

section 3(b) of Executive Order 13084 do not apply to this rule.

#### IV. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

#### List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 29, 1998.

**Tina E. Levine,**

*Acting Director, Registration Division, Office of Pesticide Programs.*

Therefore, 40 CFR chapter I is amended as follows:

#### PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 346a and 371.

#### § 180.482 [Amended]

2. In § 180.482, paragraph (b), in the table, amend the entry "Sugarcane" by revising the tolerance level "0.03" to read "0.3" and the date "12/31/98" to read "12/31/00".

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#### DEPARTMENT OF COMMERCE

##### National Oceanic and Atmospheric Administration

##### 50 CFR Part 229

[Docket No. 990104001-9001-01; I.D. 111398D]

RIN 0648-AM05

##### Taking of Marine Mammals Incidental to Commercial Fishing Operations; Pacific Offshore Cetacean Take Reduction Plan Regulations

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

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** This rule will allow acoustic deterrent devices to be deployed farther away from the net in the California/Oregon drift gillnet fishery (CA/OR DGN fishery). The intended effect of this action is to allow acoustic devices to be more safely and efficiently attached to drift gillnets.

**DATES:** Effective January 22, 1999. NMFS will accept comments until February 22, 1999.

**ADDRESSES:** Submit comments on the interim final rule to Dr. William T. Hogarth, Regional Administrator, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213.

**FOR FURTHER INFORMATION CONTACT:** Irma Lagomarsino, NMFS, Southwest Region, 562-980-4016.

**SUPPLEMENTARY INFORMATION:** On October 3, 1997 (62 FR 51805), NMFS published a final rule requiring training, equipment, and gear modifications for operators and vessels in the CA/OR DGN fishery to reduce the mortality and serious injury of several marine mammal stocks that occurs incidental to fishing operations. The regulatory text was codified in subpart C of 50 CFR part 229. To correct and clarify the meaning of the final rule, NMFS amended the regulations on May 21, 1998 (63 FR 27860).

Section 229.31(c) (1) and (2) require acoustic deterrent devices (pingers) to be used on all vessels in the CA/OR DGN fishery during every set and this section specifies pinger sound characteristics. Under § 229.31(c)(3), pingers must be attached on or near the floatline and on or near the leadline and spaced no more than 300 ft (90.0 m) apart. Pingers attached on extenders (buoy lines) or attached to the floatline with lanyards (lines) must be within 3

ft (0.91 m) of the floatline. Pingers attached with lanyards to the leadline must be within 6 ft (1.82 m) of the leadline. These pinger deployment distances were based on the same lengths of the lanyards used to attach pingers to the net in NMFS' pinger experiments in the CA/OR DGN fishery during 1996 to 1997. Results from these experiments indicated that over time, fishers became proficient at placing and removing pingers from both the floatline and leadline. The final Environmental Assessment of the final rule to implement the Pacific Offshore Cetacean Take Reduction Plan (NMFS, 1997) concluded that deploying pingers on the floatline is easier than the leadline because as the net is payed out the leadline is often buried by slack in the net. For this reason, the net reel may need to be slowed or stopped to safely attach and detach pingers to/from the leadline.

After the final rule became effective and the entire fishery was required to use pingers, NMFS learned that allowing pingers to be deployed farther away from the net could provide greater flexibility for attaching and removing pingers. Representatives of the CA/OR DGN fishery reported to NMFS that allowing pingers to be deployed farther away from the net could facilitate more efficient (faster) attachment of pingers during the "setting" of the net and removal of pingers during net retrieval. Also, at a series of skipper education workshops held in August and September 1998, CA/OR DGN fishers stated that pingers could be more efficiently and safely attached and removed to and from the net with longer pinger lanyards. Specifically, they suggested that allowing pingers to be deployed within 30 ft (9.14 m) of the floatline and within 36 ft (10.97 m) of the leadline should allow for more efficient and safe placement of pingers on the net. In particular, for some drift gillnet fishing operations, if longer pinger lanyards were attached permanently to the leadline, pingers may be deployed without slowing down the net reel because direct handling of the leadline to attach and/or remove pingers would not be necessary. For instance, after removing a "leadline" pinger from a permanently attached 36-ft (10.97 m) leadline lanyard during net retrieval, the lanyard could be temporarily tied to the floatline before the net was spun on the net reel. During the next fishing set, the leadline pinger lanyard would be readily accessible near the floatline for attachment of a leadline pinger. This rule allows greater

flexibility for pinger placement and removal from/to the net.

Increasing the length of pinger lanyards should not affect the efficacy of pingers at reducing cetacean bycatch in the fishery. Section 229.31(c)(1) stipulates that only pingers that broadcast a sound frequency of 10 kHz ( $\pm 2$  kHz) at 132 dB ( $\pm 4$  dB) re 1 micropascal at 1 m, lasting 300 milliseconds (+ 15 milliseconds) and repeating every 4 seconds (+ .2 seconds) may be used in the CA/OR DGN fishery. Pingers must also be operational to a water depth of at least 100 fathoms (600 ft or 182.88 m). Pingers were originally designed to produce a sound level that is audible at 15 dB above ambient noise levels at a distance of 100 m (328 ft) from the pinger (NMFS, 1996). To conservatively maintain this sound level in all areas of the net, pingers were placed every 300 ft (91.44 m) on the floatline and leadline during NMFS' pinger experiments in the CA/OR DGN fishery. NMFS required pingers to be attached on both the floatline and leadline because drift gillnets, especially when targeting swordfish, are often set with the floatline above the ocean temperature thermocline. Thermoclines may act as a barrier to sound transmission. Allowing pingers to be attached within 30 ft (9.14 m) and 36 ft (10.97 m) from the floatline and leadline, respectively, should maintain the same level of cetacean bycatch reduction as shorter pinger lanyards as long as the vertical distance between pingers on the floatline and leadline is not greater than 300 ft (91.44 m).

Although termed "gillnets", drift gillnets are designed to entangle fish rather than to capture fish by the gills. Drift gillnets are constructed of twisted nylon that is tied to form squares (meshes). Mesh size is measured as the distance between two opposite knots of mesh when stretched apart diagonally. To effectively catch fish, the net meshes must open to form squares. Fish entanglement would be impossible, or substantially reduced, if the net meshes were completely stretched during fishing. The average stretched mesh size in the CA/OR DGN fishery is 19 in (48.26 cm), but ranges from 16–22 in (48.26–55.88 cm). For 22-inch (55.88 cm) mesh (stretched size), the distance between the two opposing knots when the net is in the water is approximately 12 in (30.48 cm). Thus, because the maximum observed net depth (measured in meshes) is 160 meshes, the maximum vertical length of a drift gillnet while it is being fished is approximately 160 ft (48.76 m) (160 meshes  $\times$  1 ft (.3048 m) per mesh). Since pingers attached to the floatline with 30-ft (9.14 m) lanyards

and pingers attached to the leadline with 36-ft (10.97 m) lanyards would not be more than approximately 226 ft (68.88 m) apart (160 + 30 + 36), the same level of marine mammal bycatch reduction should be maintained with the longer pinger lanyards. NMFS convened the Pacific Offshore Cetacean Take Reduction Team (Team) in February 1996 to prepare a draft plan to reduce cetacean bycatch in the CA/OR DGN fishery. NMFS will continue to reconvene this Team on an annual basis to monitor the effectiveness of the Plan's strategies to reduce marine mammal bycatch. The Team will also evaluate the fishery's progress towards meeting the marine mammal bycatch reduction goals of the MMPA.

At its June 1–2, 1998, meeting, the Team recommended that the final rule should be amended to allow pingers to be attached within 30 ft (9.14 m) and 36 ft (10.97 m) of the floatline and leadline, respectively, in order to increase the safety of pinger deployment.

#### Classification

The Assistant Administrator for Fisheries, NOAA (AA), finds for good cause under 5 U.S.C. § 553(b)(B) that providing prior notice and an opportunity for public comment on this action is impracticable and contrary to the public interest because allowing pingers to be attached farther away from the net avoids an occupational hazard posed by the existing regulation. An additional **Federal Register** notification with an advance comment period would only prolong a risk to fishermen's safety without countervailing benefits to marine mammals. Setting and retrieving a drift gillnet in the CA/OR DGN fishery is already a dynamic and sometimes dangerous operation. On most vessels, two crew members are actively involved in setting the net: as the net is payed out into the water, one operates the mechanical net reel and the other snaps buoys and light-sticks to the floatline. Because the net is continually moving during this operation, a crew member's clothing, hands, arms, or legs can easily snag on an extender or on the net slack, and the crew member injured or taken overboard with the net. In this fishery, drift gillnet fishermen have been entangled in the net and injured and/or dragged overboard during the routine setting of the net. Requiring additional gear (e.g., pingers) to be attached directly, or nearly directly, to the floatline and leadline increases the hazard of this already dynamic and sometimes dangerous operation. Allowing pingers to be placed a greater distance away from the net decreases the probability that crew members will

be accidentally entangled in the net and injured and/or dragged overboard.

The affected public was already involved in the formulation of this rule via mandatory workshops for vessel operators in the drift gillnet fishery in August and September 1998. Seventy percent of the drift gillnet permit holders participated in these workshops; all were informed of the workshops and afforded the opportunity to participate. At the workshops, the fishermen and NMFS discussed the proposal to allow pingers to be attached farther away from the net. Many of the participants confirmed that the proposal would make pinger deployment safer and more efficient. No fishers opposed the modification.

Because this rule prevents injury to fishermen and is not expected to decrease the effectiveness of pingers, the AA finds for good cause under 5 U.S.C. 553(d)(3) that delaying the effective date of this rule for 30 days is unnecessary. Further, because the rule allows pingers to be placed a greater distance away from the net, it relieves a restriction and under 5 U.S.C. 553(d)(1) is not subject to a delay in effectiveness. Accordingly, the AA makes this action effective upon the date it is filed for public inspection with the Office of the Federal Register.

As this rule is not subject to the requirement to provide prior notice and an opportunity for public comment under 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are inapplicable.

This rule has been determined to not be significant for purposes of E.O. 12866.

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

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

For the reasons set out in the preamble, 50 CFR part 229 is 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 § 229.31, paragraphs (c)(2) and (3) are revised, paragraphs (c)(4) and (5) are redesignated as paragraphs (c)(7) and (8), and new paragraphs (c)(4) through (6) are added to read as follows:

**§ 229.31 Pacific Offshore Cetacean Take Reduction Plan.**

\* \* \* \* \*

(c) \* \* \*

(2) While at sea, operators of drift gillnet vessels with gillnets onboard must carry enough pingers on the vessel to meet the requirements set forth under paragraphs (c)(3) through (6) of this section.

(3) *Floatline*. Pingers shall be attached within 30 ft (9.14 m) of the floatline and

spaced no more than 300 ft (91.44 m) apart.

(4) *Leadline*. Pingers shall be attached within 36 ft (10.97 m) of the leadline and spaced no more than 300 ft (91.44 m) apart.

(5) *Staggered Configuration*. Pingers attached within 30 ft (9.14 m) of the floatline and within 36 ft (10.97 m) of the leadline shall be staggered such that the horizontal distance between them is no more than 150 ft (45.5 m).

(6) Any materials used to weight pingers must not change its specifications set forth under paragraph (c)(1) of this section.

\* \* \* \* \*

3. Figure 1 to part 229 is revised to read as follows:

Dated: January 14, 1999.

**Andrew A. Rosenberg,**

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

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Figure 1. Drift Gillnet Pinger Configuration and Extender Requirements

