

secondary aluminum smelting. This proposed delegation addresses all sources subject to the accidental release prevention regulations. In addition, EPA is proposing to automatically delegate all future hazardous air pollutant regulations which ACHD adopts unchanged from the Federal requirements. EPA is not waiving its notification and reporting requirements under this proposed approval; therefore, sources will need to send notifications and reports to both ACHD and EPA. This action pertains to affected sources, as defined by the Clean Air Act's hazardous air pollutant program, and covered processes, as defined by the Clean Air Act's chemical accident prevention provisions. EPA is taking this action in accordance with the Clean Air Act. In the Final Rules section of this **Federal Register**, EPA is approving ACHD's request for delegation of authority as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

**DATES:** Written comments must be received on or before March 1, 2002.

**ADDRESSES:** Written comments on this action should be sent concurrently to: Makeba A. Morris, Chief, Permits and Technical Assessment Branch, Mail Code 3AP11, Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103-2029, and Roger C. Westman, Manager, Air Quality Program, Allegheny County Health Department, 301 39th Street, Pittsburgh, PA 15201-8103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103 and Allegheny County Health Department, 301 39th Street, Pittsburgh, PA 15201-8103.

**FOR FURTHER INFORMATION CONTACT:** Dianne J. McNally, 215-814-3297, at the EPA Region III address above, or by e-mail at [mcnally.dianne@epa.gov](mailto:mcnally.dianne@epa.gov). Please note that any formal comments

must be submitted, in writing, as provided in the **ADDRESSES** section of this document.

**SUPPLEMENTARY INFORMATION:** For further information on this action, pertaining to approval of ACHD's delegation of authority for all hazardous air pollutant emission standards, as they apply to facilities required to obtain a Clean Air Act operating permit; the hazardous air pollutant emission standards for perchloroethylene drycleaning facilities, hard and decorative chromium electroplating and chromium anodizing tanks, ethylene oxide sterilization facilities, halogenated solvent cleaning, secondary lead smelting, hazardous waste combustors, portland cement manufacturing, and secondary aluminum smelting, as they apply to facilities not required to obtain a Clean Air Act operating permit; and, the chemical accident prevention provisions, as they apply to all facilities (Clean Air Act section 112), please see the information provided in the direct final action, with the same title, that is located in the "Rules and Regulations" section of this **Federal Register** publication.

Dated: January 22, 2002.

**Judith M. Katz,**

*Director, Air Protection Division, Region III.*  
[FR Doc. 02-2229 Filed 1-29-02; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

#### 49 CFR Part 533

[Docket No. NHTSA-2001-11048]

**RIN 2127-A168**

#### Light Truck Average Fuel Economy Standard, Model Year 2004

**AGENCY:** National Highway Traffic Safety Administration (NHTSA).

**ACTION:** Proposed rule; correction.

**SUMMARY:** This document corrects the preamble to a proposed rule published in the **Federal Register** of January 24, 2002, regarding the Light Truck Average Fuel Economy Standard for the 2004 model year. This correction inserts text that regarding the analysis of the environmental impacts of the proposal that was inadvertently omitted from the preamble.

**FOR FURTHER INFORMATION CONTACT:** Otto Matheke, Office of the Chief Counsel, NHTSA, at 202-366-5263.

### Correction

In proposed rule, FR Doc. 02-1675, beginning on page 3472 in the issue of January 24, 2002, make the following correction in the Impact Analyses section. On page 3472 in the second column, add the following correction below the Environmental Impacts heading:

"We have not conducted an evaluation of the impacts of this proposal under the National Environmental Policy Act. NHTSA is proposing to set the 2004 model year light truck CAFE standard at the same level as the standard applicable to the 1999 through 2003 model years. As this proposal maintains the fuel economy standard at the same level as prior years, it does not impose any environmental impacts. Accordingly, no environmental assessment is required."

Dated: January 25, 2002.

**Stephen R. Kratzke,**

*Associate Administrator for Safety Performance Standards.*

[FR Doc. 02-2268 Filed 1-28-02; 10:38 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 216

[Docket No. 020103001-2001-01;I.D. 122001B]

**RIN: 0648-AN43**

#### Preventing Harassment From Human Activities Directed at Marine Mammals in the Wild

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

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** NMFS is considering whether to propose regulations to protect marine mammals in the wild from human activities that are directed at the animals and that have the potential to harass the animals. The scope of this advance notice of proposed rulemaking (ANPR) encompasses any activity of any person or conveyance engaged in direct interactions with marine mammals in the wild. NMFS requests comments on what type of regulations and other measures would be appropriate to prevent harassment of marine mammals in the wild caused by human activities directed at the animals.

**DATES:** Comments must be received at the appropriate address or fax number (see **ADDRESSES**) no later than April 1, 2002.

**ADDRESSES:** Comments on this Advance Notice of Proposed Rulemaking (ANPR) should be addressed to Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910, or fax to 301-713-0376.

**FOR FURTHER INFORMATION CONTACT:** Trevor Spradlin, Office of Protected Resources, 301-713-2289.

**SUPPLEMENTARY INFORMATION:**

**Background**

Viewing whales, dolphins, porpoises, seals and sea lions in their natural habitat can be an educational and enriching experience if conducted safely and responsibly. Over the past decade, whale watching activities have grown into a billion dollar (\$US) industry involving over 80 countries and territories and over 9 million participants (Hoyt 2001). Increasing numbers of commercial operations are offering close interactions with wild marine mammals, including opportunities to swim with, touch or handle the animals.

As human interactions with wild marine mammals increase, the risk of disturbing or injuring the animals also increases. The following human activities directed at marine mammals in the wild are of particular concern to NMFS:

*“Swim-with” activities:* Over the past several years, swimming with wild dolphins has significantly increased in the Southeast U.S. and Hawaii, and is beginning to expand to other U.S. coastal areas and to other species of marine mammals. In the Southeast, swimming with bottlenose dolphins appears to be facilitated by illegal feeding activities, which have been prohibited since 1991 when NMFS amended the definition of “take” under 50 CFR 216.3 to include feeding or attempting to feed a marine mammal (56 FR 11693, March, 20, 1991). In Hawaii, where feeding of wild dolphins has not been a concern, swim activities primarily target Hawaiian spinner dolphins and take advantage of the dolphins’ use of shallow coves and bays during the day to rest and care for their young. In the Southwest, tour operators are offering opportunities to dive and swim with gray whales, pilot whales, Pacific white-sided dolphins, harbor seals, and sea lions.

*Vessel-based interactions:* The use of motorized or non-motorized vessels

(e.g., outboard or inboard boats, kayaks, canoes, underwater scooters, or other types of water craft) to interact with marine mammals in the wild is also a rapidly growing activity nationwide. For example, NMFS has received complaints from researchers and members of the public that include: (1) operators of motorized vessels driving through groups of dolphins in order to elicit bow-riding behavior (e.g., bottlenose dolphins in the Southeast, spinner dolphins in Hawaii, Dall’s porpoise in the Northwest); (2) kayakers and canoers utilizing the quiet nature of their vessels to closely approach and observe or photograph cetaceans and pinnipeds (e.g., killer whales in the Northwest, large whales and pinnipeds in California and the Northeast); (3) whale watchers attempting to touch and pet gray whales in California; (4) people using underwater “scooters” to closely approach, pursue and interact with the animals (e.g., dolphins in the Southeast); and (5) operators of personal watercraft tightly circling or crossing through groups of dolphins, often at high speed, to closely approach, pursue and interact with the animals (e.g., dolphins along the mid-Atlantic and Gulf of Mexico).

*Land-based interactions:* Public interactions with marine mammals on land have increased in recent years. Elephant seals, harbor seals and sea lions in the Southwest, and monk seals in Hawaii, are closely approached by people for the purpose of observing them, posing with them for pictures, touching, petting, poking, throwing objects at them to elicit a reaction, or simply strolling among them.

Researchers monitoring the effects of human disturbance on wild marine mammals report boat strikes, disruption of behaviors and social groups, separation of mothers and young, abandonment of resting areas, and habituation to humans (for some examples, see Kovacs and Innes 1990, Kruse 1991, Janik and Thompson 1996, Wells and Scott 1997, Christie 1998, Samuels and Bejder 1998, Bejder *et al.* 1999, Colborn 1999, Constantine 1999, Cope *et al.* 1999, Mortenson *et al.* 2000, Samuels *et al.* 2000, Constantine 2001, Lelli and Harris 2001, Nowacek *et al.* 2001).

In addition, there are significant public safety considerations as people have been seriously injured while trying to interact with wild marine mammals. People have been bitten or otherwise injured while trying to closely approach, feed, swim with, pet or interact with wild cetaceans or pinnipeds (Webb 1978, Shane *et al.* 1993, NMFS 1994, Wilson 1994, Orams

*et al.* 1996, Seideman 1997, Christie 1998, Samuels and Bejder 1998, Samuels *et al.* 2000). In one case, a dolphin killed a swimmer who was harassing the animal (Santos 1997). Some marine mammals that have injured people have been labeled as “nuisance animals,” and individuals have requested the animals be removed from the wild or euthanized.

The Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.* (MMPA), prohibits the “take” of marine mammals which includes “harassment.” Section 3(13) of the MMPA defines the term “take” as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” Section 3(18)(A) of the MMPA defines the term “harassment” as “any act of pursuit, torment, or annoyance which – (i) has the potential to injure a marine mammal or marine mammal stock in the wild, (Level A harassment), or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).”

In addition, NMFS regulations implementing the MMPA specify that the term “take” includes: the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal; and feeding or attempting to feed a marine mammal in the wild (50 CFR 216.3).

The MMPA does not provide for a permit or other authorization process to view or interact with wild marine mammals, except for specific listed purposes such as scientific research. Therefore, interacting with wild marine mammals should not be attempted, and viewing marine mammals must be conducted in a manner that does not harass the animals. NMFS cannot support, condone, approve or authorize activities that involve closely approaching, interacting or attempting to interact with whales, dolphins, porpoises, seals or sea lions in the wild. This includes attempting to swim with, pet, touch or elicit a reaction from the animals. NMFS believes that such interactions constitute “harassment” as defined in the MMPA since they involve acts of pursuit, torment or annoyance that have the potential to injure or disrupt the behavioral patterns of wild marine mammals.

Each of the five NMFS Regions has developed recommended viewing guidelines to educate the general public on how to responsibly view marine

mammals in the wild and avoid harassing them (e.g., minimum approach distances for observing the animals on land or on board a vessel; use binoculars or telephoto lenses to get a good view of the animals; limit observation time to 30 minutes or less). NMFS Regional Wildlife Viewing Guidelines for Marine Mammals are available on line at: [http://www.nmfs.noaa.gov/prot\\_res/MMWatch/MMViewing.html](http://www.nmfs.noaa.gov/prot_res/MMWatch/MMViewing.html)

NMFS recognizes that there are situations where wild marine mammals will approach people on their own accord, either out of curiosity or to ride the bow wave/surf the stern wake of a vessel underway. If wild marine mammals approach a vessel underway, NMFS recommends that the vessel maintain its course and avoid abrupt changes in direction or speed to avoid running over or injuring the animals. Vessels that are stationary should remain still to allow the animals to pass. If wild marine mammals enter an area used by swimmers or divers, NMFS recommends avoiding abrupt movements and moving away. Under no circumstances should people try to feed, touch, pet, ride or chase marine mammals in the wild.

To support these guidelines, NMFS initiated a nationwide education and outreach program and in 1997 expanded its efforts by developing the "Protect Dolphins" campaign to address growing concerns about feeding and harassment activities with wild dolphins in the Southeast. In 1998, NMFS further expanded its education and outreach efforts by joining Watchable Wildlife, a consortium of federal and state wildlife agencies and wildlife interest groups that encourages passive viewing of wildlife from a distance for the safety and well-being of both animals and people (Duda 1995, Oberbillig 2000).

The guidelines have relied on voluntary compliance by the public and commercial operators. Although "takes" may be prosecuted under the MMPA, the guidelines themselves are not enforceable. After more than a decade of extensive efforts to promote NMFS' educational message and marine mammal viewing guidelines, noncompliance continues. For example, advertisements on the Internet and in local media in Hawaii, California and Florida are promoting activities that clearly contradict the NMFS guidelines and appear to depict harassment of the animals. NMFS has received letters from the Marine Mammal Commission (MMC), members of the scientific research community, environmental groups, the public display community, and members of the general public

expressing the view that swimming with and other types of interactions with wild marine mammals have the potential to harass the animals by causing injury or disruption of normal behavior patterns. NMFS has also received inquiries from members of the public and commercial tour operators requesting clarification on NMFS' policy and the MMPA restrictions on closely approaching, swimming with or interacting with wild cetaceans.

The MMC sponsored a literature review by Samuels et al. (2000) to compile information regarding human interactions with marine mammals in the wild. Upon review of the report, the MMC stated:

"The information and analyses in the report provide compelling evidence that any efforts to interact intentionally with dolphins in the wild are likely to result in at least Level B harassment and, in some cases, could result in the death or injury of both people and marine mammals."

The MMC therefore recommended to NMFS that it "*promulgate regulations specifying that any activity intended to enable in-water interactions between humans and dolphins in the wild constitutes a taking and is prohibited*" (Letter from MMC to NMFS dated May 23, 2000). Based on both the scientific evidence and the legal framework of the MMPA, NMFS believes that these concerns apply equally to all species of whales, dolphins, porpoises, seals and sea lions.

On August 3, 1992, NMFS published proposed regulations (57 FR 34101) to provide greater protection for marine mammals by specifying, among other actions, minimum distances that people, vessels, and aircraft should maintain from these animals to avoid harming them. NMFS withdrew the proposed regulations on March 29, 1993 (58 FR 16519) to further evaluate the comments received and to consider alternatives for addressing the problem of close approach of marine mammals by vessels/persons. Since then, NMFS has continued to monitor the growing body of scientific evidence regarding the impacts of human activities directed at marine mammals in the wild, and NMFS has routinely received letters of concern from researchers, wildlife protection groups and private citizens regarding human interactions with wild marine mammals. As a result, NMFS has concluded that development of a proposed rule to prevent harassment from human activities directed at marine mammals in the wild may be warranted.

#### Request for Comments

NMFS is requesting comments on what type of regulations and other

measures would be appropriate to prevent harassment from human activities directed at marine mammals in the wild. NMFS offers several possible options for consideration and comment, and recognizes that other possibilities may exist including a combination of the following:

*Codify the current NMFS Regional marine mammal viewing guidelines* – Codifying the guidelines as regulations would make them requirements rather than recommendations, and would provide for enforcement of these provisions and penalties for violations.

*Codify the current marine mammal viewing guidelines with improvements* – The current guidelines could be revised to more clearly address specific activities of concern, and then codified as enforceable regulations.

*Establish minimum approach rule* – Similar to the minimum approach rules for humpback whales in Hawaii and Alaska, and right whales in the North Atlantic (50 CFR 224.103; 66 FR 29502, May 31, 2001), a limit could be established by regulation to accommodate a reasonable level of wildlife viewing opportunity while minimizing harassment from human activities directed at marine mammals in the wild. If establishing a minimum approach rule is appropriate, then NMFS would have to consider whether or not distances should be specific to particular species and/or Regions, and whether or not distances should be consistent between vessel platforms and from land. NMFS would consider exceptions for situations in which marine mammals approach vessels or humans as well as other situations in which approach is not reasonably avoidable.

*Restrict activities of concern* - Similar to the prohibition on feeding wild marine mammals, a regulation amending the definition of "take" and/or "harassment" could clarify which specific activities are prohibited, e.g., interacting or attempting to interact with a marine mammal in the wild. Interaction would include swimming with, touching (either directly or with an object), posing with, or otherwise acting on or with a marine mammal. This would include interaction by any means or medium, including interception, on land, on/in the water, or from the air. It would also include operating a vessel or providing other platforms from which interactions are conducted or supported.

Dated: January 24, 2002.

**William T. Hogarth,**

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

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