	150	Bottlenose dolphin, CA/OR/WA offshore. California sea lion, U.S. Harbor seal, CA.
CA squid purse seine .....	65	Short-finned pilot whale, CA/OR/WA.
Trawl Fisheries:		
AK miscellaneous finfish pair trawl .....	2	None documented.
Longline/Set Line Fisheries:		
CA pelagic longline .....	30	California sea lion.
OR swordfish floating longline .....	1	None documented.
OR blue shark floating longline. ....	1	None documented.
<b>Category III</b>		
Gillnet Fisheries:		
AK Cook Inlet salmon set gillnet .....	745	Steller sea lion, Western U.S. Harbor seal, GOA. Harbor porpoise, GOA. Dall's porpoise, AK. Beluga whale, Cook Inlet.
AK Kuskokwim, Yukon, Norton Sound, Kotzebue salmon gillnet .....	1,922	Harbor porpoise, Bering Sea.
AK miscellaneous finfish set gillnet .....	3	Steller sea lion, Western U.S.
AK Prince William Sound salmon set gillnet .....	30	Steller sea lion, Western U.S. Harbor seal, GOA.
AK roe herring and food/bait herring gillnet .....	2,034	None documented.
CA set and drift gillnet fisheries that use a stretched mesh size of 3.5 in or less.	341	None documented.
Hawaii gillnet .....	115	Bottlenose dolphin, HI. Spinner dolphin, HI.
WA Grays Harbor salmon drift gillnet (excluding treaty Tribal fishing)	24	Harbor seal, OR/WA coast.
WA, OR herring, smelt, shad, sturgeon, bottom fish, mullet, perch, rockfish gillnet.	913	None documented.
WA, OR lower Columbia River (includes tributaries) drift gillnet .....	110	California sea lion, U.S. Harbor seal, OR/WA coast.
WA Willapa Bay drift gillnet .....	82	Harbor seal, OR/WA coast. Northern elephant seal, CA breeding.
Purse Seine, Beach Seine, Round Haul and Throw Net Fisheries:		
AK Metlakatla salmon purse seine .....	10	None documented.
AK miscellaneous finfish beach seine .....	1	None documented.
AK miscellaneous finfish purse seine .....	3	None documented.
AK octopus/squid purse seine .....	2	None documented.
AK roe herring and food/bait herring beach seine .....	8	None documented.
AK roe herring and food/bait herring purse seine .....	624	None documented.
AK salmon beach seine .....	34	None documented.
AK salmon purse seine (except Southeast Alaska, which is in Category II).	953	Harbor seal, GOA.

TABLE 1.—LIST OF FISHERIES COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery description	Estimated # of vessels/persons	Marine mammal species and stocks incidentally killed/injured
CA herring purse seine .....	100	California sea lion, U.S. Harbor seal, CA.
CA sardine purse .....	120	None documented.
HI opelu/akule net .....	16	None documented.
HI purse seine .....	18	None documented.
HI throw net, cast net .....	47	None documented.
WA (all species) beach seine or drag seine .....	235	None documented.
WA, OR herring, smelt, squid purse seine or lampara .....	130	None documented.
WA salmon purse seine .....	440	None documented.
WA salmon reef net .....	53	None documented.
Dip Net Fisheries:		
CA squid dip net .....	115	None documented.
WA, OR smelt, herring dip net .....	119	None documented.
Marine Aquaculture Fisheries:		
CA salmon enhancement rearing pen .....	>1	None documented.
OR salmon ranch .....	1	None documented.
WA, OR salmon net pens .....	14	California sea lion, U.S. Harbor seal, WA inland waters.
Troll Fisheries:		
AK North Pacific halibut, AK bottom fish, WA, OR, CA albacore, groundfish, bottom fish, CA halibut non-salmonid troll fisheries. AK salmon troll .....	1,530 (330 AK) 2,335	None documented. Steller sea lion, Western U.S. Steller sea lion, Eastern U.S.
American Samoa tuna troll .....	<50	None documented.
CA/OR/WA salmon troll .....	4,300	None documented.
Commonwealth of the Northern Mariana Islands tuna troll .....	50	None documented.
Guam tuna troll .....	50	None documented.
HI net unclassified .....	106	None documented.
HI trolling, rod and reel .....	1,795	None documented.
Longline/Set Line Fisheries:		
AK Bering Sea, Aleutian Islands Greenland turbot longline .....	36	Killer whale, Eastern North Pacific resident. Killer whale, Eastern North Pacific transient.
AK Bering Sea, Aleutian Islands cod longline .....	114	None documented.
AK Bering Sea, Aleutian Islands rockfish longline .....	17	None documented.
AK Bering Sea, Aleutian Islands sablefish longline .....	63	None documented.
AK Gulf of Alaska halibut longline .....	1,302	None documented.
AK Gulf of Alaska Pacific cod longline .....	440	None documented.
AK Gulf of Alaska rockfish longline .....	421	None documented.
AK Gulf of Alaska sablefish longline .....	412	None documented.
AK halibut longline/set line (State and Federal waters) .....	3,079	Steller sea lion, Western U.S.
AK octopus/squid longline .....	7	None documented.
AK state-managed waters groundfish longline/set line(including sablefish, rockfish, and miscellaneous finfish).	731	None documented.
WA, OR, CA groundfish, bottomfish longline/set line .....	367	None documented.
WA, OR North Pacific halibut longline/set line .....	350	None documented.
Trawl Fisheries:		
AK Bering Sea, Aleutian Islands Atka mackerel trawl .....	8	Steller sea lion, Western U.S.
AK Bering Sea, Aleutian Islands flatfish trawl .....	26	Steller sea lion, Western U.S. Killer whale, Eastern North Pacific resident. Killer whale, Eastern North Pacific transient.
AK Bering Sea, Aleutian Islands Pacific cod trawl .....	87	None documented.
AK Bering Sea, Aleutian Islands pollock trawl .....	120	Steller sea lion, Western U.S. Killer whale, Eastern North Pacific resident. Killer whale, Eastern North Pacific transient. Humpback whale, Central North Pacific. Humpback whale, Western North Pacific.
AK Bering Sea, Aleutian Islands rockfish trawl .....	9	None documented.
AK Gulf of Alaska flatfish trawl .....	52	None documented.
AK Gulf of Alaska Pacific cod trawl .....	101	None documented.
AK Gulf of Alaska pollock trawl .....	83	None documented.
AK Gulf of Alaska rockfish trawl .....	45	None documented.
AK food/bait herring trawl .....	3	None documented.
AK miscellaneous finfish otter or beam trawl .....	6	None documented.
AK shrimp otter trawl and beam trawl (statewide and Cook Inlet) .....	58	None documented.
AK state-managed waters of Cook Inlet, Kachemak Bay, Prince William Sound, Southeast AK groundfish trawl.	2	None documented.
WA, OR, CA groundfish trawl .....	585	Steller sea lion, Western U.S. Northern fur seal, Eastern Pacific. Pacific white-sided dolphin, Central North Pacific. Dall's porpoise, CA/OR/WA.

TABLE 1.—LIST OF FISHERIES COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery description	Estimated # of vessels/persons	Marine mammal species and stocks incidentally killed/injured
WA, OR, CA shrimp trawl .....	300	California sea lion, U.S. Harbor seal, OR/WA coast. None documented.
Pot, Ring Net, and Trap Fisheries:		
AK Aleutian Islands sablefish pot .....	8	None documented.
AK Bering Sea sablefish pot .....	6	Humpback whale, Central North Pacific. Humpback whale, Western North Pacific.
AK Bering Sea, Aleutian Islands Pacific cod pot .....	76	None documented.
AK Bering Sea, Aleutian Islands crab pot .....	329	None documented.
AK Gulf of Alaska crab pot .....	(1)	None documented.
AK Gulf of Alaska Pacific cod pot .....	154	None documented.
AK Southeast Alaska crab pot .....	(1)	None documented.
AK Southeast Alaska shrimp pot .....	(1)	None documented.
AK octopus/squid pot .....	72	None documented.
AK snail pot .....	2	None documented.
CA lobster, prawn, shrimp, rock crab, fish pot .....	608	Sea otter, CA.
OR, CA hagfish pot or trap .....	25	None documented.
WA, OR, CA crab pot .....	1,478	None documented.
WA, OR, CA sablefish pot .....	176	None documented.
WA, OR shrimp pot & trap .....	254	None documented.
HI crab trap .....	22	None documented.
HI fish trap .....	19	None documented.
HI lobster trap .....	15	Hawaiian monk seal.
HI shrimp trap .....	5	None documented.
Handline and Jig Fisheries:		
AK miscellaneous finfish handline and mechanical jig .....	100	None documented.
AK North Pacific halibut handline and mechanical jig .....	93	None documented.
AK octopus/squid handline .....	2	None documented.
American Samoa bottomfish .....	<50	None documented.
Commonwealth of the Northern Mariana Islands bottomfish .....	<50	None documented.
Guam bottomfish .....	<50	None documented.
HI aku boat, pole and line .....	54	None documented.
HI deep sea bottomfish .....	434	Hawaiian monk seal.
HI inshore handline .....	650	Bottlenose dolphin, HI.
HI tuna .....	144	Rough-toothed dolphin, HI. Bottlenose dolphin, HI. Hawaiian monk seal.
WA groundfish, bottomfish jig .....	679	None documented.
Harpoon Fisheries:		
CA swordfish harpoon .....	228	None documented.
Pound Net/Weir Fisheries:		
AK herring spawn on kelp pound net .....	452	None documented.
AK Southeast herring roe/food/bait pound net .....	3	None documented.
WA herring brush weir .....	1	None documented.
Bait Pens:		
WA/OR/CA bait pens .....	13	None documented.
Dredge Fisheries:		
Coastwide scallop dredge .....	108 (12 AK)	None documented.
Dive, Hand/Mechanical Collection Fisheries:		
AK abalone .....	1	None documented.
AK clam .....	156	None documented.
WA herring spawn on kelp .....	4	None documented.
AK dungeness crab .....	3	None documented.
AK herring spawn on kelp .....	363	None documented.
AK urchin and other fish/shellfish .....	471	None documented.
CA abalone .....	111	None documented.
CA sea urchin .....	583	None documented.
HI coral diving .....	2	None documented.
HI fish pond .....	10	None documented.
HI handpick .....	135	None documented.
HI lobster diving .....	6	None documented.
HI squidding, spear .....	267	None documented.
WA, CA kelp .....	4	None documented.
WA/OR sea urchin, other clam, octopus, oyster, sea cucumber, scallop, ghost shrimp hand, dive, or mechanical collection.	637	None documented.
WA shellfish aquaculture .....	684	None documented.
Commercial Passenger Fishing Vessel (Charter Boat) Fisheries:		
AK, WA, OR, CA commercial passenger fishing vessel .....	>7,000 (1,107 AK)	None documented.

TABLE 1.—LIST OF FISHERIES COMMERCIAL FISHERIES IN THE PACIFIC OCEAN—Continued

Fishery description	Estimated # of vessels/persons	Marine mammal species and stocks incidentally killed/injured
HI “other” .....	114	None documented.
Live Finfish/Shellfish Fisheries: CA finfish and shellfish live trap/hook-and-line .....	93	None documented.

List of Abbreviations used in Table 1: AK—Alaska; CA—California; GOA—Gulf of Alaska; HI—Hawaii; OR—Oregon; WA—Washington.

TABLE 2.—LIST OF FISHERIES COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN, GULF OF MEXICO, AND CARIBBEAN

Fishery description	Estimated number of vessels/persons	Marine mammal species and stocks incidentally killed/injured
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**Category I**

<i>Gillnet Fisheries:</i>		
Mid-Atlantic coastal gillnet .....	>655	Humpback whale, Gulf of Maine. Minke whale, Canadian east coast. Bottlenose dolphin, WNA offshore. Bottlenose dolphin, WNA coastal. Harbor porpoise, GME/BF. Harbor seal, WNA. Harp seal, WNA. Long-finned pilot whale, WNA. Short-finned pilot whale, WNA. White-sided dolphin, WNA. Common dolphin, WNA.
Northeast sink gillnet .....	341	North Atlantic right whale, WNA. Humpback whale, WNA. Minke whale, Canadian east coast. Killer whale, WNA. White-sided dolphin, WNA. Bottlenose dolphin, WNA offshore. Harbor porpoise, GME/BF. Harbor seal, WNA. Gray seal, WNA. Common dolphin, WNA. Fin whale, WNA. Spotted dolphin, WNA. False killer whale, WNA. Harp seal, WNA.
<i>Longline Fisheries:</i>		
Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline .....	<200	Humpback whale, WNA. Minke whale, Canadian east coast. Risso’s dolphin, WNA. Long-finned pilot whale, WNA. Short-finned pilot whale, WNA. Common dolphin, WNA. Atlantic spotted dolphin, WNA. Pantropical spotted dolphin, WNA. Striped dolphin, WNA. Bottlenose dolphin, WNA offshore. Bottlenose dolphin, GMX Outer Continental Shelf. Bottlenose dolphin, GMX Continental Shelf Edge and Slope. Atlantic spotted dolphin, Northern GMX. Pantropical spotted dolphin, Northern GMX. Risso’s dolphin, Northern GMX. Harbor porpoise, GME/BF. Pygmy sperm whale, WNA.
<i>Trap/Pot Fisheries:</i>		
Northeast/Mid-Atlantic American lobster trap/pot .....	13,000	North Atlantic right whale, WNA. Humpback whale, WNA. Fin whale, WNA. Minke whale, Canadian east coast. Harbor seal, WNA.

TABLE 2.—LIST OF FISHERIES COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN, GULF OF MEXICO, AND CARIBBEAN—  
Continued

Fishery description	Estimated number of vessels/persons	Marine mammal species and stocks incidentally killed/injured
<i>Trawl Fisheries:</i>		
Atlantic squid, mackerel, butterfish trawl .....	620	Common dolphin, WNA. Risso's dolphin, WNA. Long-finned pilot whale, WNA. Short-finned pilot whale, WNA. White-sided dolphin, WNA.
<b>Category II</b>		
<i>Gillnet Fisheries:</i>		
Gulf of Mexico gillnet .....	724	Bottlenose dolphin, Western GMX coastal. Bottlenose dolphin, Northern GMX coastal. Bottlenose dolphin, Eastern GMX coastal. Bottlenose dolphin, GMX Bay, Sound, and Estuarine.
North Carolina inshore gillnet .....	94	Bottlenose dolphin, WNA coastal.
Northeast anchored float gillnet .....	133	Humpback whale, WNA. White-sided dolphin, WNA. Harbor seal, WNA.
Northeast drift gillnet .....	<sup>(1)</sup> None documented.	
Southeast Atlantic gillnet .....	779	Bottlenose dolphin, WNA coastal.
Southeastern U.S. Atlantic shark gillnet .....	6	Bottlenose dolphin, WNA coastal. North Atlantic right whale, WNA. Atlantic spotted dolphin, WNA.
<i>Trawl Fisheries:</i>		
Atlantic herring midwater trawl (including pair trawl) .....	17	Harbor seal, WNA.
<i>Trap/Pot Fisheries:</i>		
Atlantic blue crab trap/pot .....	>16,000	Bottlenose dolphin, WNA coastal. West Indian manatee, FL.
Atlantic mixed species trap/pot .....	<sup>(1)</sup>	Fin whale, WNA. Humpback whale, Gulf of Maine. Minke whale, Canadian east coast. Harbor porpoise, GM/BF.
<i>Purse Seine Fisheries:</i>		
Gulf of Mexico menhaden purse seine .....	50	Bottlenose dolphin, Western GMX coastal. Bottlenose dolphin, Northern GMX coastal.
<i>Haul/Beach Seine Fisheries:</i>		
Mid-Atlantic haul/beach seine .....	25	Bottlenose dolphin, WNA coastal. Harbor porpoise, GME/BF.
North Carolina long haul seine .....	33	Bottlenose dolphin, WNA coastal.
<i>Stop Net Fisheries:</i>		
North Carolina roe mullet stop net .....	13	Bottlenose dolphin, WNA coastal.
<i>Pound Net Fisheries:</i>		
Virginia pound net .....	187	Bottlenose dolphin, WNA coastal.
<b>Category III</b>		
<i>Gillnet Fisheries:</i>		
Caribbean gillnet .....	>991	Dwarf sperm whale, WNA. West Indian manatee, Antillean.
Chesapeake Bay inshore gillnet .....	45	Harbor porpoise, GME/BF.
Delaware Bay inshore gillnet .....	60	Humpback whale, WNA. Bottlenose dolphin, WNA coastal. Harbor porpoise, GME/BF.
Long Island Sound inshore gillnet .....	20	Humpback whale, WNA. Bottlenose dolphin, WNA coastal. Harbor porpoise, GME/BF.
Rhode Island, southern Massachusetts (to Monomoy Island), and New York Bight (Raritan and Lower New York Bays) inshore gillnet.	32	Humpback whale, WNA. Bottlenose dolphin, WNA coastal. Harbor porpoise, GME/BF.
<i>Trawl Fisheries:</i>		
Calico scallops trawl .....	12	None documented.
Crab trawl .....	400	None documented.
Georgia, South Carolina, Maryland whelk trawl .....	25	None documented.
Gulf of Maine, Mid-Atlantic sea scallop trawl .....	215	None documented.
Gulf of Maine northern shrimp trawl .....	320	None documented.
Gulf of Mexico butterfish trawl .....	2	Atlantic spotted dolphin, Eastern GMX. Pantropical spotted dolphin, Eastern GMX.
Gulf of Mexico mixed species trawl .....	20	None documented.

TABLE 2.—LIST OF FISHERIES COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN, GULF OF MEXICO, AND CARIBBEAN—  
Continued

Fishery description	Estimated number of vessels/persons	Marine mammal species and stocks incidentally killed/injured
Mid-Atlantic mixed species trawl .....	>1,000	None documented.
North Atlantic bottom trawl .....	1,052	Long-finned pilot whale, WNA. Short-finned pilot whale, WNA. Common dolphin, WNA. White-sided dolphin, WNA. Striped dolphin, WNA. Bottlenose dolphin, WNA offshore.
Southeastern U.S. Atlantic, Gulf of Mexico coastal shrimp trawl .....	>18,000	Bottlenose dolphin, WNA.
U.S. Atlantic monkfish trawl .....	(1)	Common dolphin, WNA.
<i>Marine Aquaculture Fisheries:</i>		
Finfish aquaculture .....	48	Harbor seal, WNA.
Shellfish aquaculture .....	(1)	None documented.
<i>Purse Seine Fisheries:</i>		
Gulf of Maine Atlantic herring purse seine .....	30	Harbor porpoise, GME/BF. Harbor seal, WNA. Gray seal, WNA.
Gulf of Maine menhaden purse seine .....	50	None documented.
Florida west coast sardine purse seine .....	10	Bottlenose dolphin, Eastern GMX coastal.
Mid-Atlantic menhaden purse seine .....	22	Bottlenose dolphin, WNA coastal. Humpback whale, WNA.
U.S. Atlantic tuna purse seine .....	5	None documented.
U.S. Mid-Atlantic hand seine .....	>250	None documented.
<i>Longline/Hook-and-Line Fisheries:</i>		
Gulf of Maine tub trawl groundfish bottom longline/ hook-and-line .....	46	Harbor seal, WNA. Gray seal, Northwest North Atlantic. Humpback whale, WNA.
Gulf of Maine, U.S. Mid-Atlantic tuna, shark swordfish hook-and-line/ harpoon.	26,223	Humpback whale, WNA.
Southeastern U.S. Atlantic, Gulf of Mexico, and Caribbean snapper-grouper and other reef fish bottom longline/hook-and-line.	>5,000	None documented.
Southeastern U.S. Atlantic, Gulf of Mexico shark bottom longline/ hook-and-line.	<125	None documented.
Southeastern U.S. Atlantic, Gulf of Mexico, and Caribbean pelagic hook-and-line/harpoon.	1,446	None documented.
<i>Trap/Pot Fisheries</i>		
Caribbean mixed species trap/pot .....	>501	None documented.
Caribbean spiny lobster trap/pot .....	>197	None documented.
Florida spiny lobster trap/pot .....	2,145	Bottlenose dolphin, Eastern GMX coastal.
Gulf of Mexico blue crab trap/pot .....	4,113	Bottlenose dolphin, Western GMX coastal. Bottlenose dolphin, Northern GMX coastal. Bottlenose dolphin, Eastern GMX coastal. Bottlenose dolphin, GMX Bay, Sound, & Estuarine. West Indian manatee, FL.
Gulf of Mexico mixed species trap/pot .....	(1)	None documented.
Southeastern U.S. Atlantic, Gulf of Mexico golden crab trap/pot .....	10	None documented.
Southeastern U.S. Atlantic, Gulf of Mexico stone crab trap/pot .....	4,453	None documented.
U.S. Mid-Atlantic eel trap/pot .....	>700	None documented.
<i>Stop Seine/Weir/Pound Net Fisheries:</i>		
Gulf of Maine herring and Atlantic mackerel stop seine/weir .....	50	North Atlantic right whale, WNA. Humpback whale, WNA. Minke whale, Canadian east coast. Harbor porpoise, GME/BF. Harbor seal, WNA. Gray seal, Northwest North Atlantic.
U.S. Mid-Atlantic crab stop seine/weir .....	2,600	None documented.
U.S. Mid-Atlantic mixed species stop seine/weir/pound net (except the North Carolina roe mullet stop net).	751	None documented.
<i>Dredge Fisheries:</i>		
Gulf of Maine mussel .....	>50	None documented.
Gulf of Maine, U.S. Mid-Atlantic sea scallop dredge .....	233	None documented.
U.S. Mid-Atlantic/Gulf of Mexico oyster .....	7,000	None documented.
U.S. Mid-Atlantic offshore surf clam and quahog dredge .....	100	None documented.
<i>Haul/Beach Seine Fisheries:</i>		
Caribbean haul/beach seine .....	15	West Indian manatee, Antillean.
Gulf of Mexico haul/beach seine .....	(1)	None documented.
Southeastern U.S. Atlantic, haul/beach seine .....	25	None documented.
<i>Dive, Hand/Mechanical Collection Fisheries:</i>		
Atlantic Ocean, Gulf of Mexico, Caribbean shellfish dive, hand/mechanical collection.	20,000	None documented.

TABLE 2.—LIST OF FISHERIES COMMERCIAL FISHERIES IN THE ATLANTIC OCEAN, GULF OF MEXICO, AND CARIBBEAN—  
Continued

Fishery description	Estimated number of vessels/persons	Marine mammal species and stocks incidentally killed/injured
Gulf of Maine urchin dive, hand/mechanical collection .....	>50 <sup>(1)</sup>	None documented.
Gulf of Mexico, Southeast Atlantic, Mid-Atlantic, and Caribbean cast net.		None documented.
Commercial Passenger Fishing Vessel (Charter Boat) Fisheries: Atlantic Ocean, Gulf of Mexico, Caribbean commercial passenger fishing vessel.	4,000	None documented.

List of Abbreviations Used in Table 2: FL—Florida; GA—Georgia; GME/BF—Gulf of Maine/Bay of Fundy; GMX—Gulf of Mexico; NC—North Carolina; SC—South Carolina; TX—Texas; WNA—Western North Atlantic.

<sup>1</sup>Unknown.

### Classification

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule will not have a significant economic impact on a substantial number of small entities. The factual basis for the certification appears elsewhere in the preamble to this rule and is not repeated here. As a result, no regulatory flexibility analysis was prepared. One comment was received regarding compliance with the RFA (Comment 23) and is responded to above. That comment did not cause a change in the certification previously made.

This final rule contains collection-of-information requirements subject to the Paperwork Reduction Act. The collection of information for the registration of fishers under the MMPA has been approved by the Office of Management and Budget (OMB) under OMB control number 0648–0293 (0.25 hours per report for new registrants and 0.15 hours per report for renewals). The requirement for reporting marine mammal injuries or mortalities has been approved by OMB under OMB control number 0648–0292 (0.15 hours per report). These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send

comments regarding these reporting burden estimates or any other aspect of the collection of information, including suggestions for reducing burden, to NMFS and OMB (see **ADDRESSES**).

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

This final rule has been determined to be not significant for the purposes of Executive Order 12866.

An environmental assessment (EA) was prepared under the National Environmental Policy Act (NEPA) for regulations to implement section 118 of the MMPA (1995 EA). The 1995 EA concluded that implementation of those regulations would not have a significant impact on the human environment. This final rule would not make any significant change in the management of reclassified fisheries, and therefore, this final rule is not expected to change the analysis or conclusion of the 1995 EA. If NMFS takes a management action, for example, through the development of a Take Reduction Plan (TRP), NMFS will first prepare an environmental document as required under NEPA specific to that action.

This final rule will not affect species listed as threatened or endangered

under the Endangered Species Act (ESA) or their associated critical habitat. The impacts of numerous fisheries have been analyzed in various biological opinions, and this final rule will not affect the conclusions of those opinions. The classification of fisheries on the LOF is not considered to be a management action that would adversely affect threatened or endangered species. If NMFS takes a management action, for example, through the development of a TRP, NMFS would conduct consultation under section 7 of the ESA for that action.

This final rule will have no adverse impacts on marine mammals and may have a positive impact on marine mammals by improving knowledge of marine mammals and the fisheries interacting with marine mammals through information collected from observer programs or take reduction teams.

This final rule will not affect the land or water uses or natural resources of the coastal zone, as specified under section 307 of the Coastal Zone Management Act.

Dated: August 5, 2004.

**William T. Hogarth,**

*Assistant Administrator for Fisheries,  
National Marine Fisheries Service.*

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