TABLE 2.—INTEGRAL VISTAS ASSOCIATED WITH MANDATORY CLASS I AREAS—Continued

Park	Observation point	View angle	Key features	Also viewed from—
	Con Robinson's Point	308°-150°	Herring Cove Beach Provincial Park Eastern Head Herring Cove Mainland New Brunswick* Point La Preau* Wolf Islands* Atlantic Ocean* Grand Manan Island	*Features viewed from Liberty Point.*
	Liberty Point	34°-236°	Ragged Point Mainland New Brunswick* Atlantic Ocean* Wolf Islands* Grand Manan Island* Sail Rock West Quoddy Head Lighthouse South Lubec	*Features viewed from Con Robinson's Points.

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Part VII

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 216 et al.

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Interim Exemption for Commercial Fisheries; Interim Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 216, 229 and 611

[Docket No. 81140-9106]

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Interim Exemption for Commercial Fisheries

AGENCY: National Marine Fisheries Service (NOAA Fisheries), NOAA, Commerce.

ACTION: Interim rule.

SUMMARY: NOAA Fisheries issues this interim rule to govern the taking of marine mammals incidental to commercial fishing operations and requests public comments. These regulations implement portions of the recent amendments to the Marine Mammal Protection Act of 1972 (MMPA) which provide a 5-year exemption for certain incidental takings of marine mammals in the course of commercial fishing. The intended effect of this rule is to establish a program for exempting commercial fishermen from certain of the MMPA's prohibitions on taking. After considering public comments, NOAA Fisheries will be issuing final regulations to replace this interim rule.

DATES: The amendments to Parts 216 and 611 and §§ 229.5 and 229.6 of this interim rule become effective on May 19, 1989. The remaining sections in Part 229 become effective on July 21, 1989. Comments on this interim rule must be received by July 18, 1989. Registration for Exemption Certificates under § 229.5 will be accepted immediately. Part 229 expires on October 1, 1993.

ADDRESS: Send comments to Dr. Nancy Foster, Director, Office of Protected Resources, National Marine Fisheries Service, 1335 East West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Herbert W. Kaufman, Office of Protected Resources, 301–427–2319; Steven Zimmerman, Alaska Region, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK 99802, 907–586–7233; Brent Norberg, Northwest Region, National Marine Fisheries Service, 7600 Sand Point Way NE, Seattle, WA 98115, 206–526–6110; James Lecky, Southwest Region, National Marine Fisheries Service, 300 S. Ferry Street, Terminal Island, CA 90731–7415, 213–514–6664; Douglas Beach, Northeast Region, National Marine Fisheries Service, 1 Blackburn Drive, Gloucester, MA 01930, 508–281–9328; or, Charles Oravetz, Southeast Region, National Marine Fisheries Service, 9450 Koger Blvd., St. Petersburg, FL 33702, 813–893–3366.

SUPPLEMENTARY INFORMATION:

Background

Before the 1988 amendments, the MMPA prohibited the take of marine mammals incidental to commercial fishing operations unless authorized by a general permit or a small take exemption. In order to issue a general permit, NOAA Fisheries was required to determine that the population stock from which a marine mammal was to be taken was within its optimum sustainable population (OSP) and that the marine mammal stock would not be disadvantaged by the incidental take. If these determinations could not be made, a permit could not be issued for that particular marine mammal stock. Early in 1988 it became apparent that the necessary determinations to renew certain general permits could not be made and many fishermen would be forced to forgo fishing altogether or risk substantial penalties for violating the MMPA. To address this problem, Congress amended the MMPA based on a proposal developed by representatives of the fishing industry and the conservation community.

Section 114, added by Pub. L. 100–711 on November 23, 1988, replaces most earlier provisions of the MMPA for granting incidental take authorizations to commercial fishermen with an interim exemption system valid until October 1, 1993. Section 114 gives most commercial fishermen a 5-year exemption from the incidental taking provisions of the MMPA, provided that certain conditions are met. The primary objective of this interim system is to provide a means to obtain reliable information about interactions between commercial fishing activities and marine mammals while allowing commercial fishing operations to continue despite NOAA Fisheries' current inability to make OSP findings. The information collected in conjunction with the exemption system and information on the sizes and trends of marine mammal populations will be used to develop a long-term program to govern the taking of marine mammals associated with commercial fisheries. The Secretary of Commerce is required to provide Congress a proposed system of authorizing incidental takes by January 1, 1992.

The 1988 amendments retain the immediate goal of the MMPA to reduce the incidental kill or serious injury of marine mammals in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate. As stated in Senate Report 100–592, Congress anticipated that progress toward this goal would be achieved through education programs and the development of improved fishing gear and techniques, and commended the commitment made by representatives of commercial fishing organizations to undertake and fund a special research program on gear technology and fishing practices, and to educate and inform fishermen of their responsibilities under the MMPA.

The 1988 amendments require the Secretary of Commerce to publish a list of fisheries, along with the marine mammals and number of vessels or persons involved in each such fishery, in three categories as follows:

(I) A frequent incidental taking of marine mammals;

(II) An occasional incidental taking of marine mammals; or

(III) A remote likelihood, or no known incidental taking, of marine mammals.

NOAA Fisheries published an advance notice of proposed rulemaking and proposed List of Fisheries in the Federal Register on January 27, 1989 (54 FR 4154). Comments were requested by February 27, 1989. NOAA Fisheries issued a notice of final List of Fisheries on April 20, 1989 (54 FR 16072). The List of Fisheries, categorized according to frequency of incidental take of marine mammals, will be reviewed at least annually and may be amended, after notice in the **Federal Register** and opportunity for public comment.

Based on Congressional guidance, NOAA Fisheries' interpretation of the 1988 amendments, public comment and meetings and consultations with State and Federal agencies, Regional Fishery Management Councils, treaty Indian tribes, and other interested parties, NOAA Fisheries issues this interim rule under the authority of sections 112 and 114(k) of the MMPA to govern exemptions on the taking of marine mammals incidental to commercial fishing operations. The 1988 amendments require that, beginning July 21, 1989, vessel owners must be registered and have proof of an exemption in order to engage lawfully in any Category I or II fishery. The 1988 amendments also require that within 120 days of enactment of the amendments, the Secretary publish in the **Federal Register** information to advise vessel owners on how to register for an exemption and otherwise comply with the requirements of section 114 of the MMPA. There is not sufficient time to publish a proposed rule to establish a registration and exemption system, solicit public comment, and issue a final rule in time to notify fishermen of the rule and allow all affected fishing vessel owners an opportunity to register for and receive an exemption before July 21, 1989. Therefore, to accommodate the statutory deadlines, NOAA Fisheries issues this interim rule and requests public comment. The registration and Exemption Certificate provisions established by §§ 229.5 and 229.6 of this interim rule become effective immediately; the prohibitions and other provisions become effective on July 21, 1989. Registration for Exemption Certificates may begin immediately in accordance with the instructions in this document. Based on comments received, NOAA Fisheries will issue final regulations to replace this interim rule that may amend these requirements.

NOAA Fisheries will also issue proposed regulations on the reporting requirements associated with the exemption system, and will request public comment. The reporting requirements will become effective upon publication of final regulations on the reporting requirements in the **Federal Register**.

Comments and Responses

Fifty-six comments were received in response to the January 27, 1989, advance notice of proposed rulemaking and proposed List of Fisheries. Comments and information were received from members of Congress, State and Federal agencies, treaty Indian tribes, fishing associations, fishermen, conservation groups and other interested parties. Comments on the exemption system, observer program and related topics are summarized below along with NOAA Fisheries' responses. These comments were considered in developing this interim rule. Comments on the criteria for categorizing fisheries and on the List of Fisheries are summarized and discussed in the final List of Fisheries (April 20, 1989; 54 FR 16072). Comments on the reporting system will be discussed in the notice issuing NOAA Fisheries' proposed regulations governing the reporting requirements.

Comments on Exemption System

1. One commenter urged that an interim rule be issued to implement the exemption system, to define limitations on intentional taking, and to establish terms and conditions. Another commenter urged that the public be given another opportunity to comment on the proposed exemption system before it is final, and urged that NOAA Fisheries hold public hearings after the first year of implementation.

Beginning July 21, 1989, fishermen must be registered to fish lawfully in any Category I or II fishery. To give fishermen sufficient time to register and to notify them of the requirements that will be in place, NOAA Fisheries issues this interim rule and requests public comment. Based on public comment, a final rule will be issued that may amend these requirements. Public meetings or public hearings will be conducted as necessary during the 5-year interim exemption.

2. Commenters believed that the exemption program should follow a conservative approach that favors the protection of marine mammals. Terms and conditions should be added to all exemptions to protect marine mammals, such as prohibitions on the disposal at sea of fishing gear that may entangle marine mammals.

Section 114 gives fishermen a 5-year exemption from the incidental taking provisions of the MMPA, provided certain conditions are met. The information collected in conjunction with the exemption system and information on the sizes and trends of marine mammal populations will be used to develop a long-term program to govern the incidental taking of marine mammals associated with commercial fisheries. NOAA Fisheries will restrict fisheries during the 5-year exemption if it is determined necessary to prevent significant adverse impacts on marine mammal populations or to comply with other statutory requirements. (See "Emergency and Special Regulations" section below.) NOAA Fisheries also recognizes its duty to reduce the level of incidental kill or serious injuries and has established reasonable terms and conditions to Exemption Certificates to minimize impacts while allowing commercial fisheries to continue. This interim rule prohibits the willful discard of any fishing gear, in whole or in part, in Category I, II and III fisheries.

3. Commenters believed that NOAA Fisheries should reaffirm its intent to meet the immediate goal requirement of the amendments.

NOAA Fisheries recognizes that identifying means of reducing the incidental take is important in developing a long-term program, and expects that the fishing industry will play a major role in developing improved fishing gear and techniques to reduce the incidental take of marine mammals. As noted above, NOAA Fisheries also recognizes its duties to consider requirements to reduce serious injuries or kills incidental to commercial fishing operations.

4. One commenter believed that, since the MMPA's definition of take was not changed, the definition of incidental take should not be restricted to accidental takes by entanglement, serious injury or death. Another commenter believed that only injuries or mortalities should be considered a take under section 114 of the MMPA.

The 1988 amendments to the MMPA did not change the definition of take or the prohibitions on taking marine mammals. Take, as defined in section 3 of the MMPA, means to harass, hunt, capture or kill, or attempt to harass, hunt, capture or kill any marine mammal. Incidental take is defined in this interim rule to mean any accidental or intentional taking of a marine mammal in the course of commercial fishing operations.

5. One commenter believed that the exemption under the MMPA should apply to endangered and threatened marine mammals, regardless of whether or not the takings were authorized under the Endangered Species Act of 1973 (ESA). The commenter believed that takings of endangered or threatened species not authorized under the ESA should only be subject to penalties under the ESA, rather than penalties under both the ESA and MMPA.

In general, the MMPA exemptions will apply to the accidental taking of endangered and threatened marine mammals (except southern sea otters). Restrictions on the MMPA exemptions may be made to reduce the incidental taking or to prohibit any taking of certain endangered and threatened species, if necessary to minimize adverse impacts to a population or to comply with other statutory requirements. However, endangered and threatened species continue to be protected under the ESA. The MMPA exemption does not exempt fishermen from the prohibitions under the ESA on taking endangered and threatened species. To be exempt from the taking prohibitions under the ESA, additional taking authorization is needed.

6. One commenter recommended that fishermen be automatically registered in 1989, since many fishermen will be impossible to reach because they will already be fishing by July 21 when the exemption system is to be in place. The first year should be used to familiarize fishermen with the exemption and reporting requirements.

The 1988 amendments require that, beginning July 21, 1989, vessel owners must register with NOAA Fisheries and have proof of an exemption in order to engage lawfully in any Category I or II fishery. Section 114 of the MMPA and

§ 229.9 of this interim rule contain a provision that unknowing violations will not be prosecuted during 1989. Congress added this exception to account for situations where, because a fisherman was involved in a fishery before the appropriate exemption forms and decals were available or because of the remote location of the fishery, the fisherman had no way of knowing of the requirements or did not have the ability to obtain an exemption.

7. One commenter recommended that one exemption cover both Category I and II fisheries since many fishermen will engage in fisheries in both categories and since the only significant difference between the two categories is observer coverage.

The Exemption Certificate will cover all the Category I and II fisheries that were included in the vessel owner's registration.

8. One commenter believed that using the July 21 date for the start of the annual exemption and reporting requirement would be confusing since it falls in the middle of many fishing seasons.

After the start of the program in July, 1989, NOAA Fisheries plans to use a calendar year for the Exemption Certificates, reporting requirements and quota monitoring, which is less likely to fall in the middle of a fishing season. That is, Exemption Certificates will be valid from January 1 through December 31 and reports covering that period will be due at the end of the year.

9. Commenters opposed requiring a decal as a proof of the exemption since there is already an apparent stigma attached to Category I fisheries and displaying a decal serves no useful purpose. Some of these commenters believed that a decal could potentially subject participating vessels to harm from radical animal rights groups.

NOAA Fisheries believes that a decal will serve to assist in education and enforcement efforts, and does not believe it will place any fisherman at risk. The decal will not distinguish between Category I and II fisheries.

10. One commenter opposed charging a fee for an exemption even though the fisherman may never take a marine mammal.

An Exemption Certificate is required to fish legally in a Category I or II fishery regardless of whether or not marine mammals are taken. As provided in section 114(b)(5) of the MMPA, NOAA Fisheries is charging a fee of $30.00 to cover administrative costs of granting and renewing Exemption Certificates. No Exemption Certificate is required and no fee will be charged to fish legally in Category III fisheries, which have only a remote likelihood of incidentally taking marine mammals.

11. One commenter believed that the regulations should clarify that no takings of southern (California) sea otters and no intentional lethal takings of Steller sea lions, cetaceans and depleted species are allowed under this exemption.

The interim rule includes these restrictions as prohibitions under § 229.4 applicable to Category I, II and III fisheries.

12. Commenters believed that intentional takes to protect gear and catch should be authorized under this program, as they were under the general permits. Other commenters recommended that if intentional takes are authorized, all non-lethal methods be required before taking more serious steps. One commenter recommended that NOAA Fisheries specify that any intentional lethal takings in a Category III fishery are illegal since a need to take marine mammals intentionally would be sufficient basis for listing the fishery in Category II.

The interim rule contains provisions (§§ 229.6(c) and 229.7 (d) and (e)) allowing intentional takings to protect gear, catch or person, similar to those under the general permit system. All non-injurious methods must be attempted prior to injuring or killing an animal that is causing immediate and significant damage. The provisions would also apply to Category III fisheries, although NOAA Fisheries anticipates that there will be few, if any, intentional lethal takings since these fisheries have only a remote possibility of incidentally taking marine mammals. NOAA Fisheries does not believe it is appropriate to place more restrictions on Category III fisheries than on Category I or II fisheries.

13. One commenter believed that the exemption should not allow the intentional lethal taking of Alaskan sea otters since the type of interactions that occur between this species and fisheries would not justify taking an animal to protect gear, catch or person. Sea otters have been subject to malicious takings, and such an authorization could be used as an excuse to continue this practice.

Intentional lethal takings of marine mammals are only allowed under the interim exemption, if necessary to protect gear, catch or person, after all reasonable non-injurious methods of deterrence have been exhausted. The U.S. Fish and Wildlife Service (FWS) concurs with the commenter that intentional takings of sea otters are not necessary to protect gear, catch or human life. Therefore, there should be little or no need to intentionally lethally take sea otters. However, the FWS recommended, based on the best available scientific information, that the intentional lethal take of Alaskan sea otters should be specifically prohibited in this interim rule. Therefore, NOAA Fisheries defers to the FWS on this issue and prohibits the intentional lethal taking of Alaskan sea otters.

14. One commenter objected to the observer requirement for Category I fisheries because of increased costs related to liability insurance and to accommodations for the observers, and because of the zero tolerance policy on drug possession making the captain responsible for any drug possession by the observers.

NOAA Fisheries is required under section 114(e) to place observers on board certain vessels engaged in Category I fisheries, with limited exceptions, and intends to reimburse vessel owners for all reasonable costs directly related to housing and maintaining observers. Section 114(e)(7) of the MMPA also contains limits on a vessel owner's liability for observers. Observers will be made aware of the U.S. Coast Guard's zero tolerance policy and their responsibilities to the Federal government and the vessel owner in regard to the policy.

15. Commenters stated that the role of the required observer should be specified and that the observer should not act as an enforcement agent while on board domestic fishing vessels. Another commenter recommended that the regulations state that data obtained from observers or other sources can and will be used as the basis for prosecuting fishermen for violating the MMPA or the conditions of the interim exemption.

The primary purpose of an observer is to collect scientific information. The observers will not have enforcement authority or powers; however, the data collected by an observer will be used in monitoring quotas for Steller sea lions and North Pacific fur seals. The data can also be used in civil or criminal enforcement proceedings.

16. One commenter recommended that the regulations specify the procedures whereby vessels in Category II and III fisheries may be asked to take observers and the possible consequences of failing to take observers if requested.

The observer requirements apply only to vessels in Category I fisheries. NOAA Fisheries may request vessels in Category II or III to take observers. These vessel owners are not required to take observers, and there are no penalties for not taking observers. Therefore, NOAA Fisheries does not believe it is appropriate to include any specific provisions in the regulations.

17. One commenter recommended that the regulations include provisions to require fishermen to retain and turn in certain critically needed biological specimens since animals killed during commercial fishing operations may provide the only reasonable source of certain specimens.

NOAA Fisheries has included provisions in § 229.6(c)(10) of this interim rule under which the Assistant Administrator may include additional terms and conditions in Exemption Certificates. Such conditions may include requirements for retention of biological specimens, if determined appropriate.

18. One commenter recommended that special conditions, as allowed under the MMPA in cases where a fishery will have a significant impact on a species, should be issued as soon as possible and contain measures to reduce impacts such as limiting the number of marine mammals which may be taken, the location or season where they may be taken, or the manner or gear that can be used.

NOAA Fisheries will follow the procedures for special regulations to implement necessary mitigating measures when available information indicates a significant adverse impact on a population. (See "Emergency and Special Regulations" section below.)

19. One commenter believed that any mitigating measures should be as limited as possible and not be applied across fisheries, since one fishery should not be accountable for interactions in another fishery.

NOAA Fisheries agrees; however allowable takes under established quotas may need to be allocated among fisheries.

20. One commenter believed that Category III fisheries cannot be regulated on a non-emergency basis even if the fishery poses a significant adverse impact to a marine mammal population over a period of time longer than one year.

NOAA Fisheries disagrees and believes that section 114(g) of the MMPA provides authority for placing restrictions on a Category III fishery if the incidental taking in the fishery will likely have a significant adverse impact on a marine mammal population. Fisheries are not classified based on impacts to marine mammal populations; rather, they are classified based on the average frequency with which marine mammals are incidentally taken in a fishery. Therefore, it is possible that the taking incidental to a Category III fishery, combined with other impacts, could have a significant impact on a marine mammal population.

21. One commenter recommended that NOAA Fisheries emphasize that failure to obtain an exemption or to report will expose the fisherman to penalties and prevent him or her from obtaining an exemption in following years.

The regulations make it clear that failure to obtain an exemption, failure to submit required reports, or failure to comply with other conditions of the Certificate will subject a vessel owner to civil penalties and/or suspension, revocation or denial of the Certificate. The specific penalties will be evaluated on a case-by-case basis. NOAA Fisheries does not believe that failure to register for an exemption for one year should be a basis for automatic denial of an Exemption Certificate in all subsequent years.

22. One commenter recommended that the role of the FWS be discussed, and that the appropriate FWS contact persons be identified. Further, if NOAA Fisheries takes action contrary to a FWS recommendation, the reasons should be specified and included in the appropriate **Federal Register** publication.

NOAA Fisheries is working with the FWS in implementing this exemption system, and will consult with the FWS on actions that affect or relate to marine mammals under the jurisdiction of the Department of the Interior. The FWS recommendations will be discussed in the appropriate **Federal Register** publications.

23. One commenter objected to the requirement for treaty-Indians to possess and display proof of exemptions without coordinating with the tribes' treaty fishing licenses and permits, as provided for in the amendments.

NOAA Fisheries is requiring that vessel owners display a decal on their vessel and possess an Exemption Certificate to incidentally take marine mammals. NOAA Fisheries intends to use the services and programs of treaty Indian tribes, as well as other Federal agencies, States, and Regional Fishery Management Councils, to the maximum extent practicable, to issue exemptions.

24. One commenter objected to the preparation of implementing regulations without consultation with Indian tribes on a government to government basis and objected to the lack of a written commitment by NOAA Fisheries to provide for tribal governments to undertake the implementation (including administration, information gathering, monitoring, and enforcement) of the exemption system and to provide financial assistance and equipment (firecrackers or other repelling devices) to assist tribal governments in the implementation.

NOAA Fisheries has encouraged participation by Indian tribes in the rulemaking process by providing copies of the List of Fisheries and notices and soliciting comments. NOAA Fisheries encourages participation by all constituent groups and will continue to work with representatives of the tribal governments to cooperatively implement the exemption system. NOAA Fisheries does not interpret the purpose of the recent amendments as a mandate to fund or promote harassment techniques, but rather to gather information on which to base a long-term marine mammal management regime for the future.

Comments on Observer Program

1. Commenters stated that the observer program should be designed to provide statistically reliable estimates of the rate of marine mammals interactions. To "place observers where the likelihood of observing interactions with marine mammals would be maximized" would upwardly bias the interaction estimate and not clearly define the problem.

NOAA Fisheries is designing an observer program which will be guided by the standard outlined in the amendment "* * * to obtain statistically reliable information on the species and number of marine mammals incidentally taken in the fishery." The amendment includes the following requirements: to obtain the best available scientific information; to assign observers fairly and equitably among fisheries and among vessels in a fishery; and to avoid subjecting an individual person or vessel, or group of persons or vessels, to excessive or overly burdensome coverage. Observer reports will be used to verify the reports submitted by fishermen in Category I fisheries. Data will be gathered and utilized so that comparisons of marine mammal interactions can be made among and within fisheries.

2. One commenter believed that a good alternative verification program will be needed since many vessels will not be able to carry observers and information is needed on many Category II fisheries which are not required to take observers.

NOAA Fisheries will design, and as funds permit implement, an alternative verification program to provide statistically reliable information on the species and number of marine mammals incidentally taken in those fisheries in which an observer cannot be safely accommodated. Alternative programs may include direct observations of fishing activities from vessels, aircraft, or points on shore.

3. One commenter believed that placing observers on the South Unimak purse seine and Alaska Peninsula drift gillnet fisheries would severely impede fishing operations, impose economic burdens on the owners, and increase the possibility of injury to crew or observer, and provided information to document this belief. In addition, the close living quarters on these small vessels would make the use of female observers problematic. The commenter also believed that, if an observer program is necessary in these fisheries, the use of floating observation platforms would be the most appropriate and effective method. Observations of interactions could be made on a larger segment of the fleet with a minimum of intrusion with any specific vessel.

NOAA Fisheries will not place an observer on a vessel if the facilities of a vessel for housing the observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized. This determination will be made on a case-by-case basis. The response to comment #2 above addresses alternative verification programs.

4. One commenter believed that harvesting vessels should not be included in the vessel counts on which the 20 to 35 percent observer coverage is calculated. In addition, the length of time a vessel fishes should be considered in the calculation for observer coverage.

Although harvesting vessels that deliver fish to a processing vessel without taking their catch on board may not be required to carry observers, these harvesting vessels will be used in calculating observer coverage. The harvesting vessels are the boats that interact with marine mammals. Processing vessels may have more than one bag transfer process going on at one time, therefore, 20–35 percent observer coverage of the fishing operation may be obtained only if more than one observer is placed on a processing vessel. NOAA Fisheries reserves the right to make the decision as to the number of observers on a processing vessel on a case-by-case basis to insure that statistically reliable information is obtained. However, if this method does not provide statistically reliable information on incidental takes, observers will be required on the harvesting vessels.

The length of time a vessel fishes will be considered in determining the extent of observer coverage. However, the length of time a vessel fishes will not be a factor in determining observer placement. The data management system will be designed so that comparisons of marine mammal interactions can be made across fisheries taking into account the amount of effort.

5. One commenter believed that observer effort should be placed where it would be most beneficial in assessing real impact on depleted stocks.

NOAA Fisheries has classified fisheries based on Congressional intent and documented interactions. Section 114(b)(1)(A)(i) of the MMPA does not include criteria based on the status of or impacts to marine mammal stocks for the categorization of fisheries. NOAA Fisheries will first assign observers to Category I fisheries vessels. However, if observers cannot be assigned to all the fisheries listed in Category I, NOAA Fisheries will allocate available observers according to the following priority: (1) Those fisheries that incidentally take marine mammals from any stock designated as depleted; (2) those fisheries that incidentally take marine mammals from population stocks that NOAA Fisheries believes are declining; (3) those fisheries other than those described in 1 and 2 in which the greatest incidental take of marine mammals occurs; (4) and any other fishery identified in Category I.

6. One commenter assumed that observations would be limited to between 20 and 35 percent of the fishing operations for all Category I fisheries, both foreign and domestic, and that any alternative program would be equally applied to foreign and domestic fisheries to avoid discrimination.

Foreign fishery operations are permitted under the Magnuson Fishery Conservation and Management Act which requires 100 percent observer coverage. Observer coverage under the Magnuson Act is not superseded by the less restrictive observer requirement of the MMPA. Therefore, foreign fishery activities will remain subject to 100% observer coverage.

7. One commenter recommended that existing monitoring programs should be used rather than establishing a new observer program for a fishery.

NOAA Fisheries will use existing observer/monitoring programs to the extent possible and will also augment these programs to meet the requirements of the MMPA when necessary and practical.

8. One commenter supported using observers to collect data for Regional Fishery Management Councils.

NOAA Fisheries will, if requested by Regional Fishery Management Councils, States or other Federal agencies, require observers to collect additional information, including, but not limited, to the quantities, species, and physical condition of target and non-target fishery resources and seabirds, unless NOAA Fisheries finds in writing, following public notice and opportunity for comment, that such information will not contribute to the protection of marine mammals or the understanding of the marine ecosystem, including fishery resources and seabirds.

Other Comments.

1. One commenter believed that non-lethal takes should not be counted against the quota for Steller sea lions and North Pacific fur seals. Other commenters recommended that the information system continuously track the number of these animals taken to determine when quotas are reached.

NOAA Fisheries intends to count only lethal takes against the quota, and is developing a proposed system to monitor the quota. (See "Quota Management" section below.)

2. Commenters believed that environmental groups should be consulted in developing the proposed system to govern the incidental taking of marine mammals after section 114 of the MMPA expires, and believed that FWS should be given lead responsibility for aspects of this recommendation relevant to their species.

NOAA Fisheries will consult with all interested parties, including the Marine Mammal Commission, Regional Fishery Management Councils, the FWS, fishing interests and environmental groups in developing its proposed system and its recommendations to Congress.

3. One commenter stressed the need for comprehensive data on population abundance, productivity and sources of mortality in order to develop the long-term management program mandated by Congress.

NOAA Fisheries agrees that more information is needed, and is redirecting its research program to seek that information.

4. Commenters stressed the need for a good education program to work with industry concerning the requirements and the importance and benefits of accurate reporting. One commenter believed that the education program should not be aimed solely at fishermen—there are many misconceptions about fishermen and their interactions with marine mammals.

NOAA Fisheries agrees that a good education program is important and anticipates cooperation from the fishing industry and conservation community in these efforts.

5. One commenter recommended that conservation/recovery plans be developed and implemented promptly.

NOAA Fisheries is developing conservation plans for the North Pacific fur seal and Steller sea lion. Conservation plans for other depleted species will be prepared at a later time unless NOAA Fisheries determines that a plan will not promote the conservation of the species.

Criteria for Categorizing Fisheries

Under the 1988 amendments, NOAA Fisheries must establish three categories of commercial fisheries according to whether there is frequent (Category I), occasional (Category II) or a remote likelihood or no known (Category III) incidental taking of marine mammals. To classify fisheries, it is necessary to interpret and define "frequent," "occasional" and "remote likelihood." Based on NOAA Fisheries' interpretation of Congressional intent, these terms and the subsequent placement of fisheries into categories were not to be based on the status of stocks of marine mammal species or the likelihood of significant impacts on a species. Actions, such as emergency rules, mitigating measures and alternative verification programs, are available under section 114 to address situations where incidental take may be adversely affecting a marine mammal population or where more information is needed.

NOAA Fisheries believes that "frequent," "occasional" and "remote likelihood" were intended by Congress to be evaluated on the average frequency with which marine mammals are taken incidentally in a fishery. This interpretation would place observers in fisheries where the likelihood of observing incidental takes of marine mammals would be greatest. In evaluating incidental takes for purposes of categorizing fisheries, NOAA Fisheries considers the definition of take in section 3 of the MMPA, the language of section 114, and the legislative history of the 1988 amendments, including the Senate Report, House Report and floor statements.

To determine the frequency of take, it is necessary to define both the level or amount of taking and the time period over which incidental takings will be evaluated. This will allow the calculation of a rate of taking so that a comparison among fisheries can be made. The rate is used to distinguish between fisheries with frequent, occasional and rare taking. The values chosen to define these categories should reflect Congressional intent and should be such that each category would contain fisheries.

One of the primary purposes of the interim exemption system is to obtain reliable information on species and number of marine mammals incidentally taken in commercial fishing operations. Categorizing fisheries will assist NOAA Fisheries in selecting the appropriate method for verifying the reports received from fishermen in a particular fishery. Observers will have the highest probability of seeing incidental takes of marine mammals in fisheries with frequent interactions. Therefore, the expense of placing observers in a Category I fishery is justified by the high probability they will collect sufficient information to assess accurately the total takings in a fishery and to verify the accuracy of fishermen's reports. Observers are not as likely to see marine mammal takes in Category II fisheries and other verification techniques may be more efficient.

In the proposed List of Fisheries, NOAA Fisheries set the level of take at more than one animal for frequent, one or less for occasional, and near zero for remote. Using this level of take, NOAA Fisheries believes that a 20-day period is a reasonable time period to use when determining the frequency of taking for purposes of classifying fisheries.

Using these standards, "frequent" means that it is highly likely that more than one marine mammal will be incidentally taken by a randomly selected vessel in the fishery during a 20-day period. "Occasional" means that there is some likelihood that one marine mammal will be incidentally taken by a randomly selected vessel in the fishery during a 20-day period, but that there is little likelihood that more than one marine mammal will be incidentally taken. And, "remote likelihood" means that it is highly unlikely that any marine mammal will be incidentally taken by a randomly selected vessel in the fishery during a 20-day period.

These definitions are applied to categorize fisheries according to the following guidelines. If sufficient documented information is available to estimate the frequency of incidental takings of marine mammals, that information is used in categorizing that fishery. If there is not sufficient documented information to estimate the frequency of incidental takings, the agency considers other factors that would indicate the likelihood of incidental takings such as fishing techniques and gear used, methods used to deter marine mammals, target species, seasons and areas fished, and species and distribution of marine mammals in the area. If these factors indicate a likelihood of at least occasional incidental takings, the fishery is placed in Category II. If available information or other factors indicate that the likelihood of incidental takings in a fishery would be so rare or exceptional as to be remote or non-existent, that fishery is placed in Category III.

The Committee Reports (Senate Report 100–592 and House of Representatives Report 200–970) recognize that for the first year section 114 is in effect, there may not be adequate data to determine accurately the placement of all fisheries into categories. Accordingly, these reports specified six fisheries to be included in Category I and two fisheries to be included in Category III. Most of these fisheries were identified and jointly suggested to Congress by representatives of the environmental community and the fishing industry. The Senate Report also specified that the South Unimak (False Pass and Unimak Pass) salmon purse seine fishery should be included in Category I, but the House Report did not. However, in a letter concerning the proposed List of Fisheries, the Senior Senator from Alaska stated that the South Unimak salmon purse seine fishery would not have been suggested for inclusion in Category I if additional information now available had been brought to the attention of the Senate. NOAA Fisheries used this Congressional intent as criteria for classifying fisheries in the final List of Fisheries (April 20, 1989; 54 FR 16072). However, for future revisions to the List of Fisheries, NOAA Fisheries will use all available data, including data from fishermen's reports and results of observer and alternative programs, to classify fisheries. After a year, NOAA Fisheries should have sufficient data to determine if these fisheries are categorized properly. If sufficient data are not available, NOAA Fisheries will rely on Congressional intent when classifying fisheries.

The interim rule contains the following criteria in § 229.03 for classifying fisheries when revising the List of Fisheries:

Category I. (1) There is documented information indicating a "frequent" incidental taking of marine mammals in the fishery, or (2) Congress intended that the fishery be placed in Category I and there is not documented information indicating that it should be placed in another Category.

Category II. (1) There is documented information indicating an "occasional" incidental taking in the fishery, or, (2) in the absence of information indicating the frequency of incidental taking of marine mammals, other factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, and species and distribution of marine mammals in the area suggest there is a likelihood of at least an "occasional" incidental taking in the fishery.

Category III. (1) There is information indicating no more than a "remote likelihood" of an incidental taking of a marine mammal in the fishery, (2) in the absence of information indicating the frequency of incidental taking of marine mammals, other factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, and species and distribution of marine mammals in the area suggest there is no more than a remote likelihood of an incidental take in the fishery, or (3) Congress intended that the fishery be placed in Category III and there is not documented information indicating that it should be placed in another Category.

The criteria for classifying fisheries are set forth in § 229.3 of this interim rule. In addition, the regulations contain the requirement that the List of Fisheries be reviewed annually beginning in 1990, and may be amended at any time if available information warrants. The annual changes to the List of Fisheries will be published on or about October 1 and will be effective January 1 of the next calendar year. Additional changes may be published and made effective during the year if available information warrants. All affected Category I and II vessel owners will be notified of any changes. If a fishery is changed from Category III to Category I or II, NOAA Fisheries will notify the fishing community through newspapers of general circulation, fishery trade associations, trade journals, electronic media, and through State agencies and Regional Fishery Management Councils.

Interim Commercial Fishing Exemption

Certain incidental takings of marine mammals in commercial fishing operations will be legal under the 5-year interim exemption system provided certain conditions are met. Under these regulations, owners of vessels will be required to register with NOAA Fisheries, display a decal on their vessel, possess an Exemption Certificate authorizing the incidental take of marine mammals, and maintain logs and submit periodic reports to engage lawfully under the MMPA in any Category I or II fishery. Vessels engaged in Category I fisheries will be required to take on board a natural resources observer if requested by NOAA Fisheries. Owners of vessels engaged only in Category III fisheries will not be required to register with NOAA Fisheries or to obtain an Exemption Certificate or decal to fish legally or to incidentally take marine mammals; however, they will be required to submit reports of all marine mammals incidentally killed as a result of their fishing operations. In addition, owners and masters of vessels in all categories will be required to comply with any general regulations, any conditions of the Exemption Certificate issued to the vessel owner, and any special or emergency regulations published under the authority of section 114 of the MMPA.

The 5-year interim exemption applies only to U.S. commercial fishing vessels or to those foreign vessels with valid fishing permits issued under section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*). Exemptions provided by section 114 of the MMPA are not available to vessels fishing in the yellowfin tuna purse seine fishery in the eastern tropical Pacific, or to foreign treaty fisheries, such as the Japanese salmon driftnet fishery. The interim exemption applies to commercial fishing operations which are defined in § 229.2(g) of this interim rule to include licensed commercial passenger fishing vessels. Therefore, certain charter and party boats fall under these requirements.

The MMPA exemption does not include authority to incidentally take southern (California) sea otters (*Enhydra lutris nereis*). This subspecies historically ranged along the West coast of the United States, but currently is found only along the central California coast and San Nicolas Island, California. Section 114 of the MMPA does not supersede or otherwise affect the provisions of Pub. L. 99-625, passed by Congress in 1986 to govern the translocation of southern sea otters to San Nicolas Island for research and recovery purposes. Within special zones established for this experimental population, certain restrictions on incidental taking under the MMPA do not apply. (See 50 CFR 17.84(d) for a description of these special zones and activities that can be lawfully conducted within these zones.)

The MMPA exemption does not allow the intentional lethal taking of any Steller sea lions, any cetaceans (whales and dolphins), any depleted marine mammals (including the Pribilof Island population of North Pacific fur seals), or any endangered or threatened marine mammals.

In general, the MMPA exemptions will apply to the taking of endangered and threatened marine mammals (except southern sea otters). Restrictions on the MMPA exemptions may be made to reduce the incidental taking or to prohibit any taking of certain endangered and threatened species, if necessary to minimize adverse impacts to a population or to comply with other statutory requirements. However, the MMPA exemption does not exempt fishermen from the prohibitions on taking endangered and threatened species under the ESA. To be exempt from the taking prohibitions under the ESA, additional taking authorization under the ESA is needed.

NOAA Fisheries is conducting the appropriate consultations under section 7 of the ESA concerning the effects of its regulations and the proposed issuance of Exemption Certificates. The Biological Opinions resulting from the consultations will assess the impacts of the fisheries on endangered and threatened species and will conclude whether or not the actions are likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of the critical habitat of such species. NOAA Fisheries may place conditions or restrictions on Exemption Certificates to fulfill its obligations under section 7 of the ESA. These conditions and restrictions may include actions to reduce the incidental taking or may prohibit any taking of an endangered or threatened species.

Exemption Certificates—Categories I and II

Registration process. All vessel owners (or authorized representatives) must register to obtain an Exemption Certificate and decal for each vessel that will be engaged in a Category I or II fishery. The initial registration will cover the remainder of 1989 and all of 1990. After that, registrations to renew Certificates are required each calendar year.

Registration forms, outlining the required information, are available from NOAA Fisheries. One registration per vessel is required and will cover all Category I and II fisheries in which the vessel will participate during the calendar year. The first page of the form should be sent to one of the NOAA Fisheries offices listed in § 229.5(c); the second page is a copy of the registration and will serve as an indication of registration until an Exemption Certificate is issued.

For renewals, completed registration forms, containing the information on file with NOAA Fisheries, will be sent to existing Certificate holders prior to the beginning of the year. Vessel owners will be required to make any necessary corrections and sign and return the form to NOAA Fisheries. The renewal registration forms should be submitted at least 30 days prior to the vessel engaging in a Category I or II fishery.

In addition to owners of commercial fishing vessels, the definition of "vessel owners" (§ 229.3(p)) includes owners of fixed or other fishing gear that is used in a "non-vessel fishery." A "non-vessel fishery" means a commercial fishing operation that uses fixed or other fishing gear without a vessel, such as gear used in set gillnet, trap, beach seine, weir, ranch and pen fisheries. Owners of such gear are subject to the same requirements and restrictions as owners of fishing vessels or fish processing vessels operating in a commercial fishery.

A fee of $30.00 per vessel must accompany each registration or request for renewal. "Vessel owners" in "non-vessel fisheries" must include $30.00 to register all gear owned. The fees collected in connection with the exemption system will be available to NOAA Fisheries to cover the administrative costs of granting Exemption Certificates and renewals.

Issuance of Exemption Certificates and decals. An Exemption Certificate that specifies applicable terms and conditions of any authorized incidental taking and a vessel decal will be issued to the vessel owner for each vessel to be engaged in a Category I or II fishery and who submits a completed registration form and the required fee. The initial Certificate will be valid the remainder of 1989 and all of 1990. After that, Certificate renewals will be issued each year after receipt of an updated registration, required fee and required report(s) covering all registered Category I and II fisheries. A decal will be issued with the initial Certificate and will be valid for 1989. An annual sticker for 1990 will be automatically issued upon receipt of a report covering 1989. In non-vessel fisheries, the 1990 sticker must be affixed to the Certificate. Annual stickers will be issued along with the Certificate renewal in subsequent years.

Decals, along with the annual sticker, must be attached to the vessel port side on the cabin or, in the absence of a cabin, port side forward on the hull. A replacement decal will be issued, if requested, to replace a lost or damaged decal. Decals will not be issued or required to be posted in non-vessel fisheries.

A copy of the Exemption Certificate must be on board the vessel while it is operating in a Category I or II fishery, or, in the case of a non-vessel fishery, a copy of the Certificate must be in the possession of the person in charge of the fishing operation. A copy of the Certificate must be made available upon request to any State or Federal government official authorized to enforce the provisions of the MMPA or to any designated agent of NOAA Fisheries.

Reporting requirements. NOAA Fisheries will issue a proposed rule to govern the reporting requirements under the exemption system, and will request public comment.

Observer requirements. If requested by NOAA Fisheries, the owner of a vessel engaged in a Category I fishery must take on board a natural resources observer. A vessel may be excepted from this requirement if NOAA Fisheries finds that the facilities for housing the observer or for carrying out observer functions are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized.

Vessel owners, masters and crew members are required to cooperate with observers and are required to provide information, such as vessel location, needed to meet the observers' responsibilities. If feasible and if requested by the observer, marine mammals killed during the fishing operation which are readily accessible to crew members must be brought aboard the vessel for biological processing and may be retained by NOAA Fisheries. NOAA Fisheries recognizes that for many smaller vessels, this will not be feasible and, therefore, would not be required.

Observers may not bring a civil action against the vessel or vessel owner under any law of the United States for any illness, disability or death from service as an observer, with two exceptions. First, an observer may bring a civil action against an owner or vessel for the owner's willful misconduct. Second, the observer's limitation on bringing civil actions does not apply if the observer is performing duties in service to the vessel of the sort that would normally be performed by a crew member.

NOAA Fisheries will provide for the payment of reasonable costs of housing and maintaining observers on board vessels and of maintaining biological specimens if requested by the observer or required in the Exemption Certificate.

Other terms and conditions. The Exemption Certificate will be valid for one calendar year, except that Certificates issued in 1989 will cover the remainder of 1989 and all of 1990. Vessel owners must register each year for a Certificate or renewal. After 1989, a current annual sticker is required for the vessel decal to be valid.

The Certificates will authorize fishermen to intentionally take marine mammals (except southern sea otters), without inflicting injury or death to the marine mammals, to protect catch, gear, or person. If the damage is substantial and immediate and after all practicable non-injurious methods have been taken, fishermen may injure or kill certain non-depleted marine mammals. However, in no case may fishermen intentionally kill Steller sea lions, Alaskan sea otters, any cetaceans (whales and dolphins), any depleted marine mammals (including the Pribilof Island population of North Pacific fur seals), or any endangered or threatened marine mammals under the interim exemption.

If firearms or other potentially injurious methods are used to deter Steller sea lions, cetaceans, or depleted, endangered or threatened marine mammals, due care must be exercised to avoid injuring or killing such marine mammals. If the use of firearms or other means results in an injury or mortality, the taking is presumed to be an intentional lethal take. For example, if a fisherman shoots near a Steller sea lion to scare or harass the animal away from his catch or gear and the animal is killed, that taking would be considered an intentional lethal taking and would be illegal.

Other terms and conditions may be made to Exemption Certificates as determined by NOAA Fisheries. For example, animals killed during commercial fishing operations may provide the only source of certain types of important biological specimens. Certificates may be conditioned to require that biological specimens of scientific value be retained for NOAA scientists.

In the case of endangered or threatened species, NOAA Fisheries may include terms and conditions to MMPA Exemption Certificates, at any time, to fulfill its responsibilities under the ESA. These conditions may include actions or restrictions to reduce or prevent the incidental taking of an endangered or threatened species.

Suspension or revocation of Exemption Certificates. NOAA Fisheries may suspend or revoke a Certificate or may deny a Certificate renewal if the Certificate holder (1) fails to report as required, (2) fails to take on board an observer in a Category I fishery, if requested, or (3) fails to comply with other terms and conditions of the Exemption Certificate or the regulations governing the interim exemption. The suspension, revocation or denial may occur without notice and opportunity for hearing in the case of failure to submit required reports. Other actions are subject to NOAA's civil procedures contained in subpart D of 15 CFR Part 904.

Requirements for Category III Fisheries

Owners of vessels engaged only in Category III fisheries are not required to register with NOAA Fisheries or to obtain an Exemption Certificate to fish legally under the MMPA or to incidentally take marine mammals. However, they will be required to report all lethal incidental takings, make all reasonable efforts to release animals unharmed, and use all practicable non-injurious methods before any lethal intentional take of a marine mammal to protect gear, catch, or lives in accordance with these regulations. The taking of southern (California) sea otters and the intentional lethal taking of Steller sea lions, Alaskan sea otters, cetaceans, and depleted species (including the Pribilof Island population of North Pacific fur seals) is prohibited. In addition, the incidental taking of endangered or threatened marine mammals is not exempted from the prohibitions under the ESA unless otherwise authorized.

Emergency and Special Regulations

The 1988 amendments to the MMPA provide NOAA Fisheries with both emergency and general authority to issue regulations and/or to impose conditions and restrictions on Exemption Certificates to prevent significant adverse impacts on marine mammal populations. Regulations can apply to Category I, II or III fisheries.

If NOAA Fisheries finds that the incidental taking of marine mammals in a fishery is having an immediate and significant adverse impact on a marine mammal population, emergency regulations will be issued to prevent or minimize to the maximum extent practicable any further taking. This emergency authority will be used only when no alternative is available to prevent an immediate and significant adverse impact. NOAA Fisheries must consult with the Regional Fishery Management Councils, State fishery agencies, and treaty Indian tribal governments, where appropriate, before taking any emergency action. Emergency actions will, to the maximum extent practicable, avoid interfering with existing Regional, State or tribal fishery management or conservation programs, will be as brief in duration and non-intrusive as possible, and will take into account the economics of the fisheries that may be affected and the availability of existing technology to minimize impacts. Although economic factors will be considered in determining the most appropriate method to mitigate the impacts, the primary purpose of the MMPA is to protect marine mammals and economic considerations will not be used as a basis for not taking a necessary emergency action. Emergency actions may include, but are not limited to: Quotas on the number of marine mammals that may be taken; restrictions on the time, manner and location in which marine mammals may be taken; restrictions on the time and location where the fishery may operate; and prohibitions on the use of fishing techniques or gear which are found to cause excessive marine mammal injuries or mortalities.

If NOAA Fisheries finds that the incidental taking of marine mammals in a fishery is not having an immediate and significant adverse impact on a marine mammal population, but that it will likely have a significant adverse impact over a period of time longer than one year, NOAA Fisheries will request the Regional Fishery Management Councils, State fisheries agencies, or treaty Indian tribal governments, where appropriate, to initiate or take action to minimize such impact. If the appropriate Councils, States or tribes do not act in a reasonable period of time, special regulations will be issued or special conditions may be imposed on Exemption Certificates to mitigate the adverse impacts. What constitutes a reasonable period of time will depend on the nature of the requested action and the severity of impacts to the marine mammals in the absence of any action. Any such regulations or conditions will be issued only after notice and opportunity for public comment and only after finding that such action is necessary to further the purposes of the MMPA. Special regulations or conditions will, to the maximum extent practicable, avoid interfering with existing Regional, State or tribal fishery management or conservation programs, and will take into account the views of the appropriate Regional Fishery Management Councils, States, Tribes and the public. As with emergency regulations, special regulations or conditions may include operational or gear restrictions on the fishery.

Quota Management

The 1988 amendments establish a quota of 1,350 Steller sea lions and 50 North Pacific fur seals that may be incidentally killed each year in all fisheries combined under the exemption system. If NOAA Fisheries determines that more than this number of animals will be killed, NOAA Fisheries may prescribe emergency regulations to prevent or minimize further takes in accordance with the procedures described above. These emergency actions may include restrictions on the time and locations where the fishery may operate. Since situations may arise in which a large number of Steller sea lions or North Pacific fur seals are killed by a fishery early in the year, thereby potentially preventing other fisheries from operating later in the year, Congress anticipated that NOAA Fisheries would work with the appropriate Fishery Management Councils, States, fishermen and other interested parties to develop a system of allocating lethal takes among fisheries.

NOAA Fisheries has not yet developed a proposed system for monitoring the incidental take in various fisheries to determine when quotas may be reached or for allocating takes, but will be working with Councils, States, major fishing associations and the conservation community to develop a proposed program and is requesting public comments. NOAA Fisheries believes that it is not practicable to develop a program for the period July 21 through December 31, 1989, because most Alaskan and West Coast fisheries that take Steller sea lions and North Pacific fur seals will be half or fully completed by July 21.

Reports received from fishermen at the end of a season or annually will be of little value in mitigating the effects of disproportionately large takings of any species as they are occurring. A more timely monitoring system will be needed to determine if unexpectedly large numbers of animals are being taken in any fishery. In addition to the creation of a timely reporting system, the development of an allocation system and regulations which restrict fishing in areas with high incidental takes of either species may be necessary to implement the quota system. Possible actions that NOAA Fisheries could take to address these concerns include the following:

1. *Reports*. In conjunction with the States, NOAA Fisheries may propose to add Steller sea lions and North Pacific fur seals to the list of species which are reported on fish tickets in order to

obtain timely reports. Any fish tickets indicating takes of these animals would need to be immediately reported to NOAA Fisheries.

2. Allocations. By combining the previous year's observer data, as well as logbook data and data provided by fisheries associations, NOAA Fisheries may be able to determine if problems are occurring or where or when they are likely to occur. If necessary, NOAA Fisheries would propose a scheme for 1990 or subsequent years to allocate future takings fairly among involved fisheries. In addition, if incidental take reports or other information indicated that any quota were exceeded in one year, the excess number of animals killed might be deducted from the next year's quota.

3. Regulations. If, during any fishing season, it appears that quotas may be exceeded, or that takes are unexpectedly high in certain areas, NOAA Fisheries would issue emergency regulations to restrict or terminate fishing in problem areas.

4. Status of stocks. If available information indicates that the authorized levels of incidental takes will likely have a significant adverse impact on the marine mammal population, NOAA Fisheries may issue emergency or special regulations to limit the taking further.

Penalties/Enforcement

Violations of section 114 of the MMPA, these regulations or the Exemption Certificates will subject vessel owners and fishermen to the penalties provided in the MMPA and in NOAA regulations governing administrative procedures for the assessment of penalties (15 CFR Part 904; 52 FR 10324, March 31, 1987). However, prior to January 1, 1990, unknowing violations of these requirements will not subject a fisherman to penalties. Congress added this exception to account for situations where, because a fisherman was involved in a fishery before the appropriate exemption forms and decals were available or because of the remote location of the fishery, the fisherman had no way of knowing of the requirements or did not have the ability to obtain an exemption. Therefore, NOAA Fisheries has defined "unknowing violations" to include situations where the violator can establish that he or she has not received prior notice of the requirement violated, and has not had the opportunity to receive notice.

In addition, as noted above, Certificates may be revoked, suspended or denied for violations of the MMPA, the regulations or the terms and conditions of the Certificates.

NOAA Fisheries' Enforcement Policy for Takings of Marine Mammals Incidental to Commercial Fishing published in the **Federal Register** on December 6, 1988 (53 FR 49214) remains in effect until July 21, 1989, the effective date of the prohibitions sections of this interim rule.

Observer Program

NOAA Fisheries is required to place observers on Category I vessels to monitor between 20 and 35 percent of the fishing operations by vessels in the fishery. The purpose of the observer coverage is to obtain statistically reliable information on the species and number of marine mammals incidentally taken in a fishery, to verify the adequacy of self-reporting by vessel owners, and to identify possible means for reducing such takes. The extent of observer coverage will be determined as a percentage of fishing effort or activity rather than as a percentage of the number of vessels engaged in the fishery. The specific design of the observer program, including how long an observer will be placed on a particular vessel, will vary between fisheries.

When determining the distribution of observers among fisheries and between vessels in a particular fishery, NOAA Fisheries shall be guided by the following standards:

(1) The requirements to obtain the best available scientific information available;

(2) The requirement that assignment of observers is fair and equitable among fisheries and among vessels in a fishery;

(3) The requirement that no individual person or vessel, or group of persons or vessels, be subject to excessive or overly burdensome observer coverage;

(4) And where practicable, the need to minimize costs and avoid duplication.

NOAA Fisheries is not required to place an observer on a Category I vessel if:

(1) Statistically reliable information can be obtained from observers on processing vessels to which Category I harvesting vessels deliver a catch that has not been taken on board the harvesting vessel;

(2) The facilities of the vessel for housing an observer or for carrying out the functions of the observer are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized as determined by NOAA Fisheries; or

(3) An observer is not available.

The first exception contemplates the situation where Category I vessel catcher/harvester boats do not bring the catch on board, but deliver fish directly to a floating processor on which an observer is placed. For example, observers on foreign vessels in over-the-side joint ventures may satisfy the observer requirements, and observers would not be needed on the catcher/harvester boats. However, if this method will not provide statistically reliable information on incidental takes to protect gear or catch, observers will be required on the harvesting vessels.

With respect to the adequacy of vessels to take an observer on board, NOAA Fisheries will make the necessary determinations on a case by case basis. These determinations will be made on a vessel class or fishery basis or on an individual vessel basis. Examples of situations in which observers will not be required are if a vessel is too small to carry (or house) an observer safely, if an observer will displace a crew member, or if fishing gear or the vessel cannot be operated safely because of the presence of an observer.

The exception for unavailability of observers includes situations where NOAA Fisheries may have inadequate funds to cover a full observer program or may not be able to employ or contract for sufficient qualified personnel to fully staff an observer program. To minimize these situations, NOAA Fisheries intends to use observers, to the maximum extent possible, placed under other authorities, such as the Magnuson Fishery Conservation and Management Act, to collect marine mammal interaction information, in addition to their other duties, to fulfill the observer requirements of the MMPA.

If NOAA Fisheries is unable to meet the required observer level, observers will be allocated among Category I fisheries according to the following list of priorities as specified in section 224(e)(3) of the MMPA:

(1) Those fisheries that incidentally take marine mammals from population stocks designated as depleted;

(2) Those fisheries that incidentally take marine mammals from population stocks that are declining:

(3) Those fisheries other than those described in 1 and 2, in which the greatest incidental take of marine mammals occur; and

(4) Any other Category I fishery.

If observers cannot be placed on Category I vessels at the required level, NOAA Fisheries shall establish alternative observation and verification programs to supplement or replace the statutorily mandated on-board observer program. The alternative program may include direct observation of fishing activities from vessels, airplanes, or points on shore.

Provided sufficient resources are available, an alternative program may also be established in any fishery for which reliable information is not otherwise obtainable. Voluntary observer programs for Category II and III fisheries will be considered provided that they meet the safety and scientific information criteria set forth for Category I fisheries observer programs and that the observer requirements for Category I fisheries have been met.

NOAA Fisheries, in coordination with Federal and State scientists and personnel experienced in fishery observer programs, is designing its observer program to obtain statistically reliable information on the species and number of marine mammals incidentally taken in as many Category I fisheries as possible. The level of observer coverage and whether or not an alternative program will be used will be determined for each Category I fishery. These determinations will be based on the size and nature of each Category I fishery and on the resources available for these programs. NOAA Fisheries will try to make the best use of available resources by using existing research programs, programs operated by States or other authorities, or alternative programs where statistically reliable information can be obtained at less cost. NOAA Fisheries will make available its proposed program and will request further public comment.

Although the primary purpose of the observer program is to collect data on incidental take of marine mammals, observers are not limited to this activity. Regional Fishery Management Councils, States or other Federal agencies may request NOAA Fisheries to collect other scientific or biological information, such as fishery resources and sea bird data, needed in their resource conservation and management programs. NOAA Fisheries will require the observer to collect the requested additional information unless NOAA Fisheries finds in writing, and after opportunity for public comment, that the collection of the requested information will interfere with the collection of the information related to marine mammals.

Information Management

NOAA Fisheries is developing an information management system to compile, process, store and analyze data received from fishermen's reports, observer and alternative programs, and other sources. To protect the confidentiality of data, the information from the system will be made available to the public only in aggregate form which does not directly or indirectly disclose the identity or business of any person. Such information will be available on a continuing basis, no later than six months after receipt. Depending on the nature of information requests, appropriate user fees may be charged for the information.

Confidential or proprietary information will not be disclosed except:

(1) To Federal employees requiring such information, including to Federal contractors that are authorized to collect, process or analyze report or observer data and that are bound by the restrictions on public release of such data;

(2) To State employees under agreement with NOAA Fisheries that prevents public disclosure of the identity or business of any person;

(3) When required by court order; or

(4) In the case of scientific information involving fisheries, to employees of Regional Fishery Management Councils.

Under (1) and (3) above, information from observers or from fishermen reports indicating a violation of the MMPA, regulations, or terms and conditions of Exemption Certificates may be used in civil or criminal enforcement proceedings.

Classification

This rule is being issued as an interim rule because it is impracticable and contrary to the public interest to follow the notice of proposed rulemaking and public procedure provisions of section 553 of the Administrative Procedure Act (APA; 5 U.S.C. 553). The MMPA amendments provide that vessel owners in Categories I and II cannot lawfully fish after July 21, 1989, unless they are exempted from MMPA prohibitions. To be exempted by July 21, 1989, these vessel owners are required to register with NOAA Fisheries and receive some physical evidence of their exemption. It is not possible to publish a proposed rule to establish a registration and exemption system, solicit public comments on the proposed rule, and issue a final rule in time to allow all affected fishing vessel owners a sufficient opportunity to register for and receive an Exemption Certificate before July 21, 1989, rather than merely to notify fishermen of the requirements of this rule before that date. Because many vessel owners will not be able to register during their sometimes lengthy fishing trips, a "last-minute" opportunity to register shortly before July 21, 1989, is not sufficient. Therefore, NOAA Fisheries finds for good cause that the proposed rulemaking and public procedure provisions of section 553 of the APA do not apply to this rule.

For these same reasons, NOAA Fisheries finds that it is contrary to the public interest and impracticable to publish those portions of the interim rule governing the registration and exemption system 30 days before their effective date as required by section 553(d) of the APA. However, the 30-day requirement is not being waived for the remaining portions of the interim rule relating to prohibitions on fishing which do not become effective until July 21, 1989.

Notwithstanding the publication of this rule as an interim rule, it is based on considerable public input and comment. The legislation mandating the exemption system is based upon a joint proposal from representatives of the fishing industry and the environmental community. In addition, the agency issued an advance notice of proposed Rulemaking on general requirements of the exemption system on January 27, 1989, and invited comment until February 27, 1989. The interim rule was developed in part with the information received from these public comments. NOAA Fisheries also has consulted State agencies, Regional Fishery Management Councils, representatives of the fishing industry and environmental community and other interested parties. Moreover, this interim rule invites additional public comment for a 60-day period thereby allowing for the modification or amendment of this rule with the publication of a subsequent final rule.

The Assistant Administrator has determined that implementation of the regulations of 50 CFR Part 229 will not have a significant impact on the human environment. NOAA Fisheries has prepared an environmental assessment (EA) on this action. The finding of that EA is that there will be no significant impact on the human environment as a result of this rule and that an environmental impact statement is not required. The EA is available upon request (see **FOR FURTHER INFORMATION CONTACT**).

The Under Secretary for Oceans and Atmosphere, Department of Commerce, has determined that this rule is not a major rule requiring a regulatory impact analysis under Executive Order 12291. The rule provides relief from a regulatory burden under the MMPA by exempting commercial fishermen registered under this exemption system from prohibitions against the incidental take of marine mammals in the course of commercial fishing activities. This rule will not result in (1) an annual major increase in costs or prices for consumers, individual industries or government agencies; (2) an annual effect on the economy of $100 million or more; or (3) significant adverse effect on competition, employment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The General Counsel of the Department of Commerce has certified to the Small Business Administration that this interim rule will not have a significant economic impact on a substantial number of small entities. As a result, a regulatory flexibility analysis was not prepared.

This rule contains a collection of information subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and has been approved by the Office of Management and Budget under control number 0648-0224. The collection of information requirement which is subject to the Paperwork Reduction Act is found at 50 CFR 229.5(a). Public reporting burden for this collection of information is estimated to average 15 minutes per response per year to register for an exemption. 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 this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the National Marine Fisheries Service, F/PRI, 1335 East West Highway, Silver Spring, MD 20910, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (Attn. NOAA Desk Officer).

NOAA Fisheries has determined that this rule does not directly affect the coastal zone of any State that has an approved coastal zone management program under the Coastal Zone Management Act (CZMA). These actions are being taken under the MMPA which grants exclusive authority to the Federal government to regulate the takings of marine mammals. This rule imposes additional registration and reporting requirements on a small segment of the fishing industry but the nature of these requirements is such that by themselves they do not have a direct effect on the coastal zone of any State. This determination has been submitted for review by the responsible State agencies under section 307 of the CZMA.

This rule has been determined not to contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

List of Subjects

50 CFR Part 216

Administrative practice and procedure, Fisheries, Imports, Indians, Marine mammals, Reporting and recordkeeping requirements.

50 CFR Part 229

Fisheries, Fishing vessels, Marine mammals, Reporting and recordkeeping.

50 CFR Part 611

Fish, Fisheries, Reporting and recordkeeping, Foreign relations.

Regulation Promulgation

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

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

1. The authority citation for 50 CFR Part 216 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

2. A Note is added to 50 CFR Part 216 immediately following the Table of Contents to read as follows:

Note to Part 216: See also 50 CFR Parts 228 and 229 for regulations governing certain incidental takings of marine mammals.

3. The introductory text of § 216.11 is revised to read as follows:

§ 216.11 Prohibited taking.

Except as otherwise provided in Subparts C, D, and I of this Part 216 or in Parts 228 or 229, it is unlawful for:

* * * * *

4. A Note is added immediately following the heading of § 216.24 to read as follows:

§ 216.24 Taking and related acts incidental to commercial fishing operations.

Note to § 216.24: The provisions of 50 CFR Part 229, rather than § 216.24, will govern the incidental taking of marine mammals in the course of commercial fishing operations by persons using vessels of the United States, other than vessels used in the eastern tropical Pacific yellowfin tuna purse seine fishery, and vessels which have valid fishing permits issued in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)) for the period from November 23, 1988, through October 1, 1993. Other commercial fisheries remain subject to regulations under § 216.24.

* * * * *

5. A new part 229 is added to 50 CFR as follows:

PART 229—INTERIM EXEMPTION FOR COMMERCIAL FISHERIES UNDER THE MARINE MAMMAL PROTECTION ACT OF 1972

Subpart A—General Provisions

Sec.

Subpart B—Emergency and Special Regulations [Reserved]

Authority: 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

Note to Part 229: *Effective Date:* In this Part 229, §§ 229.5 and 229.6 become effective on May 19, 1989, and all other sections become effective on July 21, 1989. This part 229 expires on October 1, 1993.

Subpart A—General Provisions

§ 229.1 Purpose and scope.

(a) The regulations in this part implement section 114 of the Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. 1384, Pub. L. 100-711, which provides for a five-year exemption from the Act's prohibition on the taking of marine mammals incidental to certain commercial fishing operations.

(b) The provisions of section 114 of the Marine Mammal Protection Act of 1972, rather than sections 101, 103 and 104, will govern the incidental taking of marine mammals in the course of commercial fishing operations by persons using vessels of the United States, other than vessels used in the eastern tropical Pacific tuna purse seine fishery, and vessels which have valid fishing permits issued in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)) for the period from November 23, 1988, through October 1, 1993. Therefore, the regulations in this part supersede until October 1, 1993, the other provisions for granting incidental take authority to these commercial fishermen, including regulations at 50 CFR 216.24 and guidelines on the taking of small numbers of marine mammals incidental to commercial fishing operations published December 13, 1983 (48 FR 55493).

§ 229.2 Definitions.

In addition to the definitions contained in the Act and unless the context otherwise requires, in this Part 229:

(a) "Act" means the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*).

(b) "Assistant Administrator" means the Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, or authorized representative.

(c) "Category I fishery" means a commercial fishery determined by the Assistant Administrator to have a frequent incidental taking of marine mammals and identified as such in the List of Fisheries.

(d) "Category II fishery" means a commercial fishery determined by the Assistant Administrator to have an occasional incidental taking of marine mammals and identified as such in the List of Fisheries.

(e) "Category III fishery" means a commercial fishery determined by the Assistant Administrator to have a remote likelihood of, or no known incidental taking of, marine mammals and identified as such in the List of Fisheries. Eligible commercial fisheries not specifically identified as Category I or II fisheries are deemed to be Category III fisheries.

(f) "Certificate" or "Exemption Certificate" means a document issued by the Assistant Administrator under the authority of section 114 of the Act that authorizes the incidental taking of marine mammals and that specifies the terms and conditions of the authorized incidental taking, including any document that modifies the Exemption Certificate.

(g) "Commercial fishing operation" means the catching, taking or harvesting of fish from the marine environment (or other areas where marine mammals occur) as part of an ongoing for-profit business enterprise. The term includes licensed commercial passenger fishing vessel (as defined in 50 CFR 216.3) activities.

(h) "Depleted species" means any species or population which has been determined to be depleted under the Act and is listed in 50 CFR 216.15 or 50 CFR Part 18, Subpart E or any endangered or threatened species of marine mammal.

(i) "Endangered or threatened species" means any species, subspecies or population that has been listed under section 4 of the Endangered Species Act of 1973. A list of endangered and threatened species is found in 50 CFR 17.11–17.12.

(j) "Fishing vessel" or "vessel" means any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for (1) fishing, or (2) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing. Fishing vessel or vessel refers only to vessels of the United States, other than vessels used in the eastern tropical Pacific yellowfin tuna purse seine fishery, and vessels which have valid fishing permits issued in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act.

(k) "Incidental take" means the accidental or intentional taking of a marine mammal in the course of commercial fishing operations.

(l) "List of Fisheries" means the most recent final list of commercial fisheries published in the **Federal Register** by the Assistant Administrator, categorized according to the frequency of incidental taking of marine mammals, in accordance with the criteria in § 229.3.

(m) "Marine mammal" means any mammal which (1) is morphologically adapted to the marine environment, including sea otters and members of the orders *Cetacea* (whales and dolphins), *Sirenia* (dugongs and manatees) and suborder *Pinnipedia* (seals, sea lions and walrus), or (2) primarily inhabits the marine environment (such as the polar bear).

(n) "Non-vessel fishery" means a commercial fishing operation that uses fixed or other gear without a vessel, such as gear used in set gillnet, trap, beach seine, weir, ranch and pen fisheries.

(o) "Observer" means a qualified individual designated by the National Marine Fisheries Service to record the incidence of marine mammal interaction and other scientific data during commercial fishing activities.

(p) "Vessel owner" means the owner of (1) a fishing vessel which is engaged in a commercial fishing operation, or (2) fixed or other commercial fishing gear that is used in a non-vessel fishery.

§ 229.3 Criteria for categorizing fisheries.

(a) *Publication.* (1) The Assistant Administrator will publish in the **Federal Register** notice of a proposed revised List of Fisheries on or about July 1, 1990, 1991 and 1992, for the purpose of receiving public comment. On or about October 1, 1990, 1991, and 1992, the Assistant Administrator will publish a final revised List of Fisheries which will become effective January 1 of the next calendar year.

(2) The proposed and final revised List of Fisheries will (i) Categorize each commercial fishery according to the criteria set forth in paragraph (b) of this section, and (ii) List the marine mammals and the estimated number of vessels or persons involved in each commercial fishery.

(3) The Assistant Administrator may publish a revised List of Fisheries at other times, after notice and opportunity for public comment. The revised final List of Fisheries will become effective no sooner than 30 days after publication in the **Federal Register**.

(b) *Categories.* The List of Fisheries will be revised and commercial fisheries will be categorized into Category I, Category II or Category III according to the following criteria. In evaluating incidental takes for purposes of categorizing fisheries, the Assistant Administrator will consider the definition of take in section 3 of the Act, the language of section 114 of the Act and the legislative history of the 1988 amendments.

(1) *Category I.* (i) There is documented information indicating a "frequent" incidental taking of marine mammals in the fishery, or (ii) Congress intended that the fishery should be placed in Category I and there is no documented information indicating that it should be placed in another Category. "Frequent" means that it is highly likely that more than one marine mammal will be incidentally taken by a randomly selected vessel in the fishery during a 20-day period.

(2) *Category II.* (i) There is documented information indicating an "occasional" incidental taking of marine mammals in the fishery, or (ii) In the absence of information indicating the frequency of incidental taking of marine mammals, other factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, and species and distribution of marine mammals in the area suggest there is a likelihood of at least an "occasional" incidental taking in the fishery. "Occasional" means that there is some likelihood that one marine mammal will be incidentally taken by a randomly selected vessel in the fishery during a 20-day period, but that there is little likelihood that more than one marine mammal will be incidentally taken.

(3) *Category III.* (i) There is information indicating no more than a "remote likelihood" of an incidental taking of a marine mammal in the

fishery, (ii) In the absence of information indicating the frequency of incidental taking of marine mammals, other factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, and species and distribution of marine mammals in the area suggest there is no more than a remote likelihood of an incidental take in the fishery, or (iii) Congress intended that the fishery should be placed in Category III and there is not documented information indicating that it should be placed in another Category. "Remote likelihood" means that it is highly unlikely that any marine mammal will be incidentally taken by a randomly selected vessel in the fishery during a 20-day period.

§ 229.4 Prohibitions.

(a) *Prohibited activities.* (1) It is unlawful for a commercial fishing vessel, a vessel owner, or a master or operator of a vessel to engage in a Category I or II fishery unless the vessel owner or authorized representative has complied with the requirements pertaining to registration, Exemption Certificates, decals and reports as contained in this 50 CFR Part 229.

(2) It is unlawful to assault, harm, oppose, impede, intimidate, impair or in any way interfere with an observer or the observations being carried out.

(b) *Prohibited taking.* (1) Except as otherwise provided in 50 CFR Part 17, Part 216 or this Part 229, it is unlawful to take any marine mammal incidental to commercial fishing operations.

(2) Under this Part 229, it is unlawful to (i) Take any southern (California) sea otter; or (ii) Intentionally lethally take any Steller sea lion, any Alaskan sea otter, any cetacean, any depleted species (including the Pribilof Island population of North Pacific fur seal), or any endangered or threatened marine mammal. If the use of firearms or other means to deter marine mammals results in an injury or mortality of a marine mammal, the taking is presumed to be an intentional lethal taking.

(3) Exemptions under this Part 229 apply only to prohibitions under the Marine Mammal Protection Act and do not apply to prohibitions under the Endangered Species Act of 1973. To be exempt from the taking prohibitions under the Endangered Species Act, specific authority under that Act is required.

(c) *Other prohibitions.* It is unlawful to violate any other provision of these regulations or the terms and conditions of Exemption Certificates.

§ 229.5 Registrations for Category I and II fisheries.

(a) *Registrations.* To engage lawfully in a Category I or II fishery after July 21, 1989, the vessel owner or authorized representative of the vessel owner must register for and receive an Exemption Certificate or annual renewal. Registrations should be submitted at least 30 days prior to the vessel engaging in a Category I or II fishery. The following information is required to register:

(1) Name, address, and phone number of vessel owner;

(2) Name and address of operator, if different from owner;

(3) Vessel name, length and home port; State commercial vessel license number, Coast Guard documentation number, State registration number, and/or Tribal plaque number, where appropriate;

(4) A list of all Category I and II fisheries that the vessel is expected to participate in during the calendar year (or during 1989 and 1990, if the registration is made during 1989), and the estimated number of trips from port for each fishery; and

(5) A certification, signed and dated by the vessel owner or authorized representative, as follows: "I hereby certify under penalty of perjury that I am the owner of the vessel or that I am authorized to register for this exemption on behalf of the owner, that I have reviewed all information contained on this document, and that it is true and complete to the best of my knowledge."

(b) *Fee.* A check or money order made payable to NOAA, National Marine Fisheries Service, in the amount of $30.00 must accompany each registration or renewal. For good cause, the Assistant Administrator may waive the fee requirement.

(c) *Address.* Registrations and requests for registration forms should be sent to the Director, Office of Protected Resources, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, 1335 East West Highway, Silver Spring, MD 20910 (phone 301/427-2319), or one of the following Regional Offices:

(1) Director, Alaska Region, National Marine Fisheries Service, P.O. Box 21668, 709 West 9th Street, Juneau, AK 99802 (907/586-7233);

(2) Director, Northwest Region, National Marine Fisheries Service, 7600 Sand Point Way NE., Seattle, WA 98115-0070 (206/526-6110);

(3) Director, Southwest Region, National Marine Fisheries Service, 300 S. Ferry Street, Terminal Island, CA 90731-7415 (213/514-6664);

(4) Director, Northeast Region, National Marine Fisheries Service, 1 Blackburn Drive, Gloucester, MA 01930 (508/281-9328); or

(5) Director, Southeast Region, National Marine Fisheries Service, 9450 Koger Blvd., St. Petersburg, FL 33702 (813/893-3366).

§ 229.6 Issuance of Exemption Certificates.

(a) *Criteria.* After receipt of a completed initial registration and required fee, an Exemption Certificate and decal will be issued to the vessel owner. If the Certificate and decal are issued in 1989, a 1990 annual sticker for the decal will be automatically issued upon receipt of required report(s) for 1989. The Exemption Certificate will be renewed and an annual sticker issued after receipt of an updated registration, required fee and required report(s) covering all registered Category I and II fisheries. An interim report should be submitted with the renewal request if fishing under the current Exemption Certificate will not be completed by December 31.

(b) *Possession of Certificates and decals.* (1) The decal and, after 1989, a current annual sticker must be attached to the vessel port side on the cabin or, in the absence of a cabin, port side forward on the hull, and must be free of obstruction and in good condition. A decal is not required for non-vessel fisheries.

(2) The Exemption Certificate or valid copy must be on board the vessel while it is operating in a Category I or II fishery, or, in the case of non-vessel fisheries, the Certificate or valid copy must be in the possession of the person in charge of the fishing operation. The Certificate or valid copy must be made available upon request to any State or Federal enforcement agent authorized to enforce the Act or to any designated agent of the National Marine Fisheries Service.

(c) *Terms and conditions.* (1) Certificates will expire at the end of the calendar year, except that Certificates issued in 1989 will expire at the end of 1990. After 1989, a current annual sticker is required for a decal to be valid.

(2) Reports. [Reserved]

(3) Observer requirements. (i) If requested by the National Marine Fisheries Service, a Certificate holder engaged in a Category I fishery must take on board an observer to accompany the vessel on any or all fishing trips in a fishing season.

(ii) After being notified by the National Marine Fisheries Service that the vessel is required to carry an observer, the Certificate holder must comply with the notification by providing the specified information within the specified time on scheduled or anticipated fishing trips to facilitate observer placement.

(iii) The National Marine Fisheries Service may waive the observer requirement based on a finding that the facilities for housing the observer or for carrying out observer functions are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized.

(iv) The Certificate holder, master and crew must cooperate with the observer in the performance of the observer's duties including:

(A) Providing adequate accommodations;

(B) Allowing for the embarking and debarking of the observer as specified by the National Marine Fisheries Service. The operator of a vessel must ensure that transfers of observers at sea are accomplished in a safe manner, via small boat or raft, during daylight hours as weather and sea conditions allow, and with the agreement of the observer involved;

(C) Allowing the observer access to all areas of the vessel necessary to conduct observer duties;

(D) Allowing the observer access to communications equipment and navigation equipment as necessary to perform observer duties;

(E) Providing true vessel locations by latitude and longitude or loran coordinates, upon request by the observer;

(F) Providing marine mammal specimens, as requested;

(G) Notifying the observer in a timely fashion of when commercial fishing operations are to begin and end; and

(H) Complying with other guidelines, regulations or conditions in Certificates that the National Marine Fisheries Service may develop to ensure the effective deployment and use of observers.

(v) Marine mammals killed during fishing operations which are readily accessible to crew members must be brought aboard the vessel for biological processing, if feasible and if requested by the observer. Marine mammals designated as biological specimens by the observer must be retained in cold storage aboard the vessel, if feasible, until retrieved by authorized personnel of the National Marine Fisheries Service.

(vi) Observers may not bring a civil action against the vessel or vessel owner under any law of the United States for any illness, disability, injury or death from service as an observer, except in cases of the vessel owner's willful misconduct or if the observer is engaged by the owner, master or individual in charge of a vessel to perform any duties in service to the vessel.

(vii) The National Marine Fisheries Service will provide for the payment of all reasonable costs directly related to housing and maintaining observers on board vessels and related to maintaining biological specimens as requested by the observer or required in Exemption Certificates.

(4) Any marine mammal incidentally taken must be immediately returned to the sea with a minimum of further injury and may be retained only if authorized by an observer, by a condition of the Exemption Certificate, or by a scientific research permit that is in the possession of the operator.

(5) A Certificate holder or a crew member may intentionally take marine mammals to protect catch, gear or person during the course of the commercial fishing operation by a means and in a manner not expected to cause death or injury to a marine mammal.

(6) If the infliction of the damage to catch, gear or person is substantial and immediate and only after all non-injurious means authorized by paragraph (c)(5) of this section have been taken, a Certificate holder or crew member may intentionally injure or kill a marine mammal to protect gear, catch or person; except that it is prohibited for a Certificate holder or crew member to intentionally lethally take any Steller sea lion, any Alaskan sea otter, any cetacean, any depleted species (including the Pribilof Island population of North Pacific fur seal), or any endangered or threatened marine mammal.

(7) No fishing gear, in whole or in part, may be willfully discarded.

(8) A Certificate holder must notify the Assistant Administrator in writing: (i) If the vessel will engage in any Category I or II fishery not listed on the registration at least 30 days prior to engaging in that fishery, and (ii) of any changes in mailing address or vessel ownership within 30 days of such change.

(9) Certificates and decals are not transferable. In the event of the sale or change in ownership of the vessel, the Certificate is void and the new owner must register for an Exemption Certificate and decal.

(10) The Assistant Administrator may establish other terms and conditions on Exemption Certificates, including terms and conditions for specific fisheries necessary to minimize adverse impacts to a marine mammal population in accordance with the procedures in § 229.8(b) or to comply with the Endangered Species Act of 1973.

(d) *Suspension, revocation or denial of Certificates.* (1) The Assistant Administrator may suspend or revoke an Exemption Certificate or deny a Certificate renewal in accordance with the provisions in 15 CFR Part 904 if the Certificate holder:

(i) Fails to submit reports as required;

(ii) Fails to take on board an observer in a Category I fishery, if requested by the National Marine Fisheries Service; or

(iii) Fails to comply with other terms and conditions, including special conditions, of the Exemption Certificate or with these regulations;

Except that the suspension, revocation or denial specified in paragraph (d)(1)(i) of this section may be without prior notice or opportunity for hearing.

(2) A suspended Certificate may be reinstated at any time at the discretion of the Assistant Administrator.

§ 229.7 Requirements for Category III fisheries.

(a) Vessel owners engaged only in Category III fisheries are not required to register for or receive an Exemption Certificate. Vessel owners and crew members of such vessels may incidentally take marine mammals subject to these provisions.

(b) [Reserved]

(c) Any marine mammal incidentally taken must be immediately returned to the sea with a minimum of further injury and may be retained only if authorized by an observer, by the Assistant Administrator, or by a scientific research permit that is in the possession of the operator.

(d) Vessel owners and crew members may intentionally take marine mammals to protect catch, gear or person during the course of commercial fishing operations, by a means and in a manner not expected to cause death or injury to a marine mammal.

(e) If the infliction of the damage to gear, catch or person is substantial and immediate and only after all non-injurious methods authorized by paragraph (d) of this section have been taken, a vessel owner or crew member may intentionally injure or kill a marine mammal to protect gear, catch or person; except that it is prohibited for a vessel owner or crew member to intentionally lethally take any Steller sea lion, any Alaskan sea otter, any cetacean, any depleted species (including the Pribilof Island population of North Pacific fur seal), or any endangered or threatened marine mammal.

(f) The willful discard of any fishing gear, in whole or in part, is prohibited.

§ 229.8 Emergency and special regulations.

(a) *Emergency regulations.* If the Assistant Administrator finds that the incidental taking of marine mammals in a fishery is having an immediate and significant adverse impact on a marine mammal population, or in the case of Steller sea lions and North Pacific fur seals, that more than 1,350 and 50, respectively, will be incidentally killed during a calendar year in all fisheries combined, the Assistant Administrator will issue emergency regulations to prevent, to the maximum extent practicable, any further taking. Any such regulations

(1) Will be issued only after consultation with Regional Fishery Management Councils, State fishery agencies and treaty Indian tribal governments, where appropriate, and will, to the maximum extent practicable, avoid interfering with existing Regional, State or tribal fishery management plans;

(2) Will take into account the economics of the fishery and the availability of existing technology to minimize incidental taking to the extent that elimination of the adverse effects on the marine mammal population will allow;

(3) May take effect immediately upon publication in the **Federal Register** and will remain in effect for no more than 180 days or until the end of the fishing season, whichever is earlier; and

(4) Will be terminated by notice in the **Federal Register** at an earlier date if the Assistant Administrator determines that the reasons for the emergency regulations no longer exist.

(b) *Special regulations or conditions.* (1) If the Assistant Administrator finds that the incidental taking of marine mammals in a fishery is not having an immediate and significant adverse impact on a marine mammal population, but that it will likely have a significant adverse impact over a period of time longer than one year, the Assistant Administrator will request Regional Fishery Management Councils, State fisheries agencies or treaty Indian tribal governments, where appropriate, to initiate or take action to minimize such impact.

(2) If the Councils, States or tribes do not take appropriate action in a reasonable period of time, the Assistant Administrator will issue special regulations or impose special conditions on Exemption Certificates to mitigate the adverse impacts.

(3) Any such regulations or conditions will be issued only if, after notice and opportunity for public comment, the Assistant Administrator determines such action is necessary to further the purposes of section 114 of the MMPA.

§ 229.9 Penalties.

(a) Except as otherwise provided, all violations of these regulations are subject to NOAA's civil procedures contained in 15 CFR Part 904.

(b) Notwithstanding any other provision in these or other NOAA regulations, a person or vessel will not be subject to penalties for unknowing violations based on failure to register occurring before January 1, 1990. An unknowing violation is one where the violator can establish that he or she has not received actual prior notice of the registration requirements and has not had the opportunity to receive actual notice. Actual notice is presumed where a person has received a MMPA Exemption Registration form or any other publication published by National Marine Fisheries Service for the purpose of informing the public of the registration requirements contained in these regulations.

§ 229.10 Confidential fisheries data.

(a) Proprietary or confidential information includes information, the unauthorized disclosure of which could be prejudicial or harmful, such as information or data that are identifiable with an individual fisherman. Proprietary or confidential information obtained under this Part 229 must not be disclosed except

(1) To Federal employees whose duties require access to such information;

(2) To State employees under an agreement with the Assistant Administrator that prevents public disclosure of the identity or business of any person;

(3) When required by court order; or

(4) In the case of scientific information involving fisheries, to employees of Regional Fishery Management Councils who are responsible for fishery management plan development and monitoring.

(b) Information will be made public in aggregate, summary, or other such form that does not disclose the identity or business of any person in accordance with NOAA Directive 88-30. Aggregate or summary form means data or information submitted by three or more persons that have been summed or assembled in such a way that the summation or assembly does not reveal the identity or business of any person.

Subpart B—Emergency and Special Regulations [Reserved]

PART 611—FOREIGN FISHING

6. The authority citation for 50 CFR Part 611 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*, 16 U.S.C. 971 *et seq.*, 22 U.S.C. 1971 *et seq.*, and 16 U.S.C. 1361 *et seq.*

7. Section 611.1 is amended by revising paragraph (c) to read as follows:

§ 611.1 Purpose and scope.

* * * * *

(c) Other U.S. laws and regulations apply to foreign vessels fishing in the U.S. EEZ such as the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 *et seq.* and 50 CFR Parts 216 and 229).

8. Section 611.3 is amended by revising paragraph (a)(3) to read as follows:

§ 611.3 Vessel permits.

(a) * * *

(3) Permits issued under this section do not authorize FFV's or persons to harass, capture, or kill marine mammals. No marine mammals may be taken in the course of fishing unless that vessel has on board a currently valid certificate of inclusion issued under a general permit or an Exemption Certificate, as appropriate, under the Marine Mammal Protection Act. Regulations governing the taking of marine mammals incidental to commercial fishing operations are contained in 50 CFR 216.24 and 229.

* * * * *

Date: May 12, 1989.

James W. Brennan,

Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration.

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federal register

Friday
May 19, 1989

Part VIII

Department of Energy

Southwestern Power Administration

Notice of Revised Proposed Town Bluff Power Rate and Opportunities for Public Review and Comment

DEPARTMENT OF ENERGY

Southwestern Power Administration

Notice of Revised Proposed Town Bluff Power Rate; Opportunities for Public Review and Comment

AGENCY: Southwestern Power Administration (SWPA) Department of Energy (DOE).

ACTION: Notice of Revised Proposed Town Bluff Power Rate and Opportunities for Public Review and Comment.

SUMMARY: A new hydropower project located in eastern Texas and generally known as Town Bluff is expected to begin producing power commercially in the near future (now estimated to be July 1, 1989). As required, the Administrator, SWPA, prepared an initial Power Repayment Study for the Town Bluff hydropower project which showed the initial level of annual revenues needed to meet cost recovery criteria under Department of Energy guidelines. Those revenues of $285,444 per year reflected the level needed to cover annual expenses for marketing, additions to plant, major replacements and the operation and maintenance of the generating facilities at the Town Bluff project. The amortized expenses incurred for the project's design and construction are not included in the Town Bluff cost recovery rate calculation because these project costs were financed in total by the project's sponsor, Sam Rayburn Municipal Power Agency (SRMPA). Notice of the opportunity for a 30-day public comment period concerning that rate was issued in the **Federal Register** April 6, 1989, (54 FR 13948). Subsequently, a change of the initial on line date and operation and maintenance projections provided by the Corps of Engineers has revised the proposed rate to a level at which the Administrator has determined that in accordance with 10 CFR 903 (Procedures for Public Participation in Power Transmission Rate Adjustments and Extensions) the public comment period should be extended. The Administrator has also developed a proposed Town Bluff Rate Schedule to recover the required revenues. The revised proposed rate, based upon the updated data for Town Bluff, will require an annual revenue of $373,068 to begin when Town Bluff is placed into commercial operation and to extend through September 30, 1993.

DATE: Written comments are due on or before May 23, 1989.

ADDRESS: Ten copies of the written comments should be submitted to the Administrator, Southwestern Power Administration, U.S. Department of Energy, P.O. Box 1619, Tulsa, Oklahoma 74101.

FOR FURTHER INFORMATION CONTACT: Mr. Francis R. Gajan, Director, Power Marketing, Southwestern Power Administration, U.S. Department of Energy, P.O. Box 1619, Tulsa, Oklahoma 74101, (918) 581-7529.

SUPPLEMENTARY INFORMATION: The U.S. Department of Energy was created by an Act of the U.S. Congress, Department of Energy Organization Act, Pub. L. 95-91, dated August 4, 1977, and SWPA's power marketing activities were transferred from the Department of Interior to the Department of Energy, effective October 1, 1977.

SWPA markets power from 23 multiple-purpose reservoir projects (24 when Town Bluff comes on line) with power facilities constructed and operated by the U.S. Army Corps of Engineers. These projects are located in the States of Arkansas, Missouri, Oklahoma, and Texas. SWPA's marketing area includes these States plus Kansas and Louisiana. Of the total, 22 projects comprise an Integrated System and are interconnected through SWPA's transmission system and exchange agreements with other utilities. The Sam Rayburn Dam project, located in eastern Texas, is not interconnected with SWPA's Integrated System hydraulically, electrically or financially. Instead, the power produced by the Sam Rayburn Dam project is marketed by SWPA as an isolated project under a contract through which the customer purchases the entire power output of the project at the dam. The Town Bluff project, located on the Neches River downstream from the Sam Rayburn Dam, consists of two 4,000 kW hydroelectric generating units. It will also, like the Sam Rayburn Dam project, be marketed as an isolated project under a contract through which the customer, SRMA, receives the entire output of the project for a period of 50 years as a result of funding the construction of the hydroelectric facilities at the project. A separate power repayment study is prepared for each project which has a special rate based on its being a hydraulically, electrically, and/or financially isolated operation.

Following Department of Energy Order Number RA 6120.2, the Administrator, SWPA, prepared an initial and a subsequently revised power repayment study for the Town Bluff project. The revised study was developed because estimates of the Town Bluff operation and maintenance costs provided by the U.S. Army Corps of Engineers were changed from $230,000 per year, which was used in the original study, to $308,440 per year and the estimated commercial on line date has been moved from June 1, 1989, to July 1, 1989. The revised study indicates that the legal requirement to repay the annual expenses for marketing, additions to plant, major replacements and operation and maintenance will be met by the revised proposed revenue level. The revised revenue level, and all future revenue levels for 50 years, will not include any of the costs incurred for the design and construction work that was financed with non-Federal funds provided by SRMA. The Revised Initial Power Repayment Study for the isolated Town Bluff project shows that $373,068 annually ($31,089 per month) is needed to satisfy the present financial criteria for repayment of the project costs. Opportunity is presented for customers and other interested parties to receive copies of the study and proposed rate schedule for the Town Bluff project. If you desire a copy of the Revised Repayment Study Data Package for the Town Bluff project, submit your request to: Mr. Francis R. Gajan, Director, Power Marketing, Southwestern Power Administration, P.O. Box 1619, Tulsa, OK 74101, (918) 581-7529.

Written comments on the Revised Proposed Town Bluff Rate are due on or before May 23, 1989. Ten copies of the written comments should be submitted to the Administrator, Southwestern Power Administration, U.S. Department of Energy, P.O. Box 1619, Tulsa, Oklahoma 74101.

Following review of the written comments, the Administrator will submit the revised rate proposal and the Revised Power Repayment Study for the Town Bluff project, in support of the proposed rates, to the Deputy Secretary of Energy for confirmation and approval on an interim basis and to the Federal Energy Regulatory Commission (FERC) for confirmation and approval on a final basis. The FERC will allow the public an opportunity to provide written comments on the proposed rate before making a final decision.

Issued in Tulsa, Oklahoma, this 5th day of May, 1989.

J.M. Shafer,

Administrator, Southwestern Power Administration.

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