issues that are explained within this notice (Administrative Record Number WV–1202).

30 CFR Part 732 Letter Dated July 22, 1997

a. 30 CFR 701.5, definitions of ''other treatment facilities'' and ''siltation structure.'' WVHC stated that the definitions cited by the State in its December 20, 2000, letter do not include all of the elements and limitations of ''other treatment facilities.'' Without these elements, WVHC stated, the State program is less effective than the Federal program. The WVHC also stated that the Federal definition of ''siltation structure'' is broader than sedimentation pond.

We disagree with these comments. As discussed above in Finding c.1, the State provisions at CSR 38–2–2.110, 38–2–2.21, 38–2–14.5.b, and 38–2–14.5.c combined are no less effective than the Federal definitions of ''other treatment facilities'' and ''siltation structure'' at 30 CFR 701.5. While the West Virginia program does not specifically provide examples of chemical or mechanical treatment as does the Federal definition, that omission alone does not render the State program less effective, because the State's provisions do not exclude nor prohibit the use of any of the treatment facilities identified in the Federal definition of ''other treatment facilities.'' In addition, the West Virginia program does have counterparts to the other aspects of the Federal definition of ''other treatment facilities.'' That is, the State's program requires the installation of adequate treatment facilities for the purpose of meeting applicable State and Federal effluent limitations and water quality standards. Such treatment facilities could include a sedimentation pond or a series of sedimentation ponds.

b. 30 CFR 761.5, ''Significant recreational, timber, economic, other values incompatible with surface coal mining operations'' as it relates to Federal lands. WVHC stated that without including the broader and more specific Federal language, the State program is less effective than the Federal program.

We disagree with this comment. As we discussed above in Finding c.2, SMCRA at section 522(e)(2) provides that, subject to valid existing rights, no surface coal mining operations except those which exist on the date of enactment of SMCRA shall be permitted on any Federal lands within the boundaries of any national forest: Provided, however, that surface coal mining operations may be permitted on such lands if the Secretary of the Department of the Interior finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations. The Federal regulations at 30 CFR 740.4(a)(5) clearly provide that it is the sole responsibility of the Secretary of the Department of the Interior to make these findings. When making such determinations on Federal lands within the State, the Secretary will use the Federal definition of that term at 30 CFR 761.5. Since we found that the State does not have to add a definition of the term to the West Virginia program, this 30 CFR part 732 issue is satisfied.

c. 30 CFR 816.104(a) Backfilling and grading: Thin overburden. WVHC stated that the State definitions are different than and narrower than the Federal definitions. They must therefore be changed, the WVHC stated, to comply with the Federal program.

As we discussed above in Finding c.3, the State's provisions at W. Va. Code 22–3–13(b)(3) apply to thin and thick overburden. While the State's descriptions of thin and thick overburden are structured differently than the counterpart Federal definitions at 30 CFR 816.104(a) and 816.105(a), the State's requirements are, nevertheless, substantively identical to the Federal counterpart definitions and the performance standards.

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendments from various Federal agencies with an actual or potential interest in the West Virginia program by letters dated January 26, 2001 (Administrative Record Number WV–1199). By letter dated February 14, 2001 (Administrative Record Number 1204), the United States Department of Labor, Mine Safety and Health Administration (MSHA) responded to our request for comments. MSHA stated that in the event that any long-standing regulation or an amendment thereto should change or alter the areas of a surface or underground coal mine or a preparation facility, including refuse piles, impoundments, sealed mines, or highwalls at surface mines, to please call MSHA. MSHA also stated that an MSHA technical inspector will be assigned to discuss the mine operator's approved plans concerning the affected areas for the amendment at issue. MSHA's comments are outside the scope of the four part 732 issues discussed in the above Findings and, therefore, will not be discussed here.

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(ii), we are required to obtain written concurrence from EPA for those provisions of the State program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

On January 26, 2001, we asked for concurrence on the amendment (Administrative Record Number WV–1198). On July 3, 2001, EPA sent us its written concurrence, with the understanding that implementation of the amendments must comply with the Clean Water Act (CWA), NPDES regulations, and other statutes and regulations under EPA authority (Administrative Record Number WV–1225). There is nothing in the State counterpart to the part 732 issues discussed in the Findings above that prevents compliance with the CWA, NPDES regulations, or other statutes and regulations under EPA authority. EPA provided us no other comments on the part 732 issues discussed above.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Dated: April 8, 2004.

Brent Wahlquist,

Regional Director, Appalachian Regional Coordinating Center.

[FR Doc. 04–9538 Filed 4–28–04; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 030630163–4122–02, I.D. 052303F]

RIN 0648–AR15

Authorization for Commercial Fisheries Under the Marine Mammal Protection Act of 1972; Zero Mortality Rate Goal

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

ACTION: Proposed rule; request for comments

SUMMARY: The Marine Mammal Protection Act (MMPA) was enacted in 1972 with the ideal of eliminating

mortality and serious injury of marine mammals incidental to commercial fishing operations. In 1994, Congress amended the MMPA and established a requirement that the level of incidental mortality and serious injury of marine mammals be reduced to insignificant levels approaching a zero rate by April 30, 2001, which is commonly referred to as the Zero Mortality Rate Goal (ZMRG). To implement the ZMRG, NMFS must establish a threshold level for mortality and serious injury that would meet this requirement. NMFS proposes in this rule that this threshold level be 10 percent of the Potential Biological Removal level (PBR) for a stock of marine mammals. NMFS solicits comments on this proposed rule and on the draft Environmental Assessment (EA) for this action.

DATES: Comments must be received by June 1, 2004.

ADDRESSES: Comments should be submitted to Chief, Marine Mammal Conservation Division, Office of Protected Resources, NMFS (F/PR2), 1315 East-West Highway, Silver Spring, MD 20910. Alternatively, comments may be submitted by email to *0648–AR15@noaa.gov*, through the Federal e-Rulemaking Portal, *http://www.regulations.gov* (follow the instructions for submitting comments), or by facsimile (fax) to (301) 427–2516.

FOR FURTHER INFORMATION CONTACT: Tom Eagle, Office of Protected Resources, NMFS, Silver Spring, MD (301) 713–2322, ext. 105, or email *Tom.Eagle@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Electronic Access

Copies of the MMPA Bulletin and marine mammal stock assessment reports (SARs) are available at *http://www.nmfs.noaa.gov/prot_res/overview/mm.html#mmpa*. Public comments on the Advance Notice of Proposed Rulemaking, the draft EA, and other information related to this proposed rule are available on the Internet at the address above or at *http://www.nmfs.noaa.gov/pr/* (see ''Recent News and Hot Topics'').

Background

On July 9, 2003 (68 FR 40888), NMFS published an advance notice of proposed rulemaking (ANPR) describing options for defining provisions of the ZMRG, which includes the requirement under the MMPA for commercial fisheries to reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate. The ANPR provides a detailed discussion of the legislative history regarding ZMRG.

The ZMRG has been a part of the MMPA since the statute was enacted in 1972. Although the legislative history is clear that the ideal for the ZMRG is to eliminate mortality and serious injury of marine mammals incidental to commercial fishing operations, it also clear that Congress recognized that such an ideal could not be achieved with existing technologies. Prior to 1994, the MMPA contained no specific deadline for achieving the ZMRG. Thus, the ZMRG expressed the ideal that U.S. commercial fisheries should continue to improve fishing gear and practices to eliminate incidental mortality rather than to rely on current fishing technologies that may continue deaths of marine mammals.

In 1994, Congress amended the MMPA and established in section 118(b)(1), 16 U.S.C. 1387(b)(1), a deadline of April 30, 2001, to reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero rate. With the establishment of the deadline, the ZMRG moved from a philosophy of continually seeking to improve fishing methods and technologies to a goal with a specific deadline.

The ZMRG is described in MMPA section 118(b). First, this section establishes target levels of incidental mortality and serious injury (insignificant levels approaching a zero mortality and serious injury rate) and a date to achieve the target (April 30, 2001). Second, the MMPA states that fisheries that maintain insignificant levels of serious injury and mortality of marine mammals approaching a zero rate shall not be required to further reduce their mortality and serious injury rate. Third, the MMPA directs NMFS to complete a review of the progress of all commercial fisheries, by fishery, toward the target levels of incidental mortality and serious injury and to submit to Congress a report of the review. The report must also note any commercial fishery for which additional information is required to accurately assess the level of incidental mortality and serious injury of marine mammals in the fishery. Finally, if the results of the review indicate that mortality and serious injury incidental to a commercial fishery are inconsistent with target levels of mortality and serious injury, then NMFS must take appropriate action under MMPA section 118(f), which provides the process for developing and implementing take reduction plans (TRPs).

The MMPA directs NMFS to develop and implement a TRP in cases where strategic stocks (threatened, endangered, or depleted stocks or stocks for which human-caused mortality exceeds the calculated PBR) interact with Category I or II fisheries (Category I and II fisheries are those that have frequent or occasional, respectively, incidental mortality and serious injury of marine mammals; see definitions at 50 CFR 229.2), and the MMPA allows NMFS to develop and implement a TRP for cases in which a non-strategic stock interacts with a Category I fishery which NMFS determines has a high level of mortality and serious injury across a number of such stocks. The MMPA contains no provisions for NMFS to develop and implement a TRP to reduce mortality and serious injury of non-strategic stocks of marine mammals incidental to Category II fisheries.

The MMPA provides that the short-term goal of a TRP is to reduce mortality and serious injury of marine mammals to levels below PBR within 6 months. The MMPA states that the long-term goal of a TRP is to reduce, within 5 years of its implementation, the incidental mortality and serious injury of marine mammals incidentally taken in the course of commercial fishing to insignificant levels approaching a zero mortality and serious injury rate, taking into account the economics of the fishery, the availability of existing technology, and existing state or regional fishery management plans. Neither the MMPA nor its legislative history indicate how these factors must be taken into account. The legislative history, however, indicates that Congress understands that available technologies may be insufficient to achieve the ideal goal of eliminating incidental mortality and serious injury of marine mammals within the economic constraints of commercial fisheries.

The MMPA does not address clearly the situation in which available technology is insufficient to reduce incidental mortality and serious injury to insignificant levels in a manner that is economically feasible for fisheries. The legislative history makes repeated references to Congressional intent to avoid shutting down fisheries or putting an overwhelming economic burden on fisheries to achieve the goal, and it contains many references to the use of the best available technologies as evidence of progress toward the ZMRG. The requirement in MMPA section 118(b)(1) provides no allowance for consideration of economics and technology in fisheries having reduced incidental mortality and serious injury to insignificant levels approaching a zero rate. However, MMPA section

118(f) specifically incorporates this consideration into the long-term goal of TRPs to reduce mortality and serious injury to insignificant levels approaching a zero rate.

Finally, the ZMRG does not explicitly exclude any commercial fisheries from achieving target levels of mortality and serious injury, and it does not exclude any marine mammal stocks from consideration. The MMPA, however, contains no provisions to develop TRPs for non-strategic stocks that are killed or seriously injured incidental to Category II fisheries. Thus, if a Category II fishery takes a non-strategic stock at levels higher than insignificant and approaching a zero mortality and serious injury rate, the MMPA has no mechanism to further reduce such mortality and serious injury.

The meaning of ZMRG under MMPA section 118 is not clear, and to implement provisions of the MMPA related to ZMRG, NMFS needs to define the level of mortality and serious injury that would be considered as insignificant levels approaching a zero rate. As described in NMFS' MMPA Bulletin (June/July 1995, p. 3) there were three major questions related to the ZMRG: (1) What does insignificant mean, (2) how close to zero do we need to approach, and (3) what rate should be used as the measurement?

NMFS addressed the first question by proposing a rule that would provide that the ZMRG address the biological significance of the levels of incidental mortality and serious injury to marine mammal stocks. In addressing ''approaching a zero rate'', NMFS stated its intent to control incidental loss of marine mammals through regulation or restrictions on fisheries to the point where these losses are biologically insignificant to marine mammal stocks. However, NMFS would continue to work with the fishing industry to design, refine, and use technologies and methods that are more ''marine mammal friendly''. Thus, NMFS intended to incorporate ''approaching a zero rate'' through incentive and improvement of available technologies and methods after incidental mortality and serious injury are reduced to a point where they are biologically insignificant.

Regarding the appropriate rate, NMFS noted that from 1988 though 1994, the rate of incidental mortality that had been used in classifying fisheries was the number of takes by an individual vessel in a 20–day period. NMFS also considered an alternative rate as the number of marine mammals in a stock killed incidental to commercial fisheries in a year. Neither of these rates were directly related to biological significance. However, a rate that expresses annual fishery-related mortality as a function of population size or productivity would address biological significance of the mortality.

In 1995, NMFS proposed a rule (60 FR 31666, June 16, 1995) that, among other things, proposed a level of mortality that would have an insignificant impact on marine mammals stocks as 10 percent of any stock's PBR. That definition was removed from the final rule (60 FR 45086, August 30, 1995), and since that time, NMFS has not promulgated final regulations to define ZMRG.

In August 2002, several organizations filed suit against NMFS alleging that NMFS failed to meet requirements of MMPA section 118. These organizations and NMFS negotiated a settlement agreement that requires, among other things, for NMFS to define the ZMRG through regulations and to submit to Congress the report on fisheries' progress toward the ZMRG as required by MMPA section 118(b)(3).

In an ANPR related to the ZMRG (68 FR 40888, July 9, 2003), NMFS described three options for defining an insignificance threshold (the maximum number of incidental mortalities or serious injuries that a population stock of marine mammals could sustain and be considered insignificant to the population), described 2 options for incorporating available technology and economic feasibility into the evaluation of a fishery relative to target mortality and serious injury levels, and solicited comments on these options or the identification of additional options related to the ZMRG. NMFS has considered comments received on the ANPR and is providing responses to these comments in this proposed rule.

Key Issues Related to the ZMRG

Despite substantial attention in the legislative history of the MMPA, the ZMRG remains confusing in certain key areas. The following discussion presents some of these confusing points as questions and addresses each question.

What Is the ZMRG?

The ZMRG is described in section 118(b) of the MMPA and includes provisions in other parts of the MMPA as well. In simple form, the ZMRG contains the following:

(1) A target for reducing incidental mortality and serious injury and a deadline by which the target is to be achieved;

(2) A statement that fisheries that have achieved the target shall not be required to further reduce incidental mortality and serious injury rates;

(3) A requirement for submitting a report to Congress describing fisheries' progress toward the target and notes fisheries for which additional information is required to assess levels of incidental mortality and serious injury; and

(4) A mechanism (the TRP process) to reduce levels of incidental mortality and serious injury in fisheries that have not met the target (within that mechanism, the economics of the fishery, availability of existing technology, and existing fishery management plans must be taken into account).

In this document, NMFS proposes an insignificance threshold as the target level of mortality and serious injury for all stocks of marine mammals. The insignificance threshold for each stock is 10 percent of that stock's PBR unless the Assistant Administrator for Fisheries adjusts that value and provides a rationale for such an adjustment.

In cases where total fishery mortality and serious injury exceed a stock's insignificance threshold, item (4) above directs NMFS to take appropriate action under the TRP process. TRPs apply to Category I and II fisheries and not to Category III fisheries. Therefore, Category III fisheries are not required to further reduce mortality and serious injury through the TRP process; however, NMFS intends to work with Category III fisheries through incentive and improved fishing technologies to reduce incidental morality and serious injury as resources allow (see response to comment 42).

What Is an Insignificant Level of Incidental Mortality and Serious Injury?

In 1995 NMFS discussed various interpretations of the term ''significant'' and proposed that ''insignificant'' within the ZMRG should relate to the biological significance of incidental mortality and serious injury to marine mammal stocks (MMPA Bulletin, June/July 1995). An insignificant level of incidental mortality and serious injury is one that has an insignificant impact on any stock of marine mammals. Three options for such levels were described in the 2003 ANPR, and each of these could be defended as having an insignificant impact on marine mammal stocks.

Why Is the Deadline Important?

The deadline emphasizes a date by which Congress intended for incidental mortality and serious injury to be reduced to insignificant levels approaching a zero rate and creates an expectation that all incidental mortality and serious injury will be sufficiently

reduced at some point in time. Prior to 1994, there was no specific deadline for achieving target levels of mortality and serious injury, and the ZMRG was more of a philosophy than a specific goal. That philosophy included the understanding that unnecessary deaths of marine mammals should be avoided, and, to the extent feasible, mortality and serious injury incidental to fishing operations should be eliminated. However, Congress was fairly clear in the legislative history of the MMPA that the available technology was insufficient to achieve the goal of eliminating incidental mortality and serious injury. Thus, the underlying philosophy of the ZMRG maintained that when new fishing practices or gear that would reduce mortality and serious injury became available, the fishing industry would adopt them. The deadline put an urgency on achieving an undefined goal and promoted confusion and frustration among a variety of constituents.

How Will Incidental Mortality and Serious Injury Levels Approach a Zero Rate?

An important part of answering this question lies in the choice of an appropriate rate to measure. The number of incidental mortalities and serious injuries in a year is a rate with mortalities and serious injuries as the numerator and time (one year) as the denominator. If NMFS identified this rate as the appropriate measure for the ZMRG, then fisheries would have to reduce annual incidental mortality and serious injury to levels approaching zero. However, mortalities and serious injuries per year is not the only rate that could be incorporated into the ZMRG. For example, in implementing the provisions of MMPA section 114, which were enacted in 1988, NMFS used a different mortality and serious injury rate for classifying fisheries. In its implementing regulations for MMPA section 114, NMFS defined frequent, occasional, and remote likelihood takings of marine mammals in terms of the number of marine mammals incidentally taken by an average fishing vessel in a 20–day period. More than one take per 20–day period was considered frequent, about one take per 20–day period was considered occasional, and remote likelihood meant that it was highly unlikely that any marine mammal would be taken by a vessel in a 20–day period. Thus, from 1988 through 1994, the pertinent rate was the number of marine mammals taken by a single fishing vessel in a 20–day period.

In 1994 and 1995, when preparing regulations to implement section 118 of the MMPA, NMFS rejected the previously used rates for classifying fisheries because they had no biological relevance. For example, a vessel in a small fishery (one with few participants or one that operated for a limited duration) could take several marine mammals from a large stock in a 20–day period, and that fishery would have little, if any, impact on the affected population. On the other hand, a large fishery could have a severe impact on a small population even if the per vessel take over a 20–day period was exceedingly small (i.e., approaching a zero rate). In its implementation of MMPA section 118, NMFS defined frequent, occasional, and remote likelihood in terms of marine mammal stocks' ability to sustain mortality (i.e., a function of the affected stock's PBR). Furthermore, NMFS proposed that an insignificant level of mortality and serious injury would be a small portion of the affected stock's PBR. Thus, since 1994, NMFS has considered the pertinent rate for the ZMRG to be the annual number of individuals in a stock of marine mammals killed or seriously injured incidental to commercial fishing per 1,000 animals in the affected stock.

In the ANPR published in 2003 for the current proposed rule, NMFS described three options for insignificance thresholds that can be mathematically re-arranged to be the product of a stock's Nmin and a rate constant. Under the 3 options, the rate constants varied from 0.0002 (10 percent of PBR for an endangered cetacean stock) to 0.006 (10 percent of PBR of a pinniped stock within its OSP [Option 1] or 10 percent delay in recovery of a pinniped stock [Option 2]). These options, therefore, define ''rate'' as the number of marine mammals incidentally killed or seriously injured by a fishery in a year as a function of the population size of the stock. Such ''rates'' are biologically relevant, and the result of each option is so small that it could be considered ''approaching a zero * * * rate''.

Would a Fishery Be Closed if It Missed the Target Mortality and Serious Injury Level by the Deadline?

A fishery would not be closed under the ZMRG simply because its incidental mortality and serious injury rate was above the target level at the deadline. The ZMRG specifically states that if mortality is higher than target levels, then NMFS should take appropriate action under MMPA section 118(f), which provides for developing and implementing TRPs. The MMPA requires that the long-term goal of TRPs must consider available technology and the economics of the fishery.

There is clearly a conflict within the MMPA because the statute has a very specific goal (reach the target by the deadline), and it does not specifically provide the consequences for a fishery not having reduced incidental mortality and serious injury to target levels by the deadline. However, the MMPA specifically states that the mechanism to reduce mortality and serious injury (the TRP process) must take into account technological and economic constraints in the long-term goal of TRPs, and NMFS must follow the TRP process under MMPA section 118(f) in regulating to reduce mortality and serious injury of marine mammals incidental to commercial fisheries.

Comments and Responses

NMFS received 14 letters, each of which contained comments on various aspects of the ANPR. These letters are available for review (see Electronic Access). These letters contain a wide range of views on the meaning of the ZMRG and on fisheries' achievement of this goal. Comments addressed 5 major topics: (1) General aspects of the ZMRG and related concepts, (2) the options for insignificance threshold that were described in the ANPR, (3) the concept of ''approaching zero'', (4) incorporating economic feasibility and available technology, and (5) recommended alternatives other than the options included in the ANPR. A summary of these comments and NMFS' responses to them are grouped accordingly.

General Comments

Comment 1: ZMRG is an unnecessary tool that distorts ecosystem-based biological management by placing marine mammals above all other species. Indeed, a zero mortality policy is the equivalent of treating all marine mammals as if they have been listed under the Endangered Species Act (ESA), even if their populations are healthy and growing.

Response: The ZMRG is a requirement under the MMPA, and, therefore, NMFS must implement it.

Comment 2: There are consequences for other species that flow from managing the oceans to give marine mammals the first and highest priority. While no one supports or condones actions leading to marine mammal mortality and injury, ZMRG is an inappropriate management tool because it ignores the needs of other species in the ocean ecosystem. It also ignores the needs and interests of other ocean users. Certainly, the ZMRG objective of maintaining marine mammal

populations at or near their maximum population level in the ecosystem is important. So is providing food for people and jobs for workers. The commercial seafood industry deserves consideration as well.

Response: As noted in the response to comment 1, the ZMRG is a part of the MMPA and must be implemented. The process to achieve target levels of incidental mortality and serious injury (i.e., TRPs) must consider available technology and the economics of fisheries, as well as state or regional fishery management plans. Therefore, the economics of the fishing industry are considered in the process for implementing the ZMRG as provided under the MMPA.

Comment 3: The problem with ZMRG begins with the statutory formula for determining the PBR that can be allowed for a marine mammal species. To compute PBR, the minimum population is multiplied by 50 percent of the maximum annual net reproductive rate. The resulting number is then reduced by a recovery factor of 0.1 for endangered species, 0.5 for threatened or status uncertain species, and 1.0 for others. The policy question is why scientists should not use the actual population level and reproduction rate supported by the data rather than the minimum population level and only half of the reproduction rate.

Response: This comment describes a common misinterpretation of the elements used in calculating PBR, upon which the various options for identifying an insignificance threshold were based. The PBR equation as provided under the MMPA uses an estimate of the abundance of the affected stock, an estimate of its annual net production, and a recovery factor. The actual abundance of marine mammals in all stocks of marine mammals is unknown. NMFS must, therefore, use an estimate of that abundance. Each such estimate contains a statistical variance; therefore, each estimate contains uncertainty regarding the actual number of animals in the population. Use of the minimum population estimate (Nmin), which is usually a lower limit of a confidence interval about the estimate, provides reasonable assurance that there is at least the number of estimated individuals in the population as provided in the definition of ''minimum population estimate'' under MMPA section 3(27), 16 U.S.C. 1362(27).

The productivity term in the PBR equation (one half the maximum theoretical or estimated net productivity rate of the stock at a small population size (Rmax)) apparently causes confusion as well. According to the logistic model, which is the underlying theory supporting the PBR approach, the per capita rate of increase is at its maximum when the population is very small relative to the carrying capacity. As the population grows, the per capita rate of increase decreases steadily until the population reaches its carrying capacity, at which time the population no longer grows.

One half Rmax is the per capita rate of increase expected under the logistic model when the population is at an abundance that would yield the greatest net annual production. If the PBR equation used a rate of increase higher than one half Rmax, the resulting PBR may represent a level of mortality that is higher than a population could sustain, and repeated annual mortality at that level could cause the population to decline below its Optimum Sustainable Population level (OSP). Such a situation would be inconsistent with the definition of PBR under the MMPA and with the MMPA goal of maintaining marine mammal stocks within their OSP levels.

Comment 4: The net result of the ZMRG is that marine mammal populations are maintained at 90 percent or more of the carrying capacity of the ecosystem. For no other ocean species is the management objective to return populations to their pristine level. This objective can only be achieved at the expense of other species, including endangered and threatened species. Equally important, this objective is achieved at the expense of providing food for the people of the country and the world because ZMRG will restrict commercial fishing even when there is no reasonable or foreseeable threat to healthy marine mammal populations.

Response: The MMPA does not provide an objective of returning marine mammals to pristine levels. As provided in response to comment 1, ZMRG is a requirement under the MMPA, and, therefore, NMFS is implementing it. The ZMRG applies only to mortality and serious injury incidental to commercial fishing operations; however, populations of marine mammals are affected by many other factors in their environments. If target levels of incidental mortality and serious injury were achieved, populations of marine mammals would not necessarily equilibrate at 90 percent or higher of their carrying capacities because other factors may limit population growth. Incidental mortality and serious injury by commercial fisheries below the insignificance threshold, however, would mean that fishing related mortality and serious injury are insignificant factors in the population trend of the affected marine mammal stock.

Comment 5: A review of the origins of the ZMRG concept clearly demonstrates that any NMFS rule using ZMRG as a regulatory standard designed to return marine mammal populations to their pristine levels is contrary to Congressional intent.

Response: Regulatory objectives do not include returning marine mammal populations to pristine levels. The ZMRG, however, expresses congressional intent that mortality and serious injury of marine mammals incidental to commercial fishing operations be reduced as low as feasible and termed such a level as an ''insignificant level approaching a zero mortality and serious injury rate''. A level of mortality and serious injury incidental to commercial fisheries that, by itself, would allow a population to equilibrate to a level within 90 percent of its carrying capacity would be considered insignificant to the population.

Comment 6: Section 118(f) of the MMPA notes that, while the long-term goal of take reduction plans is to reduce incidental mortality and serious injury to insignificant levels approaching a zero mortality and serious injury rate, the plans also are to take into account the economics of the involved fisheries and the technological limitations for achieving the goal. That is, the ZMRG is not intractable but simply requires continued vigilance to reduce mortality and serious injury to the greatest extent possible, keeping in mind competing economic and technological factors.

Response: This comment confuses the mechanism to reduce mortality and serious injury (TRPs) with the ZMRG. As noted in other parts of the preamble (see Background and *What is the ZMRG?*), a TRP is the mechanism by which incidental mortality and serious injury are to be reduced, and ZMRG is described in MMPA section 118(f) regarding the long-term goal of TRPs to include consideration of the economics of the fishery and available technology. NMFS does not negate those considerations in this proposed rule. Comments 57–64 and their respective responses also address technology and economics.

Comment 7: We are disappointed to note that ''zero mortality'' for all fisheries was to have been met by April 30, 2001, through a 5–year Take Reduction Plan, a statutory requirement under the MMPA that was to have been implemented no later than 1996. We are

further disappointed to note that to this date there are still many fisheries without the required TRPs even established.

Response: NMFS has developed and implemented TRPs and monitored the performance of fisheries under these TRPs to the maximum extent that resources allow. Congress anticipated that resources would limit the government's ability to implement all plans at once and in MMPA section 118(f)(3) established priorities for developing and implementing TRPs. NMFS has used these priorities in determining which TRPs to develop and implement first.

Comment 8: Despite the fact that NMFS is under the aegis of the Department of Commerce, it is still required by law to protect marine mammals, not conserve them because of their importance to the tuna fishing industry as long as such sustainable use is ''insignificant''.

Response: Although the MMPA is designed to protect marine mammals, there are many provisions within the MMPA that allow the taking of marine mammals. MMPA section 118 and the provisions in that section related to ZMRG require NMFS, in developing and implementing TRPs, to consider the economics of affected fisheries.

Comment 9: A restrictive definition of the ZMRG is biologically unnecessary. The three components of the PBR calculation are sufficiently conservative, even before consideration of the ZMRG.

Response: Although a marine mammal population could be maintained within its OSP so long as human-caused mortality does not exceed PBR, the MMPA states that mortality and serious injury of marine mammals incidental to commercial fisheries shall be reduced to insignificant levels approaching a zero morality and serious injury rate. The legislative history of the ZMRG clearly expresses the ideal that any unnecessary mortality of marine mammals should be avoided if feasible. Furthermore, the MMPA specifically states that reducing mortality and serious injury to PBR levels is only the short-term goal of a TRP, and reducing mortality and serious injury to levels consistent with the ZMRG, taking into account listed factors, is the long-term goal of a TRP.

Comment 10: The Pacific Scientific Review Group (SRG) has been urging NMFS to officially define ZMRG for four years with little response. The current rush to do so now appears to come only in response to litigation and has left little time to arrange for joint or individual meetings of the SRGs to discuss these options with scientists from NMFS. The recurring ''management by lawsuit'' operational style adopted by NMFS does not lend itself to well-reviewed scientific discussions.

Response: The ZMRG is a major provision of MMPA section 118, and NMFS has implemented section 118 as completely and rapidly as possible. The current effort to define these terms was publicly initiated with the ANPR on July 9, 2003, and will be completed sometime in 2004. The various opportunities for public comment included in this process allow for ample discussions related to the definitions.

Comment 11: The ANPR cited the opinion of the Center for Marine Conservation (now called the Ocean Conservancy) to justify continued kill of dolphins in the eastern tropical Pacific Ocean (ETP) and equate mortality below PBR levels as constituting ''zero mortality''. NMFS should not use the opinion of only one organization, and the reference is unacceptable and misleading.

Response: This comment misinterprets the intent of the reference to the Center for Marine Conservation's testimony. There was no suggestion that any level of incidental mortality constituted ''zero mortality''. NMFS cited the opinion of the Center for Marine Conservation in its comparison of stock-specific dolphin mortality limits to the ZMRG. In its review of the hearing record for the International Dolphin Conservation Program Act (IDCPA), which established dolphin mortality limits, NMFS found only the Center's testimony making such a comparison. Therefore, the citation of only one opinion was appropriate.

Comment 12: Little information related to accurate mortality estimates is available and much information is unreliable. Therefore, mortality limits based upon assumed levels of mortality are likely to fail to give adequate protection to marine mammals.

Response: The evaluation of fisheries progress toward the ZMRG must be made according to the information available and is, therefore, subject to the limits of such information. MMPA section 118 also requires a report to Congress on fisheries progress toward the ZMRG, and that report will, by statutory direction, contain a section that identifies those commercial fisheries for which additional information is required to accurately assess the level of incidental mortality and serious injury of marine mammals in the fishery. Therefore, NMFS will identify cases in which data are inadequate to accurately assess the level of incidental mortality and serious injury of marine mammals.

Comment 13: At the heart of the ZMRG process is the significant problem of lack of adequate data on which to base stock assessments. There is often no way of knowing how many animals there are in a given population, nor are we able to accurately determine the impact of mortalities in many fisheries. Because of a lack of resources, there are a number of fisheries about which we know little. For this reason, the take reduction teams have often found it difficult to adequately and accurately assess the success or failure of their proposed management regimes.

Response: Adequate information upon which to base a TRP and to evaluate its success is a vital part of the regime to govern interactions between marine mammals and commercial fishing operations. NMFS places a high priority on collecting the data necessary to develop and implement TRPs and to evaluate their success. Unfortunately, the costs of such evaluation is high and limits NMFS' ability to develop and implement additional TRPs.

Comment 14: While we feel that a zero mortality rate for any marine species is largely unrealistic and not achievable, we support the concept of the ZMRG, provided that the levels of incidental mortality and serious injury that may be established serve as goals and not compliance thresholds for mortality reduction.

Response: The ZMRG has several elements, including a target level of mortality and serious injury and a statement that once a fishery has achieved target levels, no further reduction in mortality and serious injury rates is required. Therefore, the insignificance threshold serves as a goal, and it establishes a limit to reductions in incidental mortality and serious injury that would be required. This level of mortality and serious injury is also the long-term goal for TRPs, and the regulatory mechanisms to achieve this goal must take into account existing technologies and the economics of fisheries.

Comment 15: The most explicit command regarding ZMRG is in MMPA section 118(b)(1), which states, ''Commercial fisheries shall reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate within 7 years after [April 30, 1994].'' Therefore, achieving such a level of mortality and serious injury is not an option; rather it is an unambiguous command of the statute, and such a command leaves no room for

consideration of the ''feasible economics'' of a given fishery.

Response: Unfortunately, the phrase ''insignificant levels approaching a zero mortality and serious injury rate'' is not clear and unambiguous. Therefore, the purpose of this proposed rule is to clarify this phrase by quantifying such levels of mortality and serious injury. Further, there are three other commands, in section 118(b)(2–4). Once a fishery has achieved target levels of incidental mortality and serious injury, no further reduction is required; a report on fisheries' progress in reducing incidental morality and serious injury is required; and fisheries above target levels of incidental mortality and serious injury must be addressed through appropriate action in the TRP process under MMPA section 118(f). The consideration of feasible economics is directed toward the long-term goal of a TRP under MMPA section 118(f), which is the mechanism to reduce mortality and serious injury of marine mammals incidental to commercial fisheries.

Comment 16: The ZMRG should be taken to mean the implementation of a precautionary approach to marine mammal management and that in taking action to protect marine mammal populations, any loss of, or potential harm to, such animals should be avoided. Any human-caused marine mammal mortality is undesirable and the ideal objective of any fisheries management plan should be to eliminate such loss.

Response: Eliminating loss of marine mammals incidental to commercial fishing is an ideal objective. The legislative history of the MMPA is reasonably clear that achieving zero mortality and serious injury is not likely, but should remain the ideal objective.

Insignificance Threshold

Comment 17: Option 3, 0.1 percent of Nmin (cetaceans) and 0.3 percent Nmin (pinnipeds), is an acceptable level by which cetacean and pinniped species should be managed. This is consistent with the established standard for an ETP dolphin insignificance threshold, which was defined by Congress.

Response: Option 3 is consistent with the established standard for ETP dolphins under MMPA section 302, 16 U.S.C. 1412. However, other alternatives are also consistent with the intent of the MMPA in provisions under MMPA section 118, and NMFS is proposing an insignificance threshold as 10 percent of a stock's PBR.

Comment 18: If NMFS decides to adopt a numerical goal for protected species, we recommend Option 2 (10 percent delay in recovery).

Response: Among options in the ANPR, Option 2 would provide the highest numbers of marine mammals that would be considered as an insignificant level of morality and serious injury. However, it would establish an insignificance threshold for stocks of endangered species that is equal to the PBR for these stocks, which would be inconsistent with the two goals (short- and long-term) of TRPs included in the MMPA.

Comment 19: Option 1 suggests that OSP should be 90 percent of carrying capacity for healthy stocks, 95 percent for status uncertain stocks, and 98 percent for endangered, threatened or depleted stocks. Option 2 suggests that OSP is 90 percent of carrying capacity, while Option 3 suggests OSP is 95 percent of carrying capacity. However, NMFS has already defined OSP as a range of population levels between 60 percent and 100 percent of carrying capacity. It is inappropriate, unwise, and likely a violation of law to use this ANPR to redefine OSP only for commercial fishermen.

Response: As noted in this comment, NMFS has used the range of population sizes from 60 percent of a stock's carrying capacity to the stock's carrying capacity as a marine mammal stock's OSP in evaluating whether a population stock of marine mammals is depleted under the MMPA. However, NMFS is not using this action to redefine OSP. The statements in the ANPR that marine mammal populations would reach levels of 90 percent to 98 percent of the stock's carrying capacity do not redefine carrying capacity. Rather, these statements indicate that mortality and serious injury of marine mammals incidental to commercial fisheries that did not exceed the insignificance thresholds under the three options would allow marine mammals to equilibrate within their OSP, near the carrying capacity, if other factors did not limit population growth.

Comment 20: In 1995, NMFS proposed a rule in which a fishery would be deemed to have met the ZMRG if it, in combination with all other interacting fisheries, killed and/or seriously injured no more than 10 percent of the PBR level of any stock. We supported this proposed definition. NMFS also proposed that in cases where incidental mortality and serious injury of all fisheries exceeded 10 percent of any stock's PBR, a single fishery would be deemed to have met the ZMRG if it was responsible for killing or seriously injuring less than one percent of the PBR for that particular marine mammal stock. We opposed this provision because if there were more than 10 interacting fisheries and each took 1 percent of the PBR, a stock could be unfairly and significantly disadvantaged over a stock with only a single interacting fishery. We are pleased to see that NMFS has not proposed this again as one of the options.

Response: In 1995, the proposed rule contained a provision to address situations where more than one fishery caused mortality and serious injury of a marine mammal stock and where total fishery mortality for that stock exceeded 10 percent of the stock's PBR. In these cases, NMFS proposed that a fishery that killed or seriously injured no more than 1 percent of the stock's PBR would be consistent with the ZMRG. In 1995, there were no cases where more than 10 fisheries killed or seriously injured a stock of marine mammals incidental to their operations. The ANPR did not address these same situations although there are cases where more than one fishery causes incidental mortality and serious injury of the same marine mammal stock, and incidental mortality and serious injury of that stock are above 10 percent of the stock's PBR. This proposed contains no provision to address this situation because none is needed (see related discussion under the headings ''What Is the ZMRG'' and ''The Proposed Rule'').

Comment 21: In all of its annual stock assessments since 1995, NMFS has used 10 percent of PBR as one of the measures for assessing the status of stocks. NMFS provides no justification in the current ANPR that suggests that this de facto definition was no longer considered scientifically justifiable or unfeasible. There is no apparent need for a new interpretation of the definition.

Response: NMFS is proposing to use 10 percent of PBR as the insignificance threshold in part to avoid confusion that would result by changing from its use in SARs since 1995.

Comment 22: Option 1 is generally the most protective of endangered stocks. As stock abundance increases, Options 1 and 3 begin to equalize and finally end with Option 3 being the most protective of abundant stocks. NMFS should afford priority to protecting vulnerable stocks in its choice of definitions for the ZMRG. For this reason alone, Option 1 is the preferable option to assure adherence to the intent of the MMPA.

Response: NMFS proposes to use Option 1 as the insignificance threshold.

Comment 23: Option 1 is simple to calculate for each stock. Furthermore, it is scientifically justifiable.

Response: NMFS is proposing Option 1 as the insignificance threshold.

Comment 24: In a report of a joint meeting of SRGs in 1999, it was noted that 0.1 percent of a stock's Nmin (which is the formula for calculating long-term dolphin mortality limits for the purse seine fishery for yellow-fin tuna in the Eastern Tropical Pacific Ocean) yielded similar results to 10 percent of a stock's PBR. One might expect that scientists who can analogize the essential results of what are now being called Options 1 and 3 could justify either. Thus, either has scientific merit.

Response: Options 1 and 3 yield similar results for cetacean stocks of unknown, depleted, or threatened status, and NMFS has used default values in calculating the PBR.

Comment 25: For the majority of stocks, the objective of avoiding significant population-level effects is likely met by reducing mortality and serious injury to a point below PBR for each marine mammal stock, particularly those that are not depleted, threatened, or endangered.

Response: Annual human-caused mortality remaining below PBR would not prohibit a stock from reaching OSP nor cause it to be reduced below its OSP. The short-term goal of TRPs addresses this point; however, under MMPA section 118(f), TRPs have a long-term goal to reduce incidental mortality to insignificant levels approaching a zero mortality and serious injury rate.

Comment 26: In the case of some endangered species, for example Hawaiian monk seals, mortality and serious injury at the PBR level could still have significant population effects. The PBR for monk seals is about five animals, and the removal by incidental mortality and serious injury of five adult females, particularly those near the peak of their reproductive potential, annually could have grave consequences for individual reproductive colonies.

Response: NMFS is aware of the limits of the logistic model and its application to small, declining populations, such as Hawaiian monk seals. Thus, rather than apply a simple mathematical formula to monk seals, NMFS may adjust the insignificance threshold based on the circumstances. In such a case, NMFS would explain its departure from the simple mathematical approach.

Comment 27: Relatively small levels of fisheries-related mortality and serious injury also take on added significance when considered in combination with other factors that may be affecting a stock.

Response: NMFS proposes to use an adjustment, generally a reduction, of insignificance thresholds to address such situations as needed.

Comment 28: The options in NMFS' ANPR can be evaluated under the following considerations: (1) Do the options take advantage of the information available on the species or stock involved, (2) are they relatively simple or straightforward to implement, and (3) are they suitably protective and consistent with the statutory mandate? Option 1 would use all the information currently available for the PBR process, but options 2 and 3 may not use all such information, particularly where estimated, rather than default, values for population growth were used in calculating PBR. All three options appear to be relatively easy to implement. However, only Option 1 would increase the level of protection provided as a stock's status worsens. Because PBR may not provide adequate protection for endangered stocks, increasing the level of protection as a stock declines seems prudent and precautionary.

Response: NMFS agrees that all three options would be easy to implement and that Options 2 and 3 do not necessarily use all available data in those few cases where estimated, rather than default, values for population growth are used in the PBR calculation. NMFS also agrees that Option 1 would provide the greatest level of protection for endangered stocks; therefore, NMFS is proposing Option 1 as the insignificance threshold.

Comment 29: From a biological perspective, the ZMRG is in some aspects similar to the negligible impact standard, each standard striving to have insignificant levels of mortality.

Response: NMFS agrees.

Comment 30: We disagree with the statement that the use of 10 percent of PBR in a final rule could result in the over-regulation of some fisheries and the assertion that the use of Option 1 could result in the over-regulation of some fisheries.

Response: The MMPA states that a TRP, which is the mechanism for reducing mortality incidental to commercial fishing, must take into account available technology and the economics of fisheries under the long-term goal. NMFS recognizes these considerations in developing and implementing TRPs. Consequently, the potential for over-regulation is diminished.

Comment 31: While Option 2 would likely maintain populations at or above 90 percent of the carrying capacity, it would not adequately protect threatened and endangered stocks.

Response: Option 2 would not be consistent with section 118(f)(2) (see comment 32 and response); therefore, NMFS is not proposing to use it.

Comment 32: Option 2 would allow the ZMRG to be achieved when incidental mortality was equal to the PBR for endangered species. Therefore, this option is inconsistent with the requirement in section 118(f)(2) of the MMPA for a short-term goal of reducing incidental mortality and serious injury to levels less than PBR and a long-term goal of insignificant levels approaching a zero mortality and serious injury rate.

Response: NMFS agrees with this comment and is not proposing to use Option 2.

Comment 33: We disagree with the assertion that Option 3 may be too restrictive for stocks at their OSP level by setting the insignificance threshold for such stocks at 5 percent of their PBR level. Stocks must be maintained within their OSP and to do that, the actual mortality and serious injury should be as small as possible. The insignificance threshold should never be the basis to undermine the ZMRG by allowing large numbers of marine mammals to be killed or seriously injured merely because their populations have reached their OSP or carrying capacity.

Response: Options 1 and 2 would result in an insignificance threshold for stocks within their OSP that is double the number that would result from the application of Option 3; therefore, some constituents may perceive Option 3 as overly restrictive for these stocks compared to Options 1 and 2. However, NMFS is proposing Option 1 as the insignificance threshold, which is consistent with NMFS' long-held interpretation that the phrase, ''insignificant levels'', relates to the impact of incidental mortality and serious injury on the affected stocks of marine mammals. Identifying the insignificance threshold as 10 percent of PBR recognizes that an insignificant level of mortality and serious injury would be a small fraction (e.g., 10 percent or less) of the human-caused mortality and serious injury that the population of marine mammals could sustain. Thus, mortality and serious injury below the insignificance threshold of each stock would be consistent with the ZMRG target levels of mortality and serious injury, which are insignificant levels approaching a zero mortality and serious injury rate.

Comment 34: We generally support Options 1 and 2 and generally oppose Option 3. Despite the advantage of making U.S. management policy

consistent with an international agreement, it is more important that the definition be internally consistent with the MMPA.

Response: NMFS proposes to use Option 1 for the insignificance threshold. The comment regarding consistency with an international agreement and being internally consistent with the MMPA relates to Option 3, and NMFS is not proposing that option.

Comment 35: We recommend Option 1 because it has a direct link to PBR. However, we are concerned that this option may result in greater precautions than necessary for protection of some endangered species. Therefore, we recommend that this option contain a provision similar to that in Option 2 where the insignificance threshold equals PBR for endangered species.

Response: Although Option 1 may result in a small number for the insignificance threshold for endangered species, the recommendation offered by the commentor is inconsistent with the requirement for short- and long-term goals of TRPs and is not proposed.

Comment 36: Option 1 is the preferable option for defining an insignificance threshold as it is the only option that is compatible with various other statutory and regulatory provisions of the MMPA; it is familiar to NMFS' constituents as it is the same as the proposed definition of ZMRG in the initial rulemaking to implement the 1994 amendments; it is the current de facto definition of ZMRG used in the SARs; it is tied to the statutory defined role of PBR; and with its use, it is easy to measure the effectiveness of a TRP (once PBR has been reached, an additional 10 percent reduction for each successive six months would meet the long-term goal of the TRP).

Response: Option 1 has many strengths as provided in this comment, and NMFS is proposing to use this option based in part on these strengths. The last statement of this comment (once PBR has been reached, an additional 10 percent reduction for each successive six months would meet the long-term goal of the TRP) results in an easily understood approach; however, data to verify such a step-wise reduction would not likely be available due to sampling constraints.

Comment 37: NMFS claims that a downside of Option 1 is that it leads to ''overly conservative levels of protection for certain endangered species''. This is hardly a downside. NMFS is obligated to conserve endangered species, and the Supreme court admonished that endangered species are to be afforded the ''highest of priorities''. Therefore, an endangered species can never be deemed to have too much protection.

Response: NMFS proposes to use Option 1 as the insignificance threshold.

Comment 38: By defining the insignificance threshold as a function of PBR, Option 1 builds in the distinction between endangered, threatened, declining, stable, or increasing stocks that the variable recovery factor in the PBR reflects. Options 2 and 3 improperly and illegally nullify the distinction the MMPA creates in the treatment of stocks of different status.

Response: NMFS is proposing Option 1 as the insignificance threshold.

Comment 39: Option 2 is illegal in that it renders portions of section 118(f) superfluous. Under Option 2, the insignificance threshold for endangered species is the same as PBR for those endangered species for which the default value of 0.1 is used as the recovery factor. Therefore, the short-term goal and the long-term goal of TRPs are the same, and the last 4 1/2 years of the TRP are meaningless.

Response: Option 2 is inconsistent with the provisions of MMPA section 118(f)(2) in the case of endangered marine mammals, and NMFS is not proposing to use it.

Comment 40: We are opposed to Option 2 as a definition for ZMRG because ZMRG for threatened and endangered species could be set at the same level as PBR. Option 1 provides the most precautionary of the three proposed approaches to marine mammal conservation.

Response: The insignificance threshold under Option 2 would be the same as PBR for endangered species, and NMFS is not proposing to use it. Option 1 is the most precautionary for endangered species.

Comment 41: We are best able to support Option 2 (10 percent delay in recovery) and request that flexibility be provided for amending the definition for categorization of fisheries. If flexibility is not provided, then a great number of Alaska's fisheries could be improperly categorized.

Response: NMFS is not proposing to use Option 2 because it would be inconsistent with MMPA section 118(f)(2) for endangered species.

Approaching Zero

Comment 42: The only option of the three that NMFS is considering for defining ''insignificant levels'' that is compatible with the MMPA, as well as the ESA, is Option 1 which sets the insignificance threshold as 10 percent of PBR. Although this may be an appropriate definition for ''insignificant levels'', it is not the same as ZMRG. A complete definition of ZMRG must also incorporate the ''approaching zero'' language of the statute.

Response: NMFS proposes to define the insignificance threshold as the upper limit of annual incidental mortality and serious injury of marine mammal stocks that can be considered insignificant levels approaching a zero mortality and serious injury rate and proposes to use Option 1 to quantify that upper limit. This quantified, stock-specific level of mortality and serious injury is relatively easy to calculate, is based on information available in the SARs, and is based on the formula that NMFS currently uses to implement this statutory phrase for purposes of the SARs. Therefore, this quantified, stock-specific level should provide commercial fishing operations with an easily understandable level of mortality and serious injury as a target to provide incentive to improve fishing technology and practices to reduce incidental mortality and serious injury and provide an effective means to meet the ZMRG of the MMPA. In addition, NMFS would continue to work with the fishing industry through incentive and improvement of available technologies and methods even after incidental mortality and serious injury in any particular fishery is reduced to a point that is biologically insignificant.

This and other comments request that NMFS define two separate levels: a population-based insignificance level and then a different level to ensure that the interactions are ''approaching zero'' regardless of the overall impacts on the populations. These comments misread the statute. The statutory requirement is that commercial fisheries reduce mortalities to a single level: the ''insignificant level.'' The phrase ''approaching a zero mortality and serious injury rate'' modifies the term ''insignificant level.'' The ''approaching zero'' language does not create a stand-alone independent second criterion. NMFS proposes to effectuate this provision by adopting a single definition for the insignificant level rather than two separate definitions as suggested by these comments. NMFS has determined that 10 percent of the PBR is an insignificant level because it is a level approaching a zero mortality and serious injury rate which will not have effects at a population level. The upper limits range from 2 animals per 10,000 animals in the population stock for endangered whales to 6 animals per 1,000 animals for robust pinneped stocks. These levels ''approach zero.'' See ''How Will Incidental Mortality and Serious Injury Levels Approach A Zero Rate?''

Comment 43: Under any of the options, including Option 1, interactions (and thus mortalities) can continue to increase as marine mammal populations grow, while still being considered to meet the definition of the ZMRG. This would seem counter to the intent specified in the MMPA that rates be ''reduced to insignificant levels approaching zero mortality and serious injury.'' While we do not believe that the Congress intended this to mean that the death rate must be absolutely zero, we do believe that the language in the MMPA indicates that this is not a static concept, but is intended to ensure that mortality is always reduced to its lowest feasible level.

Response: The ZMRG is not a static concept, and its goal is to reduce incidental mortality and serious injury of marine mammals to the lowest feasible level. NMFS realizes that the number of deaths of marine mammals incidental to commercial fishing could increase as numbers of marine mammals increase. As long as the mortality and serious injury rate (as a function of population size) decreased, an increase in the number of marine mammal deaths per year would still be consistent with the MMPA's goal of ''approaching a zero mortality and serious injury rate.'' A rate based upon mortality and serious injury per 1,000 animals in the population addresses the impact of the mortality and serious injury on the affected stock of marine mammals and, in that sense, is biologically relevant. Therefore, NMFS is using a rate based upon population size or annual production (which is a function of population size) within the ZMRG. In addition, see response to comment 42 for additional reasons why NMFS proposes to use a quantifiable rate.

Comment 44: The MMPA requires not just ''insignificant levels'' of mortality and serious injury to marine mammal stocks, but also that such takes be at rates ''approaching zero''. Nowhere in the ANPR does NMFS attempt to include the ''approaching zero'' requirement into any of the proposed definitions of ZMRG. As such, each of the proposed definitions is inadequate as a matter of law.

Response: Although the ANPR contained only a description of options for ''insignificant levels'', this proposed rule addresses ''approaching a zero...rate'' by defining the insignificance threshold as the upper limit of annual incidental mortality and serious injury of marine mammal stocks that can be considered insignificant levels approaching a zero mortality and serious injury rate. In addition, see response to comment 42.

Comment 45: If the significance thresholds for each stock of marine mammals were summed, the total for pinnipeds alone would be in the thousands. These numbers would surely shock an American public who wishes to see marine mammal deaths minimized, and would not consider the deaths of thousands of marine mammals each year in the U.S. to be ''insignificant''.

Response: Although the sum of the insignificance thresholds for all pinnipeds would be a large number, mortality and serious injury below the proposed threshold would not have a significant effect on any stock of marine mammals, and mortality and serious injury limited to the insignificance threshold would be insignificant and approaching a zero rate (when the ''rate'' being considered is mortality and serious injury as a function of population size or annual production). In addition, see response to comment 42.

Comment 46: Mortalities may rise with increases in population abundance of marine mammals; therefore, NMFS needs to develop a mechanism for either capping mortality at current ZMRG levels or ''ratcheting'' fisheries to lower levels that can be put in place as marine mammal stocks increase. This would prevent death rates from increasing even higher as marine mammal stocks finally begin to recover.

Response: The suggestion to ratchet allowable mortality levels downward in the future is one option to approach a zero mortality and serious injury rate; however, such an approach would conflict with the MMPA's requirement that once target levels of mortality and serious injury have been achieved, fisheries are not required to further reduce mortality and serious injury. The MMPA does not specify what ''rate'' should approach zero, and NMFS stated in 1995 and continues to maintain that the ZMRG should be based primarily on the significance of incidental mortality and serious injury to the affected stock.

Comment 47: The ZMRG has two key elements. First, it requires that incidental mortality and serious injury levels be reduced to the point that they are insignificant. Our interpretation is that such insignificance is to be gauged by looking at population-level effects. Second, as an additional element, the ZMRG requires that the rate of incidental mortality and serious injury approach zero. We believe this second element was intended to compel the technological advancement of fisheries to the greatest extent practicable to avoid any death or serious injury of individual marine mammals.

Response: Insignificant levels may best be gauged by looking at population effects of incidental mortality and serious injury rates. Mortality and serious injury rates based upon population size or annual production are biologically relevant, and the result of Option 1 for all stocks is a rate that is biologically insignificant and so small as to be approaching a zero rate. Calculation of the insignificance threshold under Option 1 results in rates ranging from 6 per 1,000 for robust stocks of pinnipeds to 2 per 10,000 for endangered cetaceans, and these rates are so small as to approach a zero rate. In addition, see response to comment 42 for additional reasons why NMFS proposes to use such a quantifiable rate.

Comment 48: Congress clearly intended to set a goal that goes beyond the protection of populations. The drafters of the legislation also intended to compel fishermen to avoid or minimize, to the extent technologically and economically feasible, the number of individual marine mammals killed or seriously injured. Therefore, even when removals from a stock incidental to commercial fishing operations can be tolerated at the population level, everything that is technologically and economically feasible to be done to reduce the mortality and serious injury of individual marine mammals to the lowest level practicable should be done.

Response: Once incidental mortality and serious injury has been reduced to insignificance thresholds for all stocks of marine mammals, continued reduction of incidental mortality and serious injury may be accomplished through incentive and working with the fishing industry to improve available technologies and methods, which is similar to the approach described for eliminating dolphin mortality in the ETP (see MMPA section 302(8); 16 U.S.C. 1412(8)).

Comment 49: The three proposed options to achieve ''zero mortality'' are insufficient, unacceptable, and, in at least two instances (Options 2 and 3) in direct conflict with the MMPA. We are especially concerned that the ANPR makes no attempt to include the language ''approaching zero'' in any of these options.

Response: ''Approaching a zero...rate'' is addressed in this proposed rule as described in responses to comments 42 and 44 and to other comments under the heading ''Approaching Zero''.

Comment 50: NMFS claims that one of the pros of Option 3 is that it is consistent with the ETP dolphin standard which is an ''insignificant'' metric specifically defined by Congress. This statement may be true; however,

stock-specific mortality limits are but one limit, and, given the goal of eliminating mortality, Congress never intended this limit to be the endpoint.

Response: NMFS is aware that the MMPA contains the goal of eliminating mortality incidental to purse seine fisheries for yellow-fin tuna in the ETP. There is, however, no required mechanism to achieve this goal; furthermore, the MMPA states that an International Dolphin Conservation Program should be established requiring, among other things, provisions for a system of incentives to vessel captains to continue to reduce dolphin mortality, with the goal of eliminating dolphin morality. The MMPA does not require a regulatory approach to eliminate mortality once incidental mortality is reduced below stock-specific, quantifiable dolphin mortality limits.

Comment 51: Congress clearly intended that the ''zero mortality rate'' of marine mammals be zero, as in no marine mammals.

Response: Congressional intent related to regulation of fisheries under the ZMRG is not clear. The divergence of opinions expressed in the comments to the ANPR for this proposed rule illustrates the lack of clarity of the intent of the ZMRG. However, the plain language of the statute relating to ZMRG provides that the incidental mortality and serious injury of marine mammals by commercial fisheries shall be reduced to ''insignificant levels approaching a zero mortality and serious injury rate'' (emphasis added); it does not provide ''zero mortality rate'' or ''zero marine mammals''. Furthermore, MMPA section 118(f) requires that TRPs take into account the economics of fisheries, available technologies, and existing state and regional fishery management plans, and this requirement indicates some flexibility in achieving the long-term goal of TRPs.

Comment 52: NMFS is required to take economics and available technologies into account in figuring out how to reduce mortality and serious injury to insignificant levels, but NMFS cannot use these factors as an excuse not to reach such levels.

Response: The MMPA provides that TRPs are the mechanism to reduce mortality and serious injury of marine mammals under the ZMRG (see MMPA section 118(b)(4)). The MMPA also states that, in developing and implementing TRPs, NMFS must take into account the economics of the affected fisheries, available technology, and existing fishery management plans (see MMPA section 118(f)(2)) when developing and implementing measures to achieve the long-term goal for reducing incidental mortality and serious injury to insignificant levels approaching a zero mortality and serious injury rate.

Comment 53: The MMPA requires not just ''insignificant levels'' of mortality and serious injury to marine mammal stocks, but also that such takes be at rates ''approaching zero''. Nowhere in the ANPR does NMFS attempt to include the ''approaching zero'' requirement into any of the proposed definitions of ZMRG. As such, each of the proposed definitions is inadequate as a matter of law.

Response: The ANPR described certain options that NMFS was considering related to the ZMRG and solicited comments related to these options or to identify new options. There were no proposed definitions in the ANPR. This proposed rule, however, addresses ''approaching a zero...rate'' as described in responses to comments 42, 44, and other comments under the heading ''Approaching Zero''.

Comment 54: The ''insignificant levels'' prong of the ZMRG may be interpreted as protecting marine mammal populations, while the ''approaching zero'' prong is read as protecting individual marine mammals by reducing mortality and serious injury to the lowest possible levels.

Response: See responses to comment 42, 48 and other comments under the heading ''Approaching Zero''. In addition, in developing and implementing TRPs to achieve the long-term goal of a TRP, NMFS must take into account economics of fisheries, available technologies, and existing fishery management plans.

Comment 55: Option 3 for the Insignificance threshold would be consistent with the ETP dolphin standard, which is an insignificant metric specifically designed by Congress. The current ETP standard actually goes beyond the attainment of an insignificance threshold and calls for the participating nations taking yellow fin tuna in the ETP to reduce dolphin mortality limits progressively to a level approaching zero through the setting of annual limits, with the goal of eliminating dolphin mortality in that fishery.

Response: NMFS proposes to use Option 1, not Option 3, for the insignificance threshold for purposes of MMPA section 118. In addition, see response to other comments under the heading ''Approaching Zero''.

Comment 56: The ZMRG should serve as a mechanism that fosters the development of technologies or gear modifications that will allow further reduction in mortality. The fisheries industry has proven to be extremely creative in the face of such challenges and will likely develop such methods or gears in both a cost-effective and timely manner.

Response: NMFS agrees. See response to comment 42.

Technology and Economics

Comment 57: The insignificance threshold is the driving mechanism to reduce mortality and serious injury and the incentive for fishermen and scientists to devise economically feasible technologies to meet this objective. We believe NMFS' option to incorporate available technology and economic feasibility into an initial assessment of whether fisheries had achieved the ZMRG by the statutory date is flawed and contrary to Congressional intent and court findings.

Response: NMFS is not proposing consideration of technology and economics as part of the insignificance threshold. However, it will be necessary to take technology and economic feasibility into account in developing and implementing TRPs to reduce mortality and serious injury toward the insignificance threshold.

Comment 58: Although Congress sought to encourage the development of new technology to reduce incidental interactions with marine mammals, it was always clear that ZMRG was satisfied by the use of the best available technology that was technologically and economically feasible to employ.

Response: When Congress amended the meaning of ZMRG in 1981, the House committee recognized that other fisheries (citing the foreign high seas salmon gillnet fishery as an example) had not developed new techniques and equipment for reducing incidental mortality and serious injury. Therefore, the goal in MMPA section 101(a)(2) would remain unchanged for commercial fisheries other than the purse-seine fishery for yellow-fin tuna in the ETP ''to stimulate new technology for reducing the incidental taking of marine mammals.'' (H. R Rep. No. 97–228 at 17–18 (1981)). The goal in MMPA section 101(a)(2) is essentially reiterated in MMPA section 118(b), and section 118(b) does not include any language regarding consideration of technological or economic feasibility. Under MMPA section 118(f), to reduce mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate, TRPs must take into account economics of the fisheries, available technology, and existing fishery management plans.

Comment 59: NMFS requested comment on whether fisheries should be considered to have met the ZMRG if they are below PBR but simply have no other methodologies available to reduce mortality and serious injury to lower levels such as the ZMRG level. The ZMRG stands as an incentive to develop further methods of achieving the ultimate desire of the American people that marine mammal mortality and serious injury be truly incidental and unavoidable.

Response: See response to comment 58.

Comment 60: Related to the question of whether or not a fishery should be determined to have satisfied the ZMRG if incidental mortality and serious injury exceeded a stock's insignificance threshold but suitable technological solutions were not available, stating that a fishery had met the ZMRG simply because of apparent technological difficulties would effectively change the standard to suit the situation, which seems contrary to the long-term goal of achieving a zero mortality and serious injury rate.

Response: Such a fishery would not have achieved target levels of incidental mortality and serious injury as described in the ZMRG. However, as noted in other responses, the MMPA requires that NMFS consider economic feasibility and available technology when developing and implementing plans to reduce mortality and serious injury of marine mammals incidental to commercial fishing.

Comment 61: We strongly disagree with any attempt by NMFS to consider the ''feasible economics'' of any fishery when determining whether that fishery has reached ZMRG. This is not an option under the MMPA.

Response: Although such considerations are not included in determining whether a fishery has reduced mortality and serious injury to insignificant levels approaching a zero mortality and serious injury rate under MMPA section 118(b), such considerations are mandatory in developing and implementing TRPs to reduce incidental mortality and serious injury of marine mammals to the long term goal of TRPs under MMPA section 118(f).

Comment 62: The proposed application of the ZMRG is inconsistent with the original intent of the statute and must be linked to available technology. In testimony (April 6, 2000) before the House Subcommittee on Fisheries Conservation, Wildlife and Oceans, NMFS openly recognized the nexus between the absence of critical gear research and technology and the ability to achieve the ZMRG. Sadly, little has been accomplished to date to reverse this situation as take reduction teams continue to struggle with limited information on stock status, gear technology, and innovation. Implementing a restrictive ZMRG definition in the absence of available technology will prevent the process from moving forward in a constructive common sense manner.

Response: As provided in response to comment 13, NMFS places a high priority on collecting the data necessary to develop and implement TRPs. Unfortunately, available resources are insufficient to provide more complete information on stock status, gear technology, and innovation, and TRPs must be developed on the basis of the available information. NMFS will continue to work with the fishing industry to improve available technology and methods within and outside of the TRP process.

Comment 63: The IDCPA not only established an overall dolphin mortality limit, it also set (as of 2001) stock-specific dolphin mortality limits. These limits were put into place, and became binding, irrespective of the current state of technological development. Thus, in the enactment of the IDCPA, Congress distanced itself from a definition of ZMRG that was solely equated with technological advances. Congressional intent was rather that the establishment of quantifiable mortality limits that approached biologically insignificant levels were to be viewed as both a mechanism and an incentive to encourage commercial fisheries to further reduce marine mammal mortality in order to move toward an ultimate goal of eliminating mortality.

Response: NMFS proposes a stock-specific, quantifiable insignificance threshold in part as an incentive to encourage commercial fisheries to further reduce mortality and serious injury of marine mammals. Thus, the proposed rule to implement the ZMRG as described in MMPA section 118 is similar to the IDCPA, which established stock-specific dolphin mortality limits as an incentive to further reduce incidental mortality and serious injury of dolphins incidental to the purse seine fishery for yellowfin tuna in the ETP.

Comment 64: We support incorporating available technology and economic feasibility into an initial assessment of whether or not fisheries have achieved the ZMRG by the statutory due date as long as it is measurable and defined.

Response: As noted above, the assessment of whether or not fisheries have reduced incidental mortality and serious injury to insignificant levels approaching a zero mortality and serious injury rate is independent of available technology and economic feasibility. These factors, however, must be taken into account in developing TRPs to reduce incidental mortality and serious injury once it has been reduced to levels below PBR.

Alternative Approaches

Comment 65: ZMRG should be defined using PBR and a technology standard for species that are not endangered, threatened or depleted. Although applying PBR without any further ZMRG reduction will allow species which are endangered, threatened, or depleted to reach OSP, it may be appropriate to consider a more restrictive numerical standard in order to hasten the achievement of that goal.

Response: The ZMRG does not contain a provision for a technology standard to be included in an assessment of whether commercial fisheries have achieved insignificant levels of incidental mortality and serious injury approaching a zero rate. In addition, the ZMRG is a goal for reducing mortality and serious injury levels even below PBR as is illustrated by short-term and long-term goals for TRPs.

Comment 66: NMFS should adopt a modified version of Option 1 as the most appropriate mechanism for determining when a fishery has met the ZMRG. Option 1 should be modified by adding a second component that compels further reductions in mortality and serious injury for those stocks with high PBR levels. NMFS should determine that a fishery has met the ZMRG only if it results in a level of mortality and serious injury below the threshold established for that goal.

Response: NMFS is proposing Option 1 as the definition of the insignificance threshold. However, NMFS is not proposing a regulatory mechanism to reduce incidental mortality and serious injury to levels below the insignificance threshold for stocks of marine mammals. The ideal of eliminating mortality and serious injury, once insignificance thresholds have been achieved, may be accomplished through incentive rather than regulation. See response to comment 42 and other comments and responses under the ''Approaching Zero'' heading.

Comment 67: We oppose all three options proposed by NMFS and recommended an alternative consisting of the following elements:

(1) ZMRG = PBR;

(2) the ZMRG should not apply to robust stocks, stocks that are severely

endangered (i.e., PBR ≤5 individuals), or stocks not under an MMPA management program;

(3) the application of ZMRG should be prioritized by the Secretary for stocks that have a small populations size, those that are declining most rapidly, and those whose level of incidental mortality and serious injury has not dropped significantly within 5 years of TRP implementation;

(4) the ZMRG definition must incorporate available technology and economic feasibility;

(5) the Secretary, working cooperatively with the appropriate take reduction team and SRG, should conduct the review and determination regarding the availability of technology and economic feasibility; and

(6) if technology is deemed not available and if a fishery is determined to be above he ZMRG after 5 years under an approved TRP, then the Secretary should work with fishery participants to develop and implement the appropriate technology.

Response: As provided in response to other comments, some portions (points 1–4) of this alternative would be inconsistent with the MMPA; therefore, it does not represent a reasonable alternative for consideration in defining an insignificance threshold under this proposed rule. In accordance with the MMPA, NMFS currently prioritizes the development and implementation of TRPs to address strategic stocks that interact with Category I and II fisheries and that have a small population size, those that are declining most rapidly, and those for which incidental mortality and serious injury exceed a stock's PBR. NMFS will work with take reduction teams and SRGs to review the economics of affected fisheries and the availability of existing technologies as required by the MMPA. NMFS will also work with participants of fisheries to develop and implement technologies to further reduced incidental mortality and serious injury of marine mammals as recommended in point 6 of this comment.

Comment 68: NMFS should consider a three-part approach to defining ZMRG. First, NMFS should adopt as a rule its current definition of ZMRG as set forth as Option 1 of the ANPR. Second, to address Congressional intent to limit incidental mortality of marine mammals as much as possible, if current levels of incidental mortality and serious injury from commercial fishing on a marine mammal population are lower than the Option 1 backstop would allow, ZMRG for each commercial fishery interacting with that population must be set no higher than the current level of takes. Third, to address the Congressional intent that incidental mortality approach a zero rate, NMFS must periodically revisit the levels set for marine mammal populations in each fishery whose rate does not yet fully approach zero, and gradually reduce those levels over a period of years in order to force technology to reduce takes to ''insignificant levels approaching a zero mortality and serious injury rate''.

Response: This suggested alternative approach has certain merits; however, there are problems, particularly regarding the second and third steps. Setting allowable mortality levels no higher than the current level of takes would include an assumption that the reported or estimated number of takes represents all that are occurring. Observer data are available only for a few selected fisheries; therefore, current levels of incidental mortality and serious injury cannot be verified independently and may exceed current estimates. In addition, the MMPA states that once a fishery has achieved target levels of incidental mortality and serious injury, that fishery does not have to further reduce such mortality and serious injury. If target levels were a sliding scale, a fishery could have achieved its target in one year, and in a later year, when the target had been reduced, the fishery would again be above target mortality and serious injury levels. Such an approach does not lend itself to feasible implementation. Although NMFS does not propose a sliding scale to ratchet down stock-specific insignificant thresholds over time, insignificance thresholds could change as a result of new abundance or productivity estimates.

Comment 69: There are several different ways that NMFS can define the ''approaching zero'' prong of ZMRG. The simplest would be an actual numerical cap on mortality and serious injury, and such a cap would have to be a low number (i.e., <10). The use of the word ''approaching'' implies movement; therefore, the ''approaching zero'' prong of the ZMRG is not static. It would be racheted down closer to zero with each successive year until an actual zero mortality and serious injury rate were achieved. An alternative would be to define ''approaching zero'' as a rate in relation to some other variable. The key is choosing the right rate and right variable. Perhaps the best way to define it is to use a method similar to the 2–tier approach for classifying fisheries. For the 2–tiered approach, even if the impacts on a given marine mammal stock of all fisheries combined were below insignificant levels, a fishery would not be at ZMRG unless it also individually was responsible for annual mortality and serious injury of no more than a small portion (i.e., 1 percent) of any stock's PBR. Such an approach would be straightforward to carry out and would fully implement the requirements of the ZMRG.

Response: Mortality rates ranging from 2 per 10,000 (endangered whales) to 6 per 1,000 (robust stocks of pinnipeds) marine mammals in the population represent such a small cap as to be approaching a zero mortality and serious injury rate; therefore, the second tier of the approach in this comment is not necessary to fully implement the requirements of the ZMRG.

The Proposed Rule

NMFS proposes that the default target level of mortality and serious injury that would satisfy the ZMRG is 10 percent of any stock's PBR. These targets result in upper limits ranging from 2 animals per 10,000 animals in the population stock for endangered whales to 6 animals per 1,000 in the population for robust pinniped stocks. These initial target levels of incidental mortality and serious injury are the starting points for determining final target levels of mortality and serious injury on a stock-by-stock basis, which may be adjusted on the basis of additional information. For example, in some cases (e.g., gray whale, Eastern North Pacific stock, and northern fur seal, Eastern North Pacific stock) a calculated, rather than default Rmax value is used in PBR calculations. An adjustment for these calculated values in the insignificance threshold would be a straight-forward mathematical substitution.

Using an insignificance threshold that is based upon the PBR equation is subject to the same limitations and assumptions that are found in the PBR calculations. In some cases, particularly for declining stocks, the underlying theory of the logistic model may have crucial assumptions that are not valid. For example, the PBR approach based upon the logistic model indicates that populations should grow if mortality is below sustainable levels. In the case of Steller sea lions, Western U.S. stock; northern fur seals, Eastern North Pacific stock; and Hawaiian monk seals, the populations are declining, and known human-caused mortality and serious injury are insufficient to cause the decline. In these cases, NMFS may use an adjustment to the result of the simple formula for calculating the insignificance threshold to estimate an upper limit to the level of mortality and serious injury that could be considered insignificant.

For North Atlantic right whales, the PBR is zero, which means that any human-caused mortality may impede this stock′ recovery to OSP. For right whales, it would be inconceivable to determine that some mortality and serious injury rate above zero would have an insignificant effect on the population; therefore, the insignificance threshold for right whales would be zero mortality and serious injury per 1,000 whales in the population just as the current PBR is zero.

For some stocks of marine mammals, total incidental mortality and serious injury may exceed the insignificance threshold for the stock, yet some fisheries may be having such a small impact on the stock that these fisheries' levels of mortality and serious injury could be insignificant levels approaching a zero mortality and serious injury rate. For these situations, the 1995 proposed rule contained a 2–tiered approach. The first tier was the evaluation of total fishery mortality and serious injury for each stock of marine mammals to determine if such mortality and serious injury is below a stock's insignificance threshold. The second tier was used when total incidental mortality exceeds any stock's insignificance threshold, and provided that a fishery that causes no more than 10 percent of any stock's insignificance threshold would have achieved insignificant levels approaching a zero mortality and serious injury rate.

The interactions among several MMPA sections and NMFS' implementing regulations of these provisions make the 2–tiered approach used in 1995 unnecessary. MMPA section 118(b)(4) directs NMFS to take appropriate action under the TRP process to reduce mortality and serious injury under the ZMRG, MMPA section 118(c)(1)(A) identifies the three categories of fisheries, and MMPA section 118(f)(1) states that TRPs are to be developed for Category I or II fisheries that interact with strategic stocks of marine mammals; there are no provisions to develop or implement a TRP for a Category III fishery.

According to the above provisions of the MMPA, there are no provisions to require through the TRP process that Category III fisheries further reduce mortality and serious injury of marine mammals incidental to their operations. Under existing regulations, Category III fisheries include those fisheries for which incidental mortality and serious injury are no more than 10 percent of the PBR of any stock of marine mammals, which is the insignificance threshold under this proposed rule. Category III fisheries also include those fisheries that, even when total fishery mortality and serious injury exceed 10 percent of a stock's PBR, kill or seriously injure no more than 1 percent of that stock's PBR (which is the mathematical equivalent of 10 percent of the stock's insignificance threshold). Therefore, the result of this proposed rule, other existing regulations, and provisions of the MMPA is identical to the 2–tiered approach that was contained in the ZMRG provisions of the 1995 proposed rule.

Classification

NMFS has prepared a draft EA to analyze the impacts on the human environment of establishing an insignificance threshold to implement the ZMRG. NMFS solicits comments on the draft EA (see Electronic Access) and on the proposed rule.

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities as follows:

''The 2003 List of Fisheries (68 FR 418725, July 15, 2003) includes 39,176 vessels in Category I and II fisheries, which are the fisheries subject to further reduction of mortality and serious injury under the MMPA. Of these vessels, 34 are large entities; therefore, 39,142 small entities may be affected by this proposed rule. The MMPA imposes a general moratorium on the taking of marine mammals except as provided in limited exceptions. This proposed rule would define an insignificance threshold as the upper limit of annual incidental mortality and serious injury of marine mammal stocks by commercial fisheries that can be considered insignificant levels approaching a zero mortality and serious injury rate. This definition would not, by itself, place any additional restrictions on the public. Under provisions of the MMPA, a take reduction team must be established and a take reduction plan developed and implemented within certain time frames if a strategic stock of marine mammals interacts with a Category I or II commercial fishery. The long-term goal of a take reduction plan is to reduce mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate, taking into account the economics of affected fisheries, the availability of existing technology, and existing state or regional fishery management plans. Any measures identified in a take reduction plan to reduce incidental mortality and serious injury would require separate rulemaking action before the action could be implemented. Any subsequent restrictions placed on the public to protect marine mammals would be included in separate regulations, and appropriate analyses under the Regulatory Flexibility Act would be conducted during those rulemaking procedures.''

Therefore, implementation of this proposed rule would not have a significant economic impact on a substantial number of small entities. As a result, no regulatory flexibility analysis for this proposed rule has been prepared.

This proposed rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act of 1980. This proposedrule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 13132.

List of Subjects in 50 CFR Part 229

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

Dated: April 23, 2004.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

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

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

1. The authority citation for part 229 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

2. In § 229.2, the definition for ''Insignificance threshold'' is added in alphabetical order to read as follows:

§ 229.2 Definitions.

* * * * *

Insignificance threshold means the upper limit of annual incidental mortality and serious injury of marine mammal stocks by commercial fisheries that can be considered insignificant levels approaching a zero mortality and serious injury rate. An insignificance threshold is estimated as 10 percent of the Potential Biological Removal level for a stock of marine mammals. If

certain parameters (e.g., maximum net productivity rate or the recovery factor in the calculation of the stock's potential biological removal level) can be estimated or otherwise modified from default values, the Assistant Administrator may use a modification of the number calculated from the simple formula for the insignificance threshold. The Assistant Administrator may also use a modification of the simple formula when information is insufficient to estimate the level of mortality and serious injury that would have an insignificant effect on the affected population stock and provide a rationale for using the modification.

* * * * *

[FR Doc. 04–9753 Filed 4–28–04; 8:45 am]

BILLING CODE 3510–22–S